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on the implementation of EU law on equal opportunities and anti-discrimination**

DISCUSSION PAPER : GENDER IDENTITY DISCRIMINATION

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Transgender or Gender Identity – who deserves protection?

What is it that makes Trans(gender/ sexual) people¹ so very problematic to so many people. It has now long been established, and been regularly discussed on television, that being Transgender has nothing whatsoever to do with sexual orientation or sexual practice, but rather is an issue of gender identity; the core of what makes a person. So all the fears that Trans² people are somehow sexually perverse and a possible danger to children should have long since vanished, at least at the level of government.

Further, several recent studies have discovered that it is likely that a significant contributor to what makes a Trans person may well be in the formation of certain sex dimorphic nuclei in the brain prior to birth,³ and researchers have now found what is likely to be a variant gene amongst Trans people.⁴ However, the question of whether there is a biological basis is irrelevant to the question of Rights, and the suggestion that being trans is not a lifestyle choice, whilst welcomed by many trans people who individually feel the need to for some justification to excuse to others as to why they feel this way, is not relevant to matters of rights.

¹ Transsexual people seek, where possible, hormone therapy or surgery to modify the body and its sexual characteristics to more closely resemble that of a person born into the natal sex associated with their preferred gender identity and role. In contrast Transgender is used to identify those people whose gender identity is different to that ascribed to them at birth, yet who may not wish to take the route of full genital reassignment surgery. Some may wish to be accepted as a member of the sex group which they most relate, others prefer an identity between genders, or of both genders, and no gender, or even of a different type of gender. Transgender is also used as an encompassing term and generally is used in a way which is inclusive of Transsexual people.

² Trans is used as a compact way of referring to any person, Transsexual, Transgender, gender variant or of any other gender identity whereby their preferred gender role is different from that expected of a person of their natal sex.

³ Zhou JN, Hofman MA, Gooren LJ, Swaab DF. (1995) A sex difference in the human brain and its relation to Transsexuality. *Nature*. 378:68–70.

⁴ Bentz, E., Heffler, L, Kaufman, U et al (2008) A polymorphism of the CYP17 gene related to sex steroid metabolism is associated with female-to-male but not male-to-female Transsexualism, *Fertility and Sterility*, Vol. 90, No. 1, July 2008, 56-59

As the European Court of Human Rights in Goodwin v UK Government, held made it clear, that:

*"given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment"*⁵

therefore the question as to rights is not stemmed in aetiology but a much more basic issue; the suffering people undergo to achieve their sense of self, and so the court has held the aetiology debate to be irrelevant and that

*the basis upon which a person makes the decision to undergo gender reassignment treatments is irrelevant as "In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance."*⁶

European Union Law and Discrimination Protection

Several years earlier, in 1996, the European Court of Justice, in P v S & Cornwall Council [1996] had found in that Transsexual people were protected in the workplace from discrimination, using the Equal Treatment Directive (76/007/EEC), based on gender rather than 'sex'; grounds which the court was to define as covering a person who :

*"intend(s) to undergo, or has undergone, gender reassignment."*⁷

This has proven to be somewhat unfortunate, in the long run, as restricting protection in the workplace to only a minority of the Trans community on the basis of their intention to undergo processes to transform the body. This has left out the majority of Trans people who continue to have no comeback against discrimination, not only because they do not feel they want to undergo some kind of bodily transformation, but much more commonly because of how they present or demonstrate their gender identity, role or preference in the world.

The workplace and social life are very important to Trans people, it is only by surrounding themselves with colleagues and friends can they hope to survive the first few years of Transition. The experience of Transphobic discrimination is that whilst some Trans people effectively 'pass' as a member of their preferred sex and as such may manage to be 'stealth'⁸ in everyday life, many people either for shorter periods, or in some cases, for life, do not manage to achieve that. They are targeted because it might be known or perceived to be they are Trans, or because they choose to be 'Out' as Trans.

