



Trans rights in the European Union – “sex” v. “gender” on the path towards equality and non-discrimination

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ABSTRACT: Equality and non-discrimination are two of the most important foundational values of the European Union (EU). But a rapidly evolving society means that their practical application has to be constantly under review to assess if their content and objectives are being fulfilled. When it comes to the rights of the LGBTIQ community – here in particular of trans when compared with cis women – there is still a long way to go to effectively safeguard them, while reasonably protecting all involved. Terminological confusion around the concepts of “sex” and “gender” has served to justify the curtailment of the fight for equality and non-discrimination, and relegate trans women to a position of second-class citizens. The EU needs to review its approach to this particular issue and enshrine into law the concepts of “sex” and “gender” as a way to continue to push forward in its fight for LGBTIQ rights, doing justice to its moniker of “rainbow Europe”.

KEYWORDS: LGBTIQ rights – principle of equality – principle of non-discrimination – sex – gender.

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1. Introduction

Article 2 of the Treaty on European Union (TEU) prescribes the foundational principles of the European Union (EU), serving as a guide for the protection of human rights within it. The respect for these fundamental values is a condition of access and requirement for the full exercise of rights by Member States, constituting the cornerstone of our culture and common destiny.¹

Despite the now large catalogue of rights protected at the Union level, the rapidly evolving and ever-changing social landscape requires the EU and its institutions to constantly improve and try to match the needs of its citizens.

One of the sub-groups most affected by issues of discrimination and lack of equality are LGBTIQ² persons. In 2020, the European Union Agency for Fundamental Rights (FRA) found that discrimination against LGBTIQ persons continues to be a persistent issue, where the lack of progress and worrying setbacks in some key areas are apparent.³

Additionally, in a study from 2015, 56% of respondents considered discrimination against LGBTIQ persons very common, making sexual orientation and gender identity the second and third most commonly cited grounds of discrimination in the EU. Trans persons in particular experience the highest levels of discrimination, harassment and violence. In 2020, one in five respondents reported having been physically or sexually assaulted – twice as many as other LGBTIQ sub-groups.⁴

This is a very relevant and current issue on the EU agenda, the protection of the LGBTIQ community – specifically the trans community – is a complex and multifaceted topic. Firstly, the rights that need to be protected often encroach on the areas of law traditionally reserved for Member States, namely, family law. Secondly, the societal view of the trans community is fragmented, with trans persons being condemned and ostracised not only by conservative, religious, or right-leaning groups, but also by feminists and those who claim to fight for women’s rights. For example, trans-exclusionary radical feminists (TERFs) portray trans women as “*not real women*” and a threat to the feminist movement. With others making a selective use of the trans experiences to legitimise their views of gender as a social and institutional construct with no ontological need.⁵

¹ European Union, “Aims and values”, n. d., accessed February 17, 2023, https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_en. Marcelo Rebelo de Sousa, “[comentário ao] Artigo 2.º do Tratado da União Europeia”, in *Tratado de Lisboa Anotado e Comentado*, ed. Manuel Lopes Porto and Gonçalo Anastácio (Coimbra: Almedina, 2012), 27-28.

² The “LGBTIQ” terminology is controversial, with other terms used in academic works and social discourse. Most commonly used is the term LGBTIQ+, however taking into account the context in which this article is written, the one currently used by the European Commission in its official output is adopted.

³ European Union Agency for Fundamental Rights, *A long way for LGBTI equality*, Luxembourg, Publications Office of the European Union, 2020, 10-14.

⁴ European Commission, “Special Eurobarometer 437: Discrimination in the EU in 2015”, November 2015, accessed January 26, 2023, https://data.europa.eu/data/datasets/s2077_83_4_437_eng?locale=en. European Union Agency for Fundamental Rights, *Fundamental Rights Report - 2020*, Luxembourg, Publications Office of the European Union, 2020, 4-6. European Parliament, *The rights of LGBTI people in the European Union*, Brussels, EPRS – European Parliament Research Service, November 2020, PE 651.911, 3.

⁵ Dilek Huseyinzadegan, *et al.*, “Continental Feminism”, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2020, accessed January 26, 2023, <https://plato.stanford.edu/entries/femapproach->

Thirdly, even in laws which aim to protect trans persons, legislators establish a specific image of what it is to be trans, based on binary, patriarchal, and heteronormative⁶ thinking, hence lumping all trans persons under the same umbrella of a male to female (MTF) transition, that includes all surgeries and procedures, and requires the complete adherence to social norms traditionally associated with the female sex.

