# Legal Gender Recognition and (Lack of) Equality in the European Court of Human Rights

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## 1. Introduction

According to the European Union Fundamental Rights Agency, 32% of transgender people in European Union (EU) countries feel the need to avoid expressing their preferred gender due to fear of being assaulted or threatened. An average of 50% reported having been personally discriminated or harassed on the ground of being perceived as transgender during the last year, and 30% of the respondents had felt discriminated against because of their gender identity when looking for a job.[2] The high level of discrimination experienced in EU countries illustrates the problems faced by transgender people in the continent, and calls for a closer look at equality and non-discrimination from a legal perspective.

This article systematises the rights of transgender people under the European Convention of Human Rights (ECHR, "the Convention"), and examines the European Court of Human Rights ("the Court") case law on protection of private and family life, emphasising the principles of equality and non-discrimination.[3] It illustrates the change in the Court's take on legal gender recognition, transgender marriage and the consequent breaches of private and family life, and acknowledges the shortcomings of this progress. It challenges the Court's view of equality and non-discrimination in gender identity cases by criticising the lack of thorough application of Article 14 in the judgments, and argues that the current margin of appreciation doctrine is interpreted in a way that can override equality considerations, rendering Article 14 a rather powerless tool to call differential treatment into question.

## 2. Conceptual Framework

### 2.1. Equality and Non-Discrimination

Equality is one of the main liberal aspirations and a fundamental assumption of a democratic society. It is included in all human rights documents in one form or another, and these provisions attempt to give it a legal meaning. However, equality as a concept is neither definite nor clear and its contents can be debated.[4] The meaning of equality has shifted over time and new groups have been included under the concept's protective umbrella.[5] Differing views exist on whether equality should be addressed as formal or substantive and if certain affirmative action is required or even desired to advance the position of disadvantaged groups.

Non-discrimination is inherent in the concept of equality, and the two can be seen as complementary sides of one coin; there exists a corollary between equality and non-discrimina-

tion.[6] However, non-discrimination is usually seen as referring to the negative aspect of the right: the obligation of a state to refrain from doing something rather than taking positive action to create circumstances that promote full or substantial equality.[7]

In the legal sense, the term "discrimination" generally refers to differential treatment of an individual or a group of individuals, which is based on their characteristics, and results in a disadvantage.[8] Human rights treaties themselves do not define the notion of discrimination. However, General Comment No. 18 by the UN Human Rights Committee refers to the text of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women and concludes that discrimination is "any distinction, exclusion, restriction or preference" based on the forbidden grounds "and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[9] The "effect" refers to indirect discrimination, in which a situation amounts to discrimination even without the authorities' intent to do so.[10]

For the purpose of this article, the concept of non-discrimination refers to an obligation to refrain from interfering with a person's human rights on the basis that he or she belongs to a group holding protected characteristics. Equality in this context is understood to be the positive side of the right, which may impose positive obligations on states.

### 2.2. Gender and Gender Identity

In order to grasp the notion of gender identity, we must first elaborate on the differences between the traditional concept of "sex" and the more recently adopted term "gender". The World Health Organization (WHO) defines sex as the biological characteristics of men and women while gender refers to "the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women."[11]

In international human rights law, gender and sex are sometimes used interchangeably. The texts of the international conventions traditionally talk about sex, but later interpretations have incorporated the term gender to better reflect the wider issues arising from gender-based discrimination.[12] For the purposes of non-discrimination law this makes sense, as the disadvantage experienced by women is often due to the expectations of women's role in society rather than based on merely their biological characteristics. For example, pregnancy discrimination is surely based on the biological fact that women carry children and men do not, but the subsequent disadvantage in the employment market is largely created by the expectation that the mother will be the main caretaker of the child.

While "gender" as such is often seen as largely socially constructed, in connection with the notion of "gender identity", it refers to the deep and intimate sense of an individual of their maleness or femaleness, of who they are and with whom they identify with, including the personal sense of the body.[13] Advocates for transgender equality describe "gender identity" as one's personal "experience of gender, which may or may not correspond with the sex assigned at birth."[14] In the case of transgender people, this experience is not completely in conformity with the sex assigned at them at birth.

Gender identity was linked to medical conditions years before it became a human

rights issue. The WHO still classifies gender identity in terms of mental disorder, referring to conditions such as "transsexualism" and "dual-role transvestism".[15] The medical approach has generated controversy with scholars and activists who advocate on behalf of equality for transgender people. The critics of the medical model have proposed a "self-determinative model" that "rejects the pathologisation and instead adopts a flexible, inclusive, and non-binary view of gender identity."[16] Even though a human rights approach has become more widespread over the years, the medical model is still present in the considerations of the Court.[17]

Gender identity is not clearly defined as a legal term. The only explicit mentioning of gender identity in a convention text is to be found in Article 4(3) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. The Council of Europe's explanatory report on this convention states the following:

> "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". [18]

In the legal sphere, it can be seen as more convenient to limit the discussion to the rights of post-operative transsexuals as in their case certain reassigned biological characteristics have supported counting them in the category of the "opposite sex". While the self-determinative model can be seen as an ideal way of recognising gender as it respects a person's own internal experience of their gender, legally such an approach may be problematic. Certain aspects of legal gender recognition remain problematic as long as domestic laws continue to differentiate between sexes in areas of family law, tax law and social benefits. This may explain the approach taken by the Court, which only addresses post-operative transsexuals in its case law, linking gender identity to the traditional differences of biological sex. Also, the Court of Justice of the European Union (CJEU) has addressed gender identity in the case *P. v S. and Cornwall County Council*, in which it affirmed that gender reassignment is included within the scope of the ground of "sex" in EU anti-discrimination law.[19]

"Transgender", however, does not equal "transsexual", but is a wider umbrella term encompassing everyone whose gender identity or gender expression is not entirely in conformity with his or her biological characteristics of sex. Not all these people wish to have surgical operations to achieve the biological characteristics of the "opposite sex", but feel comfortable somewhere between or outside the dichotomy of male and female (gender queer or gender variant), or merely wish to express their feminine or masculine side from time to time (such as cross-dressing). Some countries provide legal measures to recognise a so-called "third gender" to cater for the needs of people who do not identify clearly as female or male.[20]

It is also noteworthy that within many jurisdictions, while posing a list of other requirements, the law does not expect transgender people to undergo a full gender reassignment surgery in order to obtain legal recognition of the gender they are more comfort-

able with. This means a person identifying as a female can be legally recognised as a female even though she may have certain biological characteristics of the male sex, as long as she fulfils the other criteria. Still, the Court, as mentioned, has mainly dealt with applications from (fully) post-operative transsexuals.

For the purpose of this study, "gender identity" is used to mean the intimate sense of a transgender person's maleness or femaleness. "Transgender" is used as an umbrella term to encompass all persons who do not identify fully with the sex they were assigned at birth, and transsexual is used to refer to transgender people who have undergone gender reassignment surgery.

### 2.3. Private and Family Life

Article 8(1) of the ECHR states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." The provision has been used to cover a growing number of issues that would not be easily accommodated under other provisions of the Convention, and it could be argued that Article 8 is the most open-ended of all the Convention rights as it can adapt to the changing circumstances in society.[21] For instance, the concept of private life has been applied to a variety of situations, including bearing a name, the protection of one's image or reputation, awareness of family origins, physical and moral integrity, gender identity, sexual activity and orientation, a healthy environment, self-determination and personal autonomy, and privacy of telephone conversations.[22]

Article 8(2) provides for a broad restriction of the right, stating that interference can be acceptable if it is in accordance with law, necessary in a democratic society and in the interests of either national security, public safety, economic well-being of the country or for prevention of disorder or crime, protection of health or morals or the rights and freedoms of others.

In addition to private life, Article 8 protects established family life from interference by the state. The Court has stated that the notion of family life is an "autonomous concept".[23] What constitutes family life will depend on the factual relations and real existence of close personal ties.[24] In the absence of legal recognition, the Court has relied on the existing *de facto* family ties, such as applicants living together, length of the relationship and children born within it.[25]

With regard to the definition of family, the Court has rejected the idea that a lawful marriage is an essential prerequisite to a family deserving protection under Article 8.[26] It is noteworthy that the protection granted for family life under Article 8 is not the same in content as the right to marry provided for in Article 12. A couple may not have a right to marry under Article 12 but do still deserve the protection for their family within Article 8, despite being "illegitimate".

## 3. Prohibition of Discrimination on the Basis of Gender Identity

### 3.1. Non-Discrimination under the European Convention of Human Rights

The non-discrimination clause of the ECHR, Article 14, stipulates the following:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

The provision is not autonomous as it can only be invoked in conjunction with an individual right protected under the ECHR. Nonetheless, discrimination under Article 14 can be found even when the provision it is combined with in a case is not violated. Thus, Article 14 applies when the discrimination is on a ground which corresponds to the exercise of a right under the Covenant, i.e. "within the ambit" of a right protected under ECHR.[27]

As the principal provision for non-discrimination is "accessory" and not an independent right, its application is limited and the interest in elaborating it has been lacking in both academic literature and in the Court's jurisprudence. Article 14 has been referred to as unclear and conflicting.[28] To remedy this situation, on the 50th anniversary of the Convention, a general, independent non-discrimination provision was included in the Additional Protocol 12, which was opened for signatures in 2000.[29] So far, the Protocol has only been ratified by 18 of the 47 member states of the Council of Europe. Hence, the focus of this research remains on the interpretation of Article 14.

