



NEW UNIVERSITY OF LISBON

European Master's Degree in Human Rights and Democratisation
A.Y. 2017/2018

DISCRIMINATION AND TRANSPHOBIA AT AN INTERSECTION

Does the discrimination against trans women lead them into sex work?

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ABSTRACT

Trans individuals have gained more attention in the last years, and states have taken up the responsibility to tighten the protection of trans rights. Despite the steps being taken, trans women still face structural barriers in their lives due to bias, stigma and discrimination. The aim of this thesis is to find a connection between the discrimination against trans women and the high rate of trans women engaged in the sex work industry.

The principle of non-discrimination is well protected in international and regional human rights instruments. This principle aims at guaranteeing an equal and fair prospect of opportunities available in society for all individuals. Despite its universal protection, the principle of non-discrimination is far from realized. Several states still uphold laws criminalizing trans women, and the possibility to access sex reassignment treatment and legal change of gender is often susceptible to restrictions. Trans women also face social discrimination in numerous aspects of their life. Oftentimes, trans women are met with transphobic attitudes in education, employment and healthcare. They are subject to housing discrimination and risk being rejected by their family. Social discrimination adds to their already marginalized position in society. As a result, trans women may find themselves in precarious economic situations and risk homelessness. Many trans women are left with no other option than to turn to sex work to survive and to be able to finance sex reassignment treatment. Trans sex workers are among the most marginalized population, having to face both transphobia and whorephobia, leading to high rates of HIV infections and violence. This situation is exacerbated by the (partial) criminalization of sex work in most parts in the world. Although trans women often find support and a sense of community while doing sex work, and it may serve as a way to express their gender identity, the large number of trans sex workers is essentially rooted in the discrimination they face. Unable to find and keep employment, they turn to the sex work industry to survive and to live their lives in their preferred gender.

ACKNOWLEDGMENTS

I would like to express my gratitude to my supervisor, professor Teresa Pizarro Beleza, for encouraging me to always think one step further; to GAT Portugal for giving me a tour in Lisbon; to the academic staff at EIUC for making this Master possible; to my friends for always having my back; to my parents for supporting my international experiences; to Lize for taking the opportunity to travel a lot this year.

Lisbon, 7 July 2018

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INTRODUCTION

1. In late February 2006, Gisberta Salce Júnior, a Brazilian trans women living in Porto, Portugal, was tortured and anally raped for several days. She was beaten, stoned, stomped on, burned, sexually assaulted with sticks and thrown into a deep pit in an abandoned building and left to die. A group of 14 boys aged 10 to 16 years old admitted to committing the crime. Gisberta, who was living in extreme social exclusion, had been in very poor health. She had HIV and tuberculosis, lived on the street and was engaged in sex work to earn money. The media coverage that followed the murder of Gisberta happened in a biased and erroneous way. Some newspapers mentioned the murder of a transvestite, but most of the Portuguese media only mentioned her homelessness, engagement in sex work and drug addiction, while claiming that the murder could not be considered as a hate crime.¹ Gisberta's story is not unique but a reality for many other trans women. Despite states increasingly taking up the responsibility to protect trans rights and the growing awareness by the public, trans women still face structural barriers in life today. Access to hormones, sex reassignment surgery and legal change of gender is not guaranteed in many countries, and stigma and transphobia remain serious issues worldwide. Their marginalized position impedes the full participation of trans women in society, limiting the possibility to achieve their full potential. Often, this leads to unemployment and precarious economic situations. Trans women are regularly perceived as homosexual men or sex workers. And indeed, studies have found a high rate of trans women working in the sex work industry. The aim of this thesis is to determine whether the discrimination burden faced by the trans community ultimately leads trans women into sex work. The answer of this research question and the conclusion will be based on a literature review as well as the analysis of reports and surveys of several international and regional organizations. Furthermore, information was also collected through contact with a Portuguese outreach programme working with trans sex workers, Grupo de Ativistas em Tratamentos (GAT Portugal), and informal interviews with trans sex workers in Lisbon.
2. The first chapter introduces the reader to the topic. Important terms regarding trans women will be defined to settle how these terms will be used throughout this thesis. This chapter also gives a brief overview of the history of trans issues.

¹ TGEU, "Gisberta campaign (2006)", February 2006, <https://tgeu.org/gisberta-campaign-2006/>.

3. The second chapter then focusses on the discrimination against trans women. A distinction will be made between discriminatory laws and policies and social discrimination through transphobic attitudes towards trans women in education, employment, housing, family rejection and access to health care. This chapter serves as a basis for this thesis and will set out how discrimination has an impact on the lives of trans women.
4. The last chapter will then determine the link between the high rate of sex workers among the female trans community and the discrimination they face discussed in chapter two, and thereby also answer the main research question of this thesis. The final chapter also touches upon the consequences of trans women engaging in sex work on their health and regarding the violence they face during their work. In addition, the legal framework on sex work will briefly be addressed.

CHAPTER I. VIEWS ON TRANSGENDERISM

SECTION I. DEFINITIONS

5. An important aspect when discussing gender identity is the use of appropriate terminology. Therefore, it is necessary to define certain terms in order to fully comprehend the meaning and the scope of this thesis.
6. Feminist theories distinguish between the categories of sex and gender.² Sex refers to the biological distinction between men and women, based on the primary and secondary sexual characteristics, hormones and the chromosome structure. Gender, on the other hand, is deeply rooted in history and culture and refers to the social construct of gender roles and society's idea of what it means to be a man or a woman. It is based on a set of attributes, roles and behaviour associated with maleness and femaleness.³ A common aspect of all societies is that they are built upon the difference between sexes. The gender binary refers to the idea that there are only two genders which follow the sex assigned at birth. It also includes specific gender roles that are associated with being a man or a woman. These gender roles are closely related with gender stereotypes. In the words of Cook and Cusack: “[A] stereotype is a generalized view or preconception of attributes or characteristics possessed by, or the rules that are or should be performed by, members of a particular group”⁴. These stereotypes are deeply rooted in culture and are attributed to boys and girls from a young age. For example, boys are given cars for their birthday, whereas girls get dolls. The gender binary also includes the idea of gender conformity, cisnormativity and heteronormativity. This means that society expects that a person's gender identity corresponds to their sex assigned at birth, much like heterosexuality is promoted as the correct way for people to live. Society expects women to be feminine and men to be masculine, and condemns people who deviate from this expectation. However, Dr. Margaret Nichols believes that gender should be understood as being more like a continuum, rather than being a

² D. A. GONZALEZ-SALZBERG, “The accepted transsexual and the absent transgender: a queer reading of the regulation of sex/gender by the European Court of Human Rights”, *American University International Law Review* 2014, Vol. 29(4), 800.

