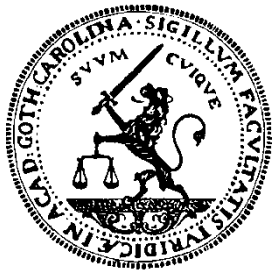

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Equal Respect for the Private and Family Life of Transgender People?

Analysis of the European Court of Human Rights' Case Law on Recognising Gender Identity

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Contents

Summary

This study examines whether the right to respect for private and family life, as enshrined in Article 8 of the European Convention of Human Rights, is equally enjoyed by transgender people. The focus of the research is on the European Court of Human Rights' case law on gender identity, and special emphasis is placed on the principles of equality and non-discrimination.

For the analysis, the European Court's jurisprudence on gender identity is divided into two sets: one, cases claiming a violation of private and family life due to non-recognition of a persons' reassigned gender, and two, cases relating to transgender marriage. The study concludes that the Court has addressed transgender issues with a growing understanding, adjusting its interpretation over recent years following societal changes and the increased acceptance of varied gender expression. The Court has held that non-recognition of a transsexual's reassigned gender in legal terms amounts to a violation of his or her private life under Article 8. Additionally, it has ruled that while transgender people should be allowed to marry according to their reassigned gender, they do not have the right to remain married to their current spouse if the pertinent member state does not provide for same-sex marriages. The 'single requirement' as a prerequisite for legal gender recognition has so far fallen within the margin of appreciation of the contracting states.

While the Court has interpreted Article 8 in a progressive and 'evolutive' manner, its considerations on equality and non-discrimination have been greatly lacking in relation to gender identity. In cases invoking Article 14, the Court has merely stated that as a substantial violation was found, there is no need to address non-discrimination separately, or that as the substantial matter falls under national discretion, so do the equality considerations. Such an approach deprives Article 14 of its relevance, and fails to see the systemic problems faced by European minorities.

Finally, both United Nations treaty bodies and the Council of Europe bodies have called for greater protection against discrimination based on gender identity and expression. This shift in soft law and policy setting may be seen as a forecast of the expansion of the legal rights of transgender people in the near future.

Abbreviations

CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
CoE	Council of Europe
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
EU	European Union
FRA	The European Union Fundamental Rights Agency
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBT	Lesbian, Gay, Bisexual and Transgender
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

1 Introduction

'Transgender' is an umbrella term referring to people whose gender identity or gender expression is not in conformity with the gender they were assigned at birth. The term 'transgender' may therefore be used, for example, to mean transsexual persons, people who identify somewhere between clearly male or female (gender queer, gender variant) or crossdressers. Although transgender issues are often grouped together with the rights of lesbian, gay and bisexual people (LGBT), gender identity is a separate concept from sexual orientation, and requires a separate approach in many regards. Both gender identity and sexual orientation have been interpreted into the general non-discrimination clauses of the main human rights conventions by the pertinent monitoring bodies, despite the lack of explicit mentioning of them in the conventions' text. The rights of transgender people are an emerging issue under international human rights law, and hence there is a lack of legal research into their content and application. This study aims to contribute towards filling the gap of legal research on the topic.

According to the European Union Fundamental Rights Agency (FRA), 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.[1] The high level of discrimination experienced in EU countries illustrate the problems faced by transgender people in the continent, and call for a closer look at equality and non-discrimination from a legal perspective.

This study systematises the rights of transgender people under the European Convention of Human Rights (ECHR, 'the Convention'), and examines the European Court of Human

[1] European Union Agency for Fundamental Rights: LGBT Survey Data Explorer, 2013. Available at: http://fra.europa.eu/DVS/DVT/lgbt.php (accessed 10.5.2014)

Rights' ('the Court') case law on protection of private and family life, emphasising the principles of equality and non-discrimination. It also looks at soft law instruments and recent policy developments, identifying possible emerging rights.

The first part of the research question is, "*how does international human rights law protect transgender people from discrimination?"*. It sets the basis of the study by introducing the applicable equality and non-discrimination framework relevant to transgender people's rights. The second, and main, part of the research question is, "*are transgender people treated equally in their enjoyment of protection for private and family life under the European Convention of Human Rights?*". This question is answered by analysing the Court's jurisprudence relating to cases on the rights of transgender people, which are divided into two sets: one, cases claiming a violation of private and family life due to non-recognition of a persons' reassigned gender, and two, cases relating to transgender marriage. The case law will be examined both in the light of the obligations arising from Article 8 (Right to Respect for Private and Family Life), and from the viewpoint of equality and non-discrimination. Non-discrimination is addressed as it is stipulated under Article 14 of the Convention, and as a general principle of law.

The thesis is divided into five parts. The introduction presents the issues with a brief background, and sets out the research question, method and limitations of the study. The second chapter introduces the main concepts of the study: equality and non-discrimination, gender and gender identity as well as the notion of private and family life.

Chapter 3 addresses the first part of the research question by presenting how gender identity is protected under international human rights law, how the standards have evolved over time, and discusses the 'discrimination test', which aims to distinguish justified distinction or preference from prohibited discrimination. Chapter 4 constitutes the main analysis section of the European Court's case law. It presents the Court's relevant jurisprudence on legal gender recognition, focusing on the 'landmark judgements' such as *Christine Goodwin v the United Kingdom*, and the most debated pending judgement at the time of writing, *Hämäläinen v Finland.* The chapter ends with analysis of the Court's equality and non-discrimination considerations, or rather the lack of them, in light of the presented cases. Finally, Chapter 5 draws conclusions based on the findings presented.

The analysis of the case law examines the Court's own argumentation, but also emphasises the considerations of equality and non-discrimination, which are often lacking from the

judgements to a varied extent. The analysis is not therefore only concerned with whether a substantive right has been violated *per se*, but also with whether the specific legislation or practice deprives transgender people of equality in the enjoyment of such right.

The study illustrates the change that has happened in the Court's take on legal gender recognition, transgender marriage and the consequent breaches of private and family life. Additionally, it challenges the Court's view of equality and non-discrimination in transgender cases, and criticises the lack of thorough application of Article 14 in its judgements. This study 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.

The main sources of law for the analysis of this study are the European Convention of Human Rights[2] and the case law from the Court on transgender issues under Article 8. In establishing the general framework for equality and non-discrimination, the applicable provisions of the International Covenant on Civil and Political Rights, and considerations of the United Nations' treaty bodies, will be relied upon. In addition to treaties, general principles of law and judicial decisions, additional sources of the research include soft law instruments such as the Yogyakarta Principles and recommendations by the Council of Europe bodies, legal literature and journal articles.

