

## EMPLOYMENT LAW

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### IN THIS ISSUE

*For transgender people, the right to be recognized as a person before the law and to be protected from discrimination is far from self-evident. This article reports on a number of decisions of the European Court of Human Rights discussing the basis and extent of these rights.*

## The Rights of Transgender People – More than a Minor Minority Issue



### ABOUT THE AUTHOR

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The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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It may well be a truth universally acknowledged<sup>1</sup> that all men are created equal and that any form of discrimination on the basis of gender (male/female) should be unequivocally condemned and banned. However, this truth does not always seem to apply to those who do not fall within this classical dichotomy. This article sets out some of the challenges faced by transgender people in their daily life and the legal instruments, both existing (*de lege lata*) and to be put in place (*de lege ferenda*) to ensure they enjoy the legal protection all citizens are entitled to.

### What is transgenderism?

For most people, the right to be recognized as male or female, and to be treated and identified as such, is self-evident from the day they were born. The internal and individual sense of belonging to the sex assigned at birth fully coincides with one's physical, psychological and physiological characteristics. From a legal point of view, this gender identity<sup>2</sup> is recognized by

providing the individual with their own specific space in public registries under a name and gender-related social security number. This perfect world is a far cry from the one that people with any form of gender dysphoria are born into. Transgender people generally experience a feeling of incongruence with the gender assigned at birth, as if they had been born "within the wrong body"<sup>3</sup>. Although they were labeled male/female at birth, and hence from a legal point considered as such, they intrinsically feel a member of the other gender.

### Prevalence and relevance

Transgenderism only affects a small portion of the world's population. Lack of data as to the actual prevalence of transgenderism is one of the reasons why the specific situation of transgender people was unknown for so long. Over the past few years, several surveys have been conducted in several EU

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<sup>1</sup> As the expression used by Jane Austen in her 1813 novel "Pride and Prejudice" goes.

<sup>2</sup> Gender identity is defined under the Yogyakarta Principles on the Application of International Human Rights Law (2006) in relation to Sexual Orientation and Gender Identity as referring to a 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 and other expressions of gender, including dress, speech and mannerisms. These Principles of 'soft law' were developed by a Commission of Jurists, the International Service for Human Rights and human rights experts from around the world. Although not binding, they are referred to as an

expert source for understanding and interpreting gender identity and sexual orientation issues.

<sup>3</sup> Transgenderism is not to be confounded with transvestitism, which refers to the need to wear clothing associated with the opposite sex. Generally speaking, transvestites do not experience gender dysphoria; they identify with the sex they were assigned at birth. Their need to cross-dress is of a sexual nature, rather than a problematic experience of their gender identity (MOTMANS, J. e.a. *Being transgender in Belgium – Mapping the social and legal situation of transgender people*, 2010, Institute for the equality of Women and Men; [http://igvm-iefh.belgium.be/nl/publicaties/leven\\_als\\_transgender\\_in\\_belgi](http://igvm-iefh.belgium.be/nl/publicaties/leven_als_transgender_in_belgi) ;

countries<sup>4</sup> as well as by the EU Agency for Fundamental Rights (FRA)<sup>5</sup>. Although reliable figures on the size of the transgender population are not available, a study by G. Gates, a demographer of the University of California Los Angeles, estimates that in the United States about 0.3 % of adults are transgender<sup>6</sup>. Between 1993 and December 2008 the Belgian National Register recorded 442 sex reassignments<sup>7</sup>. However, this number is not representative of the entire transsexual population, since psychological or social considerations, as well as high medical costs, may inhibit transgender people from actually taking the leap to surgical sex reassignment. Taking various factors into account, the Belgian Study estimates an inherent prevalence of transsexualism at 1:13.000 ("male" at birth) to 1:34.000 ("female" at birth)<sup>8</sup>.

Transgender people are undoubtedly among the smaller minority groups, when compared to other minorities. However, if a state's level of civilization can be measured by the way in which it treats its minorities<sup>9</sup>, lawmakers all over the world should be aware of the problems transgender people face because there is a definite threat to loss

of liberty, as well public accommodations that must be evaluated.

### **The right to gender recognition**

For transgender people, the right to see their actual gender fully recognized under the law and vis-à-vis their fellow citizens is to them paramount, and the basis for living as a full-fledged citizen. The Island of Malta, one of the smallest EU Member States, has eliminated transgenderism as an aberration. Under the April 1, 2015 Maltese Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC), transgenderism is no longer perceived as a medical issue, but as a matter of human rights. The individual's gender identity is recognized as a constitutional right, to be respected at all times. This right is based on self-determination and implies the right to be recognized and treated in accordance with one's identified gender. Divorce or sterilization requirements, as well as long burdensome administrative procedures, have been abolished. Instead, a quick, transparent and accessible procedure has been put in place. The individual can make a simple declaration before a notary as to

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<sup>4</sup> For an overview of these studies, see Report of the Committee on Equality and Non-Discrimination of 2 April 2015 within the Parliamentary Assembly of the Council of Europe, "*Discrimination against Transgender people in Europe*", doc. 13742, Author: Mrs D. Schemri -

<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21630&lang=EN>

<sup>5</sup> "Being Trans in Europe" was published by FRA on 9 December 2014, based on the analysis of information provided by over 6500 respondents to the survey on LGBT's people's experiences of hate

crime and discrimination –

<http://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis>.