³ DIRECTORATE-GENERAL FOR JUSTICE (EUROPEAN COMMISSION), “Trans and intersex people: discrimination on the grounds of sex, gender identity and gender expression – Study”, 2012, <https://publications.europa.eu/en/publication-detail/-/publication/9b338479-c1b5-4d88-a1f8-a248a19466f1>, 12-13.

⁴ R. J. COOK and S. CUSACK, *Gender stereotyping: transnational legal perspectives*, Philadelphia, University of Pennsylvania Press, 2010, 9.

binary. Many people do indeed identify fully with the binary endpoints of this continuum, but many others feel best represented by points somewhere in between the gender binary.⁵

7. Almost all individuals are assigned a certain sex at birth, meaning that they are classified as being male or female. This distinction is based on certain characteristics, such as a person's genitals and their internal reproductive organs. Intersex persons are born with atypical sex characteristics. They have the sexual anatomy, reproductive organs or chromosomes that do not fit the typical definition of male or female bodies.⁶ Their biological makeup is both male and female or not clearly defined as either.⁷ Although this thesis does not focus on intersex persons, they are mentioned to differentiate them from trans persons. They are also subject to similar obstacles that are faced by trans persons, for example discrimination and stigma.
8. Although most people are assigned a certain sex at birth, one's gender identity and gender expression may differ from their assigned sex. A definition of gender identity can be found in the Yogyakarta Principles⁸. The introduction to the Yogyakarta Principles states that:

“Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”

It is an intrinsic feeling of being male, female or something other or in-between. Gender expression, on the other hand, is the way a person presents their gender through physical appearance. This may include hairstyle, the way a person dresses, speech and overall behaviour, as well as names and preferred pronouns. A person's gender identity may or may not conform to their gender expression, since the former is an internal feeling and the latter is what you want to show on the outside. Gender identity cannot be confused with sexual orientation. Gender

⁵ M. NICHOLS, “Beyond the gender binary | Dr. Margaret Nichols | TEDxJerseyCity”, 30 March 2015, <https://www.youtube.com/watch?v=4MUIYlaWVUk>; M. NICHOLS, “The great escape: welcome to the world of gender fluidity”, *Psychotherapy Networker* March/April 2016, <https://www.psychotherapynetworker.org/magazine/article/1001/the-great-escape>.

⁶ UNDP, “Discussion paper: transgender health and human rights”, December 2013, <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights.html>, 3.

⁷ DIRECTORATE-GENERAL FOR JUSTICE (EUROPEAN COMMISSION), “Trans and intersex people: discrimination on the grounds of sex, gender identity and gender expression – Study”, 2012, <https://publications.europa.eu/en/publication-detail/-/publication/9b338479-c1b5-4d88-a1f8-a248a19466f1>, 12.

⁸ INTERNATIONAL COMMISSION OF JURISTS, “Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity”, March 2007, <http://www.refworld.org/docid/48244e602.html>, 6.

identity refers to one's experience of their own gender, whereas sexual orientation refers to whom a person is attracted to. The Yogyakarta Principles also provide a definition of sexual orientation which is "*understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.*"⁹ However, sometimes both sexual orientation and gender identity are considered as belonging to the same group. The initialism for this group is LGBT, meaning lesbian, gay, bisexual and trans.

9. The meaning of the term transgender underwent a great change over the years. Transgender was used to refer to a person who has the anatomy attributed to a certain sex but lived as another gender. It was a term to refer to persons who found themselves in the middle between transvestism, whereby a person merely dresses like the opposite gender, and transsexualism. Yet during the early 1990s and in particular following Leslie Feinberg's pamphlet *Transgender liberation: A movement whose time has come*, the notion of transgender shifted. It was used as an umbrella term to refer to all forms of gender defying behaviour.¹⁰ Yet, not everyone adheres to this interpretation of the term transgender. Professor Stephen Whittle – professor at the Manchester Metropolitan University and a transsexual man – uses the term transgender "*to indicate all those people who live, or desire to live, a large part of their adult life in the role and dress of that gender group which would be considered to be in opposition to their sex designated at birth.*"¹¹ He uses the term transgender as an exact term. Given Whittle's great experience and authority on trans issues, his definition of transgender will be the one adhered to in this thesis. It should be noted that sex reassignment treatment is not a precondition to whether a person is transgender or not. The term transsexual, on the other hand, is used to refer to a person who has the desire to undergo, is undergoing or already underwent sex reassignment treatment. Thus, both transgender and transsexual persons identify with the gender role opposite to the sex they were assigned at birth and seek to live permanently in their preferred gender role. Unlike transsexual persons, however, transgender persons may not necessarily wish to undergo sex reassignment treatment.¹²

⁹ Ibid.

¹⁰ S. STRYKER, "Transgender history, homonormativity, and disciplinarity", *Radical History Review* 2008, 146.

¹¹ S. WHITTLE, *Respect and equality: transsexual and transgender rights*, London, Cavendish Publishing Limited, 2002, xxiii.

¹² DIRECTORATE-GENERAL FOR JUSTICE (EUROPEAN COMMISSION), "Trans and intersex people: discrimination on the grounds of sex, gender identity and gender expression – Study", 2012, <https://publications.europa.eu/en/publication-detail/-/publication/9b338479-c1b5-4d88-a1f8-a248a19466f1>, 12.

