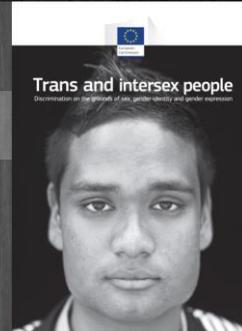


# Trans issues in EU anti-discrimination law

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PART I

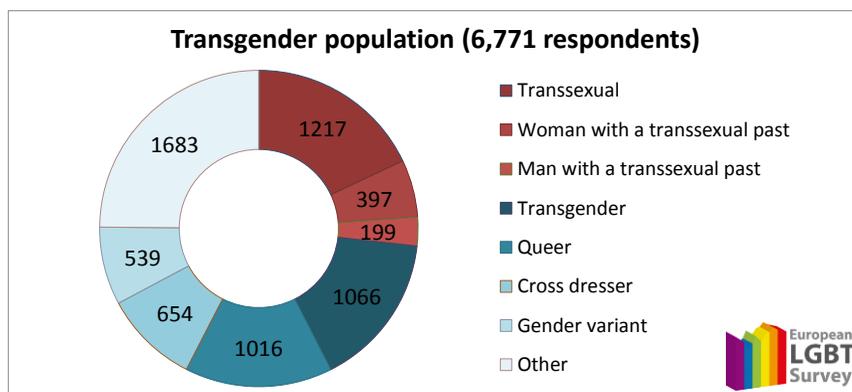
# Understanding trans

## Trans

- **Trans** (or trans\*) is an inclusive umbrella term referring to those people whose gender identity and/or gender expression differ from the sex they were assigned at birth.

## FRA LGBT Survey on trans diversity

- **73%** of trans respondents did not identify as exclusively male or exclusively female (i.e. are outside *the M/F gender binary*)



## Gender identity

- **Gender identity** refers 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, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism.

*(as defined in the [Yogyakarta Principles](#))*

## Gender expression

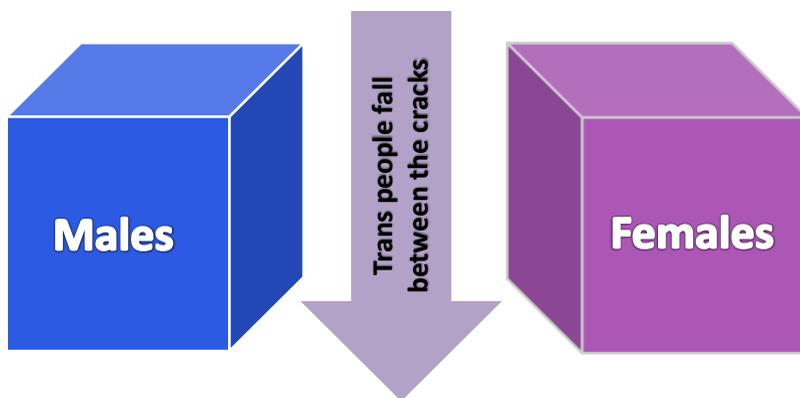
- **Gender expression** refers to people's manifestation of their gender identity, and the one that is perceived by others. Typically, people seek to make their gender expression or presentation match their gender identity, irrespective of the sex that they were assigned at birth.

## Sex ≠ gender

- **Sex** refers to the biological makeup such as primary and secondary sexual characteristics, genes, and hormones.
- **Gender** refers to people's internal perception and experience of maleness and femaleness, and the social construction that allocates certain behaviours to male and female roles which vary across history, societies, cultures and classes.

## Binary legal gender categories

- Legal definitions of 'sex' are often binary and mutually exclusive 'male' & 'female' categories and are hence problematic for trans people.



## PART II

# International human rights law

## United Nations

- **UDHR (1948)**
  - HRC Resolution (2011) *Human Rights, sexual orientation and gender identity*
- **CEDAW (1979)**
  - Two General Recommendations (2010):  
*“The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as [...] gender identity.”*

## Council of Europe (1)

- ECHR (1950) case law:

Case (year)	Right guaranteed
<i>B v France</i> (1992)	Gender recognition of post-operative transsexual
<i>Goodwin and I. v UK</i> (2002)	Right to marry in accordance with the acquired gender
<i>van Kück v Germany</i> (2003)	Right to fair and proportionate requirements related to gender reassignment
<i>Grant v United Kingdom</i> (2006)	The right to a pension in accordance with the acquired gender
<i>L v Lithuania</i> (2007)	Right to adequate and clear gender recognition procedure for change of name and legal gender
<i>P.V. v Spain</i> (2010)	'Transsexuality' as a ground of non-discrimination