The focus of the study is on the member states of the Council of Europe, with special reference to Finland and the United Kingdom. This is partly due to the abundance of relevant case law on recognising gender identity in the European framework, and especially with regard to these two countries. While the United Nations (UN) treaty bodies, especially the Human Rights Committee (HRC), have addressed gender identity to some extent, they are yet to consider an individual communication on the matter. However, the UN framework will not be totally excluded, as, for instance, the HRC's concluding observations on state reports regarding transgender issues are used as a reference point when discussing recent developments and possible emerging rights at the end of Chapter 4.

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[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, as amended by Protocols Nos. 11 and 14.

The research concentrates on issues affecting the right to respect for private and family life in conjunction with non-discrimination. Consequently, considerations of hate crime, torture and inhuman treatment, right to health and other related aspects, albeit important for the rights of transgender people, are out of the scope of this study.

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.[3] The meaning of equality has shifted over time and new groups have been included under the concept's protective umbrella.[4] 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.

The Aristotelian concept of equality is that 'likes should be treated alike'[5], which is underpinned by the notion that fairness requires consistent treatment. Traditionally this was understood as treating everyone the same. More recent scholarly debate has seen the rise of arguments for 'full equality' and treating everyone 'as equals' regardless of their characteristics. This approach advocates for positive action when it is needed to break cycles of disadvantage among disadvantaged groups.[6] Such approach is most visible in legal form in the UN Convention on the Rights of People with Disabilities (CRPD), which requires positive action and 'reasonable accommodation' in order to achieve equality and allow people to participate in society on a equal footing (see e.g. Articles 1, 2, 7, 9). The acknowledgment that some groups are disadvantaged due historical or social reasons, and that reaching equality calls for positive action, is also very much present in the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW). The CEDAW requires positive action

[3] S Fredman, Discrimination Law, Oxford University Press, 2002, p. 1.

[4] *Ibid*, p. 5.

[5]Aristotle, 3 *Ethica Nicomachea* (Nicomachean Ethics), translated by W Ross, edited by J L Ackrill and J O Urmson, Oxford: Oxford University Press, 1980, 112-117, 1131a-1131b.

[6] The Equal Rights Trust, "The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality", 2007.

from states, for instance, to "modify the social and cultural patterns of conduct of men and women" in order to tackle gender stereotyping.[7]

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-discrimination.[8] 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 that taking positive action to create circumstances, which promote 'full' or 'substantial' equality.[9]

In 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.[10] Human rights treaties themselves do not define the notion of discrimination. However, general comment no. 18 by UN HRC refers to the text of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and CEDAW 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*".[11] The *'effect'* refers to indirect discrimination, in which a situation amounts to discrimination even without the authorities' intent to do so.[12]

This being said, proving discrimination in the legal context is often complex; the court will need to decide when a distinction amounts to discrimination. Firstly, it will have to consider whether a situation is 'relevantly similar', and secondly, if differential treatment takes place, can it be justified. A distinction that was made in a 'relevantly different' situation is not

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[7] See CEDAW Article 5 (a).

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

[9] A Bayefsky, "The Principle of Equality or Non-Discrimination in International Law", Human Rights Law Journal 11:1-2, p. 1.

[10] The Equal Rights Trust, "The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality", 2007.

[11] See General Comment no. 18 of the Human Rights Committee.

[12] See e.g. *Althammer et al v. Austria*, Communication No. 998/2001, U.N. Doc. CCPR/C/78/D/998/2001, 2003.

discrimination, and a preference may be deemed as justified if it is based on 'objective' and 'reasonable' grounds.[13]

For the purpose of this research, 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. The focus of this study will, following the formulation of Article 14 of the ECHR, be non-discrimination. However, as it is so closely linked to equality and equal treatment, both terms are used throughout the research. Both concepts will be further elaborated in chapter 3.2 in the context of deciding which kind of treatment amounts to discrimination.

2.2 Gender and Gender Identity

In order to grasp the notion of gender identity, we must first elaborate on the differences between 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."[14]

In international human rights law, gender and sex are sometimes used interchangeably. The Conventions' text traditionally talks about 'sex', but later interpretations have incorporated the term gender[15] to better reflect the wider issues arising from gender-based discrimination. For 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.

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[13] O M Arnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, International Studies in Human Rights, Martinus Nijhoff Publishers, 2003.

[14] http://www.who.int/gender/whatisgender/en/ (accessed 03.04.2014)

[15] See, for instance, General Recommendations of the CEDAW Committee Nos. 9, 13, 17, 19.

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.[16] 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."[17] In the case of transgender people, this experience is not completely in conformity with the sex assigned at them at birth.

Gender identity has been 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 transvetism'.[18] 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."[19] Even though a human rights approach has become more widespread over the years, the medical model is still present in the considerations of the European Court.[20]

'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 the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence Article 4(3). The explanatory report[21] defines 'gender identity' as follows:

> *"Certain groups of individuals may also experience discrimination on the basis of their gender identity, which in simple terms means that the gender they*

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[16] http://www.ilga-europe.org/home/publications/glossary (accessed 03.04.2014)

[17] http://www.ilga-europe.org/home/publications/glossary (accessed 03.04.2014)

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

[19] A Lee, 'Trans Models in Prison: The Medicalization of Gender Identity and Eighth Amendment Right to Sex Reassignment Therapy', Harvard Journal of Law and Gender, pp. 447-471, at p. 451.

[20] See the analysis of the Court's case law in Chapter 4.2.

[21] The Explanatory Report on the Convention on Preventing and Combating Violence against Women and Domestic Violence, §53.

> *identify with is not in conformity with the sex assigned to them at birth. This includes categories of individuals such as transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to "male" or "female" categories".*

In the legal sphere, it has generally been 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 is reflected in the Strasbourg Court's case law, which only addresses post-operative transsexuals, 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 European Union (EU) anti-discrimination law.[22]

'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 crossdressing). 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.[23]

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[22] Court of Justice of the European Union (CJEU), *P v. S and Cornwall County Council*, Case C-13/94, [1996] IRLR 347.

[23] See for instance a recent decision by the Supreme Court of India on *National Legal Services Authority v Union of India and Others*, judgement of 15 April 2014 and the German Civil Statuses Act from 5.11.2013; a similar

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 comfortable 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 European Court of Human Rights, 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 European Convention on Human Rights reads as follows:

"Everyone has the right to respect for his private and family life, his home and his correspondence."

