

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Joanne CASSAR against MALTA

(Application No. 36982/11)

WRITTEN COMMENTS
submitted jointly by

INTERNATIONAL COMMISSION OF JURISTS

INTERNATIONAL CENTRE FOR THE LEGAL PROTECTION OF HUMAN
RIGHTS (INTERIGHTS)

TRANSGENDER EUROPE (TGEU)

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Introduction

1. These written comments are jointly submitted by the International Commission of Jurists, the International Centre for the Legal Protection of Human Rights (INTERIGHTS) and TransGender Europe (TGEU) pursuant to leave granted by the President of the Fourth Section on 11 July 2012 in accordance with Article 36§2 of the Convention.¹
2. The present case raises important issues regarding the legal recognition of transgender persons in their acquired gender, including with respect to their right to marry. Drawing from international and comparative law sources, this brief will demonstrate that the principle of full legal recognition of the acquired gender for all purposes, including marriage, has wide recognition across Europe and beyond. This brief will also present evidence showing the emergence of gender identity as a protected ground under anti-discrimination law at the international and domestic levels.

I. The principle of full legal recognition of the acquired gender

3. This Court has confirmed the principle of full legal gender recognition of an individual's acquired gender in its jurisprudence, most notably in the *Christine Goodwin v. United Kingdom* judgment.² In addition, the Committee of Ministers Recommendation (2010)5, adopted in March 2010, called on States to, *inter alia*, “guarantee the full legal recognition of a person's gender reassignment in all areas of life.”³
4. In the *Goodwin* case the Court linked the applicant's claim, defined as “a right to personal development and the physical and moral security in the full sense”, to the values of “human dignity and human freedom” underpinning the Convention and the notion of “personal autonomy” included in the scope of Article 8 of the Convention.⁴ In *Van Kück v. Germany*, this Court stated that “gender identity was one of the most intimate areas of a person's private life.”⁵ Along similar lines, the Court found that “the right to gender identity and personal development” constitutes “a fundamental aspect of the right to respect for private life”.⁶ Freedom to define oneself as a female or a male is “one of the most basic essentials of self-determination”.⁷ Finally, the Court recognised that the applicant had a “right to sexual self-determination”, which was one of the aspects of her right to private life.⁸
5. The principle of full legal recognition of the acquired gender has been reflected in the practice of the vast majority of the Contracting States. For example, the German Constitutional Court declared the legal recognition of an individual's gender to be imperative in light of “the right to self-determination of the person concerned, respect for human dignity and the fundamental right to protection of personhood” embedded in

¹ For Interest of Interveners see Annex to the written comments.

² *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§71-93, ECHR 2002-VI; also see *Grant v. the United Kingdom*, no. 32570/03 (Sect. 4), §§39-44, ECHR 2006-VII – (23.5.06).

³ *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies), Recommendation 21.

⁴ *Christine Goodwin v. the United Kingdom*, §90.

⁵ *Van Kück v. Germany*, no. 35968/97, §56, ECHR 2003-VII.

⁶ *Id.* §75.

⁷ *Id.* §73.

⁸ *Id.* §78.

the German Constitution.⁹ More generally, within the Council of Europe membership, the majority of States currently have in place a statutory framework for recognising a change of gender: 37 out of 47 according to a report of the Commissioner for Human Rights of the Council of Europe published in 2011.¹⁰

II. The right of transgender persons to marry in accordance with their acquired gender

6. The full recognition principle extends to the right to marry in the acquired gender. With the exception of Malta, 36 out of the 37 countries having in place a legal gender recognition system, recognise the acquired gender for the purpose of marriage.¹¹ The Committee of Ministers called on Council of Europe Member States to ensure that “the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed.”¹²
7. Relevant developments recently took place in Ireland, which still lacks a legal gender recognition system and implicitly does not allow transgender persons to marry in their acquired gender. In 2007, the High Court of Ireland delivered a judgment finding the State to be in breach of the Convention (incorporated into Irish domestic law) for failing to recognise the applicant, a transgender woman, in her acquired gender and provide her with a new birth certificate.¹³ Justice McKechnie, who heard the case, expressed great frustration at the Government’s failure to bring national law in conformity with the *Goodwin* judgment and stated that “Ireland as of now is very much isolated within the Member States of the Council of Europe... [and] must be even further disconnected from mainstream thinking.”¹⁴ The Government initially appealed the judgment before the Supreme Court, but later withdrew its appeal. In July 2011, an inter-departmental body set up by the Government to examine the possibility of adopting new gender recognition legislation published its report which included, *inter alia*, a recommendation to allow persons whose acquired gender is recognised to marry a person of the opposite gender.¹⁵ The Irish Government is currently in the process of adopting gender recognition legislation pursuant to the conclusions of the report.
8. This development is equally evident around the world. Transgender individuals are expressly permitted to marry in their acquired gender in, for example, Australia, Canada, New Zealand, South Africa, Israel, Japan, Singapore, South Korea, and the People’s Republic of China.¹⁶ In Australia, for example, the Family Court upheld the