10. The term trans will be used as an umbrella term to refer to both transgender and transsexual persons. Although this term is usually used to refer to a much broader group of all persons whose gender identity or expression is different from the sex assigned at birth, including cross-dressers, transvestites, and other gender non-conforming persons, this thesis focusses on the specific group of male-to-female transgender and transsexual persons. A common characteristic for the persons in this broad group is that they identify their gender in one way or another to be opposite or outside of the general idea of how they ought to fulfil their gender role that was assigned to them at birth. Transvestites and cross dressing people enjoy wearing the clothes and adopting the behaviour of another gender for certain periods of time. The distinction between transvestites and transgender and transsexual persons lies in the fact that transvestites do not wish to live permanently as the other gender. Their identification with the other gender may range from it being the primary gender to playing a lesser role in their identity.¹³
11. The opposite term to transgender and transsexual is cisgender. Cisgender thus refers to persons whose gender identity conforms to their assigned sex at birth.¹⁴

SECTION II. A BRIEF HISTORY OF TRANS ISSUES

12. Although trans persons only recently gained attention from the public eye following stories of trans celebrities like Caitlyn Jenner and Laverne Cox and the success of movies such as *Transamerica*, trans has a long history and different cultures use various terms to refer to it. For example, trans women would be called hijra in India, or takatāpui in New Zealand.¹⁵ The term transvestite originates from 1910, when it was used by German sexologist Magnus Hirschfeld in his monograph on transvestites¹⁶. Hirschfeld would later establish the Berlin Institute, where the first ‘sex change’ operation – as it was called then – would take place. The term transsexual was not coined until 1949, transgender not until 1971 and trans, as an umbrella term for gender non-conforming persons, not until 1996.¹⁷

¹³ Ibid.

¹⁴ UNDP, “Discussion paper: transgender health and human rights”, December 2013, <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights.html>, 3.

¹⁵ S. WHITTLE, “A brief history of transgender issues”, *The Guardian* 2 June 2010,

<https://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues>.

¹⁶ M. HIRSCHFELD, *Die Transvestiten – eine Untersuchung über den erotischen Verkleidungstrieb mit umfangreichem casuistischem und historischem Material*, Berlin, Medicinischer Verlag, 1910, 562 p.

¹⁷ S. WHITTLE, “A brief history of transgender issues”, *The Guardian* 2 June 2010,

<https://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues>.

13. The first two registered cases of transsexualism were described by a French and a German psychiatrist. Étienne Esquirol published a case in his book *Des maladies considérées sous les rapports, médical, hygiénique et médico-legal*¹⁸ in 1838. Hieronymus Fränkel, on the other hand, published his case in the *Medicinische Zeitung*¹⁹ in 1853. However, these cases did not get a lot of public attention. It was only at the end of the 19th century that the phenomenon was studied more closely. In 1870, German psychiatrist Carl Westphal published a case study²⁰ in which he stated that the patient suffered from a distortion of the sexual sensation, the feeling of representing a male being. He classified the patient as suffering from a delusion.²¹
14. As many other countries at that time, the United Kingdom passed the Criminal Law Act in 1885, which criminalized homosexual behaviour.²² People who cross-dressed were easy targets for arrest on the grounds of such legislation, since they were often associated with homosexuals. One of the first public trials for transvestitism was the case of Ernest (Stella) Bouton and Fred (Fanny) Park in 1870. They were arrested for indecent behaviour. The authorities based the prosecution on their cross-dressing and accused them of conspiracy to commit a felony, but no conviction could be made on these grounds and they were acquitted. As a result of the laws criminalizing homosexual behaviour, many trans persons went to seek doctor's advice to cure them. Yet, homosexuality and transgenderism are not synonyms. It was Hirschfeld who separated homosexuality from gender-defying behaviour, which paved the way for a more specialized interest in the matter.²³ Professor Krafft-Ebbing, an Austrian professor of psychiatry, had a special interest in trans persons. Following the expertise of Hirschfeld and Krafft-Ebbing, being trans became a recognized phenomenon available for study and treatment. During the 1920s-30s, doctors would only sporadically revert to medical intervention. Despite the difficulties to access treatment, transsexual persons were still able to find doctors who were willing to perform the operation. Doctor Felix Abraham performed the first sex reassignment surgery in 1912 in Hirschfeld's institute in Berlin on a female-to-male patient. It was only in the 1950s that synthetic sex hormones became available. At that time doctors preferred psychotherapy as a treatment for gender identity problems, and transsexualism and the

¹⁸ E. ESQUIROL, *Des maladies considérées sous les rapports, médical, hygiénique et médico-legal, Volumes 1-12*, Paris, J.-B. Ballière, 1838, 922 p.

¹⁹ H. FRÄNKEL, "Homo mollis", *Medicinische Zeitung* 1853, 102-103.

²⁰ C. WESTPHAL, "Die conträre Sexualempfindung, Symptom eines neuropathischen (psychopathischen) Zustands", *Archiv für Psychiatrie und Nervenkrankheiten* 1870, 73-108.

²¹ D. PFÄFFLIN, "Transgenderism and transsexuality: medical and psychological viewpoints", in J. M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, 12.

²² Ibid.

²³ S. WHITTLE, *Respect and equality: transsexual and transgender rights*, London, Cavendish Publishing Limited, 2002, 37.

legitimacy of sex reassignment operations was a subject of heated debate. Moreover, Switzerland was the only country in Europe at the time to allow the legal change of one's gender after permission of a judge, which was permitted for the first time in 1931. This remained impossible in other European countries until the early 1970s, even after sex reassignment surgery.²⁴

15. One of the most famous transsexual of the 20th century was Christine Jorgensen. She was a former American soldier who underwent sex reassignment treatment in Denmark. Her story was picked up by the media and she became a role model for many other transsexuals. After Jorgensen's story was made public, her psychiatrist received almost 500 letters from men and women expressing the desire to change gender, which he later published. This urged medical professionals to realize that transsexuals were not exceptional cases, but a widespread phenomenon.²⁵ Consequently, this led to new steps being taken regarding trans studies and treatment. Harry Benjamin, who had trained at Hirschfield's clinic, set up a special treatment centre for transsexual persons, where new generations of psychiatrists working with transsexuals were trained.²⁶ The first Gender Identity Clinic was established in 1963 at the Johns Hopkins University Clinic in Baltimore, United States. Harry Benjamin published the first major textbook on the subject in 1966, which was called *The Transsexual Phenomenon*^{27, 28}.
16. For a psychological and medical discourse on the subject, one should look at the *Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-5)*²⁹. The term transsexualism is no longer used in the DSM, as it is too narrow since it only applies to trans persons seeking sex reassignment treatment. Earlier versions of the DSM used *Gender Identity Disorder* as the diagnosis. This, however, has also been dropped because it reinforced the idea of trans persons having a psychiatric disorder. Already in 2009, the Council of Europe's Commissioner for Human Rights published an Issuing Paper, stating that "*from a human rights and health care perspective no mental disorder needs to be diagnosed in order to give access to treatment for a*

²⁴ D. PFÄFFLIN, "Transgenderism and transsexuality: medical and psychological viewpoints", in J. M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, 12-14.

