

## Transsexual Nongovernmental Organisations Supporting Transsexuals' Marriage Rights

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### Abstract

*Transsexuals suffer particular limitations in their marriage rights, because of their gender identity. Transsexual issues are also objects of less attention, if compared with lesbian and gay issues, within organisations dealing with lesbian, gay, bisexual, transsexual and intersexual (LGBTI) rights. As a consequence, transsexuals tend to organise themselves in special “transsexual organisations”, to better address their very specific problems. The paper analyses the case study of the organisation Transgender Europe, which supported the applicant in *Hämäläinen v Finland* before the European Court of Human Rights. The research shows that even an organisation focused on transsexuality failed in effectively addressing transsexuals' marriage rights.*

**Keywords:** Transsexual, marriage, divorce, NGOs, ECtHR

### 1. Introduction

In a message sent to the 5th Annual European Transgender Council,<sup>1</sup> former United Nations High Commissioner for Human Rights Navanethem Pillay noted that transsexual individuals suffer particular discriminations because of their gender identity (“The ‘T’ in LGBT should never be silent,” 2014). In numerous countries, transsexuals have no right to transit toward their preferred gender (United Nations High Commissioner for Human Rights, 2011, para. 71). Moreover, when they are allowed to, they suffer limitations on their human rights; they are required to be unmarried (or divorced) and sterile. The requirement of unmarried or divorced status is in conflict with transsexuals' right to private life (Agius, Köhler, & Ehrt, ILGA-Europe and Transgender Europe (Organization), 2011, p. 29), while the forced sterilisation obligates them to choose between having their preferable gender recognised or having biologically related children (Sabatello, 2011, p. 61).

A number of authors sustain that there is not much analysis on specific transsexual issues in the study of lesbian, gay, bisexual, transsexual and intersexual (LGBTI) activism (Santos, ebrary, Inc, 2013, p. 29). Therefore, the aim of this paper is to contribute to the knowledge of nongovernmental organisations' (NGOs) advocacy in support of transsexuals' human rights, in particular transsexuals' marriage rights.

In general, Santos noted that transsexuals' issues are given less attention than lesbians and gays' issues within the LGBTI movements' agenda (p. 67). Arguably, because of this lack of attention within LGBTI movements, transsexuals feel the necessity to gather themselves in specific “transsexual organisations”. Some examples are Global Action for Trans\* Equality (GATE), Movimento Identità Transessuale (MIT) and Transgender Europe (TGEU). This paper focuses on TGEU's support on *Hämäläinen v Finland* before the European Court of Human Rights (ECtHR). The case study is introduced by the analysis of the United Nations (UN) and Council of Europe (CoE) human rights law on transsexuals' marriage rights. The analysis of the UN law serves to provide a global understanding of the situation, and the analysis of the CoE law is needed because the case study falls in its aegis.

### 1.1 Some Definitions

A general distinction between sexual orientation and gender identity can be made. Sexual orientation, as defined in the Yogyakarta Principles document, refers to the emotional and sexual attraction to a person of a different gender, same gender, or more than one gender. On the other hand, gender identity refers to the personal conception of oneself as a female, male, both or neither (“The Yogyakarta Principles,” 2007, p. 6). Cissexuals are individuals who recognise themselves with their biological sex of birth (Lin et al., 2014, p. 1). A non-cissexual can decide to undertake a medical and bureaucratic procedure that leads to a gender reassignment, and the person in the phase of transition is a transsexual.

<sup>1</sup> The Council was held in Budapest in May 2014 by the organisation Transgender Europe (TGEU).

Gender identity and sexual orientation are not strictly related. The possible combinations are various; for example, a male to female transsexual could be emotionally and sexually attracted to a man or a woman, regardless of the gender transition. Indeed, the study describes the case of a male to female transsexual who wishes to maintain the relationship with her female partner.

## **2. Marriage Rights in the United Nations and Council of Europe Law**

There is no clear definition of marriage within international law, because different cultures have developed various marriage types. For example, many societies have group marriage, mainly in the form of polygamies, sometimes polyandries.<sup>2</sup> Furthermore, cultures differ in their definitions of incest (Carolyn S. Bratt, 1984, p. 258). Since the drafting of the Universal Declaration of Human Rights (UDHR), several disagreements have arisen among the delegates in drafting Article 16, the one related to the right to marry. For example, the representative from Lebanon proposed the drafting of an article that did not mention equality between the two spouses, because different religions diverge regarding the position of the wife in the family (ECOSOC, 1947, p. 12). Similarly, during the drafting of International Covenant on Civil and Political Rights (ICCPR) Article 23 on the right to marry, most of the discussions regarded equal rights between the spouses (General Assembly, 1955, para. 154). As a result, in its final version, Article 23 asks state parties to “take appropriate steps to ensure equality of rights and responsibilities”; this formulation makes Article 23 the only ICCPR provision that expects the signatories to undertake a merely progressive implementation of an obligation (Manfred Nowak, 2005, p. 515).