However, this does not correspond with reality, the ways to be trans are endless, and all are deserving of protection. Establishing rigid criteria to define who is or is not trans will inevitably exclude a large part of the community, leaving them without legal defence or recourse, and creating gap in the legal system's scope of protection.⁷

Lastly, in recent developments, national legislators – in an effort to protect trans persons – fell victim to the terminological confusion between “sex” and “gender” with possible disastrous consequences for women's rights and the disappearance of women from the legal landscape. An example is the proposed alteration to Spanish law, which replaces the term “sex” with “gender” or “gender identity”, impacting laws designed to protect women and girls, particularly when it comes to equality between men and women.⁸

Focusing particularly on issues affecting cis and trans women – and taking a feminist perspective – this article will analyse how the tension between “sex” and “gender” affects the protection of human rights, and how it could aid the effective guarantee of the principles of equality and non-discrimination within the EU.

2. The fundamental rights of equality and non-discrimination in the EU and the “rainbow Europe”

Equality as a fundamental human right is used to validate and provide a solid foundation for the adoption of non-discrimination laws.⁹ At its core is a principle that prohibits inequality, meaning equal treatment for what is the same, and different treatment for what is different – to the extent of its inequality. It goes beyond mere formal equality.

This has always been considered a fundamental general principle of EU law, working as a guarantor of fairness and a way of strengthening democracy, which ensures the functioning of European guarantees and protections.¹⁰ When it comes

continental/ (26.01.2023). Katharine Jenkins, Ruth Pearce, “The Gender Recognition Act: a trans-inclusive feminist approach” [Brochure], Institute for Policy and Engagement, University of Nottingham, p. 1.

⁶ “Heteronormativity” is the set of beliefs and attitudes that establishes heterosexuality as the only normal and natural expression of sexuality. Merriam-Webster, “Heteronormative”, n. d., accessed January 26, 2023, <https://www.merriam-webster.com/dictionary/heteronormative>.

⁷ Dylan Vade, “Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People”, *Michigan Journal of Gender & Law*, vol. 11 (2005): 255-261.

⁸ AmecoPress, “El Lobby Europeo de Mujeres alerta al Gobierno sobre el peligro de incluir términos como género en lugar de sexo en las leyes”, accessed January 26, 2023, <https://amecopress.net/El-Lobby-Europeo-de-Mujeres-alerta-al-Gobierno-sobre-el-peligro-de-incluir-terminos-como-genero-en-lugar-de-sexo-en-las-leyes>.

⁹ Thomas Papadopoulos, “Criticizing the horizontal direct effect of the EU general principle of equality”, *European Human Rights Law Review – E.H.R.L.R.*, Issue 4 (2011): 2.

¹⁰ Ricardo Leite Pinto, “[comentário ao] Artigo 20.º da Carta dos Direitos Fundamentais da União Europeia”, in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira and

to discrimination, there is a global acceptance that it is wrong and should be prohibited, with a vast majority of countries outlawing it via constitutional or statutory provisions.¹¹

In the EU, this prohibition was born out of a need to prevent distortions to the Single Market, due to the difference in legislations between Member States regarding gender equality, namely when it came to the job market, treatment in the workplace, and access to social security benefits. However, it has since greatly evolved, becoming the cornerstone of fundamental rights protection within the EU.¹²

Article 2 of the TEU establishes – among others – equality, respect for human rights and non-discrimination as foundational values of the EU; and Article 21 of the Charter of Fundamental Rights of the European Union (CFREU) broadly states that a person shall not be discriminated against on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership to a national minority, property, birth, disability, age or sexual orientation, and in most cases even nationality. This is an extensive catalogue, but neither instrument affords us with a precise definition of discrimination, which leaves space for flexible interpretation.

Additionally, the CJEU has understood EU non-discrimination law in a way that broadens protection and extends its effect. As a principle, when it comes to fundamental rights, the Court understands that coverage should be as wide-reaching as possible.¹³ Examples of this are the judgments *Mangold*,¹⁴ *Maruko*,¹⁵ *Feryn*,¹⁶ and *Coleman*,¹⁷ where the Court of Justice of the European Union (CJEU) further densifies the scope of the principle of non-discrimination by elaborating on what can constitute discrimination and who can be its victim.¹⁸

In *Mangold*, the Court decided on the subject of age discrimination in the field of employment. It recognised the principles of equal treatment and of non-discrimination as general principles of EU law (Paragraphs 75 and 76), and the reason this judgment is so relevant is three-fold. First, because it recognises that a claim for equal treatment is available for private citizens on a horizontal situation – in this case between Mr. Mangold and Mr. Helm. Second, because it establishes that legislation – be it at the national or European level – that can be challenged on the grounds that it fails to comply with the general principle of equal treatment (Paragraphs 77 and 78). Third, because the CJEU enlarged the

Mariana Canotilho (Coimbra: Almedina, 2013), 256-259.

¹¹ Andrew Altman, “Discrimination”, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2020, accessed January 26, 2023, <https://plato.stanford.edu/entries/discrimination/>.

