

EUROPEAN COURT OF HUMAN RIGHTS

R.L. & P.O. v. Russia (Application nos. 36253/13 and 52516/13)

THIRD PARTY INTERVENTION BY THE HUMAN RIGHTS CENTRE OF GHENT UNIVERSITY¹

These written comments are submitted by the Human Rights Centre of Ghent University,² pursuant to leave granted by the President of the Third Section of the European Court of Human Rights in her letter dated 15 January 2018, and in accordance with rule 44 §5 of the Rules of the Court. The Human Rights Centre's experience and expertise were set out in the application for leave to intervene, dated 2 January 2018.

The interveners submit that the case of *R.L. & P.O. v. Russia* raises important issues under the right to respect for private life (Article 8 ECHR), taken alone and in conjunction with the prohibition of discrimination (Article 14 ECHR). We respectfully submit that this case provides an important opportunity for the Court to clarify standards in the area of the human rights protection of trans* persons, a group that continues to suffer institutionalized discrimination and stigmatization in many parts of Europe, including Russia. We invite the Court to extend its protective standards by including non-transsexual trans* persons in its case law, and to be mindful of its leading role in ensuring effective protection of human rights standards in the Council of Europe and – through the authority of its case law – across the globe.

In order to support our argumentation, this submission will first elaborate on the used terminology (1). Subsequently, two principal matters will be dealt with. First, we respectfully submit that the scope of the positive obligation of legal gender recognition³ under Article 8 ECHR needs to be extended, in order to include transgender persons (2). Second, we argue that the present case warrants several considerations in relation to Article 14 ECHR (3).

1. Terminology

1.1. Sex – gender identity

This section discusses the terminology that is used throughout this intervention. Since the terminology with which the law, science, and society in general address issues regarding a person's sexual identity is varied and inconsistent, a clear demarcation is required. A person's sexual identity consists of their biological sex (characteristics), gender identity and sexual orientation. Although society and the law tend to conflate these concepts, they are *distinct* and *not mutually dependent*. This intervention will make use of the definitions that were introduced by the Yogyakarta Principles +10.⁴ The Principles were adopted by international human rights experts in 2006 and updated in 2017 (hence the '+10') and apply international human rights law standards to the context of sex, sexual orientation and gender identity. Despite not being legally binding, the Principles have been cited by various international and European human rights actors, states legislatures and courts⁵ as a leading source of inspiration for the human rights protection of trans* persons. Besides proclaiming the rights that LGBTIQ+ persons enjoy, the Principles also provide definition of concepts such as 'sex (characteristics)' and 'gender identity'. According to the preamble to the Yogyakarta Principles:

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³ Legal gender recognition refers to the judicial or administrative possibility that the law offers to (trans*) persons to seek congruence between their experienced gender identity and their official sex, as assigned and registered by the state.

⁴ See <http://www.yogyakartaprinciples.org/principles-en/>.

⁵ See for instance CJEU 25 January 2018, C-473/16, para. 62.

- **‘Sex (characteristics)’** refers to each person’s physical features relating to sex, including genitalia, and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty;
- **‘Gender identity/expression’** 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, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism.

The present case deals with two transgender persons who applied for legal gender recognition, which – according to Russian law – is only open to post-operative transsexual persons. Since the distinction between ‘transgender’ and ‘transsexual’ is of paramount importance for this submission, and arguably for the human rights protection of all gender nonconforming persons, the next section will establish the meaning of these two concepts.