If the international community does not agree on a general definition of marriage, even more challenges arise to discuss the specific case of the non-heterosexual marriage; this is because the international human rights law is characterised by heteronormativity. Heteronormativity means the assumption that heterosexuality is the normal and natural manifestation of sexuality (Castree, 2013). A heteronormative society is structured to privilege heterosexuality (Lauren Berlant and Michael Warner, 1998, p. 548), and a number of authors recognise that law is pivotal to create and maintain heteronormativity in modern society.<sup>3</sup> The drafters of the UDHR and the ICCPR had in mind only the heterosexual family model (Howard, 2001, p. 74), and therefore both documents reproduce the heteronormativity structure. Unlike the other provisions that refer to “human beings” or “everyone”, the articles related to the right to marry explicitly cite “men and women”. Similarly, in the European Convention on Human Rights (ECHR) heteronormativity is a constant, and Article 12 of the ECHR states that men and women have the right to marry; because Article 12 is based on Article 16 of the UDHR (Weil L Gordon, 1963, p. 68).

As evidenced by this brief analysis of the UDHR, ICCPR and ECHR, these international documents refer to the *right to marry*. Instead, this paper aims to point out the concept of *marriage rights*. The *right to marry* is an action; it is the right of an individual to join another individual in wedlock. On the other hand, *marriage rights* are a category referring to a group of rights, one of which is the *right to marry*; but, there are several other rights related to this category. For example, the concept of *marriage rights* encompasses the right of a person to end the marriage; in other words, the right to divorce. Furthermore, one of the *marriage rights* is also the right of the person to choose whether to not end a marriage. This paper analyses this last *marriage right*: the right of maintaining an existing marriage. To better understand the meaning of this specific right in relation to transsexuality, the next paragraph distinguishes three possible transsexuals' *marriage rights*.

### **2.1 Transsexuals' Marriage Rights in the United Nations and Council of Europe Law**

As mentioned above, gender identity and sexual orientation are not strictly related. Therefore, three combinations are possible. First, a post-operation transsexual could wish to marry a person of his/her opposite new gender, and this right is implicitly granted within the UN law and explicitly within the CoE law. Second, a post-operation transsexual could wish to marry a person of his/her same new gender, and this right is part of the same sex marriage debate. Finally, a transsexual could be willing to maintain his/her existing heterosexual marriage. The first two possibilities can be categorised as the *right to marry*; while, the third possibility is a component of the *marriage rights* category. What follows is an introductory overview of the UN and CoE law on the transsexuals' *right to marry*. The case study will focus on the transsexuals' right to maintain an existing marriage.

<sup>2</sup> From a study conducted in 1998 it appears that 186 societies were monogamous, 1,041 had occasional or frequent polygamy and 4 had polyandry (J Patrick Gray, 1998, pp. 4–5).

<sup>3</sup> See for example: (P. Johnson, 2011; McGhee, 2013; Stychin, 2003)

In its 2011 report, the UN Human Rights Council recommended state parties to facilitate the bureaucratic transition process to the new gender (United Nations High Commissioner for Human Rights, 2011, para.

84(h)). Previously, in the Concluding Observations on Ireland, the Human Rights Committee upheld that transsexuals have the right to change their birth certificates in accord with the new gender (Human Rights Committee, 2008, para. 8).<sup>4</sup> The 2011 recommendation, combined with the Concluding Observations on Ireland, seems to indicate an implicit recognition of the right of post-operation transsexuals to marry an opposite sex partner (Sarah Joseph, 2013, p. 690). However, in any UN document, there is no explicit comment on the right of a post-operation transsexual to marry an opposite sex partner.

On the other hand, the ECtHR jurisprudence has frequently dealt with transsexual issues,<sup>5</sup> and in 2002, in *Goodwin v the United Kingdom*, the ECtHR recognised that Article 12 covers also the transsexuals' right to marry an opposite sex partner. Additionally, in accord with the ECtHR decision, the Committee of Ministers of the CoE recommended member states ensure a transsexual person the right to marry ("Recommendation CM/Rec(2010)5 of the Committee of Ministers" para. 22).

Finally, the same sex marriage debate is wide and complex, and therefore a topic that would require a deeper analysis. However, in a nutshell, both from the UN and the CoE, there are no provisions to promote the implementation of same sex marriage. In looking at the UNHRC and ECtHR jurisprudence, first, in *Joslin et al v New Zealand*, the UNHRC interpreted the right to marry as only referring to different sex couples (*Joslin et al v New Zealand*, 1999, para. 8.2), and second, in *Schalk and Kopf v Austria*, the ECtHR states that because there is no consensus on same sex right to marry, CoE member states have a wide margin of appreciation on the matter (*Schalk and Kopf v Austria*, 2010, para. 46).

### 3. The Case Study: *Hämäläinen v Finland*

In 2014, Amnesty International (AI) and Transgender Europe (TGEU) supported the application of a male to female transsexual in *Hämäläinen v Finland*. The plaintiff was married with one child before starting her transition, and she complained about the violation of Articles 8 and 12, combined with Article 14.<sup>6</sup> Under Finnish law, she had to divorce her wife to have her reassigned gender recognised, and then needed to register a partnership with her. The applicant complained that the registered partnership did not provide the same security as marriage would for their child (*Hämäläinen v Finland*, 2014, para. 14–15).

