

Destination

>> **EQUALITY**

summer 2008

Transitioning
towards
full equality

**Vladimir
Luxuria:**
activist,
actress &
politician



**Disturbing
personal stories:**

forced sex change, sterilisation & murder

**TRANS
EUROPE**

Welcome to Vienna!

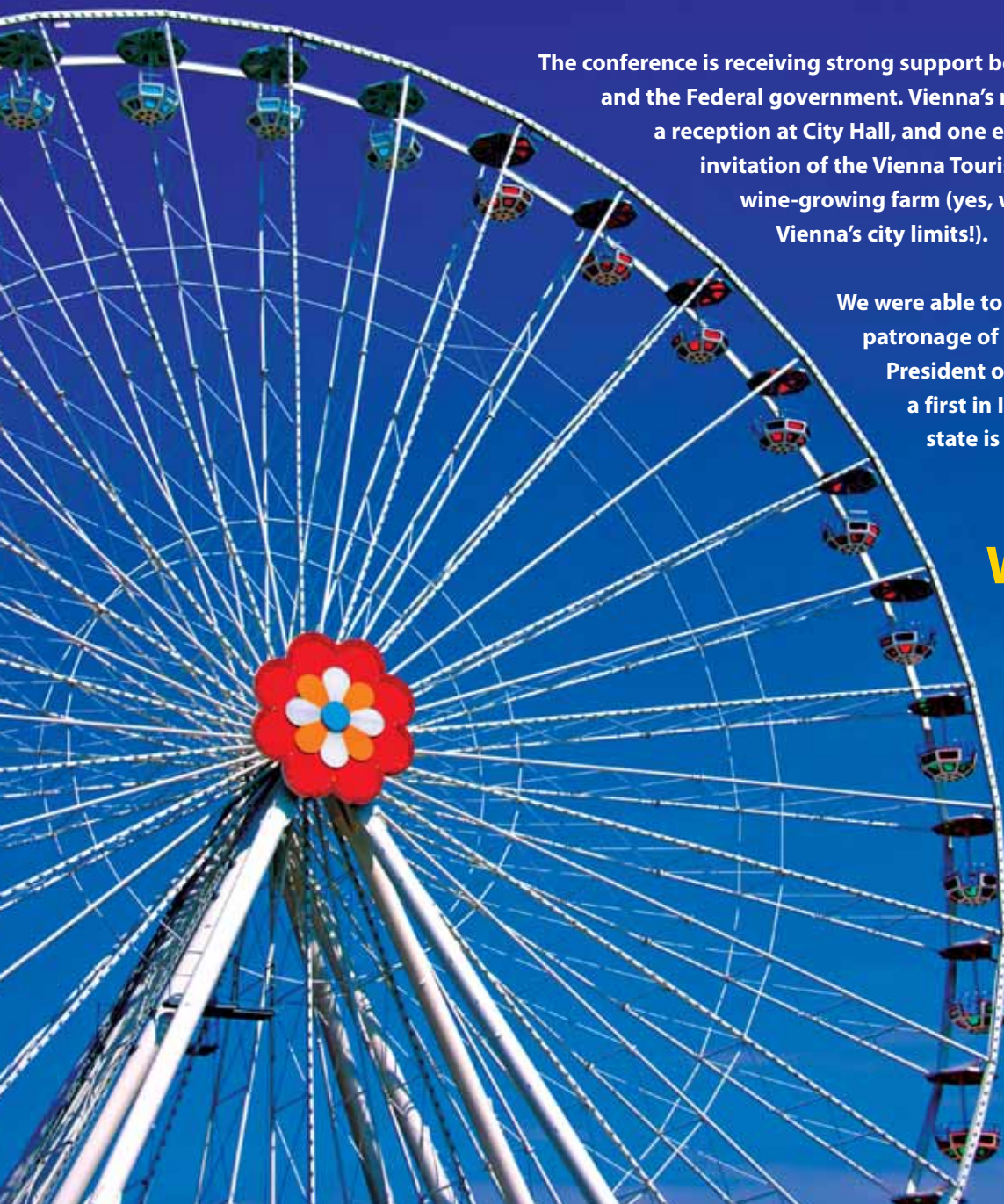
In 1983 the *Homosexuelle Initiative (HOSI) Wien*, hosted an ILGA (World) conference in Vienna for the first time—25 years later, we are happy to welcome, for the first time, delegates to an ILGA-Europe annual conference in the Austrian capital.

The conference is receiving strong support both from the City of Vienna and the Federal government. Vienna's mayor will invite delegates to a reception at City Hall, and one evening we will dine at the invitation of the Vienna Tourist Board in a restaurant of a wine-growing farm (yes, wine is produced within Vienna's city limits!).

We were able to secure the honorary patronage of Heinz Fischer, the Federal President of the Republic of Austria. It is a first in ILGA's history that a head of state is assuming such a role.

**We look
forward to
welcoming
you to
Vienna!**

HOSI Wien's conference
organising
team





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A very warm welcome to our magazine on transgender issues!

I hope you enjoy our regular visual innovations and growth, and will like the new title and look of our magazine. Most importantly, I hope you will find the contents of this edition interesting and stimulating.

ILGA-Europe has progressively, over the years, fully embraced the issues of equality and human rights for transgender people in Europe in its mandate. There is a significant degree of legal discrimination, and high levels of social stigmatisation and violence towards transgender people in Europe. ILGA-Europe together with TransGender Europe published the first comprehensive report on the legal situation for and healthcare experiences of transgender people across Europe. And this is just a beginning. More specific publications on transgender issues are to come. We are also happy to continue collaborating with TransGender Europe for the attainment of equality for transgender people.

In this magazine you will find a variety of articles covering many aspects of transgender people's rights. We are particularly happy to offer you various first-hand personal stories of transgender and intersex people, which always complement and strengthen reports, research and statistics. We keep learning from these disturbing stories of humiliation, intrusion and abuse experienced by transgender people. We also highlight some positive and promising developments, and the story of Vladimir Luxuria, the first known transgender MP in Europe, is a true story of inspiration.

I do hope you will enjoy this special transgender edition of our magazine. As usual, your comments, thoughts and reactions are most welcome and appreciated!

PATRICIA PRENDIVILLE
Executive Director, ILGA-Europe

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"Think globally, act locally"

This year ILGA-Europe's annual conference will take place in Vienna from 30 October to 2 November under the theme of "Think globally, act locally". During last year's conference the Election Preparation Committee was introduced. ILGA-Europe invites its members to actively use this new structure and process to improve the organisation's leadership.

The conference will reflect the work of ILGA-Europe and its members in advocating for international human rights standards and practices and their implementation at the local level. We hope that the conference's experienced panel speakers will not only outline current achievements, but also inspire a vision for the future of LGBT Europe.

ILGA-Europe is pleased to announce that we have already received a confirmation from Mr **Thomas Hammarberg**, Council of

Europe's Commissioner for Human Rights, who will take part in one of the conference's panel discussions.

HOSI Wien, the Austrian host organisation, has already secured a high-profile patronage of the conference – **Heinz Fischer**, Federal President of the Republic of Austria. A number of representatives of the Austrian parliament, government and Vienna City Council have already agreed to be part of the conference's honorary committee.

Election Preparation Committee

Following the proposal passed at the 2007 ILGA-Europe Conference in Vilnius, a new body was established within ILGA-Europe – the **Election Preparation Committee**.

As decided by the conference the EPC will:

- Receive nominations for the executive board of ILGA-Europe and the European representatives in the ILGA board for the elections at the 2008 conference;
- Actively seek nominations to ensure a broad representation among the candidates;
- Present the candidates and their qualifications to the 2008 conference.

The Committee's main purpose, however, will be primarily to inform the member organisations on the work and functions of the Board and subsequently encourage them to nominate candidates for the Board, therefore....

What are we looking for?

One of the major advantages of being a full member organisation is that you

effectively have **a chance to choose and influence the leadership of ILGA-Europe**. Whilst voting takes place at the Conference itself, nominations for the Board of the future take place well before the Conference. The nominations will be primarily reviewed by the Election Preparation Committee and subsequently presented at the conference.

You think you've got what it takes?

- Are you a good team player and willing to work in an international team?
- Are you able and willing to manage your time to carry out board business efficiently?
- Are you able/willing to work on both political and administrative levels?
- Do you have experience in representing an organisation in public?
- Do you have good communication skills and are able to communicate

within diverse environments and with various audiences?