As many other rights under the Convention, the protection for private and family life enshrined in Article 8 reflects the legacy of the Nazi regime in Europe and its laws on restricting 'unsuitable' marriages and alienating children from their families for the purpose of political indoctrination.[24] The provision's phrasing is unique as it is expressed as '*respect* for private and family life'. In general, the Article has been held to require non-interference with an individual's decisions on how to live his or her life. The broad nature of the provision

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decision was taken by the High Court of Australia in *Nsw Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, 2.4.2014.

[24] European Court of Human Rights, Travaux Préparatoires on Article 8 of the ECHR, DH(56)12 CDH(67)5, available at http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf (accessed 22.5.2014); M Janis, R Kay and A Bradley, *European Human Rights Law: Text and Materials*, Oxford University Press, 3rd edition, 2008, p. 373-375.

creates certain difficulties for interpretation as any restraint on individual choice could be seen as a possible violation.[25]

Article 8 consists of four dimensions of personal autonomy of an individual: private life, family life, home and correspondence. The four areas are not mutually exclusive; a measure can simultaneously interfere with multiple spheres at once.[26] The meaning of the four concepts is not clear from the wording. The Court has avoided setting specifics on the interpretation of the various aspects of the dimensions and has usually proceeded in the analysis on a case-by-case basis.[27]

While the Article itself provides very little guidance on what actually is protected under the term 'private and family life', the European Court has shed some light on the meaning in its case law. Interpretation of the right has developed over years influenced by the continuous social change in European countries. Thus, the application of the provision has become challenging as it is often difficult to predict the outcome in socially controversial situations, such as in those relating to rights of transgender or gay people. It 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.[28]

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.[29]

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[25] M Janis, R Kay and A Bradley, *European Human Rights Law: Text and Materials*, Oxford University Press, 3rd edition, 2008, p. 373-375.

[26] *Menteş and Others v. Turkey.*

[27] I Roagna, *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. 10.

[28] *Ibid*., p. 9.

[29] *Ibid.,* p. 12.

Article 8 (2) provides for a broad restriction clause 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.

Private life and family life, though protected under the same provision, are not exactly the same in terms of conceptual content. Definition of private life could be described as 'the right to choose certain intimate aspects of one's life, free from government regulation'. The Court has concluded that it would be impossible and unnecessary to attempt an exhaustive definition of 'private life' but has stated it includes to a certain degree the right to establish and develop relationships with other human beings.[30]

In addition to 'private life', Article 8 protects established 'family life' from interference by the state. The Strasbourg Court has stated that the notion of family life is an 'autonomous concept'.[31] What constitutes 'family life' will depend on the factual relations and real existence of close personal ties.[32] 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.[33]

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.[34] 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'.

For purposes of this study, private and family life is understood as the European Court under European Convention has defined its content and limits.

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[30] *Niemietz v Germany*, 1992.

[31] *Marckx v Belgium*, 1979.

[32] *K v the United Kingdom*, 1986.

[33] *Johnston and Others v Ireland*, 1986; *X, Y and Z v the United Kingdom*, 1997.

[34] See *Johnston and Others v Ireland*, 1986.

3 Prohibition of Discrimination on the Basis of Gender Identity

3.1 Non-Discrimination Standards and Gender Identity

3.1.1 Development of Non-Discrimination Standards

While the equality debates of the 20th century concentrated on racial, religious, political and women's rights, the legal discourse of the new millennium saw the emergence of new grounds: disability, sexual orientation, gender identity, citizenship and genetic features. These grounds have been largely debated and still raise controversy.[35]

The principle of equality and non-discrimination is emphasised in all main human rights documents, starting from the UN Charter (Article 1 (3)) and the Universal Declaration of Human Rights (UDHR). UDHR Article 1 stipulates: "*All human beings are born free and equal in dignity and rights"* and Article 2 (1) lists the prohibited discrimination grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 7 extends the scope of non-discrimination beyond the rights under UDHR and other provisions refer to equal treatment in relation to specific rights. For instance, Article 10 highlights equality in a fair trial, Article 16 rights to marry and found a family, Article 21 access to public service and Article 23 receiving equal pay for equal work.

Besides being a general principle of law[36] and a universal customary norm, non-discrimination is stipulated in Articles 2, 3 and 26 of the International Covenant on Civil and Political Rights (ICCPR), in articles 2(2) and 3 of the International Covenant on Economic,

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[35] Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, 2nd edition, N.P. Engel 2005, p. 599.

[36] In relation to human rights specifially, see Human Rights Committee's (HRC) General Comment No. 18: " *Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights*."

Social and Cultural Rights (ICESCR), and in regional treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Additional Protocol 12, the Revised European Social Charter (RESC), the American Convention on Human Rights (ACHR) and the African Charter on Human and People's Rights (ACHPR). Moreover, there are there are a number of universal conventions dedicated specifically to the eradication of inequalities faced by particularly disadvantaged groups, such as International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC).

Article 2 (1) of ICCPR requires that all rights under the Covenant shall be respected and ensured "*without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*. Equality between the genders, "men and women", in the enjoyment of the rights under the Covenant is stipulated in Article 3. Article 26 widens the scope of equal treatment - not only within the rights protected by the ICCPR but prohibiting discrimination in law and in any field regulated and protected by public authorities.[37]

As this research is primarily concerned with the European framework, it is important to set out the basis and limitations of non-discrimination provided for under the European Convention on Human Rights. The main non-discrimination clause, 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"*.

[37] The UN HRC has reaffirmed the autonomous nature of Article 26 in its General Comment (GC) no. 18[37] and subsequent jurisprudence: See e.g. *S.W.M Broeks v. Netherlands*, 1990 and *F.H. Zwaan-de Vries v. Netherlands*, 1990. The idea of the independent scope can also be traced back to the *travaux préparatoires* of the Covenant. See E.g. A/C.3/SR.1100,§ 8, 19, SR. 1101, § 2.; Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, 2nd edition, N.P. Engel 2005, p. 598.

Unlike Article 26 of ICCPR, 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.[38]

As the principal provision for non-discrimination is 'accessory' and not an independent right similar to ICCPR Article 26, 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.[39] 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.[40] So far, the Protocol has been ratified by only 18 of the 47 member states of the Council of Europe. Hence, the focus of this research remains on the interpretation of Article 14.

Both Article 14 of the Convention and Article 1 of Protocol 12 refer to securing non-discrimination, and not to the wider concept of equality. However, the connected nature of equality and non-discrimination is acknowledged, and it can be argued that these concepts in essence entail the same idea.[41] The Explanatory Report to Protocol 12 explains:

> "*While the equality principle does not appear explicitly in the text of either of Article 14 of the Convention of Article 1 of this Protocol, it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists*."[42]

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[38] See e.g. *Inze v. Austria*, 1987 and *Karlheinz Schmidt v. Germany*, 1994.