1.2. Trans* – transgender – transsexual – cisgender

The concepts ‘trans’ or ‘trans*’ are an umbrella term for all gender nonconforming persons, i.e. all persons whose gender identity/expression does not (always) (completely) match their assigned sex or the gender identity which society attaches to it.⁶ The umbrella term presupposes a spectrum of persons who (sometimes or always) live, or desire to live, in the role of a gender which is not the one designated to that person at birth. The spectrum – which shows endless variation in identities, expressions and practices – *inter alia* includes:⁷

- Transgender(ist) persons: individuals who live, or desire to live, their life performing a gender role that does not follow the socially expected one that is allegedly correlative to the sex assigned to them at birth. Transgender persons do not wish to undergo sex reassignment treatment (hormonal treatment and/or surgery) in order to create congruence between their gender identity and sex characteristics. However, some transgender persons undergo *some* forms of treatment on their body to express their self-defined gender, without going as far as sex reassignment;
- Transsexual persons: persons who mentally, socially and sexually identify as the gender opposite to the one allegedly related to their assigned sex registered at birth. Some, but not all, transsexual persons also experience severe mental distress because of the incongruence between their biological sex and their gender identity. This mental and emotional distress is referred to as ‘gender dysphoria’. Transsexual persons desire to undergo – as far as medically possible – sex reassignment treatment in order to have their sex characteristics aligned with their gender identity. One may distinguish between:
 - Pre-operative persons: persons who have not yet undergone sex reassignment surgery, but are willing to;
 - Post-operative: persons who have undergone sex reassignment surgery.

While all transsexual persons are trans*, not all trans* persons are transsexual. Indeed, the group of transgender persons – like the applicants in the present case – is much larger than the group of transsexual persons. Recent Belgian population research indicates that while the number of transgender persons amounts to 0.6-0.7% of

⁶ ‘Transgender’ is sometimes also used as an umbrella term for all forms of gender nonconformity.

⁷ The spectrum also includes genderqueer/non-binary persons: umbrella term for persons whose gender identity is neither male, nor female, or may identify as both male and female at one time, as different genders at different times, as no gender at all. The term also includes persons who dispute the very idea of (only two) gender(s). Genderqueer/non-binary persons therefore defy the dominant binary system of ‘male’/‘female’ gender identities in law and society.

the population, the number of transsexual persons lies at 0.05-0.1%.⁸ The conceptual difference between ‘transgender’ and ‘transsexual’ is therefore not only of theoretical importance, but is also crucial if the human rights of *all* gender nonconforming persons are to be protected. The following sections will make use of the terms ‘trans*’, ‘transgender’ and ‘transsexual’ as defined above. Since the applicants in the present case are transgender persons who do not question the male/female gender dichotomy, the situation of non-binary persons will not be dealt with in this intervention.

Persons whose gender identity is in congruence with their assigned sex are called cisgender persons.

2. The need to extend the positive obligation under Article 8 ECHR

With this submission, we respectfully invite the Court to extend the positive obligation concerning legal gender recognition under Article 8 of the Convention, in order to include transgender persons (who do not wish to undergo sex reassignment treatment) and transsexual persons who are unable to undergo sex reassignment treatment.⁹ This call is based on the abovementioned correct conceptual understanding of the different forms of gender nonconformity, and is in line with a growing European and global trend (discussed below) towards the full depathologisation of trans* persons in law and society.

2.1. Legal gender recognition under Article 8 ECHR

Over the last fifteen years, the European Court of Human Rights has continuously held that a person’s gender identity belongs to the personal sphere protected by Article 8 ECHR. Moreover, it regards gender identity as one of the most basic essentials of self-determination.¹⁰ In its landmark ruling in the case *Christine Goodwin v. United Kingdom* (Application no. 28957/95), the Court held that States have a positive obligation under Article 8 ECHR to foresee a procedure for legal gender recognition, yet left the matter of the appropriate means to implement this obligation to the State’s margin of appreciation. Since then, it has been asked to review the compatibility of a number of conditions for legal gender recognition set by the Contracting States.¹¹ Importantly, in its most recent trans* related case – *A.P., Garçon, Nicot v. France* –, the Court found that the requirement of the ‘irreversibility of the transformation of the bodily appearance’, i.e. treatment involving (a high risk of) sterility, violated Article 8 ECHR. However, the Court has not yet found a violation in the compulsory diagnosis of the ‘syndrome of transsexuality’¹² and/or compulsory sex reassignment treatment.¹³