⁹ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 27 May 2008, 1 BvL 10/05, §72, available at http://www.bverfg.de/entscheidungen/ls20080527_1bv1001005.html, and other case law cited there.

¹⁰ Council of Europe Commissioner for Human Rights, “Discrimination on Grounds of Sexual Orientation and Gender identity in Europe”, 2011, available here: http://www.coe.int/t/commissioner/activities/Themes/LGBT/nationalreports_en.asp.

¹¹ See the ILGA-Europe Rainbow Map and Index, May 2012, available at http://www.ilga-europe.org/home/news/for_media/media_releases/ilga_europe_launches_its_very_first_annual_review_of_human_rights_situation_lgbti_in_europe_and_updated_rainbow_map, listing the countries in Europe on the basis of criteria which include the ability of transgender people to legally marry a person of the other gender and the existence of legal/administrative procedures for legal gender recognition.

¹² *Recommendation CM/Rec(2010)5 of the Committee of Ministers*, Recommendation 22, see *supra* note 3.

¹³ *Foy v. An t-Ard Chláraitheoir, Ireland and the Attorney General*, [2007] IEHC 470.

¹⁴ *Id.* §100.

¹⁵ Gender Recognition Advisory Group, Report to Joan Burton, T.D., Minister for Social Protection, 15 June 2011, p. 39, available here: <http://www.welfare.ie/EN/Policy/Legislation/Pages/gragreportjune11.aspx>.

¹⁶ *Id.* at Annex 9 (Conclusion Table); see also *A.G for the Commonwealth v. Kevin and Jennifer*, Family Court of Australia at Sydney, 21 February 2003 (declaring marriage between a woman and a post-operative transgender man to be valid); *Attorney-General v. Otahuhu Family Court* [1995] 1 NZLR 603 (holding that “where a person has undergone

marriage of a transgender man and a woman and stressed that both global trends and scientific evidence compelled it to conclude that an individual could change his sex for all purposes, including marriage. The Court added: “Failing to do so would lead to the odd result that a person who appears to be a man, who functions in society as a man, and whose body can never function as a woman’s body and has most of the characteristics of a man, would be entitled to marry a man.”¹⁷

9. In the United States, where marriage laws are determined by individual states, a small number of cases concerning the validity of a marriage involving a transgender individual have been litigated, almost always in the context of divorce, custody, or inheritance dispute.¹⁸ The outcomes of these cases vary, but the more recent cases hold that the validity of a marriage depends on the validity of the change to the birth certificate. In an immigration case, for example, the U.S. Board of Immigration Appeals found a marriage between a transgender woman and a man from El Salvador to be valid because the woman had legally changed her sex, in conformity with state law.¹⁹ The Board of Immigration Appeals also noted that if the change of sex was not recognised for marriage purposes, the “anomalous” result would be to recognise as valid marriages that were apparently of the same sex, such as the marriage of “a postoperative male-to-female transsexual to a female.”²⁰
10. In a case involving whether a transgender woman was covered by her husband’s health insurance policy, another American court used similar reasoning. The court first firmly rejected the idea that the case was about same-sex marriage. Rather “the question is whether Plaintiff changed her sex under Minnesota law so that her marriage is recognized as an opposite-sex marriage under Minnesota law.”²¹ Because Christine Radtke was in possession of a valid certificate stating her sex as female, her marriage was deemed valid under state law. What mattered, the court stated, was the gender at the time of marriage and not at the time of birth. If marriage capacity requirements were not determined at the time of marriage, than restrictions such as age or marital status would be meaningless.
11. Even in *In re Ladrach*, a much earlier case finding that a transgender woman could not obtain a marriage license, the court noted: “It seems obvious to the court that if a state

surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex, there is no lawful impediment to that person marrying as a person of that sex”); Alteration of Sex Description and Sex Status, Act No. 49 of 2003 (South Africa); Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder [“Law No. 111 of 16 July 2003”] (Japan); see also Sable, Suzanne, “Pride, Prejudice, and Japan’s Unified State”, in *University of the District of Columbia Law Review*, Winter 2008; “Japan’s Transsexuals Emerge from the Dark”, in *Los Angeles Times*, 11 June 2006; “Editorial: Gender Identity Disorder”, in *Asahi Shimbun*, 14 January 2010; Chan Wing Cheong, “Latest Improvements to the Women’s Charter”, *Singapore Journal of Legal Studies*, December 1996; Singapore Women’s Charter (1997 Revised Edition); “Sex-change woman gets married”, in *China Daily*, 2 January 2004; “Transsexual’s wedding mirrors social changes”, in *China Daily*, 11 May 2004; *In re Change of Name and Correction of Family Register*, Supreme Court of South Korea (en banc), 22 June 2006; Kelley, Matt and Mike Lee, “South Korea’s legal trans-formation”, in *fridae.com*, 29 May 2009; “South Korean Transgender Star Harisu at Her Wedding Ceremony”, in *Asianbite.com*, 16 May 2007; Wockner, Rex, “Singer Allowed To Switch Gender”, in *Windy City Times*, 1 January 2003.

¹⁷ *In re Kevin (Validity of marriage of transsexual)*, Family Court of Australia (2001), aff’d by *Attorney General v. Kevin and Jennifer*, Family Court of Australia (Full Court) (2003).

¹⁸ The vast majority of marriages involving transgender individuals are never litigated. Thus “the lack of cases from other jurisdictions affirmatively holding that a transgender individual can marry someone of the opposite sex does not signal that most other jurisdictions prohibit such marriages.” *Radtke v. Miscellaneous Drivers & Helpers Union Local*, 2012 WL 1094452 (D.Minn. 2012).

¹⁹ *In re Jose Mauricio Lovo-Lara and Gia Teresa Lovo-Ciccone*, 23 I&N Dec. 746 (BIA 2005).

²⁰ *Id.* at n. 5.

²¹ *Radtke* at §8.

permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled.”²² Another U.S. case finding a marriage to be invalid, *Littleton v. Prange*, is consistent with *Ladrach*. There the court held the amendment to the birth certificate to be invalid because the law only permitted the amendment of clerical type errors.²³ At the present time, however, the majority of U.S. states (26) have laws that permit the issuance of a new birth certificate following gender reassignment. An additional 21 states amend birth certificates after gender reassignment.²⁴ As the court observed in *Radtke*:

*The only logical reason to allow the sex identified on a person’s original birth certificate to be amended is to permit that person to actually use the amended certificate to establish his or her legal sex for other purposes, such as obtaining a driver’s license, passport, or marriage license... There is no basis to conclude that Minnesota recognizes Plaintiff as female for some purposes – birth records and driver’s licenses, but not for others – marriage certificates.*²⁵

III. Preconditions for legal recognition of the acquired gender

12. The Maltese Constitutional Court adheres to an understanding of sex that is primarily defined by reference to unchangeable biological traits, which in turn amounts to an absolute bar to the applicant’s ability to get married in her acquired gender. In this section we will show that this understanding of sex is discredited and that increasingly more flexible tests have been adopted. Some jurisdictions grant access to legal gender recognition after genital surgery has been carried out. This approach, too, has come under scrutiny and has been abandoned in an increasing number of European countries. A recent law adopted in Argentina may well represent the culmination of this process, recognising the right of transgender persons to self-identify their gender without any medical requirements.
13. Courts departing from the outdated doctrine of the immutability of sex²⁶ rely on a more nuanced understanding of sex, no longer bound exclusively to biological factors, but defined more expansively to include also psychological and social characteristics.²⁷ This Court in *Goodwin* stated, for instance, that with sophisticated surgery and hormonal treatment the “principal unchanging biological aspect of gender identity [was]

²² *In re Ladrach*, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987).

²³ 9 S.W.3d 223, 231 (Tex. Ct. App. 1999).

²⁴ See http://www.lgbtmap.org/equality-maps/birth_certificate_laws.

²⁵ *Radtke* at §11.

