

**IN THE EUROPEAN COURT OF HUMAN  
RIGHTS**

**A.M. and Others v. Russia**  
(Application no. 47220/19)

**WRITTEN COMMENTS**  
Submitted jointly by  
Transgender Europe  
and  
ILGA Europe

9 July 2020

1. These written comments are submitted on behalf of Transgender Europe (TGEU) and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), pursuant to leave granted on 11 March 2020.<sup>1</sup> They are structured as follows. The first part presents information about transgender parenthood and research that dispels some of the myths and preconceptions that surround it. Nonetheless, historically States have sought to restrict transgender parenthood and interfere with family relationships, based on hetero-normative and transphobic assumptions. The second part describes broader international trends that contextualise the justifications invoked at the national level for restricting the applicant’s rights: depathologisation of trans identities, protection against discrimination based on gender identity and on the right to legal gender recognition (LGR). The third part examines national and international legal developments suggesting that the “best interests of the child” standard should be based on an individualised, contextualised inquiry into the facts, that balances the interests of all those involved, rather than provide a vehicle for negative preconceptions about trans parents.

I. Facts and myths on transgender parenthood

a) *Information on transgender parenthood*

2. Trans people, like cisgender people, have several possible pathways to parenthood - begetting biological children with or without the use of assisted reproduction, through gestational surrogacy, adoption, or step-parenthood/second-parent adoption. They commonly have children prior to their gender transition, but also, increasingly, after their gender transition, as countries gradually lift the restrictions on LGR, particularly with respect to sterilisation. Even sterile individuals may still retain some options for reproduction, subject to availability of knowledge, accessible healthcare providers and/or financial resources.<sup>2</sup> Reports of men giving birth have become increasingly common, triggering public debate.<sup>3</sup> Trans families are equally diverse, involving one parent, two parents or multiple parents; gay, lesbian or bisexual parents; parents who are, and parents who are not, legally-recognised or documented; parents living in marriage, registered or cohabiting partnerships. This is consistent with this Court’s statement to the effect “that there is not just one way or one choice when it comes to leading one’s family or private life.”<sup>4</sup>

3. Many trans parents live with children at any given time or place. A large

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<sup>1</sup> Taking into account the three-month extension granted by the Court as a result of the COVID-19 pandemic, the submission deadline is July, 10<sup>th</sup>.

<sup>2</sup> Through procedures such as embryo cryopreservation, oocyte cryopreservation and ovarian tissue cryopreservation (for trans men), and sperm cryopreservation, surgical sperm extraction and testicular tissue cryopreservation (for trans women), see Chloe De Roo et al., *Fertility options in transgender people*, *International Review of Psychiatry*, 2016, VOL. 28, NO. 1, 112–119.

<sup>3</sup> One of the first documented cases in the USA is that of Thomas Beatie, a trans man who gave birth to three children, which ended up before the Arizona Court of Appeal (*Beatie v. Beatie*, 2014 Ariz. App. LEXIS 156, 2014 WL 3953199 Arizona Court of Appeals, August 13, 2014). Also see MacDonald et al. *Transmasculine individuals’ experiences with lactation, chestfeeding, and gender identity: a qualitative study*, in *BMC Pregnancy and Childbirth*, 2016; Alexis D. Light et al., *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, *Obstet Gynecol* 2014.

<sup>4</sup> *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 67, 20 June 2017.

LGBTI survey conducted in the EU<sup>5</sup> found that 77 % of 140,000 respondents live with someone else: 67 % live with their partners, while 12 % of all respondents also live with children belonging to one of the partners. Overall, 14 % of all respondents with a partner say that they are raising a child, including 19 % of trans persons. 70 % of trans respondents who share guardianship of their or their partner's child say that both partners are legal guardians. Other studies approximate that 25–49% of the trans population have children.<sup>6</sup> Although the present brief focuses on family dissolution, it is important to emphasize that most trans people with children live in happy, fulfilling and uncontested relationships.