²⁵ S. WHITTLE, "A brief history of transgender issues", *The Guardian* 2 June 2010, <https://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues>.

²⁶ Ibid.

²⁷ H. BENJAMIN, *The transsexual phenomenon*, New York, Julian Press, 1966, 296 p.

²⁸ D. PFÄFFLIN, "Transgenderism and transsexuality: medical and psychological viewpoints", in J. M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, 15; S. WHITTLE, "A brief history of transgender issues", *The Guardian* 2 June 2010, <https://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues>.

²⁹ AMERICAN PSYCHIATRIC ASSOCIATION, *Diagnostic and statistical manual of mental disorders 5th edition (DSM-5)*, Washington DC, American Psychiatric Association, 2013, 1120 p.

condition in need of medical care.”³⁰ This view was later adopted by the European Parliament in its Resolution of 28 September 2011 at the United Nations³¹ (UN).³² Therefore, the DSM-5 replaced the term gender identity disorder with gender dysphoria, which emphasizes the suffering of trans persons.³³

17. On 18 June 2018, the World Health Organization (WHO) announced that it will no longer classify being trans as a mental health disorder, instead placing it under sexual health conditions in the newly updated *International Statistical Classification of Diseases and Related Health Problems*^{34, 35}.

³⁰ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Issue paper: human rights and gender identity”, 29 July 2009, <https://rm.coe.int/16806da753>, 10-11.

³¹ European Parliament resolution on human rights, sexual orientation and gender identity at the United Nations of 28 September 2011, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0427+0+DOC+XML+V0//EN>.

³² EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, “Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU: Comparative legal analysis (Update 2015)”, *Publication Office of the European Union* 2015, <http://fra.europa.eu/en/publication/2015/lgbti-comparative-legal-update-2015>, 16.

³³ D. PFÄFFLIN, “Transgenderism and transsexuality: medical and psychological viewpoints”, in J. M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, 20-21.

³⁴ WHO, “ICD-11”, 18 June 2018, <http://www.who.int/classifications/icd/en/>.

³⁵ WHO, “ICD-11: classifying diseases to map the way we live and die”, 18 June 2018, <http://www.who.int/health-topics/international-classification-of-diseases>.

CHAPTER II. DISCRIMINATION AGAINST TRANS WOMEN

SECTION I. INTRODUCTION

18. The General Assembly of the UN adopted the Universal Declaration of Human Rights³⁶ (UDHR or Universal Declaration) as an international agreement on 10 December 1948.³⁷ The Universal Declaration sets out a list of fundamental rights and freedoms which should apply to everyone and should thus be universally protected.³⁸ The UDHR is a unique document because it formulates the first catalogue of fundamental norms.³⁹ The UDHR is “*a common standard of achievement for all peoples and all nations*”, which can be achieved by “[*promoting*] respect for these rights and freedoms and by progressive measures, national and international” as well as by “[*securing*] their universal and effective recognition and observance.”⁴⁰ The first article of the UDHR states that “[*a*]ll human beings are born free and equal in dignity and rights.”⁴¹ According to the UDHR, every individual enjoys a certain set of minimum rights regardless of the state they live in, their ideology, race, religion or sex. The idea of universalism of human rights entails that those rights are inalienable, interdependent, indivisible, equal and non-discriminatory. Although the idea of equality and universalism is widely accepted among the international community, it is far from realized. During the past decades, attention has been drawn to gender (in)equality. States have taken up the responsibility to tackle the existing inequality between men and women. Recently, attention has also been brought to inequality beyond the gender binary. In his message to the 2013 Oslo Conference on Human Rights, Sexual Orientation and Gender Identity, UN Secretary-General Ban Ki-Moon called the fight against homophobia and transphobia “*one of the great, neglected human rights challenges of our time.*”⁴² Transphobia can be defined as “*an emotional disgust towards individuals who do*

³⁶ Universal Declaration of Human Rights 10 December 1948, www.un.org/en/universal-declaration-human-rights/.

³⁷ E. BATES, “History”, in D. MOECKLI, S. SHAH, S. SIVAKUMARAN and D. HARRIS (eds.), *International human rights law*, Oxford, Oxford University Press, 2014, 30.

³⁸ I. BANTEKAS and L. OETTE, *International human rights law and practice*, Cambridge, Cambridge University Press, 2016, 17.

³⁹ G. BROWN, *The Universal Declaration of Human Rights in the 21st Century: a living document in a changing world*, Cambridge, Lightning Source for Open Book Publishers, 2012, 29.

⁴⁰ Preamble UDHR; W. KÄLIN and J. KÜNZLI, *The law of international human rights protection*, Oxford, Oxford University Press, 2009, 14; G. D. COHEN, “The “human rights revolution” at work: displaced persons in postwar Europe”, in S-L. HOFFMANN (ed.), *Human rights in the twentieth century*, Cambridge, Cambridge University Press, 2011, 49.

⁴¹ Article 1 UDHR.

⁴² UN SECRETARY-GENERAL, “Secretary-General’s video message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity”, 15 April 2015, <https://www.un.org/sg/en/content/sg/statement/2013-04-15/secretary-generals-video-message-oslo-conference-human-rights-sexual>.

not conform to society's gender expectations."⁴³ Concern about the protection of the rights of LGBT and intersex persons has been raised both by the UN and regional human rights organizations. On a global level, several UN entities have put effort into combatting discrimination and violence based on sexual orientation and gender identity. Ban Ki-Moon expressed his concern regarding discrimination based on gender identity in a speech on Human Rights Day in 2010, saying that:

*"[W]e reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity. [...] Together, we seek the repeal of laws that criminalize homosexuality, that permit discrimination on bases of sexual orientation or gender identity, that encourage violence."*⁴⁴

Furthermore, many UN entities have taken up the task of raising awareness on gender identity and protecting the rights of trans individuals, including the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Development Programme (UNDP) and the Joint United Nations Programme on HIV/AIDS (UNAIDS).⁴⁵ Moreover, following Resolution 32/2⁴⁶, the Human Rights Council appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. The Independent Expert is mandated with various duties, such as assessing the implementation of existing human rights instruments with regards to overcoming discrimination and violence against LGBT persons and raising awareness.⁴⁷ Further steps have been taken on a regional level. In 2014, the African Commission on Human and People's Rights adopted a resolution⁴⁸ condemning violence and other human rights violations on the grounds of sexual orientation and gender identity. Similarly, in 2013 the Organisation of American States (OAS) adopted the

⁴³ D. B. HILL and B. L. B. WILLOUGBY, "The development and validation of the genderism and transphobia scale", *Sex Roles* 2005, Vol. 53, 533; K. L. NADAL, K. C. DAVIDOFF and W. FUIJI-DOE, "Transgender women and the sex work industry: roots in systemic, institutional, and interpersonal discrimination", *Journal of Trauma and Dissociation* 2013, Vol. 15(2), 171.