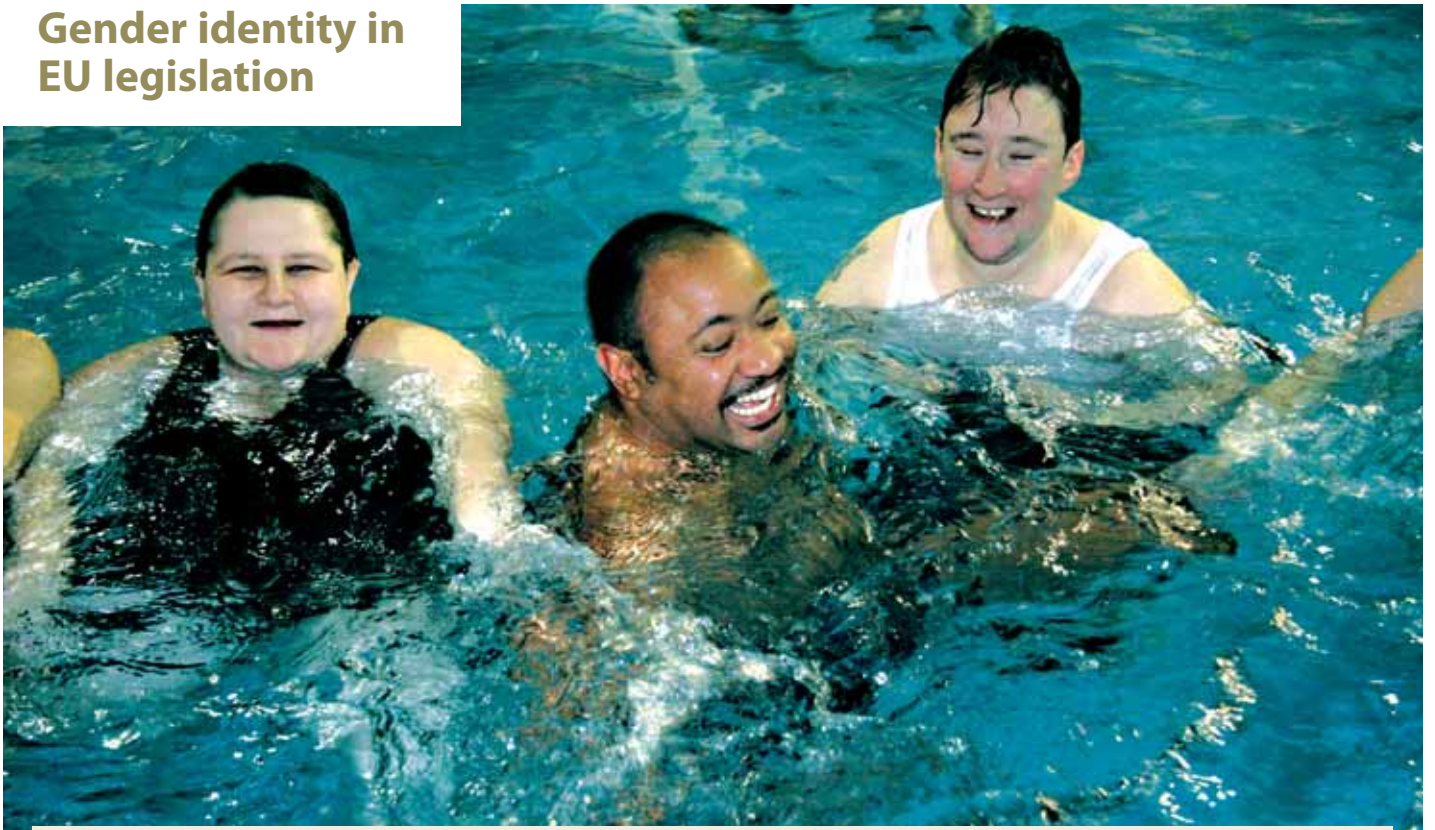
- Do you have or are willing to obtain experience in advocacy and lobbying relevant for following and fulfilling ILGA-Europe's organisational aims and objectives?

Are you willing to commit to work for the whole duration of the mandate?

Serving in an international capacity is an exciting and challenging opportunity; therefore we strongly encourage all who believe that they *have what it takes* or know individuals who *have what it takes* to fill in the nomination form which can be found in ILGA-Europe's first mailing on our conference page

www.ilga-europe.org/conference.

Your Board nomination forms should be addressed to patricia@ilga-europe.org by **12 September 2008**.



Achievements and challenges ahead

This article briefly reviews the significant progress achieved since *P* filed a case against *S* and Cornwall City Council all across the European Union and discusses some of the challenges that remain twelve years on.

In the case of *P v S and Cornwall City Council* in 1996, the European Court of Justice (ECJ) held that the right not to be discriminated against on grounds of sex cannot be confined simply to discrimination based on the fact that a person is of one or other sex, and may include discrimination arising from the gender reassignment of a person. This ground-breaking decision established a principle that European gender equality legislation also protects individuals on the basis of their gender role. Following the *P v S* case regarding employment, the ECJ was also presented with two key cases regarding pension rights. In both cases of *K.B. v NHS Pensions Agency* (2004) and *Richards v Secretary of State for Work and Pensions* (2006), the ECJ asserted the *P v S* principle, and held that

transsexual people had the right to be treated equal to other persons of their new gender role for pension purposes.

Further to the decisions by the ECJ, this principle has now been confirmed through its inclusion in the 'recast' *Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (2006/54/EC)* which aims to consolidate (and repeal) a number of separate gender equality Directives and codify some of the employment case-law. Moreover, while not expressly referring to trans people, the *Directive implementing the principle of equal treatment between men and women in the*



access to and supply of goods and services (2004/113/EC) also protects persons who “intend to undergo, [are] undergoing or who have undergone gender reassignment”¹.

The Challenges Ahead

The legal progress achieved since 1996 in European Union legislation and case-law is undisputable. By and large trans persons have been afforded virtually all the legal protection available for the ground of gender. Nonetheless, a number of concerns are worth considering:

Firstly, it is not clear whether ‘gender reassignment’ is understood widely enough to adequately protect all transgender people against discrimination. In fact, the link that this term seems to convey between gender reassignment procedures and the provision of legal protections is of concern. Unfortunately, until a case of a transgender person who does not intend to undergo gender reassignment is decided by the ECJ, the extent of the protection remains a matter of legal debate and speculation.

Another issue of concern is the lack of visibility of wording referring to ‘gender identity’ in EU gender equality directives. This lack of visibility may permit the maintenance of the status quo in States where the protection of the rights of transgender people fall through cracks in the law. It is unclear in fact if so far any

States have specifically included trans people in the implementation of Directives 2004/113/EC and 2006/54/EC.

ILGA-Europe is pleased to see that a window may be opening on this front too. A recent report commissioned by the European Commission, and entitled *Tackling Multiple Discrimination: practices, policies and laws* recommends the European Commission and Member States to introduce, “Express recognition of the ground of gender identity as part of equality policy and legislation through the addition of gender identity to the ground of gender, thus reading ‘gender and gender identity’”. ILGA-Europe commends this recommendation and looks forward to contributing towards future progress in its regard. The spelling out of the *P v S* principle in the ground of anti-discrimination itself is an excellent way of raising visibility and clarifying any doubts on the extent of applicability that remain. Such an inclusion would also provide a perfect educational tool thus showing that discrimination on this ground of ‘gender identity’ is illegal in the European Union.

SILVAN AGIUS

Policy & Programmes Officer

ILGA-Europe

¹ See Council of the European Union 2606th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), held in Luxembourg on 4 October 2004.



Mainstreaming Equality and Gender Identity

***Access to Health Services for Transsexual People* published by the Equality Authority in Ireland is a ground-breaking work promoting equality of opportunity and combating discrimination in areas covered by the equality legislation. The Irish Equality Authority is one of the first equality bodies in the EU to work towards achieving full equality for transgender people in practice.**

Last year the Equality Authority in Ireland announced the settlement of a case under the Equal Status Acts taken by a transsexual person against the State Examination Commission and the Department of Education and Science. The case was settled when the State Examinations Commission agreed to re-issue the transsexual person's

Group Intermediate Examination Certificate and School Leaving Certificate in her new name in accordance with the gender with which she identifies. The Equality Authority highlighted the landmark nature of this settlement as a valuable and necessary recognition for transsexual people from an important statutory body.

This case reflects what the Equality Authority has noted as a growing visibility for transsexual people among those bringing claims of discrimination under Irish equality legislation. This visibility reflects higher levels of information among transsexual people of their rights under equality legislation. It



“Day for woman” by Marcin Góralski.

This image is published with the permission of the European Commission’s pan-European information campaigns “For Diversity, Against Discrimination.” and “2007 - European Year of Equal Opportunities for All”.

also reflects a growth in confidence among transsexual people in asserting these rights and a growth in their confidence in the institutions established under the equality legislation.

The Equality Authority has a broad mandate to promote equality of opportunity and to combat discrimination in the areas covered by the equality legislation. The Employment Equality Acts prohibit discrimination in the workplace and in vocational training. The Equal Status Acts prohibit discrimination in the

provision of goods and services, accommodation and education. Both Acts cover nine grounds including the ground of gender. The gender provisions of the Acts have to be interpreted as providing protection to transsexual people in the light of the *P v S* judgement which precludes dismissal of a transsexual person for a reason related to gender reassignment.

The Equality Authority initially developed a dialogue with transsexual people which focused on exchanging information. This was somewhat intermittent and reflected the difficulties experienced by transsexual people in securing resources to organise and represent their shared interests and in mobilising their community in a context of significant stigma. However, this intermittent dialogue has grown into a strong partnership as the organisations of transsexual people have grown in strength, confidence and expertise.

The Equality Authority was concerned from an early stage with the absence in Ireland of a legal recognition for transsexual people in the gender with which they identify. The Equality Authority has sought change in this situation including through providing a legal briefing paper to the relevant government department.

The dialogue with transsexual people focused on the absence of a health treatment path for people with Gender Identity Disorder and on the difficulties being experienced by transsexual people in opening a dialogue with the health services. As a result of this dialogue the Equality Authority commissioned and published research on *Access to Health Services for Transsexual People*.

This research found that policy and practice around meeting the health needs of transsexual people was underdeveloped in Ireland. It recommended action by the Department

of Health and Children to develop a formal policy on transsexualism; action by the relevant professional bodies to develop standards of care and provide for the professional development of their members in relation to implement these standards; and action by the Health Service Executive to develop strategies to meet the healthcare needs of transsexual people.

The research report created the conditions for a partnership between the Health Service Executive, the organisations of transsexual people and the Equality Authority. The work in this partnership has focused on progressing a draft statement from the Health Service Executive on meeting the healthcare needs of transsexual people and on organising an expert symposium for a wide range of medical professionals on meeting these needs.

The symposium was well attended by medical professionals and was opened by the Minister for Health and Children. The symposium marked an important moment in enhancing the status and standing of transsexual people. The key challenge is now to secure practical action from the Health Service Executive addressing the health needs of transsexual people.

These are the foundations that have been developed by the Equality Authority in its work with transsexual people – foundations that should serve as a launching pad for ongoing work by the Equality Authority to contribute to the achievement of full equality in practice for transsexual people. These foundations rest on a strong partnership with organisations of transsexual people, the development of a knowledge base on the experience and situation of transsexual people and the creation of a sense of trust in and ownership of the Equality Authority among transsexual people.