4. On the few occasions that it has encountered trans families with children, the Court factored their wellbeing in its examination. *Hämäläinen v. Finland* was about a trans woman who was married and who fathered a daughter prior to undergoing gender-affirming medical treatment and applying for LGR. She complained that she was required to divorce before being issued with documents that reflected her gender identity. The Court rejected her claims, but in doing so it emphasized that a registered partnership scheme was available that would replace marriage and that sufficiently protected the applicant's relationship with her infant daughter.<sup>7</sup> The main applicant in *X, Y and Z v. United Kingdom*, a trans man, complained about the authorities' refusal to register him as father to his long-standing partner's daughter, born by artificial insemination by donor. From the outset, the Court decided that the applicants' ties qualified as protected "family life."<sup>8</sup> While declining to find a violation of the Convention, the Court emphasized that the applicant was not prevented in any way from acting as a father in the social sense: he lived together with his daughter, he provided her with emotional and financial support, she used his surname and he exercised full joint parental responsibility.<sup>9</sup> The applicant in *P.V. v Spain*, a trans woman, had been married and had a child before transitioning.<sup>10</sup> After separation, the applicant's former wife lodged proceedings with a view to removing her parental authority and visitation rights, because she took hormones and wore women's clothes. National courts mostly rejected the request as unfounded, taking the view that the applicant had not neglected her parental duties, and only permitted a partial and temporary restriction on the visitation rights due to her "emotional instability." The Court dismissed the applicant's Article 14 claim noting that she had not been deprived of all contact and that the system of visits had eventually been expanded.

5. Studies<sup>11</sup> have conclusively disproved the fears of 'contagion' in transgender families, in terms of children adopting atypical gender behaviour or gender identity,

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<sup>5</sup> EU FRA, *A long way to go for LGBTI equality*, 2020, p. 29-30.

<sup>6</sup> Myrte Dierckx et al. (2015), *infra* note 16, p. 2.

<sup>7</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, §§85-86, ECHR 2014. Compare and contrast with pre-*Goodwin* Commission decision in the case *L.F. v. Ireland*, no. 28154/95, 2 July 1997.

<sup>8</sup> *X, Y and Z v. United Kingdom*, 22 April 1997, Reports of Judgments and <sup>[SEP]</sup>Decisions 1997-II, §36-37.

<sup>9</sup> *Idem*, §50.

<sup>10</sup> *P.V. v. Spain*, no. 35159/09, 30 November 2010.

<sup>11</sup> This account is based on several meta-analyses: Myrte Dierckx et al. (2015), *Families in transition: A literature review*, International Review of Psychiatry; Rebecca L. Stotzer et al., *Transgender Parenting: A Review of Existing Research*, Williams Institute, 2014, Trish Hafford-Letchfield et al., *What do we know about transgender parenting?: Findings from a systematic review*, Health Soc Care Community. 2019;27:1111–1125; Myrte Dierckx et al., *Resilience in Families in Transition: What Happens When a Parent Is Transgender?*, 66 FAM. REL. 399, 399, 403, 408 (2017); Carla A. Pfeffer et al., *Transgender-Parent Families*, in Abbie E. Goldberg and Katherine R. Allen (eds.), *LGBTQ-Parent Families: Innovations in Research and Implications for Practice*, Spriger, 2<sup>nd</sup> 2020.

or of an impact on developmental milestones.<sup>12</sup> A Belgian study,<sup>13</sup> based on in-depth interviews with minor children and their parents (trans and cisgender), found that although gender transition can be a “challenging and emotional process for the entire family”, most children “did not experience their parent’s gender transition as a painful loss.” This was often due to the various protective processes developed by the family, including family continuity and communication, the acceptance of a partner, and reflection and analysis from both the parent and child regarding the meaning of transition to set them at greater ease.

6. The majority of transgender parents questioned in multiple studies reported that relationships with their children were generally good or positive, including after “coming out” or transitioning.<sup>14</sup> Several variables may play a role during difficult gender transitions, including the age of children (younger children seem more accepting), the relationship between parents, even when they are separated, and the existence of social stigmatisation.<sup>15</sup> Both children and parents often experienced a lack of trans or trans-friendly and knowledgeable therapists, a lack of support groups and having social service needs related to childcare and networking with other parents.<sup>16</sup> Besides challenges, some research suggested that transgender families provide a beneficial environment for accepting differences and embracing diversity.<sup>17</sup>