Gender identity as a ground protected from discrimination is not explicitly mentioned in the Convention text. However, it is interpreted to be included under the "or other status" clause under Article 14 of ECHR.[30] The Court has affirmed the view in its case law. In *PV v Spain*, decided in 2010, the Court explicitly emphasised that, although no issue of sexual orientation arose in the current case, "transsexualism" was a notion covered by Article 14, which contained a non-exhaustive list of prohibited grounds for discrimination.[31] The Court included gender identity, in the form of "transsexualism", in the list of protected ground even though it did not find a violation of Article 14 in the circumstances of the case in question.[32]

### 3.2. Justified Distinction or Prohibited Discrimination?

According to the case law of the Court, the first step in establishing whether discrimination has taken place is to examine whether the treatment has been different, and whether the person who had been treated differently, was in a relevantly similar situation. Under Article 14 of the ECHR, equal situations prescribe equal treatment and different situations different treatment.[33] Even though it may be easy to agree on this Aristotelian approach, also referred to as "equality of consistency", it is not free from problems. Assessing when people are sufficiently alike, or when their situation is relevantly similar, is a complex task. Treating similar people alike calls for finding a comparator, a similarly situated person of a different sex, race, religion or other status, who has been treated more favourably. This assumes a "universal individual", which hardly exists beyond a certain norm one should comply with.[34]

In deciding when two persons are relevantly alike, the law requires a judge to disregard the impugned characteristics, for instance the race, sex or gender identity, of the parties. This assumes that individuals can be considered in the abstract, apart from their inherent characteristics, which still heavily determine their social, economic and political situation. The comparator, on the other hand, is not an abstract person, but a white male, Christian, able-bodied and heterosexual. It has been argued in feminist literature that unless the applicant conforms to this

"male norm", she or he cannot overcome the threshold to demonstrate being similarly situated to the comparator. [35]

The Aristotelian equality requires an answer to the question: equal to whom? In light of the male norm comparator theory, the answer is "equal to a man". For example, in the area of equal pay, women who are paid less are unlikely to find a male comparator doing equivalent work in the same establishment. This is due to segregation in the employment market: few men work in secretarial positions or in a nursery. Thus, it is often extremely difficult for an applicant to demonstrate being treated differently in a relevantly similar situation and consequently have a chance of succeeding with their claim of discrimination.[36] This is a crucial point in relation to the crux of this article as well as the literature on Article 14 of the ECHR, which suggests that the applicant bears the burden of proof for establishing the factors of similar situation and differential treatment.[37]

If the above-mentioned condition is strictly applied, it can impose a wide-reaching limitation on discrimination claims. Placing the burden of proof on the applicant on the similarity of situations also requires him or her to justify *why* similar treatment in the case would be required. It can be rather troublesome to establish the similarity to the comparator group, and the arguments related to the issue actually engage with the heart of the justification for the treatment.[38] However, the Court has not always been consistent in applying the test of comparable situations. It has also issued judgements, such as *Dudgeon v the United Kingdom*, which suggest that the applicant does not actually bear the whole burden of proof in establishing the similarity.[39] In these cases, the Court merged the consideration of similarity with the objective justification scrutiny. Therefore, the Court does not always place such a heavy burden on the applicant before embarking on the analysis of objective justification, for which the respondent state must provide proof.[40]

On the other hand, the Court has held that certain differences that are inherent in otherwise similar situations may justify difference in treatment. In *Rasmussen v Denmark* the Court pointed out that states enjoy a certain margin of appreciation in assessing whether and to what extent differences in similar situations justified different treatment in domestic law.[41]

After establishing a difference in treatment in similar situations, the second step is to consider whether objective and reasonable justification exists. In other words, the treatment will be deemed discriminatory unless it is a proportionate means of achieving a legitimate aim.[42] Despite the seemingly straightforward and well-established test, without further elaboration on the content of legitimate aim and proportionality, the Court is left rather free to rule on a case-to-case basis.[43]

Almost any action can be claimed to pursue a legitimate aim, and states often invoke this when they are accused of violations under Article 14. Governments can claim good intentions and noble aims even when they are making harsh divisions based on, for example, gender stereotypes.[44] For example, limiting immigration of foreign men over foreign women has been argued to "protect public tranquillity and order".[45] Hence, as discriminatory intent can very rarely be proven, the legitimacy test is satisfied in most cases. Some scholars have addressed this challenge by suggesting that an aim should only be declared legitimate if it is in accordance with

the Convention values. Thus, an aim that contradicts the objectives of the Convention should not be held legitimate.[46]

The second part of the test, analysis of proportionality, is the one that, given the problems relating to the legitimacy test, determines the outcome of the case.[47] Although the principle of proportionality is not explicitly stated anywhere in the Convention, it is very much present in the Court's case law throughout the provisions, and can be identified in essence in the second paragraphs of Articles 8-11, which allow limitations on rights if they are "necessary in a democratic society".[48] The principle has been associated with the "fair balance" that is to be struck between the public interest and the interest of the individual in his or her enjoyment of the Convention rights. In applying the proportionality test, the Court has balanced the consideration of whether the measures chosen by a state are disproportionate against the consideration of the margin of appreciation.[49]

The margin of appreciation doctrine entails that the Court should not assess the legitimacy of state policies as such, but only their conformity in effect with the Convention requirements.[50] The approach originated in the *Belgian Linguistics* case, in which the Court stipulated that it cannot assume the role of the national authorities as it would lose the sight of the subsidiary nature of the Convention.[51] The national authorities were said to be free to choose measures they consider appropriate in applying the Convention rights, and the review of the Court was to be limited to scrutinising their conformity.[52] Since the 1960s, this principle has developed into the doctrine of margin of appreciation. The case *Handyside v United Kingdom* is the main precedent on the approach, but it has been further elaborated in theory and practice in subsequent case law.[53]

The margin of appreciation affects how strictly an individual case is reviewed. This "strictness of review" is adjusted based on the circumstances of each case.[54] The margin is considered to be wider when there exists a lack of "European consensus" on the matter in question.[55] However, due to the absolute nature of non-discrimination, the margin should generally be narrow in considerations under Article 14. The very essence of the provision is to protect minorities from arbitrary treatment endorsed by the majority. If states are granted wide discretion based on the views of the majority, the core idea of the non-discrimination clause can be compromised.[56] The Court has not always applied the same margin of appreciation to all Article 14 cases. For example, in *Rasmussen v Denmark*, where the court found discrimination on the basis of difference in otherwise similar situations, rather than on the basis of a specific ground of discrimination, the Court gave Denmark a wide margin of appreciation.[57]

However, the Court has identified certain classes of cases in which scrutiny is strict and a difference in treatment requires "very weighty reasons". These categories are sex (including sexual orientation), illegitimacy and nationality. Strict scrutiny is also required in relation to race and religion, but without reference to "very weighty reasons" by the Court.[58] Moreover, the Court has stated that the margin of appreciation shall be narrow when a particularly important facet of an individual's existence or identity is at stake or there exists a consensus among the Council of Europe member states with regard to the relative importance of such interest.[59] The last example illustrates the

self-restraint of the Court as margin of appreciation plays a key role even in cases concerning particularly intimate aspects, such as one's identity.

Following the Vienna Convention on Law of Treaties (Articles 31 and 32), the interpretation of the Convention is guided by the object and purpose of it as an instrument of effective protection for human rights. Based on this starting point, the Court has adopted "evolutive interpretation" as one of its principal interpretative methods.[60] While accepting these principles *per se*, some commentators have raised concerns over so-called judicial activism of the Court when it interprets the Convention in a way that requires changes in domestic law. This counterbalance concern has been linked to margin of appreciation and sees the doctrine as an expression of judicial restraint.[61] However, emphasising the requirement to restrain neglects the other side of the coin: the Court still has the overall power to ensure that national measures meet the Convention requirements, for instance in relation to non-discrimination.

The Court has held that the Convention is "an instrument designed to maintain and promote the ideals and values of a democratic society".[62] Further, it has elaborated that such values include pluralism, tolerance and broadmindedness.[63] On this note it has been argued that as democratically elected bodies are the ones responsible for enacting law and deciding on policy, adherence to democratic governance requires that the Court has a limited discretion on law-making.[64] In addition, the cultural diversity among contracting states has served as a legitimate concern under the Convention entailing that the Court should not try to impose uniform solutions for the culturally and ideologically varied states.[65] Still, a balance will always need to be struck between the cultural differences and the universal standards of the Convention.[66]

As we have seen, a distinction, exclusion, or restriction of preference may be justified if it is based on reasonable and objective criteria, it has a legitimate aim and it is proportional between the means and the aim.[67] This goes for all the grounds, even the most sensitive ones. What is *reasonable* is often debatable and depends on specific circumstances: the situation in the country in question, its cultural and religious background, and specific social traditions and customs. The changing social and moral values in modern societies can result in controversial cases, such as those relating to gender identity issues. At the same time, the Court has repeatedly affirmed the "living instrument" nature of the ECHR, emphasising the need for progressive interpretation.[68] Hence, there exists a need for a careful balance of progressive interpretation and the reasonability and proportionality of certain restriction. Margin of appreciation based on cultural differences and values should not override the universality of equality and non-discrimination.

