

# EMA Human Rights Blog

Many Voices, One Vocation

Home (<http://www.emahumanrights.org>)

> The Complicated Relationship between the ECtHR and Trans Rights  
(<http://www.emahumanrights.org/2019/05/23/the-complicated-relationship-between-the-ecthr-and-trans-rights/>)

# The Complicated Relationship between the ECtHR and Trans Rights



(<http://www.emahumanrights.org/2019/05/23/the-complicated-relationship-between-the-ecthr-and-trans-rights/>)



EMA Human Rights Blog (<http://www.emahumanrights.org/author/alice/>)

May 23, 2019 (<http://www.emahumanrights.org/2019/05/>)

**The Complicated Relationship between the ECtHR and Trans Rights**  
(<http://www.emahumanrights.org/2019/05/23/the-complicated-relationship-between-the-ecthr-and-trans-rights/>)

**By Liesbet Debecker**

**The European Court of Human Rights (ECtHR) is the main body for protecting human rights in Europe, yet it has had a complicated relationship with trans rights. The ECtHR balances between making landmark decisions for the protection of trans rights while denying trans persons other necessary protections. It seems like one of the arguments it often uses to generate change, that of international consensus, is also one of the arguments holding it back.**

First of all, it is important to understand how the ECtHR has protected (or failed to protect) trans rights throughout the years. It took the Court several years to acknowledge a general right for trans people to have their legal gender changed. In the case of *Rees v United Kingdom* of 1986, the Court said states are allowed to strike a fair balance between new, possibly burdensome legislation and the right to an effective private life of transgender people.[1] In the UK, where there are separate registers for birth, marriage and death amongst other things rather than one civil registration system, a right for gender recognition would be a particularly heavy legislative burden. In the case of *B v France*, a country that does have a single civil registration system, the Court, applying the same 'fair balance' test as in *Rees*, concluded there was an obligation for the state to change the legal gender of trans people, as it would not be as burdensome for France as the UK.[2]

It was not until 26 years after *Rees v UK* that the Court concluded that there was a general right for trans people to have their legal gender changed, no matter how burdensome this proved to be for the state.[3] The Court's main argument for the change of legislation was the "continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals." [4] In other words, the Court changed its case law due to international consensus and the growing acceptance of trans identities.

**“The Court changed its case law due to international consensus and the growing acceptance of trans identities.”**

The Court did not itself state the exact conditions that states can impose on trans people in order to have their legal gender changed until in 2017 when the *A.P, Nicot and Garçon v France* case came along.[5] One remarkable thing about this case, aside from its content, is the fact that the Court addressed the applicant, a transwomen with masculine pronouns throughout the case. The ECtHR's reasoning behind this was that it was still their official gender at the time, and that it in no means wanted to exclude them from the gender they identify with. The case itself concerned the French conditions for a legal gender change. The Court struck down the sterility requirement, even though there was no international consensus in this regard. Since this requirement concerned an essential aspect of an individuals' intimate identity, states had a narrower margin of appreciation. France's reasons of limiting trans people's physical integrity did not respect a fair balance and went too far, thus violating article 8 of the European Convention for Human Rights

(ECHR). The Court did allow states to require proof of a gender identity disorder, because it found no consensus in this regard. The fact that the Court prohibited the sterility requirement, was a big step forward for trans persons all over Europe, yet it is a shame the judgment did not abolish the requirement for proof of a gender identity disorder (today called gender dysphoria, because of the stigma 'disorder' carries). The Parliamentary Assembly of the Council of Europe itself recommend in a 2015 Resolution that Member States remove the proof of mental illness as a condition for a legal gender change[6] and some Member States – like Belgium – have already abolished this requirement.[7] While there may not be a consensus yet there does seem to be growing backlash against this requirement.

## **“The Court missed an opportunity to provide trans people with more protection.”**

In the Court's latest judgment concerning trans rights, the Court reconfirmed the positive obligation under article 8 ECHR for Member States to create a legal procedure for gender recognition and specified that those conditions had to be “quick, transparent and accessible”. [8] It did, however, miss an opportunity to provide trans people with more protection regarding the conditions of this procedure. The applicant complained about having to undergo mandatory sex reassignment surgery, but the Court did not investigate this claim further once it had concluded that there was a violation of Article 8 due to a lack of clear procedure and requirements.

Researchers Gaiparashvili and Schoentjes see this as an avoidance strategy on behalf of the Court so as not to cause contention.[9] When considering that one of the main arguments used in cases concerning trans rights, namely whether or not there is an international consensus, this seems very plausible. The Court seems very aware of what decision may go too far for some of its Member States. But does that really justify not protecting the physical integrity and private life of trans people, a group facing a lot of discrimination throughout the world? In such cases, in order to receive much needed protection, the ECtHR should move beyond international consensus in order to protect trans rights. If the Court will not do it, who will?