*b) Restrictions on transgender people’s reproductive and family rights*

7. Historically, States sought to control transgender people’s reproductive rights and disrupt parent/child relationships through legal restrictions and court practice, underpinned by hetero-normative and transphobic assumptions. The sterilisation requirement, motivated by a concern for preserving traditional gender roles, used to be the norm across Europe and still is the law in 13 States. Sweden used to have in place a ban on saving own reproductive material in addition to the sterilization requirement,<sup>18</sup> while other countries prevented trans individuals with children from accessing gender recognition procedures.<sup>19</sup> Married trans people are often required to end their marriage before being able to rectify their identification documents. The United Kingdom makes LGR in the case of married trans people contingent on spousal consent.<sup>20</sup> These requirements may fuel family disagreement during an already challenging transition period and provide the cisgender spouse with the upper

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<sup>12</sup> Myrte Dierckx et al. (2015), p. 2-3; supra note 16.

<sup>13</sup> Myrte Dierckx et al. (2017), p. 11, supra note 16.

<sup>14</sup> See Rebecca L. Stotzer et al., p. 9-10 or Trish Hafford-Letchfield et al., p. 1119-1120.

<sup>15</sup> Myrte Dierckx et al. (2015), p. 2-3. Similar outcomes reported in or Trish Hafford-Letchfield et al., p. 1119-1120.

<sup>16</sup> Rebecca L. Stotzer et al., p. 12, Myrte Dierckx et al. (2017), p. 3.

<sup>17</sup> Rebecca L. Stotzer et al., p. 12.

<sup>18</sup> Jenny Gunnarsson Payne & Theo Erbenius (2018) *Conceptions of transgender parenthood in fertility care and family planning in Sweden: from reproductive rights to concrete practices*, *Anthropology & Medicine*, 25:3, 329-343,

<sup>19</sup> In Ukraine, Order No. 60/3 February 2011 of the Health Ministry, withdrawn on 31 December 2016, automatically disqualified trans people with minor children from LGR. In Japan, original statutory provisions, upheld by the Supreme Court in 2007, required trans people applying for LGR to be childless, justified with the need to prevent ‘disturbance of the family order’ and potential ‘harm for children’ as well as Japan’s unique customs, traditions and family structures. There was partial reform in 2008 and now only the absence of minor children is required, Jens M. Scherpe (ed.), *The legal status of transsexual and transgender persons*, Intersentia, 2015, p. 638.

<sup>20</sup> For example England and Wales, under the Legal Gender Recognition Act 2004.

hand in case of a dispute, with access to children frequently at stake.

8. Courts in some countries used to routinely void marriages involving trans partners based on the doctrine that sex is an immutable biological category that is fixed at birth. This doctrine was introduced in the infamous '70s British judgment *Corbett v. Corbett* that defined the law for several decades until finally displaced by this Court's *Christine Goodwin*<sup>21</sup> judgment, which, in turn, resulted in the adoption of the Gender Recognition Act 2004. The jurisprudence built on *Corbett* served as a pretext for severing contact between trans parents and their children in many cases, as marriages voided extinguished any rights of custody or visitation. Furthermore, there is widespread discrimination in child custody disputes, based on outdated and unscientific stereotypes around transgender parenthood.<sup>22</sup>

## II. Relevant trends on transgender rights

### a) Depathologisation

9. Pathologisation, which is based on the pre-conceived idea that trans identities are inherently disordered, subverts an essential aspect of human personality and leads to serious human rights violations.<sup>23</sup> In 2016, several regional and global international human rights mechanisms issued a joint statement calling for an urgent end to the pathologisation of trans adults and children, by reforming medical classifications and adopting measures to prevent all forms of forced treatment and procedures affecting the people in question.<sup>24</sup> The group noted that pathologisation was one of the root causes behind widespread human rights violations and an obstacle to overcoming negative attitudes, stereotypes, and the barriers preventing the realisation of their rights. In particular, pathologisation serves as a justification for imposing unwanted medical treatments, hindered access to gender-affirming treatments and to LGR, contributed to marginalisation and exclusion in education, health, employment and housing among other areas and was conducive to violence.

10. The Inter-American Court of Human Rights (IACtHR) noted that medical or psychological certification of gender identity runs counter to the principle of self-determination and that of the free development of one's personality.<sup>25</sup> Certification pre-requisites are invasive, call into question the person's identity, while resting on

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<sup>21</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.