NIALL CROWLEY

CEO, The Equality Authority, Ireland



A call for change

This article attempts to provide a succinct overview of the findings of the Transgender EuroStudy's survey regarding the transgender experience of healthcare that was conducted during 2007 and received 2575 replies from across Europe.

The *Transgender Eurostudy: Legal Survey and Focus on the Transgender Experience of Health Care* is the first publication of its kind in many ways. It addresses both the gap in knowledge with regard to the legal situation within Europe, and provides the results of the most comprehensive study to date on the barriers in the access of

healthcare experienced by transgender people. A quick review of the document will reveal that while legal progress has been achieved, the situation of most transgender people remains bleak and prone to discrimination and abuse. As Professor Stephen Whittle frankly put it, "This research shows that all trans people are getting a bad deal!"

Following the first review of the published data, it is immediately apparent that the situation on the ground is not significantly different for transgender people irrespective of whether they are skilled or not, or whether they fall within the higher or lower income brackets. Worryingly, there does not seem to have been any significant progress in the experiences of transgender people who transitioned less than 5 years ago when compared to those who transitioned more than 10 years ago. In fact, in many countries, trans people are inadequately protected against discrimination and still suffer several instances of discrimination and prejudice in accessing healthcare.

The findings of this report are presented in two areas of data analysis based on the survey and the focus groups: the first area covers clinical needs and the second experiences of treatment by healthcare professionals.

When it comes to **clinical needs**, the vast majority of respondents reported that they were refused State funding for hormones. Likewise, the vast majority were refused State funding for surgery. Besides, one third of the respondents were refused treatment because a practitioner did not approve of gender reassignment. In order to access their clinical needs therefore, many have had to fund their own treatment out of their own pocket at high personal cost. This fact is rather

in the access of non-trans-related healthcare, however, it must be said that many trans people avoid accessing routine healthcare because they anticipate a negative response.

In its analysis of the online survey results the report thus highlights several concerns, including the current shortage of accessible, localised access to specialist care for transgender and transsexual people; the current poor service that trans people receive; a great number of service providers do not meet the internationally recognised standards of best practice; and the issue of the rights of trans people to dignity in healthcare.

Conclusions and Recommendations

This report indicates that there is a pressing need for training of healthcare professionals in the needs of trans people, as well as a need for community-based clinicians and for training in cultural competence on the needs of trans people. It demands that one of the main principles of contemporary healthcare (i.e. to meet needs on an equal basis) is respected and that therefore medical treatment should be made available to trans people equally as to other ordinary citizens, unless there is some exceptional reason for not providing it.

The report also asks European institutions to be more involved in equality strategies of transgender and transsexual health to assist better service delivery at national level. Finally, there is a need to move away from the classification of transgender and transsexual identities



worrying as around half of the respondents fell within the bracket of lower income earners and thus had to enter significant and unnecessary financial burdens to meet their needs.

With regard to **treatment by healthcare professionals**, one quarter of the respondents claimed that they did not get an adequate response from doctors or psychiatrists regarding their gender transition, while a quarter of trans people experienced adverse treatment by healthcare professionals because they were trans. A slight improvement was registered

as pathological mental illnesses, as such classifications only maintain the belief that gender identity is a medical rather than human rights issue.

SILVAN AGIUS

Policy & Programmes Officer

ILGA-Europe

¹ Joint ILGA-Europe and TransGender Europe publication available in hard copy format by post and electronically at http://www.ilga-europe.org/europe/publications/non_periodical/transgender_eurostudy_legal_survey_and_focus_on_the_transgender_experience_of_health_case_april_2008



Participants at the Transgender Council in Berlin, May 2008.
Image by Anja Weber

Improving trans people's living conditions

TransGender Europe is both a network and a council striving to establish cross-border networking of people, groups and organisations that support improvement in the living conditions and standards of all transgender people and endeavouring to organise TransGender Councils where transgender activists can meet to discuss issues affecting the community.

In spring 2005 the Viennese transgender group Trans X Austria proposed holding a European activists meeting to mark its tenth anniversary. The interest in this event was so widespread by the trans community that Trans X went ahead and organised the First European TransGender Council on Civil and

Political Rights which was held at Vienna City Hall in November that year. In total, 120 trans people and supporters representing 66 groups from 21 European countries attended. One of the resolutions adopted was to continue the work of the Council in committee in order to prepare a subsequent Council

and explore the possibilities of establishing a permanent organisation. The provisional Steering Committee met on several occasions, to lay the groundwork for a non-profit association registered in accordance with Austrian law with its seat in Vienna. As one might expect, this process was not an easy



one. Even so, members of the Steering Committee, chaired by Justus Eisfeld, were present at a considerable number of events to make known and promote the rights of trans people with European and international institutions.

The Second European TransGender Council: Making Human Rights Work was held in Schoeneberg Town Hall, Berlin in May 2008. This time, over 200 activists and friends from 83 groups and 38 countries attended – including (from outside of the EU) Iceland, Croatia, Serbia, Russia, Belarus, the Ukraine, Turkey, Israel, Georgia, Armenia, Azerbaijan, Kyrgyzstan, Japan, Africa and the Americas.

TransGender Europe (TGEU) refers to itself as a **network** and **council**: a network in that it strives to establish cross-border networking of people, groups and organisations that support improvement in the living conditions and standards of all transgender people; and a council in that it endeavours to organise regularly occurring TransGender Councils, where transgender activists meet to discuss issues affecting the community. The newly elected Steering Committee and Executive intend to take TGEU forward into what it is meant to be: a powerful activist and interest group lobbying for real change in the Council of Europe throughout all of the countries of Europe, not just those which are members of the European Union.

From its beginnings TransGender Europe has had a close working arrangement with ILGA-Europe. ILGA-Europe was a sponsor of the 1st Council in Vienna and 2nd Council in Berlin. Justus Eisfeld and

other members of the Steering Committee have worked closely with ILGA-Europe over the past three years, and will continue to do so in the years to come. Under the Chair of Stephen Whittle and Julia Ehrh, TGEU will continue to deepen its co-operation with ILGA-Europe to further develop the organisation.

Together with ILGA-Europe, TGEU assisted Press for Change (GB) in the preparation of the *Transgender EuroStudy: Legal Survey and Focus on Transgender Experience of Health Care*. More results of the EuroStudy will be published in the future. These will include the experiences of discrimination, harassment and violence in the workplace, on the street and within the family.

TransGender Europe is committed to bringing activists together, ensuring they have up-to-date knowledge of the European situation together with information about the experiences within individual countries, making sure that activists are involved with campaigns not just in their own states but within the whole of Europe and beyond and also providing them with the tools to succeed in their lobbying and case work, including support in court cases brought at a national or European level, to liaise with the European Parliament, the Council of Europe and ILGA-Europe and to run projects such as those with ILGA-Europe in order to reach standards of excellence.

JANE THOMAS
Secretary, TGEU

Transgender specific publications to be published during ILGA-Europe

**Further to this magazine and
*Transgender EuroStudy: Legal Survey
and Focus on the Transgender
Experience of Health Care*, ILGA-
Europe is to publish the following:**

- A manual of the correct implementation of EU legislation vis-à-vis transgender people
- A factsheet summarising the content of the manual and indicating good practice examples that can be taken up by EU Member States
- A set of posters promoting transgender people's rights. One vis-à-vis employment and training, and the other regarding the acquisition of goods and services.

For further details and
information contact
silvan@ilga-europe.org



Mapping the transition towards full legal equality

The uphill road taken towards the legal recognition of the rights of transgender people has been long and winding, but it has borne its fruits. This article provides a succinct account of the cases decided by the European Courts and maps the rights achieved so far.

Although respect for human rights and equality has been a cornerstone of European law for several decades, it has taken time and considerable effort for the rights of trans people to be taken seriously. Gender categories govern much of our daily lives and are at the heart of national laws covering a wide range of areas such as employment, healthcare, social security, family life; for trans people whose gender identity is not recognised in law, this can lead to regular experiences of discrimination and humiliation. In this article I outline the developments that have taken place before the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) in addressing this form of discrimination.

The European Convention contains several potentially important rights for

trans people. It protects both the right to privacy and the right to family life (Article 8), and it provides that 'men and women' have the right to marry and found a family (Article 12). It also says that everyone should enjoy the Convention's rights equally (Article 14). A review of the ECtHR's case law over the past twenty years reveals the Court's struggle to understand how these rights can be made meaningful for trans people. European Union law provides for gender equality, and this article discusses how this has benefited trans people's employment rights.

The right to identity and legal recognition

One of the ECtHR's greatest struggles has been over the question of whether

trans people have the right to a legal gender identity that is aligned with their social, physical and psychological gender identity (Article 8). In *Rees v UK* (1986), the Court held that the UK was not obliged to alter the birth certificate of a trans male to reflect his assigned gender. The Court, finding little common ground between European States, concluded that this was an issue over which national legislators had a wide discretion. The Court, however, acknowledged the "seriousness of the problems affecting these [trans] persons and the distress they suffer" as a result of the legal discrimination and acute humiliation that follow from their incongruous legal and social gender identities, and said that States must keep this rapidly-developing process under review.

Over the next few years the Court remained consistent in its approach. In *Cossey v UK* (1990), the Court again held that the Convention does not require the UK to formally recognise a trans person's assigned gender. It found that science had not settled "conclusively the doubts concerning the causes of the condition of transsexualism". However, this time the judges' decision was split by ten votes to eight and the Court also appeared to be more sensitive to the multiple forms of discrimination that trans people experience when their gender identity is not recognised in law. In *Sheffield & Horsham v UK* (1998), the Court insisted that there was still insufficient national legal consensus for it to change its approach. It found that 'transsexualism' continues to raise "complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States". But the judges, rejecting the applicant's claim by the narrowest of margins, displayed impatience over the lack of progress in national law and criticised the UK for failing to take steps to keep this area under review.