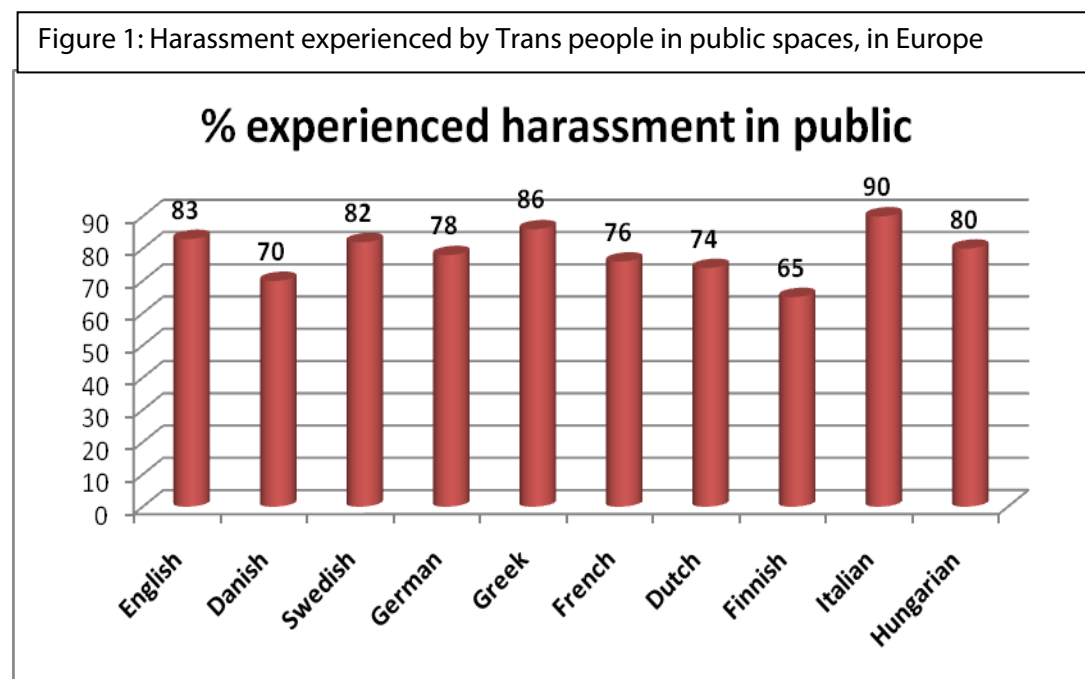
⁵ Goodwin v UK Govt, [2003] ECHR (Application no. 28957/95) para 59

⁶ ibid

⁷ P v S & Cornwall Council [1996] Case C-13/94. In the UK this working phrase was altered to "intending to undergo, undergoing or having undergone, gender reassignment" in recognition of the long periods of time waiting to undergo gender reassignment treatments in the National Health Service. In 1999, the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102 reg 2(3) further defined this by inserting a new s.82 of the Sex Discrimination Act 1976 (as amended) to mean "a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process", as

⁸ To live in 'stealth' is to not disclose one's Trans status to anyone, except for close family.

It should be noted that throughout Europe over 60% of Trans people claim to have suffered Transphobic harassment or violence (Fig 1) below,⁹ and further research the shown that 10% of those in work have suffered from a criminally violent act from their work colleagues.¹⁰



Additionally, a significant amount of violence experienced in public spaces by LGB people, is not technically homophobia, but should be better labeled as Transphobic. The reason the victim is chosen is not based on whom they find attractive, but rather is about the way they look, talk, and walk down the street – they are just as much a challenge to gender norms, and almost as likely to be a victim because of that.¹¹

More generally non-violent discrimination is based on prejudices in relation to what a Trans person might be like,¹² or if they are to use the same facilities, other women see them as potentially criminally dangerous. At other times, the reasons are entirely irrational, un-developed, reasons similar to those seen in Transphobic violence. Finally they are viewed as a 'business problem'.

⁹ Turner, L., Whittle, S, Combs, R (2009 forthcoming) Transphobic Hate Crime in the European Union, London: Press for Change

¹⁰ Whittle, S (2002) Employment Discrimination & Transsexual People, A Study Comparing Pre- and Post P v S Experiences; Ashstead: GIREs

¹¹ Stonewall National Advisory Group (1999) Breaking the Chain of Hate. A National Survey Examining Levels of Homophobic Crime and Community Confidence towards the Police Service', London: Stonewall.

¹² Press for Change, the UK Trans lobby group, respond to several cases each year, where, on discovery, Trans people are accused of being paedophiles. It is only in very recent years that Trans people have been thought of as suitable parents and been allowed by the courts to maintain access to children of a previous marriage, or their been allowed to access fertility treatments. (see X, Y & Z v UK [1997] ECHR (Application no.75/1995/581/667)

In business the reason is generally given that the business owner is worried about losing staff or customers. The view is taken that by having a Trans member of staff, they will be 'trouble', i.e. distressing other staff, or putting off customers, they will also want excessive time off for treatments, and they will no longer be able to do the full duties of the job.¹³

In relation to the Business Model justifying discrimination, Press for Change have argued

*"(since 1996) there have been few (if any) formal complaints to the police, nor has there been any case law in the area (which) shows the extent to which service providers can adapt. .. we think a proportionate and legitimate aim to not provide single sex services where a person has not commenced living permanently in their new gender role would be an appropriate limit ... the vast majority of businesses will not find any need to use it and will continue to provide services across the board"*¹⁴

The grounds in P v S, originally were only intended to relate to workplace issues, yet were maintained without change in the ETD (Goods and Services) 2004/113/EC,¹⁵ despite the European Court of Human Rights by that time going having gone much further by making it quite clear in the cases of Goodwin v UK, that :

*"... a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative Transsexual."*¹⁶

and that *"the assumption by the Transsexual of the social role of the assigned gender"*¹⁷ was a key factor, having previously said

*"the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings."*¹⁸

It could be argued that whilst many would view a convergence of the two courts as regards Trans people's rights, it is just as important to recognise the gulf that still exists between them.

