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**Queering European Union Law: Sex and
Gender Beyond the Binary and
Cisnormativity**

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Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity

Inês Espinhaço Gomes*

Abstract

The EU legal framework, namely the general non-discrimination law and the specific gender equality law, does not expressly protect intersex, transgender or other gender non-conforming individuals who do not undergo gender confirmation surgeries. More specifically, this framework leads to a narrow interpretation of “discrimination on the grounds of sex” and does not include non-binary gender categories, such as “sex characteristics”, “gender identity”, “gender expression”, “gender-related aspects” or “other status”. Such approach reflects the individual, social and institutional assumptions that one is either a woman or a man, because one is born with either female or male sex. In the light of the principle of equality, this paper aims to deconstruct and challenge those binary and cis assumptions and to propose legal solutions that accommodate the protection of all the sex/gender variants, in order to achieve a truly inclusive EU (gender) equality or non-discrimination legal framework.

Key words: Equality, EU Law, Fundamental Rights, Gender, Genderqueer, Intersex, Sex, Transgender.

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Table of Contents

<u>LIST OF ABBREVIATIONS</u>	<u>VI</u>
<u>INTRODUCTION</u>	<u>2</u>
<u>PART 1: SEX, GENDER AND THE SOCIAL FRAMEWORK</u>	<u>4</u>
A. Sex and Gender: An Evolutionary Social (De)construction	4
B. Challenging the Binary and Cisnormativity: Spectrum and Dimensions	9
C. Some Practical Implications: The Consequences of Challenging or Complying with the Binary and Cisnormativity	13
<u>PART 2: SEX, GENDER AND THE EUROPEAN UNION LEGAL FRAMEWORK</u>	<u>16</u>
A. The (Gender) Equality and Non-Discrimination Framework	16
I. Primary Law: The Treaties and the EU Charter	17
1. The General Principle of Equality or Non-discrimination	17
2. The Principle of Gender Equality	18
II. Secondary Law: Directives	19
1. The Employment Equality Directive	20
2. The Gender Directives	21
3. The Directives Outside the (Gender) Equality or Non-Discrimination Legal Framework: Asylum and Judicial Cooperation in Criminal Matters	25
III. The Case Law of the Court of Justice of the European Union	28
1. <i>P v S and Cornwall County Council</i> (1996)	28
2. <i>K. B. v National Health Service Pensions Agency and Secretary of State for Health</i> (2004)	34
3. <i>Sarah Margaret Richards v Secretary of State of Work and Pensions</i> (2006)	37
4. <i>MB v Secretary of State for Work and Pensions</i> (2018)	39
B. Other Contributions: Inside and Outside the European Union	43
I. Inside the European Union: a Brief Look at the European Union's Soft Law	44
1. The European Parliament's Resolutions	44
2. The Commission's List of Actions and Reports	46
3. The Council's Guidelines and Conclusions	48
4. The European Union's Agencies	48
II. Outside the European Union: a Brief Look at the Council of Europe Framework	50
1. The European Convention on Human Rights and the European Court of Human Rights	51
2. Other Documents of the Council of Europe	54

<u>PART 3: SEX, GENDER AND A QUEER READING OF EUROPEAN UNION LAW</u>	<u>56</u>
A. The European Union (F)Law and its Challenges	56
I. The Union’s Limited Field of Action	56
II. A More Proactive Role	58
III. Land Insight: Future Claims?	59
B. Overcoming the Challenges Through a Queer Legal Reading	62
I. Creating New Discrimination Grounds: Non-Binary Gender Categories or an Open Clause	62
II. A Broad Understanding of Sex Discrimination	65
III. A Call for the Union’s Values: Equality, Human Dignity and Respect for Fundamental Rights	70
IV. Legislating Other Fields	72
<u>CONCLUSION</u>	<u>73</u>
<u>LIST OF DOCUMENTS</u>	<u>79</u>
<u>BIBLIOGRAPHY</u>	<u>84</u>

List of Abbreviations

CJEU – Court of Justice of the European Union

CoE – Council of Europe

DG JUST – Directorate-General for Justice and Consumers

EC –European Community

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EEC – European Economic Community

EIGE – European Institute for Gender Equality

EU – European Union

EU Charter – Charter of Fundamental Rights of the European Union

FRA – European Union Fundamental Rights Agency

LGBTI - Lesbian, Gay, Bisexual, Trans, Intersex

LIBE - Committee on Civil Liberties, Justice and Home Affairs

OII Europe – Organization Intersex International Europe

PACE – Parliamentary Assembly of the Council of Europe

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

“Gender becomes not a guide to static categories of sexed identity, but to the dynamic and contested interplay of imagination, regulation, and transgression in the societies and cultures we study. (...) Far from being an exercise in frustration, this approach opens the way to new thinking, new interpretations, and perhaps even to new policies.”

Joan Scott, “The Uses and Abuses of Gender”, pp. 74 – 75.

Introduction

Most people rely on the assumption that, as far as gender is concerned, there are two types of bodies, two kinds of identities, and two ways of expressing them: female/male, woman/man, femininity/masculinity, respectively. This dichotomic rational is deeply established in our society and its institutions, and shapes our individual perceptions from early on in our lives.

The question of our gender is first raised while we are still inside the womb: Is the baby a girl or a boy? Later on, one is faced with the same question while applying for a job, looking for place to live, joining a sports team, using public toilets and while facing many other daily and life episodes. This segregation is so deeply engrained within us that one might not even realize it: We simply fit gender norms, and gender norms fit us.

However, this is not the reality for everyone. Some people do not match the individual, social and institutional expectations that one is either a woman or a man simply because one was born with either female or male sex, and so one behaves according to either her femininity or his masculinity.

This paper aims at challenging this “either/or” assumption and at reading European Union (EU) law from a queer legal perspective. Although “queer” was first used as a pejorative term for homosexuality, it has since been appropriated to challenge heterosexual norms.¹ Queer became a way “to make strange, to frustrate, to counteract, to delegitimize, to camp up – heteronormative knowledge and institutions, and the subjectivities and socialites that are (in)formed by them and that (in)form them”².

Nonetheless, a queer perspective was also then used to dismantle binary and cis assumptions. This approach unveils the ambiguities, varieties and fluidity that sex and gender can entail and supports the

¹ STRYKER, *The Transgender History*, p. 20; VALDES, *Afterword & Prologue: Queer Legal Theory*, p. 47.

² SULLIVAN, *A Critical Introduction to Queer Theory*, p. vi.

claim of all those who do not present sex characteristics and/or do not identify and/or express their gender according to the expected dichotomy of female/male, woman/man.³

The queer legal theory or queer law has emerged from this context. This approach seeks to resist, destabilize and problematize the social gender assumptions, categories and discursive tendencies reflected in the legal framework; it intends to dissect the law and transgress its oppressive foundations; it aims at giving voice to the silenced bodies and identities through a legal system that acknowledges them; ultimately, it seeks to accommodate all diversity within gender.⁴

Therefore, considering a queer legal perspective, the purpose of the thesis is to assess whether the EU legal framework accommodates sex and gender beyond binary and cis norms, i.e. within all their varieties and possibilities, or whether it relies on the binary dichotomy and the unquestionable assumption that one is a woman or a man because one was born with female or male sex.

Part 1 aims to briefly introduce some perspectives on the concepts of sex and gender (*Section A*), to challenge certain assumptions that arise from the binary and cis norms and to unveil possible dimensions and varieties (*Section B*), and to give an insight to the practical implications faced by people who do not fit the gender norms (*Section C*). This “(de)construction” and social framework will contextualize the legal problems, challenges and possible solutions brought in *Parts 2* and *3*.

Part 2 is devoted to the assessment of the EU legal framework. The main goal is to assess whether this framework accommodates, explicitly or implicitly, the concepts of sex and gender as (de)constructed in *Part 1*, or whether it is silent or incomplete in that regard. *Section A* focus on the primary sources of the Union, namely on *I*) the EU Treaties – Treaty on European Union (TEU) and Treaty

³ STRYKER, (fn. 1), p. 20; SULLIVAN, (fn. 2), p. 99.

⁴ VALDES, (fn. 1), pp. 349, 353, 361, 362; MORGAN, “Queer Law: Identity, Culture, Diversity, Law”, pp. 34, 39 – 41.

on the Functioning of the European Union (TFEU) – and the Charter of Fundamental Rights of the EU (EU Charter), *II*) the secondary legislation, namely several Directives and *III*) the case law developed by the Court of Justice of the European Union (CJEU).

Section B looks at other contributions that play an important role in the development of the EU legal framework. *Subsection I* assesses the so-called soft law of the Union that, although not having legal binding force, encourages the emergence of EU law, or complements it and gives further guidance. *Subsection II* turns to the Council of Europe (CoE) framework and analyzes certain contributions that may influence the Union’s law, because of the close relation between the two frameworks.

Finally, *Part 3* aims at constructing a queer reading of EU law, i.e. at mapping ways of including protection to all those who present varied sex characteristic or gender identities. *Section A* starts to acknowledge present and future challenges for the Union in regard to the action and protection in this field. *Section B* proposes possible ways to overcome those challenges, to accommodate protection, and to further the pursuit of equality within the EU legal framework.

Part 1: Sex, Gender and the Social Framework

A. Sex and Gender: An Evolutionary Social (De)construction

Back to the late 60s and early 70s, sexologists and psychiatrists such as *Robert Stoller* (1968)⁵, *John Money* and *Anke Ehrhardt* (1972)⁶ developed the idea that sex and gender encompassed different categories. Sex would refer to the physical characteristics determined by anatomical, physiological and biological conditions⁷, while gender

⁵ STOLLER, *Sex and Gender: on the development of masculinity and femininity*.

⁶ MONEY/EHRHARDT, *Man & Woman, Boy & Girl: the differentiation and dimorphism of gender identity from conception to maturity*.

⁷ STOLLER (fn. 5), p.9, mentioning “chromosomes”, “external and internal genitalia”, “gonads”, “hormonal states” and “secondary sex characteristics”.

would relate to the psychological development or cultural attributions, formed by gender identity and gender role.⁸

More particularly, *Stoller* perceived sex as related to the terms female and male, and gender as one's "amount of masculinity and femininity", which could vary.⁹ According to the author, gender identity referred to one's knowledge and awareness of "belonging" to one sex or another, which was influenced by 1) the external appearance of sex, 2) the social and cultural influences and 3) the hormonal information.¹⁰ Moreover, gender role would refer to one's expression or behavior of that identity in front of others.¹¹

Similarly, *Money* and *Ehrhardt* developed the concept of gender identity as "the sameness, unity, and persistence of one's individuality as male, female or ambivalent"¹², resulting from the combination of various factors – from sex dimensions to self-development and social interaction.¹³ Besides, gender role was essentially one's conduct that indicated one's "degree" of maleness, femaleness or ambivalence to others or to the self.¹⁴ Thus, gender identity was considered the "private expression" of sex role, and the latter the "public expression" of the former.¹⁵

Similarly, MONEY/EHRHARDT (fn. 6), pp. 7 – 15, referring to "chromosomal sex", "gonadal sex", "hormonal sex", "morphological sex", "fetal hormonal sex", "external morphologic sex, "assigned sex".

⁸ STOLLER (fn. 5), pp. 9 – 10; MONEY/EHRHARDT (fn. 6), p. 4.

⁹ STOLLER (fn. 5), pp. 9 – 10.

¹⁰ *Ibid.*, pp. 10 and 65. The author calls, respectively, 1) "the anatomy and physiology of the external genitalia", 2) "the attitudinal forces of the parents", 3) "the biological force".

¹¹ *Ibid.*, p. 10.

¹² MONEY/EHRHARDT (fn. 6), p. 4.

¹³ By "sex dimensions" I refer to the categories mentioned in MONEY/EHRHARDT (fn. 7). By "self-development and social interaction" I mean the factors pointed by the authors through their study, such as the relation between "dimorphism" (boy/girl, female/male differentiation) and behaviour, parenting, culture (pp. 117 – 118), early mother-infant interaction (pp. 179 – 180), the experience of sexuality, eroticism and love in childhood (pp. 180 – 194), the same experiences in puberty and adult life (pp. 195 – 235), and the impact of brain function and development (pp. 236 – 258).

¹⁴ MONEY/EHRHARDT (fn. 6), p. 4.

¹⁵ *Ibid.*, (fn. 6), p. 4

Noteworthy, the word “gender” and its differentiation from “sex” urged in this context to justify the reason why some people would develop and express their identity at odds with their male or female body. *Stoller* was focused on transsexuality¹⁶, whereas *Money* and *Ehrnard* wanted to prove that gender identity was malleable and could be shaped in early childhood.¹⁷

The sex/gender dichotomy was after adopted by feminists’ claims in the 70s. It served them to counter the biological determinism of sex, to refuse the idea that biology or anatomy is “destiny”¹⁸. In other words, feminists aimed to show how their female physical attributes did not define their aspirations and roles in society. Contrary, those behavioral and psychological traits were determined by social and cultural constructions, thus differences between women and men were shaped by social and cultural practices and expectations. Therefore, gender, because socially constructed, could be changed, whereas sex was immutable.¹⁹

Despite the agreed distinction sex/gender, biological/social, immutable/variable, feminist’s views varied, especially in regard to how the social forces operated in the definition of gender.²⁰ A certain approach would focus on the patriarchal notions and expectations on

¹⁶ As far as the work in STOLLER (fn.5) is concerned.

¹⁷ See FAUSTO-STERLING, *Sexing the Body – Gender Politics and the Construction of Sexuality*, pp. 63 – 64, 66 – 73, for the controversial and long debate between Money and Milton Diamond on the topic, and the unfortunate real story of David Peter Reimer whose penis was accidentally circumcise while being 7 months old, and who was then surgically turned into and raised like a girl, following Money’s counseling based on his gender identity theory (the case was known as John/Joan). Years after David “came back” to his male identity and committed suicide.

¹⁸ BUTTLER, *Gender Trouble*, p. 9; SCOTT, “The Uses and Abuses of Gender”, p. 66.

¹⁹ As explained in FAUSTO-STERLING (fn. 17), pp. 3 – 4; SCOTT (fn. 18), pp. 63 and 66 – 71.

²⁰ Due to the purpose here standing and the complexity of the topic, the examples following merely intend to briefly illustrate some of the approaches. See for instance TUANA/TONG, *Feminism and Philosophy – Essential Readings in Theory, Reinterpretation and Application*, for possible feminists’ perspectives (liberal, Marxist, radical, psychoanalytic, socialist, anarchic, phenomenological, postmodern, intersectional feminists perspectives).

what women and men ought to be, which were assimilated through socialization from childhood to adult life.²¹ A different perspective would rely on the early infancy as the period that most shapes one's feminine or masculine personality.²² Differently, another view would perceive gender, not as a behavioral development, but as the sexual objectification of women.²³

Notwithstanding, there was a mutual feminist purpose: to challenge the inequality between women and men through the concept of gender.²⁴

At a certain moment, the distinct feminist's perspectives found different sources of criticism. Some pointed the problem that feminists' claims relied on the assumption of a shared view of

²¹ For instance, MILLET, *Sexual Politics*, (1970). The author refers to "male" and "female" as "two different cultures" (p. 31) shaped (but mostly, "consented") through the socialization of "patriarchal politics" (p. 26). This notion would refer to an interconnecting chain between 1) temperament or psychological component – masculine/feminine, aggressive/docile, intelligent/ignorant –, 2) role or sociological component – domestic service and child care/all other human activities –, and 3) status or political component – male superiority/female inferiority. Those concepts and others – such as institutionalized force, patriarchy through economic and educational power, family and the patriarchy's chief institution – are developed in chapter two.

²² For instance, CHODOROW, "Family Structure and Feminine Personality", (1974). Chodorow starts to claim that explanations such as the one above (that suggest "patterns of deliberate socialization") are insufficient (p. 199). The author understands that gender identity and expectations about sex roles are enshrined in a child's personality. This is mainly because girls and boys experience social environment and psychological development differently, which is justified by the women/female's role on children's caretaking (pp. 200 – 207). While a woman (mother) is more likely to identify with and project herself in her daughter (pp. 202 and 208 – 210), she will instead push her son to develop masculine traits, as opposed to herself (p. 202).

²³ For instance, MACKINNON, *Toward a Feminist Theory of State* (1989). In her work, MacKinnon claims that the social meaning of sex arises through the "erotization" of the male "dominance" and female "submission" (p. 113). The author focuses on sexuality (chapter 7) and how women experience it in submission, non-consensual intercourse and violence. This male supremacy/women submission is institutionalized through rape (chapter 9), prostitution and pornography (chapter 11) (pp. 112 – 113 and 197).

²⁴ SCOTT (fn. 18), p. 69.

womanhood, on the supposition that women related through a common identity.²⁵

That approach neglected the fact that gender is not a coherent and consistent construction through time and space. Instead, gender should be perceived as an intersectional concept, i.e., in relation to other factors such as religious, racial, sexual, class, ethnical, local and regional realities, identities and temporalities.²⁶

Besides, this distinct woman identity seemed to challenge its own feminist claim: “if women are essentially different, then on what basis can they be considered equal to (the same as) men?”²⁷

Moreover, the dichotomies sex/gender and biological determinism/social construction started to be contested. Are sex and gender really different categories? Is sex really biological determined and gender socially constructed? *Judith Butler* purposed that sex is as constructed as gender; hence, no distinction is to be drawn between the terms.²⁸ In a nutshell, the author claimed that sex is determined by cultural assumptions; that sex becomes what it is because of the constructed “gendered meanings”²⁹ given to it.

Furthermore, not all languages differentiate the two concepts.³⁰ Besides, not all discourses precisely draw that boundary, either intentionally – as seen, because they intend to challenge the dichotomy – or unconsciously. The terms have been used

²⁵ As defended in RILLEY, *Am I that name? – Feminism and the Category of “Women” in History*; BUTTLER, (fn. 18), pp. 3 – 9. SCOTT (fn. 18), pp. 66, 68 – 69.

²⁶ RILLEY, (fn. 25), pp. 2 – 3; BUTTLER, (fn. 18), p. 6; SCOTT (fn. 18), p. 68, pointing out that although some feminists might have acknowledged these varieties, they nonetheless referred to a sort of “inherent sameness”, usually connected to “reproduction”. Kimberle Crenshaw brought the concept of “intersectionality” to the context of feminism, for the first time (1989). In CRENSHAW, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, the author aimed to explain that the oppression and violence towards black women were the result of them being both black and women.