**Liesbet** (<http://www.emahumanrights.org/contributors/liesbet-debecker/>) **did a bilingual bachelor in law at the Brussels campus of the Catholic University of Leuven. After that, she obtained her masters in law at the Catholic University of Leuven, spending one year of her master's on exchange at the University of Vienna. Her specialisations were criminal law, international and European law, but she wrote her thesis in human rights law. Her main interest is gender issues in law.**

---

[1] *Rees v United Kingdom* App no 9532/81 (ECHR, 17 October 1986).

[2] *B v France* App no 13343/87 (ECHR, 25 March 1992).

[3] *Goodwin v United Kingdom* App no. 28957/95 (ECHR, 11 July 2002).

[4] *Ibid*, §85.

[5] *A.P., Garçon and Nicot v France* App nos. 79885/12, 52471/13 and 52596/13 (ECHR, 6 April 2017).

[6] *Ibid*, §77.

[7] Article 135/1 Belgian Civil Code.

[8] *X v The Former Yugoslav Republic of Macedonia* App no. 29683/16 (ECHR, 17 January 2019); Mariam Gaiparashvili and Sarah Schoentjes, 'X v. FYROM: A circumspect compromise on trans\* rights?' (*Strasbourg Observers*, 2 April 2019) <<https://strasbourgobservers.com/2019/04/02/x-v-fyrom-a-circumspect-compromise-about-trans-rights/>> accessed 18 April 2019.

[9] Gaiparashvili and Schoentjes (n 8).

22  
Shares

Share

Tweet

Pin

Email

Share

---

🗨️ **No Comments** (<http://www.emahumanrights.org/2019/05/23/the-complicated-relationship-between-the-ecthr-and-trans-rights/>)  
In **Uncategorised**

## Leave a Reply

Your email address will not be published. Required fields are marked \*

Comment

Name\*

Email\*

Post comment

## Recent Posts



The Gay Test: Medicalisation and Queer Asylum Seekers (<http://www.emahumanrights.org/2019/06/04/the-gay-test-medicalisation-and-queer-asylum-seekers/>)

4th June 2019



Education for Roma: The Key to Equality in Hungary? (<http://www.emahumanrights.org/2019/05/30/education-for-roma-the-key-to-equality-in-hungary/>)

30th May 2019

Counter-Terrorism Measures and Economic, Social and Cultural Rights

(<http://www.emahumanrights.org/2019/05/28/counter-terrorism-measures-and-economic-social-and-cultural-rights/>)

28th May 2019



The Refugee: A Male Definition, a Male Practice? (<http://www.emahumanrights.org/2019/05/20/%ef%bb%bfthe-refugee-a-male-definition-a-male-practice/>)  
20th May 2019





Western Campaigns for LGBTI Decriminalisation: Help or Hindrance?

(<http://www.emahumanrights.org/2019/05/17/lgbti-decriminalisation-and-the-west-how-to-move-forward/>)

17th May 2019



Romania – LGBTI Rights: Accession too soon? Better something than nothing.  
(<http://www.emahumanrights.org/2019/05/13/romania-lgbti-rights-accession-too-soon-better-something-than-nothing/>)  
13th May 2019



Taking the World by Storm(ont): Power Sharing in Northern Ireland  
(<http://www.emahumanrights.org/2019/05/09/taking-the-world-by-stormont-power-sharing-in-northern-ireland/>)  
9th May 2019



How Your Gender Impacts Your Health (<http://www.emahumanrights.org/2019/05/07/how-your-gender-impacts-your-health/>)  
7th May 2019



Uncovered: the Complicated Relationship between Sport and Hijab  
(<http://www.emahumanrights.org/2019/05/02/739/>)  
2nd May 2019



UN Global Compact for Safe, Orderly and Regular Migration: Challenges and Opportunities  
(<http://www.emahumanrights.org/2019/04/29/un-global-compact-for-safe-orderly-and-regular-migration-challenges-and-opportunities/>)  
29th April 2019



## About Us

The EMA Human Rights Blog is a collection of reports, stories and opinions about human rights around the world. It is written by the students of the European Inter-University Centre.

The content of this site does not reflect the official opinion of the **Global Campus of Human Rights** (<https://gchumanrights.org>). Responsibility for the information and views expressed in the articles lies entirely with the author(s).

©2018 All Rights Reserved - Webriti. Designed and Developed by **Webriti** (<https://www.webriti.com/>)