We respectfully argue that the scope of this positive obligation to enact a procedure of legal gender recognition is under-inclusive; leading to a gap in the human rights protection of transgender persons. While the scope of the positive obligation established in the *Christine Goodwin* case requires adequate respect for the gender identity of (post-operative) transsexuals, it has hitherto not been extended to similarly require adequate respect for the gender identity of transgender persons. It is respectfully submitted that such under-inclusiveness can no longer be upheld, taking into account the fact that, as with post-operative transsexuals, transgender persons are confronted with “[a] conflict between social reality and law” which similarly places them in “an anomalous

⁸ The number of gender ambivalent (non-binary) persons even amounts to 1.9-2.2% of the population. See E. Van Caenegem, K. Wierckx, E. Elaut, A. Buysse, A. Dewaele, F. Van Nieuwerburgh, G. De Cuyper and G. T’Sjoen, “Prevalence of Gender Nonconformity in Flanders, Belgium”, *Archives of Sexual Behavior* 2015, Vol. 44(5), p. 1281-1287.

⁹ This submission will only focus on medical requirements concerning legal gender recognition. However, this is not to say that other conditions are not problematic from a human rights perspective.

¹⁰ ECtHR, *Van Kück v. Germany*, 35968/97, Judgment of 12 June 2003, para. 73.

¹¹ ECtHR, *L. v. Lithuania*, 27527/03, Judgment of 11 September 2007; *Hämäläinen v. Finland*, 37359/09, Judgment of 16 July 2014.

¹² ECtHR, *A.P., Garçon, Nicot v. France*, para. 144.

¹³ ECtHR, *Nuñez v. France*, 18367/06, Decision of 27 May 2008.

position, in which [they] may experience feelings of vulnerability, humiliation and anxiety” (*mutatis mutandis* *Christine Goodwin*, § 77). In the next sections, we will point out that this under-inclusiveness is at odds with various international developments. Moreover, we invite the Court to find that the State’s margin of appreciation in cases relating to gender identity is narrow. Last, we respectfully invite the Court to refine its terminology in cases related to trans* persons, in light of the clear conceptual differences between transgender and transsexual persons mentioned above.

2.2. International trend toward full depathologisation of trans* persons

Trans* persons, unlike people who are socially discriminated against on grounds like sex, race, ethnicity or disability, lack a particular international convention which obliges states to ensure that their human rights, and more specifically their right to equality and non-discrimination, are respected, protected and fulfilled. However, according to the Office of the UN High Commissioner for Human Rights, “protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards; the legal obligations of states to safeguard the human rights of LGBT people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights standards”.¹⁴ In recent years, several influential international human rights actors have clarified the scope of these human rights standards in the context of gender identity. It may be argued that these soft law instruments reflect the emerging existence of a right to the legal recognition of every individual’s gender identity, *solely on the basis of self-determination*. This claim is also supported by an increasing global trend in state practice.

Although the Court referred to various international instruments in its recent *A.P., Garçon, Nicot* judgment, it regrettably only deduced from these instruments that there is an agreement among human rights actors on the unacceptability of a(n) (implicit) condition of compulsory sterility for legal gender recognition (para. 125). Hence, the Court has limited the positive obligation regarding the legal gender recognition to (post-operative) transsexual persons, and therefore only a minority of the trans* community.¹⁵ However, we respectfully submit that the aforementioned instruments actually call for a total abolishment of *all forms of pathologisation* in the context of legal gender recognition, in order to include all trans* persons. The next sections will establish the most relevant sources that evidence the clear international trend toward the full depathologisation of trans* persons in the law.