²⁷ As asked by SCOTT (fn. 18), p. 68.

²⁸ BUTTLER, (fn. 18), pp. 10 – 11.

²⁹ *Ibid.*, p. 139. Following the same line, FAUSTO-STERLING (fn. 17), p. 9.

³⁰ HUBBARD, “Gender and Genitals – Constructs of Sex and Gender”, p. 157. For instance, in German “*Geschlecht*” means both gender and sex.

interchangeably, leaving sometimes the doubt whether it is premeditated or not.

One concludes that the sex/gender dichotomy is contested. Very different perspectives have been and can be taken through different times and contexts and may serve very distinct claims. This paper will assume the permeability of the terms.³¹

B. Challenging the Binary and Cisnormativity: Spectrum and Dimensions

If at this point the relation between sex and gender is far from being stable, the follow considerations will stress those concepts even more.

Most people assume that there are two genders: female and male, women and men. Thus, lives are regulated on the basis of this dichotomy, which is reflected in the health and social systems, in many areas of law, in education, in employment, in ludic activities, in the market, among others. We are continuously being segregated into woman or man, female or male.³² That is what it is meant by binary normativity.³³

Along with this idea, it lays the notion that one will identify with, express according to or live in that sex assigned at birth (which is female or male). As above, individuals, society and institutions are framed in that postulation. That is what is meant by cisnormativity.³⁴

However, the very existence of intersex and trans people challenge those norms. Their bodies, identity and expression do not fit into this binary and cisnormativity.³⁵ Why is that so?³⁶

³¹ Thus, I will use them interchangeably, unless the differentiation is needed for the discussion.

³² PREVES, *Intersex and Identity*, pp. 13 – 16, talking about the relevance attributed to gender categorization in the social order. AGIUS (fn. 41), p. 13.

³³ Or bigenderism as referred in GILBERT, “Defeating Bigenderism: Changing Gender Assumptions in the Twenty-first Century”, pp. 93 – 103.

³⁴ For instance, see SHELTON, “Cisnormativity and Housing programs” or STRYKER (fn. 1), p. 22, referring to cisgender or cissexual – “cis”, the author explains, refers to “on the same side as”.

³⁵ PREVES, (fn. 32), p. 18 – 19. AGIUS (fn. 32), p. 13.

Intersex³⁷ people are born with certain physical, hormonal and/or genetic characteristics that, from a binary perspective, do not entirely (partially or at all) fit into the female and male sex characteristics. They may present a varied range of features – regarding chromosomal sex (genetic information), gonadal sex (ovaries, testes), external morphological sex (penis, scrotum, labia, clitoris), internal morphological sex (prostate, vagina, uterus), secondary sex features (body hair, breasts), hormonal sex (androgens, estrogens)³⁸ – that does not permit, as far as sex dichotomy is understood, to classify them as female or male.³⁹

Thus, because intersexuality encompasses such diversity, it should be perceived as an umbrella term embracing all those with varied sex characteristics. Also because of that very reason, intersex people should not be assumed as included in the “third sex” or “third gender” trend. Some intersex people do identify themselves as woman or man, others may identify themselves with both, neither or do not seek for such categorization.⁴⁰

Trans people may refer to all those who do not identify or express with the sex assigned at birth.⁴¹ This umbrella term may include all those categories (and the ones which are about to come) of people

³⁶ The following categories are described as a result of all the literature used in this paper and that, one way or another, refer to those categories and terms. For a general and catalogued source see, for instance, ILGA-Europe Glossary, or STRYKER (fn. 1), pp. 7 – 23. While defining some terms, I may provide specific sources for specific issues.

³⁷ Previously named “hermaphrodites”, and also know as “intersexual” or “intersexed”.

³⁸ For more specific details on those possible combinations, see, for instance, FAUSTO-STERLING (fn. 17), pp. 52-53; GREENBERG, *Intersexuality and the Law*, pp. 11 – 14.

³⁹ It is estimated that intersex people, in all their variety, amount to 1,7%, according to FAUSTO-STERLING, “The Five Sexes, Revisited”, p. 20.

⁴⁰ As pointed in AGIUS (fn. 32), p. 15.

⁴¹ Definitions that rely on gender/sex differentiation refer to: whose *gender* identity or expression is at odds with their *sex*. See, for instance, ILGA-Europe Glossary, p. 8; FAUSTO-STERLING (fn. 39), p. 22; AGIUS/TOBLER, *Trans and Intersex people, Discrimination on the grounds of sex, gender identity, and gender expression*, pp. 12 – 13, while defining transgender but also gender identity and expression.

who live, present, express, identify their gender regardless the binary and/or cisnormativity. This definition encompasses a lot of aspects.

First, that there is a distinction between gender identity and gender expression.⁴² In fact, the meritorious Yogyakarta Principles⁴³, that had settled those definitions in an international level, includes the later in the former term.⁴⁴ The after Yogyakarta Principles plus 10⁴⁵ remarked that aspect and amended the previous document, in order to include precisely the distinctive reference to gender expression (and sex characteristics).⁴⁶

Moreover, commonly include in the category of trans are other categories: 1) transsexuals as those who identify with the opposite gender of the one assigned at birth and wish to undergo gender confirmation⁴⁷ surgeries; 2) transgender as those who live permanently in their preferred gender(s), but do not necessarily wish or need to undergo medical intervention; 3) cross-dressers⁴⁸ as those who wear gender atypical clothes, because of political, fashion and

⁴² See for instance, STOLLER, (fn. 5), p. 10, and MONEY/EHRHARDT (fn. 6), p. 4 (they call it “gender role”); AGIUS/TOBLER (fn. 41), p. 13; ILGA-Europe Glossary, p. 5; STRYKER (fn. 1), p. 12 (calling it “gender comportment”).

⁴³ The Yogyakarta Principles, Principles on the application of international human rights law in relation to sexual orientation and gender identity adopted in March 2007, following an international human rights experts’ meeting held in Yogyakarta in November 2006, therefore having no-binding effect.

⁴⁴ *Ibid.*, Preamble, p. 8: gender identity refers “to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.

⁴⁵ The Yogyakarta Principles plus 10, Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, as adopted on 10 November 2017, Geneva.

⁴⁶ *Ibid.*, p.7. It defines gender expression as “each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioral patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity” (p. 6).

⁴⁷ The most common term is “gender reassignment surgery”, but “gender confirmation surgery” seems to better express what these people are seeking for. The ILGA-Europe Glossary, p. 5, recognizes the term.

⁴⁸ As explained in STRIKER (fn. 1), pp.17 – 18, this term is a more nonjudgmental and non-eroticized term for “travesties”.

theatrical motives and/or as a way to resist social norms; 4) agender as referring to those who do not want or feel like having a gender identity; 5) and all other terms such as polygender, androgyne, genderqueer, queer people, gender variant, gender non-conforming, gender fluid that refer to people who may live, express, identify with both or neither male and female characteristics and roles, who are fluid in their identity and expression, who do not conform with and instigate gender binary and/or cisnormativity.⁴⁹ People may identify with one of those categories, or none, or with more than one.⁵⁰

Furthermore, the terms trans and transgender are used interchangeably, but sometimes they are differentiated.⁵¹ Likewise, the term transgender may include the term transsexual, or may intentionally put it aside. The main reason for that distinction is the idea that, in fact, transsexual people reinforce the binary model, while refusing cis norms.⁵² Thus, they may be called transsexual woman (or male-to-female transsexual) or transsexual man (or female-to-male transsexual).

This aspect is connected to the tension between transsexual/transgender politics.⁵³ In a nutshell, transsexual people seek for the “acceptance” of living as the other gender, by “passing”, whereas transgender people aim to be accepted in their fluidity. Thus, transsexual politics is concerned with the medical and legal rights of transsexual people, whereas transgender politics look at frustrating

⁴⁹ I will refer to “trans” or any of these terms when referring to a broader understanding.

⁵⁰ See, for instance RODRIGUÉZ, pp. 166 –167, who identifies with several categories; KUSALIK, “Identity, Schmididentity”, p. 55 – 56, who does not find gender identity a central issue and criticizes the attempts to define categories.

⁵¹ As noted by AGIUS/TOBLER (fn. 41), p. 12, trans is now considered to be the most inclusive term for all the variety. Using the term transgender instead, as a broad concept, see, for example, STRYKER, (fn. 1), p. 19, or the approach in ROEN, ““Either/Or” and “Both/Neither”: Discursive Tensions in Transgender Politics”.

⁵² KESSLER, *Lessons From the Intersexed*, p. 5.

⁵³ A very good insight on this tension is explored in ROEN (fn. 51). I will mention only some aspects.

binary norms. Therefore, from a postmodern transgender point of view, “passing” is opposed to the transgender claim.⁵⁴

If this distinction is established, and considering a person who, although identifying with the other binary opposed sex and wishing to pass, does not do it, or does it incompletely – whatever the reasons are (for instance, the person cannot afford the confirmation surgery or is not allowed to access it) – one may question: in which of those two categories would this person fit?

It becomes clear that sex characteristics and gender identities are varied and go beyond binary and cis understandings. On the one hand, the definition of categories may give more visibility to the different situations and claims, and offers a range of possibilities that contradict and threaten the binary and cisnormativity. On the other hand, categories can be discriminatory and create (unnecessary?) tensions.

The most important claim here is that, the dichotomy of male/female, women/men, shall not be taken for granted. There are as many variations as existing people. That is a human reality.

C. Some Practical Implications: The Consequences of Challenging or Complying with the Binary and Cisnormativity

Because norms dictate a dualistic approach of sex, people who deviate from those norms will either be treated differently and face stigma, once the system is not ready to accommodate their situation, or forced to comply with the norm (and still face stigma).

The infant surgeries and medical treatments to which intersex children are usually submitted prove this idea. Once their anatomy confronts the binary understanding of sex – because they cannot be categorized into female or male –, their bodies shall be “fixed”,

⁵⁴ ROEN (fn. 51), pp. 501 – 503. Opposing this distinction, see, for instance, STRYKER (fn. 1), pp. 149 –152 – for the author transgender can include transsexual, and both can relate to queer; ROEN, (fn. 51), p. 521.

“normalized”.⁵⁵ Usually, those medical interventions aim at nothing else but fixing the “abnormality”, once they do not even seek to safe the infants’ immediate or long-term health – on the contrary, those interventions result in many unfortunate and irreversible consequences, such as the lost of sexual sensitivity.⁵⁶

This medical and social non-acceptance of intersex bodies ends up demonstrating that those who claimed sex to be a social construction, along gender – or refusing distinction at all –, seemed to be right, and that medical practices perpetuate binary norms and the importance of sex.⁵⁷

Similarly, legal gender markers reinforce both the binary and cishnormativity. First, because they most usually provide the female or the male gender marker, with no third option – should legal gender markers anyway exist?⁵⁸ Moreover, the change of legal gender marker is not allowed or encompasses requirements such as 1) surgical interventions (including sterilization) and hormonal treatment, 2) or/and a medical mental health diagnosis.⁵⁹

Consequently, gender variant people either submit themselves to those sluggish, humiliating and costly processes, or are left with no

⁵⁵ HUBBARD (fn. 30), p. 161; FAUSTO-STERLING (fn. 17), p. 8; GREENBERG (fn. 38), pp. 11 – 25.

⁵⁶ FAUSTO-STERLING, (fn. 39), p. 21.

⁵⁷ KESSLER, “The Medical Construction of Gender: Case Management of Intersexed Infants”, p. 26; FAUSTO-STERLING, (fn. 17), p. 31.

⁵⁸ Proposing the ban of gender category in legal documents, for instance, FAUSTO-STERLING (fn. 39), p. 23.

⁵⁹ According to the TGEU, Trans Rights Europe Map & Index 2018 (14 May 2018), 14 European countries demand sterilization (7 EU Member States– Bulgaria, Czech Republic, Finland, Latvia, Luxembourg, Romania and Slovakia) and 34 require a mental health diagnosis (22 EU Member States – all except Belgium, Denmark, France, Greece, Ireland and Malta; Cyprus does not recognize legal gender change) as preconditions for legal gender recognition, available at <https://tgeu.org/trans-rights-map-2018/>, last accessed on 05/09/18. These data is from 21 April 2018. Meanwhile, as far as known, Portugal approved a new gender identity law that limits the mental diagnosis to people under 18; Luxembourg approved a parliamentary proposal on a new gender identity law. See ILGA-Europe Rainbow No 274 (July 2018), point legal gender recognition, available at <https://www.ilga-europe.org/resources/rainbow-digest/july-2018#Legal%20gender%20recognition>, last accessed on 05/09/18.

option but having a legal gender marker with which they do not identify or which does not represent their variety.

Intersex and trans people suffer various structural, verbal, physical discrimination and violence through life, community exclusion, social stigmatization, harassment and crime, with enormous negative consequences for their psychological and personal development. It is important to recall the concept of intersectionality⁶⁰ in discrimination, and how violence and different treatment may be related to very different factors.

Typically, intersex people experience most discrimination in the field of sport, but also suffer from bullying and exclusion in school – activities where their sex characteristics may be more exposed – and in employment. Because of the previous medical interventions they suffered while infants, they distrust medical support.⁶¹ Trans people face the most discrimination in employment, but also in education, health care (usually poor), goods and services; lack of family support is also an issue, among others.⁶²

Despite the similar root that lays under the discriminatory treatment – which is, all in all, the binary and cisnormativity – intersex and trans people may have distinct claims. For instance, intersex people aim at stopping and forbidding the infant genital surgeries, they claim more access to parental information, more range of given options, and the right of the child to decide whether a surgery or treatment is to be performed.⁶³

Instead, trans people, who wish to undergo gender confirmation surgeries and to change their legal gender markers to the opposite sex, want to ensure their access to such procedures and to medical and

⁶⁰ Part 1, A: Sex and Gender: An Evolutionary Social (De)construction.

⁶¹ According to AGIUS (fn. 32), pp. 43 – 44.

⁶² According to FRA, *Being Trans in the European Union, Comparative analysis of EU LGBT survey data*, December 2014, pp. 21 and 77; FABENI/AGIUS, *Transgender People and the Gender Recast Directive – Implementation Guidelines*, p. 19.

⁶³ FAUSTO-STERLING (fn. 39), pp. 21 and 23.

health structures, and to more clear, fair and safe practices; other genderqueers may want to banish the existence of legal gender identity or to introduce a third or alternative option that includes them, and to finish with all the binary institutionalized segregation of gender.

Of course that intersex people who do not perceive themselves as neither woman nor man, may also wish to pursue the last claim, which shows that those claims can touch each other. Again, the limited approach of establishing strict categories or claims reveals some benefits and some disadvantages.

A lot more could be here said. The stigmatization and the pathologization of those bodies and identities do not support their acceptance among individuals, society and institutions. The dichotomic norms in which society is established serve ciswomen and cismen, but not the spectrum of sex characteristics and gender identities and expressions. They suffer from the perpetuation of those binary absolute truths, in a system that is not ready to accommodate and empower them.

Part 2: Sex, Gender and the European Union Legal Framework

A. The (Gender) Equality and Non-Discrimination Framework

The EU legal framework presents a general equality or non-discrimination framework⁶⁴, based on the core principle of equality or non-discrimination, being respectively the positive and the negative facet of the same principle⁶⁵, thus used interchangeably.

More particularly, the protection of gender equality under the EU legal framework is often known as “EU gender equality law” and can

⁶⁴ For a complete assessment, see CRAIG/BÚRCA, *EU Law – Texts, Cases and Materials*, pp. 892 – 963.

⁶⁵ BESSON, “Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?”, p. 652.

be understood as representing a “EU gender equality *acquis*”⁶⁶, which embraces some provisions of the Treaties, legislation and judgments of the CJEU.

In this section, the main goal is to assess whether both the more general and the particular legal framework foresee the protection of discrimination against individuals on the grounds of sex beyond the binary and cisnormativity, as defined in *Part 1*. A look will be taken in regard to the EU primary and secondary law, and case law of the CJEU – all binding instruments, according to article 288 of the TFEU.⁶⁷

I. Primary Law: The Treaties and the EU Charter

1. The General Principle of Equality or Non-discrimination

Article 2 of the TEU claims “equality” and “non-discrimination” as core values of the Union and Article 3 sets the fight of “social exclusion and discrimination” as an Union’s objective.

The TFEU imposes the Union the elimination of “inequalities” and the fight against “discrimination based on *sex*, racial or ethnic origin, religion or belief, disability, age or sexual orientation”⁶⁸, while “defining and implementing its policies and activities”, according to Articles 8 and 10 (“nationality” having its own protection under Article 18). Article 19 – under Part Two “Non-discrimination and Citizenship of the Union” – foresees the competence of the Union – the Council, acting unanimously with the consent of the European Parliament – to take action to combat discrimination based on the grounds set above (paragraph 1), or to adopt incentive measures that support Member States’ action – under the ordinary legislative procedure (paragraph 2).

⁶⁶ BURRI/PRECHAL, *EU Gender Equality Law*, p. 1.

⁶⁷ On the Union’s instruments and Article 288 of the TFEU, see CRAIG/BÚRCA (fn. 64), pp. 106 – 123.

⁶⁸ Hereinafter, the italic is added in order to emphasize the terms that are relevant for the discussion in this context.

The EU Charter devotes Title III to “equality”, claiming the principle in Article 20, and prohibiting “discrimination based on any ground such as *sex*, race color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation” in Article 21. This Article not only extends the list of explicit grounds in comparison with the one provided in the TFEU, but also notably uses the expression “such as” proposing certain grounds in a non-exhaustive list.⁶⁹

2. The Principle of Gender Equality

The TEU also establishes “equality between *women* and *men*” as a core value and an objective of the Union, according to Article 2 (2nd sentence) and Article 3, respectively.

Such principle shall be promoted by the Union while developing its activities according to Articles 8 TFEU. A particular concern is given to the field of social policy, having the Union – through the European Parliament and Council, with the Economic and Social Committee’s consultancy – the task of adopting measures to ensure the “principle of equal opportunities and equal treatment between *men* and *women* in matters of employment and occupation”, in the terms of Article 157 (3), having a supportive and complementary task to Member States’ activity, according to Article 153 (1) (i).