[39] O M Arnadóttir, p. 1.

[40] Protocol No. 12 to the Convention of Human Rights and Fundamental Freedoms, opened for signatures 4 November 2000, and entered into force 1 April 2005.

[41] O M Arnadóttir, p. 7.

[42] Explanatory Report to Protocol No. 12, para 1.

Also, despite the lack of explicit mentions, the Court has made references to equality in its case law.[43] Still, the difference between the two concepts under the Convention can be argued to affect to which degree positive obligations are imposed on states.[44]

Gender identity as a ground protected from discrimination is not explicitly mentioned in any of the 'traditional' Conventions' texts. Nonetheless, it is interpreted to be included under the "…*or other status*" clause[45] under Article 14 of ECHR. The European 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. 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.[46]

In addition to being interpreted into the 'any other status' clause, gender identity has been read into the provisions of the CEDAW by General Recommendations Nos. 27 and 28 of the CEDAW Committee.[47] Gender identity has been explicitly mentioned for the first time in an international treaty's text in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, which entered into force in August 2013. It expressly refers to the grounds of gender identity in article 4(3), which stipulates on non-discrimination.

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[43] *Ibid*., para 15.

[44] O M Arnadóttir, p. 8.

[45] See for instance Committee on Economic, Social and Cultural Rights General Comment No. 20, E/C.12/GC/20, 2009, Pv. V Spain, concluding observations of the HRC.

[46] *PV v Spain* / *Affaire PV v Espagne*, 2010, §§15, 37 (the full version is only available in French).

[47] Gender identity is expressly included in General recommendation No. 27 on lder women and protection of their human rights, CEDAW/C/GC/27; and General recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/GC/28.

3.1.2 Soft Law Instruments on Gender Identity

In addition to the 'hard' sources of law, a couple of soft law instruments are worth mentioning in relation to protection of gender identity. In 2006, the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations, developed a set of international legal principles on the application of international law to cases of sexual orientation and gender identity. The aim of the project was to clarify and to bring about coherence to the interpretation of states' human rights obligations. The adopted 'Yogyakarta Principles' address a wide range of human rights standards and advise states on how to apply them to issues of sexual orientation and gender identity.

The principles draw from existing rights such as the right to equality and non-discrimination, the right to recognition before the law, the right to life, the right to be free from torture, cruel, inhuman or degrading treatment, the right to education and the right to the highest attainable standard of health, and give recommendations on how these rights should be realised in order to give them full effect with regard to LGBT people.[48] For instance, in relation to a relevant right regarding this study, the right to found a family, Principle No. 24 states the following:

> *"Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members."*

In applying this principle to practice, it calls for states to:

> *"Ensure that laws and policies recognise the diversity of family forms",* and to "*ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners"*.[49]

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[48] See the Yogyakarta Principles, Principles 2-17. Available at: http://www.yogyakartaprinciples.org/principles_en.htm (accessed 10.5.2014).

[49] See the Yogyakarta Principles, Principle No. 24.

It is noteworthy that even though the principles present more detail and can be considered as going further than the 'pure' rights recognised under international human rights law, they are not 'creating' new categories of obligations. For instance, the right to found a family does not require states to provide for same-sex marriages, as no such legally binding obligation currently rests on nation states. However, the Principle No. 24 calls for equal treatment of different-sex and same-sex couples *when* a state recognises same-sex relations. In doing so, the principles do engage with certain issues currently under the discretion of states, such as providing access to adoption or assisted procreation for all couples, regardless of gender or sexual orientation.

On the universal level, the United Nations High Commissioner for Human Rights issued a report in 2011 on discrimination and violence faced by LGBT people. Based on the report findings, the Commissioner recommended that member states enact comprehensive anti-discrimination legislation including on the grounds of sexual orientation and gender identity, and to ensure discrimination on the grounds of sexual orientation and gender identity is combatted.[50]

In the Council of Europe, the Committee of Ministers has adopted a recommendation to member states in 2010 on measures to combat discrimination on grounds of sexual orientation or gender identity.[51] The recommendation urges states to examine existing legislative and other measures to tackle both direct and indirect discrimination faced by LGBT people. In the appendix, the Committee gives specific advice related to certain rights, including the right to respect for private and family life. In this regard, the Committee recommends that requirements for legal gender recognition should be regularly reviewed in order to remove 'abusive requirements'.[52] Further, the member states are encouraged to take measures to guarantee "*full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a*

[50] Report of the United Nations High Commissioner for Human Rights, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41, 2011, Recommendation e. The report was submitted to the Human Rights Council pursuant to its Resolution 17/19.

[51] Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity. Adopted by the Committee of Ministers on 31 March 2010. Available at: https://wcd.coe.int/ViewDoc.jsp?id=1606669 (accessed 10.5.2014)

[52] Appendix to Recommendation CM/Rec(2010)5, IV(20).

quick, transparent and accessible way".[53] Although the text does not elaborate on what might constitute an 'abusive' requirement, any prerequisite should however fulfil the criteria of being quick, transparent and accessible.

With regard to transgender marriage, the Committee calls for effectively guaranteeing a transgender person's right to marry once his or her preferred gender is legally recognised. This recommendation does not, however, extend to considering a right to remain married, only the possibility to marry a person of the sex "opposite to their reassigned gender".[54] Like the Yogyakarta Principles, the Committee also respects national discretion by not referring to a right to same-sex marriage as such, but does talk about equal treatment *when* same-sex relations are recognised at national level.[55]

The Parliamentary Assembly of the Council of Europe has also addressed the discrimination faced by LGBT people in its Resolution 1720, and the subsequent Recommendation 1915, in which it called for monitoring the implementation of the above-mentioned Committee of Minister's Recommendation, and further actions of Council of Europe in the field.[56]

3.2 Justified distinction or prohibited discrimination?

3.2.1 'Relevantly similar' situation and the Question of Comparator

According to the case law of the Strasbourg 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.[57] 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

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[53] *Ibid*., IV(21).

[54] *Ibid*., IV(22). See Chapter 4.1.2 for further explanation on the two different scenarios of transgender marriage.

[55] *Ibid.*, IV(24).

[56] Council of Europe Parliamentary Assembly. Recommendation 1915, 2010. Available at http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta10/erec1915.htm (accessed 22.5.2014).