²⁶ The doctrine of the immutability of sex yields back to the 1971 *Corbett v. Corbett* judgment in which an English court, relying on expert opinion “that the biological sexual constitution of an individual...cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means”, concluded that sex was immutable, a biological fact determined at birth by the congruence of three factors: chromosomes, gonads and genitals. See *Corbett v. Corbett*, [1971] Probate Reports 83.

²⁷ See for example the *Re Kevin* judgment of the Full Court of the Australian Family Court, also referred to in the *Goodwin* judgment, and according to which “the person’s biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person’s life experiences, including the sex in which he or she was brought up and the person’s attitude to it; the person’s self-perception as a man or a woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex re-assignment treatments the person has undergone, and the consequences of such treatment” *Kevin v. Att’y Gen. (Re Kevin)*, (2001) 165 Fam. L.R., 404, 473 (Austl.). See along similar lines judgments from South Korea (Supreme Court [S. Ct.], 2004 Seu 42, 22 June 2006, *In re Change of Name and Correction of Family Register*, English text available here: http://library.scourt.go.kr/jsp/html/decision/2_67.2004seu42.ht), and Malaysia (*JG v. Pengarah Jabatan Pendaftaran Negara*, High Court of Kuala Lumpur, 25 May 2005).

the chromosomal element.”²⁸ However, it was “not apparent” why “the chromosomal element... must take on decisive significance for the purposes of legal attribution of gender identity for transsexuals.”²⁹ Similarly, the German Constitutional Court has consistently stressed that “a person’s gender affiliation is significantly dependent on his/her psychological make-up and enduring sense of identity with a particular gender” and that legal recognition should take into account “both mental and psychological factors.”³⁰

14. Following *Goodwin* and the repudiation of the immutability doctrine, some jurisdictions privileged a test of “psychological and anatomical harmony”,³¹ as a condition of granting legal gender recognition. This could be achieved through surgical treatment aimed at approximating the appearance of genitalia with the individual’s preferred gender. The compulsory surgery requirement, whether intended to lead to sterility or not, has come under increased scrutiny because it is an invasive procedure, and often unaffordable or medically impossible in specific circumstances.
15. There is a clear trend towards separating legal recognition procedures from surgical and hormonal treatment requirements. The Committee of Ministers Recommendation (2010)5 stated that “prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.”³² The Parliamentary Assembly of the Council of Europe (PACE) Resolution 1728 (2010) called upon Member States to ensure that official documents reflect the individual’s preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy.³³ Similarly, the Council of Europe Commissioner for Human Rights called on Member States to “abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognize a person’s gender identity in laws regulating the process for name and sex change.”³⁴
16. According to a recent survey, seven out of 47 Council of Europe Member States do not make medical or surgical interventions a prerequisite for the purposes of legal gender recognition: Austria, Bulgaria, Germany, Hungary, Portugal, Spain and the United Kingdom.³⁵ A number of states are currently considering reforming their legal gender recognition legislation along similar lines.³⁶

²⁸ *Christine Goodwin v. United Kingdom*, § 82.

²⁹ *Id.*

³⁰ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 27 May 2008, 1 BvL 10/05, §72, available at http://www.bverfg.de/entscheidungen/ls20080527_1bv1001005.html, and other case law cited there.

³¹ This wording introduced in Sharpe, A.N., *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish, 2002b), p. 58.

³² *Recommendation CM/Rec(2010)5 of the Committee of Ministers*, Recommendation 20, see *supra* note 3.

³³ At §16.11.2.

³⁴ *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 29 July 2009, § 44.

³⁵ See the ILGA-Europe Rainbow Map and Index, May 2012, *supra* note 11.

³⁶ *E.g.*, the Netherlands (see: *Netherlands to Remove Surgery and Sterilization Requirements from Transgender Law*, available at <http://stoptortureinhealthcare.org/news-and-resources/forced-sterilization/netherlands-remove-surgery-and-sterilization-requirements-tr>); Sweden (see: *Sweden will remove the sterilization requirement after strong pressure from the national and international community*, available at http://tgeu.org/Sweden_will_remove_the_sterilization_requirement and <http://www.questioningtransphobia.com/?p=3982>); and Ireland (see Gender Recognition Advisory Group, Report to Joan Burton, T.D., Minister for Social Protection, 15 June 2011, *supra* note 15).