Furthermore, Article 157 (1) of the TFEU enshrines the even more specific principle of “equal pay for *male* and *female* workers”, defining in paragraph 2 the meaning of “equal pay without discrimination based on *sex*”. Besides, paragraph 4 encourages Member States to take measures in order to ensure “full equality in practice between *men* and *women*”, by facilitating the

⁶⁹ KILPATRICK, in PEERS/HERVEY/KENNER/WARD (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Art. 21, pp. 582 and 587; AGIUS/TOBLER (fn. 41), p. 32.

“underrepresented *sex*” to pursue “vocational activity or to prevent or compensate for disadvantages in professional careers”.

The EU Charter ensures the principle of “equality between *women* and *men*”, reiterating the focus on employment, work and pay, and foreseeing the possibility of action “in favor of the under-represented *sex*”, according to Article 23.

Thus far, one realizes that certain provisions of the EU general non-discrimination primary law encompass a reference to sex with no further binary distinction or claim the principle of equality and non-discrimination with no further reference to specific grounds. Moreover, the EU Charter contains a non-exhaustive list that may include other unforeseen discrimination grounds.

However, the text of the legal provisions within the EU equality primary law clearly follows a binary understanding of gender, with the use of terms such as “women”, “men”, “female” and “male”, neglecting the existence of gender diversities. Besides, the terms sex and gender assume permeability.

II. Secondary Law: Directives

For the purpose here standing, one shall have a look at certain Directives, which are “binding as to the result to be achieved”, although leaving discretion to national authorities as to the “form and method” of its implementation, according to paragraph 3 of Article 288 of the TFEU.

The aim of this section is to assess whether the conclusion in regard to the primary law is extendable to the (gender) non-discrimination Directives. The first Directive arises in the context of the general non-discrimination framework, whereas the following, known as Gender Directives, emerge within the gender equality law. Another focus will be given to certain Directives that were adopted outside the (gender) non-discrimination framework.

1. The Employment Equality Directive

The Directive 2000/78/EC⁷⁰ (Employment Equality Directive) emerges within the field of equal treatment in employment and occupation. This document recognizes the steps taken within the Union towards the protection of the principle of equal treatment between men and women, particularly in the social policy field.⁷¹

It moves on recalling the Union's commitment to ensure such right in regard to social policy matters⁷², and acknowledging that other grounds deserve the same protection in the field of employment and occupation, those being "religion or belief, disability, age or sexual orientation"⁷³ (racial or ethnic origin being already protected under other Directive⁷⁴).

Although the Directive aimed at establishing a "general framework for equal treatment", none of its grounds offers protection to intersex and trans people.⁷⁵ In fact, the Directive was adopted after the introduction of Article 19 of the TFEU, with the Treaty of Amsterdam, which legitimized the Union to take action to combat discrimination on the range of grounds there safeguarded.⁷⁶ Once sex, race and ethnic origin were already protected grounds under secondary law, the Employment Equality Directive extended protection to the remaining ones.

The new Directive failed, however, to cover other fields of EU competence besides employment and occupation⁷⁷, although some

⁷⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16.

⁷¹ *Ibid.*, Recitals 2 and 3.

⁷² *Ibid.*, Recitals 5 – 9.

⁷³ *Ibid.*, from Recitals 11 onwards.

⁷⁴ *Ibid.*, Recital 10. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000 (Race and Ethnic Origin Directive).

⁷⁵ As it will be further assessed in Part 3, B, I: Creating New Discrimination Grounds: Non-Binary Gender Categories or an Open Clause.

⁷⁶ CRAIG/BÚRCA (fn. 64), p. 905 – 906; FRA/CoE (fn. 76), p. 21.

⁷⁷ CRAIG/BÚRCA (fn. 64), pp. 908 – 909.

years later the Commission had proposed its extension through the so-called Horizontal Directive, which has not been adopted yet.⁷⁸

2. The Gender Directives

The EU gender equality law is rich in terms of Directives. The Union has enacted such instruments in the fields of employment and occupation – Directive 2006/54/EC⁷⁹ (the so-called Gender Equality Directive or Recast Directive) –, self-employed capacity – Directive 2010/41/EU⁸⁰ –, social security schemes – Directive 79/7/EEC⁸¹ (Gender Statutory Social Security Schemes Directive) –, goods and services – Directive 2004/113/EC⁸² (Gender on Goods and Services Directive) –, pregnancy – Directive 92/85/EEC⁸³ (Pregnancy Directive) – and parental leave – Directive 2010/18/EU⁸⁴ (Parental Leave Directive).⁸⁵

All those Directives follow the binary understanding of sex, aiming the achievement of equal treatment and/or equal opportunities

⁷⁸ Commission of the European Communities, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, 2008/0140 (CNS), Brussels, 2.7.2008. On the proposal, see, for instance, CRAIG/BÚRCA (fn. 64), pp. 913 – 914.

⁷⁹ European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L204/23.

⁸⁰ European Parliament and Council Directive 2010/41/EU of 7 July 2010 on application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, OJ 2010 L180/1.

⁸¹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L6/24.

⁸² Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L373/37.

⁸³ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ 1992 L348/1.

⁸⁴ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESS EUROPE, UEAPME, CEEP and ETUC, OJ 2010 L68/13.

⁸⁵ For a close look at each of the gender directives, BURRI/PRECHAL (fn. 66), pp. 5 – 17; CRAIG/BÚRCA (fn. 64), pp. 914 – 931.

between *men* and *women*. Whereas most of them undoubtedly state this idea in their epigraph, the Parental Leave Directive claims it in the Preamble. Less explicit is the Pregnancy Directive, which seems to cover only female pregnant, given birth or breastfeeding workers. Such assertion can derive from the definition of “pregnant worker” or “worker who has recently given birth” or “who is breastfeeding” in Article 2, which uses the term *her*. This last aspect might be relevant in situations where the legal gender marker of the pregnant, given birth or breastfeeding worker does not match the expected “female” gender.

A closer look should be given to the Recast Directive which repealed existing Directives in order to consolidate them, to enshrine concepts developed by the CJEU, and, most relevantly for this work, to introduce a change of mindset, limited though, whose merits belongs to a judgment of the Court⁸⁶, as follows.⁸⁷

Recital 3 of the Preamble embraced the Court’s understanding that the “scope of the principle of equal treatment between men and women” could not be limited to the “prohibition of discrimination based on the fact that a person is of *one* or *other sex*”. If such idea would be taken *tout court*, the door would be open for a prohibition of discrimination suffered by those people who are not, or do not (want to) identify or express to “one or other sex”. In other words, it would possibly embrace intersex and trans people.

However, the recital went further stating that, due to the “purpose and the nature of the rights” at stake, the Directive would additionally apply to “discrimination arising from the *gender reassignment of a person*”.⁸⁸ The ambit of the protection is unclear. Some consider that it only covers those who had undergone gender confirmation

⁸⁶ Judgment in *P v S and Cornwall County Council*, Case C-13/94, ECR 1996 I-02143, ECLI:EU:C:1996:170. This case will be explored in the following section Part 2, A, III, 1: *P v S and Cornwall County Council* (1996).

⁸⁷ BURRI/PRECHAL (fn. 66), p. 8.

⁸⁸ The Directive adopted almost the same exact wording the CJEU used in judgment in *P v. S and Cornwall County Council*, ECLI:EU:C:1996:170, para 20.

surgeries, i.e. when the process is complete⁸⁹, while others believe it protects also those who intend to undergo or are still undergoing gender reassignment surgeries.⁹⁰ One way or another, such option not only excludes intersex and all other gender variants, but it also enforces and confirms the binary comprehension of gender.

It is, of course, notable that the Recast Directive incorporated in its Preamble the protection against discrimination based on “gender reassignment”. It was the first time that such protection was expressly enshrined in the EU legal framework⁹¹, gaining force as a general principle of law and recalling Member States the importance of taking legislative action in that matter.⁹² The Commission even later reminded national authorities of their obligation to transpose such novelty⁹³, although a Preamble can be seen as merely setting objectives, having no binding legal force.⁹⁴

However it cannot be ignored the bittersweet effect of such contemplation, “somewhat tempered by continuing (...) normativity” and the “(re) establishment of the binary nature of sex roles”⁹⁵. By incorporating such “narrow protection”, the Recast Directive put aside people who live or/and present their gender outside the binary

⁸⁹ CASTAGNOLI, *Transgender Persons’ Rights in the EU Member States*, p. 4 and 5; MOS, “Conflicted Normative Power Europe: The European Union and Sexual Minority Rights”, p. 87.

⁹⁰ FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis*, p. 131; WHITTLE/TURNER/AL-ALAMI, *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination*, p. 73.

⁹¹ CASTAGNOLI (fn. 89), p. 4.

⁹² BURROWS/ROBISON, “An Assessment of the Recast of Community Equality Laws”, p. 189.

⁹³ European Commission, Report on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), {SWD(2013) 512 final}, COM(2013) 861 final, Brussels, 6.12.2013, para 3.

⁹⁴ According to the judgment in *Hauptzollamt Bremen v J. E. Tyson Parketthandel GmbH hanse j.*, Case C-134/08, ERC 2009 I-02875, ECLI:EU:C:2009:229, para. 16. As explained in AGIUS/TOBLER (fn. 41), p. 45, Member States are expected to follow the Preamble, but not to transpose it.

⁹⁵ As well phrased in TRAVIS, “Accommodating Intersexuality in European Union Anti-Discrimination Law”, p. 191.

normativity and those who biologically present an ambivalent sex. The EU legislator was incapable of giving a step beyond the Court's unwillingness in engaging with certain complexities⁹⁶, missing the opportunity of comprising protection to all other possible and existing sexes and gender identities, thus failing to ensure the maximal equality within the gender spectrum.

Furthermore, the protection in regard to other aspects of life – such as access to and supply of goods and services – was also neglected.⁹⁷ In this regard it is worth to mention that, while negotiating the proposal of the Gender Goods and Services Directive, the Council and the Commission did acknowledge and debate the issue.⁹⁸ It remains the question why had the Council disregarded such consideration in the final version of the legislation.

From this sub-section, one concludes that the so-called EU gender equality directives disregard a broad and inclusive understanding of gender, being trapped in the bipolar model, and confirming the approach taken under primary law.

However, the Recast Directive contains a (limited) comprehension of gender identity, by extending the scope of application to those discriminatory situations that arise from “gender reassignment”. Nonetheless, the absence of such reference in the Gender Goods and Services Directive is questionable and, as this paper will show, the Gender Statutory Social Security Schemes Directive is to be interpreted as including such mention, according to the CJEU understanding in 2006.⁹⁹

⁹⁶ CHALMERS/DAVIES/MONTI, *European Union Law: text and materials*, p. 584.

⁹⁷ Following WHITTLE/TURNER/AL-ALAMI (fn. 90), p. 9, though referring to the particular case of the UK's legislator, but whose critique is here plausible.

⁹⁸ As one can read in the Council of the European Union, Draft Minute of the 2606th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), held in Luxembourg on 4 October 2004, Document Number ST 13369 2004 INIT, p. 7.

⁹⁹ Judgment in *Sarah Margaret Richards v Secretary of State of Work and Pensions*, Case C-423/04, ECR 2006 I-03585, ECLI:EU:C:2006:256. This case will be

3. The Directives Outside the (Gender) Equality or Non-Discrimination Legal Framework: Asylum and Judicial Cooperation in Criminal Matters

A particular assessment should be made in regard to the Directive 2011/95/EU¹⁰⁰ (EU Qualification Directive), which amended the Directive 2004/83/EC. It expressly imposed Member States – using the term “shall”¹⁰¹ – to duly consider “*gender identity*” in order to determine a particular social group, in the terms of Article 10 (1) (d) and according to recital 30 of the Preamble – aspect that was not foreseen in the previous Directive.¹⁰²

The way the new element is phrased – “*gender* related aspects, including *gender identity*” – proposes a broad understanding of gender. Thus, “gender” can be understood as a spectrum concept, embracing innumerable “aspects”, such as gender identity.

Despite this open concept, it is not clear whether this provision undoubtedly protects intersex people.¹⁰³ However, as constructed above in *Part I*, if the concepts of sex and gender are permeable to each other, then it makes sense to consider intersexuality as either a sex- or a gender-based matter.¹⁰⁴ Thus, it would be possible to include it as a “gender related aspect”. Such interpretation is supported by the inclusion in Article 9 (2) (f) of “acts of a gender-specific or child-

explored in the following section Part 2, A, III, 3: *Sarah Margaret Richards v Secretary of State of Work and Pensions* (2006).

¹⁰⁰ European Parliament and Council 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), OJ 2010 L 337/9.

¹⁰¹ TSOURDI “Sexual orientation and gender identity: developments in EU law”, p. 21.

¹⁰² *Ibid.*, p. 20.

¹⁰³ *Ibid.*, p. 21.

¹⁰⁴ SHIEK/WADDINGTON/BELL, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law: Ius Commune Casebooks for the Common Law of Europe*, p. 79.

specific nature” as “acts of persecution”, which could embrace cases of persecution of intersex adults and children.¹⁰⁵

Still in the field of asylum law, the Directive 2013/32/EU¹⁰⁶ (Common Procedures on International Protection Directive) acknowledges that special procedures’ guarantees might be granted in cases involving “*inter alia* (...) *gender*” and “*gender identity*”¹⁰⁷. However, and contrary to the previous Directive, the concept of gender seems to rely on the male/female dichotomy, by mentioning “*female and male applicants*”.¹⁰⁸

Moreover, Directive 2012/29/EU¹⁰⁹ (Victims’ Rights Directive) is devoted to the support and protection of victims of crime, who, according to Recital 9, should be treated “without discrimination based on any ground such as (...) *gender, gender expression, gender identity* (...)” – proposing a non-exhaustive list (“such as”). It is noteworthy that this legal instrument not only includes “gender identity”, but also “gender expression”, fact that denotes a particular sensitivity to the different levels of experiencing gender.

Furthermore, the Directive recognizes the existence of “*gender-based violence*” crime, which is perpetrated against a person because of “that person’s *gender, gender identity or gender expression*” or because it affects “persons of a particular *gender* disproportionality”. Such is to be considered as a form of discrimination and a violation of fundamental freedoms – being the “key element” of the Directive.¹¹⁰

¹⁰⁵ TSOURDI (fn. 101), p. 21.

¹⁰⁶ European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013.

¹⁰⁷ *Ibid.*, recital 29 and Article 11 (3).

¹⁰⁸ *Ibid.*, recital 32.

¹⁰⁹ European Parliament and Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012.

¹¹⁰ PEERS, *Guidelines for transposition – The EU Directive on Victims’ Rights (2012/29/EU) and Homophobic and Transphobic Crimes*, p. 21.

Victims of gender-based violence are subjected to a special treatment and protection, in the terms of Recitals 38 and 57 and Articles 9 (3) (b) and 23 (2) (d). Also, Recital 56 provides that “*gender* and *gender identity* or *gender expression*” are personal characteristics that should be taken into account when making an individual assessment of the victim, enforced by Article 22 (3).

Besides the obligation of protecting those victims’ rights, Member States are bound to raise awareness, “in particularly by targeting groups at risk (...) such as victims of *gender*-based violence”, according to Article 26 (2), and to provide “*gender* sensitive” training of “lawyers, prosecutors and judges”, according to Recital 61.

The spectrum of gender seems to be here enshrined, and the considerations made above in regard to intersex people are here applied *mutatis mutandis*.

Under this sub-section, one concludes that, although outside the (gender) equality or non-discrimination legal framework, the Qualification Directive and Victims’ Rights Directive foresee gender identity as a factor of discrimination and further suggest an open concept of gender, either by referring to “aspects” of gender or by mentioning “gender-based” including “gender identity” and “gender expression”, respectively.

Besides, the two Directives do not make any reference to a binary understanding of gender, thus possibly allowing the protection of intersex people, considering the conceptual permeability between sex and gender.

Similarly, the Common Procedures on International Protection Directive safeguards the possibility of ensuring special procedures to people suffering discrimination based on gender identity. Contrarily, it seems to follow a binary definition of gender, making the protection of intersex people questionable.

III. The Case Law of the Court of Justice of the European Union

1. *P v S and Cornwall County Council* (1996)

In *P v S and Cornwall County Council*¹¹¹ (*P v S*), the CJEU had to deal with the question whether the principle of equal treatment regarding working conditions, including dismissal, – at the time enshrined in Article 5 (1) of the Directive 76/207/EEC, today included in the Recast Directive – precluded the dismissal of a transsexual person based on gender reassignment.¹¹²

The applicant, *P*, was a manager in the educational establishment Cornwall County Council, and informed *S*, the Director of Studies, Chief Executive and Financial Director, about the intention of undergoing gender reassignment, from male to female. Few months later, after having undergone some minor surgeries, *P* received a notice of the termination of the contract, based on redundancy reasons.¹¹³

Contrary to the United Kingdom and Commission understanding¹¹⁴, the Court held that such dismissal was contrary to the objective of the directive.¹¹⁵ It supported its judgment on the European Court of Human Rights' (ECtHR) case *Ress v United Kingdom*¹¹⁶ that defined transsexuals as “those who, whilst belonging physically to one sex, feel convinced that they belong to the other” often seeking to undergo “medical treatment and surgical operations to adapt their physical characteristics to their psychological nature”¹¹⁷.

¹¹¹ Judgment in *P v S and Cornwall County Council*, Case C-13/94, ECR 1996 I-02143, ECLI:EU:C:1996:170

¹¹² *Ibid.*, para 13. Hereinafter, I will use the term transsexual as the CJEU has defined it (fn. 117). Besides, I will use the term “gender reassignment”, once it is the legal term referred by the CJEU.

¹¹³ *Ibid.*, paras 3 – 6.

¹¹⁴ *Ibid.*, paras 14 and 15.

¹¹⁵ *Ibid.*, para 24.

¹¹⁶ Judgment in *Ress v The United Kingdom*, Application no. 9532/81, 17 October 1986.

¹¹⁷ Judgment in *P v S and Cornwall County Council*, ECLI:EU:C:1996:170, para. 16.

