Gender Identity Discrimination in European Judicial Discourse

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Introduction: Gender Identity

Gender identity is receiving increasing recognition as a prohibited ground of discrimination at international and national levels. The UN system and the Council of Europe have highlighted its pertinence in the implementation of international and European human rights standards.[2] Explicit references to gender identity can also be found in recent national equal treatment legislation in a growing number of countries.[3]

One focal point for these developments was the publication, by a group of international human rights experts in 2007, of *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, usually referred to as the Yogyakarta Principles. The definitions of sexual orientation and gender identity given in the Yogyakarta Principles have acquired a considerable degree of authority although they have also received critical attention.[4] The principles define gender identity in a broad manner, also incorporating elements of the notion of "gender expression":

> "Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."[5]

Critics of the concept, drawing on queer theory, have pointed out that such a definition privileges essentialist identity above gender blurring while acknowledging that trans activists did agree to the definition as a strategic choice.[6]

This broad definition of gender identity is applicable to practically everyone. However, the group of people usually identified as facing discrimination on grounds of gender identity are trans persons. This heterogeneous group of people encompasses persons who have a gender identity which is different from the sex assigned to them at birth and people who wish to portray their gender identity in a different way to the sex assigned at birth. It includes people who feel they have to, prefer to, or choose to, for example by clothing, accessories, mannerisms, speech patterns, cosmetics or body modification, present themselves differently from the expectations of the gender role associated with the sex assigned to them at birth. Among trans people, transsexuals in particular may wish to undergo hormonal and surgical gender reassignment or affirming treatment to permanently modify their bodily appearance and function. Other trans persons may choose different means to express their gender identity.[7]

Recent European studies have demonstrated that trans persons experience discrimination in many areas of life including employment, healthcare and education.[8] A particular chal-

lenge for transsexuals is the legal recognition of preferred gender, which may involve complicated administrative and medical procedures. The frequent requirement of infertility, i.e. sterilisation, is a case in point. The fact that trans persons are often subjected to medical diagnoses, and need trans-specific healthcare highlights healthcare as the context of potential discrimination.

This article will discuss the ways European jurisprudence has viewed and ruled on gender identity discrimination. In this context, European judicial discourse is understood to encompass the supranational judgments and decisions taken by the European Court of Human Rights (the ECtHR), the former European Commission of Human Rights (the Commission) which functioned as the ECtHR's ante-chamber until the late 1990s, and the Court of Justice of the European Union (previously known as the European Court of Justice). This view from above is naturally limited in many respects and covers only partially the wide range of discrimination encountered by trans persons on grounds of their gender identity. Yet it can offer valuable insights into the treatment of trans people in society as the cases discussed pose fundamental questions about the nature of obstacles trans persons experience to the full and effective enjoyment of human rights.

In fact, "gender identity" as such is only rarely mentioned in European jurisprudence. The currently more ambiguous term "sexual identity" has been, since the 1970s, the preferred term used in European jurisprudence, to cover some of the ground coming under today's notion of gender identity.[9] Owing to the closed lists of prohibited grounds under EU law, the Court of Justice of the European Union in Luxembourg (the Court of Justice) has approached gender identity discrimination through the "sex" ground.[10] The ECtHR and the Commission in Strasbourg have had no such imperative need to identify gender identity discrimination with the sex ground since the European Convention on Human Rights (the ECHR) operates on an open-ended list of discrimination grounds. European jurisprudence on the subject has, nevertheless, been relatively clear in distinguishing gender identity and sexual identity from sexual orientation in this context.

In reality, the ECtHR has hardly ever ruled explicitly under Article 14 (Prohibition of Discrimination) of the ECHR in cases related to trans persons.[11] Both the ECtHR and the Commission have usually preferred to decide such cases with reference to the substantial Articles (e.g. 3 (Prohibition of Torture), 6 (Right to a Fair Trial), 8 (Right to Respect for Private and Family Life) and 12 (Right to Marry)) alone, following by now somewhat dated judicial practice. However, this has been followed by the occasional acknowledgement that the discrimination alleged by the applicant under Article 14 had been at the heart of the complaints related to the substantial articles as well.[12] Still, in these cases, the ECtHR and the Commission have not applied a discourse which fully elaborates the non-discrimination angle. The ECtHR's doctrine on differential treatment is rarely referred to explicitly. This is in contrast with the Court of Justice where the non-discrimination approach is explicit, as the EU equal treatment directives provide the basis for the rulings.

Naturally, the approach taken by the ECtHR and the Commission could be primarily described as human rights-based. The difference between a rights-based and an equal treatment approach is, however, somewhat academic. Both approaches can be ultimately grounded on the fundamental principles enunciated in the Universal Declaration of Human Rights which, at the outset (Article 1), highlights equality in dignity and rights. Non-discrimination and equality are transversal principles underpinning human rights. The insight of the ECtHR and, even more so, of the Commission, that the individual's right to self-determination of gender identity – with reference to Article 8 of the

ECHR – is the fundamental aspect of the complaints brought forward by trans persons under the ECHR, is perfectly relevant to both approaches.[13]

European jurisprudence on gender identity discrimination is also intimately connected with the development of the doctrine of states' positive duties under the ECHR and the necessity to provide differential treatment to trans persons when the treatment afforded to the majority would be clearly discriminatory in their case. The need to build on the concept of reasonable accommodation in this context is evident. This demonstrates the evolution from formal equality towards substantive and transformative equality as the doctrine underpinning equal treatment legislation.[14]

This article will focus on three specific elements of European judicial discourse on gender identity. It will first discuss the scope given to the ground of gender identity in the jurisprudence, with reference to the notion of sexual identity and the prevailing medical classifications which frame the discourse. The article will then turn to the development of the doctrine on positive duties and the pertinence of reasonable accommodation to the subject. An analysis of the limits and lacunae of the protection afforded which follows highlights certain troubling images conveyed by the discourse. The conclusion will build on the general observations outlined in the introduction.