[57] O M Arnadóttir, p. 41.

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 the opposite 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.[58]

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 that unless the applicant conforms to this norm, she or he cannot overcome the threshold to demonstrate being 'similarly situated' to the comparator. Feminist literature has referred to this conformist pressure as the 'male norm'.[59]

The Aristotelian equality requires an answer to the question: equal to whom? In the 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.[60] This is a crucial point in relation to the crux of this study 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'.[61]

Accordingly, case law of the Court and suggestions on pertinent literature provide that it is up to the applicant to establish *prima facie* discrimination while the burden to establish the

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[58] S Fredman, p. 9.

[59] *Ibid*.

[60] *Ibid*., p. 9-10.

[61] O M Arnadóttir, p. 42.

objective and reasonable justification rests on the state.[62] If this 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.[63] 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'. In these cases, the Court merged the consideration of similarity with the objective justification scrutiny. Therefore, they do not place such a heavy burden on the applicant before embarking on the analysis of objective justification, for which the respondent state must provide proof.[64]

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 formulated a specific 'differences in otherwise similar situations' test, which was linked to the margin of appreciation in assessing whether and to what extent differences in similar situations justified different treatment in domestic law.[65]

3.2.2 Objective and Reasonable Justification

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 if it does not pursue a legitimate aim and/or if the means chosen are

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[62] Harris, O'Boyle and Warbrick, p. 474.; Dijk and Hoof, p. 722; *Fredin v Sweden*, 1991, *Johnston and Others v Ireland*, 1986, *Van der Mussele v Belgium,* 1983 deal with the similarity of situations test and conclude that the rule of evidence is that the applicant must show the similarity. In the cases the applicant was considered not successful in establsihing analogy between the situations and hence no violation was found od Article 14.

[63] O M Arnadóttir, p. 85.

[64] Dijk and Hoof, p. 724-726; *Dudgeon v the United Kingdom,* 1981 (however concerning Article 8), *Abdulaziz, Cabales and Balkandali v the United Kingdom*, 1985, *Holy Monasteries v the Greece*, 1994.

[65] *Rasmussen v Denmark*, 1984; O M Arnadóttir, p. 42, 52. The test has been subsequently applied in latter case law such as *James and Others v the United Kingdom*, 1986, *Inze v Austria,* 1987 and *Larkos v Cyprus*, 1999.

not proportionate to the aim sought to be realised.[66] 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.[67]

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 e.g. race characteristics. Racial segregation or limiting immigration of foreign men over foreign women could be, and has been, argued to 'protect public tranquillity and order'.[68] 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'.[69]

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.[70] 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 Articles 8-11, in their second paragraphs allowing limitations on rights if they are "necessary in a democratic society".[71] 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

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[66] The test was established for the first time in the *Belgian Linguistics* case, 1986, §10.

[67] O M Arnadóttir, p. 42.

[68] See e.g. *Abdulaziz, Cabales and Balkandani v the United Kingdom*, 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.

[69] O M Arnadóttir, p. 44; B Sundberg-Weitmann, "Legal Tests for Applying the European Convention on Human Rights and Freedoms in Adjudicating on Alleged Discrimiantion", 1980, Nordisk Tidskrift för International Ret, pp. 48-49.

[70] See for instance *Camp and Bourini v the Netherlands*, 2000; *Salguiero da Silva Mouta v Portugal*, 1999; *Hoffman v Austria*, 1993.

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

consideration of whether the measures chosen by a state are disproportionate against the consideration of the margin of appreciation.[72]

The margin of appreciation doctrine entails that the Strasbourg Court should not assess the legitimacy of state policies as such but only their conformity in effect with the Convention requirements.[73] 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. 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.[74] Since 1960s, this principle has developed into the doctrine of margin of appreciation. The case *Handyside v the United Kingdom* is the main precedent on the approach, but it has been further elaborated in theory and practice in subsequent case law.

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.[75] The margin is generally considered to be wider when there exists a lack of 'European consensus' on the matter in question.[76] In addition to the consensus among member states, 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.[77] 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 and/or there exists a consensus among the Council of Europe member

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[72] *Ibid*., pp. 131-140 and 145.

[73] O M Arnadóttir, p. 44.

[74] *Belgian Linguistics* case, §10; O M Arnadóttir, p. 58.

[75] O M Arnadóttir, p. 60.

[76] In *Rasmussen v Denmark*, 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." (§40)

[77] O M Arnadóttir, Chapter 5.2.4. and p. 66.

states with regard to the relative importance of such interest.[78] 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 (VCLT, 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.[79] While accepting these principles *per se*, some commentators have raised concerns over so-called 'judicial activism' of the Court when it by interpretation of the Convention 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.[80] 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".[81] Further, it has elaborated that such values include pluralism, tolerance and broadmindedness.[82] 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.[83] In addition, the cultural diversity among contracting states has served as a legitimate concern under the Convention entailing that the Court should not try and impose uniform solutions for the culturally and ideologically varied states.[84] Still, a balance will

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[78] *SH v Austria*, 2011, §94.

[79] See R Bernhardt, "Thoughts on the Internpretation of Human Rights Treaties" in F Matscher and H Petzold (eds), Protecting Human Rights: the European Dimension – Studies in Honour of Gerard Wiarda, pp. 67-68.

[80] Berhardt, pp. 67-68; Matscher, p. 78.

[81] *Kjeldsen, Busk Madsen and Pedersen v Denmark*, 1976, §53.

[82] See e.g. *Handyside v the United Kingdom*, 1976, *Young, James and Webster v the United Kingdom*, 1981.

[83] P Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism?", Human Rights Law Journal, 1998, p. 2; P Mahoney, "Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin", 11 HUM. Rxs.L. J.57, 1990 p. 81.

[84] P Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism?".

always need to be struck between the cultural differences and the universal standards of the Convention.[85]

As we have seen above, 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.[86] 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, e.g. 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.[87] 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.

[85] O M Arnadóttir, p. 60.

[86] UN HRC, GC no. 18, U.N. Doc. HRI/GEN/1/Rev.7, at 146, 1989; ECtHR *Gaygusuz v. Austria*, 1996.

[87] See the case law discussed in Chapter 4.2.