Besides, it recalled former case-law that had considered the principle of equality as a fundamental right.¹¹⁸

Once Recital 3 of the Recast Directive embraced a similar wording such as the one used in this judgment¹¹⁹, the considerations made in that regard are extensible here.¹²⁰ However, some further assessment must take place. When referring to “gender reassignment” the CJEU did specify which stages were comprised, whose understanding the legislator refrained from including, as also above problematized. Thus, the Court included the situations in which a person “intends to undergo, or has undergone, gender reassignment”¹²¹.

It is doubtful whether people who do wish to pass but for instance cannot afford it or whose wish is being denied by national authorities are considered to be included as those who “intend to undergo gender reassignment”. Moreover, it is questionable whether such expression contains a narrower understanding of those who are in a pre-operation moment, thus in situations where the gender confirmation surgery is concretely foreseeable.¹²²

This might be a too meticulous assessment, and both views are arguable: 1) on the one hand, the Court literally only demands intention, not concretization; 2) on the other hand, it seems to infer a progressive scale from past to future (phrased in the chronological opposite order).

¹¹⁸ Judgment in *P v S and Cornwall County Council*, ECLI:EU:C:1996:170, paras 18 and 19.

¹¹⁹ *Ibid.*, para 20.

¹²⁰ Part 2, A, II, 2: The Gender Directives, in regard to the Recast Directive.

¹²¹ Judgment in *P v. S and Cornwall County Council*, ECLI:EU:C:1996:170, para 21.

¹²² In the same line, AGIUS/TOBLER (fn. 41), p. 43, although without going further on details, recognizing some confusion regarding what “gender reassignment” comprises and visualizing space for interpretation. For a narrow interpretation, see for instance Commissioner for Human Rights of the CoE Issue Paper, *Human Rights and Gender Identity*, CommDH/IssuePaper(2009)2. p. 5. The issue was also mentioned but unsolved by AG *Jacobs* (*Opinion of Advocate General Jacobs*, delivered on 15 December 2005, *Sarah Margaret Richards v Secretary of State of Work and Pensions*, Case C-423/04, ECR 2006 I-03585, ECLI:EU:C:2005:787, point 57) and AG *Bobek* (*Opinion of Advocate General Bobek*, delivered on 5 September 2017, *MB v Secretary of State for Work and Pensions*, Case C-451/16, ECLI:EU:C:2017:937, paras 73 – 74).

However, the intention here is to show how problematic categorizations might be and how legal considerations reproduce social uncertainties. Above, it was referred that the distinction between transsexuality and transgenderism encompasses certain challenges, as to the inclusion (or exclusion) of certain people in either one or another. Moreover, these two categories coexist in a central tension: transsexuality reinforcing the binary system and transgenderism destabilizing it. It can be said, thus, that this Court's judgment reflects such tension.¹²³

Another point refers to the comparative element established in the judgment. The CJEU compared the treatment given to a person who intends to undergo, is undergoing or has undergone gender reassignment to the treatment given to the "persons of the sex to which he or she was deemed to belong before undergoing gender reassignment"¹²⁴.

The issue was highly problematized by some.¹²⁵ One view understood that the judgment relied on the comparison between (transsexual) female and (non-transsexual) male, thus accepting the sex favored by *P*.¹²⁶ A different approach considered that the Court followed a comparison between people of same sex (namely male-to-male) once that *P* was, in fact, always considered a man under British law, thus being compared to the fellow male colleagues.¹²⁷ According to the latter, the Court had left behind the traditional comparator female/male, moving towards an assessment that relies on

¹²³ STYCHIN, "Troubling Genders: A Comment on *P. v. S. and Cornwall County Council*", p. 222.

¹²⁴ Judgment in *P v. S and Cornwall County Council*, ECLI:EU:C:1996:170, para 21.

¹²⁵ For a complete overview, see AGIUS/TOBLER (fn. 41), pp. 38 – 41.

¹²⁶ For instance, BELL "Shifting Conceptions of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*", p. 66; CAMPBELL/LARDY, "Discrimination Against Transsexuals in Employment", p. 415 – instead of "sex" the authors use the term "sexual status".

¹²⁷ For instance, FLYNN, "Case Law: A. Court of Justice Case C-13/94, *P. v. S. and Cornwall County Council*, Judgment of the Full Court of 30 April 1996, [1996] ECR I-2143", p. 377.

“disadvantage[s] and detriment[s]”¹²⁸ – which demanded an understanding of “sex” as a “role to be performed and judged by others” or as a “socio-cultural construct”¹²⁹.

Some authors were certain that the Court had refused a “symmetrical comparison”¹³⁰ or the “traditional comparison analysis”¹³¹ or the “equal misery argument”¹³² – as argued by the United Kingdom¹³³–, i. e. the comparison between a transsexual woman and a transsexual man. Such approach would lead to the probable conclusion that no unfavorable treatment would be at stake, because both would have been dismissed in the same circumstances, once discrimination had arisen from the gender reassignment and not from the sex of the employee (or more particularly, not because *P* was a woman).¹³⁴

However, a more skeptical view still questioned 1) whether it was really possible to claim that *P* was not dismissed because of being a woman, 2) whether the CJEU included the potential situation of female-to-male transsexual in its categorization, 3) and how (and why) did the Court find its way to claim discrimination without relying its assessment on the traditional comparison.¹³⁵

But most of all – and surprisingly the debate above does not seem to even touch this point – it is important to ask: if the Court did went away from the usual symmetrical comparative element, why did it not compare the treatment given to *P* (a *transsexual person*) with the treatment given to a *non-transsexual person*, regardless whether the

¹²⁸ FLYNN (fn.127), pp. 377 – 378.

¹²⁹ *Ibid.*, pp. 379 – 380, and further criticizing the mention of “sex”, instead of “gender”.

¹³⁰ AGIUS/TOBLER, (fn. 41), p. 40.

¹³¹ CAMPBELL/LARDY (fn. 126), p. 415.

¹³² BELL (fn. 126), p. 66.

¹³³ Judgment in *P v S and Cornwall County Council*, ECLI:EU:C:1996:170, para 15.

¹³⁴ CAMPBELL/LARDY (fn. 126), p. 415; MCINNES, “Case C-249/96, Lisa Jacqueline Grant v. South West Trains Ltd, Judgment of the Full Court of 17 February 1998, [1998] ECR I-636”, p. 1052 and fn. 44.

¹³⁵ For instance, AGIUS/TOBLER (fn. 41), p. 40, concluding that the Court was moved by the “obviousness of the sex discrimination”.

transition was male-to-female or female-to-male?¹³⁶ If the discrimination is found to be based on gender reassignment, as the CJEU held, it seems essential to assess whether a transsexual person was treated unfavorably when compared to a non-transsexual person.

One way or another, it is clear that the Court escaped from strict “formulas” and instead concentrated “on the heart of the [patent] discrimination matter”¹³⁷, which was not a novelty in the Court’s jurisprudence.¹³⁸ On the one hand, this approach frightens legal certainty, but on the other hand it overcomes the dangerous limits of such narrow and “mathematical” assessment, by ensuring the rights of those who suffer real and clear discrimination.

The strong opinion of Advocate-General (AG) *Tesauro*¹³⁹ is here worth to assess, not only because it influenced the outcome of the judgment¹⁴⁰, but also because it suggested a dauntless step that the Court refrained from including.

It is true that the AG’s vision went along with a medical discourse that pathologizes transsexual people, which the Court did not seem to follow.¹⁴¹ Mr. *Tesauro* was inspired by the definition at the time proposed by the CoE Parliamentary Assembly’s (PACE) which perceived transsexualism as a “*syndrome* characterized by a dual

¹³⁶ The position in WINTEMUTE, “Recognizing New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes”, p. 341 might be the closest one, when the author defends that the comparison should be done between P and a “*non-transsexual* (chromosomal) female” though still enhancing the sex of the compared person.

¹³⁷ AGIUS/TOBLER (fn. 41), p. 41.

¹³⁸ The lack of male comparator in the judgment in *Dekker*, Case C-177/88, ECR 1990 I 03941, ECLI:EU:C:1990:383, as noted in, for instance, MCINNES (fn. 134), pp. 1048 –1049 and fn. 33; BELL (fn. 126), pp. 66 – 67; FLYNN (fn. 127), pp. 376 – 377.

¹³⁹ *Opinion of Advocate General Tesauro*, delivered on 14 September 1995, P v S and Cornwall County Council, Case C-13/94, ECR 1996 I-02143, ECLI:EU:C:1995:444.

¹⁴⁰ BARNARD “P v. S: Kite Flying or a New Constitutional Approach?”, p.62.

¹⁴¹ STYCHIN (fn. 123), p. 222.

personality, one physical, the other psychological”¹⁴². But he moved forward.

At first, the AG acknowledged a dynamic understanding of the legal system, by referring that the law could not “cut itself off from society as it actually is”, having therefore to be “capable of regulating new situations brought in the light by social change”¹⁴³. Further on, he questioned the “traditional *man/women dichotomy*” undoubtedly enshrined in the Directive. In his view the Directive neglected “*all unfavorable treatment connected to sex*”¹⁴⁴, once it disregarded the “possible range of characteristics, behavior and roles shared by men and women, so that *sex* itself ought rather to be thought as a *continuum*”¹⁴⁵. However, paradoxically, it implicitly proposed that a person falling within the “*third gender*” should not be considered included in the Directive.¹⁴⁶

With innumerable references to the general “fundamental”, “inalienable”, “universal” principle of equality¹⁴⁷ and somehow suggestive and ample line of argumentation – from the ironic reference to the figures of Adam and Eve¹⁴⁸ to the reference of social justice and European integration¹⁴⁹ –, the Opinion ended by asking the Court to take the “courageous”, “bold but fair and legally correct”¹⁵⁰ decision of considering the dismissal of a transsexual person, like the one presented in the case, as undermining the principle of equal treatment under the Directive. And so did the Court.

¹⁴² Parliamentary Assembly of the CoE, Recommendation 1117 of 29 September 1989 on the Condition of Transsexuals, para 1. *Opinion of Advocate General Tesouro*, ECLI:EU:C:1995:444, point 8.

¹⁴³ *Opinion of Advocate General Tesouro*, ECLI:EU:C:1995:444, point 9.

¹⁴⁴ *Ibid.*, point 16.

¹⁴⁵ *Ibid.*, point 17.

¹⁴⁶ *Ibid.*, point 22.

¹⁴⁷ *Ibid.*, points 19, 20, 22, 24.

¹⁴⁸ *Ibid.*, point 17.

¹⁴⁹ *Ibid.*, referring to words once stated by the AG *Trabbuchi*.

¹⁵⁰ *Ibid.*, point 24.

2. *K. B. v National Health Service Pensions Agency and Secretary of State for Health (2004)*

In *K. B. v National Health Service Pensions Agency and Secretary of State for Health*¹⁵¹ (*K. B.*), the CJEU had to assess the question whether a legislation that excluded a transsexual man from benefiting from a widower's pension was considered to be a discrimination based on sex, under Article 141 EC (today Article 157 TFEU) and Directive 75/117 (today enshrined in the Recast Directive).¹⁵²

K. B. was a worker at the National Health Service (NHS) and a member of the NHS Pension Scheme. *R*, her partner and a transsexual man, was not able to benefit from the widower's pension, once only spouses were allowed to receive it. However, the couple was not able to marry, even though it was their wish: *R* could not change his gender marker after the gender confirmation surgery, thus remaining female in his birth certificate, and the British law did not recognize the validity of same-sex marriage.¹⁵³

The Court held that legislation such as the British one was in breach of Article 141 of the EC Treaty, once that it prevented a couple as *K.B.* and *R.* from fulfilling the marriage requirement necessary for allowing *R.* to receive the benefit at stake. Nonetheless, it gave to the national court the ultimate word as to whether *K.B.* could rely on such provision, once the conditions for the legal gender recognition were to be determined by national authorities.¹⁵⁴

The Court noted that attributing such grant only to married couples, excluding others, was a matter of national competence, and that it could not be perceived as “*per se* discriminatory on the grounds of sex”, as the sex of the claimant was irrelevant.¹⁵⁵ Nevertheless, it considered that unequal treatment did emerge from the precondition – the “capacity to marry” – to be fulfilled in order to obtain the

¹⁵¹ Judgment in *K. B. v National Health Service Pensions Agency and Secretary of State for Health*, Case C-117/01, ECR 2004 I-00541, ECLI:EU:C:2004:7.

¹⁵² *Ibid.*, para 16.

¹⁵³ *Ibid.*, paras 11 – 13.

¹⁵⁴ *Ibid.*, paras 35 – 36.

¹⁵⁵ *Ibid.*, paras 28 – 29.

survivor's pension – which constituted “pay” within Article 141 and the Directive at stake.¹⁵⁶ It noted that it was impossible for *K.B.* and *R.* to satisfy such requirement, under British law, but not to (heterosexual) couples where neither of the partners had undergone gender confirmation surgery.¹⁵⁷

The Court sustained its decision in the ECtHR's judgment *Christine Goodwin v the United Kingdom*.¹⁵⁸ The Strasbourg Court held that the fact that a transsexual, whose gender identity was not recognized by national law, is unable “to marry a person of the sex to which he or she belonged prior to gender reassignment surgery” because they are according to their civil status of the same sex, is considered to be a breach of Article 12 (right to marry) of the European Convention on Human Rights (ECHR).¹⁵⁹

There are some particular aspects worth to mention. First, it is striking that the ruling did not mention the *P v S* judgment, neither to follow it, nor to put it aside, although the outcome of the former reinforced the outcome of the latter.¹⁶⁰ For instance, the Commission did refer to that previous judgment in order to dismiss its application, once it considered the two situations to be different: *P* was directly discriminated because of her gender reassignment, whereas the unequal treatment in the present case aroused from the fact that it was impossible for *K. B.* and *R* to marry.¹⁶¹

Moreover, even though the claimant was a ciswoman (*K.B.*) who was however unable to nominate her transsexual partner for the grant at stake, the Court took the vision that the couple suffered

¹⁵⁶ Judgment in *K. B. v National Health Service Pensions Agency and Secretary of State for Health*, ECLI:EU:C:2004:7, paras 25 – 27.

¹⁵⁷ *Ibid.*, paras 30 – 31.

¹⁵⁸ Judgment in *Christine Goodwin v the United Kingdom*, Application no. 28957/95, 11 July 2002.

¹⁵⁹ Judgment in *K. B. v National Health Service Pensions Agency and Secretary of State for Health*, ECLI:EU:C:2004:7, paras 33 – 34.

¹⁶⁰ BELL, “A Hazy Concept of Equality - Case C-117/01 *K.B. v. N.H.S. Pensions Agency and Secretary of State for Health*, European Court of Justice, 7 January 2004”, p. 230; AGIUS/TOBLER (fn. 41), p. 37.

¹⁶¹ Judgment in *K. B. v National Health Service Pensions Agency and Secretary of State for Health*, ECLI:EU:C:2004:7, paras 22 – 23.

discrimination. For that, it compared the treatment given to *K.B* and *R.* to the treatment given to a heterosexual couple where neither of the partners had undergone such intervention. The Court focused on the gender confirmation surgery itself, regardless whether the transition operated from female-to male or male-to-female.

This comparison differs from the one the Court followed in *P v S*, and it is close to the point this paper made while discussing the issue above. However, the Court can still be criticized in this matter, not only because it called again upon an unnecessary and limited comparative approach, but also because it did not consider that, if both partners of a heterosexual couple would have undergone gender confirmation surgery, they would in fact be able to marry.¹⁶²

The different sources of discrimination – towards 1) non-married couples, 2) same-sex couples and 3) transsexual people – involved the Court in a complex approach, and some wondered how much of this decision was in regard to the concepts of family law and how much was about gender identity.¹⁶³ Perhaps due to this complexity, the Court emerged in a vague reasoning and lack of precision.¹⁶⁴

One way or another, the Court was willing to, once again, recognize the rights of transsexual people, while trying to not interfere with the Member State's competences, although, and similarly in *P v S*, it found itself trapped in the binary dichotomy of sex.

¹⁶² BELL (fn. 160), p. 226.

¹⁶³ For instance, CANOR “Case 117/01, *K. B. v National Health Service Pensions Agency and Secretary of State for Health*, judgment of the full court of 7 January 2004”, p. 1117 – 1121, also explaining the relation between the present case with the judgments in *Lisa Jacqueline Grant v South-West Trains Ltd.*, Case -249/96, ERC 1998 I-00621, ECLI:EU:C:1998:63 and in *D and Kingdom of Sweden v Council of the European Union*, Joined cases C-122/99 P and C-125/99 P, ECR 2001 I-04319, ECLI:EU:C:2001:304; BELL (fn. 160), p. 228.

¹⁶⁴ BELL (fn. 160), pp. 225 – 227.

3. *Sarah Margaret Richards v Secretary of State of Work and Pensions (2006)*

In *Sarah Margaret Richards v Secretary of State of Work and Pensions*¹⁶⁵ (*Richards*), the question asked to the CJEU was whether Article 4 (1) of the Gender Statutory Social Security Schemes Directive precluded national legislation that denied a transsexual woman the entitlement to a retirement pension at the women's retirement age.¹⁶⁶

Ms Richards, a transsexual woman, applied to the Secretary of State for Work and Pensions for a retirement pension to be paid as from the date she would become 60, the retirement age for women born previous to 6 April 1950, under British law.¹⁶⁷ Her intention was denied on the ground that the retirement age for *Ms Richards* was 65, the retirement age applied for men.

The Court answered affirmatively¹⁶⁸, explicitly reiterating the wording in *P v S*.¹⁶⁹ It stated the unequal treatment aroused from the claimant's inability to fulfill one of the eligibility requirements for the pension, contrary to "women whose gender is not the result of gender reassignment surgery"¹⁷⁰. Moreover, and based in *K.B.*, such precondition was to be considered "incompatible with the requirements of Community law"¹⁷¹.

It results from the above that, although arriving to the same outcome, the Court this time relied on a different comparative element, namely assessing the treatment given to *Ms Richard* and the treatment give to non-transsexual women. Here, the Court is clearly

¹⁶⁵ Judgment in *Sarah Margaret Richards v Secretary of State of Work and Pensions*, Case C-423/04, ECR 2006 I-03585, ECLI:EU:C:2006:256.