The Court's hints that time was running out for national legislators to address this issue had been getting stronger,

and by the start of this century it had decided that enough was enough. In *Goodwin v UK* (2002) the Court, in a dramatic U-turn, held unanimously that non-recognition of a trans woman's gender status violated her privacy rights. The judges held that "the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable". The Court noted an international trend towards legal recognition and held that time had run out for the UK to align the anomalous legal and social status of trans people. Although acknowledging that its judgment would lead to some administrative inconvenience, the Court said that this must be tolerated in order to enable trans people to live in dignity, with their gender identity fully recognised. When balancing the applicant's interests against the public interest, the Court held, "the Convention now tilts decisively in favour of the applicant". With those words, the right to legal recognition had been won.

A couple of recent cases regarding privacy rights are of interest because they show that the right to gender recognition must be real, rather than

illusory. In *Van Kück v Germany* (2003), the Court held that the Convention had been violated because the applicant, a trans woman, had been unable to claim the medical costs of her reassignment from an insurer which deemed the treatment 'not necessary'. The Court found the applicant had been placed in the impossible position of having to prove her transsexuality was genuine, even though "the essential nature and cause of transsexualism are uncertain". In *L v Lithuania* (2007) a trans male complained about the absence of law in Lithuania regulating full gender-reassignment surgery, which effectively prevented him from completing his transition process. This lack of provision meant that he could not in fact obtain the legal recognition of his gender status that was available, at least in theory, to post-operative trans people under Lithuanian law. The Court held that the *de facto* non-recognition of *L's* status amounted to a violation of the Convention.

Marriage rights

Trans people with an opposite-sex partner are unable to marry while their gender is unrecognised, at least in those countries where marriage is restricted to opposite-sex couples. Unsurprisingly,



Nicolas, Sabrina and Katrina – activists working to advance trans rights in Europe

European courts on trans rights

several trans people in this situation have complained to the ECtHR that their right to marry has been violated (Article 12). In *Rees* the Court upheld the British position that the right to marry refers to “the traditional marriage between persons of opposite biological sex”. Four years later, in *Cossey* the Court held that “attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage”. However, the dissenting voices were getting louder. Judge Martens, rejecting the idea that the capacity to procreate is an essential of marriage, noted that marriage is a “species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential as the physical one”.

The *Goodwin* judgment was as bold on marriage rights as it has been on identity rights. The Court unanimously upheld the applicant’s argument that her right to marry her long-term (male) partner had been violated. It said that marriage was not dependent on the ability of the couple to

The *Goodwin* judgment was as bold on marriage rights as it has been on identity rights.

procreate. It went on to say that, although the Convention refers to marriage as a union of two people of opposite gender, gender cannot, in light of current social and medical developments, be determined solely by biological criteria. Finally, the Court found to be irrelevant the fact that the applicant *could* marry a woman, as this was purely an illusory right. The UK

responded to this judgment with the Gender Recognition Act 2004, which allows trans people to legally alter their gender and to marry an opposite-sex partner.

Although *Goodwin* was progressive, it is not the end of the story. *Wena & Anita Parry v UK* (2006) concerned two people who had married as an opposite-sex couple in 1960. They complained that their right to marry was violated by British law which required them to dissolve their marriage before *Wena*, a trans female who began her transition in 1998, could have her assigned gender recognised. The Court disagreed. It found that the couple could enter into a civil partnership, which would enable them to “continue their relationship in all its current essentials”. It went on to find that States are not required to extend marriage to same-sex couples.

Family rights

In *X, Y & Z v UK* (1997) the Court held that a trans male was not entitled to be registered as the father of a child (*Z*) who had been born to his partner (*Y*) by alternative insemination. Although the Court acknowledged that the applicants had created family ties and were living to all purposes as a traditional family, it went on to find that the UK was not obliged to formally recognise *X* as *Z*’s father. The Court noted the lack of consistent practice

among European States and noted the importance of maintaining a coherent system of family law. The Court

also said that it was unclear that the legal amendments sought by the applicants “would necessarily be to the advantage of such children”. This judgment pre-dates *Goodwin* and is of less relevance now the right of trans people to marry has been recognised. However, it is still relevant for trans people with family rights claims to make that fall outside of marriage.

Employment rights

So far, the majority of the ECJ’s trans rights cases have concerned employment matters. In *P v S and Cornwall County Council* (1996), the ECJ held that the EEC Equal Treatment Directive (76/207/EEC), which provides for equal treatment between men and women, prohibited discrimination against a trans woman. This groundbreaking judgment effectively ended discrimination against trans people in matters governed by EU law. In *K.B. v National Health Service Pensions Agency, Secretary of State for Health* (2004), the ECJ held that European law prohibited employers from excluding, explicitly or implicitly, trans people and their partners from pay-related benefits. In *Grant v UK* (2006), a case concerning facts before the Gender Recognition Act came into force, the ECtHR held that refusing a trans woman a pension when she reached 60, the age of entitlement for women, was a violation of the Convention.

Conclusions

In many respects, this article celebrates the legal progress that the European courts have achieved. The gradual recognition of trans right in Europe results from the successful struggles of trans people and the organisations that campaign on their behalf against gender identity discrimination. Although this progress is significant, cases such as *Parry* show that a number of areas of discrimination still need to be addressed.

The battle goes on at a national level, however, where the jurisprudence of the ECtHR has not always been respected, and some States significantly ignore their human rights obligations towards transgender people.

Dr LOVEDAY HODSON
University of Leicester

Lesbian, Gay, Bisexual and Transgender Families under Human Rights Law

Dr Loveday Hodson

Human rights law provides that differences in treatment based on sexual orientation and gender identity are illegitimate unless justified by particularly serious reasons. Paradoxically, however, LGBT families are not presently offered equal protection. Clearly, such discrimination and exclusion can bring devastating consequences.

This document challenges the arguments that are often put forward for the maintenance of such discrimination and alternatively recommends that States and international human rights tribunals end all discrimination relating to marriage, partnership, adoption and parental responsibilities irrespective of sexual orientation and gender identity.



Different Families, Same Rights?

A series of publications regarding the rights of LGBT families



Freedom and Justice in the EU: Implications of the Hague Programme for Lesbian, Gay, Bisexual and Transgender Families and their Children

Dr Matteo Bonini Baraldi

This report looks at the difficulties that have arisen out of the various forms and levels of legal recognition of same-sex partners in the EU-27. Currently, only a handful of Member States have conflict rules governing the recognition of foreign (same-sex) partnerships and these rules differ considerably. Other States that have no legal recognition of their own are at a loss about how to deal with new foreign marriages and registered partnerships. Uncertainty and protection of national sovereignty over family matters seem to be the most common feeling in several European capitals – sharply in contrast with an increasing circulation of people, lifestyles, family structures, work arrangements and legal models.

Given the above framework, this document looks at the most relevant EU measures which impact on LGBT rights. It focuses on the Hague Programme and its measures and policies that impact on individual rights and those of LGBT families.

If you are interested in obtaining these publications,
please contact michael@ilga-europe.org

Brutal murder of Gisberta

This article remembers the brutal killing of Gisberta Salce Júnior in Oporto and reflects on the social exclusion and marginalisation that help such hate crimes to take place.

Gisberta, a 46 year old Brazilian citizen, was a transsexual woman living in Oporto. In February 2006, she was brutally beaten and killed by a group of fourteen adolescent boys, aged between 12 and 16. This group of adolescents – most of whom were under the care of a state-financed foster institution – had been told by one of them about a 'man with breasts that looked like a woman'. When the group met Gisberta at the abandoned construction site that she lived in, they verbally abused her several times. Within weeks, the abuse had escalated to the point that they physically assaulted her on 15 February. She was beaten with sticks, burnt with cigarette tips, stripped naked and sexually assaulted – there was even evidence of a strip of wood being forcefully inserted into her anus. On 19 February in an attempt to conceal the crime, she was dumped (while still alive) into a nearby pit filled with stagnant water, where she drowned. Throughout this ordeal, and as the perpetrators later admitted, she was repeatedly showered with humiliating expressions like 'sissy' and 'shitty faggot'.

The case involved two separate trials. In the first, the thirteen teenagers who were under 16 were tried as minors in a non-criminal court. Twelve partially confessed to the accusations, denying their intent to kill. The public prosecutor dropped the

attempted murder charges and the teenagers were tried instead for grievous bodily harm, attempting to conceal the corpse, and failure to aid an endangered person. They were convicted to 11-13 months in a special educational institution – and the court failed to reach any conclusion with respect to the motive of the crime, stating, however, it had not been out of 'homophobic' reasons.

The second trial led to the conviction of the only perpetrator who was 16 at the time. Previous testimonies had placed him as the main instigator. The court stated it could not prove the charges of grievous bodily harm because the other thirteen teenagers were 'conveniently vague and forgetful' in their testimonies, and claimed they could not remember the details. Written letters, exchanged between the other perpetrators and himself, were later found, in which they stated their loyalty to him, and promised to exonerate him with their testimonies. He was subsequently sentenced to just 8 months of house arrest for "failure to aid an endangered person".

Despite numerous efforts by LGBT organisations, the media reported the victim being male, a crossdresser, or as a 'homeless man'. Her photo – clearly showing her as the beautiful woman she was – was never used in the media.



Commemoration of
 Gisberta at the 2006
 Oporto LGBT Pride



Gisberta Salce Júnior



Transphobic motivations were underplayed and the focus was instead on the level of violence and age of the perpetrators. Gisberta's story speaks volumes about social exclusion and marginalisation. She was never granted Portuguese nationality despite having lived in Portugal for 21 years. Since she had not undertaken genital surgery, she was not able to change her legal gender.¹ When in 1996, she lost her job at a nightclub when it closed down, she had no other option but to turn to prostitution. She developed drug problems and STDs, was terminally ill, and forced into begging in order to survive.