¹² Mariana Canotilho, “[comentário ao] Artigo 21.º da Carta dos Direitos Fundamentais da União Europeia”, in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013), 260-261.

¹³ Ana Luísa Riquito, “O Conteúdo da Carta dos Direitos Fundamentais da União Europeia”, in *A Carta dos Direitos Fundamentais da União Europeia*, ed. Ana Luísa Riquito *et al.* (Coimbra: Coimbra Editora, 2001), 63.

¹⁴ Judgment *Werner Mangold v Rüdiger Helm*, 22 November 2005, C-144/04, EU:C:2005:709.

¹⁵ Judgment *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, C-267/06, EU:C:2008:179.

¹⁶ Judgment *Centrum voor gelijkeheid van kansen en voor racismebestrijding v Firma Feryn NV*, 10 July 2008, C-54/07, EU:C:2008:397.

¹⁷ Judgment *S. Coleman v Attridge Law and Steve Law*, 17 July 2008, C-303/06, EU:C:2008:415.

¹⁸ Andrea Eriksson, “European Court of Justice: Broadening the scope of European nondiscrimination law”, *International Journal of Constitutional Law*, vol. 7, issue 4 (2009): 732-733.

grounds of discrimination beyond what was found in equal treatment Directives at the time (Paragraphs 75 and 76).

The *Maruko* judgment concerned a case of discrimination on grounds of sexual orientation, where Mr. Maruko who was in a registered same-sex partnership was denied his application for a widower's pension. Here, the CJEU enlarged the protection of the Directive 2000/78/EC – whose purpose was to combat certain forms of discrimination, such as on the grounds of sexual orientation, in the field of employment and occupation – to the surviving life partner if their situation is comparable with that of a spouse (Paragraphs 68 to 72). The Court held that, if this is the case – if the situation is comparable – it constitutes direct discrimination within the meaning of Articles 1 and 2(2)(a) of the Directive (Paragraphs 65 and 66).¹⁹

In *Feryn*, the CJEU decided on the principle of equal treatment between persons irrespective of racial or ethnic origin. This was a case where a Belgian sales and installation company had applied a discriminatory recruitment policy, namely when it came to Moroccan nationals, arguing that customers had expressed discomfort having immigrant workers in their houses. The Court set out that under Directive 2000/43/EC, this was a case of direct discrimination even though there was not a victim per se (Paragraphs 23 and 24). The public statements made by the management of the company were enough to “*strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market*” (Paragraph 25), and therefore constitute a form of direct discrimination.

Finally, in *Coleman*, the Court heard a case questioning if the EU's discrimination policy – namely Directive 2000/78/EC – covers not only people who are disabled, but also people who suffer discrimination because they are related or connected to a disabled person, specifically a mother who had to miss work to attend to her disabled son. The CJEU held that the purpose of the Directive was to combat all forms of discrimination on the grounds of disability, even if the person is not themselves disabled but is associated with/responsible for a disabled individual (Paragraphs 38, 43 and 56).

The wrongfulness of discrimination lies in the imposition or creation of a disadvantage that negatively impacts a person or persons because they are a part of or associated with a salient social group.²⁰

Taking into account this understanding of discrimination, the EU has been fertile ground for the protection of LGBTIQ persons. The concept of our so-called “*rainbow Europe*” has long been part of the collective consciousness.²¹

From international activists to anti-LGBTIQ government officials, the EU is seen as a community which not only tolerates but actively respects, includes and fights for LGBTIQ persons. There is something distinctive about Europe – and specifically the EU – that makes it stand out, a unique unity despite internal

¹⁹ Andrea Eriksson, “European Court of Justice: Broadening the scope of European nondiscrimination law”, 741-742.

²⁰ Andrew Altman, “Discrimination”.

²¹ ILGA – Europe, “Rainbow Europe”, n. d., accessed March 28, 2023, <https://www.rainbow-europe.org>. Philip M. Ayoub, David Paternotte, “Europe and LGBT Rights: A Conflicted Relationship”, The Oxford Handbook of Global LGBT and Sexual Diversity Politics (2019): 11. Anna van der Vleuten, “Transnational LGBTI activism and the European courts: Constructing the idea of Europe”, in *LGBT activism and the making of Europe: A rainbow Europe?*, ed. Philip M. Ayoub and David Paternotte, (London: Palgrave Macmillan, 2014), 120.

diversities. Still, no one seems to agree on the reasons why this is the case, speaking only of European “exceptionality”.²²

However, this does not mean that the EU does not have problems which need to be addressed. Focusing on the main object of this text, the legal definition and recognition of trans identity is one of the topics where some of the biggest asymmetries are seen.