<sup>22</sup> Myrte Dierckx et al. (2017), *infra* note 16, p. 2.

<sup>23</sup> OHCHR, *Living Free and Equal: What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, 2016, pp. 74-75; Joint statement of United Nations and regional human rights experts, "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness", 17 May 2016; Reports of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: A/73/152, 2018, § 10-16 and A/HRC/35/36, 2017, § 58.

<sup>24</sup> "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness" For International Day against Homophobia, Transphobia and Biphobia - Tuesday 17 May 2016, available here <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>.

<sup>25</sup> I/A Court H.R., *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, available here (in English): [http://www.corteidh.or.cr/docs/opinion/es/seriea\\_24\\_eng.pdf](http://www.corteidh.or.cr/docs/opinion/es/seriea_24_eng.pdf), § 127 et seq.

the assumption that having an identity contrary to the sex assigned at birth is inherently pathological, and perpetuate the prejudices associated with the gender binary. The World Professional Association for Transgender Healthcare (WPATH) emphasised that “the expression of gender characteristics, including identities, that are not stereotypically associated with one’s assigned sex at birth is a common and culturally-diverse human phenomenon which should not be judged as inherently pathological or negative.”<sup>26</sup> “Gender identity disorder” or equivalent diagnoses contribute to the stigmatisation and social exclusion of trans people, without contributing to their physical or mental wellbeing.<sup>26</sup>

11. In 2019, the World Health Organisation (WHO) amended the International Classification of Diseases (ICD), by removing all trans-related diagnoses from the mental health chapter and opening a new chapter on “Conditions related to Sexual Health,” that includes gender incongruence<sup>27</sup>. The new chapter is intended to facilitate access to medical treatment and cost coverage for those trans people who wish to undergo such therapies, while recognising that being transgender is not a mental health condition. The WHO explained that “trans-related and gender diverse identities are not conditions of mental ill health, and classifying them as such can cause enormous stigma.”<sup>28</sup> The new version of the authoritative manual, ICD-11, will be implemented at the national level from January 2022. These changes deprive pathologisation of trans identities of its ‘scientific’ justification.

b) *Gender identity as a protected ground under non-discrimination law*

12. The third party interveners submit that trans people qualify as “a particularly vulnerable group in society, whose members have suffered considerable discrimination in the past”, and should therefore be afforded strict protection under Article 14. Studies, reports, position papers and other research, including by the Parliamentary Assembly<sup>29</sup> and the Commissioner for Human Rights,<sup>30</sup> consistently indicate that trans people suffer from disproportionately high levels of violence, harassment and discrimination in all fields of life. The above-mentioned 2020 FRA LGBTI survey indicates that most (60%) trans respondents are ‘rarely’ or ‘almost never’ open compared to 40% of gay men and 35% of lesbian women. Over a half of trans people have been discriminated against over the last year, compared to 39% of lesbian women and 32% of gay men. Trans teenagers suffer much more discrimination than their lesbian, gay or bisexual peers. A higher proportion of trans people felt discriminated at work in 2019 compared to 2012. The trans community

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<sup>26</sup> WPATH *De-psychopathologisation Statement*, 26 May 2010. The WPATH publishes the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SoC), which outline the treatment protocols for gender reassignment treatment, “based on the best available science and expert professional consensus”. The latest version from 2011 is available here: <http://www.wpath.org/>.

<sup>27</sup> World Health Organisation, ICD-11 for Mortality and Morbidity Statistics (ICD-11 MMS) 2018 version, available here: <https://icd.who.int/browse11/l-m/en>. Also see “WHO releases new International Classification of Diseases (ICD 11)”, 18 June 2018, available here: [https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-\(icd-11\)](https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-(icd-11)).

<sup>28</sup> WHO/Europe brief – transgender health in the context of ICD-11: <http://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/who-europe-brief-transgender-health-in-the-context-of-icd-11#402873>.

<sup>29</sup> Parliamentary Assembly, *Discrimination against transgender people in Europe: Report*, 2015.

<sup>30</sup> Commissioner for Human Rights, *Human Rights and Gender Identity*, 29 July 2009.

suffers more harassment and assaults than their lesbian, gay and bisexual peers. The TGEU Trans Murder Monitoring Project,<sup>31</sup> which has been documenting thousands of murders across the world, found that trans and gender-diverse people are victims of horrifying hate violence, including extortion, physical and sexual assaults, and murder, which often go unreported.