⁴⁴ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc.* 1/HRC/19/41 (2011), para 2; UN FREE & EQUAL, "Fact sheet: equality and non-discrimination", <https://www.unfe.org/wp-content/uploads/2017/05/Equality-and-Non-Discrimination.pdf>.

⁴⁵ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc.* 1/HRC/19/41 (2011), para 3.

⁴⁶ Resolution 32/2 on the Protection against violence and discrimination based on sexual orientation and gender identity of 30 June 2016 (15 July 2016), *UN Doc.* A/HRC/RES/32/2 (2016).

⁴⁷ OHCHR, The role of the United Nations in combatting discrimination and violence against lesbian, gay, bisexual, transgender and intersex people: a programmatic overview, 11 April 2017, http://www.ohchr.org/Documents/Issues/Discrimination/UN_LGBTI_summary_11Apr2017.pdf.

⁴⁸ Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity of 12 May 2014, <http://www.achpr.org/sessions/55th/resolutions/275/>.

Inter-American Convention against All Forms of Discrimination and Intolerance⁴⁹, which addresses these issues, after already adopting a Resolution on Human Rights, Sexual Orientation and Gender Identity⁵⁰ in 2010. The European Union (EU) has published guidelines on the promotion and protection of human rights of LGBT and intersex persons, and both the European Parliament and the Parliamentary Assembly of the Council of Europe have adopted resolutions to reach this goal. In addition, the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights both issued judgments affirming the rights of trans persons.⁵¹

19. In order to set out the link between trans women engaging in sex work and their marginalized position in society, it is necessary to take a look at trans discrimination. Despite the many steps taken to protect the rights of trans women, they still experience violence and discrimination due to their gender identity or expression in all regions of the world.⁵² Trans women face discrimination on an interpersonal (e.g. being discriminated or harassed by strangers or co-workers), institutional (e.g. being employed at a workplace without an anti-discrimination policy) and systemic (e.g. belonging to a society in which trans women have a lower status) level.⁵³ Discrimination takes place in numerous aspects of society, such as the labour market, in schools and regarding health care. They risk violations of their human rights due to transphobic attitudes and a lack of adequate legal protection against discrimination based on gender identity. The effect of this discrimination is often aggravated because trans women risk being mistreated and disowned by their own family.⁵⁴ The negative attitudes towards trans women is highly influenced by the importance that society places on a fixed gender binary.⁵⁵ One of the main issues regarding trans rights is a lack of legal recognition, equality and protection, and fundamental citizenship rights. The rights that should be protected are the rights to legal identity based on the gender of their preference, and the right to equality and non-discrimination. The aim of this chapter is to set out how trans women experience the various types of discrimination

⁴⁹ Inter-American Convention against All Forms of Discrimination and Intolerance of 5 June 2013, http://www.oas.org/en/sla/dil/inter_american_treaties_a-69_discrimination_intolerance.asp.

⁵⁰ Resolution on Human Rights, Sexual Orientation and Gender Identity of 8 June 2010, <http://www.oas.org/en/iachr/lgtbi/links/>.

⁵¹ Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nations High Commissioner for Human Rights (4 May 2015), *UN Doc. A/HRC/29/23* (2015), para 38.

⁵² Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc. 1/HRC/19/41* (2011), para 1.

⁵³ NADAL et al, "Transgender women and the sex work industry: roots in systemic, institutional, and interpersonal discrimination", *Journal of Trauma and Dissociation* 2013, Vol. 15(2), 170.

⁵⁴ OHCHR, "re: sexual orientation and gender identity in international human rights law", New York, 2012, 9.

⁵⁵ DIRECTORATE-GENERAL FOR JUSTICE (EUROPEAN COMMISSION), "Trans and intersex people: discrimination on the grounds of sex, gender identity and gender expression – Study", 2012, <https://publications.europa.eu/en/publication-detail/-/publication/9b338479-c1b5-4d88-a1f8-a248a19466f1>, 13.

and how that influences their lives. While not addressing all types of discrimination, this thesis will underline the critical human rights violations that are associated with higher rates of sex work among trans women.

SECTION II. INTERNATIONAL LEGAL STANDARDS AND OBLIGATIONS

20. The principle of universality and non-discrimination is one of the cornerstones of international human rights law. Its aim is to “*allow all individuals an equal and fair prospect to access opportunities available in a society.*”⁵⁶ This implies that persons who find themselves in the same situation should be treated equally, regardless of a particular characteristic they possess.⁵⁷ Before 1945, this principle was only protected in minority treaties with a very limited scope. With the adoption of the Charter of the United Nations⁵⁸ on the 26 June 1946, the principle of non-discrimination became a recognized part of international law. Unlike the League of Nations, which did not mention racial or religious equality, the UN Charter recognizes the principle of equality and non-discrimination as one of its basic provisions. Notably, Article 1(3) UN Charter aims at protecting this principle, stating that the Charter aims at “*promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.*”⁵⁹
21. As mentioned above, this principle of non-discrimination is enshrined in Article 1 UDHR. Many other provisions of the Universal Declaration directly or indirectly refer to the principle of equality, emphasizing the universal application of the UDHR.⁶⁰ Although the UDHR does not impose direct obligation on a state, its general importance cannot be underestimated. The international community has agreed that the provisions of the UDHR are part of binding international customary law, and thus binding on states.⁶¹ Furthermore, many provisions of the UDHR were codified in national constitutions and binding regional or international treaties.⁶²

⁵⁶ EUR-LEX, “Non-discrimination (the principle of)”, https://eur-lex.europa.eu/summary/glossary/nondiscrimination_principle.html.

⁵⁷ Ibid.

⁵⁸ Charter of the United Nations of 26 June 1945, <http://www.un.org/en/charter-united-nations/>.

⁵⁹ L. WEIWEI, “Equality and non-discrimination under international human rights law: research notes 03/2004”, *The Norwegian Centre for Human Rights* 2004, <http://www.corteidh.or.cr/tablas/r08121.pdf>, 5.

