
Editorial: Transsexuals and their rights to sexual autonomy and identity

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Nowadays, it is more than commonly acknowledged in the legal literature that transsexual individuals enjoy a number of fundamental rights regarding their autonomy to choose the gender of their choice and to embrace the sexual identity that they consider as fitting. The case of transsexual individuals' poses a serious of question as far as their legal acknowledgment is concerned, namely regarding the identification between the legal and the substantial sex of a legal subject. What it is crucial in this framework is the legal acknowledgment of the transsexuals' identity, namely a name fitting to the sex of their choice as a necessary precondition for the enjoyment from their part of their necessary public and social acknowledgment as equal members of society.

The legislative acknowledgement of the transsexual individuals' freedom to choose their true sex and be identified by the gender of their choice not only is a part of their substantial autonomy but it also enhances their social emancipation. By having the right to choose their true over their legal sexual identity, transsexuals can fully enjoy their rights to the free development of their personality, namely as far as the rights to marriage, family life and sexual identification are concerned. Though, of vital importance, nevertheless, this legislative acknowledgment of the transsexual individuals' freedom to choose their true sex does not yet exist in many national jurisdictions, thus posing serious

obstacles to the enjoyment of the transsexuals' basic right to sexual orientation and identification.

Moreover, we should underline that the legal acknowledgement of the individuals' real sex and name does not merely reflect the need to guarantee main aspects of his/her autonomy but also contributes to the very structure of one's self and his/her recognition as an independent and autonomous individual. The individual as a subject of law is not only identified by the legal principles and values aiming in protecting both the individual and the public interest but also by his/her real or substantial features, including which his/her sexual orientation and identification. In this sense, the legislative conditions for undertaking gender reassignment surgery as a prerequisite for receiving a new sexual identity – very common in many national legal orders – does not take into account that in the case of transsexuals sexual identification is not necessarily a biological fact but also a choice deriving from the personality of an individual. In this sense, the law cannot regulate sexual identification without taking into account the individual's free will and choice.

More specifically, we should stress that the legal recognition of transsexuals' name and sex does not only contribute to the enjoyment of a series of rights relating to their private and personal sphere but it also contributes to their recognition and equal participation in the social and public sphere. In this framework, the value of the legislative protection of the actual identity of a transsexual individual lies in his/her protection from social discrimination, from social stigma, while it enhances the transsexuals' social integration. Accordingly, the legislative acknowledgement of the transsexuals' sexual autonomy promotes the enjoyment of their rights to privacy, private and family life, their right to marriage and sexual orientation while it guarantees their rights to dignity and personality. Additionally, extremely important is in this sense the free access of transsexual individuals to health services that can realise the right to medically change their gender and sexual identity.

Since the '80s, the case law of the European Court of Human Rights (ECtHR) has laid the foundation for the recognition of the transsexuals' autonomy in the choice of gender and sexual identity. On the basis of Article 8(1) European Convention of Human Rights (ECHR), which guarantees the right to privacy and family life, the Strasbourg Court has recognised that the issue of sex selection is a matter central for the protection of an individual's autonomy, as well as for the enjoyment of his/her sexual identification and free development of personality.

In this context, the ECtHR in the case *B. versus France* (No. 13343/1987, 25 March 1992) expressed for the first time the view that the French authorities' refusal to change the sex of transsexual individual in the registry constituted a violation of his right to privacy according to Article 8(1) ECHR. The Strasbourg Court in this case drew a line between what is considered to be a legal and a real sex and underlined the significant impact that the non-official recognition of the latter may have in the daily life of a transsexual individual. In this case, the Strasbourg Court overturned its previous case law in *Rees versus UK* (No. 3582/81, 17 October 1986) and *Cossey versus UK* (No. 10843/84, 27 September 1990). In these cases, the court had supported the opposite opinion, namely that the British authorities had no obligation in changing the registry data as far as the sex of transsexual individuals was concerned. As the ECtHR stated in the case of *B. versus France* that this difference in opinions could be justified due to the difference between the civil and common law registry systems, where the first initiated

the ability to change one's personal information throughout his/her entire life while the latter made such changes difficult.

It is the case *Sheffield and Horsham versus UK* (30 July 1998) in which the ECtHR for the first time underlines the need for an open to social changes interpretation of the ECHR in order to further protect and guarantee the transsexual's human rights, namely their right to privacy, family life and marriage. Although, even in this case the Strasbourg Court did not find a violation of the right to privacy under Article 8 ECHR by the British authorities', nevertheless, it pointed out that the issue of sex selection raises complex scientific, legal, moral and social problems regarding which at that certain point a solid consensus among the member states of the Council of Europe was not yet configured. In the case *Sheffield and Horsham*, the Strasbourg Court underlined its commitment to monitor the social changes that eventually led to the gradual and growing recognition of the need to protect transsexual individuals especially after the post-surgery period of their lives, where their real sex selection has been concluded and where a series of rights related to their privacy and sexual freedom should be guaranteed.