17. In 2004, the United Kingdom government adopted the Gender Recognition Act (GRA), giving transgender people full legal recognition of their acquired gender for all purposes, including marriage.³⁷ The procedure set up under the GRA consists of an individual application to a multi-disciplinary panel to have one's change of gender recognised and a revised birth certificate issued.³⁸ Individuals must establish before the panel that they have or have had gender dysphoria, have lived for two years in the acquired gender, and intend to live in that gender until death.³⁹ The GRA does not include specific medical or surgical treatment requirements, reflecting the government's explicit determination to "avoid discriminating against people who for some medical reason unconnected with their gender are unsuitable for particular kinds of surgical, hormonal or other treatment" or who due to finances or hospital waiting lists must wait years to receive surgeries.⁴⁰ At the same time, the government clarified that the above-mentioned criteria were "designed to establish whether a person has taken decisive steps to live full and permanently in the acquired gender," and that "a person's physiology [needed not] fully conform to the acquired gender."⁴¹
18. The Portuguese legal gender recognition law,⁴² which came into force in 2011, enables transgender people to obtain new identity documents pursuant to a standardised administrative procedure requiring a statement from a multi-disciplinary team of experts to the effect that they have been diagnosed with gender identity disorder. The law does not require hormone therapy, sex reassignment surgery, infertility or any other medical interventions for the legal recognition of gender identity.
19. By a judgment dated 28 January 2011, the German Constitutional Court struck down as unconstitutional the provisions of the Transsexuals Act requiring permanent infertility and genital surgery for the purposes of legal gender recognition.⁴³ The claimant, a 62-year old transgender woman, complained about not being able to enter a registered partnership with her female partner. Legal recognition as a woman, a prerequisite for entering a same-sex partnership, involved the prerequisite of surgery, which in her case carried substantial health risks. Entering marriage as a man, the claimant's sex assigned at birth, was not an option either, as she had already changed her name to a female name and would thus face the risk of constant public disclosure of her gender identity. The Constitutional Court noted that the impugned legislation constituted "a massive impairment of physical integrity". Although it served a legitimate purpose, namely that changes sought would be irreversible, that could not be assessed solely "against the degree of the surgical adaptation of their external genitals but rather against the consistency with which they live in their perceived gender."

³⁷ Gender Recognition Act, 2004, c. 7 (U.K.).

³⁸ *Id.* §1(4), sched. 1.

³⁹ *Id.* §2(1).

⁴⁰ Joint Committee on Human Rights, Nineteenth Report of Session 2002-2003 (Draft Gender Recognition Bill), 2002-3, H.L. 188-I, H.C. 1276-I, at 13, available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>.

⁴¹ 418 PARL. DEB., H.C. (6th ser.) (2004) 53 (statement of Mr. David Lammy, Parliamentary Under-Secretary of State for Constitutional Affairs).

⁴² Lei no 7/2011 - Cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código do Registo Civil, online at: www.dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf (in Portuguese).

⁴³ Also see along similar lines the 2009 judgment of the Austrian Higher Administrative Court in which it overruled the sterilisation requirement, *Verwaltungsgerichtshof* [Administrative Court], 2008/17/0054, 27 February 2009; and *Verfassungsgerichtshof* [Administrative Court], B 1973/08-13, 3 December 2009.

20. The global professional medical association, the World Professional Association for Transgender Health (WPATH), has also added its voice to the calls to eliminate sterilisation and surgical requirements from the list of requirements for gender recognition in the following terms:

*No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person's lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.*⁴⁴

21. These developments have not only taken place in Europe. For example, the Argentinean Gender Identity Act,⁴⁵ recognising that a person's subjectively felt and self-defined gender may or may not correspond with the gender assigned at birth, establishes the right to change one's registered gender and name on demand, without requiring any form of medical procedure or hormone therapy as a pre-condition. The law also provides a right to access any desired medical treatment in relation to gender reassignment at no extra cost. In addition, the Law grants all people in Argentina the right to be treated in accordance with their gender identity and to be identified as such in all identity documents and registers. In Uruguay, the relevant legislation explicitly prohibits a requirement of gender reassignment surgery for the purposes of legal gender recognition.⁴⁶

IV. Equality and non-discrimination on grounds of gender identity in international and comparative law

22. Individuals are protected from discrimination on the grounds of gender identity under international, including regional, human rights law. At the domestic level, comparative legal developments show increased protection against discrimination on the basis of gender identity as well as expanded means to recognise a change of sex markers on legal documents.