¹⁶⁶ *Ibid.*, para 20.

¹⁶⁷ *Ibid.*, paras 14 – 16.

¹⁶⁸ *Ibid.*, para 38.

¹⁶⁹ *Ibid.*, para 24.

¹⁷⁰ *Ibid.*, para 29.

¹⁷¹ *Ibid.*, para 31.

moving away from the comparator between the two sexes, as it followed in *P v S* and already put aside in *K.B.*¹⁷²

According to skeptical view, this makes it hardly understandable how can such cases be perceived as falling within the sex discrimination ground, according to the traditional sex equality approach.¹⁷³ However, it is precisely because the Court is moving away from such traditional approach, that such understanding becomes possible and necessary. As said above in the analysis of the *P v S* case, if gender reassignment was the genuine ground for discrimination in those cases, it was instead hardly understandable how could the Court still rely on a comparison between the sexes female/male and not between transsexual people/cispeople.

Nonetheless, there is still an aspect in regard to the comparative element that should be noted. Once the pension is attributed to women at an early age, it is tempting to compare the treatment given to Ms *Richards* with the one given to ciswomen. However, it seems important to differentiate two different moments: 1) the situation where Ms *Richards* does not see her identity recognized as cispeople do, and 2) the situation where Ms *Richards* is being denied the same treatment given to ciswomen in regard to the pension entitlement – the former leading to the latter.

The Court acknowledged this interdependent distinction, when it concluded that discrimination aroused from Ms *Richards*' "inability to have the *new gender*"¹⁷⁴, which left her unable to fulfill the necessary requirement to obtain the pension at the age of 60 "unlike *women* whose gender is not the result of gender reassignment surgery"¹⁷⁵. However, it ruled on the basis of the second stage of discrimination, thus being patent the comparison to ciswomen.

¹⁷² And following AG *Jacobs*, *Opinion of the Advocate General Jacobs*, delivered on 15 December 2005, *Sarah Margaret Richards v Secretary of State of Work and Pensions*, Case C-423/04, ECR 2006 I-03585, ECLI:EU:C:2005:787, points 41 – 45.

¹⁷³ AGIUS/TOBLER, (fn. 41), p. 43.

¹⁷⁴ Judgment in *Sarah Margaret Richards v Secretary of State of Work and Pensions*, ECLI:EU:C:2006:256, para 28.

¹⁷⁵ *Ibid.*, para 29.

If that had not been the case, and the focus would rely on the comparison to *cispeople*, the CJEU could eventually be blamed for challenging national norms regarding gender identity and legal gender recognition, thus exceeding its field of competences and/or risking its legitimacy. Perhaps exactly for this reason, the Court avoided such route and started the present judgment by repeating its previous decision in *K.B.*, making clear that the rules regarding legal gender recognition were a matter left for the Member State.¹⁷⁶ Thus, it left for national authorities to determine whether *Ms Richards* was to be treated as “deserving gender recognition”¹⁷⁷.

4. *MB v Secretary of State for Work and Pensions* (2018)

Very recently (June 2018), the CJEU dealt with a similar case in *MB v Secretary of State for Work and Pensions*¹⁷⁸ (*MB*), answering the question whether Article 4(1) in conjunction with Articles 3(1)(a) and 7(1)(a) of the Gender Statutory Social Security Schemes Directive precluded national legislation that required a transsexual person, who was willing to qualify for the a statutory retirement pension, to fulfill not only physical, social and psychological requirements, but also the condition of not being married with someone of the sex or gender the person has “acquired” with the “change”.¹⁷⁹

With some reminiscences of the facts in the cases *K.B.* and *Richards*, *MB*, a transsexual woman, could not get the retirement pension at the age of 60, like ciswomen did, once that she still had a male legal marker in her birth certificate. According to British law, the marriage between *MB* and her female partner had to be annulled, so

¹⁷⁶ BELL (fn. 160), p. 228, although the author makes that consideration in the context of the *K.B.* case.

¹⁷⁷ Judgment in *Sarah Margaret Richards v Secretary of State of Work and Pensions*, ECLI:EU:C:2006:256, para 21. Also according to AG Jacobs, *Opinion of Advocate-General Jacobs*, ECLI:EU:C:2005:787, point 51.

¹⁷⁸ Judgment in *MB v Secretary of State for Work and Pensions*, Case C-451/16, ECLI:EU:C:2018:492.

¹⁷⁹ *Ibid.*, para 26.

that *MB* could get legal recognition of her female sex (along with other physical, social and psychological criteria that she did fulfill).¹⁸⁰

The CJEU answered affirmatively, holding that the British legislation amounted to direct sex discrimination, dismissing the justification brought by the United Kingdom. It concluded that the national law treated less favorably a person who had undergone gender confirmation surgeries after marrying than it treated a person who had not undergone such operations and was married, once that the marriage annulment condition, for the purpose of the entitlement of the statutory retirement pension, applied to the former, but not to the latter.¹⁸¹

Like in *Richard*, though more detailed, the Court started to legitimize its intervention.¹⁸² It pointed out that it was asked to decide only on the conditions imposed for the entitlement of the statutory retirement pension, and not on the question whether the gender legal recognition procedure could itself rely on the marriage annulment condition.¹⁸³

However, and mentioning previous case law, it recalled that although civil status and gender legal recognition were matters of national competence, the Member States could not neglect the Union's law, namely the principle of non-discrimination, while legislating such issues.¹⁸⁴ It reiterated the judgment in *K.B.* holding that national legislation setting civil status requirements for a retirement pension fell within the scope of the principle of sex non-discrimination. Thus, the Member State was required to comply with that principle under the Directive at stake while exercising that competence, i.e. while legislating matters of civil status.¹⁸⁵

¹⁸⁰ Judgment in *MB v Secretary of State for Work and Pensions*, ECLI:EU:C:2018:492., paras 16 – 19.

¹⁸¹ *Ibid.*, paras 37, 48, 50 – 53.

¹⁸² *Ibid.*, paras 27 – 33.

¹⁸³ *Ibid.*, para 27.

¹⁸⁴ *Ibid.*, para 29.

¹⁸⁵ *Ibid.*, paras 30 – 31.

With such an elaboration – more meticulous than in the above cases – the Court seemed more committed than ever in elucidating that it was intervening in a field of the Union’s competence distinct from national competence. By doing so, it also evidenced how national legislation was obliged to comply with EU law, even if indirectly, especially in regard to the principle of equality or non-discrimination based on sex.

Notwithstanding, the novelty of this ruling relied on the consideration of the comparative element, upon which this judgment took again some more time.¹⁸⁶ By comparing the situation of a married person that “has changed” sex with a married person that “remained”¹⁸⁷ with the sex assigned at birth, the Court was essentially comparing the treatment given to a (married) transsexual *person* to that given to a (married) *cisperson*.¹⁸⁸ This comparison represents a step further than the one given in *Richards* and it is, from the view of this paper, the correct one, as already commented.

The United Kingdom claimed that both situations were not comparable, once the former entailed an, at the time of the facts, unpermitted same-sex marriage and the latter a permitted heterosexual marriage. Nonetheless, the Court affirmed the opposite, arguing that the subject matter of the legislation at stake was the grant of a certain retirement pension to persons that had reached the respective pensionable age and were therefore entitled to receive such benefit in relation to contributions paid during the working life, regardless the civil status, which was unrelated to that pension and thus irrelevant for the comparison.¹⁸⁹

¹⁸⁶ Judgment in *MB v Secretary of State for Work and Pensions*, ECLI:EU:C:2018:492 paras 34 – 48.

¹⁸⁷ *Ibid.*, para 37.

¹⁸⁸ The Court did not use these the term “cispeople”, but AG Bobek referred to “cisgender person”, even providing a definition. See *Opinion of Advocate General Bobek*, delivered on 5 September 2017, *MB v Secretary of State for Work and Pensions*, Case C-451/16, ECLI:EU:C:2017:937, para 39 and fn. 2.

¹⁸⁹ Judgment in *MB v Secretary of State for Work and Pensions*, ECLI:EU:C:2018:492, paras 40 – 46.

Following the Opinion of the AG *Bobek*¹⁹⁰, the Court warned the distinction between the present case and the ECtHR's judgment in *Hämäläinen v. Finland*.¹⁹¹ In the latter the subject matter was not the entitlement of a statutory retirement pension, but the legal gender recognition regarding civil status, which lead the Strasbourg Court to deny the comparability of the situations.¹⁹²

Hence, the CJEU gave a step further that the one in *Richards* and as defended above by this paper. Because *MB* was the first ruling (and the most recent one) that entailed such understanding, it is still uncertain whether the Court is willing to use the same comparative element in future cases – although always assessed in a “specific and concrete manner”¹⁹³ – or whether such approach might change again.

From the assessment above, one concludes that thus far the CJEU has dealt only with cases regarding postoperative transsexual people. In that context, the Court was willing to safeguard protection to such category, by including discrimination based on gender reassignment in the provisions prohibiting discrimination on the grounds of sex. It did so in cases where the discrimination was directly based on gender reassignment, but also in situations where the discrimination aroused from the inability of fulfilling certain conditions and thus of enjoying certain rights safeguarded by the Union's law.

However, in order to preserve its and the Union's role and legitimacy, the Court clearly drew the line between its competence and the one belonging to the Member States, leaving them the determination of the rules regarding legal gender recognition or civil status, but pointing that the Union would always interfere when its principles are being compromised.

¹⁹⁰ *Opinion of Advocate General Bobek*, ECLI:EU:C:2017:937, para 44.

¹⁹¹ Judgment in *Hämäläinen v. Finland*, Application no. 37359/09, 16 July 2014.

¹⁹² Judgment in *MB v Secretary of State for Work and Pensions*, ECLI:EU:C:2018:492, para. 47. Judgment in *Hämäläinen v. Finland*, Application no. 37359/09, 16 July 2014, para 112.

¹⁹³ Judgment in *MB v Secretary of State for Work and Pensions*, ECLI:EU:C:2018:492, para. 42.

To achieve such outcomes, the Court started to 1) compare the treatment given to the claimant (transsexual person) with the treatment given to non-transsexual people of the opposite sex, 2) afterwards comparing the former to the treatment given to non-transsexual people of the (now) same sex, and 3) finally comparing her/his situation to the one of a non-transsexual, regardless sex, thus progressively moving away from the traditional sex equality approach, leaving behind the comparison between sexes.

One can also conclude that these rulings do not give a possible answer for future cases that might deal with other gender varieties, and that go beyond the binary understanding.¹⁹⁴ They do not even seem to leave an open door in that regard, once the Court merely explored the concept of sex and its boundaries as it was brought to it. Perhaps it was avoiding certain complexities, or it was honoring the *thema decidendum* of the judgments.

B. Other Contributions: Inside and Outside the European Union

As seen above, the (gender) equality or non-discrimination legal framework has at its heart the primary law, secondary law and case law of the CJEU. However, there are other contributions that should not be disregarded, once they might well have an impact in the outcome of such legal framework.

A particular look will be taken to some of the recent non-legal instruments that emerged within the activities of the Union's institutions and agencies. They introduced ideas and reaffirmed certain concerns regarding gender varieties and may influence the EU legal framework.¹⁹⁵

Another brief assessment will be made to the CoE framework, once that, although being a separate legal system, it has a deep and close relation to the Union's framework, due to the clear influence of the

¹⁹⁴ Also noted by AGIUS/TOBLER (fn. 41), p. 43.

¹⁹⁵ On the relevance of recommendations, opinions and soft law, see CRAIG/BÚRCA (fn. 64), pp. 109 – 110.

ECHR, the case law of the Strasbourg Court and some non-legal contributions from its institutions.

Due to the purpose and limitation of this paper, some other international documents will not be assessed, even though they constitute very relevant sources and contributions to the topic.¹⁹⁶

I. Inside the European Union: a Brief Look at the European Union's Soft Law

1. The European Parliament's Resolutions

The European Parliament has actively issued resolutions concerning the topic.¹⁹⁷ In a resolution devoted to sexual orientation and gender identity, initially drafted by the Committee on Civil Liberties, Justice and Home Affairs (LIBE)¹⁹⁸ and adopted by the European Parliament (February 2014)¹⁹⁹, the Commission, Member States and relevant agencies were asked to collaborate together on a Roadmap to protect the fundamental rights of LGBTI people²⁰⁰, on the fields of employment, education, health, goods and services, family and freedom of movement, hate speech and crime, asylum and foreign policy.

Among others, it requested the Commission to have special attention on gender identity when monitoring the implementation of the, already above studied, Recast Directive²⁰¹, the Gender Goods and

¹⁹⁶ For other international human rights instruments in regard to the topic of this paper, see AGIUS/TOBLER (fn. 41), pp. 23 – 29. For general contributions from other international human rights instruments, see CRAIG/BÚRCA (fn. 64), pp. 386 – 388.

¹⁹⁷ The European Parliament's Intergroup on LGBT Rights collects all relevant acts from 2009-2018, European Parliament's Intergroup on LGBT Rights News, available at <http://www.lgbt-ep.eu/news/>, last accessed on 15/08/18.

¹⁹⁸ LIBE Report of 8 January 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI)).

¹⁹⁹ European Parliament, Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI)).

²⁰⁰ *Ibid.*, para 4 (A).

²⁰¹ *Ibid.*, para 4 (C) (i)

Services Directive²⁰², the Common Procedures on International Protection Directive, the Qualification Directive²⁰³ and the Victims' Rights Directive²⁰⁴.

Interestingly, the European Parliament made no mention to the Gender Statutory Social Security Schemes Directive that, according to the CJEU interpretation in *Richards*, includes as well the (limited) protection of gender identity, as seen above. On the contrary, by referring to the Gender Goods and Services Directive, it assumed that such ground was there protected, although as noted neither the Directive makes explicit mention to it, nor has the Court decided so.

Moreover, it notably asked the Commission to issue guidelines specifying that transgender and intersex people are protected under "sex" for the purpose of the Recast Directive²⁰⁵, to expressly include "gender identity" as discrimination ground in future equality legislation and, together with Member States and agencies, to address the lack of legislation and research in regard to intersex people.²⁰⁶ Nevertheless, one can question why would the protection of intersex people be only safeguarded under the Recast Directive.

In September 2016, in a resolution regarding the Employment Equality Directive²⁰⁷, the European Parliament called for national measures that could improve legal definitions under the Recast Directive, as to include transgender people who do not undergo gender confirmation surgeries²⁰⁸, and asked the Commission and Member States to consider, combat and prevent discrimination faced

²⁰² European Parliament, Resolution on the Roadmap (2014) (fn. 199), para 4 (F) (i).

²⁰³ *Ibid.*, para 4 (K) (i).

²⁰⁴ *Ibid.*, para 4 (J) (i).

²⁰⁵ *Ibid.*, para 4 (C) (ii).

²⁰⁶ *Ibid.*, para 4 (G) (i) and (iv).

²⁰⁷ European Parliament, Resolution of 15 September 2016 on application of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive') (2015/2116(INI)).

²⁰⁸ *Ibid.*, para 66.

by intersex people in the field of employment, by reviewing legislation and practices.²⁰⁹

In one of the most recent resolutions (March 2018)²¹⁰, the European Parliament focused on the general situation of human rights in the Union in 2016 and explicitly addressed the situation of transgender and intersex people. It acknowledged and condemned all forms of discrimination against LGBTI people, and called the Commission to monitor the transposition and implementation of EU legislation concerning their rights and to promote and protect equal rights and opportunities, in cooperation with civil society and in due respect for the Member States' competences.²¹¹

Furthermore, in regard to transgender people, it deplored Member States practices and laws that pathologized them and that imposed conditions that hindered the change of the gender legal marker and the gender confirmation surgeries (such as medical interventions, forced sterilization and psychiatric consent). It called Member States to review those processes and the Commission to provide guidance for that purpose.²¹²

Regarding intersex people, the European Parliament disproved the infant medical interventions and called the Commission to collect data on human rights violations suffered by intersex people and to provide guidance to national authorities regarding the protection of their rights.²¹³

2. The Commission's List of Actions and Reports

In May 2015, the Commission issued a report on the application of the Directive 2004/113/EC on goods and services.²¹⁴ It acknowledged

²⁰⁹ European Parliament, Resolution of 15 September 2016 (fn. 207), para 67.

²¹⁰ European Parliament, Resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (2017/2125(INI)).

²¹¹ *Ibid.*, paras 61 – 63.

²¹² *Ibid.*, para 66.

²¹³ *Ibid.*, para 68.

²¹⁴ European Commission's Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive

that, although the CJEU had not decided on a case regarding transgender people, a broad understanding of gender identity should also be covered by the protection against sex discrimination, along with gender reassignment.²¹⁵ This assessment is based on the assumption that gender reassignment is also protected under the present Directive, similarly considered above in regard to the European Parliament's considerations.

As an answer to the European Parliament's demand of a Roadmap on LGBTI issues, the European Commission, through its Directorate-General for Justice and Consumers (DG JUST) headed by the Commissioner for Justice, Consumers and Gender Equality *Věra Jourová*, issued in December 2015 a List of Actions to advance LGBTI equality.²¹⁶ Afterwards, and following the Council request (which will be further assessed), it issued a similar list in the format of Annual Reports regarding the actions taken in 2016 and 2017, published in February 2017²¹⁷ and March 2018²¹⁸, respectively.

In these documents the Commission touched the concerns or requests advanced by the Roadmap Resolution. It noted its effort in monitoring the implementation of the above Directives with a special concern on gender identity, in spreading awareness through the European citizens, in supporting Member States, civil society, businesses and third countries, in advancing LGBTI rights, among others.

2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

²¹⁵ *Ibid.*, para 3.3.

²¹⁶ European Commission, List of Actions by the Commission to Advance LGBTI Equality.

²¹⁷ European Commission, Annual Report 2016 on the List of Actions to Advance LGBTI Equality.

²¹⁸ European Commission, Annual Report 2017 on the List of Actions to Advance LGBTI equality.