At this point, underreporting of transphobic hate crimes is still a serious problem in Portugal. More recently, a transsexual woman called Luna (another sex worker of Brazilian origin) was also murdered, and her body was found in a municipal dump. The investigation of this violent crime is still under way and there is no confirmation on what the motive of this crime was. In any case, it is clear that society has so far failed to protect transgender people against hate crimes, despite the Gisberta case.

LUÍSA REIS

Associação ILGA Portugal



Flowers and candles
 at Gisberta's 'home'

¹ In Portugal in fact, there is currently no gender identity law and only the courts can (at their discretion) recognise a transsexual person's new gender. Though there are no set requirements, these almost always include genital surgery; heterosexuality; being unmarried and childless; sterility; and fitting into strict notions of 'masculinity' or 'femininity'

Secret of My Sex

It is standard practice for many doctors to routinely withhold information about the true nature of intersex newborns and to take it upon themselves to neatly categorise them into the male or female boxes. Sarah Graham recounts her experience ...

There are some sentences that we all dread hearing, "You've got cancer" is probably at the top of most people's list. Being told that you can't have children is another. When I was eight, a gynaecologist told my parents this devastating news: that I had a very rare genetic condition and that if my ovaries weren't removed I would develop cancer when I reached puberty and die.

Nearly 20 years later I discovered that my doctors and consultants had lied to my parents and me. And this wasn't a one-off – it was standard policy in the UK (until the mid-1990s) to hide the truth about all conditions like mine. I was 25 when I found out the extent of the cover-up and the shock of suddenly being told the true nature of my diagnosis – with no support and after being systematically lied to for so many years – nearly killed me. I went into an emotional meltdown.

The dark secret about my body is that I'm the living embodiment of an apparent contradiction, an XY woman (both female and male). Put simply, my body looks outwardly female but I have male chromosomes and one or two other surprises internally. There are several possible types of intersexuality. As many as two babies in every thousand are born with "ambiguous genitalia" and it is estimated that as many as four per cent of the population are born with an intersex condition.

We are a largely invisible oppressed minority, and the fear, fascination and loathing our bodies provoke in modern Western culture has held the power to shame and silence me for years; as it does many thousands of others and their families. I'm guessing you probably don't know much about intersexuality. That's because in the 20th century the medical and legal establishment tried their best to erase us from society. Despite nature's love of diversity – a rainbow of sex and possible genders – the paternalistic experts took it upon themselves to try to force everyone into two categories: male and female. Binary boxes. Nothing else is acceptable.

We've heard a lot about the "heathen" African tribes who carry out clitoridectomies, but not much has been written about the genital surgery done to babies and young children – to make them look "more normal" – by gynaecologists in Europe and North America. These operations are often for entirely cosmetic reasons and they are frequently damaging to adult sexual responsiveness and/or fertility.

The doctors have rules about how big a clitoris can be and if a baby has a small penis he may be reassigned as female because vaginas are easier to make than functioning phalluses that pass the "locker room test". Ninety per cent of intersex babies emerge from the operating theatre as girls. This

The doctors have rules about how big a clitoris can be and if a baby has a small penis he may be reassigned as female because vaginas are easier to make than functioning phalluses that pass the "locker room test".

disgusting infringement of children's basic human rights is starting to be challenged by an organised group of intersexuals. But surgery is still happening routinely.

When an intersex baby is born, an "expert" is called to decide which sex to assign it to and the parents are often pressured to go along with this decision. The parents are then expected to collude with society's rigid socialisation process (pink for a girl, blue for a boy) and not tell their child what operation(s) they have been through and who they really are. It is very rare that parents get the support they need to cope with the possibility of raising an intersexed baby, and the space to consider letting the child decide what gender(s) they feel they are later in life.

My journey began in 1977. For a few months I'd been having some abdominal pain and after various tests I was referred to see a world-eminent gynaecologist (imagine God in a white coat). After being examined by him and what seemed like an army of medical students he announced to the room that, I was a "very special little girl". This proclamation was, it turned out, something of a mixed blessing. I can remember the pain in my father's voice and can still picture my mother crying. At first I didn't understand why they were so upset about me having to go to a London hospital for a "small operation". But I soon pieced things together and worked out that no ovaries equals no babies; and having no ovaries meant that I had to take oestrogen hormone pills from the age of 12.

On one of my regular trips to see God he broke the news that as well as being infertile, I wouldn't be starting periods – "you don't have a womb" and "you may not grow any pubic hair". These shocking statements were delivered without any emotion as simple matters of fact and then I was left to make sense of them. I couldn't speak to my parents. My shame was too great. Things got worse when I was 14 or 15: my gynaecologist examined me and said my vagina may be too small for comfortable intercourse. He sent me home with a set of NHS dildos (small to very large) with little explanation about how to use them. I felt so freaked out by this that I threw them in the bin.

Being told that on a chromosomal level I am male (XY, not XX) and that the “ovaries” that were removed from me were in fact undescended “testes” was a complete shock.

My gender identity as a girl had never felt like a very good fit. I was a tomboy from a very young age. Although I rejected dresses and pig-tails and liked climbing trees, I was interested in boys. But as my teens progressed, I began to feel like I was failing as a woman. Not being able to have children really undermined my self-esteem. I worried a lot about whether a male partner would stay with me if I couldn't give him a family.

I was still seeing different gynaecologists twice a year for check-ups and none of them broke ranks and told me the truth. When I was 17, I was really quite surprised to fall in love with a woman. Coming out as a lesbian was a very happy experience for me. I moved to London to study at Goldsmiths College and joined the gay rights action group OutRage! Derek Jarman and I became very good friends on a demo – lying under a “Gay Rights Now!” banner in the middle of Charing Cross Road. My friendship with Derek got me really thinking about sexuality and gender, and I soon dropped the label “lesbian” in favour of “queer”: with its rejection of “heterosoc’s” rules and regulations.

Selfishly, I wish that Derek hadn't died when he did (1994) because it was later that year that a new gynaecologist finally told me the truth about my condition. Derek was someone who wouldn't have been shaken by my news. He'd have helped me see the positives and challenged the gang of assassins that took over my head. Even though I was knowledgeable about the cultural construction of sexuality, nothing prepared me to deal with the facts about my rare genetic condition – which is now called Androgen Insensitivity Syndrome (AIS). Being told that on a chromosomal level I am male (XY, not XX) and that the “ovaries” that were removed from me were in fact undescended “testes” was a complete shock. (No, really! On a good day, I can laugh about it now).

My body is a 1 in 30,000 genetic fluke and I am nearly completely insensitive to testosterone, so even though I have male chromosomes I didn't develop properly along male lines (all fetuses begin as female and exposure to the mother's testosterone makes the XY baby's body grow male features).

Many XY women are happily heterosexual. For me, my bisexuality and sense that I do embrace both sexes (although physically I look much more female than male, I feel that I have elements of both) has led me to take part in an interesting experiment. It transpires that the operation I had as a child may not have been necessary – some young XY girls and women today choose to keep their testes and produce hormones naturally. (There is a small risk of cancer but it can be monitored). My

endocrinologist, Dr Conway, and I have been changing my hormone replacement therapy: from just oestrogen to a mix of both oestrogen and testosterone. It has given me more energy, a better sex drive and I feel more fully alive. There are only a handful of women doing this and I'm volunteering to be a guinea pig, which can be a bit scary, but I approach it with an open attitude of scientific enquiry.

Despite being “immune” to testosterone, my body has gone through some physical changes (better muscle tone, more pubic hair, bigger clitoris), which has been interesting. Emotionally I have changed too. I am more aware of my male energy and have cried a lot less (although I sobbed like a girl at the end of *Brokeback Mountain*). Strangely, I am also feeling much more comfortable with my femaleness than ever before. Being on “male” hormones (both male/female sexes produce testosterone and oestrogen) has given me a greater understanding of male sexuality. The physical urgency it creates can feel like quite a pressure.

I can honestly say I don't regret anything that happened to me – except for the infertility – because it has made me very strong. Through doing a great deal of soul-searching and thinking about “Who am I?”, I have an enlightened view of the male/female power struggles and the search for balance. I'm investigating mounting a challenge to the legal system's binary thinking and for proper recognition in law of the right to be acknowledged for who I am – intersex. I really want the freedom to marry my female fiancée in church. It's how God made me.

The campaign for intersexed rights will benefit us all. Why should we be forced – by that rigid last-century thinking – into those uncomfortable categories. Surely we will all benefit from being free to roam and not so boxed in?

SARAH GRAHAM

Learn More:

UK Intersex Association www.ukia.co.uk

The Intersex Society of North America www.isna.org

Androgen Insensitivity Syndrome Support Group

www.medhelp.org/www/ais/



Justus Eisfeld

“Sterile yet?”

“Don’t be alarmed, it’s
standard procedure!”

Transgender people experience several difficulties in Europe in the process towards changing the gender indicated on their birth certificates, passports or other identity documents. Such a change often requires the persons in question to prove that they are sterile, have undergone irreversible gender reassignment and divorced their same-gender partner.

ILGA-Europe met with Justus Eisfeld, the former Chairperson of Transgender Europe, to learn more about the sterilisation requirement and its implications.

ILGA-Europe: What does the sterilisation requirement mean and how widespread is it in Europe?

Justus Eisfeld: The sterilisation requirement means that a trans person has to prove sterility, often through a testimony of one or two medical doctors, in order to be able to change all paperwork, like birth certificate, passport etc. to the right gender. Often sterilisation, a certain set of medical procedures and/or divorce are required. These requirements exist in most countries in Europe.

ILGA-Europe: We understand that many still treat this procedure as a purely medical procedure and have disregarded its human rights implications. What is your take on that?