<sup>6</sup> See footnote 4, p. 6 of the Report, footnote 4.

<sup>7</sup> Being Transgender in Belgium, see footnote 3, p. 40.

<sup>8</sup> <http://igvm-iefh.belgium.be/nl/activiteiten/transgender/cijfers>

<sup>9</sup> Quote by U.S. Supreme Court Justice Ruth Bader Ginsberg. This expression has also been used in reference to any society's most vulnerable group of people.

his/her gender identity, which will take effect after a period of 30 days. This enables transgender people to live as other citizens.

This Bill is considered a significant breakthrough for transgender people's rights. It fully meets Resolution 2048 of 22 April 2015 ("Resolution"), enacted by the Parliamentary Assembly of the Council of Europe that, specifically as concerns legal gender recognition, which calls upon Member states to: (i) provide procedures on the basis of self-determination, thus allowing transgender people to change their name and registered sex on birth certificates, identity cards, passports, educational certificates and other similar documents; (ii) abolish sterilization and other compulsory medical treatment, as well as mental health diagnosis, as a necessary legal requirement to recognize a person's gender identity; (iii) remove any restrictions on the right of transgender people to remain in an existing marriage upon recognition of their rights and ensure that spouses or children do not lose certain rights; (iv) consider including a third gender option in identity documents for those who seek it; and, (v) ensure that the best interests of the child are a primary consideration in all decisions concerning children (Article 6.2.)<sup>10</sup>

Although this Resolution is not binding, it has the merit of setting out the guidelines on the

rights of transgender people for the benefit of future lawmakers from all Treaty States of the Council of Europe<sup>11</sup>. As the Resolution explicitly welcomes the emergence of a right to gender identity as a means to improve the legal situation of transgender people, it clearly signifies the path for the Treaty States to follow.

Except for Malta, the right to gender identity is not recognized as a fundamental human right, either under the European Convention of Human Rights or under the Constitution of any other Treaty State. However, the European Court of Human Rights, (ECtHR), the judicial body of the Council of Europe, has given legal protection to transgender people under other articles of the European Convention on Human Rights. In the case of *Goodwin v. the United Kingdom* of 22 April 2008, the European Court of Human Rights held that the lack of legal recognition of a person's gender reassignment breached the right to respect for a person's private life, a human right protected under article 8 of the Convention<sup>12</sup>. The Court had reached the same conclusion on the 23<sup>rd</sup> of August 2006 in the case of *Grant v. United Kingdom*, when it considered the refusal of the British government to apply the women's retirement age (60) to a male, having transitioned to a female, to be a breach of Article 8 ECHR<sup>13</sup>.

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<sup>10</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21736&lang=EN>;

<sup>11</sup> It should be noted the Council of Europe is not the EU Institution but the Continent's leading human rights organization, created in the aftermath of

World War II and counting 47 member states of which 28 are members of the EU.

<sup>12</sup> <http://hudoc.echr.coe.int/eng?i=001-84582>;

<sup>13</sup> <http://hudoc.echr.coe.int/eng?i=001-75454>;

A Treaty State that would impose an absolute ban on any form of sex reassignment treatment would also be held in violation of article 8 of the ECHR<sup>14</sup>. In its 12 June 2003 (*Van Kück v. Germany*) decision, the ECtHR ruled that transsexuality must be considered a medical condition for which treatment is available in order to ensure the person's well-being. As gender identity is one of the most intimate areas of a person's private life, the Court considered that the burden placed on such a person to prove the medical necessity of treatment, including irreversible surgery, was disproportionate (Consideration 56). Treaty states should therefore make sure their social legislation provides for reimbursement of the costly reassignment treatment.

In a decision of 31 March 2008, the ECtHR held Lithuania in breach of Article 8 for having denied a transgender person the right to obtain a change of his social security number, despite partial reassignment treatment, thus forcing this person to remain tied to the gender assigned at birth. Although the refusal to change the gender on the birth certificate of a post-operative transgender person was not considered an inhuman or degrading treatment in the sense of Article 3 of the ECHR, the Court

found that it constituted a breach of the right to respect of a person's private life<sup>15</sup>.

Under Article 12 of the ECHR, the right to marry and start a family is guaranteed to any man or woman<sup>16</sup> of marriageable age. As a result, the United Kingdom had to enact legislation (the Gender Recognition Bill) that recognizes the postoperative gender of a transsexual person. In the case of *Hämäläinen v. Finland*<sup>17</sup> the applicant, a transgender male-to-female person, complained under Article 8 of the ECHR that her right to respect for private and family life had been violated when the full recognition of her new gender was made conditional on the transformation of her pre-existing marriage into a registered partnership with the consent of his spouse. This required the transgender person to keep the original male identity number, because Finland did not permit same-sex marriages. Obtaining a new identity number as a woman, would require divorce from her spouse, or conversion of her marriage into a registered partnership. In its decision of 16 July 2014, the ECtHR considered that the Finnish system as a whole did not violate Article 8 of the ECHR because the state's precondition of conversion of the marriage into registered partnership was not considered to be disproportionate to the rights of the individual. According to the Court, the

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<sup>14</sup> "1. Everyone has the right to respect for his private ... life ... 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>15</sup> <http://hudoc.echr.coe.int/eng?i=001-82243>;

<sup>16</sup> As this right is explicitly given to "a man and a woman", same-sex marriage cannot be considered a human right under the European Convention on Human Rights. This matter is left to Treaty States.