⁶⁰ Ibid 6.

⁶¹ H. DAVIS, *Human rights law: directions 3rd edition*, Oxford, Oxford University Press, 2013, 16; O. DE SCHUTTER, *International human rights law*, Cambridge, Cambridge University Press, 2014, 18; I. BANTEKAS and L. OETTE, *International Human Rights Law and Practice*, Cambridge, Cambridge University Press, 2016, 17-18.

⁶² G. BROWN, *The Universal Declaration of Human Rights in the 21st century: a living document in a changing world*, Cambridge, Lightning Source for Open Book Publishers, 2012, 34; O. DE SCHUTTER, *International human rights law*, Cambridge, Cambridge University Press, 2014, 18; I. BANTEKAS and L. OETTE, *International human rights law and practice*, Cambridge, Cambridge University Press, 2016, 18.

This was for example the case for the International Covenant on Civil and Political Rights⁶³ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁴ of 1966. Article 26 ICCPR holds that *“the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”* The ICESCR also has general and specific non-discrimination provisions similar to the ICCPR. Article 2(2) ICESCR, for instance, states that *“[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*⁶⁵ The grounds of discrimination referred to in the Covenants are not exhaustive. The use of the term *“other status”* intentionally leaves the list of grounds for discrimination open. Sexual orientation has, for example, been accepted as a discrimination ground on several occasions.⁶⁶ The Committee on Economic, Social and Cultural Rights (CESCR) also recognized that *“other status”* includes gender identity in its General Comment No. 20⁶⁷, stating that *“gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”*⁶⁸

22. The principle of non-discrimination is also protected in several regional human rights instruments, as for example in Article 14 of the European Convention on Human Rights⁶⁹ (ECHR) which states that *“[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,*

⁶³ International Covenant on Civil and Political Rights of 16 December 1966, *United Nations Treaty Series*, Vol. 999, 171.

⁶⁴ International Covenant on Economic, Social and Cultural Rights of 16 December 1966, *United Nations Treaty Series*, Vol. 999, 3.

⁶⁵ L. WEIWEI, “Equality and non-discrimination under international human rights law: research notes 03/2004”, *The Norwegian Centre for Human Rights* 2004, <http://www.corteidh.or.cr/tablas/r08121.pdf>, 6.

⁶⁶ HRC, 31 March 1994, No. 488/1992, Toonen/Australia; General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (2 July 2009), *UN Doc. E/C.12/GC/20* (2009); General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (16 December 2010), *UN Doc. CEDAW/C/GC/28* (2010).

⁶⁷ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc. 1/HRC/19/41* (2011), para 7.

⁶⁸ General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (2 July 2009), *UN Doc. E/C.12/GC/20* (2009), para 32.

⁶⁹ European Convention on Human Rights of 4 November 1950, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Similarly, Article 1 of the American Convention on Human Rights⁷⁰ holds that “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”⁷¹

23. The international community has attributed special importance to specific groups that are vulnerable to discrimination. This has given rise to the adoption of several major international treaties that elaborate on the provisions of the UDHR. These are, for example, the Convention on the Elimination of All Forms of Racial Discrimination⁷² of 1965, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women⁷³ (CEDAW) and more recently the Convention on the Rights of Persons with Disabilities⁷⁴ of 2006.
24. Violations of the principle of non-discrimination is a worldwide issue. Cultural attitudes are often used as a justification for these violations. Although historical, cultural and religious backgrounds should not be undervalued, the duty of states remains “*to promote and protect all human rights and fundamental freedoms*”.⁷⁵ UN Secretary-General Ban Ki-Moon stated that “[w]here there is a tension between cultural attitudes and universal human rights, rights must carry the day.”⁷⁶ States have several duties under international law regarding human rights protection. They have a duty to respect, protect, fulfil and promote. Under the duty to respect states must refrain from taking any measures that may interfere with or impair an individual’s enjoyment of their right. The duty to protect entails that a state must take all necessary measures

⁷⁰ American Convention on Human Rights of 22 November 1969,

<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

⁷¹ L. WEIWEI, “Equality and non-discrimination under international human rights law: research notes 03/2004”, *The Norwegian Centre for Human Rights* 2004, 7.

⁷² Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966, *United Nations Treaty Series*, Vol. 660, 195.

⁷³ Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979, *United Nations Treaty Series*, Vol. 1249, 13.

⁷⁴ Convention on the Rights of Persons with Disabilities of 13 December 2006, *United Nations Treaty Series*, Vol. 2515, 3.

⁷⁵ Gathering a body of global agreement: Vienna Declaration and Programme of Action (25 June 1993), *UN Doc. 1/CONF.157/23* (1993), para 5; Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc. 1/HRC/19/41* (2011), para 5.

⁷⁶ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc. 1/HRC/19/41* (2011), para 2; UN FREE & EQUAL, “Fact sheet: equality and non-discrimination”, <https://www.unfe.org/wp-content/uploads/2017/05/Equality-and-Non-Discrimination.pdf>.

to ensure the protection from infringements of human rights law by third parties, including by enforcing existing laws or addressing regulatory gaps, and establishing institutions for the effective enforcement of human rights law. The duty to fulfil means that states must take all positive measures to ensure that individuals enjoy the rights recognized in human rights instruments. Lastly, the obligation to promote entails that states must take all measures to ensure that individuals under their jurisdiction know about their rights and can enjoy them.

SECTION III. LEGAL AND DE FACTO DISCRIMINATION AGAINST TRANS WOMEN

25. Over the recent years, many governments in all regions have taken up the responsibility to reduce the violence and discrimination based on gender identity. These initiatives include strengthening or adopting anti-discrimination and hate crime laws, extending the protection on grounds of gender identity and reforms of gender identity laws, which make it easier to varying degrees for trans women to obtain legal recognition of their gender identity. These initiatives go further than only legislative measures. In many countries gender identity training is offered to police officers, judges, prison guards, medical staff and teachers. Anti-bullying programmes focussed on LGBT youth are being introduced at schools and shelters for homeless LGBT persons have been built. Popular media such as series and movies are drawing attention to LGBT issues and making it subject to debate. Trans celebrities help raise awareness for trans persons, and make coming out as trans more acceptable in modern society. Despite these positive developments, they are often still overshadowed by continuing, serious and widespread human rights violations against trans women. These violations include killings, physical and sexual assault, arbitrary detention, denial of their right to expression and discrimination in health care, housing, education and employment.⁷⁷
26. The discussion of the discrimination of trans women is divided into two sections. First, discriminatory laws and policies will be addressed. This includes laws penalizing trans individuals and cross-dressers, as well as laws criminalizing homosexuality. The possibility of legal change of gender will also be discussed in the first section, with a focus on the case law of the ECtHR. In the second section, the social discrimination will be addresses. This is discrimination based on the group to which a person belongs or is perceived to belong, in this case the trans community. This goes beyond laws and policies, and focusses on attitudes and prejudice society holds against trans women. This section includes discrimination in education,

⁷⁷ Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nation High Commissioner for Human Rights (4 May 2015), *UN Doc. 1/HRC/29/23* (2015), 3-4.

employment, housing, access to health care and family rejection. Although they are divided into two sections, both sections are very much interrelated and affect one another.