Justus Eisfeld: Many of the laws were made in the 1970s and 1980s, when transsexuality was just emerging as a new subject in medicine. The laws were made with the best intentions at the time, but are hopelessly outdated. We are slowly starting to realise that trans people have human rights too, and that they include the right to make decisions regarding one’s own body. It’s a radical concept to some, especially when one gets caught up in all the fascinating insights that medicine can offer. Unfortunately, that’s really beside the point in law-making. A state should not have the right to decide which course of medical treatment is right for a person – that belongs to the private sphere of a trans person.

ILGA-Europe: On a practical level, how would you compare say, the difficulty of changing one’s sex on official documents in Germany, France, and the UK in terms of the sterilisation requirement?

Justus Eisfeld: In France there is no law about this, only case-law. The regulations that have been established are complicated, and

one has to prove all kinds of surgeries, such as sterilisation and genital surgery. In Germany you can change your name with a psychological report from two independent experts. Recently that includes the gender on the passport. To change the birth certificate one has to be sterilised, prove surgeries and be divorced. In the UK you just have to prove to a tribunal that you have lived in the preferred gender for at least two years, though no proof of medical treatment is required. The UK option is the best in terms of human rights, though the waiting time of two years can be a problem for some people, especially those who travel a lot.

ILGA-Europe: Have any national courts declared this procedure illegal? If so, what were the arguments that were put forward for that?

Justus Eisfeld: The Court that went the furthest is the Constitutional Court in Austria – they have declared the whole procedure, including the divorce requirement, illegal. Ireland lost its case (not giving out new birth certificates at all) as well, and will have to introduce a new law in due course. But we are still waiting for a case about the sterilisation issue to go to the European Court of Human Rights in Strasbourg – that hasn’t happened yet.

ILGA-Europe: On a personal level, were you also subjected to the sterilisation requirement prior to the issuing of your passport? If so, what did this mean to you?

Justus Eisfeld: Yes, I was. At the time I was caught up in just wanting to go through the whole transition process as quickly as possible. In Amsterdam where I did all of that, the hysterectomy was more or less scheduled automatically for me. In hindsight it all went a little too fast and I only really realised that I would never be the father of my own child when it was too late. When I realised what happened, I got really angry that the state would have so much power over my body.

*This interview was recorded by **Silvan Agius** on behalf of ILGA-Europe*



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Same Love™

Transforming
politics



**The transgender
equality struggle taken to
parliament**



Vladimir Luxuria and Michael Cashman, MEP, at London EuroPride 2006



At London EuroPride 2006

A long-time LGBT activist and well known Italian TV personality and actress, in 2006, Vladimir Luxuria was elected as the first openly transgender member of parliament in Europe. ILGA-Europe caught up with her to learn more about her two-year experience in parliament.

ILGA-Europe: What motivated you to enter the world of politics?

Vladimir Luxuria: I never programmed my entry into the world of politics. Instead, I had participated in many initiatives for the rights of lesbian, gay, bisexual and trans persons. In 1994, I organised the first Pride event in Rome. I also organised many activities on 1 December to fight the spreading of HIV/AIDS and for the dignity of HIV+ persons. I've always done this as I've always believed in it – it was something bigger than me. I couldn't not speak out on behalf of those people who may have had less courage than myself. After that, in 2006 the Communist Refoundation Party asked me to join their list of candidates, assuring me of a sure candidacy. I simply accepted this offer since I knew of the symbolic importance of letting people see a trans person in parliament. In Italy, as you know, we have a significant problem when it comes to the laws regarding civil unions and laws against discrimination because there is a lot of homophobia and intrusion by the

church. Therefore, I thought that my presence in parliament could be useful.

ILGA-Europe: What was your experience as an MP? Did you suffer from transphobic comments or attitudes from other MPs or journalists?

Vladimir Luxuria: I represent a first in many ways. I was the first transgender person who was presented as a candidate, and also the first person registered as a man to present herself in parliament in women's clothing. Because of this, I knew that I was in the attention of both the media and a number of MPs. When I entered parliament for the first time, everybody was watching me, video cameras were pointed at me, the photographers' lenses were pointing at me, and I knew that many were expecting me to make a false move, a mistake, something not quite right so that they could criticise me. Instead, I worked hard and transformed the initial suspicions into the respect of many. I have to say that at the beginning there were many instances

of discrimination. For example, when at the beginning the President of the Chamber of Deputies Fausto Bertinotti addressed me in the feminine, a right-wing deputy stood up shouting and protesting, saying, "He is a man! He was born a man, and therefore he must be addressed as a man." I also remember one instance in the bathrooms. There was Elisabetta Gardini, ex-Deputy of Forza Italia, who protested against my using women's toilets, as according to her for the simple reason that I was identifying as man at birth I had to use men's toilets. With regard to the mass media, I have to say that I was generally well respected. Clearly, right-wing newspapers also used the fact that I was a trans person to confront the left. However, I surely let down anyone who was expecting another Cicciolina, a transgression or something provocative.

ILGA-Europe: Did you have to struggle more than others to speak about the issues that mattered to you?

Vladimir Luxuria: I have to be honest. I have to say that the first time I took the floor

Transforming politics

in parliament, everyone was keen to listen, everyone was rather attentive. Generally, in parliament, at least in the Italian parliament, a lot of small talk and mumbling goes on; there are those who speak a lot, and there are a lot of distractions. Often, while an MP is speaking, the others are busy doing something else, like chatting on their cell phones or working on their computers. Instead, when I spoke for the first time there was an amazing silence in parliament. Clearly there were those who were listening because they respected my beliefs, and those who were listening in order to find arguments with which to rebut me. Therefore, for better or worse there was a lot of attention.

ILGA-Europe: How is your life outside of parliament and what is on your agenda these days?

Vladimir Luxuria: Well, I was well aware that I was not going to grow old in parliament or stay there indefinitely. I have always considered it as a short parenthesis; as one of the many experiences of my life. Certainly, however, I was not expecting the legislature to fall after such a brief period of time. I believe that one needs to and has to continue fighting for one's ideals independently of the role that one performs within society. I believe that even if I did a totally different job, if I was a wall painter so to speak, I would do the exactly same thing. I believe that I have to keep speaking about such important issues as civil unions, the fight against discrimination, and the fight against the interference of the Vatican; this is something that I've inherited as a result of my experience in parliament.

ILGA-Europe: What are the issues that you are currently working to resolve as a politician?



Vladimir Luxuria: Various issues. I had presented a bill for the recognition of full citizenship of transgender people. This proposal addresses their employment rights and the discrimination suffered at the workplace, as let's face it, many trans people do not have a free choice on whether to prostitute themselves or not, as they do not have any other employment possibilities. Along with this, there is the whole issue of having one's documents changed irrespective of whether one has undergone genital surgery or not; the laws in Spain and the UK are a good example of this. What I've done therefore is that I've submitted this proposal to some MPs, so that they can present it with their own signatures, and the aim contained in this piece of law may be achieved in spite of the fact that I am no longer a member of parliament.

ILGA-Europe: Are you managing to keep a good balance between your political life and the entertainment world that you were so much part of?

Vladimir Luxuria: Yes. I believe that one can merge the two and have political entertainment, as one may also use artistic language to pass on very

important political messages through theatre and television. I have, for example, presented one of Pier Vittorio Tondelli's works, entitled *Separate Rooms*, in which a man who has lived with another gay man for 30 years is suddenly considered as an unrelated person by family members and the state at the time of his partner's death. I believe that speaking through theatrical works can therefore be a powerful political statement.

ILGA-Europe: Finally, what would be your advice to other LGBT politicians in Europe?

Vladimir Luxuria: I wish them the best of luck! Whoever is a parliamentary candidate (outside of the known difficult countries) can certainly have some good experiences. I'm sure that it would be a very beautiful experience to be able to applaud one's parliament following the introduction of the legal recognition of same-sex unions, for example. Such laws make one feel a part of society; they send out a strong message that one should not be ashamed of one's identity. Unfortunately, I have not had the possibility to enjoy such satisfaction, and my impact in parliament has been rather small, as we have not managed to achieve great gains for the issues that concern us directly. Nonetheless, I think that Italian society is ready for change; it is the politics that is lagging behind. So I trust that sooner or later, and hopefully within my lifetime, a law on civil unions and anti-discrimination will also be introduced in Italy.

Silvan Agius recorded this interview on behalf of ILGA-Europe and translated it into English



Thomas Hammarberg: determined to fight for trans rights

In sync with the European Court of Human Rights' decisions and the Council of Ministers' commitment to step up the Council of Europe's work to combat discrimination on the grounds of sexual orientation and gender identity¹, Commissioner for Human Rights Thomas Hammarberg, writes about his commitment to improve the human rights situation of transgender people.

During my two years in office as the Commissioner for Human Rights I have noted with great concern the stereotypes about transgender persons and the discrimination that affects this community. Some transgender persons have been denied necessary healthcare and have been confronted with medical practitioners who refuse to provide gender reassignment therapy. Others have been denied the possibility to have a change of name in their passports or identification documents, despite clear jurisprudence of the European Court of Human Rights on this subject.

I think that the lack of correct information and the unfamiliarity with the specific problems of transgender persons are at the root of the problem. For this reason I very much welcome the recent *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care* which sheds an alarming light on transgender people's experiences of inequality and discrimination in accessing healthcare in Europe. At the same time I am convinced that we must learn more about the other human rights issues affecting transgender persons: what are their experiences regarding employment, education and housing? The information I receive, which is often fragmented, gives a bleak picture.

Another issue of concern is hate-motivated incidents against transgender persons. Some of the Council of Europe Member States are notorious for their maltreatment of transgender citizens and my office receives reports from some of the victims. Too often hate crimes against transgender persons go unnoticed and there is no proper response by law enforcement authorities.