In *Hämäläinen v Finland*, AI observed that many states had failed in providing reasonable arguments to justify discrimination based on gender identity, and that traditions could not be valid justifications to limit individuals' rights (para. 54–55). However the ECtHR held that there had been no violation of Article 8 and no need to discuss the case under Article 12 (The Court assessment), because there is neither a European consensus on allowing same sex marriage, nor in how to deal with the gender recognition in case of a pre-existent marriage (para. 74).

TGEU observed that 21 out of 47 CoE member states, covering approximately 44 % of all CoE inhabitants, "give access to a legal institute for recognition of same-sex couples"<sup>7</sup> (AlecsRecher, 2013, p. 4). In so doing, the organisation tried to raise the consensus argument because it is often used by the ECtHR on cases regarding LGBTI issues (P. R. Johnson, ebrary, Inc, 2013, pp. 77–83). With the aim of making the consensus argument convincing, the organisation gathered data on same sex civil partnership and marriage acts. However, this strategy drove the debate away from the applicant's complaint; she saw a civil partnership as being not a suitable solution for her family and she preferred maintaining her existing marriage. The organisation treated this case as an advocacy for the recognition of same sex *right to marry*, or at least the recognition of the LGBTI right to register a civil partnership; but there were other considerations to take into account.

<sup>4</sup> Ireland is recently modifying its legislation on transsexual rights: General Scheme of the Gender Recognition Bill (16 June 2014).

<sup>5</sup> See for example: *Cossey v the United Kingdom*, 1990, *Rees v the United Kingdom*, 1986, *Shiffeld and Horshman v the United Kingdom*, 1998.

<sup>6</sup> The articles in object are: Article 8, right to respect for private and family life; already mentioned Article 12, right to marry; and Article 14, prohibition of discrimination.

<sup>7</sup> The data do not encompass Luxembourg that allowed same sex marriage in June 2014.

When transsexuals are required to divorce, they can have the possibility of overtaking the forced divorce by a second marriage or by registering a civil partnership, but these solutions are not the most preferable. The passage from the first marriage to second marriage, or to a civil partnership, is a useless bureaucratic procedure.

Additionally, in the case of children in the family, they suffer a period of uncertainty in which the spouses are legally unrelated, and often civil partnership acts do not provide the same degree of protection that marriage would for children.

To summarise, it appears that TGEU failed in supporting Mrs Hämäläinen, because the organisation's priority was promoting the recognition of same sex relationships, rather than supporting the applicant's right to maintain her existing marriage. TGEU aimed to obtain an ECtHR adjudication stating that there is a consensus among CoE member states in recognising same sex couples. Instead, the problem to address was that a government should not force any citizen to divorce. In other words, TGEU's advocacy drove the debate away from the applicant's willing, and there was another strategy to follow. In my opinion, TGEU could have highlighted that the government needs to protect the applicant's right to maintain her existing marriage. The organisation could have also reinforced this assumption in pointing out that this solution would have meant a better protection of the best interests of Mrs Hämäläinen's child.

#### 4. Conclusions

TGEU supported the *Hämäläinen* case with the aim of obtaining the recognition of the *right to marry* – or at least the right to register a civil partnership – for same sex couples by the ECtHR. An international adjudication in this direction would have meant a big step forward for the LGBTI community in Europe. Unfortunately, the circumstances of the case were not fitting with the advocacy agenda of the organisation. In fact, the case was not focused on Mrs Hämäläinen's *right to marry*. It was instead concerning the protection of Mrs Hämäläinen's *marriage rights*; specifically, the right to maintain her own marriage. In other words, in this occasion, TGEU tailored its support to advocate a certain right, the *right to marry*; but this adjustment disadvantaged the applicant.

In conclusion, NGOs operating on the field of transsexuals' rights, and in general LGBTI rights, are largely helping the LGBTI community in providing *pro bono* legal advice to the applicants. Additionally, NGOs are key actors in promoting the legal change within the international human rights law, because, in supporting individual applications, they raise delicate issues before the UNHRC and the ECtHR. However, this case study shows that sometimes NGO's priority and applicant's willing are not on the same page. Obviously, it cannot be claimed that TGEU's support of the applicant's right to maintain her marriage would have resulted in a positive adjudication. Notwithstanding, the organisation lost the occasion to raise a particular issue, which is unique within the transsexual community. Therefore, when NGOs are to make the choice to whether support individual applications that do not fully reflect their advocacy agenda or not; they should make a choice between two possibilities: either supporting the application in accordance with the applicant's willing, or not supporting the application at all. The third way, the one chosen by TGEU, i.e. supporting the individual application in disaccord with the applicant's willing, is detrimental for all the actors involved. On one hand, the applicant is not well represented; on the other hand, the organisation is not able to effectively target the real problem, and therefore its chances of success are reduced.

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