A turning point for the ECtHR case law, especially regarding its previous judgements regarding the UK registry system is the case *Christin Goodwin versus UK* (No. 28957/95, 11 July 2002). The applicant appealed due to the lack of legal recognition of her new gender and thus complained for the discrimination that she suffered because of this omission to the enjoyment of her rights to labour, pension and insurance. The ECtHR found a violation of Article 8 ECHR in this specific case and also marked the international trend towards the increasing social acceptance of transsexuals and the legal recognition of their new sexual identity after sex reassignment surgery. In this context, the Strasbourg Court noted that to the extent that really significant matters of public interest are not compelling, the protection of the privacy and sexual identity of transsexual individuals should be prioritised as extremely important. What the ECtHR particularly pointed out in the case of *Christin Goodwin* is the importance of the recognition of the new real identity of the transsexual persons in the enjoyment of a series of other rights such as the right to privacy, family life and marriage and the family. In this context, and despite the fact that a relative consensus among the member states of the Council of Europe, especially regarding the legal recognition of the right to marriage in cases of transsexual individuals did not yet existed, nevertheless, the Strasbourg pointed out the augmenting need for a progressive and 'living' interpretation of the ECHR compatible with the social changes and the increasing recognition of the rights of transsexuals by the Council of Europe members.

The need for more progressive national legislation acknowledging the rights of transsexuals, especially regarding their freedom to register their real and not their biological was pointed out in the case *L. versus Lithuania* (No. 27527/03, 11 September 2007) of the ECtHR. As the ECtHR found the failure of the Lithuanian authorities to introduce national legislation in order to facilitate the effective enjoyment of the freedom to select sex, thus to guarantee freedom of access to the public health services, was in fact a violation of Article 8 ECHR. In its decision, the ECtHR found a violation despite the fact that Lithuania legislatively guaranteed the recognition – even without reassignment surgery – of change for the name and sex in the case of transsexual individuals. The dynamic nature of the ECtHR case law and its impact on the national legal order of the Council of Europe member states is reflected in more recent judgements. In this framework, characteristic are the cases *P. versus Portugal* (No 56027/09, 6 September

2011) and *Cassar versus Malta* (No. 36982/11, 9 July 2013) in which the Court of Strasbourg findings have been incorporated by the respected member states thus leading in the legislative realisation of transsexual rights in sex selection, family and marriage, in both countries (Portugal and Malta).

Nevertheless, the ECtHR has not yet dealt with the issue of the acknowledgment of homosexual rights, particularly regarding their right to marriage. Thus, in its very recent judgement *Hänäläinen versus Finland* (No. 37359/09, 16 July 2014) the ECtHR dealt with a married transsexual that also had a child who surgically altered her sex from male to female and also acquired a new first name but could not change her legal status unless her wife gave the consent to change their marriage to a same-sex partnership. His wife refused and therefore the Finnish authorities also declined to change her sex in the registry. The ECtHR did not consider this legislative limitation as disproportionate to the extent that the relevant Finnish legislation does not recognise the right to marriage but acknowledges the freedom to enter same-sex partnerships for homosexual transsexuals. Thus, the Strasbourg Court did not consider that a positive violation regarding the rights to privacy, family life and marriage has taken place.

On a national level of particular interest is the German legislation concerning transsexuals and the case law that has over time been developed by the Federal Constitutional Court of Germany (Bundesverfassungsgericht) concerning its application. Indeed, to this day, in many cases the law which regulates the legal status of transsexuals (Transexuellengesetz, TSG 1981) has been the subject of interpretation and criticism of the German Constitutional Court concerning notably the provisions which relate to the enjoyment of the rights of homosexual transsexuals. In this context, of great significance is the judgement of the German Federal Court in the case *Maria-Sabine Augstein* (BVerfGE, 60, 123). The applicant was a transsexual who had adopted the so-called 'small solution' that the 1981 legislation offered for transsexuals who had not altered their sex by reassignment surgery gender ('big solution'), thus, the possibility to only change their first name but not also alter their sex. Later on, the applicant wished to exercise her right to marriage, but according to the 1981 legislation she had to reinstate her original name since the legislation applied was obsolete and therefore it did not recognise the rights of homosexual transsexual marriage and same-sex partnerships. The Federal Constitutional Court of Germany ruled that in this case indeed had occurred a violation of fundamental rights guaranteed by the German Basic Law and in particular of the right to privacy, protection of the sphere of intimacy and the right to the name. In an equally very significant judgement (BvR 3295/07) the Federal Constitutional Court of Germany ruled that the reassignment surgery as a precondition for the enjoyment of the right to marriage between homosexual transsexuals constitutes a serious breach of their rights to privacy, to physical integrity and sexual identification.

As it is eloquently indicated both by the case law of the ECtHR and the Federal Constitutional Court, the protection of the true identity and autonomy of transsexuals as well as their freedom to choose their name, sex and to enjoy their sexuality (both identification and determination) is very often hampered by outdated, inconsistent to the changing social conditions national legislations. In this context, we underline at this point the need for legislative changes at a national level, especially among the member states of the Council of Europe in order to embrace and guarantee the transsexuals right to enjoy their true gender, their sexuality and public identification.