1. Sexual Identity and Medical Discourse

In European judicial discourse, gender identity is most often referred to as sexual identity, even though gender identity has also been specifically mentioned in more recent jurisprudence. As early as the 1970s, the Commission referred to sexual identity as an essential element of personality, which in the case of a "post-operative" transsexual resulted "from his changed physical form, his psychical make-up and his social role".[15] Transformation from one sexual identity to another characterised the use of the concept in the judicial discourse often referred to as "new sexual identity" in the context of "the legal recognition of the change in the applicant's sexual identity".[16] In this manner, sexual identity was clearly differentiated from the notion of sexual orientation[17] and was applied in ways coming relatively close to the current concept of gender identity.

Gender identity, in its rare appearances in the jurisprudence, is applied in an analogous fashion. In 2002-2003, the ECtHR stressed that "gender identity is one of the most intimate areas of a person's private life" and discussed the significance of the chromosomal element of sex for "the purposes of legal attribution of gender identity for transsexuals".[18] Gender identity is also referred to in the context of medical classifications due to the existence of "gender identity disorder" in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM-IV) and the WHO International Classification of Diseases (ICD-10).[19]

The jurisprudence is in fact heavily penetrated by medical discourse. As the case law is almost exclusively related to transsexuals, "transsexualism", a medical diagnosis which preceded that of gender identity disorder in the DSM, is often the subject of deliberations. In 1979, the Commission defined transsexualism as:

> "[A]n illness characterised by dual personality – one physical and the other mental. The patient is deeply convinced of belonging to the other sex resulting in the demand that one's body is rectified accordingly."[20]

In 1986, the ECtHR noted that transsexualism was not a new condition and stated that the:

> "[T]erm 'transsexual' is usually applied to those who, whilst belonging physi-

cally to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature". It also underlined that "post-operative" transsexuals formed a fairly well-defined and identifiable group.[21]

Later on, the condition of "gender dysphoria" became associated with transsexualism in the case law.[22] In fact, the ECtHR has explicitly confirmed that "transsexuality", with reference to gender dysphoria, is a protected ground of discrimination under Article 14 of the ECHR, which includes an open-ended list of prohibited grounds of discrimination.[23] This underscores the close interplay of the medical and legal discourses in delimiting the scope of gender identity as a discrimination ground in European jurisprudence. For the ECtHR, this discrimination ground would principally apply in cases of unequal treatment experienced by transsexual persons who have undergone gender reassignment treatment.

Accordingly, medical discourse has played an important part in affording rights protection to transsexuals in the first place. Instead of using gender identity as a broader discrimination ground, transsexualism, defined as a medical condition, has been applied in European jurisprudence. Medical and scientific developments related to transsexualism and to its possible etiology were often discussed in the rulings of the ECtHR.[24] This was partly due to the fact that national jurisprudence had occasionally arrived at the conclusion that transsexualism had been willingly caused by the applicants themselves and that they thereby did not merit specific legal protection or recognition.[25] The legal definition of sex, from an overwhelmingly biological point of view, laid down in the English case of *Corbett v Corbett* [1971] P83 played an important part in early jurisprudence as well.[26] Only as late as in 2002, the ECtHR brushed aside the pertinence of arguments regarding medical etiology as well as the predominance of a biological definition of sex and recognised that medical science did not provide any determining argument as regards the legal recognition of transsexuals.[27] The Commission had arrived at a similar position in 1979.[28] However, this did not change the underlying assumption that transsexuality or gender dysphoria as a medical condition was the applicable discrimination ground as such.

It is also significant to note that the ECtHR has made an attempt to differentiate between the applicable medical and legal discourses. In two judgments from 2003 and 2009, the ECtHR castigated the judicial authorities in Germany and Switzerland for substituting themselves for medical experts by stressing that determining the medical necessity of gender reassignment measures was not a matter of legal definition.[29] By doing so, the ECtHR not only highlighted the autonomy of medical expertise over legal discourse but also the right to self-determination by transsexuals who were no longer expected to prove the medical necessity of gender reassignment treatment. In the *Christine Goodwin v The United Kingdom* judgment of 2002, the ECtHR had already stated that it was illogical for a State not to afford full legal recognition for the transsexual's preferred gender if gender reassignment treatment had already been authorised and financed by the state on the basis of a medical diagnosis and treatment operated by a national health service.[30]

The jurisprudence of the Court of Justice related to trans persons is also framed by medical discourse. Definitions of transsexuality or transsexualism, as well as the legality of gender reassignment treatment, play an important part in the deliberations. The medical conditions of gender dysphoria and gender identity disorder are also specifically mentioned.[31] Yet there is a more conscious emphasis on discrimination than in the rulings

of the ECtHR. In fact, in these cases the Court of Justice has applied the ground of sex in its judgments with reference to the principle of equality as laid out in EU directives on the equal treatment for men and women.[32] The Court of Justice has affirmed that discrimination arising from gender reassignment, i.e. the intention of a person to undergo or having undergone gender reassignment, is covered by the principle of equality between men and women.[33] In addition, the jurisprudence has made it clear that discrimination based on gender reassignment should not be confused with discrimination related to sexual orientation.[34]