4 Protecting Private and Family Life of Transgender People

4.1 Legal Gender Recognition as a Private and Family Life Issue

4.1.1 Recognition of Gender Identity in Official Documents

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, driver's 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.[88]

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. 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*

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

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."[89]

Thus, recognising people's preferred gender can help prevent discrimination and stigma on the basis of gender identity or gender reassignment.[90] Generally, the right to be recognised according to one's gender identity can 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.[91]

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 e.g. The UN Special Rapporteur on Torture and the Council of Europe Commissioner for Human Rights and the Council of Europe Commissioner for Human Rights.[92] 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.[93]

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

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[89] Amnesty International: International Secretariat, *The State Decides Who I Am – Lack of Recognition for Transgender People in Europe*, EUR 01/001/2014, 2014, p. 20.

[90] *Ibid*.

[91] See for instance Article 16 of the ICCPR, Articles 2 and 26 of the ICCPR, Articles 14 and 8 of the ECHR.

[92] UN Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, §§ 78 and 88, Human Rights and Gender Identity, CommDH/Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, 2, § 3.2.1.

[93] For instance, Sweden and Germany have abolished such requirements, reviewing of legislation is ongoing e.g. in Finalnd and Norway. See 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 (accessed 16.5.2014); Amnesty International, The State Decides Who I Am: Lack Of Legal Gender Recognition for Transgender People in Europe, 2014. Available at: http://www.amnesty.org/en/library/info/EUR01/001/2014/en (accessed 16.5.2014.).

case law presented in the next chapter concentrates on the two latter aspects, which have been debated in the European Court of Human Rights 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 right to health, 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 grave difficulties in applying for education or employment, in registering for voting and seeing the 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 simply avoid voting, applying for new education or a job. 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]."*[94]

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 ID do not match, his or her history is revealed, which opens up a possibility of violence and discrimination based on gender identity.

Article 26 of ICCPR requires states to act against discrimination by public and private agencies in all fields.[95] In the case of Article 14 of ECHR, the scope is more limited: it is often stated that it would not apply to purely private matters.[96] In relation to legal gender

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[94] Amnesty International: International Secretariat, *The State Decides Who I Am – Lack of Recognition for Transgender People in Europe*, EUR 01/001/2014, 2014, p. 53.

[95] UN HRC GC 28 (2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10.

[96] Olivier De Schutter, *International Human Rigths Law*, Cambridge Universiry Press, 2010, p. 614.

recognition, the discrimination is clearly a question of the public sphere but reaches to the semi-private and private sphere when considering the indirect effects of denying such recognition, which is likely to impair the enjoyment of several other rights of gender minorities.

As we will see in Chapter 4.2, the Strasbourg 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.

4.1.2 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 the 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. Firstly, 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 Strasbourg 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 the 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.[97]

The second aspect of 'transgender marriage' is more contested. The legal problem occurs when a person has already married before 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

[97] See an earlier case of *Rees v the United Kingdom* and the more recent *Christine Goodwin v the United Kingdom*, 2002.

the national legislation, to convert the marriage into a civil partnership available for same-sex couples.[98] By such requirement the state intervenes with an existing marital relationship, an aspect of private and family life protected under Article 8 of the ECHR.[99] 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 the United Kingdom* and *R and F v the United Kingdom*. 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. The Chamber dismissed her application on merits in 2012,[100] but the case was referred to the Grand Chamber. The hearing of the case *Hämäläinen v Finland* was held in October 2013, and the outcome of the Grand Chamber ruling is expected soon.

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.[101]

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 gay couples, is that they *are already* married, whereas a gay couple would wish to *get* married. The Chamber ruled in *Hämäläinen v Finland* that the issue in question was essentially that of the right to same-sex marriage under Article 12 of the ECHR. This view was later contested by the applicant in her

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[98] For a compilation of the European countries' legislation on LGBT issues, including legal gender recognition,see ILGA-Europe, Rainbow Map Index 2014. Available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_europe (accessed 16.5.2014)

[99] In *Dadouch v Malta*, 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); Constantin Cojocariu, Submission to the Grand Chamber in case Hämäläinen v Finland, p. 4-5.

[100] See *H v Finland*, 2012.

[101] For European context, see the landmark case of *Kopf and Schalk v Austria,* 2010.

request for referral and submission to the Grand Chamber.[102] Although the right to marry under Article 12 and the protection of marriage as 'private and family life' under Article 8 do intersect, they are still separate rights. The former stipulates a person's right to enter a marriage, while the latter protects an *existing* relationship from unlawful interference.

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.[103] 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.

4.2 Legal Gender Recognition in the European Court of Human Rights

4.2.1 Non-Recognition of Gender Identity - a Breach of Private Life?

The first ever case concerning legal gender recognition brought to the Strasbourg Court was *Rees v the United Kingdom*, decided in 1986. 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 confine him as male, especially the 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, the birth certificate was still required in certain instances, and the contradiction between the gender marker in his birth certificate and

[102] Constantin Cojocariu, Submission to the Grand Chamber on *Hämäläinen v Finland*, 19 July 2013.

[103] *Ibid*., §19; *Burden v the United Kingdom,* 2008.

his appearance resulted in difficult and distressing social encounters.[104] In accordance with the domestic legislation at place at the time, the applicant was still regarded as a woman with regard to marriage, pension rights and certain employment benefits.[105] Despite the possible discriminatory nature of the actions, Article 14 (non-discrimination) was not invoked in the present case.

In assessing such 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 albeit 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.[106]

Drawing from the wide margin of appreciation, the Court ruled that the United Kingdom 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 to the United Kingdom to change their 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.[107]

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[104] *Rees v the United Kingdom*, 1986, §34.

[105] *Ibid*., §40.

[106] *Ibid*., §37.

[107] *Ibid*., §50.

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 need to constantly review the scientific and societal developments with regard to the rights of transsexuals.[108] This can be seen as a prediction of the future developments of the law, and has later been reflected in the subsequent jurisprudence discussed below.

However, the change did not yet come about in the next judgement on gender identity issued 4 years later, in 1990. In the case of *Cossey v the United Kingdom*, the Court came to very similar conclusions than in the *Rees* case presented above. 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".[109] 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 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*. 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 contradiction 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.[110] 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.

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[108] *Ibid*., §47.

[109] Cossey v the United Kingdom, 1990, §40.

[110] *B v France*, 1992, §43.

As with *Rees*, the Court recalled the requirement of striking a fair balance between the competing interests.[111] It however 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.[112] Still, these developments remained inconsistent among member states and were not the main reason for the Court to depart from its analysis in *Rees* and *Cossey* judgements. In the end, the Court did find a violation of Article 8, but the crux of the argumentation 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.[113]

Despite already 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 the United Kingdom*, transgender women Ms. Sheffield and Ms. Horsham invoked articles 8, 12 and 14 of the Convention but no violation was found. 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".[114]

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

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[111] *Ibid*., §44.