## 4. Protecting Private and Family Life of Transgender People

### 4.1. Legal Gender Recognition as a Private and Family Life Issue

Legal recognition of gender identity is an issue that arises when individuals seek to change their gender marker on identity documents such as birth certificates, passports and national identity cards. Problems arising from any contradiction in identity documents are often accumulated in other secondary documents like diplomas, driving licences, national health insurance cards and other certifications. Legal recognition cases

may also arise when an individual seeks to change his or her name to reflect their preferred gender.[69]

As proving one's identity is required constantly in everyday life, the issue is of great importance to the people concerned. Without correct documents, enrolling in school, finding a job, opening a bank account, renting an apartment or travelling across borders becomes a greatly burdensome task. The ability to change the gender marker in identity documents protects transgender people's privacy as otherwise an individual's personal history is exposed every time he or she has to present identification. A 20-year-old transgender man explains how the discrepancy between identity documents and gender identity affects his everyday life:

"I still have a female name and identity number, and I have had problems with my ID. For instance, almost every time I try to collect a parcel from the post office, they question whether the passport is mine. Also, the travel card has my identity number on it and when I try to get on a bus, the driver often claims it is not my card as it says female."[70]

Thus, recognising people's preferred gender can help prevent discrimination and stigma on the basis of gender identity or gender reassignment.[71] Generally, the right to be recognised according to one's gender identity could be seen to flow from the right to recognition before the law, the right to be equal before the law and the right to enjoy protection of private and family life.[72]

The process of legal gender recognition varies across Europe. While some countries lack legal frameworks altogether, in others individuals are required to undergo a cumbersome process including surgical procedures, providing proof of infertility and possibly divorcing their current partner. Such requirements have recently been criticised by the UN Special Rapporteur on Torture and the Council of Europe Commissioner for Human Rights.[73] Due to these statements and other recent developments, there has been a trend towards a greater respect for self-determination in the process as a growing number of Council of Europe member states have given up such prerequisites in their domestic legislations, or are currently reviewing them.[74]

The debate and subsequent legislative amendments in European countries illustrate a change in the discourse regarding transgenderism – traditionally seen as a medical issue, it has gradually resonated more in the human rights field, awakening concerns over the right to be free from inhuman and degrading treatment, discrimination and invasions of private life. The case law presented in the next chapter concentrates on the two latter aspects, which have been debated in the Court since the 1980s.

Lack of legal gender recognition is not only an issue relating to private life as such, but bears added consequences for other rights such as the right to health, the right to education, and civil and political rights. As mentioned above, a transgender person whose identity documents do not match his or her appearance will experience difficulties in applying for education or employment, when registering to vote and when seeing a doctor. Even when such difficulties can be overcome by explaining the situation, the humiliation experienced by transgender people can limit their behaviour as it will be easier to simply avoid voting or applying for a job or place in education. Elsa, a transgender woman whose

legal gender remains male, describes the difficulties she has experienced:

"I used to apply for jobs with my female name. I knew I would have to tell my future employers that I was a transgender person at some point, but I feared being judged. Even in interviews where the issue was not discussed I still felt pressured because I knew I would have to produce my identity card and my health insurance card [should I be offered the job]."[75]

Additionally, even though this study does not concern hate crime and other bias motivated violence against transgender people *per se*, it is important to note that if legal gender recognition is denied, the risk of exposing one's personal details of reassigned gender is high. When a person's appearance and gender marker on their identity documents do not match, his or her history is revealed, which opens up a possibility of violence and discrimination based on gender identity.

As we will see in chapter 4.3, the Court has clearly established the right to legal gender recognition under Article 8 of the ECHR. A certain level of recognition is thus required, but as to how the contracting states wish to fulfil this obligation, a wide margin of appreciation is granted. Although the interpretation of the Court has developed over time to become more supporting of the rights of transgender people, the specific circumstances of each case will determine whether a violation arose or not.

### 4.2. Transgender Marriage

"Transgender marriage" refers to a situation when the preferred gender identity of one of the spouses is judicially recognised. Thus, it is an issue closely related to legal gender recognition. In the context of marriage, there are two different scenarios in which the legal rights of an individual have had to be, or still need to be, clarified. First, there is a question of a transgender person's "sex" for the purposes marriage. The crux of the issue is whether a person is to be regarded as belonging to their preferred sex according to their gender identity, or if the inability to gain certain biological characteristics of the other sex denies the possibility to marry according to the reassigned gender. The Court has dealt with this aspect with a growing understanding towards transgender people over time, and concluded in the Grand Chamber judgment of *Christine Goodwin v United Kingdom* in 2002 that gender cannot be regarded as a solely biological construction and a transgender person shall be allowed to marry according to their reassigned sex.[76]

The second aspect of transgender marriage is more contested. The legal problem occurs when a person has previously married and later wishes to have his or her gender identity legally recognised. In some jurisdictions it is a prerequisite for legal gender recognition that one is single. In practice, a married person is required to divorce their spouse or, depending on the national legislation, to convert the marriage into a civil partnership available for same-sex couples.[77] By imposing such requirements the state intervenes with an existing marital relationship, an aspect of private and family life protected under Article 8 of the ECHR.[78] The task of the Court in such cases is to strike a fair balance between the interests of the married transgender individual and the interests of society. The Court has previously dealt with the issue in the admissibility decisions of the cases *Parry v United Kingdom* and *R and F v United Kingdom*.[79] Both applications were declared inadmissible as manifestly ill-founded

as same-sex marriage was not permitted under English law at the time. Later, the issue was reconsidered in a case against Finland, when a transgender woman disputed the divorce requirement. In July 2014, the Grand Chamber in *Hämäläinen v Finland* held, in accordance with an earlier Chamber judgment (*H v Finland*),[80] that the requirement to be unmarried as a precondition to legal gender recognition did not violate the applicant's right to private life, right to marry or right to non-discrimination.[81]

Both aspects of transgender marriage have been under scrutiny specifically as the majority of jurisdictions continue to define marriage exclusively in terms of opposite-sex partners, and a right to enter a same-sex marriage is not currently protected under international human rights law, but left to the discretion of nation states to regulate.[82]

However, it can be argued that the issue of transgender marriage should not be understood in terms of same-sex marriage in general. Although both spouses in this form of transgender marriage will be legally of the same sex, the difference, in relation to couples one of whom is transgender, is that they *are already* married, whereas a gay couple would wish to *get* married. This was a distinction adopted by the Chamber in *H v Finland,* which ruled that Article 12 concerned the right to marry rather than to remain married. Accordingly, the Court held, it was not at stake in the case, which instead related to the consequence of a person's change of gender for their existing marriage.

The Court has previously regarded marriage as a fundamental institution which is afforded special protection under the Convention. Even though other forms of family have been afforded recognition over time, marriage continues to enjoy the highest level of protection.[83] Thus, living in an existing marriage and a desire to enter a marriage, in general, should not be seen as comparable situations. Allowing transgender people to continue their marriages would therefore not mean that a state loses its discretion to regulate the terms of same-sex relationships. Following the principle of legal certainty, the state could provide for continuing the relatively small number of existing marriages and still restrict the right to marry to different-sex couples in general if it so wishes.[84]

### 4.3. Legal Gender Recognition in the European Court of Human Rights

#### 4.3.1. Non-Recognition of Gender Identity – a Breach of Private Life?

The first ever case concerning legal gender recognition brought to the Court was *Rees v United Kingdom*, decided in 1986.[85] The applicant was a post-operative female-to-male transsexual, who claimed violations of the right to respect for private and family life (Article 8) and the right to marry (Article 12). He complained that the government had failed to provide measures that would legally recognise him as male, especially with regard to obtaining a birth certificate that would state his real gender identity. Although he had been issued a new passport with a male gender marker, his birth certificate was still required in certain instances and the contradiction between the gender marker in his birth certificate and his appearance resulted in difficult and distressing social encounters.[86] In accordance with the domestic legislation in place at the time, the applicant was still regarded as a woman for the purposes of marriage, pension rights and certain employment benefits.[87] Despite the possible discriminatory nature of the actions, Article

14 (non-discrimination) was not invoked in the present case.

In assessing such a situation for the first time, the Court held that the state's refusal to alter birth certificates did not amount to interference. It recalled that although Article 8 mainly requires states to refrain from arbitrary interference in people's private and family life, it may pose certain positive obligations as well. However, these positive obligations will vary considerably from case to case, as the notion of "respect" is not clear-cut. The Court noted that at the time, in 1986, the laws regulating legal recognition of transsexuals' gender varied widely throughout member states and the law was in a "transitional stage". Thus, a wide margin of appreciation was to be granted to contracting parties on the matter.[88]

Drawing from the wide margin of appreciation, the Court ruled that the UK was free to decide on the measures by which it would recognise gender of transsexuals. While the fair balance requirement called for certain adjustments to the existing system, it did not give rise to an obligation on the UK to change its system of registering births and population. Therefore, the positive obligations of the state to make adjustments did not extend so far as to alter the present system altogether. Thus, no violation of Article 8 had arisen.

The Court also noted that a possible annotation in the birth register could not mean the acquisition of all biological characteristics of the other sex, illustrating the highly biological understanding of sex and gender adopted by it. The view was further confirmed in the Court's analysis of Article 12, in which it held that there had been no violation by the applicant's inability to marry a woman, as he was not seen biologically as male despite the fact that he had undergone gender reassignment surgery.[89]

Regardless of the fact that the Court did not find any violations, it accepted that in accordance with the living nature of the Convention there existed a constant need to review the scientific and societal developments with regard to the rights of transsexuals.[90] This can be seen as a prediction of the future developments of the law, and has been reflected in the subsequent jurisprudence.

However, the change did not come about in the next judgement on gender identity issued four years later, in 1990. In the case of *Cossey v United Kingdom*, the Court came to a very similar conclusion to the *Rees* case presented above.[91] It ruled that there had been no violation of Articles 8 or 12, as "gender reassignment surgery did not result in the acquisition of all the biological characteristics of the other sex".[92] Additionally, it decided that attachment to the traditional concept of marriage provided "sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage", and that the state enjoys a wide margin of appreciation in relation to regulation of the right to marry in national law.

Finally, in 1992, the Court found a violation of Article 8 with regard to concerning the recognition of transsexuals for the first time, in the case *B v France*.[93] The applicant, Miss B, was a male-to-female transsexual, who had undergone hormonal and surgical treatment to make her physical appearance comply with her gender identity. She invoked Article 8 of the Convention as, in her opinion, the French authorities' refusal to update her gender marker to female in the civil status register interfered with her right to respect for private and family life. She explained that the contra-

diction between her appearance and her identity documents forced her to disclose intimate personal information to third parties and created great difficulties in her professional life.[94] In addition, Miss B wished to marry her male partner, with whom she cohabited. As this was impossible due to her male gender marker, she subsequently claimed a violation of her right to marry under Article 12.