2.2.1 *Yogyakarta Principles +10*

As mentioned above, the Yogyakarta Principles +10 have been a very influential source of inspiration in the field of LGBTIQ+ rights. Although the Court is yet to refer to the Principles, Judges Sajó, Keller and Lemmens already pointed out their relevance in their dissenting opinion in the case *Hämäläinen v. Finland*. For the purpose of this submission, Principles 3 and 31 are of particular importance.

On the basis of these principles, “everyone has the right to recognition everywhere as a person before the law. [...] Each person’s self-defined [...] gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. *No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity*” (Principle 3). States must ensure that “no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health,

¹⁴ Office of the United Nations High Commissioner for Human Rights, “Combatting Discrimination Based on Sexual Orientation and Gender identity”, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>.

¹⁵ ECtHR, *Christine Goodwin v. United Kingdom*, para. 90; *Hämäläinen v. Finland*, para. 59; *Y.Y. v. Turkey*, 14793/08, Judgment of 10 March 2015, para. 108; *A.P., Garçon, Nicot v. France*, para. 97-100.

marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender" (Principle 31).

The Yogyakarta Principles +10 thus denounce all forms of psycho-medical requirements in relation to the legal recognition of a person's self-defined gender identity.

2.2.2. Council of Europe and European Union

As the Court noted in its judgment in the recent case *A.P., Garçon, Nicot v. France* (para 74-77), the Committee of Ministers,¹⁶ the Parliamentary Assembly (PACE)¹⁷ and the Human Rights Commissioner of the Council of Europe¹⁸ have consistently adopted important guidelines with regard to conditions for legal gender recognition. For instance, the Human Rights Commissioner considers that the pathologisation of transgender persons "may become an obstacle to the full enjoyment of human rights by transgender people especially when it is applied in a way to restrict the legal capacity". He also called on member states to:

"Abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change."

PACE Resolution 2048(2015) not only qualifies *all* medical requirements for legal gender recognition as violations of fundamental rights, notably the right to private life and physical integrity (Article 8 ECHR), but also actively calls on member states to:

- *"develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record;"*
- *"abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws regulating the procedure for changing a name and registered gender."*

The Parliamentary Assembly affirmed this call in its recent Resolution 2191(2017):

"Simplify legal gender recognition procedures in line with the recommendations adopted by the Assembly in Resolution 2048(2015) and ensure in particular that these procedures are quick, transparent and accessible to all and based on self-determination".

The European Parliament has also condemned the "deplorable" pathologisation of transgender persons in its recent Resolution on promoting gender equality in mental health and clinical research.¹⁹ The Parliament held that:

"Transgender identities are not pathological, but are deplorably still considered mental health disorders, and most Member States request such diagnoses for access to legal gender recognition or transgender-related healthcare, even though research has shown that the 'gender identity disorder' diagnosis is a source of significant distress for transgender persons."

¹⁶ Council of Europe Committee of Ministers, *Recommendation (2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity*.

¹⁷ Council of Europe Parliamentary Assembly, *Resolution 1728(2010) on discrimination on the basis of sexual orientation and gender identity; Resolution 2048(2015) on discrimination against transgender people in Europe; Resolution 2191(2017) promoting the human rights of and eliminating discrimination against intersex people*.

¹⁸ Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity*, 2009.

¹⁹ European Parliament, *Resolution of 14 February 2017 on promoting gender equality in mental health and clinical research*.

2.2.3. UN (treaty) bodies

United Nations human rights treaty bodies, such as the Committee on Economic, Social and Cultural Rights (CESCR),²⁰ and the CEDAW Committee²¹ have also started to bring attention to the legal pathologisation of transgender persons in their country-specific concluding observations, raising concerns about the compulsory requirement for transgender persons to undergo surgical and/or hormonal treatment before legal gender recognition can be granted.