3. The Council's Guidelines and Conclusions

In June 2013, the Council issued guidelines to promote and protect the rights of LGBTI people in external relations.²¹⁹ Recognizing certain human rights standards enshrined in important international legal documents²²⁰, and referring to its own legislation in the field of equality and non-discrimination, the Council acknowledged, among others, that “trans”, “intersex” and “gender-variant” persons were “particularly vulnerable to gender-based and sexual violence”²²¹ and suffered most discrimination while trying to access jobs, health care, education or detention facilities.²²²

Three years later, the Council adopted conclusions on LGBTI equality²²³ for the first time.²²⁴ It made general requests regarding the protection and promotion of the rights of this group of people – for instance, it asked the Commission to issue annual reports.²²⁵ However, it did not make any special remark on the particular situation of transgender and intersex.

4. The European Union's Agencies

The EU counts with certain bodies that, although not being Union's institutions, were created as independent agencies that are expected to collect data, produce reports and studies, to monitor the EU and Member States activities, and to promote awareness on the field of human rights or gender in particular.

²¹⁹ Council of the European Union, Guidelines To Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons, adopted on 24 June 2013.

²²⁰ *Ibid.*, for instance paras 1, 5, 9 – 12.

²²¹ *Ibid.*, for instance para 36.

²²² *Ibid.*, for instance paras 3 and 19.

²²³ Council of the European Union, Conclusions on LGBTI equality, Press Release, 338/16,16/06/2016.

²²⁴ According to European Commission, Justice and Consumers, LGBTI Equality (17 May 2018), http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=605456, last accessed on 16/08/18.

²²⁵ Council of the European Union, Conclusions on LGBTI equality, Press Release, 338/16, 16/06/2016, para 9.

The European Institute for Gender Equality (EIGE)²²⁶ is completely dedicated to the promotion of gender equality and the fight against discrimination based on sex, and operates within the Union's policies and initiatives framework. However, gender equality for the purpose of this agency seems to refer to the principle of equality between women and men, as one can read in the Regulation establishing this body.²²⁷

The European Union Agency for Fundamental Rights (FRA)²²⁸ is a decentralized EU agency devoted to human rights in general, although having "Gender" and "LGBTI" as two main themes and a Department of "Equality and Citizen's Rights". This body has made relevant contributions to the situation of transgender²²⁹ and intersex²³⁰ in the EU, and in regard to discrimination in the grounds of "gender identity" and "sex characteristics"²³¹. Those documents are very important once that, besides the fact that they address those particular issues from an expertise view, some come within the request of EU institutions²³² or are presented in their meetings and brought to discussion.²³³

²²⁶ See EIGE's website, last accessed on 29/07/18.

²²⁷ European Parliament and of Council Regulation No 1922/2006 of 20 December 2006 on establishing a European Institute for Gender Equality, OJ L 403, 30.12.2006. For a critique of EIGE, in regard to the issue of intersexuality, see TRAVIS (fn. 95), pp. 196 – 197.

²²⁸ See FRA's website, last accessed on 29/07/18.

²²⁹ For instance, FRA, (fn. 62).

²³⁰ For instance, FRA, *The fundamental rights situation of intersex people*, May 2015.

²³¹ For instance, FRA, *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU – Comparative legal analysis: update 2015*, December 2015.

²³² For instance, as one can read in FRA (fn. 62), p. 3.

²³³ For instance, FRA contribution on intersex (fn. 230), was presented in the European Parliament's LGBTI Intergroup – FRA News "FRA focus paper on the rights of intersex people presented at the European Parliament" (22 September 2015), in <http://fra.europa.eu/en/news/2015/fra-focus-paper-rights-intersex-people-presented-european-parliament>, last accessed on 29/07/18 – and in the Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons – FRA News "EU Council Working party discusses the rights of intersex people" (22 September 2015) in <http://fra.europa.eu/en/event/2015/eu-council-working-party-discusses-rights-intersex-people>, last accessed on 29/07/18).

The sub-section above shows that the institutions and agencies of the EU are aware of the challenges faced by individuals who do not fit within bipolar comprehensions of sex and gender. There is a willingness of broadening the existing concept of sex, gender and gender “reassignment”, in order to include gender identity and sex characteristics.

Moreover, there seems to be a dialogue between those distinct bodies, with reciprocal requests and reference to each other’s contributions. Besides, those resolutions, recommendations and reports not only focus on Union’s legislation, as they also give attention to national laws and practices.

However, those more progressive contributions have not had an impact on EU law thus far. Perhaps they will prove to be useful, when it comes the moment of reconsidering new and more inclusive legal concepts.

II. Outside the European Union: a Brief Look at the Council of Europe Framework

The umbilical relationship between the EU and the CoE is reciprocal and can be realized in many different aspects. The Union is expected do accede the ECHR, according to Article 6 (2) of the TEU and allowed by Article 17 of Protocol 14 of the ECHR.²³⁴ Furthermore, both European Courts refer to one another, their case law and legal framework, and the same is true for the respective institutions.²³⁵

²³⁴ Council of Europe, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention, CETS 194, 13.V.2004. However, according to the CJEU, the Draft Accession Agreement of the EU to the ECHR, was considered by the CJEU incompatible to the EU’s autonomy safeguarded in Article 6 (2) of the TEU, in Case Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454.

²³⁵ As seen, the above CJEU case law mentioned judgments of the ECtHR. Also the previously assessed documents issued by the EU institutions made, in their introduction, several references to the CoE framework – see for instance the European Parliament Resolution on the Roadmap 2014 (fn. 199), or the Council of the European Union, Guidelines (fn. 219), para 11. For other examples, see CANOR (fn. 163), p. 1122 or FRA/CoE (fn. 76), p. 17. For the mutual relation between the two courts, see CRAIG/BÚRCA (fn. 64), pp. 425 – 426.

Moreover, according to Article 6 (3) of the TEU, the rights enshrined in the Convention, their scope and meaning, constitute general principles of EU law. Even though general principles sit below primary law, from a legal hierarchy perspective, they may be called for interpreting certain provisions of the Treaties.²³⁶ Besides, Article 52 (3) of the EU Charter claims the ECHR as a source of interpretation of the Union's fundamental rights.²³⁷

Such permeability is very relevant, specially from the point of view of the EU, once that, when it is called to act within the field of fundamental rights, it can find inspiration in concepts and approaches developed by the Convention and its Court, whose mandate is specialized in the protection and promotion of human rights.²³⁸

1. The European Convention on Human Rights and the European Court of Human Rights

The ECHR foresees in Article 14 the prohibition of discrimination with a non-extensive list of grounds²³⁹, including *sex* and other status. Such provision can only be used in conjunction with the exercise of a substantive right also protected under the Convention²⁴⁰. Exceptionally, Member States that had ratified Protocol 12²⁴¹ are also bound by the principle in regard to any right safeguarded under national law.²⁴²

²³⁶ CRAIG/BÚRCA (fn. 64), p. 111.

²³⁷ ROSAS, "Five Years of Charter Case Law", pp. 14 – 15; CRAIG/BÚRCA (fn. 64), p. 385.

²³⁸ As mentioned in FRA/CoE (fn. 76), p. 17. But see GERARDS, "Who Decides on Fundamental Rights Issues in Europe? Towards a Mechanism to Coordinate the Role of the National Courts, the ECJ and the ECtHR", pp. 49 – 53, noting that the CJEU has developed its own progressive *acquis* in regard to human rights protection, and pointing the turbulent and complex relation between the two European courts.

²³⁹ Judgment in *Engel and Others v. the Netherlands*, Application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8 June 1976, para 72, by referring to "any ground such as" and "other status".

²⁴⁰ FRA/CoE (fn. 76), pp. 28 – 29.

²⁴¹ Council of Europe, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 177, 4.XI.2000.

²⁴² FRA/CoE (fn. 76), p. 18.

Thus far, and similarly to the CJEU, the ECtHR has only decided on cases brought by postoperative transsexual persons, although in a greater number of judgments.²⁴³ The questions brought to the latter touched matters such as 1) the absence of legal recognition of gender and name of post-operative transsexuals²⁴⁴, 2) the requirements imposed for the legal gender recognition²⁴⁵, 3) the conditions related to the gender confirmation surgery and the reimbursement of its costs²⁴⁶, 4) the lack of clarity of such procedures²⁴⁷, 5) the recognition of the right to marry in accordance to the confirmed gender²⁴⁸ 6) and the recognition of a right to a pension according to the confirmed gender.²⁴⁹

For the purpose here standing, it is not relevant to assess meticulously those judgments. The ambit of the issues brought to the ECtHR and the CJEU might relate – as they often do – but are substantially different. That is mainly due to the fact that the Convention and so the role of the Strasbourg Court have a different domain and function (the so-called *raison d'être*), than EU law and the mandate of the CJEU: the former court provides a “second opinion” in regard to national legislative and practices that might be in

²⁴³ For an overall idea, summary of the cases and some of the pending cases, see the most recent ECtHR Press Unit, Factsheet on gender identity issues, March 2018. See also AGIUS/TOBLER, (fn. 41), pp. 26 – 28.

²⁴⁴ Judgments in *Ress v The United Kingdom*, Application no. 9532/81, 17 October 1986; *Cossey v. the United Kingdom*, Application no. 10843/84, 27 September 1990; *B. v. France*, Application no. 13343/87, 25 March 1992; *X, Y and Z v. the United Kingdom*, Application no. 21830/93, 22 April 1997; *Sheffield and Horsham v. the United Kingdom*, Applications nos. 22985/93 23390/94, 30 July 1998; *Christine Goodwin v. United Kingdom*, Application no. 28957/95, 11 July 2002.

²⁴⁵ Judgements in *Hämäläinen v. Finland*, Application no. 37359/09, 16 July 2014; *A.P., Garçon and Nicot v. France*, Applications nos. 79885/12, 52471/13 and 52596/13, 6 April 2017.

²⁴⁶ Judgments in *Van Kück v. Germany*, Application no. 35968/97, 12 June 2003; *Schlumpf v. Switzerland*, Application no. 29002/06, 8 January 2009; *Y.Y. v. Turkey*, Application no. 14793/08, 10 March 2015.

²⁴⁷ Judgment in *L. v. Lithuania*, Application no. 27527/03, 11 September 2007.

²⁴⁸ Judgments in *Christine Goodwin v. United Kingdom*, Application no. 28957/95, 11 July 2002; *I. v. UK*, Application no. 25680/94, 11 July 2002.

²⁴⁹ Judgment in *Grant v. United Kingdom*, Application no. 32570/03, 23 May 2006.

breach with the Convention, whereas the latter court safeguards and promotes the Union's law.²⁵⁰

Therefore, matters such as those brought to the ECtHR do not fall within the scope of EU law, except for the one related to the right to pension and, as the CJEU stressed, as long as the issue constitutes a requirement for the entitlement of rights protected under the Union's legislation.²⁵¹ Thus, it is worth to look instead to the concepts built by the Strasbourg Court.

Although gender identity is not expressly foreseen under the ECHR – as it is for instance in Article 4 (3) of the Istanbul Convention²⁵² – the ECtHR has recognized that the provision of Article 14 of the Convention covers such ground. While in *P.V. v. Spain (P.V.)*²⁵³ this European Court stated that “transsexuality” was undoubtedly protected under Article 14²⁵⁴, in the case *Identoba and Others v. Georgia*²⁵⁵ it held that the provision covered “gender identity”²⁵⁶. On the one hand, one could see it as a change of paradigm, a step forward towards the inclusion of all the diversity within the gender identities. On the other hand, the Strasbourg Court does it so by reiterating previous cases, namely *P.V.*, which leaves the doubt whether it was really willing to include the entire spectrum, or it merely changed the expression but wanted to mean the same.

One way or another, “gender identity”, and not just “transsexuality”, is to be understood as a factor protected under the Convention, thus the Court might well include the protection of transgender people if that ever happens to be brought to its decisive

²⁵⁰ GERARDS (fn. 238), p. 57 – 59; CAMERON, “Competing Rights?”, p. 197.

²⁵¹ Judgment *MB v Secretary of State for Work and Pensions*, ECLI:EU:C:2018:492, paras 27 – 33 already assessed in Part 2, A, III, 4: *MB v Secretary of State for Work and Pensions* (2018). This subject will be developed in Part 3, A, I: The Union's Limited Field of Action.

²⁵² CoE Convention on preventing and combating violence against women and domestic violence (2011).

²⁵³ Judgment in *P.V. v. Spain*, Application no. 35159/09, 30 November 2010.

²⁵⁴ *Ibid.*, para 30.

²⁵⁵ Judgment in *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015, para 96.

²⁵⁶ *Ibid.*, para 96.

sphere. Similarly, intersex people seem to find protection on the ground of “sex” or, ultimately, in “other status”.

2. Other Documents of the Council of Europe

In July 2009 the, at the time, Commissioner for Human Rights of the CoE, *Thomas Hammerberg*, issued a paper exclusively on gender identity.²⁵⁷ This type of documents is non-legal binding and aims to provide data, raise questions and debate, bring awareness and recommend future steps, thus being mainly directed to Member States and civil society.²⁵⁸ In the introductory part, the Commissioner referred to the debate that differentiates sex from gender and to the importance of gender identity in one’s life, distinguishing it from sexual orientation, and he addressed the general challenges faced by transgender people.²⁵⁹

Despite the main focus on Member States’ human rights issues, good practices and future steps, the paper referred to EU law, namely to the EU Gender Directives and the judgments of the CJEU. It criticized the lack of an explicit mention to “gender identity” and that the inclusion of “gender reassignment” in “sex discrimination” was not extending protection to transgender people who did not want or could not undergo gender reassignment, because of their “free choice”, “health needs” or “denial of access to any treatment”²⁶⁰. It ended by pointing out the opportunity of including “gender identity” explicitly in future EU Directives, through the revision of existing Directives.²⁶¹

In March 2010 the Committee of Ministers of the CoE issued recommendations directed to Members States on measures to combat

²⁵⁷ Commissioner for Human Rights of the CoE Issue Paper (fn. 122).

²⁵⁸ *Ibid.*, p. 2.

²⁵⁹ *Ibid.*, pp. 3 – 4.

²⁶⁰ *Ibid.*, pp. 4 – 5.

²⁶¹ *Ibid.*, p. 5.

discrimination based on gender identity.²⁶² Similarly, in April 2015 PACE presented a resolution covering the situation of transgender people in Europe²⁶³; the first resolution adopted on the issue cover the condition of “transsexuals” and goes back to 1989.²⁶⁴

Recently (October 2017), PACE adopted for the first time a resolution specifically focusing on the situation of intersex people.²⁶⁵ The document did important remarks on the situation of intersex people in general²⁶⁶, and called for the importance of having laws that do not “create or perpetuate barriers to equality for intersex people”, but instead anti-discrimination legislation that effectively covers their situation.²⁶⁷ Although the resolution focus on national legislation and the role of national authorities, it might be inspirational for the EU legislative bodies, which actually had included in their resolutions and recommendations a reference to these contributions.²⁶⁸

According to this sub-section, although the ECtHR has, similarly to the CJEU, only dealt with cases brought by postoperative transsexual people, the protection of “gender identity” is considered protected under the non-exhaustive list of Article 14 of the Convention.

Besides, it can be pointed the progression the Strasbourg Court took by moving from a concept of “transsexuality” to “gender identity”, which might denote a broader understanding of the latter.

²⁶² Committee of Ministers of the CoE, Recommendation CM/Rec (2010)5 to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010.

²⁶³ Parliamentary Assembly of the CoE, Resolution 2048 (2015) on Discrimination against transgender people in Europe, adopted on 22 April 2015.

²⁶⁴ Parliamentary Assembly of the CoE, Recommendation 1117 (1989) on the Condition of Transsexuals, adopted on 29 September 1989.

²⁶⁵ Parliamentary Assembly of the CoE, Resolution 2191 (2017) Promoting the human rights of and eliminating discrimination against intersex people, adopted on 12 October 2017. ILGA-Europe News, “The Council of Europe makes history with its first specific resolution on the rights of intersex people” (12 October 2017), available at <https://www.ilga-europe.org/resources/news/latest-news/council-europe-first-resolution-intersex>, last accessed on 26/08/18.

²⁶⁶ Parliamentary Assembly of the CoE, Resolution 2191 (2017) (fn. 265), pp. 1 – 3.

²⁶⁷ *Ibid.*, p.5.

²⁶⁸ As mentioned above, (fn. 235).

Furthermore, the other mentioned contributions, which essentially address CoE Member States, demonstrate willingness in protecting and promoting the rights of intersex and trans people.

Such considerations could inspire both the CJEU in future rulings and the Union's legislative bodies, while conceiving future legislation or reviewing the already existing one.

Part 3: Sex, Gender and a Queer Reading of European Union Law

A. The European Union (F)Law and its Challenges

At this stage, one is capable of identifying the flaws in EU legislation in regard to the protection of gender varieties.

One may question whether the absence of adequate legal provisions and the uncertainty of some existing and constructed notions were premeditated or the result of unaware approaches. Besides, one may wonder whether the Union can in fact act, and if so in what extent. In any case, is the Union expected to act?

I. The Union's Limited Field of Action

It is first important to recall that the EU (non-discrimination) legal framework has a very specific field of application and an even more limited scope in regard to human rights protection. Despite the good intentions, the Union is, one could say, technically and foundationally unable to interfere in legal fields that in this context would deserve an intervention. Why is that so?

Firstly, the Union's competences are laid down in Articles 3 – 6 and 352 of the TFEU²⁶⁹ within which and only the Union is allowed to take action, according to the principle of conferral foreseen in Article

²⁶⁹ Article 3 – exclusive competence; Article 4 – shared competences; Article 5 – coordinating competences; Article 6 – complementary competences; Article 352 – flexibility clause; SCHÜTZE, “EU Competences – Existence and Exercise”, pp. 84 – 89; CRAIG/BÚRCA (fn. 64), pp. 75 – 94.

5 (2) of the TEU.²⁷⁰ Under the principle of subsidiarity, and outside the scope of its exclusive competences, the Union can only act when the objectives cannot be “sufficiently” achieved by the Member States themselves, according to Article 5 (3) of the TFEU.²⁷¹

Moreover, the Union is expected to combat discrimination “within the limits of the powers conferred by the Treaties”, according to Article 19 of the TFEU, i.e. it can only apply the principle of non-discrimination where the issue falls within the scope of EU law.²⁷²

A similar limitation is safeguarded in Article 51 of the EU Charter, which refers to the Charter’s field of application. Paragraph (1) foresees that the rights and principles there provided are to be respected and promoted by the Union and Member States while implementing EU law and with respect of the limits of powers under the Treaties. Paragraph (2) adds that the EU Charter cannot extend the field of application of EU law and create or modify the Union’s powers and tasks (also according to second sentence of Article 6 (1) of the TEU).²⁷³

This might explain the reason why, in the judgments above examined, the CJEU was so concerned in showing that it was dealing with a Union’s matter, or why the it did not have to deal with the kind of issues brought to the ECtHR.