As with *Rees*, the Court recalled the requirement of striking a fair balance between the competing interests.[95] However, it considered that there had been a change since the cases of *Rees* and *Cossey*, as it was undeniable that attitudes towards transsexuals had changed, science had progressed in making the gender reassignment surgery more accurate, and increasing importance had been attached to the problems faced by trans people.[96] Still, these developments remained inconsistent among member states and were not the main reason for the Court to depart from its analysis in the *Rees* and *Cossey* judgements. In the end, the Court did find a violation of Article 8, but the crux of the reasoning was the differences between the English and the French systems of registering births and population. In France, birth certificates are designed to be updated throughout life, so there was no reason why the civil status of Miss B could not be updated. Additionally, the fact that a (wrong) gender marker was included in an increasing number of official documents, and that Miss B was unable to change her forenames, differentiated the situation from that of the British one to the extent that the severe difficulties experienced in her everyday life, taken as a whole, amounted to a violation of the respect of Miss B's private life.[97]

Despite finding a violation of Article 8 in the French context, the Court did not see a reason to depart from its analysis in *Rees* and *Cossey* when a new case from the United Kingdom was brought before it in 1998. In *Sheffield and Horsham v United Kingdom*, transgender women Ms Sheffield and Ms Horsham invoked Articles 8, 12 and 14 of the Convention but no violation was found.[98] However, the Court affirmed that the "area needs to be kept under permanent review by the Contracting States" in the context of "increased social acceptance of the phenomenon and increased recognition of the problems which post-operative transsexuals encounter".[99]

This was the first transgender case in which the Court was asked to consider the aspect of equality and non-discrimination in addition to the substantial right. With regard to the claim under Article 14, the applicants argued that as the law continued to treat them as male, they were victims of sex discrimination, which they suffered through having to disclose their pre-operative gender. They stated that their disadvantaged position in law concerned intimate aspects of their private lives, and that their private life was interfered with in a disproportionate manner, which could not be justified by an appeal to the respondent State's margin of appreciation. As the Court had not at this point established that gender identity was a protected ground, the applicants claimed that they were treated differently than men based on sex. The government submitted that the applicants received the same treatment in law as any other person who has undergone gender reassignment surgery, hence claiming that the applicants were not treated less favourably than the comparator group. It further submitted that in any case a difference in treatment could be justified with reference to the same reasons as presented under Article 8.

The Court referred to its reasoning in relation to the claim under Article 8 by stating that it had already concluded that the re-

spondent state did not overstep its margin of appreciation in not legally recognising a transsexual's post-operative gender. It was satisfied that a fair balance was struck between the need to safeguard the interests of transsexuals and the interests of the state. This was due to the conclusion that the situations in which the applicants were required to disclose their pre-operative gender did not occur so frequently that it would disproportionately affect their right to respect for their private lives. The Court went on to conclude that this argumentation would be sufficient for the consideration under Article 14 as well:

"Those considerations, which are equally encompassed in the notion of 'reasonable and objective justification' for the purposes of Article 14 of the Convention, must also be seen as justifying the difference in treatment which the applicants experience irrespective of the reference group relied on. The Court concludes therefore that no violation has been established under this head of complaint."[100]

By this statement, the Court treated the discrimination claim in essence as same as the substantial claim under Article 8, assuming that Article 14 did not provide any added value. It can be argued that such conclusion deprives Article 14 of its relevance.

Despite the fact that gender identity was not yet established as a protected ground, the Court should have addressed the discrimination claim brought before it. The applicants did encounter interference with their private life, and this interference was due to the fact that they had undergone gender reassignment. The difference in treatment was therefore based on the personal characteristics closely linked to the applicants' gender, which raises a question under Article 14 of the Convention.

The government had incorrectly compared the situation of Ms Sheffield and Ms Horsham to that of other transgender people who have gone through gender reassignment concluding that these two groups were treated the same. However, in this case the applicants' situation should have been compared to that of non-transgender people, who are not required to continuously disclose their personal details in everyday life. The Court did note the question of reference group but further stated that it does not matter to whom the applicants are compared, as there was "reasonable and objective justification" for the interference with their private life. This statement presumes that whatever is deemed as reasonable justification for the interference *per se*, will be reasonable in terms of different treatment and equality as well.

Given the nature of Article 14 as a safeguard to equal enjoyment of the Convention rights, its relevance cannot be reduced by treating it in essence as the same as a claim under a substantive right. For the purposes of equality, the Court should have addressed the discrimination claim as separate, and not only refer to argumentation under the substantive right.

The long anticipated change in the interpretation of transgender cases was to come in the landmark judgement of *Christine Goodwin v United Kingdom*, decided by the Grand Chamber in 2002. In this case, the Court found a violation of private life and the right to marry for the first time regarding the legal gender recognition procedures in the UK.[101] The applicant was a male-to-female transsexual, who had faced harassment and humiliation in her everyday work during and

following her gender reassignment process, and continued to have problems with her national insurance payments as she was still in that regard considered a man. Consequently, in her application, she complained in particular about her treatment in employment, social security and her inability to marry according to her female gender (Articles 8 and 12). In addition, she relied on the prohibition of discrimination (Article 14) as she claimed to have been treated less favourably on the basis of her gender identity.[102]

In relation to the main part of the claim, Article 8, the Court held that as the applicant lived entirely as a female but was still considered as a male for several legal purposes, the situation resulted in a conflict between social reality and law, which amounted to a serious interference with her private life. This conflict was emphasised by the anxiety, vulnerability and humiliation experienced in her everyday life. In its reasoning, the Court placed weight on the respect for human dignity and freedom as the very essence of the Convention, and the continuing international trend towards increasing social acceptance of transgender people and legal recognition of preferred gender identity. Despite calling for constant review of the legal measures in relation to scientific and societal developments in its earlier decisions, nothing had effectively been done by the respondent government. As the UK failed to demonstrate significant factors of public interest to weigh against the interests of the individual in obtaining legal recognition, the Court concluded that the fair balance tilted decisively in favour of the applicant, and the government could no longer argue that the matter fell within its margin of appreciation.[103] By this ruling, the Court acknowledged that the increased "European consensus" had resulted in narrowing down the UK's margin of appreciation on legal recognition of transgender people.

It is noteworthy that the Court considered that society could reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with their gender identity. In addition, the Court put emphasis on the notion of personal autonomy, including the protection of the personal sphere of each individual, which was seen as an important underlying principle when interpreting the guarantees provided by Article 8.

Also with regard to the right to marry, the Court departed from its earlier jurisprudence by finding a breach of Article 12 for the first time, as Ms Goodwin was denied the ability to marry her male partner. While the state was left to determine the conditions and formalities of transgender marriage, there was no justification for denying transgender people from enjoying the right to marry under any circumstances.[104] It was notable that the Court decided to abandon a purely biological understanding of gender for the first time in its jurisprudence. It held that owing to the major social changes in the institution of marriage since the adoption of the Convention, as well as great developments in medicine and science, there was no reason why, for the purposes of Article 12, the determination of gender should be based on purely biological criteria.[105] Though fewer countries at the time provided for a transgender marriage in the reassigned gender than recognised the reassignment of gender itself, the Court did not consider this as a supporting argument for leaving the matter under contracting states' margin of appreciation. The discretion of states did not extend so far as to effectively bar transgender people from enjoying the right to marry altogether.[106]

When addressing the complaint under the non-discrimination clause, the Court did acknowledge the link to it, but as it had already found violations of the substantive Articles 8 and 12, it held that there was no need to consider separately the issue under Article 14.[107]

While the *Goodwin* case was a progressive step in jurisprudence on recognising gender identity, the Court unfortunately omitted any analysis of the non-discrimination aspect of the claim. As Ms Goodwin faced interference with her private life and her right to marry, the Court was correct in finding violations of Articles 8 and 12. However, the Court did not acknowledge the fact that Ms Goodwin faced this interference for being a transgender person, in other words on the basis of her gender identity. She faced similar difficulties in her everyday life as any transgender person would have under the domestic law in place at that time. On the other hand, non-transgender people would not face such interference. Therefore, the Court should have addressed the possible discrimination by analysing the similarity of situations and a possible justification for the differential treatment.

The approach taken by the Court can be seen as a practical one as the needs of the applicant had already been met in the present case. However, leaving out the analysis of possible discrimination fails to highlight and address any structural problems perpetuating such discrimination. By ignoring a discriminatory intent or effect, the Court did not take the opportunity to emphasise the universal nature of human rights and the equal enjoyment of the Convention rights by everyone.

A proper analysis of equality in Ms Goodwin's case would not have necessarily made a great difference to the applicant herself, as her situation was remedied through Articles 8 and 12. Still, an analysis under Article 14 would have been important for acknowledging the situation of the disadvantaged group as a whole. The Court's dismissal of the discrimination claim undermines the possibility of any structural problems behind the differential treatment, and therefore the case fails to have a more profound impact on the equality discourse with regard to transgender people.

Furthermore, the Court refused to consider Article 14 merely on the basis that a violation was found under another provision. The omission on non-discrimination implies that Article 14 would not add anything to the substantive right in question. Such an approach renders the provision rather toothless to address claims of discrimination.

*Goodwin v UK* was a landmark judgement in many regards as it clearly stated that denying legal gender recognition and the possibility to marry in the reassigned gender are violations of Articles 8 and 12, respectively. However, the judgement's potential in terms of equality and non-discrimination was not fulfilled. Had the Court set a strong precedent under Article 14, it would likely have affected subsequent case law in a way that places more emphasis on equality and non-discrimination – possibly even to the point of finding violations under Article 14.