Nowadays, the self-determination model of recognition is widely considered to be ideal, as it allows the person to make a formal declaration of their gender status and have it recognised by governmental authorities.²³ This is done without the excessive medicalisation and pathologisation of trans identities, without requiring a psychiatric diagnosis that ignores how intersectional the trans community actually is, and without undergoing invasive medical interventions such as sterilisation or surgery – which are a clear violation of trans persons’ fundamental human rights. This model is adopted by countries such as Belgium, Denmark, Ireland, Luxembourg, Malta, Spain, and – with law no. 38/2018, of the 7th of August – also Portugal.²⁴

Contrarily, countries such as Hungary, Poland, Czech Republic, Slovenia and Bulgaria have continuously fought back the advancement of trans rights. Here, the legal change of gender is either not addressed, illegal, or it requires surgery.²⁵ Populist politicians have demonised the LGBTIQ community, deeming them “disgusting”, “perverse” and “monstrous”, in their fight to preserve so-called traditional values. They have also argued against policies and passed legislation using the protection of children as a justification to deprive LGBTIQ persons of their rights. Poland, specifically, has gone so far as effectively linking homosexuality to paedophilia.²⁶

Using the example Portuguese law²⁷ – as one of the most recent and advanced – to explore what the self-determination model might entail, the right to self-determination of gender identity and expression, as well as the right to the safeguard of the sexual characteristics of each individual are enshrined in Article 1 of law

²² Philip M. Ayoub, David Paternotte, “Europe and LGBT Rights: A Conflicted Relationship”, *The Oxford Handbook of Global LGBT and Sexual Diversity Politics* (2019): 1-2.

²³ United Nations, “The struggle of trans and gender-diverse persons”, n. d., accessed March 28, 2023, <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons>.

²⁴ Chris Dietz, “Governing Legal Embodiment: On the Limits of Self-Declaration”, *Feminist Legal Studies*, vol. 26, issue 2 (2018): 185-187. Directorate-General for Justice and Consumers, *Legal gender recognition in the EU – The journey of trans people towards full equality*, Luxembourg, Publications Office of the European Union, 2020, 9, accessed January 26, 2023, <https://data.europa.eu/doi/10.2838/085419>.

²⁵ EQUALDEX, “Right to change legal gender”, n. d., accessed March 28, 2023, <https://www.equaldex.com/issue/changing-gender>.

²⁶ Dunja Mijatović, “Pride vs. indignity: political manipulation of homophobia and transphobia in Europe”, 16 August 2021, accessed January 27, 2023, <https://www.coe.int/en/web/commissioner/-/pride-vs-indignity-political-manipulation-of-homophobia-and-transphobia-in-europe?inheritRedirect=true>. Wester Van Gaal, “LGBTIQ rights: Hungary and Poland veto EU children’s strategy”, *EU Observer*, Brussels, 8 October 2021, accessed January 27, 2023, <https://euobserver.com/rule-of-law/153178>. Eszter Zalan, “Budapest ruling seen as normalising anti-LGBTI sentiment”, *EU Observer*, 3 February 2022, accessed January 27, 2023, <https://euobserver.com/rule-of-law/154275>. Zoltán Kovács, “Portrayal and promotion – Hungary’s LGBTIQ+ law explained”, *EURACTIVE*, 27 September 2022, accessed January 27, 2023, <https://www.euractiv.com/section/non-discrimination/news/portrayal-and-promotion-hungarys-latest-anti-lgbt-law-explained/>.

²⁷ Assembleia da República, *Lei n.º 38/2018, de 7 de agosto*, Diário da República n.º 151/2018, Série I, 7 August 2018, 3922-3924, accessed February 2, 2023, <https://dre.pt/dre/detalhe/lei/38-2018-115933863>.

no. 38/2018, of the 7th of August. There is a strict prohibition of discrimination, establishing an obligation of the State to create the necessary conditions for the full and effective exercise of the right to self-determination (Article 2).

Furthermore, no person can be required to prove they underwent any medical procedure – be it surgical, pharmacological, hormonal, psychological, or psychiatric – as a requisite for a decision [Article 9 (2)], their declaration of will is enough to start the procedure.

When it comes to minors, those between the ages of 16 to 18 years old can legally change their name and sex in legal documents, given that the requirements of Article 7 are followed (Article 3). This issue is controversial and has led to court cases and legislative changes worldwide. The main topics under discussion where minors are involved are: at which age are young people able to legally change their gender and when they are able to transition, if they so wish; and the opposition between the young person's rights to free development and choice, and the parent's and doctor's wills and responsibilities.²⁸

Forcing a young person to live in a way that does not correspond with their gender contributes to social exclusion and stigma, poor school performance, mental and physical health issues and suicidal tendencies. Identity recognition procedures – which are easy to access and navigate – can contribute to resolve this.²⁹

Furthermore, most healthcare professionals agree that adolescents have the capacity to understand and discuss in depth their own medical issues. Sexual health and the legal change of identification documents should not be denied because of any perceived societal or moral implications, if the adolescent shows capacity.³⁰

In November 2020, the European Commission adopted the LGBTIQ Equality Strategy 2020-2025. The first-ever of its kind, it aims to build a Union that embraces and celebrates diversity, and where people are free to be themselves without fear of violence or repression.³¹

This strategy is structured through four pillars: tackling discrimination against LGBTIQ persons, ensuring LGBTIQ persons' safety, building LGBTIQ inclusive societies, and leading the call for LGBTIQ equality around the world.³²

This shows that EU institutions are not only committed to tackle internal problems, but also lead the charge when it comes to the protection of the fundamental rights of LGBTIQ persons, doing justice to the moniker of “*rainbow Europe*”.