¹³ A (Respondent) v Chief Constable of West Yorkshire Police (Appellant) (2004 U. K, HL. 21, E.W.C.A. Civ 1584, para 56

¹⁴ Press for Change (2009) Submission to the Parliamentary Committee on the Draft Equality Bill, London: Press for Change, para C.44

¹⁵ Council of Europe: 2606th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), held Luxembourg on 4 October 2004

¹⁶ Supra n5, para 100

¹⁷ ibid

¹⁸ Ibid para 90

Whilst the ECHR is defining rights in a broadly expansive manner, clearly indicating that medical treatments and surgery do not define a person, yet the Court is also more than willing to say that the State must provide treatment in a timely manner for those Trans people who wish to have it,¹⁹ as it

*"... noted the particular importance of questions concerning one of the most intimate aspects of private life, namely a person's gender identity, for the balancing of the general interest with the interests of the individual."*²⁰

in contrast the European Court of Justice and EU law have got stuck in a rut, whereby the law simply has not found the mechanism to expand beyond a view, that though whilst better than nothing in 1996, is not up to scratch for today's ever changing challenges about gender and what it really means.

The limits of EU Law

As it stands we not only have European Union states who appear to be doing nothing to support the Trans people in their communities, but we also have states using the decision in P v S to create narrow mechanisms. These fail to support the vast majority of Trans people, who just wish to have the opportunity to express 'themselves' without undergoing surgical procedures, for example as a man who prefers women's clothes, or as a young woman who does not wish to wear the 'female' uniform at work because she finds wearing it very unpleasant.

They fail to protect children and young people who express gender variance. The provision of protection only on the basis of 'gender reassignment' in younger gender variant children having to invoke protection, by saying they wish to undergo gender reassignment, whereas their real need at that time of life is simply to have permission to express or present themselves in a way which is most conducive to their well being. In 80% of cases, there is remission from childhood gender variance, but they have to make an unreliable prediction that they 'intend to undergo gender reassignment', which is a very difficult claim to back out of.

Yet, ironically, the ECJ has interpreted its own ruling to mean that trans people who commence working in a new gender role, are to be considered a person of that new gender role from the moment they start, and the person need not have had any gender reassignment treatments at all,²¹ even an initial assessment – an increasingly common situation as Health Authorities throughout Europe take to rationing gender reassignment treatments so as to trim their budgets. Whilst it may seem a positively good thing, that a person does not need to have 'special' treatments in order to be recognised as the person they feel they are, at least for the purposes of the ETD, that fails to recognise the real suffering often contained within the hypothetical situation. The increasing difficulties in accessing gender reassignment treatments means many trans people still feel extremely unhappy and dissatisfied by the failure of governments to guarantee access at no cost to gender reassignment treatments for those who want to have them. For many the body does matter.

¹⁹ L v Lithuania [2007] ECHR, (Application no. 27527/03), Schlumpf v Switzerland [2009] ECHR (Application No: 29002/06)

²⁰Schlumpf v Switzerland [2009] ECHR (Application No: 29002/06) summary at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4d0dd240bfee7ec12568490035df05/1b52d41d1efa5cafc1257540004b324a?OpenDocument>

²¹ Sarah Margaret Richards v Secretary of State for Work and Pensions (Case C-423/04) ECJ 27-04-06.

Effectively we are seeing many trans people living permanently in their preferred gender role with only an 'intention to undergo gender reassignment, but little hope of reaching the stage of having undergone gender reassignment treatments.

So, what difference is there between a natal male who wishes to wear women's clothing at work, be known under a female name, who is seriously thinking about whether they intend to undergo gender reassignment at some time in the future, as compared to a natal male who wishes to wear women's clothes at work, be known under a female name, and who is intending to undergo gender reassignment at some time in the future.

Very little of course, the only difference is that they have a different perspective on their gender identity, and the first person is still debating the point and so has no protection under the ETD's. The second person having decided what their gender identity is, the though we do know that 43% of natal males who cross dress would wish to commence living permanently in their preferred gender role and maybe undergo gender reassignment treatments , but fear of losing their partner , their children, their job and their home are what deters them.