On the same day, the Grand Chamber issued a similar judgment in the case *I v the United Kingdom*, finding breaches of Articles 8 and 12. A similar conclusion was drawn later in 2006 in the case of *Grant v the United Kingdom*, in which the Court held that following the landmark judgement on *Goodwin*, there was no longer any justification for failing to recognise the "change of gender of post-operative transsexuals".[108]

By the time the *L v Lithuania* judgment was issued in 2007, the disadvantage suffered by transgender people due to the contradiction between their identity documents and gender identity was more or less presumed.[109] At this point, the Court simply stated that the applicant found himself in the "intermediate position of a pre-operative transsexual, having undergone partial surgery, with some important civil status documents having been changed".[110] The facts left the applicant in a situation of distressing uncertainty with regard to his private life and the recognition of his true identity.[111] The government argued that budgetary constraints on public health services had prevented them from providing for the process, but the Court rejected this argument. It held that a delay in regulating the issue had extended for over four years, which could not be seen as proportionate. Also, as the number of people involved would have been rather small, the burden on the government to provide for their needs was not unduly high. Hence, the fair balance shifted in favour of the applicant and the Court found a violation of Article 8.

In the case of *P.V. v Spain*, the Court examined, for the first time, the possible discriminatory aspect of the state's conduct based explicitly on "transsexualism" and gender identity. The applicant, a male-to-female transsexual, had had a child prior to her reassignment surgery. After the reassignment, the state had restricted the applicant's contact with her six-year-old son arguing that her emotional instability after the procedure risked affecting him. While the Court established clearly that her status as a transsexual came under the protective umbrella of Article 14, it did not find a violation in this regard. The applicant had invoked the non-discrimination clause in conjunction with Article 8 protecting her right private and family life, but no breach was found due to the Court's reasoning that the restrictions based on meeting her son had not been on the grounds of her gender identity. Instead, they were imposed having the child's well-being in mind, giving him time to adjust progressively to his father's reassigned gender.[112]

However, it could be argued that the Court's interpretation of Article 14 was not sufficient in terms of equality. Had the Court taken into consideration the applicant's equal right to enjoy family life regardless of her gender identity, it might have arrived to a different conclusion and found a violation of Article 14 in conjunction with Article 8. In the present judgement, the Court *de facto* restricted the applicant's access to her child based on her gender identity, even if the aim of doing so was to protect the child's well-being. It can be questioned whether there was actual evidence or indication of the harmful effect of the gender reassignment to the child, and whether this was carefully balanced against the right to family – the Court did not discuss this in detail.

It is clear from the above-presented jurisprudence that the Court has addressed the rights of transgender people with a growing understanding, and extended the protection afforded to their private and family life over the years. In doing so, the Court has repeatedly recalled the living instrument nature of the ECHR, interpreting it in evolutive manner, and expanding the protection in line with societal changes. However, the analysis of the Court has concentrated greatly on the possible violation of the substantive Article 8 at the expense of equality and non-discrimination considerations.[113]

### 4.3.2. Debate on the Divorce Requirement

As explained above, some aspects of transgender marriage remain contested. In particular, the requirement to be single, or divorce one's current partner in order to obtain legal gender recognition, continues to raise controversy. To this end, the case of *Hämäläinen v Finland*, initially adjudicated in Chamber on 13 November 2012 and then referred to the Grand Chamber, whose judgment was published in July 2014, was important in determining which direction the Court's jurisprudence would turn. Despite the possibility to review the issue in light of the growing support for transgender rights globally, the Grand Chamber, like the Chamber before it, maintained that a fair balance was struck between the interests of the applicant wishing to stay married to her partner, and the general interests of society in the case. The Grand Chamber relied on the margin of appreciation doctrine granting member states a wide discretion to regulate on matters linking to gender recognition and same-sex marriage. The Court voted 14-3 that no violation had taken place. [114]

The applicant of the case was a male-to-female transsexual, who has been married since 1996 and had a child born in the marriage in 2002. According to the Finnish Trans Act (2003), in order to obtain full recognition of her gender, she should be single (sections 1 and 2 of the Act). The provision was interpreted so that she needed to either get a divorce, or with the consent of her wife, convert the relationship into a civil partnership, a form of recognition available to same-sex couples. The Grand Chamber was asked to consider Articles 8 and 12 both taken alone and in conjunction with Article 14, to determine whether the applicant's private and family life, and her right to marry, had been interfered on the grounds of her gender identity. As the applicant and her partner did not want to divorce or to make any other changes in their marital status, the applicant was forced to live with a continuous contradiction between her gender identity and gender marker.[115]

The applicant's main claim was that her right to private and family life had been violated when the full recognition of her gender identity was made conditional on divorce or transformation of her marriage into a civil partnership. According to the domestic law, the applicant's reassigned gender could not be introduced into the population register as long as she remained married. The applicant argued that transgenderism was a medical condition and her gender identity was a private matter, which fell within the scope of her private life. She contended that the state was violating her privacy every time the male gender marker revealed her to be transgender. Also, the couple stated that a divorce would be against their religious convictions, and a civil partnership would not provide the same protection to their child as marriage. As a consequence, the applicant argued she was forced to choose between legal gender recognition and preserving her marriage.[116]

The government argued that as Finland provided the couple with a viable option – turning the marriage into a registered civil partnership – the case was not about forced divorce and the current requirements for legal gender recognition were proportionate. The Grand Chamber agreed and noted that a civil partnership entailed almost the same rights and obligations as marriage, and hence the couple would not "lose any rights".[117] The Grand Chamber decided to approach the issue not as interference of private and family life, but as a question of

whether the government had a positive obligation to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married. It came to the conclusion that such a positive obligation did not exist, and ruled that in the absence of a European consensus on regulating transgender marriages, Finland was to be granted a wide margin of appreciation on regulating legal gender recognition and in balancing the public and private interests involved.[118]

Additionally, the Court noted that according to relevant case law, Article 12 does not impose an obligation on states to grant same-sex couples access to marriage.[119] Moreover, the Court held that no separate issue arose under Article 12. The issue at stake was rather the consequences of the applicant's change of gender for the existing marriage between her and her spouse, and this question was already examined under Article 8.[120] This conclusion is noteworthy in differentiating between an existing transgender marriage and the right to marry as such. In essence it contradicts the Courts reasoning in not finding a violation, which was heavily based on the margin of appreciation granted to states in whether they wish to apply the right to marry to same-sex couples or not.

Under Article 14, the applicant raised a claim that she was discriminated against on two counts: first, as she had to comply with an additional requirement of terminating her marriage in order to obtain legal gender recognition, she had been discriminated against compared to non-transsexuals, who obtained legal gender recognition automatically at birth. As a consequence, the fact that she had been denied a female identity number revealed the confidential information of her being transgender because, unlike a non-transgender person, she had to explain this difference on every occasion when her identity number was required. Second, the applicant argued that she and her family had received less protection than persons in heterosexual marriages owing to stereotypical views associated with the applicant's gender identity. As gender identity was now commonly recognised as a ground protected for the purposes of non-discrimination, a concern under Article 14 was evident.[121]

The government argued that although Article 14 may be applicable, the applicant was not in a similar situation compared to non-transgender persons, as the latter would not be applying for "a change of their gender".[122] This view illustrates the lack of sensitivity and understanding of the reality of transgender persons. Obviously non-transgender people would not be applying for gender reassignment as their appearance and identification documents already correspond to their identity. The differentiating factor therefore is being transgender, and the possibility to live in dignity according to one's innermost experience of oneself.

The Grand Chamber drew from earlier case law by recalling that if there is a difference in treatment of persons in relevantly similar situations, such a difference has to have objective and reasonable justification. In assessing whether the differences in similar situations justify a differential treatment, the state enjoys a wide margin of appreciation.[123] At the same time the Grand Chamber noted that where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted, and if a difference is based on gender or sexual orientation, particularly serious reasons are required by way of justification.[124] In the present case, the Grand

Chamber found that the applicant's situation was not sufficiently similar to the comparator group. Accordingly, no violation of Article 14 taken in conjunction with Article 8 took place.[125] The Grand Chamber did not provide any explanation for why the situation between transgender and non-transgender people was not seen as relevantly similar.

Subsequently, the Grand Chamber, in accordance with the previous ruling by the Chamber, held that there had not been a violation of Article 8 in conjunction with Article 14, and that there was no need to examine the case under Article 12. However, as opposed to the unanimous judgement of the Chamber in 2012, this time three Grand Chamber judges joined in a dissenting opinion.

The Grand Chamber's statement that the applicant failed to establish the "similarity of situations" places a heavy burden of proof on the applicant. Although it has been held in previous case law that the applicant should bear this burden, the Court's jurisprudence is not clear-cut in this regard. As the concepts of establishing similarity and justifying differential treatment are intertwined, it may be difficult to completely separate the analysis of one from the other.[126]

In establishing the similarity of situations, one could ask did the applicant not end up in her current situation due to her gender identity? Can one find other differentiating factors than the applicant's status as a transgender woman? If the protected ground of gender identity is the only differentiating factor, should the situations not be treated the same? Article 14 is in place to guarantee equal enjoyment of the Convention rights – a difference based solely on a protected ground should therefore be interpreted as a violation, unless it is justified. On this basis, the Court should have analysed the possible legitimate aim and proportionality of the state's interference.

As the Court did not provide any explanation for its conclusion, it is unclear if any situation faced by a transgender person would amount to "relevantly similar" in the eyes of the Court. The "male norm" comparator theory suggests that it would be practically impossible for a transgender person to establish the "similarity of situations" because they *are* transgender, and therefore deviate from the norm in the first place.[127] Stereotypical views on gender or gender roles may amount to discrimination if they result in in differential treatment nullifying or impairing the enjoyment of rights.[128] The essence of Article 14 is to provide a safeguard to people who may not be able to equally enjoy their rights due to the fact that they are not white, able-bodied, Christian, heterosexual males. To this end, it would have been crucial for the Court to back up its conclusions – otherwise the relevance of Article 14 can be questioned altogether.