²⁸ Hugo Greenhalgh, “Who should decide when a child can change gender?”, *Reuters*, 14 February 2020, accessed February 17, 2023, <https://www.reuters.com/article/us-lgbt-rights-health-analysis-idUSKBN2080SI>.

²⁹ Richard Köhler, “Legal Gender Recognition and the Best Interest of the Child”, TGEU Policy paper, November 2018, 1.

³⁰ Katherine Romero, Rebecca Reingold, “Advancing adolescent capacity to consent to transgender-related health care in Colombia and the USA”, *Reproductive Health Matters*, vol. 21, issue 41 (2013): 186-187 and 189.

³¹ European Commission, “LGBTIQ Equality Strategy 2020-2025”, n. d., accessed January 27, 2023, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en.

³² European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Union of Equality: LGBTIQ Equality Strategy 2020-2025”, COM(2020) 698 final, Brussels, 12 April 2020, 3.

3. The distinction between “sex” and “gender” – a tool for the better protection of trans women?

A brief analysis of the seminal judgments relating to trans rights at the European level makes two things very clear: a great effort was made by the European Court of Human Rights (ECtHR) and the CJEU to protect the rights of trans persons; and a great confusion between the terms, “sex” and “gender” as well as their effective meaning.

In *P. v S.*,³³ the CJEU revolutionised the way trans rights were seen in the EU. This was the case of P., a MTF applicant who in April 1992 – a year after being employed as a manager in an educational establishment – informed her superior she intended to undergo “gender reassignment”.³⁴ In September of the same year, she was given three months’ notice and her dismissal took effect after her final operation. This seemed to have happened because of P.’s proposal to transition, although dismissals were happening at her place of employment. As a defence, the United Kingdom argued that this could not be a case of sex discrimination for the purposes of Directive 76/207/EEC – as it was proposed – because P. being a man or a woman was irrelevant, their employer would have dismissed them either way if they had chosen to transition (Paragraph 15).

The Court held that the principle of equal treatment between men and women as prescribed by that Directive should not be confined to discrimination based on belonging to either binary “sex”, but also applied when trans persons are discriminated against on the grounds of “sex” due to their “gender” reassignment (Paragraph 20). This because when a person is dismissed on the grounds they intend to undergo “gender reassignment”, they are treated unfavorably when compared to persons of the sex they were assigned at birth (Paragraph 21).

This sort of interpretation was innovative and very generous at a time when trans persons were not protected at the European level. The CJEU adopted such a complicated reasoning because allowing a trans person to be discriminated against in such a way “would be tantamount (...) to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard” (Paragraph 22). However, this approach can be criticised, as it is questionable that a comparison between persons’ birth assigned sex – meaning a comparison between the situations of cis and trans individuals before transition, which are inherently different – is the best path to protect trans persons. Especially, because this is the understanding it has continued to follow in subsequent cases, as proved by *MB*.³⁵

When it comes to the ECtHR, in *Christine Goodwin*, it decided for the first time in favour of the trans applicant, arguing that the actions of the United Kingdom conflicted with the applicant’s dignity to live in accordance with their chosen identity.³⁶ This was the case of an applicant – again a post-operative MTF – that had lived fully as a woman since the mid-1980s (Paragraph 13), however was still legally considered a male by the United Kingdom governmental authorities (Paragraph 18). Not having legal recognition of her gender re-assignment greatly impacted her life, namely when

³³ Judgment *P. v S. and Cornwall County Council*, 30 April 1996, Case C-13/94, EU:C:1996:170.

³⁴ Nowadays, the correct terminology would be “gender confirmation”, as it more inclusive and less pathologizing. K. C. Clements, “What to Expect from Gender Confirmation Surgery”, *Healthline*, 22 December 2018, accessed February 18, 2023, <https://www.healthline.com/health/transgender/gender-confirmation-surgery>.

³⁵ Judgment *MB v. Secretary of State for Work and Pensions*, 26 June 2018, C-451/16, EU:C:2018:492.