Universal and Regional Instruments

23. Article 14 of the Convention implicitly includes gender identity by virtue of its open-ended illustrative list of grounds. In *P.V. v. Spain*, this Court held that: “la transsexualité est une notion qui est couverte, à n'en pas douter, par l'article 14 de la Convention.”⁴⁷ A variety of authorities within the Council of Europe have also articulated the importance of protecting against discrimination on the grounds of gender identity. In this respect, the Committee of Ministers Recommendation (2010)5 called on member states to ensure that legislation and other measures are adopted and implemented to combat discrimination on grounds of gender identity and to ensure

⁴⁴ See the *WPATH Identity Recognition Statement*, 16 June 2010, available at http://www.wpath.org/publications_public_policy.cfm.

⁴⁵ Online at: <http://www.l.hcdn.gov.ar/dependencias/dsecretaria/Periodo2011/PDF2011/SANCIONES/7243-D-2010.pdf> (in Spanish).

⁴⁶ Article 3, *Ley No 18.620 Derecho a la Identidad de Género y al Cambio de Nombre y Sexo en Documentos Identificatorios*, available at: <http://sip.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=18620&Anchor> (in Spanish).

⁴⁷ *Affaire P.V. c. Espagne*, Application No. 35159/09 (30 November 2010), §30. Note that the Court used the term “transsexualité” but was clearly referring to gender identity.

respect for the human rights of transgender persons.⁴⁸ The Committee of Ministers specifically recommended adopting non-discrimination measures in the sectors of employment, education, and sports.⁴⁹

24. Similarly, the PACE, in Resolution 1728(2010), states: “Sexual orientation and gender identity are recognised as prohibited grounds for discrimination.” The PACE urged member states to “adopt and implement anti-discrimination legislation which includes sexual orientation and gender identity among the prohibited grounds for discrimination.”⁵⁰ Member States are further called upon to ensure, in legislation and practice, the right of transgender persons to “relationship recognition, in accordance with the case law of the European Court of Human Rights.”⁵¹ The case law of the European Court includes, of course, *Christine Goodwin v. United Kingdom*.
25. Within the European Union, gender identity falls under the guarantees of protection from discrimination on the basis of sex. In *P. v. S. and Cornwall County Council*, the European Court of Justice found a violation of Council Directive 76/207/EEC on the principle of equal treatment for men and women in employment. P. had been dismissed from her job because she was planning gender reassignment. The Court held:

*Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.*⁵²

26. In *K.B. v. National Health Service Pensions Agency*, the Court found a breach of Article 141 EC, guaranteeing the principle of equal pay for male and female workers for equal work, where national law prohibited a person from marrying in his post-reassignment sex.⁵³ K.B. and her partner, who was assigned male at birth but had undergone gender reassignment surgery, were unable to fulfill the marriage requirement in order to designate each other as pension beneficiaries, in violation of Article 141. Nevertheless, it was up to the national court to determine whether the conditions had been met for a legal change of gender.
27. The EU Gender Recast Directive of 2006 is the first EU Directive to refer to persons intending to undergo or having undergone gender reassignment. It provides that the “scope of the principle of equal treatment for men and women ... also applies to discrimination arising from the gender reassignment of a person.”⁵⁴

⁴⁸ Committee of Ministers Recommendation (2010)5.

⁴⁹ *Id.* Recommendations 29-39.

⁵⁰ Parliamentary Assembly Resolution 1728 (2010) at §16.5.

⁵¹ *Id.* at §16.11.5.

⁵² *P. v. S. and Cornwall County Council*, Case C-13/94 (ECJ 1996). In *Richards v. Secretary of State for Work and Pensions*, Case C-423/04 (ECJ 2006), the Court confirmed this approach.

⁵³ *K.B. v. National Health Service Pensions Agency*, Case C-117701 (7 January 2004).

⁵⁴ EU Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) at preambular §3.