The Court has continuously omitted analysis on equality of transgender people and focused on the substantive claims of interference with private and family life. The *Hämäläinen* judgment followed suit. Had the landmark case of *Goodwin v UK* been decided under Article 14, it would probably have set a different view for subsequent jurisprudence, including the present case. Still, it may be argued that since *Goodwin v UK* there has been a growing global focus on transgender rights, also in terms of equality, which should have affected the majority's reasoning in *Hämäläinen v Finland* by placing more emphasis on Article 14.

The dissenting judges held that the Court should have found a violation of Article 8,

and that it should have approached Articles 12 and 14 differently.[129] Firstly, they argued that the lack of European consensus should not have been the only factor in determining the width of the margin of appreciation. As the Court had established before, that same margin should be restricted when "a particularly important facet of an individual's existence or identity is at stake". Accordingly, gender identity should have been considered to be of such importance to the applicant's very identity, that it would render the margin narrower.[130] Also, the Court should have, in the dissenting judges' view, approached the issue as a potential breach of a negative obligation, not as a possible positive obligation resting on the state, as the majority did.[131] Secondly, the judges criticised the majority's take on same-sex marriage, and the fact that they seemed to address sexual orientation and gender identity as one and the same. With regard to the right to marry, homosexual couples and transgender couples were treated the same by the majority despite their relevantly different situations.[132] Lastly, they argued that the Court did not pay sufficient attention to Article 14, and should have analysed the possible discrimination more in depth.[133]

The dissenting judges made an interesting point in terms of equality under the right to marry by stating that the majority treated transgender couples and homosexual couples the same despite their different situations. Although gender identity and sexual orientation are closely linked, they are different concepts, and gender reassignment of one spouse does not automatically render a transgender relationship homosexual. By concluding that there exists no obligation to provide for same-sex marriage under Article 12, and neither could such an obligation be derived from Article 8, the majority failed to understand the difference explained above. While Article 14 taken in conjunction with Articles 8 or 12 does not currently require states to provide for equal marriage as such, it may require a non-stereotypical view of the institution when it comes to the small number of pre-existing transgender marriages facing involuntary dissolution. The Court should have given its view on this specific matter rather than resorting to the analysis of same-sex marriage in general.

As pointed out by the minority of the Grand Chamber, the above-mentioned approach does not lack legal basis – constitutional courts in Austria, Germany and Italy have recently overturned decisions requiring the dissolution of pre-existing marriages as a precondition for legal gender recognition without imposing same-sex marriage.[134]

The Court's decision confirmed a wide margin of appreciation for states in sensitive issues, and took a stand for a rather stereotypical and normative view on marriage. The ruling is disappointing for advocates of transgender equality, as the case is likely to have a chilling effect on how Council of Europe member states review their legislation on legal gender recognition – at least it will not push them to amend current laws on transgender marriage. States may, however, be affected by the growing support for transgender rights outside the legal sphere, and following this policy trend changes in legislation may occur. Accordingly, when a high enough number of Council of Europe member states amend their laws, the European consensus will grow, and the Court will be required to rethink its position – possibly along the lines presented by the dissenting judges, and following the example set by national courts in Austria, Germany and Italy.

### 4.3.3. The (Lack of) Equality and Non-Discrimination Analysis

A remarkable weakness in the Court's reasoning, common to the majority of the summarised cases, is the considerable lack of analysis of non-discrimination. The requirement of non-discrimination has not been properly addressed in the cases it was invoked in, apart from a short account in *Sheffield and Horsham v the United Kingdom*. In *Christine Goodwin v the United Kingdom* the Court contended that no separate need to consider the claim under Article 14 arose, and in *Hämäläinen v Finland*, the Court stated briefly that the applicant was not in a relevantly similar situation with the comparator group, without giving any further explanation for this conclusion.

In the cases discussed above, the Court did not aim to establish whether a distinction based on a person's gender identity (gender reassignment) was justified in terms of non-discrimination, it only addressed the interference's rightfulness within the ambit of private and family life, balancing this right against the interests of the society as a whole. In order to be more convincing, the Court should widen its argumentation and establish why in these cases the situation did not amount to discrimination. This is not fulfilled merely by referring to the margin of appreciation based on the exact same terms as in the Court's analysis under Article 8.

By contending that the margin of appreciation analysis under Article 8 is also enough to cover any claim of discrimination, the Court seems to be treating Article 14 and Article 8 in essence as the same, not placing any added relevance on the non-discrimination clause. Considering the importance of non-discrimination as a general principle of law, and the separate provision of ECHR under Article 14, such an approach cannot be seen as tenable.

Grouping the two provisions' content together also compromises the very idea of prohibition of discrimination based on certain characteristics by implying that if these characteristics divide the view of the majority, the state has the right treat them differently. Justifying a difference in treatment based on the fact that gender identity is a debated issue amongst European countries goes against the very idea of the non-discrimination clause, especially when the Court has already clearly established it as a protected ground under Article 14.[135] Moreover, the Court has itself emphasised in its 1999 judgment of *Lustig-Prean and Beckett v the United Kingdom* that negative attitudes on the part of the majority against a minority cannot amount to sufficient justification for discrimination.[136]

On the other hand, a rather inconsistent approach can be found when analysing a series of cases invoking the non-discrimination clause. While the Court has often been reluctant to apply Article 14 altogether, in certain cases in which the differentiating treatment was based on sex the Court found a violation by emphasising the aspect of equality. For example, in case of *Eremia v the Republic of Moldova*, the Court ruled that a domestic violence victim had been subjected to inhuman and degrading treatment contrary to Article 3 of the ECHR, and as domestic violence disproportionately affects women, she had also been discriminated against under Article 14.[137] Also, in the case of *Abdulaziz, Cabales and Balkandali v the United Kingdom*, the Court found a violation of Article 8 in conjunction with Article 14 in a situation that treated male spouses of British residents less favourably than female spouses when apply-

ing for residence permits.[138] The noteworthy aspect is that the Court did not find a violation of Article 8 on its own, but only when tied into the aspect of equal treatment on the grounds of sex.

Therefore, it seems to depend, at least to some extent, on which grounds the discrimination claim is brought before the Court. In cases relating to gender discrimination the Court has been more eager to analyse aspects of discrimination than in cases regarding differential treatment based on gender identity. This may be an illustration of the fact that gender identity is a newcomer to the list of protected grounds, and, as discussed above, raises controversy in some member states. However, in the light of the high level of discrimination and harassment experienced by transgender people throughout Europe,[139] the requirement of non-discrimination should be thoroughly addressed by the Court in cases relating to gender identity.

In some of the gender identity cases decided by the Court, a comprehensive non-discrimination analysis might have resulted in a different ruling. Let us look at the case *Hämäläinen v Finland*, and the "divorce requirement" imposed on the applicant by the Finnish state: if the Court had accepted that the applicant was indeed in a similar situation to non-transgender married people, the claim would have had a chance of succeeding. Had the Court been mindful of the criticism based on the "male norm" comparator, it could have concluded that the burden of proof placed on the applicant was unduly heavy. The Grand Chamber could also have acknowledged that transgender couples were actually treated similarly to homosexual couples despite being in different situations, as was suggested in the dissenting opinion.

Moreover, as the Court has itself established, it should apply strict scrutiny in cases that concern race or sex, including sexual orientation. If sexual orientation is read into "sex", it would be logical to include gender identity, a concept more related to sex than sexual orientation, as well. However, the Court holds that member states enjoy a wide margin of appreciation if there is no European consensus in a certain matter, such as same-sex marriage or the requirements of legal gender recognition. Consequently, the margin of appreciation renders the first statement void in practice.

### 4.3.4. Is Protection Limited to Post-Operative Transsexuals?

Although recent recommendations by universal and regional bodies discuss transgender, gender identity and expression in a general manner, including transsexuals, transvestites and gender queer people, the developments under the ECHR have only applied to post-operative transsexuals.[140] It remains to be seen whether the European legal framework will extend to all transgender people based on their self-identification, rather than reconstructed biological characteristics. Will the Court depart from a strictly binary view on gender to encompass rights of people who do not identify clearly as male or female? Will it acknowledge the concept of 'third gender' as Courts in India and Australia, for example, have done?

The previous case law, and the Court's highly biological understanding of gender, suggests that such a development is not likely in the near future. The Court uses binary dichotomy of men and women, and transgender people are seen as changing from one of these two categories. Furthermore, the Court refers to a 'change' of gender rather than reassignment

and recognition of the (true) gender of a person, which further illustrates the view based on biological changes rather than self-identification. For trans people, their gender does not "change", but their bodily characteristics can be brought more into conformity with their gender identity by medical treatment.

However, if European countries take on the recommendations to tackle discrimination of transgender people and consequently develop their legislation to cater for the needs of everyone falling under the umbrella term of transgender, this is unlikely to go unnoticed by the Court. If a European consensus on issues such as the "third gender" is reached, it will sooner or later lead the Court to adjust its views as well. Still, in light of the Court's jurisprudence so far, it looks like the slow improvement in acknowledging transgender rights will concentrate on post-operative transsexuals.

## 5. Conclusion

The protection of transgender people under the European human rights law framework has developed greatly over the last few decades. While the Court in the 1980-1990s had not yet accepted gender identity as an analogous protected ground, and found that non-recognition of reassigned gender did not breach the Convention, since the early 2000s it has ruled in favour of the applicant in several cases regarding a transgender person's right to be fully recognised before the law, and the right to marry a person of the "new opposite sex". In the light of these developments, transgender people have been able to enjoy their right to private and family life on a more equal basis than before. However, the change has taken place through the progressive interpretation of Article 8, rather than considerations on equality and non-discrimination.