³⁶ Judgment *Case of Christine Goodwin v. the United Kingdom*, 11 July 2002, Application no. 28957/95.

it came to the field work and pensions, and her right access certain advantages which required her to present her birth certificate (Paragraph 19). More worryingly, in the early 1990s she suffered from sexual harassment in the workplace, but when she tried to pursue a case, she was denied since she was legally still considered male (Paragraph 15). Given this, the ECtHR held that a serious interference with her private life as defined in Article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms arose when the actions of the State conflicted with an important aspect of personal identity – namely the dignity to live in accordance with her chosen “*sexual identity*” (Paragraph 93).

In both cases – and additionally in *Rees*³⁷ and *MB*³⁸ – the Court used the terms “*gender*”, “*gender reassignment*”, “*changed gender*”, “*acquired gender*”, “*birth gender*”, “*gender identity*”, “*new gender*”, “*sex*”, “*biological sex*”, “*sexual identity*”, “*assigned/ reassigned sex*”, “*birth sex*” and “*original sex*”, interchangeably, creating unnecessary confusion. These were missed opportunities for the Court to lay the foundations of a definition of “*gender*” that would apply across the EU.

This presents a problem because, those who are against trans rights – namely the resolutely anti-gender groups that continually fight for the exclusive use of “*sex*” as the only adequate and natural way to identify men and women – will use this confusion to delegitimise trans experiences, pathologise their identities, and alienate their rights.³⁹ Hence, it is vital to understand that “*sex*” and “*gender*” have different meanings and their differentiation is important, as these are issues that affect aspects of identity and social position.⁴⁰

“*Sex*” relates to things such as chromosomes, hormones and reproductive organs; therefore, the different biological and physiological characteristics of females, males and intersex persons are usually assigned at birth. “*Gender*”, on the other hand, relates to characteristics that are socially constructed – norms, behaviours, and roles that are traditionally associated with women, men, girls, and boys – and define social relationships. It is a social, psychological and cultural construct that is deeply personal, and not defined by biological sex.⁴¹ They interact but are not equivalent.

³⁷ Judgment *Case of Rees v. The United Kingdom*, 17 October 1986, Application no. 9532/81.

This is the first case the ECtHR heard regarding a trans applicant, hence why it is relevant. It involved Mr. Mark Rees, who sought to see his birth certificate altered to reflect his sex as male, which was denied. The Court, at this time, denied that this was a violation of Article 8 or of Article 12 of the Convention, agreeing with the United Kingdom. This decision was later retracted in the abovementioned *Christine Goodwin* judgment.

³⁸ Judgment *MB v. Secretary of State for Work and Pensions*, 26 June 2018, C-451/16, EU:C:2018:492.

In this case *MB* – a MTF applicant – who after transitioning, could not see her gender legally recognized because she refused to get a divorce. At this time the United Kingdom had not legalized gay marriage yet, and it required the annulment of a previously contracted marriage to afford gender legal recognition. The main problem arises when *MB* tries to take advantage of a pension scheme which benefits women but is denied – as she is still legally considered male. The Court once again uses the same reasoning as in *P. v. S.*, using discrimination on the grounds of sex to resolve the issue.

³⁹ Luke Armitage, “Explaining backlash to trans and non-binary genders in the context of UK Gender Recognition Act reform”, *Journal of the International Network for Sexual Ethics and Politics*, Special Issue (2020): 13.

⁴⁰ Council of Europe, “Sex and gender”, n. d., accessed January 27, 2023, <https://www.coe.int/en/web/gender-matters/sex-and-gender>.

⁴¹ World Health Organization, “Gender”, n. d., accessed January 27, 2023, https://www.who.int/health-topics/gender#tab=tab_1. Council of Europe, “Sex and gender”, n. d., accessed January 27, 2023 <https://www.coe.int/en/web/gender-matters/sex-and-gender>.

Continuing with the Portuguese example, this distinction is made in the Portuguese law no. 38/2018, of the 7th of August. Article 7 (1) states that any person of Portuguese nationality that is not a minor and has no psychological interdiction can apply to have their name and “*sex*” changed in the civil registration when their “*gender*”/ “gender identity” does not correspond with the birth assigned “*sex*”.

In a way, language is performative, and has the ability to be identity-creating, to be inclusionary or exclusionary, and the usefulness of legislation often depends on the words used. If there is terminological confusion in the prescription of a certain law, strategy or principle, the needs of the gender-diverse populations it aims to benefit are brought into question.⁴² It may put trans persons in a dehumanising position of disconnection with full personhood, as their experiences and identities are seen primarily as a pathology; they are a victim in need of help because their birth assigned sex does not correspond with their expressed gender.⁴³

Furthermore, not treating the two concepts differently in the legal landscape can lead – as covered previously – to hostility toward trans persons, and can limit their access to healthcare, social benefits, State sponsored provisions, limit their civil rights and curtail the protection of their fundamental rights. This leads to the rift created between cis women and trans women, where cis women’s historical trauma – born from living in a male-dominated society and having to fight hard for their rights – is weaponised by positioning trans women’s rights as diametrically opposed, as a way to make them seem like a threat that needs to be fought against.⁴⁴