Moreover, in its 2015 “Free and Equal” campaign, the Office of the High Commissioner for Human Rights released a factsheet on the human rights protection of transgender persons, calling on states to:

“Legally recognize the gender identity of trans people in official documents through a simple administrative process based on self-identification without abusive requirements such as forced medical diagnosis, sterilization, treatment or divorce.”²²

2.2.4. State practice

In recent years, an increasing number of states worldwide have reformed their legal framework concerning gender recognition by abolishing medical requirements. Although the number of countries that allow for legal gender recognition *solely* on the basis of self-determination, i.e. without any form of psycho-medical requirement, is still limited, it may be argued that there is a clear trend towards abolishing not only compulsory sterility but also compulsory sex reassignment treatment (hormonal treatment and surgery) as minimum standards. Moreover, the most recent legal reforms abided by the requirements set in the abovementioned international soft law instruments.

Within the Council of Europe, this amounts to 19 countries:²³

- Full self-determination (*administrative* procedure, no medical requirements, such as diagnosis/assessment): Belgium (2017), Denmark (2014), Ireland (2015), Malta (2015), Norway (2016);²⁴
- Self-determination (*judicial* procedure, no medical requirements, such as diagnosis/assessment): France (2016), Greece (2017);
- No compulsory medical intervention required:²⁵ Germany (2011), the Netherlands (2013), Portugal (2010), Russia (2018), United Kingdom (2004);
- No compulsory surgical intervention required:²⁶ Croatia (2013), Estonia, Finland,²⁷ Iceland (2012), Italy (2015), Spain (2007), Sweden (2013).

2.3. The need for a narrow margin of appreciation

We respectfully submit that the Contracting States’ margin of appreciation in cases relating to gender identity needs to be narrow. We argue that this finding naturally results from the Court’s existing case law (1), the

²⁰ E.g. CmESCR on Germany, E/C.12/DEU/CO/5 (2011).

²¹ E.g. CmEDAW on Switzerland CEDAW/C/CHE/CO/4-5 (2016), on Slovakia, CEDAW/C/MNE/CO/2 (2016), p. 12 and on Montenegro, CEDAW/C/SVK/CO/5-6 (2017), p. 14.

²² OHCHR, Transgender, <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Transgender.pdf>.

²³ See <https://tgeu.org/trans-rights-map-2017/>.

²⁴ The Parliaments of Luxembourg and Portugal are currently also debating a bill that will introduce a procedure of legal gender recognition solely on the basis of self-determination.

²⁵ These countries require some form of psycho-medical assessment/diagnosis during the procedure of legal gender recognition.

²⁶ The remaining required medical intervention can be compulsory hormonal treatment.

²⁷ However, Finnish law still requires sterility.

abovementioned international trend towards full self-determination with regard to gender identity (2), and the fact that trans* persons form a particularly vulnerable group in society who have suffered considerable discrimination in the past due to their gender identity (3).

2.3.1. *The Court's existing case law*

The Court has already addressed the extent of the Contracting States' margin of appreciation in several cases relating to legal gender recognition. As mentioned above, it has continuously held that a person's gender identity belongs to the personal sphere protected by Article 8 ECHR. Moreover, it regards gender identity as one of the most basic essentials of self-determination.²⁸ In its recent judgment in *A.P., Garçon, Nicot v. France*, the Court even held that Article 8 ECHR holds "a right to self-determination, of which the freedom to define one's gender identity is one of the most essential elements" (para. 93). According to the Court, a person's gender identity is "an essential aspect of intimate identity of all persons, if not of their existence" (para. 123). In this light, the Court pointed out that "in the twenty first century, the right of transsexuals to personal development and to *physical and moral security in the full sense* enjoyed by others in society *cannot be regarded as a matter of controversy* requiring the lapse of time to cast clearer light on the issues involved".²⁹