[112] *Ibid*., §48.

[113] *Ibid*., §63.

[114] *Sheffield and Horsham v the United Kingdom*, 1998, §60.

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 as 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 argumentation in relation to the claim under Article 8 by stating that it had already concluded that the respondent 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*."[115]

[115] *Ibid*., §76.

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.

The long anticipated change in the interpretation of transgender cases was to come in the landmark judgement of *Christine Goodwin v the 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 United Kingdom. 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. Subsequently, 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.[116]

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 argumentation, the Court placed weight on the very essence of the Convention in respect for human dignity and freedom, and the continuing international trend towards increasing social acceptance of transgender people and legal recognition of the 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 United Kingdom 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

[116] *Christine Goodwin v the United Kingdom*, 2002.

matter fell within its margin of appreciation.[117] By this ruling the Court acknowledged that the increased 'European consensus' had resulted in narrowing down the United Kingdom's discretion margin 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 Strasbourg 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 in 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.[118] 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.[119] 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.[120]

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

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[117] *Christine Goodwin v the United Kingdom*, §93.

[118] *Ibid.*, §103.

[119] *Ibid*., §100.

[120] *Ibid*., §103.

and 12, it held that there was no need to separately consider the issue under Article 14.[121] This can be seen as a practical decision 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 any structural problems perpetuating such discrimination and addressing them. 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. In addition, such an omission implies that Article 14 does not add anything to the substantive right in question, which renders it rather toothless to address claims of discrimination.

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".[122]

By the time the *L v Lithuania* judgement 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.[123] 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".[124] The facts left the applicant in a situation of distressing uncertainty with regard to his private life and the recognition of his true identity.[125] 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

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[121] *Ibid*., §108.

[122] *Grant v the United Kingdom*, 2006, §§43-44.

[123] Constantin Cojocariu, Submission to the Grand Chamber in *Hämäläinen v Finland*, p. 17.

[124] *L v Lithuania*, 2007, §57.

[125] *Ibid*, §59.

not unduly high. Hence, the fair balance shifted in the favour of the applicant and the Court found a violation of Article 8.

In the case of *PV 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 6-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 placed having the child's well-being in mind, giving him time to progressively adjust to his father's reassigned gender.[126]

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 on the expense of equality and non-discrimination considerations.[127]

4.2.2 Debate on the Divorce Requirement

As explained above in Chapter 4.1.2, 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*, referred to the Grand Chamber in 2013, is crucial in determining which direction

[126] *PV v Spain / Affaire PV v Espagne*, §36.

[127] See more on the lack of equality and non-discrimination analysis in Chapter 4.2.3.

the Court's jurisprudence will take next. Will the Court once again update its reasoning in line with the 'living instrument' nature of the Convention by acknowledging the European and global developments? Or will it maintain that fair balance remains to be struck between the interests of transgender people wishing to stay married to their partner, and the general interests of the society? The margin of appreciation has so far granted the member states a wide discretion to regulate on matters linking to gender recognition and same-sex marriage. Yet, if the circumstances of an individual are rendered disproportionately difficult as a result, the Court has a mandate to declare a violation of the Convention.

The applicant of the case is a male-to-female transexual, who has been married since 1996 and has 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 is interpreted so that she needs to either get a divorce, or with the consent of her wife, the relationship can be converted into a civil partnership, a form of recognition available to same-sex couples. The applicant invoked Articles 8 and 12 in conjunction with Article 14, arguing that her private and family life, and her right to marry, had been interfered on the grounds of her gender identity. As the couple do not want to divorce or make any other changes in their marital status, the applicant is forced to live with a continuous contradiction between her gender identity and gender marker.[128] The Grand Chamber held an oral hearing on the case in October 2013, and the final decision is still pending.[129]

In 2012, the Chamber issued its judgement on the same case (then known as *H v Finland*), in which it 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. 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 the transformation of her marriage into a civil partnership. According to the current domestic law the applicant's reassigned gender could not be introduced into the population register as long as she stayed married. The applicant

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[128] For the facts, see *H v Finland*, 2012. The case name changed to *Hämäläinen v Finland* in 2013 when the anonymity was lifted.

[129] See the Grand Chamber hearing at: http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=3735909_16102013&language=lang. (accessed 27.5.2014)

argued that transgenderism was a medical condition and her gender identity was a private matter, which hence 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.[130]

As the interference had basis on national law, it fulfilled the legality requirement. Thus, the issue was whether the interference had a legitimate aim and had it been necessary in a democratic society. The government presented that "health and morals" and "rights and freedoms of others" constituted a legitimate aim, to which the Court agreed.[131]

As to the necessity, the Court emphasised the positive obligation upon states under Article 8, including respect for human dignity and the quality of life in certain respects.[132] While the margin of appreciation granted to states was wide, the Court nevertheless required the states to implement the recognition of the reassigned gender of post-operative transgender people through, for instance, amending their civil status data.[133] However, the Court held that these positive obligations depend on the specific circumstances of each case. In the case at hand, the Chamber decided that a fair balance was struck in the Finnish judicial system between the applicant's interest to gain legal recognition and the state's interest to keep the traditional institution of marriage intact.[134]

With regard to the changes in the applicant's and her wife's marital status, the Court held that it was not disproportionate to require that the marriage would be converted into a civil partnership as it was considered to entail almost the same rights and obligations as marriage. 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,[135] and that the effects of

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[130] *H v Finland*, §13.

[131] *Ibid.*, §45.

[132] *Ibid.*; see also: *Pretty v the United Kingdom*, 2002, §65.

[133] *H v Finland*; see aslo: *Christine Goodwin v the United Kingdom*, §§71-93; *Grant v the United Kingdom*, §§39-44.

[134] *H v Finland*, §§46, 52.

[135] *Schalk and Kopf v Austria*, §101.

a change in legal gender marker in the context of marriage falls within the appreciation of the contracting state.[136]

This being said, the Court still concluded that the present case does not as such raise an issue under Article 12, as the applicant had already been married since 1996. 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. 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 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, as there was a difference in treatment between her and other transgender people who were in the same situation but were not married, and between her and non-transgender people.[137]

The Court 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.[138] In the present case, the Court found that the applicant's situation was not sufficiently similar to the comparator groups. Moreover, it held that the essence of the case was not discrimination, but the fact that Finnish law does not currently provide for same-sex marriages.[139] Therefore, in the Court's view, it could not be concluded that the applicant was discriminated against when not being able to obtain a female gender marker, even assuming that she could be considered to be in a similar position to the other people. Accordingly, no violation of Article 14 taken in conjunction with Article 8 took place.[140]

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[136] See *Christine Goodwin v the United Kingdom*, §103.