There are issues which specifically affect persons born with female reproductive organs. There is still a deep gender bias in medicine that is historically discriminatory against cis women. Female medical issues – especially when it comes to pain management, obstetrics, and gynaecology – are poorly studied and understood and this deeply impacts cis women’s quality of life.⁴⁵

In the same vein, access to healthcare by trans women is marred by difficulty, as trans-specific healthcare is often dependent on documents that are dependent on tough processes of legal recognition. When they finally get access, they are often met with a lack of knowledge, a lack of empathy, and an inappropriate curiosity by medical professionals. In a 2014 survey, FRA found that 22% of respondents felt

⁴² Mieke Verloo, Anna Van der Vleuten, “Trans* Politics: Current Challenges and Contestations Regarding Bodies, Recognition, and Trans* Organising”, *Politics and Governance*, vol. 8, issue 3 (2020): 225. Chris Dietz, “Governing Legal Embodiment: On the Limits of Self-Declaration”, *Feminist Legal Studies*, vol. 26, issue 2 (2018): 186. Michigan State University – The Gender and Sexuality Campus Center, “Glossary – Oppressive/Demoralizing terms, and terms for Forms of Oppression”, n. d., accessed January 27, 2023, <https://gsc.msu.edu/education/glossary.html>.

⁴³ Abigail W. Lloyd, “Defining the Human: Are Transgender People Strangers to the Law?”, *Berkeley Journal of Gender, Law and Justice*, vol. 20, issue 1 (2005): 152. Luke Armitage, “Explaining backlash to trans and non-binary genders in the context of UK Gender Recognition Act reform”, *Journal of the International Network for Sexual Ethics and Politics*, Special Issue (2020): 15.

⁴⁴ Sarah Dittum, “Trans rights should not come at the cost of women’s fragile gains”, *The Economist*, 5 July 2018, accessed January 27, 2023, <https://www.economist.com/open-future/2018/07/05/trans-rights-should-not-come-at-the-cost-of-womens-fragile-gains>. Luke Armitage, “Explaining backlash to trans and non-binary genders in the context of UK Gender Recognition Act reform”, *Journal of the International Network for Sexual Ethics and Politics*, Special Issue (2020): 18.

⁴⁵ Fay Schopen, “The healthcare gender bias: do men get better medical treatment?”, *The Guardian*, November 2017, accessed January 27, 2023, <https://www.theguardian.com/lifeandstyle/2017/nov/20/healthcare-gender-bias-women-pain>. Fierce Healthcare, “Exploring Gender Bias in Healthcare”, 2019, accessed January 27, 2023, <https://www.fiercehealthcare.com/sponsored/exploring-gender-bias-healthcare>.

personally discriminated against by healthcare personnel, with France being one of the countries with the highest number of incidents, with 30% of respondents saying they experienced it.⁴⁶

Trans women also suffer heightened levels of violence, harassment, hate-motivated crimes, and see their acceptance into broader society dependent on full transition, with their participation only permitted through traditional institutions, such a marriage.⁴⁷ This rift maintains the binary and cisgender status quo of our society, where cis men have prominence and more power than any other group, harming women as a whole.⁴⁸

One cannot deny the different experiences that come from growing up as a person assigned female at birth and a person who is assigned male at birth that identify as women. From very early on, girls are conditioned to satisfy patriarchal ideals, by being demure, encouraged to take up domestic pursuits, having an outpour of unsolicited advice on how to be more feminine, attractive and lady-like, having their bodies sexualized while they are still children, etc. A trans woman who grew up assigned male at birth, was expected to fulfil other ideals, being sporty, decisive, encouraged into more academic pursuits, and more often than not having their strong personalities nurtured and their aggressiveness forgiven.⁴⁹ In both cases, the specific individual is suffering, but the reasons are very different.

Maintaining “sex” as the only concept in the legal landscape disenfranchises trans women, but eliminating it in favour of “gender” eradicates cis women’s conquests up to this point. We argue that the best path towards gender equality is striving for the separation of the concepts of “sex” and “gender” in the public conscious, which can and will lead to the acceptance of trans persons in all their multitudes. As cis women and trans women have different needs deserving of protection, this separation can only be beneficial to both groups.