28. The prohibition on discrimination on the grounds of gender identity is also well established in international human rights law at the universal level. Like the European Convention, the universal human rights treaties provide an open-ended enumeration of prohibited grounds and conclude with the phrase “other status”. The CESCR includes gender identity among “other status” as one of the prohibited grounds of discrimination.⁵⁵ In concluding observations on State reports, it has urged the adoption of legislation to protect transgender individuals from discrimination.⁵⁶ Other UN treaty bodies, including the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, and the Committee against Torture similarly include gender identity as a protected ground under their respective treaties.⁵⁷ The UN Human Rights Committee, interpreting state obligations under the International Covenant on Civil and Political Rights (ICCPR), has expressed concern in respect of situations where States do not recognise a change of gender by issuing new identity documents and has equally noted with approval legislation that grants legal recognition to a change of gender identity.⁵⁸
29. The UN Human Rights Council adopted a resolution in June 2011 expressing “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”⁵⁹ The Organization of American States (OAS) has also adopted a series of resolutions condemning discrimination and acts of violence on the basis of sexual orientation or gender identity.⁶⁰

Domestic Developments

30. At the national level, at least twenty-four states within the Council of Europe provide protection for gender identity, either in comprehensive non-discrimination legislation explicitly or as a form of sex discrimination, or through judicial practice.⁶¹ Within the United States, 16 states and the District of Columbia have laws prohibiting discrimination in housing or employment on the basis of gender identity.⁶² In addition, many individual local jurisdictions have non-discrimination laws that include gender identity.⁶³ At the federal level, transgender workers are protected by the Civil Rights Act of 1964, which the U.S. Equal Employment Opportunity Commission has held

⁵⁵ *Id.* at §32.

⁵⁶ See for example the concluding observations on Poland, E/C.12/POL/CO/5, 19 January 2010, Republic of Korea, E/C.12/KOR/CO/3, 17 December 2009, China, E/C.12/1/Add.107, May 13 2005, Trinidad and Tobago, E/C.12/1/Add.80, June 5, 2002, (Hong Kong) China, E/C.12/1/Add.58, May 21, 2001.

⁵⁷ CRC, General Comment No. 13, UN Doc. CRC/GC/2011/13, at §60 and 72(g); CAT, General Comment No. 2, UN Doc. CAT/C/GC/2, at §21; CEDAW, General Recommendation No. 27, UN Doc. CEDAW/C/GC/27, at §13 and General Recommendation No. 28, UN Doc. CEDAW/C/GC/28, at §18.

⁵⁸ Concluding Observations (Ireland), UN Doc. CCPR/C/IRL/CO/3, at §8; Concluding Observations (United Kingdom of Great Britain and Northern Ireland), UN Doc. CCPR/C/GBR/CO/6, at §5.

⁵⁹ A/HRC/17/L.9/Rev.1 (15 June 2011).

⁶⁰ AG/RES. 2435 (XXXVIII-O/08), AG/RES. 2504 (XXXIX-O/09), AG/RES. 2600 (XL-O/10), and AG/RES. 2653 (XLI-O/11).

⁶¹ EU Fundamental Rights Agency, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States* (2011), at p. 22; EU Directorate General for Internal Policies, Policy Department C, Citizens’ Rights and Constitutional Affairs, *Transgender Persons’ Rights in the EU Member States* (2010), at p. 5; Council of Europe, Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe* (2nd ed. 2011), at pp. 41-42.

⁶² See <http://www.lgbtmap.org/equality-maps>.

⁶³ See <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions>.

includes “gender identity” within the prohibition on sex discrimination.⁶⁴ In Ecuador, Bolivia, Chile, New Zealand, and six territories or states in Australia, there are gender identity-specific protections against discrimination. In many other countries, gender identity is included in general non-discrimination laws.⁶⁵

31. In addition, courts around the world have recognised the importance of protecting against discrimination on the basis of gender identity and gender expression. Even before the definitive ruling from the EEOC, United States federal courts had extended the protections of the Civil Rights Act to transgender workers.⁶⁶ In 2007, the Supreme Court of Nepal ruled that people of the third gender and *metis* (as transgender individuals are known in Nepal) are entitled to the full range of all human rights and should be protected from discrimination.⁶⁷ In 2009, a similar ruling was handed down by the Supreme Court of Pakistan, which ordered provincial authorities to implement its recommendations concerning protecting *hijras* from discrimination in the areas of inheritance, voter registration, schooling, and employment.⁶⁸

Conclusion

32. Most jurisdictions in Europe and many across the world recognise the acquired gender of transgender persons for all legal purposes including marriage. This recognition reflects an understanding of sex as shaped by psychological and social characteristics rather than biological characteristics alone. Moreover, States are gradually abandoning restrictive medical requirements for the purposes of legally changing gender. We are also witnessing the emergence of gender identity as a separate protected ground under international law and domestic anti-discrimination legislation. The Interveners submit that it would be discriminatory, in violation of the Convention, to refuse to permit an individual to marry in her legally recognised gender.