13. Gender identity is protected under Article 14, although the language used by the Court has been uneven. In *P.V. v. Spain*, the Court stated that Article 14 “undoubtedly” covered “transsexuality”.<sup>32</sup> In *Identoba and others v. Georgia*, the Court mentioned in passing that Article 14 “duly covers questions related to sexual orientation and gender identity.”<sup>33</sup> In *Hämäläinen*, the Court appeared to suggest that gender identity should be encompassed within the grounds of “gender or sexual orientation” and accordingly that strict scrutiny would have been called for.<sup>34</sup> The *Convention on Preventing and Combating Violence against Women* (‘the Istanbul Convention’) must be implemented without discrimination based on gender identity, among other grounds.<sup>35</sup> The Committee of Ministers<sup>36</sup> and the Parliamentary Assembly<sup>37</sup> adopted documents urging Member States to combat discrimination based on gender identity in all areas of life.

14. Transgender people are also protected under EU gender equality legislation. In 1996, the CJEU held that discrimination against people who intend to undergo, are undergoing and have undergone gender reassignment may amount to sex discrimination.<sup>38</sup> *P. v. S. and Cornwall County Council* concerned a trans person who had been dismissed from work for having proposed to undergo gender reassignment treatment. The CJEU reasoned that, considering “its purpose and the nature of the rights which it seeks to safeguard,” the scope of the directive in question “cannot be confined to discrimination based on the fact that a person is of one or other sex.” Therefore, “such discrimination is based, essentially, if not exclusively, on the sex of the person concerned.” Those findings were reiterated, with some variation, in three other cases: *K.B.*,<sup>39</sup> concerning the access of the trans partner to a survivor’s occupational pension, *Richards*,<sup>40</sup> concerning the access to a statutory retirement pension, and *MB*, concerning the access of a married trans woman to a statutory

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<sup>31</sup> According to date available on the website of the project, <http://transrespect.org/en/>.

<sup>32</sup> *P.V. v. Spain*, no. 35159/09, § 30, 30 November 2010.

<sup>33</sup> *Identoba and Others v. Georgia*, no. 73235/12, § 96, 12 May 2015. Also *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 113, 14 January 2020.

<sup>34</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014.

<sup>35</sup> *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Articles 3 and 4§3.

<sup>36</sup> *Rec. 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*, 31 March 2010, Section I.A.

<sup>37</sup> Parliamentary Assembly, *Discrimination against Transgender people in Europe*, Resolution 2048(2015), §6.1.

<sup>38</sup> CJEU, Case C-13/94 *P. v S. and Cornwall County Council* [1996]. The notion of ‘gender identity’ is expressly mentioned in EU law: *Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime*. Preamble, §9; *Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, [2011], Article 10(1)(d).

<sup>39</sup> CJEU, Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004].

<sup>40</sup> CJEU, Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006].

retirement pension.<sup>41</sup>

15. UN Treaty Bodies routinely refer to gender identity as a protected characteristic.<sup>42</sup> In *G. v. Australia*, on the divorce requirement for the purposes of LGR, the Human Rights Committee (HRC) stated that “the prohibition against discrimination under Article 26 [of the ICCPR] encompasses discrimination on the basis of marital status and gender identity, including transgender status.”<sup>43</sup> Gender identity and gender expression are protected grounds under the American Convention on Human Rights, with any differential treatment based on these grounds subject for strict scrutiny.<sup>44</sup> In a far-reaching judgment, the US Supreme Court has recently held that transgender people are covered by the prohibition of sex discrimination in the field of employment under Title VII of the 1964 Civil Rights Act.<sup>45</sup>

c) *The right to legal gender recognition*

16. The Court has established that gender identity is a fundamental personal characteristic and a basic attribute of self-determination that comes within the scope of the right to respect for private life.<sup>46</sup> Gender identity is “one of the most basic essentials of self-determination”<sup>47</sup> and the expression of a “right to sexual self-determination.” The Parliamentary Assembly<sup>48</sup> and the Commissioner for Human Rights<sup>49</sup> have also affirmed the right to gender self-determination. The IACtHR noted that gender identity is an expression of the possibility that every human being should have “to self-determine and freely choose the options and circumstances that give meaning to their existence, according to their own convictions.”<sup>50</sup>