However, while the Court held in *Christine Goodwin v. United Kingdom* that Article 8 ECHR generates the positive obligation to foresee a procedure of legal gender recognition, it has given the Contracting States a wide margin of appreciation with regard to the measures and conditions to secure this Convention right (para. 85). Conversely, in *A.P., Garçon, Nicot v. France*, the Court pointed out that medical requirements directly involving the individual's (right to) physical integrity require special consideration and thus a narrow margin of appreciation (para. 123). In this regard, the Court pointed out the impossible dilemma for transgender persons and held that conditioning the recognition of the gender identity of transgender persons on the realisation of a sterilising operation or treatment that they do not want to undergo, comes down to conditioning the full exercise of their right to respect for their private life under Article 8 of the Convention on the renouncement of the full exercise of their right to integrity under Article 8 and Article 3 of the Convention (para. 131).

We respectfully argue that the same reasoning necessarily applies to compulsory sex reassignment treatment (hormonal treatment and surgery), and all other forms of medical requirements, as these also involve – as with a condition of compulsory sterility for legal gender recognition– pitting the right to respect for one's gender identity against the right to respect for one's physical integrity, especially when persons are unwilling to undergo such requirements, as is the case for transgender persons. We therefore invite the Court to hold that the State's margin of appreciation in cases regarding gender identity is narrow, as it did in its existing case law.

2.3.2. *The international trend towards full depathologisation of trans* persons*

In its case law regarding the legal recognition of trans* persons, the Court has consistently taken into account the changing legal and social circumstances concerning gender nonconformity. Indeed, already in *Rees v. United Kingdom* (1986), it held that "the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and social developments" (para. 47).

In *Christine Goodwin v. United Kingdom* (para. 85) and *A.P., Garçon, Nicot v. France* (para. 124), the Court specifically referred to respectively the international trend towards legal gender recognition and the abolishment of the condition of sterility to find a need for a strengthened protection of trans* persons under

²⁸ ECtHR, *Van Kück v. Germany*, 35968/97, Judgment of 12 June 2003, para. 73 (own translation).

²⁹ ECtHR, *Christine Goodwin v. United Kingdom*, para. 90.

Article 8 ECHR. Moreover, the fact that an *increasing* number – yet not a majority –³⁰ of Contracting States reformed their legislation in a short period of time (*in casu* seven years) was of particular importance.³¹ We therefore respectfully invite the Court to similarly recognize the abovementioned clear international trend towards the *full* depathologisation of trans* persons in the law, and the clear move towards self-determination in recent reforms (2014-2018) of the national legal gender recognition frameworks by several Contracting States. It may thus be argued that the State’s margin of appreciation in cases regarding gender identity is narrow.

2.3.3. *Trans* persons as a particularly vulnerable group*

According to the Court’s case law, “if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, [...], then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.”³² We respectfully invite the Court to find that trans* persons form such a particularly vulnerable group in society, since they have been suffering considerable transphobia, i.e. discrimination, stigmatization and stereotyping on the basis of their gender identity, in Europe,

According to the seminal report by the Council of Europe Human Rights Commissioner on the human rights of trans* persons, “many transgender people live in fear and face violence in the course of their lives. This violence ranges from harassment, bullying, verbal abuse, physical violence and sexual assault, to hate crimes resulting in murder. Transphobia – understood as the irrational fear of, and/or hostility towards, people who are transgender or who otherwise transgress traditional gender norms – can be considered as one of the main causes of violence and intolerance that many transgender persons face”.³³ These findings were corroborated by the Council of Europe Parliamentary Assembly which held that “transgender persons face a cycle of discrimination and deprivation of their rights in many Council of Europe member states due to discriminatory attitudes and to obstacles in obtaining gender reassignment treatment and legal recognition of the new gender”.³⁴

Since prejudice and stigma towards a particular group in society have been indicators that have crucially informed the Court’s assessment of group vulnerability, we respectfully invite the Court to apply the concept of vulnerable groups, which it already used in relation to Roma,³⁵ people with disabilities,³⁶ people living with HIV³⁷ and asylum seekers,³⁸ to trans* persons.