[137] *H v Finland*, §§58, 65.

[138] See *Burden v the United Kingdom*, 2008.

[139] *H v Finland*, §66.

[140] *Ibid*., §67.

4.2.3 The (lack of) Equality and Non-Discrimination Analysis

A remarkable weakness in the Court's argumentation, 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 Chamber stated briefly that the applicant had not established that she was in a 'relevantly similar' situation with the comparator, without giving any further explanation to this conclusion.

In the cases discussed above in Chapter 4.2, 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 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.[141]

[141] See *PV v Spain* / *Affaire PV v Espagne*.

Moreover, the Court has itself emphasised in its 1999 judgement 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.[142]

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 did find 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.[143] 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 applying for residence permits. 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,[144] the requirement of non-discrimination should be thoroughly addressed by the Court in cases relating to gender identity.

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[142] See *Lustig-Prean and Beckett v the United Kingdom*, 1999.

[143] *Eremia v the Republic of Moldova*, 2013, §§84, 90. This conclusion was reached following a third party intervention by the Equal Rights Trust emphasising the discriminatory nature of violence against women.

[144] See, for instance, the FRA LGBT survey, May 2013. The survey provides evidence on how LGBT persons in the EU experience bias-motivated discrimination, violence and harassment in different areas of life. Available at http://fra.europa.eu/en/publication/2013/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-results (accessed 10.5.2014).

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 *H 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 in 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.

Moreover, as the Court has established itself, 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 Emerging Rights of Transgender People?

4.3.1 Increased Attention to Gender Identity in the United Nations Treaty Bodies

At the universal level, the UN Human Rights Committee ('the Committee') has taken a clear stand to support the rights of transgender people. While it is yet to decide on an individual complaint on the issue, it has addressed discrimination faced by transgender people in its considerations of reports submitted by state parties under the ICCPR. For instance, in relation to a recent report submitted by Finland, the Committee was concerned that the current domestic legislation on gender identity is not comprehensive, and therefore fails to protect against discrimination on all the grounds covered by Articles 2 and 26 of the Covenant.[145] Accordingly, the Committee called for increased efforts by the Finnish government to increase its efforts in the field of combatting and eliminating discrimination on grounds of

[145] Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Finland, 8-26 July 2013, §8.

sexual orientation and gender identity, by, for instance, implementing comprehensive legislative reform which guarantees equal protection from discrimination on all grounds.[146]

Similarly, in 2014 the Committee commented on the situation of transgender people in Latvia with a reference to hate crimes, violence, discrimination and the inadequate application of legislative framework. It consequently called for better protection of vulnerable groups, including transgender people.[147]

Although references to gender identity have become more frequent in the last couple of years, the Committee voiced its concern over the lack of legal recognition of transgender people in Ireland already in 2008 in its concluding observations to Ireland's report, as no birth certificates were issued in accordance with the reassigned gender. Further, it urged Ireland to ensure that its domestic legislation is not discriminatory of non-traditional forms of partnership.[148] Despite finding room for improvement, the Committee has also welcomed the amendments in domestic legislations, which have recently taken place to enhance protection of transgender people's rights.[149] This shows progress in the countries in question, although it may be incomprehensive and slow in the view of the Committee.

Alongside the Human Rights Committee, the CEDAW Committee has expressed its support for advancing the rights of transgender people. For instance, in its recent concluding observations on a country report by Finland, the Committee applauded a proposed amendment to the Finnish Equality Act, which would include gender identity and gender expression in the traditional definition of gender, and extend the protection against discrimination to transgender individuals.[150]

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[146] *Ibid*.

[147] Human Rights Committee, Concluding observations on the third periodic report of Latvia, CCPR/C/LVA/CO/3, §19.

[148] Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Ireland, 7 – 25 july 2008, CCPR/C/IRL/CO/3,§8.

[149] See the reports mentioned above in notes 135-137.

[150] Committee on the Elimination of Discrimination against Women, Concluding Observations on the 7th Periodic Report of Finland, CEDAW/C/FIN/CO/7, §10.

The presented examples illustrate an increased attention afforded to issues affecting transgender people within the UN human rights system in the last couple of years. In addition, there exists ample soft law and policies both at universal and European level showing a growing will in Europe to enhance protection and tackle discrimination faced by transgender people.[151]

4.3.2 Limits of the Increasing Protection

Although the UN treaty bodies and policy recommendations 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. 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 Strasbourg 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 the bodily characteristics can be brought more into conformity with the 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

[151] See a compilation of CoE member states' responses to the Committee of Ministers Recommendation CM/Rec(2010)5, which shows the gradual progess taking place: Steering Committee for Human Rights, Report on the implementation of 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, CM(2013)36 add2, 2 May 2013; Chapter 3.1.2.

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.

As mentioned, the increased level of political attention, policy initiatives and recommendations by UN treaty bodies aiming to tackle discrimination based on gender identity implies that the recognition of the equal rights of transgender people is on the rise. However, a weakness in this development is the general nature of these recommendations and policies: they discuss tackling discrimination of transgender people in a broad way, but often do not elaborate on what specifically could amount to discrimination, or how the protection should apply to gender queer people. This is especially problematic as many rights in domestic legislation remain gender-based and uphold the binary dichotomy of gender.

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 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 to 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 two persons of the same sex wish to enter.

As the margin of appreciation doctrine is also applied to considerations regarding equality and non-discrimination under Article 14, treating transgender people differently to non-

transgender people, with regard to marriage, has not amounted 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 to such 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 for appropriate addressing. This is especially vital looking at statistics about discrimination against transgender people in Europe; by leaving out the non-discrimination aspect the Strasbourg 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,[152] in others it mentions that no separate consideration is needed and in others briefly disregards the claim without further explanation. 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. Still, in the light of the previous jurisprudence and the restricting doctrine of margin of appreciation, it is unlikely that the Court will apply equality and non-discrimination to find a violation in the upcoming Grand Chamber judgement *Hämäläinen v Finland*.

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[152] See the cases of *Eremia v the Republic of Moldova*, *Abdulaziz, Cabales and Balkandali v the United Kingdom*.

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 the 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 legislations, be an emerging right in the region. When European countries merge their policies and laws, a European right may be 'created' in accordance with the 'living instrument' nature of the ECHR. However, as long as European countries continue to have varied legislation on transgender marriage, the issue will fall within the contracting states' margin of appreciation.

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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