17. In *A.P., Garçon and Nicot v. France*, the Court ruled that the requirement to undergo sterilisation or treatment involving a very high probability of sterility as a precondition to LGR was in breach of the right to respect for private life.<sup>51</sup> In *Transgender Europe and ILGA-Europe v. Czech Republic*, the European Committee for Social Rights declared the forced sterilisation requirement to be in breach of Article 11 of the Social Charter on the right to protection of health, based on similar reasoning.<sup>52</sup> In 2018, the CJEU held that requiring a trans woman to divorce before being recognised in her inner gender identity, a necessary pre-condition for becoming eligible for a retirement pension from the statutory age available to women,

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<sup>41</sup> CJEU, Case C-451/16, *MB v. Secretary of State for Work and Pensions* [2018].

<sup>42</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association: Kirichenko K, Ihler M. *United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics: Annual Report 2018* (Geneva: ILGA World, February 2020).

<sup>43</sup> HRC, *G. v. Australia*, Communication no. 2172/2012, 17 March 2017, §7.12-7.15.

<sup>44</sup> IACtHR, Advisory Opinion OC-24/17, supra note 25, §64-81.

<sup>45</sup> *Bostock v. Clayton County*, Georgia [2020]

<sup>46</sup> *Van Kück v. Germany*, no. 35968/97, §56 and 75, ECHR 2003-VII.

<sup>47</sup> *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).

<sup>48</sup> Resolution 2048 (2015), *Discrimination against transgender people in Europe*, §6.2.1.

<sup>49</sup> See for example the Commissioner’s statement of 22 October 2015, in which he “encouraged member states to follow the current European trend towards recognising the self-determination of trans people regarding their gender.” Annual Activity Report 2015, 14 March 2016, p. 30.

<sup>50</sup> IACtHR, Advisory Opinion OC-24/17, supra note 25, §§85-101 and particularly §93.

<sup>51</sup> *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, 6 April 2017.

<sup>52</sup> European Committee of Social Rights, *Transgender Europe and ILGA-Europe v. the Czech Republic*, complaint no. 117/2015, 15 May 2018.

constituted discrimination based on sex.<sup>53</sup> An increasing number of Council of Europe members, currently eleven, have in place LGR legislation based on self-determination.<sup>54</sup>

18. Council of Europe standards support the principle that a trans person's officially recognized gender identity should be determinative of all their rights and obligations. The Committee of Ministers called on States to "take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life."<sup>55</sup> In *Christine Goodwin*, the Court remarked that although the legal changes envisaged with respect to LGR had significant "repercussions" in terms of birth registration, access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance, these were "far from insuperable." The Court was unable to identify any specific 'hardship or detriment' flowing from LGR being made available and stated that "society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."<sup>56</sup> The Court clarified in its case-law that LGR applies equally for the purposes of marriage<sup>57</sup> and gendered pension eligibility requirements.<sup>58</sup>

19. The advances outlined above are based on the recognition that trans people should not have to face discriminatory consequences after choosing to live in accordance with their gender identity or because they underwent gender-affirming medical treatment. After all, the Court has affirmed 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."<sup>59</sup> For example, the *A.P., Garçon and Nicot v. France* judgment was predicated on the finding that trans people faced an "impossible dilemma" in being forced to choose between their right to bodily integrity and their right to gender identity recognition.<sup>60</sup> Notwithstanding the outcome in *Hämäläinen*, based on a particular set of facts, the dissenters in that judgment made a similar point, that "it is highly problematic to pit two human rights – in this case, the right to recognition of one's gender identity and the right to maintain one's civil status – against each other." The above-mentioned CJEU *P v. S* judgment is based on a

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<sup>53</sup> CJEU, Case C-451/16, *MB v. Secretary of State for Work and Pensions* [2018].