The Court has already recognised the personal suffering and social stigmatisation of trans* persons in its case law. Indeed, in *Christine Goodwin v. United Kingdom*, it held that “the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law [...] cannot be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of *vulnerability*, humiliation and anxiety” (para. 77). In its recent judgment in *A.P., Garçon, Nicot v. France*, the Court pointed out that the psycho-pathologisation of trans* persons reinforces the stigmatisation

³⁰ ECtHR, *A.P., Garçon, Nicot v. France*, para. 71. At the time of the judgment, 22 Contracting States required sterilisation for legal gender recognition, whilst 18 States did not.

³¹ ECtHR, *A.P., Garçon, Nicot v. France*, para. 124.

³² E.g. ECtHR, *Alajos Kiss v. Hungary*, para. 42.

³³ Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity*, 2009, p. 14.

³⁴ Council of Europe Parliamentary Assembly, *Resolution 1728(2010) on discrimination on the basis of sexual orientation and gender identity*.

³⁵ ECtHR, *D.H. and others v. Czech Republic*, 57325/00, Judgment of 13 November 2007.

³⁶ ECtHR, *Alajos Kiss v. Hungary*, 38832/06, Judgment of 20 May 2010.

³⁷ ECtHR *Kiyutin v. Russia*, 2700/10, Judgment of 10 March 2011.

³⁸ ECtHR *M.S.S. v. Belgium and Greece*, 30696/09, Judgment of 21 January 2011.

of which they are victims (para. 138). We therefore invite the Court to find that the State's margin of appreciation in cases regarding gender identity is narrow.

3. The need to examine the cases under Article 14 jointly with Article 8 ECHR

To conclude this intervention, we submit that there is also a need to separately examine whether there has been a violation of the prohibition of discrimination in Article 14 ECHR, taken together with Article 8 ECHR, in addition to our arguments concerning Article 8 ECHR taken on its own. We respectfully argue that medical requirements in the context of legal gender recognition discriminate not only trans* persons in comparison with cisgender persons, but also transgender persons in comparison with transsexual persons. In this regard, we invite the Court to note the use of transphobic and therefore harmful, negative stereotypes about gender nonconformity as a justification for these medical requirements, which also raises issues concerning the Contracting States' positive obligations under Article 14 ECHR. Since we argued above that trans* persons form a particularly vulnerable group in society, their rights may only be restricted on the basis of "very weighty reasons".³⁹ Since trans* persons and transgender persons are discriminated on the basis of pervasive stereotypes in law and society, we respectfully argue that no "very weighty reasons" can be proven by the State.

3.1. Discrimination of trans* persons and transgender persons

3.1.1. *Discrimination of trans* persons vs. cisgender persons*

We respectfully submit that the discrimination of trans* persons in the law is essentially based on the cisnormative nature of the official registration of sex and gender, which occurs shortly after birth. On the basis of this cisnormative stereotype, it is commonly assumed that all persons who are born with 'typical' male sex characteristics (especially genitalia) will develop a male gender identity, and all persons who are born with 'typical' female sex characteristics will develop a female gender identity. Although this cisnormative logic is correct for the majority of the population (cisgender persons), a significant group of (trans*) persons will (sometimes) (partly) experience incongruence between this official registered identity and their self-defined gender identity. In many jurisdictions, these gender nonconforming persons will be able to apply for legal gender recognition, but only on the basis of invasive medical requirements, such as sex reassignment treatment (hormonal treatment and/or surgery). In other words, contrary to cisgender persons, trans* persons are placed before the impossible dilemma of choosing between their right to physical integrity and their right to have their gender identity recognized before the law,⁴⁰ based on a cisnormative, and therefore stereotypical logic. We submit that in this case, discrimination exists because the law fails to accommodate relevant differences among individuals. Since its seminal judgment in *Thlimmenos v Greece*, the Court has recognized that '(t)he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (para. 44). The situation of trans* persons is different in comparison to that of cisgender persons, in that their sex characteristics do not correspond to their gender identity. Therefore the application of the same legal conflation of sex and gender to these persons that applies to the majority, is discriminatory, as it is not based on any objective and reasonable justification. Moreover, we argue that it is highly relevant for the Court to name the above-described cisnormative stereotype that lies at the basis of this failure to differentiate.