I will continue to monitor the human rights situation of transgender persons in the Council of Europe Member States. In the autumn my office will organise an expert meeting with activists, experts and academics to discuss the problems at stake and the challenges ahead. During my country visits I will try to meet with representatives of transgender groups and organisations and continue to raise their concerns with governmental authorities. I will also follow up on the results of the Second Transgender European Council meeting in Berlin recently attended by one of my advisors.

THOMAS HAMMARBERG

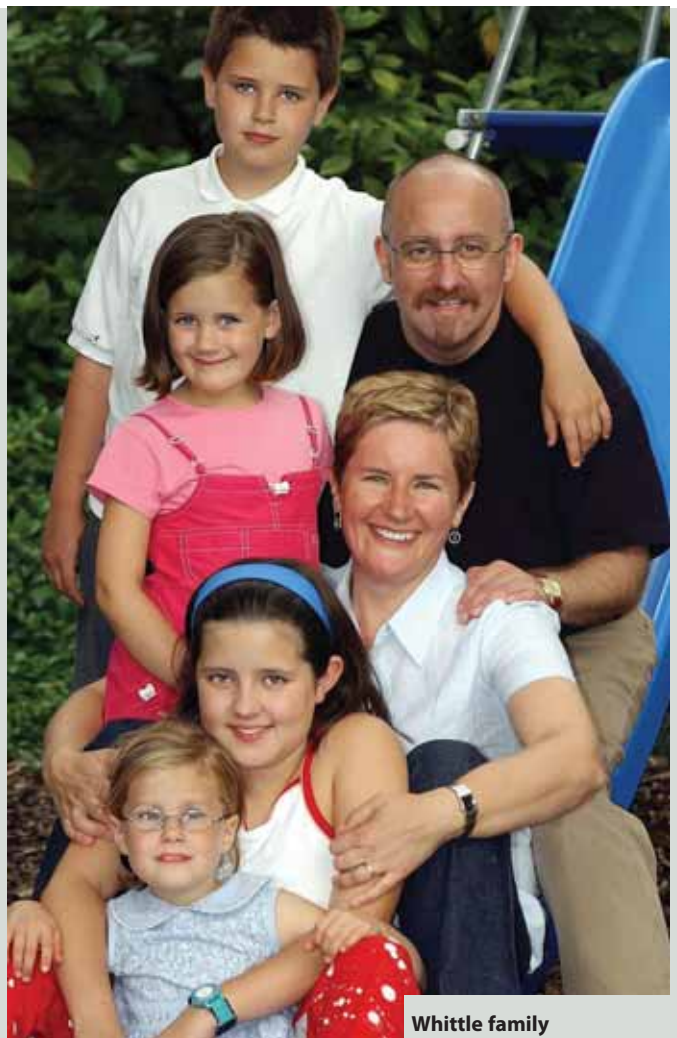
¹ See ILGA-Europe's press release "Council of Europe takes major initiatives to combat discrimination against LGBT people" at http://www.ilga-europe.org/europe/media/council_of_europe_takes_major_initiatives_to_combat_discrimination_against_lgbt_people

Reproducing the non-nuclear family

This article looks at the right to respect for family life of trans individuals and their families, and makes a wider case for the respect of all families irrespective of their formation, or the sexual orientation and gender identity of these members.

When a child is born, new parents discuss the benefits that birth has brought to them; the love the child will bring into the family, and the exciting future that the family now has. Unfortunately, in some states, many persons including trans people, are all too often refused the right to even attempt to have a child by fertility treatment because they are not in a heterosexual normative relationship.

If gay men wish to access the use of a surrogate, they will find themselves taking expensive trips overseas rather than staying in Europe. Adoption is not much better, though there have been recent changes in some adoption laws. Even in states where there are LGBT-friendly adoption laws, LGBT couples will face structural prejudices throughout the system. Heteronormative assumptions amongst social workers have led to an attitude that lesbian/gay parents are a child's last resort. *Press for Change's*¹ recent case load shows that trans people who wish to adopt have little chance at all, unless they are single and it is an inter-family adoption. Even those in couples where they are already raising 'their own' children will find social workers trying to push them into a parenting contract rather than allowing them to proceed to court to fully adopt as joint parents. Those gay men who do manage to adopt will often get older children with more problems than most, because social workers leave them last on the list.



Whittle family

Yet, nowadays, due to the pioneering work of many couples, more and more LGBT families are being formed. The 2000 census in the USA estimated that 163,879 households with children were headed by same-sex couples. The number will be far greater today, as many more LGBT people have realised that this is something they not only want to do, but feel entitled to do.

But it is difficult to access fertility treatment, partly because clinical staff-made qualitative assessments ('facts') of LGBT people, based upon their own experience of family, which differ widely according to their own sexual orientation and gender identity. Consequently, lesbian women, surrogate volunteers for gay men, or those women with a trans partner, are assessed as always missing what is necessary to be good mothers; the father figure for some, the mother figure for gay men.

We went through this process from 1990 onwards. At the time, what led us to the doors of the first court, was that the refusals of treatment for my partner Sarah are made because of the biology of the body of the applicant's partner, not the applicant herself. It did not matter how good a 'mother' a woman might be, it mattered whether her partner was lesbian or a trans man. We fought for the right for Sarah to be thought

of as a potential good mother, in order to get access to fertility treatment. Eventually we did win, and four children later in the case of *X, Y and Z v UK Government* (1997)² we fought for the right for me to be recognised as a good parent and, maybe, because the children called me dad, a good father. We lost.³

Rarely in the process of LGBT couples accessing fertility treatment or completing adoption, is there ever any extensive and accurate discussion of the **paramount concerns** surrounding the birth or placing of the child. In the debate within fertility clinics, the view is taken that as the child has not yet been conceived the paramount concern of the child's right to life is not yet important. Clinicians instead focus on secondary 'best interest' matters such as the child's need for a father, or the influence of a child regularly seeing two women in bed together. The equivalent to refusing a woman treatment because she does not have a male partner, would be refusing a woman access to fertility treatment because she is single, or a sex worker, or Jewish. The discussion is about a class of people, LGBT people, and whether they can ever be good parents.⁴

Consequently, the real discussion does not take place. Until the child is conceived, the paramount concern must be about whether there will be an opportunity of discussing the child's best interests in the future, after birth. Therefore, the paramount concern in relation to a non-conceived child has to be whether it is to be conceived and brought to life. The answer is clear. Unless one is absolutely certain that the child is going to experience nothing in their life but terrible pain and suffering, it is always in the best interest of all potential children to have a chance at life. When they are born, we can then start discussing best interests.

Case Law

European Case Law has emphasised that

under Articles 7 - 10 of the Convention of the Rights of the Child, there is a positive obligation under international human rights law to protect the family. A dissenting judge in the case of *X, Y and Z v UK Government*, Judge Gotchev held that the refusal to allow X to marry Y, and to recognise X as a parent of Z contravened both Articles 8 and 12 of the European Convention from the point of view of the "welfare of the child, which should be the prevailing consideration". He concluded that the Articles oblige a state to allow (what were already) de facto family ties to be legally safeguarded from the moment of birth or as soon as practicable thereafter, to render possible the child's integration into the family. Best interests as such, only exist because the child is born.

Gotchev's dissent is important because he had the question of the paramount concerns in relation to the children, at the forefront of his mind, followed then by the best interests. As such his conclusion was a logical next step; the state must do whatever is best for the child once born. He argued that if there is no reason to not do so, the child's family must be safeguarded by the law, and if that means recognising a de facto father as legal father, there should be a mechanism to do so. But of course, Gotchev's decision was merely dissenting from the majority of the court.

The recent ECtHR decision in *E.B. v France* (2008)⁵ has finally set out the ECHR's anti-discrimination and equality standards for LGBT families. In *E.B.* a lesbian woman applied for, and was refused, approval for overseas adoption by a single person. Though the court reiterated, that the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt, and/or is a right to adopt provided for by domestic law or by other international instruments. However, the court held there had been a contravention of Article 8 because of

the excessive emphasis on the fact of EB's homosexuality in the reasoning of the domestic authorities and that the final decision had been made, not on her fitness to parent, but because of her sexual orientation. The court went on to say that the excessive reference to the lack of a "paternal referent" showed that the reference to her homosexuality was, if not explicit, at least implicit throughout the decision-making process. The European Court of Human Rights held that making a distinction as to who can become a parent, on considerations of the person's sexual orientation, is a distinction which is not acceptable under the Convention.

As such *E.B. v France* offers real hope. Adoption agencies, and fertility clinics will have to rethink their assumption of the unfitness to be a parent, of the LGBT person or their partner. It is a hope we must take to our national governments, and LGBT activists should be insisting that governments produce new guidance to all fertility clinics and adoption agencies. *E.B.* is a victory for the right thinking people of Europe who firmly believe that all children have a right to have a loving parent/parents and a loving home.

STEPHEN WHITTLE

¹ Press for Change www.pfc.org.uk

² *X, Y and Z v UK Government* (1997) ECHR (75/1995/581/667)

³ Later, we were able to marry under the provisions of the UK's Gender Recognition Act and eventually, after almost 2 years of assessment by social workers, I was deemed acceptable enough to jointly adopt the children I had been raising for over 12 years.

⁴ UK courts addressed this in the case of *R v Ethical Committee of St. Mary's Hospital (Manchester) ex parte H* when H was refused IVF because she had worked in the past as a prostitute. The Court refuted a clinician's right to refuse treatment to any person solely because they were of a certain class of people. Today, LGBT families are central to what is a contemporary, 'pseudo-natural', discussion of eugenics, even if that word is never used. Most clinicians would recoil in horror from the idea of eugenics, but many continue to practice it when their patients and/or their partners are 'queer'.

⁵ *E.B. v France* (2008) ECHR (Application no. 43546/02)

Disassembling the Social Construct

This article explores the dualistic way in which gender is predominantly understood in our society, and then asks us to revisit the cry “it’s a boy” or “it’s a girl” and reflect whether it should determine our gender for the rest of our lives.