<sup>54</sup> Denmark (2014), Malta (2015), Ireland (2015), Norway (2016), Luxembourg (2018), Iceland (2019) and some regions in Spain have legislation based purely on self-determination. While France (2016), Belgium (2017), Greece (2017) and Portugal (2018) do not require any sort of medical certification for the purposes of LGR, they have other, non-medical requirements or formalities, such as judicial filters, single status or age. See the TGEU Trans rights Europe & Central Asia index 2020, here: <https://tgeu.org/trans-rights-europe-central-asia-index-2020-indicators-criteria/>.

<sup>55</sup> 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, 31 March 2010, §21.<sup>[SEP]</sup>

<sup>56</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §91, ECHR 2002-VI. The Court has recently restated the same principle as follows: "states are required, in accordance with their positive obligation under Article 8, to recognize the change of gender undergone by post-operative transsexuals through, *inter alia*, the possibility to amend the data relating to their civil status, and the ensuing consequences," *Hämäläinen v. Finland* [GC], no. 37359/09, §68, ECHR 2014.

<sup>57</sup> *Idem*, §103.

<sup>58</sup> *Grant v. the United Kingdom*, no. 32570/03, §43, ECHR 2006-VII.

<sup>59</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §52, ECHR 2002-VI.

<sup>60</sup> *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §132, 6 April 2017.

similar insight, that trans people should not be forced to choose between presenting in accordance to their gender identity and keeping their job. The same principle should apply in the family life sphere, in the sense that trans people should not suffer any detriment as a result of living in accordance with their gender identity, a right that everybody else is otherwise taking for granted.

### III. Discrimination based on gender identity in relation to parental rights

20. This Court has developed clear principles with respect to custody decisions and access to children. The right of parents and children to enjoy each other's company subsists even if the relationship between the parents is broken.<sup>61</sup> The best interests of the child are a primary consideration in this area, potentially overriding parental rights in case of conflict. Nonetheless, there is an assumption that maintaining the child's ties with their family serves their best interests, unless the family has proved particularly unfit. Family ties may only be severed in very exceptional circumstances. Everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. In that sense, States have a positive obligation to adopt specific measures designed to facilitate contact and "reconcile the conflicting interests of the parties," including by providing mediation services, addressing communication barriers<sup>62</sup> or helping persons in difficulty.<sup>63</sup>

21. Strict scrutiny applies to restrictions on parental rights of contact, which may lead to the parent-child relationship being effectively curtailed. Such restrictions require an in-depth examination of the entire family situation and a whole series of factors, in particular factors of a factual, emotional, psychological, material and medical nature."<sup>64</sup> This Court has been willing to interrogate restrictions couched in the high language of the best interests principle, which were in fact based on stereotypes and lacked evidence of actual harm. In a case involving a Jehovah's Witness parent, the Court criticised domestic courts for "ruling *in abstracto* and on the basis of general considerations, without establishing a link between the children's living conditions with their mother and their real interests."<sup>65</sup> In *Y.I. v. Russia*, the Court stated that "the applicant's drug addiction appears to have been the main, if not the only, ground for depriving her of parental authority" and that the authorities "did not assess the impact which the children's separation from their mother [...] might have on their well-being."<sup>66</sup> In *Vojnity v. Hungary*, the Court pointed out that "there is no evidence that the applicant's religious convictions involved dangerous practices or exposed his son to physical or psychological harm."<sup>67</sup> In *Cința v. Romania*, the Court concluded that "the applicant was perceived as a threat because of his mental illness without further consideration to the concrete circumstances of the case and the family situation."<sup>68</sup>

22. The Court has already dismissed as unscientific the Russian authorities'

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<sup>61</sup> *Kacper Nowakowski v. Poland*, no. 32407/13, § 70-75, 10 January 2017.

<sup>62</sup> *Idem*, §87-88, 95.

<sup>63</sup> *Y.I. v. Russia*, no. 68868/14, § 87, 25 February 2020.

<sup>64</sup> *Idem*, §78.

<sup>65</sup> *Palau-Martinez v. France*, no. 64927/01, § 42, ECHR 2003-XII.

<sup>66</sup> *Y.I. v. Russia*, no. 68868/14, § 90, 93, 25 February 2020.

<sup>67</sup> *Vojnity v. Hungary*, no. 29617/07, § 38, 12 February 2013.