³⁹ ECtHR 29 January 2013, no. 11146/11, *Horváth and Kiss v. Hungary*, para. 128.

⁴⁰ See ECtHR, A.P., *Garçon, Nicot v. France*, para. 132.

3.1.2. *Discrimination of transgender persons vs. transsexual persons*

In addition, we submit that there is discrimination of transgender persons in comparison with transsexual persons, in that similarly situated persons are treated differently. The relevant similarity is that both categories of persons experience incongruence between their sex at birth, and their gender identity. This is a problem that the law rightly seeks to solve. However, where such solution is only available to transsexual persons who are able and willing to undergo sex reassignment treatment, an unjustifiable distinction is operated among similarly situated persons. As a result, transgender persons, who are unwilling to undergo sex reassignment treatment (hormonal treatment and/or surgery), are excluded.⁴¹ Although this issue was already raised under Article 14 ECHR in *A.P., Garçon, Nicot v. France*, the Court did not find it necessary to address this point, given the violation of Article 8 ECHR (para. 158).

However, we respectfully submit that this finding fundamentally mischaracterized the inherent stereotypical and transphobic nature of the human rights violations that trans* persons in general, and transgender persons in particular, suffer when they are forced to comply with medical requirements for legal gender recognition, *a fortiori* when these requirements concern sex reassignment treatment (hormonal treatment and/or surgery). Indeed while the abovementioned figures show that the number of transsexual persons is considerable lower than the number of transgender persons, the latter continue to suffer from the stereotype that all gender nonconforming want to undergo (full) sex reassignment therapy to align their bodily characteristics with their gender identity. Moreover, it may be argued that the decision by the Court in *A.P., Garçon and Nicot v. France* is inconsistent with its finding that “being an element of personal identity, gender identity is fully covered by the right to respect for private life, which is provided by Article 8 of the Convention. This counts for all individuals” (para. 95).

For the reasons advanced under both 3.1.1. and 3.1.2., we invite the Court to find that the medical conditions for legal gender recognition are based on harmful, transphobic stereotypes regarding gender nonconformity and therefore violate Article 14 in conjunction with Article 8 ECHR.

3.2. Positive obligations of the State under Article 14 ECHR

Finally, the case at hand raises an issue in terms of positive obligations under Article 14 ECHR. Indeed States’ commitment to human rights means that they must facilitate a culture of acceptance and encourage tolerance and debate. The Court has already addressed the matter of positive obligations under Article 14 ECHR. In this regard, we draw attention to cases concerning Roma,⁴² whom the Court has considered to form a particularly vulnerable group in society (see *supra*). As mentioned above, given the considerable transphobia trans* persons continue to face in law and society, we have respectfully invited the Court to find that trans* persons also form a particularly vulnerable group in society.

We submit that existing negative stereotypes and discrimination against trans* persons constitute factual inequalities which the State can or must work towards to correct. Therefore, we argue, States are under a positive obligation under Article 14 ECHR to “use all available means to combat” transphobia and discrimination on the basis of gender identity, and to take measures to counteract the social exclusion of vulnerable groups, which includes trans* persons. This obligation includes the installment of a framework for legal gender recognition based on self-determination of gender identity.

⁴¹ Besides, not all transsexual persons are able or willing to undergo sex reassignment treatment, which can be based on medical and/or social grounds. Those who are not able or willing, are also unjustifiably excluded.

⁴² *D.H. and Others; Nachova and Others; Horváth and Kiss v. Hungary*