<sup>17</sup> <http://hudoc.echr.coe.int/eng?i=001-145768>;

partnership was a genuine option, which provides legal protection for same-sex couples that is almost identical to that of marriage (Consideration 87). This type of compromise under other governments is likely.

On 10 March 2015, the ECtHR rendered a decision on a complaint by a Turkish female-to-male transgender person, who was refused authorization by the Turkish courts to undergo gender reassignment surgery because he was not permanently unable to procreate. For the first time, the Court was asked to examine the issue of prior conditions, that may be imposed by the state, on transgender persons in advance of the process of gender change and the compatibility of these conditions with Article 8 of the Convention. The Court determined the initial refusal undeniably had repercussions on the applicant's right to gender identity and personal development - a fundamental aspect of the right to respect for private life. Although the interference with personal choices arose under the government's duty to protect the public, the interference could not be justified as "necessary" in a democratic society. The Court explicitly stated that it failed "to see why persons wishing to undergo gender reassignment surgery should have to demonstrate that they are unable to procreate even before the physical process

of gender change can be undertaken" (Consideration 116). The Court held the denial of the right to re-assignment surgery for many years, was a breach of the applicant's right to respect for his private life as laid down by Article 8 of the Convention<sup>18</sup>.

### **Protection against discrimination**

The European Convention on Human Rights does not mention gender identity as a specific prohibited ground of discrimination enumerated under article 14<sup>19</sup>. However, the European Court of Justice of Human Rights has accepted a broad interpretation of the ground "and other status", as including this concept. Within 21 Treaty States of the Council of Europe, protection against discrimination is guaranteed by including gender identity as a prohibited ground of discrimination. In other States, case law considers the discrimination of transgender people to be equally prohibited, as it constitutes a form of discrimination based on a person's sex. In spite of this array of legal principles aimed at protecting people from various forms of discrimination, transgender people remain subjected to widespread discrimination in all aspects of their daily life, as demonstrated by the Report presented to the Committee on Equality and Non-Discrimination, preceding Resolution 2048<sup>20</sup>. Studies reveal that transgender people are, more than any

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<sup>18</sup> <http://hudoc.echr.coe.int/eng?i=001-153134>;

<sup>19</sup> These grounds are: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>20</sup> Author: Mrs D. Schemri -

<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21630&lang=EN>;



other minority, exposed to the risk of homelessness, because rejected by their own families, or denied access to rental properties. The majority (69%) of transgender respondents to the FRA survey reported that negative comments and conduct occurred regularly in their daily school life. Many choose not to live in their actual preferred gender for fear of exposing themselves to the mockery of their fellow workers or for losing their job or their home. This fear is definitely not unfounded.

In a landmark decision of 17 February 2014, the Belgian Labour Court of Appeal of Brussels considered that a transsexual employee<sup>21</sup>, was wrongfully dismissed and discriminated against by his employer who was unable to provide sufficient evidence of the reasons that he had supposedly dismissed her for (long term absence from work, bad working attitude, ...). Consequently, the employer was condemned to pay his former employee six (6) months' wages for unlawful dismissal and an additional six (6) months' on grounds of discrimination<sup>22</sup>. The Institute for the Equality of Women and Men, the Belgian "Watchdog" on non-discrimination issues, was granted a symbolic euro. Although in this case the transgender employee successfully brought her case to court, not all victims of discrimination in the workplace, or in other areas of daily life, find their way to or through the legal system. In order to stop the festering of this societal problem, there

is a need for raising awareness, training and education, both of the general public, as well as of professionals in the field of education, health services or law-enforcement. The Resolution expressly calls on member States to address these issues pertaining to the human rights of transgender people with a specific focus on the requirement to respect their privacy and dignity (Article 6. 4).

The rights of transgender people are still the subject of legal and political controversy. However, under the impulse of the EU Court of Human Rights, there is a growing tendency to view their position as a matter of basic human rights to be implemented and protected by the national states. From that perspective, the protection of transgender people's rights becomes much more than a minor minority issue. Within the parameters as set out by the EU Court of Human Rights, the legal systems of the national states will ultimately be called upon to identify the ways in which protection for transgender people in society can and should be crafted and enforced.

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<sup>21</sup> Born a man, the employee underwent surgery to become a woman and obtained a change of her civil status and name.

<sup>22</sup> Labour Court of Appeal Brussels 17 February 2014, R.G.n° 2011/AB/1054 and 2011/AB/1059.

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