The right to legal gender recognition has arisen due to social changes in European countries, which have triggered the Court to depart from its earlier case law and interpret the Convention as a living instrument, adapting to the social and medical developments in society. This being said, the Court has continuously emphasised how each case shall still be decided based on its special circumstances, and that the 'fair balance' will shift accordingly. Thus, even though the Court has increasingly found states have unlawfully interfered with transgender people's private and family life, some aspects of legal gender recognition continue to fall within the margin of appreciation granted to the contracting parties.

According to the current interpretation of European human rights law, the contracting states are obliged to provide recognition for the reassigned gender of trans individuals. As to how they should do it, they enjoy a wide margin of appreciation. Within this margin, the states can impose requirements on transgender persons, such as being single, in order to obtain full legal recognition. The "single requirement" may in practice mean that already married couples are forced to divorce, or convert their marriage into a civil partnership. This has been argued to be mainly due to the lack of European consensus on same-sex marriage, upon which states are free to regulate themselves, regardless of the differences between an existing transgender marriage and a marriage between two persons of the same sex.

The margin of appreciation doctrine is often applied also to claims regarding equality and non-discrimination under Article 14. This, together with the Court's view that transgender people cannot compare themselves to non-transgender people with

regard to marriage, has meant that differential treatment did not amount to discrimination under the Convention.

Nevertheless, it can be argued that the Court has neglected equality considerations in its pertinent case law to a great extent. In some cases Article 14 was not invoked, but in the cases that it was, the Court stated that there was either no need to separately address Article 14, or that no discrimination had occurred without applying the equality and non-discrimination framework and consequently explaining how it arrived at such a conclusion.

Even if the analysis on equality and non-discrimination would not render a different conclusion by the Court, Article 14 is still a binding, and a separate, obligation calling to be addressed appropriately. This is especially vital looking at statistics about discrimination against transgender people in Europe; by leaving out the non-discrimination aspect the Court fails to see structural problems. The Court does not live in a vacuum separate from social reality, in which it could overlook systemic issues of disadvantage affecting minorities.

It can also be stated that the Court has been inconsistent in applying Article 14. While in some cases it has analysed the equality and non-discrimination framework, in others it mentions that no separate consideration is needed and in others briefly disregards the claim without further explanation.[141] The former has applied especially to cases regarding gender discrimination, while the latter has been true in transgender judgements.

It could be argued that a thorough non-discrimination analysis would have rendered a different outcome in some of the transgender cases – if the Court would have been willing to apply the "male norm" comparator theory in assessing the similarity of situations, and emphasise equal enjoyment of the right to respect for private and family life.

As we have seen above, a wide margin of appreciation has been the main reasoning of the Court when it has *not* found a violation of a transgender person's private and family life. The Court seems to treat the substantial claim under Article 8 and the non-discrimination claim under Article 14 as one and the same – as they are both rejected based on nation states' wide discretion. This view is not convincing as Article 14, albeit "accessory", is still a separate right under the Convention. If it bears no relevance to the Court's argumentation, what is the purpose of it altogether?

An increased level of protection for transgender people's rights has been called for in recent policy developments within the Council of Europe, general soft law and the recommendations of UN treaty bodies. While the Court has not yet accepted the continuation of transgender marriage as a protected right, it may, in the light of these developments and changes in domestic laws, be an emerging right in the region. The change in the Court's interpretation did not yet come about in the recent judgement on *Hämäläinen v Finland*, as the Court held that the issue continued to fall under national discretion. However, unlike the Chamber, the Grand Chamber was divided on the question. The dissenting judges drew attention to the weaknesses in the majority's argumentation on lack of European consensus, global developments and non-discrimination, laying a basis for updated views when future claims are brought before the Court.

The progress that has happened so far in relation to the rights of transgender people

has happened through development in interpretation of Article 8, not of Article 14. The inconsistent and incomprehensive approach of the Court on equality has meant that the non-discrimination framework under the ECHR has not proven to be a very useful tool to address discrimination claims in cases relating to gender identity.

While breaches of non-discrimination are not always as obvious as infringements of substantial rights, they are nonetheless far-reaching and hold a certain added gravity as they threaten to undermine the universality of human rights. Hence, the principle of non-discrimination should be granted more emphasis in the analysis of the Court.

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2 European Union Agency for Fundamental Rights, "LGBT Survey Data Explorer" 2013.

3 European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) *ETS* 5.

4 Fredman, S., *Discrimination Law*, Oxford University Press, 2002, p. 1.

5 *Ibid.,* p. 5.

6 See, for example, Grant, E., "Dignity and Equality", *Human Rights Law Review*, Vol. 7, No. 2, 2007, p. 300; McCrudden, C., "Equality and Non-Discrimination", in *English Public Law*, (ed.) Feldman, D., Oxford University Press, 2004, pp. 581-668.

7 Bayefsky, A., "The Principle of Equality or Non-Discrimination in International Law", *Human Rights Law Journal*, No. 11:1-2, p. 1.

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9 See UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.

10 See UN Human Rights Committee, *Althammer et al v Austria* (Communication No. 998/2001) 2003.

11 World Health Organization, "Gender, Women and Health: What do we mean by 'sex' and 'gender'?", available at: http://www.who.int/gender/whatisgender/en/.

12 See, for example, the Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation No. 9: Statistical Data Concerning the Situation of Women*, 1989; CEDAW Committee, *General Recommendation No. 13: Equal Remuneration for Work of Equal Value*, 1989; CEDAW Committee, *General Recommendation No. 19: Violence Against Women*, 1992.

13 ILGA-Europe, "ILGA-Europe Glossary", available at http://www.ilga-europe.org/home/publications/glossary.

14 *Ibid*.

15 World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders - Diagnostic Criteria for Research*, 1992.

16 Lee, A., "Trans Models in Prison: The Medicalization of Gender Identity and Eighth Amendment Right to Sex Reassignment Therapy", *Harvard Journal of Law and Gender*, Vol. 31: 447-471, p. 451.

17 See the analysis of the Court's case law in chapter 4.3.

18 Council of Europe, *Explanatory Report on the Convention on Preventing and Combating Violence against Women and Domestic Violence*, Para 53.

19 *P v S and Cornwall County Council* [1996] IRLR 347.

20 See, for example, a recent decision by the Supreme Court of India on *National Legal Services Authority v Union of India and Others*, judgment of 15 April 2014 and the German Civil Statuses Act from 5.11.2013. A similar decision was taken by the High Court of Australia in *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

21 Roagna, I., *Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights*, Council of Europe Human Rights Handbooks, 2012, p. 9.

22 *Ibid*., p. 12.

23 European Court of Human Rights (ECtHR), *Marckx v Belgium* (Application No. 6833/74),1979.

24 ECtHR, *Lebbink v Netherlands* (Unreported, June 1, 2004).

25 ECtHR, *Johnston and Others v Ireland* (Application No. 9697/82), 1986; ECtHR, *X, Y and Z v the United Kingdom* (Application No. 21830/93), 1997.

26 *Ibid., Johnston and Others v Ireland*.

27 See e.g. ECtHR, *Inze v Austria* (Application no. 8695/79), 1987; ECtHR, *Karlheinz Schmidt v Germany* (Application no. 13580/88), 1994.

28 Arnardóttir, O. M., *Equality and Non-Discrimination under the European Convention on Human Rights,* Martinus Nijhoff Publishers, 2003, p. 1.

29 Protocol No. 12 to the Convention of Human Rights and Fundamental Freedoms (entered into force 1 April 2005) *ETS* No. 177.

30 ECtHR, *P.V. v Spain* (Application No. 35159/09), 2010.

31 *Ibid.*

32 *Ibid*., Paras. 15, 37. In addition to being interpreted into the "any other status" clause, gender identity has been read into the provisions of the CEDAW by the CEDAW Committee in *General recommendation No. 27 on older women and the protection of their human rights,* 2010; *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*, 2010. Gender identity has been explicitly mentioned for the first time in the text of an international treaty in the Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence (entered into force August 2013), *CETS* No. 210. It expressly refers to the grounds of gender identity in Article 4(3), which stipulates non-discrimination.

33 See Arnardóttir, above note 28, p. 41.

34 See Fredman, above note 4. p. 9.

35 *Ibid.*

36 *Ibid*., pp. 9-10.

37 See Arnardóttir, above note 28, p. 42.

38 *Ibid*., p. 85.

39 ECtHR, *Dudgeon v the United Kingdom* (Application No. 7525/76), 1981.

40 *Ibid.,* concerning Article 8; Van Dijk, P. and Hoof, G., *Theory and Practice of the European Convention on Human Rights*, Martinus Nijhoff Publishers, 1998, p. 724-726; ECtHR, *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Application no. 9214/80; 9473/81; 9474/81); ECtHR, *The Holy Monasteries v Greece* (Application No. 13092/87; 13984/88), 1994.

41 ECtHR, *Rasmussen v Denmark* (Application no. 8777/79), 1984; see Arnardóttir, above note 28p. 42, 52. The test has been subsequently applied in latter case law such as ECtHR, *James and Others v the United Kingdom* (Application No. 8793/79), 1986; see *Inze v Austria*, above note 27; ECtHR, *Larkos v Cyprus* (Application No. 29515/95), 1999.

42 The test was established for the first time in the *Case "Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium" v Belgium* (Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), 1968 (*Belgian Linguistics Case)*, Para. 10.

43 See Arnardóttir, above note 28, p. 42.

44 *Ibid*., p. 44.

45 See e.g. *Abdulaziz, Cabales and Balkandani v the United Kingdom*, above note 40, in which the Court held that advancing public tranquility and protecting domestic employment market constituted a legitimate aim with regard to immigration rules that treated foreign wives more favourably than foreign men, but that the measures chosen were not proportionate to the aim.

46 See Arnardóttir, above note 28, p. 44; Sundberg-Weitmann, B., "Legal Tests for Applying the European Convention on Human Rights and Freedoms in Adjudicating on Alleged Discrimiantion", *Nordisk Tidskrift för International Ret*, 1980, pp. 48-49.