Since the equal treatment directives of the European Union operate with closed lists of discrimination grounds, the sex ground was simply the only applicable ground in this instance in the absence of a specific ground of transsexuality or gender identity in EU law. The Advocate General has also pointed out that transsexuals do not constitute a third sex and do therefore fall under the scope of equal treatment directives.[35] In a case concerning a dismissal from a job, the Court of Justice applied as a comparator persons of the sex to which the applicant had been deemed to belong before undergoing gender reassignment.[36]

In conclusion, it should be stressed that the ground of gender identity in European jurisprudence is clearly related to medical classifications and the medical condition of gender dysphoria or gender identity disorder. In fact, the origins of the notion of gender identity itself can also be found in medical and psychological discourse.[37] It should be highlighted that European jurisprudence has rather exclusively concerned transsexuals. Transsexuality and gender reassignment, the latter with reference to the ground of sex, rather than gender identity in a broader sense, are the prohibited discrimination grounds applied by the ECtHR and the Court of Justice. This naturally has implications in terms of the scope of protection afforded and it is unclear whether other trans persons than transsexuals would be able to profit from the European non-discrimination guarantees to a similar extent as transsexuals.

2. Positive Obligations and Reasonable Accommodation

European jurisprudence on gender identity discrimination coincided with the development of the doctrine of positive obligations by the ECtHR and the Commission. Positive obligations, in turn, are intricately related to the notion of substantive equality when applied in the field of non-discrimination.[38] This is particularly significant to trans persons whose full enjoyment of human rights often requires differential treatment or reasonable accommodation in a more contemporary sense.

The development of positive obligations by the European Court of Human Rights is usually traced to the judgment *Marckx v Belgium* of 13 June 1979 dealing with the difference of treatment made between "illegitimate" and legitimate children under Belgian law with reference to Articles 8 and 14 of the ECHR. In this case, the ECtHR noted that "there may be positive obligations inherent in an effective 'respect' for family life" and that states had an obligation to ensure the coherence of their national law by making necessary reforms following rulings by the ECtHR.[39] In the judgment *Airey v Ireland* of 9 October 1979, concerning an effective right of access to the courts and the availability of legal aid with reference to Articles 6-1 and 8 of the ECHR, the ECtHR already stated clearly that the "fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive".[40] The doctrine of positive obligations is built upon the realisation that the state should not only abstain from interfering with the rights of individuals (a "negative obligation") but also take positive measures, when necessary, to protect and fulfil such

rights. This is in line with the Court's often repeated dictum that "[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".[41]

In the first Opinion of the Commission on a case related to gender identity – *D. van Oosterwijck v Belgium* of 1 March 1979 – predating the ECtHR's *Marckx* judgment, the Commission still stated that Article 8 of the ECHR predominantly implied only negative obligations on the part of the State. In reality, however, the Commission's finding of a violation of Article 8 in this case implied a positive obligation even if this was not spelled out in an explicit manner. With reference to the failure of the applicant to obtain recognition of his preferred gender, the Commission stated:

"In the Commission's opinion, the failure of Belgium to contemplate measures which would make it possible to take account in the applicant's civil status of the changes which have lawfully occurred, amounts not to an interference in the applicant's exercise of his right to respect for private life, but a veritable failure to recognise the respect due to his private life within the meaning of paragraph 1 of Article 8 of the Convention."[42]

Such a "veritable failure" to "contemplate measures" which would result in due respect being given to the private life of the applicant does in practice amount to a failure to observe positive obligations inherent in a proactive reading of Article 8 of the ECHR. It is therefore not surprising that in a separate opinion appended to the report, one member of the Commission concluded that the ECHR indeed imposed positive obligations on states under Article 8.[43] In fact, this statement was made with reference to the Commission's earlier Opinion in the case of *Marckx*, in which the Commission had already argued that the right to respect for family life under Article 8 implied the right to the legal recognition by the state of the parental affiliation between the mother and an "illegitimate" child.[44] Subsequently, the extent of the state's positive obligations under Article 8 as to the right to respect for private life of transsexuals in terms of the state's recognition of their preferred gender became a major point of contention, for two decades, between the ECtHR and the Commission.[45]

With the exception of the case of *C. against United Kingdom*,[46] the Commission always upheld its initial position that states violated the positive obligations inherent in Article 8 of the ECHR when they did not grant official recognition to transsexuals' preferred gender. Its Opinion in the case of *Mark Rees against United Kingdom* from 1984 referred directly to the positive obligations of states[47] and couched its arguments in terms which come close to acknowledging the right of transsexuals to self-determination:

"The Commission accepts the applicant's view that sex is one of the essential elements of human personality. If modern medical research into specific problems of transsexualism and surgery as effected in the present case has made possible a change of sex as far as the normal appearance of a person is concerned Art 8 must be understood as protecting such an individual against the non-recognition of his/her changed sex as part of his/her personality. This does not mean that the legal recognition of a change of sex must be extended to the period prior to the specific moment of change. However, it must be possible for the individual after the change has been effected, to confirm his/her normal appearance by the necessary documents."[48]

Furthermore, the Commission pointed out that gender reassignment treatment had assisted the applicant in realising his identity and "[i]n refusing to consider an entry in the birth register reflecting the applicant's change of sex the respondent Government treats the applicant as an ambiguous being".[49] It also noted that several member states of the Council of Europe, including Sweden, Germany, Italy, Switzerland and Norway, had

already adopted procedures to recognise transsexuals' preferred gender.