<sup>68</sup> *Cința v. Romania*, no. 3891/19, § 74, 18 February 2020

concerns about exposing children to “gay propaganda”, as well as their reliance on majoritarian preferences in order to justify differential treatment.<sup>69</sup> The violation of Article 14 in *Salgueiro* was predicated on “a distinction based on considerations regarding the applicant’s sexual orientation,” namely the applicant living with another man, homosexuality being an “illness” or normative views about the environment that is suitable for raising children.<sup>70</sup> In *E.B. v. France*, an adoption case, the Court considered veiled references to the applicant’s homosexuality, such as that the child would lack of a “paternal” reference, to constitute evidence of discrimination.<sup>71</sup> For its part, the Parliamentary Assembly adopted in 2018 a resolution that asked States to “protect the rights of parents and children in rainbow families without discrimination based on [...] gender identity,” including with respect to parental authority.<sup>72</sup>

23. Similar considerations appear in the IACtHR judgment *Karen Atala v. Chile*, concerning the denial of custody to a lesbian mother, motivated by her sexual orientation. The IACtHR pointed out that “the determination of the child’s best interest in cases involving the care and custody of minors must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven damage or risks to the child’s well-being and not those that are speculative or imaginary.” It therefore followed that “speculations, assumptions, stereotypes, or generalized considerations regarding the parents’ personal characteristics or cultural preferences regarding the family’s traditional concepts are not admissible.”<sup>73</sup> The IACtHR reasoned that it was impermissible to justify a differential treatment by reference to the risk of social discrimination as States had an obligation to “confront intolerant and discriminatory expressions in order to prevent exclusion or the denial of a specific status.”<sup>74</sup>

24. British courts have recently examined a widely publicized case that featured prominently the question of whether social discrimination could justify denying visitation rights to a trans woman and that involved a family belonging to an ultra-Orthodox Jewish community. The claimant, a trans woman who had been married with five children, was excluded from the community after transitioning to her inner gender identity and denied access to her children. She made an application for direct contact, which was initially rejected based on fears that the children would be ostracized from their community.<sup>75</sup> However, this decision was reversed on appeal, based on several considerations. First, the Court of Appeal expressed doubts that social animus, without greater justification, could suffice to terminate all direct contact between parent and child. Second, the court was concerned that not enough attempts were made to enforce direct contact before terminating contact. Third, the human rights implications of the decision had not been sufficiently considered.<sup>76</sup>

25. A systematic study of American court decisions on child custody and

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<sup>69</sup> *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 70, 20 June 2017.

<sup>70</sup> *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 36, ECHR 1999-IX.

<sup>71</sup> *E.B. v. France* [GC], no. 43546/02, 22 January 2008.

<sup>72</sup> Parliamentary Assembly, Resolution on “Private and family life: achieving equality regardless of sexual orientation,” 10 October 2018, 4.5.

<sup>73</sup> IACtHR, *Atala Riffo and daughters v. Chile*, judgment of February 24, 2012, §109.

<sup>74</sup> *Idem*, § 119.

<sup>75</sup> *J v B and the Children (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4.

<sup>76</sup> *In the Matter of M (Children) (hereinafter ‘Re M’)* [2017] EWCA Civ 2164

visitation in cases involving trans parents finds that in the past trans parents used to be removed from custody or visitation rights based on their status as such, which carried a presumption of harm.<sup>77</sup> However, manifest discrimination has more recently morphed into a nexus test that links the best interests of the child to fears and stereotypes tied directly to the parent’s status, leading in effect to the same outcome. According to the study, courts systematically cite the following harms to justify restricting trans parental rights: the fear of contagion of gender nonconformity; the parent’s exercise of the supposedly-volitional “choice” to transition or express their gender, including presumptions of selfishness and distraction; a presumption of instability; the specter of an inherent connection to sexuality; a child’s (potential) anxiety around transition and loss; and the risk of stigma from being associated with a trans person. To root out discrimination from these cases, the study proposed to “expressly bar from considering specific illegitimate factors that are frequently used as stand-ins for transgender status,” while permitting “consideration of every other factor relevant to a child’s well-being.”

#### IV. Conclusion

26. For the reasons set out above, the third party interveners submit that decisions on child custody or access rights for transgender parents should be based on an individualised analysis of factors that are genuinely important to the child’s well-being, rather than on negative preconceptions and myths about transgender parents.

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<sup>77</sup> Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593 (2019).