47 See, for example, ECtHR, *Camp and Bourini v the Netherlands* (Application No. 28369/95), 2000; *Salgueiro da Silva Mouta v Portugal* (Application No. 33290/96), 1999; ECtHR, *Hoffman v Austria* (Application no. 12875/87), 1993.

48 Eissen, M., "The Principle of Proportionality in the Case-Law of the European Court of Human Rights", in *The European System for the Protection of Human Rights*, (eds.) MacDonald, J., Matscher, F. And Petzold, H., Dordrecht, Martinus Nijhoff Publishers, 1993, p. 125.

49 *Ibid*., pp. 131-140 and 145.

50 See Arnardóttir, above note 28, p. 44.

51 See *Belgian Linguistics Case,* above note 42.

52 *Ibid*., Para 10; see Arnardóttir, above note 28, p. 58.

53 See ECtHR, *Handyside v the United Kingdom* (Application no. 5493/72), 1976, Paras. 47-49. The margin of appreciation doctrine in its current form is further elaborated in the case law discussed in chapter 4.3.

54 See Arnardóttir, above note 28, p. 60.

55 In *Rasmussen v Denmark*, above note 41, Para 40., the Court stated: "The scope of margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States."

56 See, for example, ECtHR, *Lustig-Prean and Beckett v the United Kingdom* (Application No. 31417/96), 1999, in which the Court established that negative attitudes on the part of the majority against a minority cannot amount to sufficient justification for discrimination

57 See *Rasmussen v Denmark*, above note 41; see Arnardóttir, above note 28, pp. 42, 52.

58 *Ibid.,* Arnadóttir, Chapter 5.2.4. and p. 66.

59 ECtHR, *S.H. and Others v Austria* (Application no. 57813/00), 2011, Para 94.

60 See Bernhardt, R., "Thoughts on the Interpretation of Human Rights Treaties" in *Protecting Human Rights: the European Dimension – Studies in Honour of Gerard Wiarda*, (eds.) Matscher, F. And Petzold, H., Carl Heymanns Verlag, 1998, pp. 67-68.

61 *Ibid*., pp. 67-68 and 78.

62 ECtHR, *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (Application no. 5095/71; 5920/72; 5926/72), 1976, Para 53.

63 See, for example, *Handyside v the United Kingdom* above note 53, *Young, James and Webster v the United Kingdom* (Application no. 7601/76; 7806/77), 1981.

64 Mahoney, P., "Marvellous Richness of Diversity or Invidious Cultural Relativism?", *Human Rights Law Journal*, 1998, p. 2; Mahoney, P. "Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin", *Human Rights Law Journal*, 1990 p. 81.

65 *Ibid.,* "Marvellous Richness of Diversity or Invidious Cultural Relativism?".

66 See Arnardóttir, above note 28, p. 60.

67 UN Human Rights Committee, *General Comment No. 18, Non-Discrimination*, 1989; ECtHR, *Gaygusuz v Austria* (Application no. 17371/90), 1996.

68 See the case law discussed in chapter 4.3.

69 International Commission of Jurists, *Sexual Orientation, Gender identity and Justice: A Comparative Law Casebook*, 2011, p. 173.

70 Amnesty International, *The State Decides Who I Am – Lack of Recognition for Transgender People in Europe*, 2014, p. 20.

71 *Ibid.*

72 See for instance Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (entered into force 23 March 1976) 993 *UNTS* 3; Articles 8 and 14 of the ECHR.

73 UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, A/HRC/22/53, 2013, Paras 78 and 88; Council of Europe Commissioner for Human Rights, Hammarberg, T., *Human Rights and Gender Identity*, 2009, 2, Para 3.2.1.

74 For example, Sweden and Germany have abolished such requirements. Review of legislation is ongoing. In countries, including Finland and Norway: ILGA-Europe, *Rainbow Europe 2014: What is it Like to Be Lesbian, Gay, Bisexual, Trans & Intersex in Europe*, 2014, p. 161; ILGA-Europe, "Rainbow Map Index 2014", available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_europe.

75 See Amnesty International, above note 70, p. 53.

76 *Christine Goodwin v the United Kingdom* (Application no. 28957/95), 2002. See also the earlier case of *Rees v the United Kingdom* (Application no. 9532/81), 1986.

77 For a compilation of the European countries' legislation on LGBT issues, including legal gender recognition, see ILGA-Europe, *"Rainbow Map Index",* above note 74.

78 In *Dadouch v Malta*, (Application no. 38816/07), 2010 a case concerning the authorities' failure to register a marriage contracted abroad by a Maltese national, the Court stated that "registration of a marriage, being a recognition of an individual's legal civil status, which undoubtedly concerns both private and family life, comes within the scope of Article 8(1). See also Interights, "In the European Court of Human Rights Case of H. v Finland (Application No. 37359/09) Request for Referral to the Grand Chamber on behalf of the Applicant", 13 February 2013, pp. 6-7 (unpublished).

79 *Parry v the United Kingdom* (Application no. 42971/05), 2006; *R and F v the United Kingdom* (Application no. 35748/05), 2006.

80 See *H. v Finland*, above note 80. The case name changed to *Hämäläinen v Finland* in 2013 when the anonymity was lifted.

81 ECtHR, *Hämäläinen v Finland* (Application no. 37359/09), 2014.

82 For European context, see the landmark case of ECtHR, *Schalk and Kopf v Austria* (Application no. 30141/04), 2010.

83 See Interights, above note 78; ECtHR, *Burden v the United Kingdom* (Application no. 13378/05), 2008.

84 The same view was taken by three dissenting judges in *Hämäläinen v Finland*.

85 *Rees v the United Kingdom* (Application no. 9532/81), 1986.

86 *Rees v the United Kingdom*, 1986, Para 34.

87 *Ibid.,* Para 40.

88 *Ibid*., Para 37.

89 *Ibid.,* Para 50.

90 *Ibid*., Para 47.

91 ECtHR, *Cossey v the United Kingdom* (Application no. 10843/84, 1990.

92 *Cossey v the United Kingdom,* 1990, Para 40.

93 ECtHR, *B v France* (Application no. 13343/87) 1992.

94 B v France, 1992, Para 43.

95 *Ibid*., Para 44.

96 *Ibid*., Para 48.

97 *Ibid*., Para 63.

98 *Sheffield and Horsham v the United Kingdom* (Application no. 22985/93; 23390/94), 1998.

99 *Sheffield and Horsham v the United Kingdom*, 1998, Para 60.

100 *Ibid*., Para 76.

101 See *Christine Goodwin v the United Kingdom*, above note 76.

102 *Ibid.*

103 *Ibid.*, Para 93.

104 *Ibid*., Para 103.

105 *Ibid*., Para 100.

106 *Ibid*., Para 103.

107 *Ibid*., Para 108.

108 ECtHR, *Grant v the United Kingdom* (Application No. 32570/03), 2006, Paras 43-44.

109 See Interights, above note 78, p. 17.

110 ECtHR, *L v Lithuania* (Application No. 27527/03), 2007, Para 57.

111 *Ibid*., Para 59.

112 See *P.V. v Spain*, above note 30, Para 36.

113 See more on the lack of equality and non-discrimination analysis in chapter 4.3.3.

114 See *Hämäläinen v Finland*, above note 81, Paras 74-75 and 87-89.

115 For the facts, See *H. v Finland*, above note 80; *Hämäläinen v Finland*, above note 81.

116 *Ibid., Hämäläinen v Finland*, Paras 44-45.

117 *Ibid*., Para 84.

118 *Ibid*., Para 74.

119 *Ibid.*, Para 96; see *Schalk and Kopf v Austria*, above note 82, Para 101.

120 *Ibid., Hämäläinen v Finland*, Para 97.

121 *Ibid*., Paras 98, 103-105.

122 *Ibid*., Para 106.

123 *Ibid.*, Para 108; see *Burden v the United Kingdom*, above note 84.

124 *Ibid., Hämäläinen v Finland*, Paras 67 109.

125 *Ibid.*, Paras 112-113.

126 This issue is discussed above in chapter 3.2.

127 *Ibid*.

128 See *Hämäläinen v Finland*, above note 81, Para 54 (referring to the third party intervention by Amnesty International).

129 *Ibid*., Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens, Paras 2-7.

130 *Ibid*., Para 5; see *S.H. and Others v Austria*, above note 59.

131 *Ibid*., *Hämäläinen v Finland*, Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens, Para 4.

132 *Ibid*., Paras 17 and 20.

133 *Ibid*., Para 21.

134 Austrian Constitutional Court Case V 4/06-7 Judgement of 8 June 2006, German Constitutional Court Case 1BvL 10/05 judgment of 27 May 2008, and Constitutional Court of Italy, no. 170/2014 Judgment of 11

June 2014; *Ibid*., Para 16.

135 See *P.V. v Spain*, above note 30.

136 See *Lustig-Prean and Beckett v the United Kingdom*, above note 56.

137 ECtHR, *Eremia v the Republic of Moldova* (Application no. 3564/11), 2013, Paras 84, 90. This conclusion was reached following a third party intervention by the Equal Rights Trust emphasising the discriminatory nature of violence against women.

138 See *Abdulaziz, Cabales and Balkandani v the United Kingdom*, above note 40.

139 EU Fundamental Rights Agency, *EU LGBT survey - European Union Lesbian, Gay, Bisexual and Transgender Survey*, May 2013.

140 For recommendations see, for example, UN Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Finland*, UN Doc. CCPR/CO/82/FIN, 2013, Para 8.; UN Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*: *Report of the United Nations High Commissioner for Human Rights,* UN Doc. A/HRC/19/41, 2011, Recommendation e.

141 See *Eremia v the Republic of Moldov,* above note 138; *Abdulaziz, Cabales and Balkandani v the United Kingdom*, above note 40.