The ECtHR, on the other hand, held a different position until its ruling in the case of *Christine Goodwin v The United Kingdom* of 2002,[50] with the exception of the case of *B. v France* in 1992[51] in relation to which both the ECtHR and the Commission were in rare agreement. In the case of *Rees v The United Kingdom* from 1986, the ECtHR acknowledged the positive obligations inherent in an effective respect for private life but stressed that they were subject to the state's margin of appreciation. It also pointed out that the notion of "respect" was not clear-cut in terms of positive obligations: the diversity of national practices and situations had to be taken into account when considering the issue. Furthermore, in determining the existence of a positive obligation, a fair balance had to be struck between the general interest of the community and the interests of the individual.[52]

In the *Rees* case, the ECtHR departed from the opinion of the Commission and ruled that the respondent state had acted within its margin of appreciation. It stated that:

> "While the requirement of striking a fair balance (…) may possibly, in the interests of persons in the applicant's situation, call for incidental adjustments to the existing system, it cannot give rise to any direct obligation on the United Kingdom to alter the very basis thereof."[53]

Accordingly, the Court deemed that the positive obligations inherent in Article 8 of the ECHR did not extend as far as to require the United Kingdom to change its birth registration system to recognise transsexuals' preferred gender. The ECtHR did acknowledge, nevertheless, that transsexuals encountered serious problems and highlighted the need for appropriate legal measures to be kept under review with reference to scientific and societal developments.[54]

Until 2002, the ECtHR maintained that scientific and societal developments had not tipped the balance of the state's margin of appreciation to oblige the United Kingdom to change its birth registration system in this respect. This remained so even when an overwhelming majority of member states had already adopted measures to grant full legal recognition to gender reassignment. In 1998, the ECtHR still pointed out that there was not "yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law".[55] This position, which was clearly refuted by the *Christine Goodwin* judgment of 2002, is quite contradictory since the ECtHR has usually highlighted the margin of appreciation of states to choose the exact measures aimed at fulfilling their positive obligations.[56] The existence of any "common approach" in a detailed sense would appear unrealistic from this perspective.

However, in the case of *B. v France* from 1992, the ECtHR did find a violation of Article 8 owing to the failure of the French civil register system to recognise the gender reassignment of the applicant. The ECtHR argued that the situation in France was different from that prevailing in the United Kingdom and found that the applicant's daily situation, taken as a whole, was not compatible with the respect due to her private life. It deemed that the French civil register system was adaptable to meet the needs of transsexuals and that the discrimination experienced by them in France had reached a sufficient level of seriousness to be taken into account for the purposes of Article 8. The ECtHR also considered more generally that attitudes had changed, science progressed and the importance attached to the "problem of transsexualism" increased. It nevertheless stated that a sufficiently broad consensus had not yet been reached between member states regarding the etiology of transsexualism and the related legal situations and their consequences so as to change the Court's general

appraisal of the situation in Europe from that of its earlier judgments.[57]

The simultaneous ECtHR Grand Chamber judgments in *Christine Goodwin v The United Kingdom* and *I. v The United Kingdom*[58] from 2002 constituted a watershed in European jurisprudence on gender identity.[59] There is irony in the fact that when the newly reorganised ECtHR issued these rulings, which finally vindicated the position adopted by the Commission in 1979, the Commission itself had ceased to exist as a consequence of the ECtHR's reform. The extent of the positive obligations of states to respect the private life of transsexuals through the legal recognition of their gender reassignment was made manifestly clear through these rulings which took a further step towards recognising the transsexuals' right to self- determination:

"[T]he very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (…) In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."[60]

The ECtHR was fully aware of the significant changes the respondent state had to carry out in order to fulfil its positive obligations in the fields of birth registration, access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. Nevertheless, the ECtHR declared that:

"No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."[61]

The ECtHR concluded "that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant" and found a violation of Article 8.[62]

It should be noted that the Court of Justice has also considered its cases related to gender identity with reference to human dignity and substantial equality. The Advocate General has clearly stated that the principle of non-discrimination on grounds of sex, which was applied in these cases, is aimed at attaining substantive and actual equality between persons.[63] The dignity and freedom to which transsexuals are entitled have been highlighted in terms of human dignity and the fundamental right to free personal development as also elaborated by the German Constitutional Court.[64]

The rulings of the ECtHR from 2002 open the way for considering the importance of the notion of reasonable accommodation for trans persons. As the ECtHR has demonstrated, the effective enjoyment of human rights by transsexuals requires clearly differential treatment as that afforded to the majority.[65] Important changes to procedures and practices in many fields of societal activity were foreseen by the ECtHR in order to accommodate the specific needs of transsexuals. Differential treatment is necessary to ensure the equality of outcomes. While the original birth registration system in the United

Kingdom did not pose a problem to the overwhelming majority of the population, it was clearly not adapted to gender reassignment and constituted an obstacle against the effective enjoyment of human rights by transsexuals. Here the parallels with many people with disabilities are striking and it is not surprising that the concept of reasonable accommodation has been developed, in the first place although not exclusively, in the context of the rights of persons with disabilities.[66]

The UN Convention on the Rights of Persons with Disabilities defines the notion of reasonable accommodation in its Article 2:

"'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

Reasonable accommodation does not constitute a temporary special measure or exception to the rule of equal treatment but is part of the general obligation of non-discrimination as is the related notion of accessibility.[67]

For trans persons, reasonable accommodation could include, for example, differential procedures for civil registration, special facilities for changing name and sex in identity documents and educational diplomas, and adaptations to the working environment in terms of unisex toilets and the availability of time for treatment related to gender reassignment. It could also encompass the possibility to continue an existing marriage after gender reassignment when it is not normally authorised for same-sex couples. There is a need for further research and practice in order to explore the possibilities for implementing reasonable accommodation with reference to gender identity and other prohibited grounds of discrimination in addition to disability.