## Council of Europe (2)

- COM Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity (2010)
- Convention on preventing and combating violence against women and domestic violence (2011)
  - \* *1<sup>st</sup> international convention to refer to gender identity*

# EU law & trans people

## Trans in EU law

- Neither the *TFEU* nor the *Charter of Fundamental Rights* refer to **gender identity or gender expression**.
- Directives prohibiting gender discrimination in access to goods and services, and employment and social protection only cover '**gender reassignment**'.

## *P v. S and Cornwall County Council*

- In the case of *P v. S and Cornwall County Council* ([Case C-13/94](#)) the CJEU held that the right not to be discriminated against on the grounds of sex cannot be confined simply to discrimination based on the fact that a person is of one or other sex, and may include discrimination arising from the gender reassignment of a person.

## Confirmation of the *P v S* principle

- The *P v. S* principle was confirmed twice in the cases of:
  - *K.B. vs. National Health Service Pensions Agency* ([C-117/01](#))
  - *Sarah Margaret Richards v Secretary of State for Work and Pensions* ([C-423/04](#))

## Case-law affirmed in EU Directives

- CJEU case law confirms that:
  - ‘Sex’ = ‘men and women’  
= ‘gender reassignment’
- EU Gender Equality Directives cover ‘gender reassignment’
  - 2004/113/EC Goods and Services Directive (2606<sup>th</sup> Council and Commission meeting [minutes](#))
  - 2006/54/EC Gender ‘Recast’ Directive (*Recital 3*)

## 2004/113/EC (Meeting minutes)

"Concerning Article 3 and its application to transsexuals, the Council and Commission recall the jurisprudence of the Court of Justice in case C-13/94 P v S and Cornwall County Council, where the Court held that the right not to be discriminated against on grounds of sex cannot be confined simply to discrimination based on the fact that a person is of one or other sex, and **may include** discrimination arising from the gender reassignment of a person."

## 2006/54/EC (Recital 3)

"The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person."

## FRA Opinion (2008)

"[T]ransgenderism may not have to be reduced to [a] narrow understanding, linking it to 'gender reassignment' defined as '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'. Whereas transgender people in this narrow understanding do find themselves in a specific situation due to the operation of gender reassignment [...] there is no reason not to extend the protection from discrimination beyond these persons, to cover cross dressers, and transvestites, people who live permanently in the gender 'opposite' to that on their birth certificate without any medical intervention and all those people who simply wish to present their gender differently. It has been recommended that protection from discrimination on grounds of 'gender identity', more generally, should encompass not only transsexuals (undergoing, intending to undergo, or having undergone a medical operation resulting in gender reassignment), but also those other categories."

FRA, [Homophobia Report: Part I - Legal Analysis](#) (2008)

## 'Gender reassignment' risk

- In the absence of an agreed wide definition gender reassignment remains problematic as it may exclude those trans people who have not undergone, and do not intend to undergo surgical and/or medical treatment.
- These people may amount to **73%** of the trans population according to the FRA LGBT Survey.

## Recent developments in EU law

- **Recast Asylum Qualification Directive 2011/95/EU**
  - 'gender, gender identity' (Recital 30)
  - "Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group" (Article 10.1.d)
  - \* *1<sup>st</sup> EU law to refer to gender identity*
- **Victims' Rights Directive 2012/29/EU**
  - 'gender, gender identity, gender expression' (Recitals 5, 8.f & 18)
  - \* *1<sup>st</sup> international law to refer to gender expression*

# Future EU law?

## How can it improve?

- A formal revision of the Treaty in order to include new grounds
- Broader interpretation of the already existing law referring to discrimination on the ground of 'sex'
- Domestic transposition is free to exceed the minimum standards set in EU law

## Inclusion in gender equality laws?

- No opportunity for the inclusion of gender identity and gender expression in legislation based on Articles 19 & 157 TFEU
- However:
  - There is no impediment for the inclusion of gender identity and gender expression within the meaning of sex
  - *Possible parallel grounds*: pregnancy, maternity and paternity, and family responsibilities

Thank you  
Questions welcome