§1. Discriminatory laws and policies

A. Laws penalizing individuals because of gender identity

27. Albeit not as widespread as laws criminalizing homosexuality, several states still uphold laws used to penalize individuals because of their gender identity. The Human Rights Committee (HRC) held that “[a]rrest and detention of individuals on charges relating to sexual orientation and gender identity – including offences not directly related to sexual conduct, such as those pertaining to physical appearance or so-called “public scandal” – are discriminatory and arbitrary”.⁷⁸ The HRC has on several occasions expressed concern about national anti-discrimination legislation not including discrimination on the ground of gender identity, for example in its Concluding Observations on Belize and the Philippines.⁷⁹ UNAIDS published a report in 2017, stating that “[o]verall, 23 out of 114 reporting countries stated that they criminalized or prosecuted transgender persons and/or criminalized cross-dressing.”⁸⁰ In another report, it held that according to Transgender Europe’s (TGEU) project Trans respect versus Transphobia (TvT), 55 countries criminalized and/or prosecuted trans persons in 2015. Furthermore, seven countries criminalized cross-dressing, and 12 countries prosecuted it. Some other countries still have laws that criminalize trans persons but they are not currently enforced. In others, prosecution occurs without laws criminalizing trans persons through the application of other laws, or without a legal basis.⁸¹
28. A practical example of a state that criminalizes cross-dressing is Kuwait. In May 2007, Kuwait’s National Assembly amended Article 198 of the Kuwaiti penal code. Before this amendment, the article was a generic public decency law. Yet, the article now criminalizes “imitating the appearance of a member of the opposite sex”, with a sentence of one year

⁷⁸ Ibid 12.

⁷⁹ Concluding observations on the fourth periodic report of the Philippines, adopted by the Committee at its 106th session (15 October - 2 November 2012) (13 November 2012), *UN Doc. CCPR/C/PHL/CO/4* (2012), para 12; Concluding observations on Belize in the absence of a report, adopted by the Committee at its 107th session (11 – 28 March 2013) (26 April 2013), *UN Doc. CCPR/C/BLZ/CO/1* (2013), para 13.

⁸⁰ UNAIDS, “Blind spot: reaching out to men and boys”, 2017, http://www.unaids.org/sites/default/files/media_asset/blind_spot_en.pdf, 29.

⁸¹ UNAIDS, “Prevention Gap Report”, 2016, http://www.unaids.org/sites/default/files/media_asset/2016-prevention-gap-report_en.pdf, 25.

imprisonment or a fine of one thousand dinars.⁸² The article does not criminalize a specific act or behaviour, but rather physical appearance. Since the article does not lay down any specific criteria, the police have free discretion to determine whether a person's appearance constitutes imitating the opposite sex. Testimonies have shown that trans women have been arrested for dubious reasons, such as having a soft voice or smooth skin. The amendment has given rise to an increase of human rights violations against trans women in Kuwait, including harassment, sexual assault, and arbitrary arrest. Although only few cases result in convictions, trans women who had been arrested by the police claimed that they forced them to sign declarations stating that they would not imitate the opposite sex again before releasing them. The police mistreatment, abuse and assault is rarely reported, for fear of re-arrest, retaliation and other threats.⁸³ According to Human Rights Watch (HRW), Article 198 of the Kuwaiti Penal Law violates "*rights to non-discrimination, equality before the law, free expression, personal autonomy, physical integrity, and privacy.*"⁸⁴ Furthermore, the sexual and physical violence committed by police officers acting in official capacity may amount to torture.⁸⁵ The HRC expressed its concern about "*the new criminal offence of "imitating members of the opposite sex"*" and stated that Kuwait should "*repeal [this offence], in order to bring its legislation in line with the Covenant.*"⁸⁶

29. Similarly, Guyana has a law which targets trans persons. Cross-dressing is criminalized under section 153 (1) (xlvi) of the Summary Jurisdiction Act Chapter 8:02, stating that "*wearing of female attire by man; wearing of male attire by woman;*" is a minor offence. In February 2009, seven people were arrested, detained and fined for cross-dressing under this rule. Following the conviction, three of the convicted persons together with the Society Against Sexual Orientation Discrimination, filed a complaint before the Guyana Constitutional Court, claiming that the law is unconstitutional. In September 2013, the Court ruled that cross-dressing is not a crime, unless it is done for "improper use". The litigants appealed this decision and the exception made for

⁸² HUMAN RIGHTS WATCH, "Universal Periodic Review: Kuwait", 5 November 2009, <http://www.refworld.org/docid/506580e837.html>.

⁸³ HUMAN RIGHTS WATCH, "They hunt us down for fun: discrimination and police violence against transgender women in Kuwait", 15 January 2012, <https://www.hrw.org/report/2012/01/15/they-hunt-us-down-for-fun/discrimination-and-police-violence-against-transgender-women>.

⁸⁴ Ibid.

⁸⁵ B. WILLE, "Being Transgender in Kuwait: "My biggest fear is a flat tire"", 15 July 2013, <https://www.hrw.org/news/2013/07/15/being-transgender-kuwait-my-biggest-fear-flat-tire>.