Recently there has been a linguistic shift in some supra-national organisations, following on from the Yogyakarta Principles which defined the concerns of Trans and intersex people in terms of:

*"gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."*²²

On December 2008, the United Nations affirmed that they are:

*"deeply concerned (by) discrimination ... directed against persons in all countries in the world because of ... gender identity"*²³

²² The Yogyakarta Principles on the application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. (2007), at http://www.yogyakartaprinciples.org/principles_en.pdf

²³ On the 18th December 2008, 66 countries of the United Nations reaffirmed "the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity." They stated they are "deeply concerned by violations of human rights and fundamental freedoms based on sexual orientation or gender identity," and said that "violence, harassment, discrimination, exclusion, stigmatization and prejudice are directed against persons in all countries in the world because of sexual orientation or gender identity." (United Nations: General Assembly Statement Affirms Rights for All at <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/826.html>)

Earlier this year, Thomas Hammarberg, Human Rights Commissioner of the Council of Europe, in a statement on the 5th January 2009 stated:

"During missions to member states of the Council of Europe, I have been reminded of the on-going discrimination many face on account of their gender identity (1). Transgender persons encounter severe problems in their daily lives as their identity is met with insensitivity, prejudice or outright rejection."

and concluded:

*"There is no excuse for not immediately granting this community their full and unconditional human rights. Council of Europe Member States should take all necessary concrete action to ensure that Transphobia is stopped and that Transgender persons are no longer discriminated against in any field."*²⁴

Furthermore, the Council of Europe is using the term Gender Identity for working purposes and the European Council Committee of Experts on Sexual orientation and Gender Identity Rights uses the term in its preliminary recommendations.²⁵

So where does Europe go from here? The original (1996) Bill of Gender Rights,²⁶ a Trans community led initiative, states

*"...It is fundamental that individuals have the right to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role. Therefore, all human beings have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role; and further, no individual shall be denied Human or Civil Rights by virtue of a self-defined gender identity which is not in accord with chromosomal sex, genitalia, assigned birth sex, or initial gender role."*²⁷

which is judiciously close to the statement of the ECHR in Goodwin v UK Govt. (see above) wherein it said :

*"the notion of personal autonomy is an important principle ..., protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings"*²⁸

²⁴ Thomas Hammarberg at http://www.coe.int/t/commissioner/Viewpoints/090105_en.asp

²⁵ The final meeting of the European Council Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT) is meeting will take place in November 2009. The draft is titled 'Future Recommendations on Measures to Combat Discrimination Based on Sexual Orientation or Gender Identity.' Their recommendations call for member states to comprehensively review and improve existing law, and take further measures to combat discrimination on the grounds of gender identity. Also they should ensure independent institutions are fully mandated to combat this discrimination, and they must consult fully with Trans communities on the adoption and effective implementation of law and policies to achieve this.

²⁶ The International Bill of Gender Rights, (As adopted June 17, 1995 Houston, Texas, U.S.A) at <http://inquirer.gn.apc.org/GDRights.html>

²⁷ Ibid Art. 1 The Right To Define Gender Identity

²⁸ Supra n17

The time has clearly come to re-address the decision in P v S which is now used primarily to deny equality rights to a large group of people. This should be done soon, it is crucial that the new European States are persuaded to provide better protections for Trans people, but we need to find a way of ensuring that the law is updated to better reflect our contemporary knowledge and understanding of gender and gender identity, before they entrench a version of law which is clearly out of date.

Questions:

- Is there any justification for continuing to define people's rights to equality through 'medical practices they are the subject of' or their 'intentions' rather than the intentions of those who discriminate against them?
- How far would the European definition of the 'trans person deserving of protection' have to move in order to truly address gender identity discrimination. If European law were to move in such a way, could it be used to extend the rights of non-trans people to more fully express their gender?
- Has any country taken any special measures, or promoted, a wider understanding of gender protection from discrimination than that contained within the case of P v S & Cornwall County Council?ⁱ
- Are there any countries who have not fully complied with the decisions taken by the European Court of Human Rights, in particular; Goodwin v UK,ⁱⁱ I v UK,ⁱⁱⁱ Van Kück v Germany,^{iv} Grant v UK,^v and L v Lithuania,^{vi} which have firmly placed the Convention in support, but also beyond, the principles contained in ECJ law?

i P v S & Cornwall Council [1996] Case C-13/94

ii Goodwin v UK Govt, [2003] ECHR (Application no. 28957/95)

iii I v UK Govt [2003] ECHR (Application no.

iv Van Kück v. Germany.[2007] ECHR (Application No. 35968/97).

v Linda Grant v. UK, [2006] ECHR(Application No. 32570/03) ECHR 548, 23 May 2006

vi L v Lithuania [2007] ECHR, (Application no. 27527/03)