3. Disturbing Images

While the role of European jurisprudence in protecting the human rights of trans persons has been considerable, it also contains disturbing features which pose fundamental questions as to the limits of the afforded protection. In fact, the image of the trans person shaped by the medico-legal discourse of the jurisprudence is quite extraordinary and one–sided. We appear to envision only transsexuals who have almost always undergone hormonal and surgical gender reassignment treatment – "post-operative transsexual" is one of the omnipresent markers. Medical diagnoses of gender dysphoria, gender identity disorder and transsexualism accompany the applicants who are portrayed, almost heroically, as exercising their right to self-determination by choosing to undergo dangerous medical treatment to ensure the "stability" of their gender identity.

It is this image of suffering individuals, who through their extraordinary efforts become "deserving" of legal and societal recognition, which is embedded in the European jurisprudence of all the judicial instances covered in this article. In its judgment in *van Kück v Germany,* the ECtHR pointed out that:

"[G]iven the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment".[68]

In the case of *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, the Advocate General of the Court of Justice of the European Union made a similar statement:

"Transsexuals suffer the anguish of being convinced that they are victims of an

error on the part of nature. Many have chosen suicide. At the end of a long and painful process, in which hormone treatment is followed by delicate surgery, medical science can offer them partial relief by making their external physical features correspond as far as possible to those of the sex to which they feel they belong. To my mind it is wrong that the law should take refuge in purely technical expedients in order to deny full recognition of an assimilation which has been so painfully won."[69]

The portrayal takes place against a background of daily discrimination experienced by transgender persons that is amply illustrated in the rulings.[70] The treatment of transsexuals as "ambiguous beings" by the state through its previous non-recognition of gender reassignment plays an important role and it should be noted that several applicants have also claimed, albeit unsuccessfully so far, violations of Article 3 on the prohibition of torture of the ECHR as well.[71] In the rulings, the judicial bodies offer their sympathy for the persons concerned even when they are unable to uphold the applicants' human rights claims.[72] Even those judges who clearly state their scepticism towards the full recognition of the human rights of trans persons in opinions appended to the judgments do not fail to express concern over the human suffering involved.[73]

However, there is an open space which remains unexplored by the European jurisprudence. While the judicial discourse demonstrates a desire for stability in terms of gender identity and stress that transsexuals do not represent a third sex,[74] it is exactly this space between two binaries that the rulings fail to shed light into. Not that it is totally absent either. Transsexuals' personal histories of transition are usually recited at the beginning of the judgments among "the facts". What is especially striking in these miniature CVs is that they repeatedly demonstrate the long period of time – several years if not decades – which it has taken for the applicants to "transition" to their "true gender identity".[75] Indeed, the jurisprudence and some appended opinions suggest that the official recognition of gender reassignment constitutes an integral part of a long process, perhaps providing the ultimate closure to the "transition".[76] Yet, while we must highlight the fact that not all trans persons actually intend to undergo gender reassignment at all, even among transsexuals who wish to do so, the continuity or coherence of any binary gender identity may not be as evident as we may think initially, simply because of the temporal dimension involved.

This raises two inter-related issues. One is the availability of protection against discrimination for those trans persons who do not intend to undergo gender reassignment and those transsexuals who are in the process of undergoing gender reassignment treatment – not simply "intending or having undergone" it. Another is the conditions required for the legal recognition of the preferred gender of trans persons. Although both of these issues may still fall into the cracks of the doctrines of subsidiarity and the states' margin of appreciation, they are worth exploring for a moment.

The fact that the European judicial instances have almost exclusively dealt with claims originating from "post-operative" transsexuals among trans people demonstrates a tendency that irreversible gender reassignment treatment is viewed as a necessary condition for acquiring legal recognition for a trans person's preferred gender. While such a requirement is not universal among European countries, it does exist in a great number of them.[77] Yet sterilisation as a condition for the legal recognition of a person's gender identity, even with reference to a medical condition, appears strange from a human rights perspective. Principle 3 of the Yogyakarta Principles advocates an end to such requirements. The Commissioner for Human Rights of the Council of Europe has made a similar recommendation.[78] The Eu-

ropean Court of Human Rights has not yet ruled directly on this issue.

There is, however, jurisprudence on another usual condition for the recognition of gender reassignment, i.e. the requirement of being unmarried. On this issue, the ECtHR has decided that a divorce requirement can fall within the margin of appreciation of member states. The ECtHR did so with the full knowledge of the consequences of the requirement on the family life of the applicants:

> "The legislation clearly puts the applicants in a quandary – the first applicant must, invidiously, sacrifice her gender or their marriage. In those terms, there is a direct and invasive effect on the applicants' enjoyment of their right to respect for their private and family life."[79]

The specificity of Article 12 of the ECHR, on the right to marry, which in the main defers to national legislation on marriage, was referred to by the ECtHR as a reason for finding the application manifestly ill-founded. It is of interest to note that in some member states, the highest courts have ruled that a divorce requirement would not be proportionate for recognising gender reassignment.[80] The proportionality test may ultimately depend on the specific conditions related to divorce and partnership legislation in each member state.

If we take the view that compulsory sterilisation or divorce requirements are too high a price to pay for maintaining heteronormative gender binaries, we may then pose the question as to the alternatives for recognising gender variance and protecting trans persons more broadly against discrimination to ensure their substantive equality. Perhaps surprisingly, earlier European jurisprudence on gender identity discrimination may shed some alternative light for viewing the question. In the 1970s, the Belgian government argued in the case of *D. van Oosterwijck* before the Commission that the state only rarely had to differentiate between women and men. For example, the Belgian identity cards and passports at the time did not indicate the sex of the person concerned.[81] The French government developed this line of argument vigorously in the case of *B. v France* and stressed that there usually was no need to make the sex of a person explicit when carrying out public or private business.[82] This would demonstrate that the authorities of member states have been able to imagine a society where explicit distinctions based on gender are only made when considered necessary following a proportionality test.