Background

Ongoing developments in feminist theory throughout the 1980s and 1990s further contributed to a focus on gender, rather than one based on individual decisions of men and women. Gender is seen as a core organising principle that underlies various phenomena and related processes. Most important is the view that while sex is defined as a biological outcome of chromosomal structures, gender is ‘socially

constructed.’ In feminist theory, gender is seen as a matrix of identities, behaviours and power relationships that are constructed by the culture of a society in accordance with sex. This means that the content of gender – what constitutes the ideals, expectations, and behaviours or expressions of masculinity and femininity – will vary among societies.

When people interact with each other, by adhering to this content or departing from it, they either reaffirm or change what is meant by gender, thus affecting social relationships at a particular time or in a particular setting. This means that gender is not immutable but also changes and, in this sense, is both socially constructed and reconstructed through time.

Alternative ways to approaching gender became more visible, particularly in academic settings, in the 1990s when theorists¹ challenged notions of sex, sexuality, and gender in their work. The focus of their work was to disassemble and lay down the meanings attached to these concepts.

A Different Kind of Freedom

“The instinct to control bodies, genders and desires may be as close as we have to a universal constant.”

Riki Wilchins

“As far as I’m concerned, being any gender is a drag.”

Patti Smith

The cry “It’s a boy” or “It’s a girl” introduced us to the world, and as we grow and mature into adulthood, everything around us grows and matures with us, except for gender. Since childhood our bodies are placed in a web of expectations and rules concerning how we look, dress, our sex, physical characteristics, who we should desire and how we should desire them. From childhood to puberty to adulthood, we are



led to believe that gender is a constant that never shifts. The gender we are assigned at birth locks us onto a journey through which we are expected to become men or women.

Theorist Judith Butler argued that gender is a performance. In other words gender is something we do, rather than something we are. As with all performances there's always the possibility of something going wrong, forgetting the lines, falling off the stage. I take gender in its broadest sense to include sexual orientation and sex. The cause of homophobia is gender where the notion that gay men are not masculine enough or lesbian women are insufficiently feminine. I include sex because what stimulates sexism and misogyny is gender and the fear and hatred around issues of vulnerability or femininity.

"I don't know who it was that discovered water, but I'm pretty sure it wasn't a fish."

Marshall McLuhan

Feminists have analysed patriarchy and argued the difficulty in doing so, as no alternative system could be found and compared to. This argument could be applied to the system of gender. We know it so much that we cannot imagine an alternative. We are the last to discover our assumptions about reality because we are so immersed in them. Gender is what we

know inside and out. When I started looking into gender I felt like wearing the glasses I have worn from childhood and through which I have always seen and can't remember how the world looked before.

Gender is both similar to the formal system of marriage, which is supported by public policy, law and institutions and the socio-legal practices as contained in the sexist treatment of women. However, unlike these systems and practices, gender is mainly a system of symbols and meanings used for power and sexuality. Gender is a system of rules, privileges, rewards and penalties belonging to the use of those symbols: masculinity and femininity, strength and vulnerability, action and passivity, dominance and weakness. We gender something by applying one of the two meanings. Anything can be gendered and indeed in many of our languages, every object is given a gender. The penalties resulting for the "wrong" use of words range from common to fatal, including: hostile stares, being humiliated, assaulted, arrested, raped, forced psychiatric treatment, genital mutilation and murder.

Besides these repressive effects, gender is also productive: it produces meanings. These meanings are created through an extensive and visible structure: birth certificates, passports, marriage laws, and adoption policies. However, they are also produced by less visible, small, everyday processes – interactions that create and change gendered meanings in every moment. These exchanges of meanings – while buying the milk, using the lift, sitting in church, over dinner, taking the bus – all label us with our gender and expect us to put up with it in order to interact with other people.

Two genders is what we've learnt about, is all we've named, all we see through our lens. Changing that requires "a political upheaval that we have yet to see in any recent human rights movement." (Wilchins, 2002) Academically, gender has been very productive with articles, books, theories, and conferences. However as a civil/human rights cause, gender is 'younger'. Despite all this I feel that no amount of books, interviews with trans people and courses made me understand gender until I actually started doing the work on a personal basis.

Feminism was right: The personal is political, and nowhere more so than with gender. Kate Bornstein said, "If you truly want to see what it might be like to live without a gender, or to change your gender, or to even understand the gender you've perhaps

got and really like, then there's only one way for it: you need to do the work."

As a social researcher I write ethnographies of lives, including mine and commonly enough these narratives bring up the feelings of shame, humiliation, and fear associated with gender; feelings which are not the result of personal failings, nor are they the accidental consequence of a system of gender norms. They're the gender system at work: "enjoining us in policing ourselves, reminding us of our place, shaming us into submission, and making our gender appear natural, seamless, and voluntary." (Wilchins, 2002)

As Nestle, Howell and Wilchins argue, no individual effort will change the gender system, no amount of changing ourselves will change any of the feelings. Since the gender system is an organised and systemic oppression, it can only be challenged through an organised and systemic response.

A movement working for gender equality will not only work through the halls of justice, but also engage with newer and challenging political questions: How do we come to know our selves, understand our bodies, and how have we come to be the "us" that we are? Our movement needs to think out loud about the political tools to reach the small voices, our individual efforts.

It is a huge and long task for any movement. '...unlike the struggles against homophobia, racism, and sexism, the struggle against genderism will not only be about gaining rights for an oppressed class of men and women. It will be about gaining equality for all men and women. And paradoxically it will be about the rights of some of us to not be men or women.' (Wilchins, 2002)

"I am trapped in whose body?"

Despite the increasing cultural sensitivity to gender in recent years, this has been limited and relatively small. The energy behind the emerging politics of gender has been channelled into one area: transgenderism. So when gender is mentioned it is put down – and often put off – as only transgender. Therefore, gender has been seen to affect only a small minority of people. And all this has been happening under the 'mainstream' shield of inclusion where we make sure that the "LGB" issues are brought forth with the trailing "T". While it is commendable to cheer the emergence of transgender as an important cause, I believe that

limiting the gender dialogue to one identity has relieved the rest – gay and straight – from analysing and examining its own history of going beyond gender norms.

Genderqueerness² will not be confined to one community as it is an issue that goes beyond boundaries and identities, which are themselves gender-based. We need to rethink gender, which will mean we need to rethink our politics.

Conclusion

In my everyday life I reject labels and categories of all sorts. Not that I think that others should not have them – far from it. But I find I do not fit. For me, gender has moved from the personal to the political – to a human rights movement, which I believe, is continuously in the process of being built. I approach my field with a sense of awe at the ways different people's lives must be, only for that to bring me back and discover that their stories are our stories, and that they are us. We have all had experiences like these, very few of us have spoken up. It is about those aspects that have been treated as socially embarrassing and politically unacceptable, because they could not be 'mainstreamed'. Well, it is time to change the mainstream. Indebted to the women's, feminist, lesbian and gay rights movements I conclude by saying: Gender is the human rights movement of our time, because gender rights are human rights.

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¹ Judith Butler, Luce Irigaray, Monique Wittig, and Jeffrey Weeks amongst many others.

² I use "gender queer" and "genderqueerness" as a tool to approach gender – a tool, which helps me discuss gender beyond the binary.



COPENHAGEN 2009
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LOVE OF
FREEDOM
FREEDOM
TO LOVE



**40 years after Stonewall -
Conference on LGBT Human Rights
27-29 July 2009**

The 2nd World Outgames international conference on LGBT rights will be held in Copenhagen, Denmark from 27-29 July in 2009

Under the banner "Love of Freedom. Freedom to Love", a major objective of the World Outgames international conference on LGBT rights in Copenhagen will be to gather and disseminate best practices and tools for promoting diversity and tolerance.

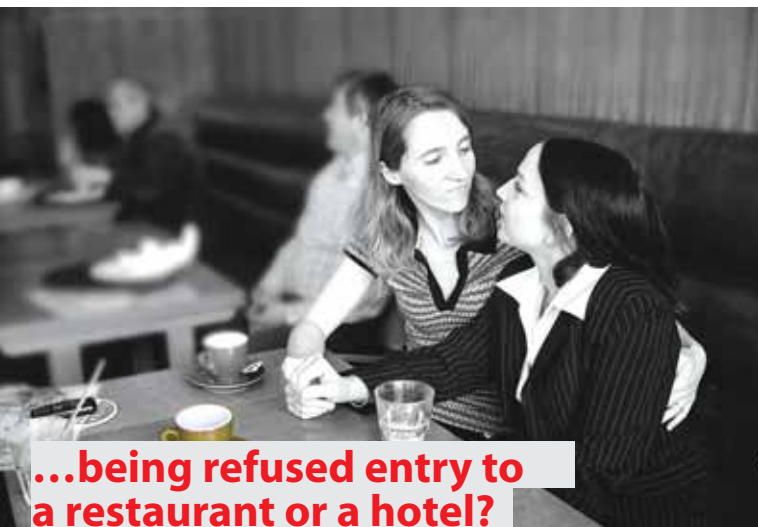
Among the wide range of important topics and themes concerning LGBT rights to be covered are being out in sports and business, recognition of same-sex partnerships and marriage, parenting rights including adoption and medically assisted insemination, and LGBT history and heritage.

The conference program will be finalised by World Outgames 2009 in co-operation with co-presidents Rebeca Sevilla from Peru and Svend Robinson from Canada, along with an international advisory group consisting of 15 members from all over the world.

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Do you know that if a new EU anti-discrimination directive is adopted, lesbian, gay and bisexual people will be protected from...



On 2 July 2008 the European Commission has proposed a single anti-discrimination directive which would prohibit discrimination on the grounds of age, disability, sexual orientation and religion or belief in the areas of social protection, including social security and health care, education and access to and supply of goods and services which are commercially available to the public, including housing.

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