Nonetheless, despite the limited scope of action, the Union has the floor for being indeed progressive in the areas it can intervene – a good example is precisely the so complete range of EU equality or non-discrimination directives, particularly in the field of gender.²⁷⁴ Moreover, through soft law documents, the EU institutions have the power to show concern and to recall awareness of Member States in

²⁷⁰ CRAIG/BÚRCA (fn. 64), p. 74.

²⁷¹ CRAIG/BÚRCA (fn. 64), p. 95 – 96.

²⁷² *Ibid.*, p. 933; FRA/CoE (fn. 76), p. 34.

²⁷³ For a comment, see WARD, in PEERS/HERVEY/KENNER/WARD (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Art. 51, pp. 1413 – 1454.

²⁷⁴ For the evolution of this framework and the several concepts there enshrined, with the great progressive contribution of the CJEU, see BURRI/PRECHAL, (fn. 66), CRAIG/BÚRCA (fn. 64), pp. 914 – 931.

matters the Union cannot legislate – as it was for instance the case of the recent European Parliament’s resolution on human rights, where it reproved *inter alia* national practices concerning gender legal recognition procedures, gender confirmation surgeries and surgeries practiced on intersex.²⁷⁵

II. A More Proactive Role

The absence of an explicit legal protection was sometimes interrupted by limited attempts of filling the silent and the use of blurry ideas, creating a situation of uncertainty.

On the one hand, the CJEU included the protection of “gender reassignment” within the “sex” discrimination ground, fact that confirmed the binary approach of sex and gender under EU law and showed no door has been left open for further debate. On the other hand, the Commission²⁷⁶ and the European Parliament²⁷⁷ followed the understanding that a broader concept of gender identity was also to be understood as there included.

Despite that approach, the EU legal framework remained silent. The Council refrained from including such explicit mention in the Goods and Services Directive, even when the discussion was at the table and the CJEU had taken that approach previously in *P v S*.²⁷⁸ The very recent judgment in *MB* showed that the Court’s intent was merely to ripen the comparative element and to clarify its (and the Union’s) field of competences, rather than possibly accommodate the diversity of gender identities and expressions and sex characteristics. As noted, the Court is not to be blamed, once it was not called to decide upon that matter, although it would not be the first nor the second time the Court would pronounce in *obiter dictum*.

Hence, it is unclear whether such emptiness, uncertainty and lack of concretization were conscious or not. Not that there is lack of

²⁷⁵ Above (fn. 210).

²⁷⁶ Above (fn. 214).

²⁷⁷ Above (fn. 207).

²⁷⁸ Part 2, A, II, 2: The Gender Directives, and above (fn. 98).

awareness, nor of sensitivity, quite the contrary. However, it seems that the Union is waiting for new litigations to come, namely claims brought, for instance, by trans people that had not undergone gender confirmation surgeries, by other gender non-conforming or by intersex, so that new concepts might arise through judicial interpretation, perhaps leading to changes in the legislation, as it happened after *P v S*.

This avoids the anticipation of challenges and complexities, but turns the legal system into a merely reactive one, rather than simultaneously proactive. As the AG *Tesauro* said, law has to “keep up the social changes”²⁷⁹. In my perspective, this means that the legal system not only has to develop in order to accommodate new societal concepts and developments, as it also has to be able to provide new perceptions and influence societal change.

In other words, law has to be able to give legal answers brought by the claims of those who are discriminated against because they do not fit the binary and cis norms, but also to *a priori* generate societal awareness of this people and their issues, and thus to contribute for the debate and deconstruction of dichotomies.²⁸⁰

In fact, Article 21 (1) of the EU Charter mandates the Union to assume a proactive role in the promotion of fundamental rights.²⁸¹ And law, and namely EU law, is just one of the possible tools.²⁸²

III. Land Insight: Future Claims?

Besides the above-mentioned osmotic relation between law and society, the Union’s legal framework also establishes a reciprocal relation with the national legal systems. The influence of EU law in

²⁷⁹ *Opinion of Advocate General Tesauro*, ECLI:EU:C:1995:444, point 9.

²⁸⁰ Similarly *STYCHIN* (fn. 123), pp. 218 – 219. Skeptical in this regard, see *MORGAN* (fn. 4), p. 41. The relation between law and social change seems to be controversial – for an overall idea, see *MINOW*, “Law and Social Change”.

²⁸¹ *CRAIG/BÚRCA* (fn. 64), p. 397; *WILLIAMS*, “Human Rights in the EU”, p. 252.

²⁸² *MORGAN* (fn. 4), pp. 41 and 44, talking about the need for “more direct strategies”. Similarly, *SPADE*, “Trans Survival and the Limits of Law Reform”, p. 187, claiming the insufficiency of (US) anti-discrimination law and crime legislation, and proposing other strategies.

national legislation is obvious, but the other way around also proves to exist. Before an explicit protection of human rights was enshrined in the Treaties and the EU Charter came into force and became primary law, the so-called general principles of Community law created by the CJEU were inspired not only in international human rights documents, but also in national constitutions.²⁸³

Taking another close example, the principle of equal pay between women and men was enshrined in the Treaty of Rome (today Article 157 of the TFEU) because at the time French legislation protected such value. Once France was the only Member State with such provision, it feared that the cheaper female labor of other Member States would put its undertakings in an unfair disadvantage. Such new provision developed from an economic approach to a social and fundamental rights dimension and initiated the complex construction of what today is the comprehensive equality and non-discrimination legal framework, above referred.²⁸⁴ This very single example shows how the French law, at the time unprecedented, forced a change in EU law, which developed into a whole new dimension.

Similarly, in regard to the issue here standing, the national legal systems of the EU Member States are coming up with new and more progressive facets. For instance, in a decision of October 2017²⁸⁵, the German Federal Court considered unconstitutional that the civil status law required gender to be registered, but did not provide a gender marker other than male or female. Therefore, it requested the German legislator to enact provisions in accordance to the Basic Law, by 31st December 2018.²⁸⁶

²⁸³ FRA/CoE (fn. 76), pp. 20 – 21.

²⁸⁴ BURRI/PRECHAL (fn. 66), p. 2; CRAIG/BÚRCA (fn. 64), pp. 893 – 898; FRA/CoE (fn. 76), pp. 20 – 23.

²⁸⁵ BVerfG, Order of the First Senate of 10 October 2017 - 1 BvR 2019/16 - paras. (1-69). For an English version, see http://www.bverfg.de/e/rs20171010_1bvr201916en.html, last accessed on 29/08/18.

²⁸⁶ *Ibid.*, p. 3.

Besides the notable remarks on the “binary gender patterns”²⁸⁷ and assumptions²⁸⁸, and thus the acknowledgement of diverse identities beyond dichotomies, the recognition of “gender identity” as a protected ground against discrimination under “gender”²⁸⁹ – (de)constructions that indeed might well inspire the CJEU –, the point that is here worth to make is that by the end of the year the German civil status law has to either provide a third gender marker or none at all.²⁹⁰

In the last scenario, it is not quite clear how (or even, if) the Gender Directives would persist, but considering the former, how would the Union law respond to the claims brought by a person whose non-binary sex or gender is legally recognized? Could the person rely on the Gender Directives that prohibit discrimination on the ground of “sex” regarding employment, and occupation, access to goods and services? How would then the binary understanding of “sex” under the Union’s legislation be interpreted, when confronted with a non-binary concept of sex (or gender) under national law?

Those questions are of course additional to the already challenges that the Court may face by claims brought by intersex and trans people, even when their sex or gender is not legally recognized: is gender identity included in “sex” as “gender reassignment” is under the EU Gender Directives? Does “sex” simultaneously include the protection of intersex people, or does it inevitably entail the female/male dichotomy and the principle of equality between men and women? Similarly, does the expression “gender-related issues” embrace “sex-characteristics”? Can a pregnant person, who does not match the expected “female” legal marker, rely on the Pregnancy Directive?

²⁸⁷ BVerfG, Order of the First Senate of 10 October 2017 - 1 BvR 2019/16 - paras. (1-69), for instance para 59.

²⁸⁸ *Ibid.*, for instance para 54.

²⁸⁹ *Ibid.*, para 56.

²⁹⁰ As pointed by *Nora Markard*, the German Court left such decision to the legislator, MARKARD “Structure and Participation: On the Significance of the ‘Third Option’ for the Equality Guarantee” (3 February 2018), para 11.

The German ruling and the future legislative solution might well serve as an impulse for legislature and judicial bodies of other Member States to similarly reconsider their construction of gender. Besides, the growing awareness and visibility of non-binary sex and identities may motivate more legal claims, under national systems, and more questions may be brought to the Court, under Article 267 of the TFEU. It is therefore clear that the Union has to be ready to answer future challenges, because they will certainly arrive.

B. Overcoming the Challenges Through a Queer Legal Reading

If the EU is expected to give solutions to future claims and to contribute to the (de)construction of the concepts of gender beyond a binary and cisnormativity, although aware of its limited scope of action, how could such intervention proceed?

I. Creating New Discrimination Grounds: Non-Binary Gender Categories or an Open Clause

One of the options is to expressly include non-binary categories as new discrimination grounds in the text of the EU legislation. As seen, the European Parliament already asked the Commission for the explicit inclusion regarding “gender identity”²⁹¹, and the Commissioner for Human Rights of the CoE acknowledged it as possible.²⁹² Similarly, the Organization Intersex International Europe (OII-Europe) urged, in a LIBE hearing, EU law to cover “sex characteristics” – or alternatively “intersex status”.²⁹³

Such amendment would 1) ensure the effective protection of transgender and intersex people, namely their access to justice and enjoyment of their rights²⁹⁴, 2) clarify the distinction between the two

²⁹¹ European Parliament, Resolution of 4 February 2014 (fn. 199), para 4 (G) (i).

²⁹² Commissioner for Human Rights of the CoE Issue Paper (fn. 122), p. 5.

²⁹³ AGIUS (fn. 32), p. 44.

²⁹⁴ OII Europe speech at LIBE hearing on “The situation of fundamental rights in the European Union in 2015” by *Dan Christian Ghattas*, Co-Chair of OII Europe, 16 June 2016, p. 4.

claims, and thus more accurately regulate their protection, 3) increase visibility and promote equality²⁹⁵, 4) create legal certainty, 5) avoid unclear comparisons by the CJEU²⁹⁶.

Regarding secondary law that could be ensured by expressly foreseeing those grounds under the Employment Equality Directive once it establishes a general framework and covers several grounds for discrimination. Luckily with the so long awaited adoption of the Horizontal Directive, the protection would be extended to non-employment and occupation areas, such as social protection, health care, education, access to goods and services, like it is foreseen in the Racial and Ethnic Equality Directive.²⁹⁷ In fact, the initiative to include “gender identity” and “sex characteristics” could well accompany the discussion of the adoption of the Horizontal Directive, which seems in need of a new impulse (10 years have passed since the Commission proposal).

Nevertheless, such addition seems only possible if the Treaties, namely Articles 10 and 19 (1) of the TFEU, would also include such grounds, once those provisions legitimize the Union to take action to combat discrimination based on the list of grounds there protected.²⁹⁸ This procedure seems not only sluggish, but also unlikely.²⁹⁹ Once the inclusion of the new grounds would enlarge the competence of the Union, namely the competence of adopting secondary legislation on those fields, only the ordinary revision procedure would be possible, according to Article 48 (1, 1st sentence) and (2, 2nd sentence) of the TEU.³⁰⁰

This revision procedure, as described in Article 48 (2-5) of the TEU, encompasses many procedural steps and the intervention of all

²⁹⁵ AGIUS (fn. 32), p. 44.

²⁹⁶ AGIUS/TOBLER (fn. 41), p. 76

²⁹⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000

²⁹⁸ KILPATRICK (fn. 69), p. 579; CRAIG/BÚRCA (fn. 64), p. 906.

²⁹⁹ AGIUS/TOBLER (fn. 41), pp. 76 – 77.

³⁰⁰ *Ibid.*, p. 76.

EU institutions and national governments and parliaments.³⁰¹ Having that in mind and considering some previous difficulties – such as the failure of the Constitutional Treaty, or the long process of the ratification of the Lisbon Treaty –, Member States and EU institutions might be reluctant in initiating such procedure. Besides such change might be seen by some as a minor issue to be at the Union’s table at the moment. Moreover, in order to enter into force, the amendment would have to be “ratified by all Member States in accordance with their respective constitutional requirements”, according to Article 48 (4, 2nd sentence), condition that would certainly be difficult to achieve, considering the topic at stake and the very particular societal and constitutional views on it.³⁰²

Nevertheless, imagining this amendment would become possible, it is always appropriate to recall that legal certainty comes along with the possibility of excluding other unforeseen situations – both are the two faces of the same coin (the coin being the creation of categories). This is a known paradigm of legal methodology and, as pointed out by the CoE Commissioner for Human Rights, a particular challenge for human rights protection as well: to protect the “human rights of everyone is to apply a consistent human rights approach and not to exclude any group of people”³⁰³.

For instance, would then “gender identity” include “gender expression”? As seen above³⁰⁴, although the distinction is known, the terms are ambiguous. On the one hand, the Yogyakarta Principles Plus 10 acknowledged that they were “distinct and intersectional grounds of discrimination”. On the other hand, it clarified that any reference to gender identity is to be interpreted as “inclusive of gender expression

³⁰¹ For a comment on ordinary revision procedure, see WITTE, “Treaty Revision Procedures After Lisbon”, pp. 119 – 122.

³⁰² Following AGIUS/TOBLER (fn. 41), pp. 76 – 77.

³⁰³ CoE Commissioner for Human Rights (fn. 122), p. 4. Also acknowledging this challenge JOSHI, “K.B. v. National Health Service Pensions Agency and the Secretary of State for Health: The Influence of Human Rights Law in Protecting Transsexuals from Employment Discrimination”, p. 750.

³⁰⁴ Above (fn. 44).

as a ground for protection”³⁰⁵. The outcome remains unclear, and it is visible how the tension in the social framework presents consequences when looking at legal solutions.

Therefore, either “gender expression” would have to be expressly included as well, or the term “gender identity” would have to entail the former, which can be considered inaccurate. Alternatively, and inspired in the EU Qualification Directive, the term “gender-related aspects” could be introduced, with a more inclusive ambit.

Simultaneously, the addition of the expression “such as” or “other status” would expand the list of grounds to other unforeseen ones, following the legislative technique used in Articles 21 of the EU Charter and 14 of the ECHR.

II. A Broad Understanding of Sex Discrimination

Considering the unlikelihood of a Treaty revision and thus of the inclusion of non-binary categories as protected grounds under EU equality or non-discrimination provisions, the protection of intersex and trans people could be granted through a broader interpretation of the sex discrimination ground, reading that could find support in the EU general principles.³⁰⁶

It is relevant to recall the complexities mentioned in *Part 1* regarding the relation between sex and gender and between trans and intersex. If one clearly draws a line between sex and gender, it might be more conceptually challenging to include the protection of trans in the ground of sex.³⁰⁷ This is because their *gender* identity and/or *gender* expression do not confirm the sex assigned at birth, once they live, present, or/and express their gender at odds with their sex.

³⁰⁵ The Yogyakarta Principles Plus 10, (fn. 45) p. 6.

³⁰⁶ As proposed by the European Parliament in the Resolution on the Roadmap (2014) (fn. 199), para 4 (C) (ii) and partially in the Resolution on the Employment Equality Directive (fn. 207); FRA (fn. 90), p. 129; AGIUS/TOBLER (fn. 41), pp. 77 – 78 and 87.

³⁰⁷ For instance, MASSELOT, “The New Equal Treatment Directive Plus Ça Change...” p. 95, who considers that the “concept of gender remains beyond the scope of the new Directive”; or FLYNN (fn. 127), who considers the Court was talking about “gender discrimination” and not “sex discrimination”, p. 379.

Hence, the question might be whether gender identity and expression can be indeed included within the category of sex.

Contrarily, because intersex people are born with particular sex characteristics that challenge binary anatomies, discrimination might arise from this very fact. Therefore, instead of the conceptual debate about the differences between sex and gender – although it can be questioned whether intersex people find protection under “gender” or “gender-related aspects”, as seen above³⁰⁸ –, the question is whether sex as a discrimination ground is perceived as including non-binary sex characteristics.³⁰⁹

As I indicated above, I assume the permeability between the concepts of sex and gender. Besides, the EU institutions, namely the CJEU, do it so. It is important to bare in mind this perception while assessing the following possibilities, not forgetting that intersex, transsexual, transgender and gender variant people have different claims.

In this context, it would be appropriate to establish some distinctions between some already studied provisions. For instance, Articles 2 (2nd sentence) and 3 of the TEU and Articles 8 and 157 of the TFEU clearly mention sex binary terms, whereas the provisions of Articles 10 and 19 of the TFEU offer a broaden understanding, by mentioning “sex”, without making any further bipolar distinction. Thus, the last two provisions could be understood as foreseeing protection for non-binary sexes, identities and expressions.³¹⁰

³⁰⁸ Part 2, A, II, 3: The Directives Outside the (Gender) Equality or Non-Discrimination Framework: Asylum and Judicial Cooperation in Criminal Matters, regarding the EU Qualification Directive.

³⁰⁹ Stressing the problem, AGIUS/TOBLER (fn. 41), pp. 82 and 87; see also FRA (fn. 231), pp. 71 – 72.

³¹⁰ Following TRAVIS (fn. 95), p. 189, although the author was specifically considering such option for intersex people.

From a systematic interpretation point of view³¹¹, the fact that the EU primary law specifically provides the principle of equality between women and men does not hinder, in my perspective, the unity of sense and the consistency of the EU legal order. Recalling the general principles, equality and non-discrimination is not limited to women and men. Hence, it is acceptable that the Treaties and the EU Charter provide, on the one hand, more specific provisions in regard to the equality between women and men, and on the other hand, broader provisions and a concept of sex that does not necessarily rely on that binary definition.