Such imaginative capacity can also be found at the national level currently as regards conditions for recognising gender reassignment. As already noted, the divorce requirement is by no means universal. Such a requirement does not make sense either in those countries where there is access to marriage by same-sex couples more broadly.[83] The sterilisation requirement is not universal either and there is recent jurisprudence from the German and Austrian constitutional courts declaring it contrary to fundamental rights guarantees.[84] Current gender recognition legislation in the United Kingdom, Spain and Portugal does not require sterilisation.[85]

When such practices are followed by more member states we may ultimately witness more affirmative European jurisprudence regarding the issue. This would open up the possibility for European jurisprudence on gender identity discrimination which would not simply protect "post-operative" transsexuals but trans persons in a wider sense. Jurisprudence of this kind could also recognise the existence of gender variance which cannot simply be confined into binary categorisations but may indeed occupy "ambivalent" or "intermediate zone" positions previously eschewed by the ECtHR.[86] The observance of proportionality in determining the necessity of making explicit distinctions as to the sex or gender of a person as well as the implementation of reasonable accommodation for

gender variance could then be applied as operative principles for ensuring that all trans persons can effectively enjoy their universal human rights.

Conclusion

European judicial discourse on gender identity clearly demonstrates the fact that differential treatment can be essential for achieving substantive equality for certain minorities in particular. Positive obligations of states to protect and fulfil human rights may necessitate reasonable accommodation to enable individuals to live in dignity and enjoy human rights on an equal basis with others. In such situations, identical treatment for everybody would result in the blindness of formal equality to recognise people's actual diversity. Here the unity of human rights and equality approaches is evident, highlighting the pertinence of the notion of transformative equality,[87] which is underpinned by the need to take proactive measures, by a great variety of institutions, to ensure equality. The implementation of reasonable accommodation for other groups than people with disabilities will have to be developed further.

However, discourse on gender identity discrimination also provides pointers beyond minority concerns. The need to apply proportionality in the distinctions made in relation to sex or gender has a broader relevance. Gender variance is by no means limited to trans persons alone: a wide range of differences in gendered roles and expressions can be found among the population at large. After all, the notion of gender identity as defined in the Yogyakarta Principles is applicable to practically everybody. A broad understanding of gender identity, which may also reach further than the definition given in the Yogyakarta Principles, should have the potential to question essentialist gender binaries and accommodate the full scope of existing gender diversity. This underscores the pertinence of gender identity to the ground of sex or gender as well as gender equality more generally. In the case of trans persons, the European jurisprudence already demonstrates that both grounds can be used to afford protection against discrimination.

It would be worthwhile to explore further the interconnections between these two grounds in an effort to grasp the broader relevance of the notion of gender identity that would also temper the inherent binary essentialism present in the sex ground. While both grounds can be viewed separately, the fruitfulness of their inter-relationship should not be underestimated. Although it may be necessary to highlight the usefulness of the ground of gender identity in ensuring specific and effective protection against the discrimination encountered by trans persons, the strategic use of both grounds and their cross-fertilisation hold even greater potential for implementing equality for the population at large.

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[2] See, for example, UN Human Rights Council, *Resolution on Human Rights, Sexual Orientation and Gender Identity*, A/HRC/17/19, 17 June 2011; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para 2)*, UN Doc. E/C. 12/GC/20, 2 July 2009, Para 32; and Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, 31 March 2010. The non-discrimination provision (Article 4) of the new Council of Europe Convention on preventing and combating violence against women and domestic violence, (CM(2011)49 final), adopted by the Committee of Ministers on 7 April 2011, includes gender identity explicitly among the prohibited grounds of discrimination.

[3] In Europe, this is the case in Albania, Croatia, the Czech Republic, Germany, Hungary, Montenegro, Serbia, Sweden and the United Kingdom, although there is significant variation in the precise wording used. See also Commissioner for Human Rights of the Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*, Council of Europe Publishing, 2011, pp. 41-42.

[4] Ettelbrick, P. L. and Zeràn, A. T., *The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007 – June 2010: Final Report*, 10 September 2010; Waites, M., "Critique of 'sexual orientation' and 'gender identity' in human rights discourse: global queer politics beyond the Yogyakarta Principles", *Contemporary Politics*, Vol. 15(1), 2009, pp. 137-156.

[5] See Footnote 2 to the Introduction to the Yogyakarta Principles.

[6] Waites, above note 4, pp. 147-148.

[7] In addition to transsexuals, trans persons can include, among others, transgender people, transvestites, cross-dressers, no gender, multigender, genderqueer people, intersex and other gender variant persons. The definitions used, which can overlap, are adapted from the descriptions given by TransgenderEurope. For more information, see the organisation's website, available at: www.tgeu.org. "Transgender persons" is also used by some people and organisations as an umbrella term to refer to all trans persons.

[8] Whittle, S., Turner, L., and Al-Alami, M., *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*, The Equalities Review, 2007; Motmans, J., *Being Transgender in Belgium: Mapping the Social and Legal Situation of Transgender People*, Institute for the Equality of Women and Men, 2009; Franzen, J. and Sauer, A., *Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben*, Antidiskriminierungsstelle des Bundes, 2010; see also Commissioner for Human Rights of the Council of Europe, above note 3.