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⁶⁴ *Macy v. Holder*, EEOC Appeal No. 0120120821 (20 April 2012), available at <http://transgenderlawcenter.org/cms/blogs/552-24>.

⁶⁵ New Zealand Human Rights Act, section 21(1)(a); New Zealand Attorney General Crown Law Opinion (22 August 2006); Australian state and territory non-discrimination laws are available at http://www.humanrights.gov.au/info_for_employers/law/; for information about other countries see <http://www.transrespect-transphobia.org/sheets/sheet1.php?table=2>.

⁶⁶ *Schroer v. Billington*, 577 F. Supp. 2d 293 (U.S. Court of Appeals for the District of Columbia 2008); *Glenn v. Brumby*, 663 F.3d 1312 (U.S. Court of Appeals for the 11th Circuit 2011).

⁶⁷ *Sunil Babu Pant and Others v. Government of Nepal* (Supreme Court of Nepal 2007).

⁶⁸ *Khaki v. Rawalpindi* (Supreme Court of Pakistan 2009).

ANNEX

INTEREST OF THE INTERVENERS

INTERIGHTS (www.interights.org) is an international human rights law centre, based in London, which has held consultative status with the Council of Europe since 1993. It works to promote the effective realisation of international human rights standards through law. To this end, INTERIGHTS provides advice on the use of international and comparative law, assists lawyers in bringing cases to international human rights bodies, disseminates information on international and comparative human rights law and undertakes capacity building activities for lawyers and judges. A critical aspect of INTERIGHTS' litigation work involves the selective filing of third party interventions before international courts and tribunals on points of law of key importance to human rights protection, and on which our knowledge of international and comparative practice might assist the Court. INTERIGHTS has provided advice to legal counsel and intervened as a third party in a number of cases dealing with the human rights of lesbian, gay, bisexual and transgender (LGBT) persons (for example KAOS GL v Turkey, No. 4982/07, pending, R. v. FYROM, No. 23804/12, pending or Vejdeland v Sweden, No. 1813/07, judgment of 9 February 2012).

Transgender Europe – TGEU (www.tgeu.org) founded by the European Trans Movement at the first European Transgender Council in 2005 is a not-for-profit European Umbrella organisation working for trans equality and the advancement of human rights of transgender persons in Europe. To date TGEU has 52 member organisations in 29 countries and is registered under Austrian law. TGEU advocates for the rights of transgender persons with European Institutions, such as Council of Europe, European Union and Organization for Security and Cooperation in Europe, builds capacity of organizations and initiatives supporting transgender equality on the national level, and engages in research on the human rights situation of transgender people in Europe and different parts of the world. TGEU is member of the European network of Social NGOs the social platform and the Fundamental Rights Platform consulting the EU Fundamental Rights Agency. It was accredited observing status with the Committee Of Experts On Discrimination On Grounds Of Sexual Orientation And Gender Identity (DH-LGBT) drafting the Recommendation of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation and gender identity (CoM Rec 2010(5), and consulted the Council of Europe Human Rights Commissioner for his publications “Human Rights and Gender Identity” (2009) and “Report on Discrimination on grounds of Sexual Orientation and Gender Identity” (2011).

The ICJ (<http://www.icj.org>), founded in 1952, is composed of 60 eminent jurists who are representatives of the different legal systems of the world. The ICJ's International Secretariat, based in Geneva, implements the aims and objectives of the Commission. The ICJ provides legal expertise at both the international and national levels, to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level. The ICJ has a project on Sexual Orientation and Gender Identity that seeks to address issues of discrimination and violence directed at LGBT individuals through the application of international human rights law. The ICJ has previously submitted written comments to the Court in the cases of Taddeucci & McCall v. Italy (No. 51362/09, pending), Ladele & McFarlane v. United Kingdom (Nos. 51671/10 and 36516/10, pending), GenderDoc M v. Moldova (No. 9106/06, judgment of 12 June 2012), Vejdeland and Others v. Sweden (No. 1813/07, judgment of 9 February 2012), Al-Saadoon and Mufdhi v. the United Kingdom (No. 27021/08, judgment of 2 March 2010), Finogenov v Russia (Nos. 18299/03 and 27311/03, judgment of 20 December 2011), and Bayatyan v Armenia (No. 23459/03, judgment of 7 July 2011), among others.