4. Conclusion

In the current state of the European integration, a lack of respect for fundamental human rights by EU Member States is unacceptable. This was shown when both the Commission and the Parliament took action against Hungary due to its continued lack of respect for the rule of law and the fundamental rights of minority groups.⁵⁰

⁴⁶ Věra Dvořáková, “Access to Trans Healthcare: The Situation in Europe”, *The New Federalist*, 31 March 2022, accessed January 27, 2023, <https://www.thenewfederalist.eu/access-to-trans-healthcare-the-situation-in-europe?lang=fr>. European Union Agency for Fundamental Rights, “Being Trans in the European Union Comparative analysis of EU LGBT survey data”, FRA – European Union Agency for Fundamental Rights, Vienna, 2014, 41-42.

⁴⁷ Luke Armitage, “Explaining backlash to trans and non-binary genders in the context of UK Gender Recognition Act reform”, 25.

⁴⁸ Luke Armitage, “Explaining backlash to trans and non-binary genders in the context of UK Gender Recognition Act reform”, 12 and 23.

⁴⁹ Dhruvi Pachalla, “How The Patriarchy Affects Young Girls Around the World”, *The Spearhead Magazine*, 2 January 2021, accessed February 16, 2023, <https://thespearheadmagazine.com/how-the-patriarchy-affects-young-girls-around-the-world/>. Fabiha Afifa, “The urge to condition young girls to fit patriarchy”, *The Daily Star*, 1 September 2021, accessed February 16, 2023, <https://www.thedailystar.net/shout/news/the-urge-condition-young-girls-fit-patriarchy-3108446>.

⁵⁰ Kate Abnett, Jan Strupczewski, “EU holds back all of Hungary’s cohesion funds over rights concerns”, *Reuters*, 22 December 2022, accessed February 16, 2023, <https://www.reuters.com/world/europe/eu-holds-back-all-hungarys-cohesion-funds-over-rights-concerns-2022-12-22/>.

The EU and Member States exist in a delicate balance between their respective attributes, and issues relating to fundamental rights can often infringe on national competence, which would mean a disrespect for the principles of European loyalty, subsidiarity and proportionality.⁵¹ However, this must not stop EU institutions' endeavours to ensure the protection of fundamental rights for cis and trans women within their scope of action.

The aim is to reach more than formal equality. As such, enshrining into law the definitions of “sex” and “gender”, making it clear how they differ and how they intersect – and affording protections under both – can avoid confusion and create the largest possible blanket of protection for women as a whole. Furthermore, it would mean the CJEU could easily evolve in its jurisprudence, being more inclusive of trans issues, without having to focus on birth-assigned sex. Particularly, because the ways to be trans are endless and do not always involve gender confirmation surgeries.⁵²

This approach where the list of protected grounds is added to, instead of having substitutions made, reconciles the protection of trans women's rights with cis women's “fragile gains”.⁵³ It also puts an end to the weaponisation of the “sex”/ “gender” distinction, utilised to keep trans women at a margin when it comes to the protection of their rights. Cis women's fears are understandable, but are ultimately misplaced. The collective fight should be directed at the institutional problems of hegemonic masculinity and patriarchy.⁵⁴

While we recognise this will not constitute the be-all end-all solution for trans rights in the EU – as asymmetries between Member States cannot be ignored; and neither can the fact that staunchly conservative and anti-LGBTIQ groups are unlikely to change their minds – for those who are sensitive or receptive to these issues, it can push forward the principles of equality and non-discrimination. The goal is always to reach an equilibrium between all the issues in question.

It has been the spirit of the EU, when it comes to fundamental rights, to enlarge the legal protection, and when it relates to LGBTIQ rights specifically, to be at the forefront of the fight. As shown earlier, trans rights and cis women's rights are neither mutually exclusive nor incompatible. They are different, but intersect, and are all equally deserving of protection. The differentiation between “sex” and “gender” in the legal landscape could be a path towards the full realisation of the LGBTIQ Equality Strategy 2020-2025, and the effective protection of both groups.

⁵¹ Jacek Saryusz-Wolski, “Working document on the principles of subsidiarity and proportionality”, European Parliament, Committee on Constitutional Affairs, 7 July 2021, 1-2. European Parliament, “Legislative Train Schedule, Area of Justice and Fundamental Rights - Anti-Discrimination Directive”, 2022, accessed January 27, 2023 <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-anti-discrimination-directive>. Alessandra Silveira, *Princípios de Direito da União Europeia Doutrina e Jurisprudência*, 2nd Edition (Lisbon: Quid Juiris? – Sociedade Editora Ld.ª, 2011), 103-104.

⁵² Dylan Vade, “Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People”, 261. K. C. Clements, “What to Expect from Gender Confirmation Surgery”.

⁵³ Sarah Ditung, “Trans rights should not come at the cost of women's fragile gains”, *The Economist*, 5 July 2018, accessed February 18, 2023, <https://www.economist.com/open-future/2018/07/05/trans-rights-should-not-come-at-the-cost-of-womens-fragile-gains>.

⁵⁴ Luke Armitage, “Explaining backlash to trans and non-binary genders in the context of UK Gender Recognition Act reform”, 18.