[9] An interesting interpretation of the differences between the notions of sexual identity and gender identity can be found in Diamond, M., "Sex and Gender are Different: Sexual Identity and Gender Identity are Different", *Clinical Child Psychology and Psychiatry*, Vol, 9(3), July 2002, pp. 320-334.

[10] The EU equal treatment directives (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services) operate with reference to closed lists of discrimination grounds. However, the Charter of Fundamental Rights of the European Union, which entered into force in 2009, includes a non-exhaustive list of discrimination grounds in Article 21.

[11] The most notable exception is *P. V. v Spain*, Appl. no. 35159/09, ECHR, 30 November 2010.

[12] See, for example, *Christine Goodwin v The United Kingdom*, Appl. No. 28957/95, ECHR, 11 July 2002, Para 108.

[13] See also Reed, R., "Transsexuals and European Human Rights Law", *Journal of Homosexuality*, Vol. 48(3), 2005, pp. 64-65.

[14] On the evolution of equal treatment legislation see Hepple, B., "The New Single Equality Act in Britain", *The Equal Rights Review*, Vol. 5, 2010, pp. 11-23.

[15] *D. van Oosterwijck against Belgium*, Appl. No. 7654/76, Report of the European Commission on Human Rights, adopted on 1 March 1979, Para 52.

[16] *Mark Rees against The United Kingdom*, Appl. No. 9532/81, Report of the European Commission on Human Rights, adopted on 12 December 1984, Paras 31 and 48; *Sheffield and Horsham v The United Kingdom*, Appl. No. 31-32/1997/815-816/1018-1019, ECHR, 30 July 1998, Para 60; *P. v S. and Cornwall County Council*, Case C-13/94, Opinion of the Advocate General, 14 December 1995, Para 10.

[17] See above, note 11, Para 30.

[18] See above, note 12, Para 82; and v*an Kück v Germany*, Appl. No. 35968/97, ECHR, 12 June 2003, Para 56.

[19] See above, note 12, Para 81.

[20] See above, note 15, Para 16.

[21] *Rees v The United Kingdom*, Appl. No. 9532/81, ECHR, 17 October 1986, Para 38; cf. *P. v S. and Cornwall County Council*, above note 16, Para 8.

[22] See above, note 12, Para 78.

[23] See above, note 11, Para 30.

[24] See, for example, *B. v France*, Appl. No. 13343/87, ECHR, 25 March 1992, Paras 46-48; and *Sheffield and Horsham v The United Kingdom*, above note 16, Para 56.

[25] *B. v France*, above note 24, Paras 14-15; *van Kück v Germany*, above note 18, Para 23; cf. the government's position in *D. van Oosterwijck against Belgium*, above note 15, Para 36.

[26] See *Mark Rees against United Kingdom*, above note 16, Para 21; *Rees v The United Kingdom*, above note 21, Paras 27 and 29; *Sheffield and Horsham v The United Kingdom*, above note 16, Para 27; and above note 13, pp. 57-58.

[27] See above, note 12, Paras 81-83.

[28] See above, note 15, Para 16.

[29] The ECtHR found a violation of Article 6(1) of the ECHR in both cases. (See above, *van Kück v Germany*, note 18, Paras 53-57 and 64-65; and *Schlumpf v Switzerland*, Appl. No. 29002/06, ECHR, 8 January 2009, Paras 51-58; cf. above, note 15, Para 16.)

[30] See above, note 12, Para 78.

[31] *P. v S. and Cornwall County Council*, above note 16, Paras 8-13 and 24; *ibid*., Judgment, 30 April 1996, Para 16; *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, Case C-117/01, Opinion of the Advocate General, 10 June 2003, Paras 25, 79 and footnote 15; *Sarah Margaret Richards v Secretary of State for Work and Pensions*, Case C-423/04, Opinion of the Advocate General, 15 December 2005, Para 1.

[32] The rulings refer to Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

[33] *P. v S. and Cornwall County Council*, above note 16, Judgment, Paras 20-21.

[34] *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, above note 31, Paras 25 and 73.

[35] *P. v S. and Cornwall County Council*, above note 16, Para 22; see also above, note 10, on closed lists of discrimination grounds.

[36] *P. v S. and Cornwall County Council*, above note 16, Judgment, Para 21.

[37] See Franzen, J. and Sauer, A., above note 8, pp. 13-15.

[38] Goldschmidt, J. E., "Reasonable Accommodation in EU Equality Law in a Broader Perspective", *ERA Forum,* Vol. 8(1), 2007, pp. 39-48.

[39] *Marckx v Belgium*, Appl. No. 00006833/74, ECHR, 13 June 1979, Paras 31 and 42.

[40] *Airey v Ireland*, Appl. No. 6289/73, ECHR, 9 October 1979, Para 25.

[41] *Ibid.,* Para 24.

[42] See above, note 15, Para 52.

[43] *Ibid.,* Separate Opinion by Mr Sperduti, p. 24.

[44] *Paula and Alexandra Marckx v Belgium*, Appl. No. 6833/74, Report of the European Commission on Human Rights, adopted on 10 December 1977, Para 72.

[45] See also Helfer, R., "Consensus, Coherence and the European Convention on Human Rights", *Cornel International Law Journal*, Vol. 133, 1993, pp. 146-154.

[46] *C. against United Kingdom*, Appl. No. 10843/84, Report of the European Commission on Human Rights, adopted on 9 May 1989.

[47] See above, note 16, *Mark Rees against United Kingdom*, Para 40.

[48] *Ibid.,* Para 43.

[49] *Ibid.,* Para 48.