From a teleological perspective³¹², it is even understandable why the Union's primary law goes further in specifying the equal treatment between women and men. Despite the initial economic purpose of that inclusion, as briefly mentioned, this principle developed and turned to be essential to combat the actual discrimination suffered by women. However, such assertion does not invalidate the existence of other covered grounds, including sex interpreted in a more expansive way.

The same could be said in regard to the provisions of the Directives that foresee "direct discrimination", "harassment" and "sexual harassment"³¹³, once they include the concept of "sex",

³¹¹ SALACHOVÁ/VÍTEK, "Interpretation of European Law, Selected Issues", p. 2718; LENAERTS/GUTIERREZ-FONS, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice", pp. 16 – 17.

³¹² LENAERTS/GUTIERREZ-FONS (fn. 311), pp. 31 – 37.

³¹³ Article 2 of the Recast Directive and Gender Goods and Services Directive, Article 3 of the Directive 2010/41/EU on self-employed capacity. Direct discrimination: "where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation". Harassment: "where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment". Sexual harassment: "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".

without mentioning binary terms.³¹⁴ However, there are some aspects to be considered.

First, the concept of “indirect discrimination”³¹⁵ challenges the assertion above, once it sets “persons of the *other sex*” as the comparator, thus embracing a binary sex model.³¹⁶ This would create incoherence as to the application of the Directives: “direct discrimination”, “harassment” and “sexual harassment” would protect intersex people, while “indirect discrimination” would neglect them.

Second, and recalling again legal interpretation rules, a systematic approach demands an “internal compliance of provisions”³¹⁷. Those concepts enshrined in Article 2 and 3 of the Directives are not isolated, but instead confined in a document. This fact not only asks for a coherent connection between the provisions, but also imposes a common goal, calling for a teleological interpretation.³¹⁸ This purpose is established in the Article 1 of the Directive and relates to the equal treatment between men and women, including transsexuals, in employment and occupation

Thus, and leading to the third argument, the Directives *per se* do not seem to give space for such interpretation, unless they would be amended by the European legislators or interpreted so by the CJEU – not forgetting the possibility for further developments by national legislators or national courts.³¹⁹ Once the amendment of the Directives encompasses the difficulties above presented, the main hope relies on the Court, in what EU law is concerned – Member States can always

³¹⁴ As defended by TRAVIS (fn. 95), pp. 191 and 192, again in regard to intersexuality and focusing on the Recast Directive.

³¹⁵ Also defined in the provisions referred in (fn. 313). Indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.

³¹⁶ TRAVIS (fn. 95), p. 192.

³¹⁷ SALACHOVÁ/VÍTEK (fn. 311), p. 2718.

³¹⁸ Systemic interpretation and teleological interpretation are often interlinked, according to LENAERTS/GUTIERREZ-FONS (fn. 311), p. 32.

³¹⁹ The last idea as proposed by TRAVIS (fn. 95), p. 191.

offer a stronger protection, once the Union's equality or non-discrimination law only sets a minimum regime.³²⁰

Such interpretation was already somehow initiated by the CJEU in its case law. As seen, the Court had the understanding that sex would also encompass "gender reassignment". Although this approach relied and reinforced the binary normativity, it did somehow put aside the traditional view that gender is inevitably given at birth, acknowledging that some people do not confirm their assigned birth-sex or gender.

Moreover, the progressive construction of the comparative element from *P v S* to *MB* – leaving behind the comparison between the two sexes and establishing a comparison between transsexual people and cispeople – might mirror the willingness of the Court in moving away from the traditional gender equality approach towards a broader and more inclusive comprehension of sex and gender. Such understanding encompasses the idea that "sex" discrimination may entail different concepts, rather than only the binary forces as opponents and comparable.

Nonetheless, the reference to a comparator might still be an issue in the case of intersexuality: to what "other sex" would an intersex person be compared?³²¹ However, if the Court keeps the same understanding as in its most recent case (*MB*), intersex people will most likely be compared to non-intersex people. This would be the most accurate comparator, if the real ground for discrimination is considered to be "sex characteristics" or "intersex status", within the concept of "sex".

Moreover, the Court could finally acknowledge the limits of the traditional comparative approach, and start to assess this type of discrimination cases without a reference to a comparator. That would mean recognizing that the claimant faced a disadvantaged, fact that is related to the claimant's sex characteristics (or gender identity or

³²⁰ AGIUS/TOBLER (fn. 41), pp. 78 – 79 and 87.

³²¹ TRAVIS (fn. 95), p. 192.

gender expression, in the case of trans people claims)³²², moving to a more flexible equality approach.³²³

III. A Call for the Union's Values: Equality, Human Dignity and Respect for Fundamental Rights

Would the call for general principles of equality, human dignity and respect for fundamental rights support the protection of intersex and trans people in any way?

As seen, the principle of equality is protected as a value and a fundamental right of the Union, under Articles 2 of the TEU and 20 of the EU Charter, respectively. Those provisions make no mention to particular grounds for discrimination, thus proposing a broad protection to any difference in treatment that may arise in the Union's activities.³²⁴

Besides, the respect for human dignity and for fundamental rights including the rights of persons belonging to minorities is, again, a core value of the Union, enshrined in Article 2 of the TEU and in Article 1 of the EU Charter. The fact that the EU Charter has the value of primary law enhances the call for the respect of human rights in general.³²⁵

Moreover, the open clause of Article 21 (1) of the EU Charter extends protection to grounds that are not written in the provision. So it does Article 14 of the Convention, which constitutes a general principle of EU law (Article 6 (3) of the TEU) and with which Article 21 of the EU Charter seems to have an undeniable relation.³²⁶

As seen, the ECtHR is able to include new grounds in Article 14 of the Convention, as it did with transsexuality, and later gender identity. However, unlike the Strasbourg Court, the CJEU seems unable to extend protection to other grounds under Article 21 of the EU Charter.

³²² As highly proposed by BELL (fn. 160), p. 226.

³²³ *Ibid.*, p. 231; FLYNN (fn. 127), pp. 377 – 378.

³²⁴ BELL, in PEERS/HERVEY/KENNER/WARD (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Art. 20, p. 563.

³²⁵ WILLIAMS (fn. 281), p. 253.

³²⁶ KILPATRICK (fn. 69), p. 584; BELL (fn. 324), pp. 566 – 567.

As explained, although Article 51 (1) of the EU Charter always applies when Union entities act,³²⁷ the Treaties provide a limited list of grounds, and including new ones would be seen as contravening Articles 6 (1) of the TEU and 51 (2) of the EU Charter.³²⁸

But how can the open clause entail unforeseen grounds, if the CJEU and similarly the Union legislators are trapped in the impossibility of developing them through interpretation or new legislation, respectively, and unless treaty revision? Is the open clause of Article 21 of the EU Charter reduced to be a mere anti-discrimination slogan? How is the Union then supposed to “promote” human rights, as Article 51(1) of the EU Charter requests? Is the latter a mere passive mandate?³²⁹

On the one hand, the claim for these Union’s values would best serve the inclusion of new grounds through a Treaty revision, since the Treaties must be in accordance with the Charter.³³⁰ On the other hand, this claim would support a broader interpretation of sex, as enhancing the maximum equality, human dignity and human rights of individuals.

³²⁷ CAMERON (fn. 250), p. 187; ROSAS, “When is the EU Charter of Fundamental Rights Applicable at National Level?”, p. 1272. On the contrary, the part of the provision that addresses Member States and the expression “implementing Union law” are highly disputed.

³²⁸ AGIUS/TOBLER (fn. 41), pp. 52.

³²⁹ In CRAIG/BÚRCA (fn. 64), p. 397, the authors criticize the tension between the duty to “promote” human rights (paragraph 1 of Article 51 of the EU Charter) and the limitation of the EU’s powers (paragraph 2); KILPATRICK (fn. 69), p. 591: the author does not question whether the CJEU can or not extend the grounds of discrimination; instead, she asks whether the Court can broaden the field of application of any given ground, which is considerably a different aspect. But WILLIAMS (fn. 281), p. 253, notes the difference between avoiding the breach of human rights and promoting their protection through policy making. This is indeed a complex issue and, for now, I have more questions than answers.

³³⁰ CRAIG/BÚRCA (fn. 64), p. 111.

IV. Legislating Other Fields

A last but perhaps more restrictive possibility would be to consider gender identity, gender expression and sex characteristics while legislating other fields.

For instance, before sex became a protected ground under EU law, the Union legislated in the field of gender equality, considering it as an aspect of the internal market, thus relying on certain general legal basic provisions.³³¹ Similarly, it could take that approach in regard to gender identity, gender expression and sex characteristics.³³²

In fact, and as seen, by legislating in the fields of asylum and judicial cooperation in criminal matters, the Union took the chance to enhance explicit protection of “gender related aspects”, “gender”, “gender identity”, “gender expression”. This secondary legislation was enacted outside the non-discrimination framework legitimized under Article 19 of the TFEU, but under the competences laid down in Article 78 (2) (a), (b) and (d) of the TFEU – measures for a common European asylum system – and Article 82 (2) of the TFEU – directives on minimum rules to facilitate mutual recognition of judgments and judicial decisions and to facilitate police and judicial cooperation.

Another example, although not constituting a legal binding instrument, was the resolution issued by the European Parliament on gender equality in the media.³³³ This document acknowledged the impact of the media and advertisement on cultural gender norms, thus recognizing their potential in deconstructing stereotypes regarding LGBTI people, promoting gender-sensitivity awareness, providing young people with critical thinking and capacity of pointing out discrimination arising from *inter alia* “gender identity”, “gender expression” and “sex characteristics”.³³⁴

³³¹ TOBLER, “Sex Equality Law under the Treaty of Amsterdam”, pp. 143 – 144.

³³² AGIUS/TOBLER (fn. 41), p. 32.

³³³ European Parliament, Resolution of 17 April 2018 on gender equality in the media sector in the EU (2017/2210(INI)).

³³⁴ *Ibid.*, paras E and 23.

This type of intervention through soft law is, as mentioned, usually directed to Member States, hence having the important role of influencing their laws and practices, which can be more protective than EU law.

Conclusion

To come up with a single definition of sex and gender is a difficult and controversial task. Some claim that sex refers to biological and physical characteristics, and that gender indicates the social construction of the former. This dichotomy is used to explain the existence of people who develop their gender identity and expression (or roles) at odds with their sex. Others have appropriated the distinction to counter the assumption that “anatomy is destiny” and thus to explain that the differences between women and men are socially constructed, instead of biologically determined. Still, some dispute the boundaries between these two terms and consider both to be social constructions. Thus, the two concepts cannot reflect one single notion.

The same contested approach is taken when looking at the dichotomy woman/man, female/male. The usual assumption is that one is either a woman or man, because one was born either with a female or male sex. Thus, individuals, society and institutions perceive people as either woman or man (binary normativity) and as identifying with and expressing their identity according to the sex assigned at birth (cisnormativity).

However, some people challenge those assumptions and norms. Some are born with sex characteristics that, from a binary perspective, do not entirely (partially or at all) fit into the female and male sex characteristics – they are called intersex. Others identify with the opposite gender to the one assigned at birth – usually called

transsexuals – or identify with or express their identity according to both genders or with none – typically called transgender.

The boundaries between those definitions are also challenged. On the one hand, categories can be seen as creating visibility to specific situations and emphasizing certain claims. On the other hand, they block the fluidity within the gender range and might marginalize certain individuals. Therefore, one should perceive gender as a spectrum and a complex myriad of possibilities. The use of certain terms, such as trans, genderqueer, gender variant, gender fluid, gender non-conforming, may encompass this perception

Because individuals, society and institutions are framed on the basis of binary and cis norms, people who do not fit them face the most discriminatory treatment and violence in many different fields of life, such as employment, sports, health and social systems, family and social surrounding. In many situations, the legal system does not accommodate their protection and even paradoxically poses struggles.

The EU general equality and non-discrimination legal framework protects discrimination based on “sex”, but does not expressly cover, for instance, gender identity, gender expression, sex characteristics or gender-related aspects, under Articles 10 and 19 of the TFEU. Although not specifying those grounds, but only “sex” or “other status”, Article 21 of the EU Charter contains a non-exhaustive list. Besides, the principle of equality, with no specific reference to grounds, is claimed as a value and a fundamental right of the Union (Articles 2 (1st sentence) of the TEU and 20 of the EU Charter).

The Employment Equality Directive, which establishes a general framework for equal treatment in employment and occupation, joining the Race and Ethnic Origin Directive, does not protect other grounds but religion or belief, disability, age and sexual orientation.

The particular EU gender equality legal framework understands gender according to the binary division, which finds protection in the ground of sex. The primary law uses, in this context, the concepts of woman, man, female, male (Articles 2, 2nd sentence and 3 of the TEU, Articles 8 and 157 of the TFEU, and Article 23 of the EU Charter).

Such gender dichotomy is reflected in all the Gender Directives. However, the Preamble of the Recast Directive includes protection of discriminatory treatment that arises from gender reassignment, including it in the concept of sex, reflecting the CJEU decision in *P v S* case (1996). The same is to be understood regarding the Gender Goods and Services Directive – although questionable – and the Gender Statutory Social Security Schemes Directive – as decided by the CJEU in *Richards* case (2006).

The case law of the CJEU has thus far dealt with post-operative transsexuals, without leaving the door open for other situations, except for pre-operative transsexuals. It included, in sex discrimination, different treatment that arose directly or somehow derived from gender reassignment, when such situations related to the entitlement of rights protected under EU law. The highly debated comparative element used by the Court progressively moved away from the traditional sex equality approach, leaving behind the comparison between sexes – recently, in the *MB* case (2018), the Court compared a transsexual woman with a cisperson.

The varied contributions of EU institutions and its agencies show a broad understanding of gender, proposing the protection of gender identity and sex characteristics under sex discrimination. Similarly, some CoE entities show the same awareness in regards to the situation and protection of intersex and trans people. The Strasbourg Court, while also dealing only with claims from post-operative transsexuals, moved from the protection of transsexuality to gender identity under the open clause of Article 14 of the Convention.

It is therefore clear that the Union legal framework, although aware of the fact that one may not identify with the gender assigned at birth, nonetheless still relies on a binary understanding of gender. Thus, trans people who do not undergo gender confirmation surgeries do not find protection on the grounds of sex once the discrimination they may face is not based on gender reassignment (as the CJEU had developed), but instead grounded on their gender identity or expression. This binary view also impedes the protection of intersex people in the ground of sex, once they do not have strict female or male bodies, but sex characteristics that challenge traditional gender dichotomy assumptions.

Nonetheless, the Union legal framework leaves space for further developments. One possibility would be to reform the existing law in order to expressly include non-binary gender categories – such as “sex characteristics”, “gender identity”, “gender expression”, “gender-related aspects” – or to create an open clause, in order to avoid an eventual marginalization of certain unforeseen situations. That would demand a Treaty revision, under the complex ordinary revision procedure of Article 48 (1) (2-5) of the TEU, once the Union is only legitimized to take action in regard to the grounds covered by Article 19 of the TFEU. This option would take time and a real willingness of the EU institutions and Member States, which seems unlikely.

A second approach would be to broadly interpret sex discrimination, as including all the variety regarding sex. For those who draw a clear line between sex and gender, this approach may be more conceptually challenging. On the contrary, for those who understand the permeability of the terms, as the Union seems to do, that approach would be methodologically, legally and conceptually correct.

A call for the Union's values of equality, human dignity and respect for fundamental rights would support this interpretation, and encourage (or even impose) the above Treaty reform. This would be in line with the EU Charter demand for the Union's proactive role in regard to the promotion of fundamental rights and principles.

A final approach would be to consider sex/gender varieties in other fields of competence, as the EU has done in the past through the field of the internal market, or more recently in the fields of asylum and judicial cooperation in criminal matters. At the same time the Union's soft law may well introduce awareness and influence national legislation, specially knowing that Member States can enact even more protective provisions than the minimum rules set by the Union.³³⁵

The constant permeability between law and society demands a queer reading of EU law, i.e. an understanding of the legal concepts of sex/gender beyond the binary and cisnormativity. Recalling, what started to be the protection of fair competition had developed into the principle of equal pay and later the principle of equality between women and men, initiating the whole new equality and non-discrimination framework. It is true that, at the time of the Treaty of Amsterdam, the Union's legislators included some grounds but neglected others. This does not mean the latter do not deserve protection under the actual EU legislation, but that there is room to grow and improve. The Union's law, as any legal system, is subjected to a dynamic evolution.³³⁶

And even if, due to the permeability of social conceptual developments, the Union finds itself lost in the uncertainty and

³³⁵ AGIUS/TOBLER (fn. 41), pp. 78 – 79.

³³⁶ As said in WITTE (fn. 301), p. 115: the text of the Treaties “is not, and cannot be, a definitive document carved in stone for generations to come”.

variability of the gender spectrum, one should not fear. It is true that legal systems rely on categories, and EU law is no exception. This is important in terms of legal certainty: inserting usual meanings in the normative text and so granting a high predictability in the judgments.³³⁷ However, this gender uncertainty opens a “site for political contestation”³³⁸, and the “usual meanings” may embrace new dimensions.

A Treaty revision may seem unlikely, but a broad interpretation of “sex” should not find excuses. In fact, a reform may even be insufficient, without a queer reading. Insufficient because: 1) other strategies need to be taken, once that certain discourses, along with the legal one, are extremely influential in constructing views about gender varieties³³⁹ and 2) the foundational concepts in which law relies need to be (de)constructed.³⁴⁰

The ultimate goal of a queer reading of EU law is to provide (gender) dignity, freedom, autonomy, protection and acceptance to everyone.³⁴¹ This is what the EU (gender) non-discrimination legal framework should aim for. It is surely a very long road, but Law and Gender constructions never met shortcuts.

³³⁷ LENAERTS/GUTIERREZ-FONS (fn. 311), p. 8.

³³⁸ SCOTT (fn. 18), p. 74.

³³⁹ MORGAN (fn. 4), pp. 41 and 44, although the author refers to “views about homosex”.

³⁴⁰ *Ibid.*, pp. 39 – 41.

³⁴¹ VALDES, (fn. 1), pp. 362 and 377.

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