[50] See above, note 12.

[51] *B. v France*, above note 24.

[52] *Rees v The United Kingdom*, above note 21, Paras 35 and 37.

[53] *Ibid.,* Paras 42 and 44.

[54] *Ibid.,* Paras 42-44 and 47.

[55] See *Sheffield and Horsham v The United Kingdom*, above note 16, especially Paras 35, 57 and 61. Of 37 countries analysed by Liberty in their submission to the ECtHR, only four had not provided for procedures for the official

recognition of gender reassignment. (Cf. Joint Concurring Opinion of Judges de Meyer, Valticos and Morenilla appended to the judgment. This Opinion appears to suggest that for the judges concerned, scientific, legal or societal developments as well as the doctrine of margin of appreciation held little relevance in cases related to trans persons.)

[56] See, for example, above note 39, Paras 42 and 58; above note 40, Para 26; and *B. v France*, above note 24, Para 63; cf. above note 12, Para 85.

[57] *B. v France*, above note 24, Paras 51-63.

[58] *I. v The United Kingdom,* Appl. No. 25690/94, ECHR, 11 July 2002.

[59] Of course this watershed was already anticipated by several dissenting opinions appended to the earlier rulings of the Court. See, for example, *Cossey v The United Kingdom*, Appl. No. 10843/84, ECHR, 27 September 1990, Dissenting Opinion of Judge Martens; and *Sheffield and Horsham v The United Kingdom*, above note 16, Joint Partly Dissenting Opinion of Judges Bernhardt, Thor Vilhjalmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu, and Dissenting Opinion of Judge van Dijk.

[60] See above, note 12, Paras 71 and 90.

[61] *Ibid.,* Para 91.

[62] *Ibid.,* Para 93.

[63] *P. v S. and Cornwall County Council*, above note 16, Para 19.

[64] *P. v S. and Cornwall County Council*, above note 31, Judgment, Para 22; *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, above note 31, Para 77. On the jurisprudence of the German Constitutional Court, see above, note 13, pp. 60-61.

[65] On the approach of the ECtHR regarding differential treatment in the prevention of discrimination, see *Thlimmenos v Greece*, Appl. No. 34369/97, ECHR, 6 April 2000, Paras 39-49.

[66] See above, note 38, pp. 44-48.

[67] *Ibid.,* pp. 45-46. The obligations related to the concept of accessibility are described in Article 9 of the UN Convention on the Rights of Persons with Disabilities, A/RES/61/106, 13 December 2006.

[68] V*an Kück v Germany*, above note 18, Paras 14 and 59; cf. above, note 15, Paras 14-15 and 52.

[69] *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, above note 31, Para 79.

[70] For example, *B. v France*, above note 24, Paras 59-60 and 63; and above note 12, Paras 15-19, 60-62, and 92.

[71] For example, the cases of *van Oosterwijck v Belgium*, Appl. No. 7654/76, ECHR, 6 November 1980; *Mark Rees v United Kingdom*, Appl. No. 9532/81; *B. v France*, above note 24; and *L. v Lithuania*, Appl. No. 27527/03, ECHR, 11 September 2007.

[72] *Rees v The United Kingdom*, above note 21, Para 47.

[73] See, for example, *B. v France*, above note 24, Dissenting Opinion of Judge Valticos, joined by Judge Loizou.

[74] See above, note 12, Para 71; and *P. v S. and Cornwall County Council*, above note 16, Para 22.

[75] For example, see above, note 12, Para 13; cf. Rooke, A., "Telling Trans Stories: (Un)doing the Science of Sex", in Hines, S. and Sanger, T. (eds.), *Transgender Identities: Towards a Social Analysis of Gender Diversity*, New York, Routledge, 2010, pp. 64-83.

[76] *Mark Rees against United Kingdom*, above note 16, Para 43; above note 12, Para 78; *Cossey v The United Kingdom*, above note 59, Dissenting Opinion of Judge Martens.

[77] Commissioner for Human Rights of the Council of Europe, above note 3, pp. 86-87; see also European Union Agency for Fundamental Rights, *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis*, 2010, Table 1.

[78] Commissioner for Human Rights of the Council of Europe, above note 3, p. 13.

[79] *Parry v The United Kingdom*, Appl. No. 42971/05, ECHR, 28 November 2006, p. 10; cf. *R. and F. v The United Kingdom*, Appl. No. 35748/05, ECHR, 28 November 2006, p.12.

[80] Constitutional Court of Austria (V 4/06, 8 June 2006) and Federal Constitutional Court of Germany (1 BvL 10/05, 27 May 2008).

[81] See above, note 15, Paras 21-23.

[82] *B. v. France*, above note 24, Para 61.

[83] In Europe, access to marriage by same-sex couples is currently available in Belgium, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden. The divorce requirement for the recognition of gender reassignment, how-

ever, is still in the statute books in Sweden. (See Commissioner for Human Rights of the Council of Europe, above note 3, pp. 87-88 and 91.)

[84] *Ibid*., pp. 86-87; see also Constitutional Court of Austria (V 4/06, 8 June 2006) and Federal Constitutional Court of Germany (1 BvR 3295/07, 11 January 2011).

[85] Commissioner for Human Rights of the Council of Europe, above note 3, pp. 86-87.

[86] Cf. Hines, S., "Recognising Diversity? – The Gender Recognition Act and Transgender Citizenship", in Hines, S. and Sanger, T. (eds.), *Transgender Identities: Towards a Social Analysis of Gender Diversity*, New York: Routledge, 2010, pp. 87-105.

[87] See above, note 14, pp. 11-24, in which the notion of transformative equality is developed.