⁸⁶ Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee (Kuwait) (18 November 2011), *UN Doc. CCPR/C/KWT/CO/2* (2011), para 30.

improper use, since it is vague and subjective.⁸⁷ The Court of Appeal, however, upheld the decision of the Constitutional Court, saying that the law is not unconstitutional and that the meaning of “improper use” should be determined in a case by case manner.⁸⁸

30. Along with the criminalization of cross dressing or sex reassignment surgery, anti-homosexuality laws often also target trans women. Despite sexual orientation and gender identity being two different concepts, trans women are often perceived as gay men by law enforcement officers and the judiciary system.⁸⁹ In addition to laws penalizing and criminalizing trans persons, only few states have specific projects that aim at the protection of trans human rights and at supporting trans individuals in case of violations of their rights.⁹⁰

B. Legal change of gender

31. Gender identity is a fundamental aspect of a person’s life, closely connected to personal autonomy.⁹¹ Usually, sex is assigned at birth, and thereafter it becomes a legal fact that entails social expectations. Although for most people the sex assigned at birth matches their gender identity, this is not the case for trans women. They may wish to change, or partly change, their legal, social and physical status to correspond to their gender identity. Legal gender recognition plays a key factor in fighting discrimination of trans women. Often enough still, trans women are denied the right to change their gender on identification cards and other official documents, and are thus legally identified as male. This constitutes a violation of the fundamental right to personhood. This violation holds many negative consequences in the day to day life of trans women. The lack of legal gender recognition can stand in the way of obtaining identification documents, let alone one that states their preferred gender. Persons whose legal gender indicated on their official documents does not match with their preferred gender and gender expression are vulnerable to harassment, suspicion by others and even violence. Most states only allow that the sex at birth can be listed on official identification documents. In this case, confusion may arise when official identification is required and a person’s gender expression does not match

⁸⁷ S4 FOUNDATION, GOIP, DAG and SASOD, “Discrimination in the Enjoyment of Economic, Social and Cultural Rights in Guyana”, 20 March 2015, <http://www.sasod.org.gy/sites/default/files/resources/IACHR%20Submission%20on%20Discrimination%20in%20the%20Enjoyment%20of%20ESCR%20in%20Guyana.pdf>, 10.

⁸⁸ J. MARZOUCA, “Press release - McEwan et al v Attorney General of Guyana Court of Appeal decision”, 27 February 2017, <http://www.u-rap.org/web2/index.php/component/k2/item/64-press-release-mcewan-et-al-v-attorney-general-of-guyana-court-of-appeal-decision>.

⁸⁹ TGEU, “Sex work policy”, <https://tgeu.org/wp-content/uploads/2014/12/TGEU-sex-work-policy.pdf>, 3.

⁹⁰ NSWP, “Briefing paper #09: the needs and rights of trans sex workers”, <http://www.nswp.org/sites/nswp.org/files/Trans%20SWs.pdf>, 3.

⁹¹ ECtHR, 6 April 2017, No. 79885/12, A.P., Garçon, Nicot/France, para 120.

their sex at birth. It furthermore can be a burden when doing seemingly simple everyday activities, such as opening a bank account, attending a school or college, or picking up a parcel at the post office. These activities may be stressful and embarrassing for trans women when they are forced to reveal their sex assigned at birth, even if they do not wish to do that. Such scrutiny constitutes a violation of the right to privacy. The value of legal gender recognition is recognized in the Yogyakarta Principles, stating that “[p]ersons of diverse [...] gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined [...] gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”⁹² Furthermore, the UN High Commissioner for Human Rights emphasized the importance of legal change of gender, and recommended that states should “[f]acilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.”⁹³ Thus, having a legal procedure to change and recognize a person’s gender which is in accordance with their gender identity is essential for trans women to live life with dignity and respect.⁹⁴

1. European Court for Human Rights case law

32. On a European level, Sweden was the first country to legislate on the legal change of gender in 1972. Despite its pioneer role in legal gender recognition, it only recently modernised its legal rules. Germany followed Sweden’s lead in 1980. Many provisions have successfully been challenged in the German Constitutional Court, thus pushing modernisation of the existing legislation.⁹⁵ Due to the cases brought before the Constitutional Court, Germany has a relatively progressive legislation regarding legal change of gender. Yet, because many changes have been made following court rulings, many issues are still left unsolved, in particular regarding parenting rights.⁹⁶ Other European countries followed during the last decades of the 20th century.

⁹² Principle 3 of the Yogyakarta Principles.

⁹³ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc. A/HRC/19/41* (2011), para 84.

⁹⁴ UNDP, “Stigma, discrimination, violence and human rights”, <http://www.undp.org/content/undp/en/home/search.html?q=stigma+discrimination+violence+and+human+rights>, 33-34; TGEU, “Legal gender recognition”, <http://tgeu.org/issues/legal-gender-recognition/>.

⁹⁵ See for example: Bundesverfassungsgericht (DE) 16 March 1982, nr. I BvR 938/81; Bundesverfassungsgericht (DE) 26 January 1993, nr. I BVL 38, 40, 43/91; Bundesverfassungsgericht (DE) 18 July 2006, nr. I BvL 12/04.

⁹⁶ J. M. SCHERPE, “The legal status of transsexuals and transgender persons – an introduction”, in J. M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, 3.

33. The ECtHR has played an important role in the development of national legislations addressing trans issues. Over the past decades, the ECtHR has decided on several questions, such as sex reassignment surgery and sterilization as a precondition for those who seek to legally change their gender. When the ECtHR decides on issues regarding gender identity, it usually considers two things: on the one hand, the rights safeguarding respect for a freedom, and on the other hand, the rights safeguarding the respect for non-discrimination.⁹⁷ Cases brought before the ECtHR by trans persons are often grounded on a violation of Article 8 ECHR, which protects the right to private and family life. Article 8 ECHR states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is worth noting that the ECtHR has hardly ever ruled explicitly under the anti-discrimination provision enshrined in Article 14 of the European Convention in cases related to trans persons. The Court has usually decided these cases on the grounds of Articles such as Article 3⁹⁸, 6⁹⁹, 11¹⁰⁰, 12¹⁰¹ and 13¹⁰² of the Convention and Article 1 of Protocol 1¹⁰³.¹⁰⁴ However, the Court has sometimes referred to Article 14 of the Convention, underlining the connection of the non-discrimination article with the substantial articles relied on before the Court.¹⁰⁵ Yet, this does not elaborate the complete extent of the non-discrimination factor at play in these cases.¹⁰⁶ An exception to this is the *P.V. v Spain*¹⁰⁷ ruling by the Court in 2010.¹⁰⁸ The case concerned a male

⁹⁷ F. EDEL, “Case law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity”, *Council of Europe* March 2015, 13.

⁹⁸ Prohibition of torture.

⁹⁹ Right to a fair trial.

¹⁰⁰ Freedom of assembly and association.

¹⁰¹ Right to marry.

¹⁰² Right to an effective remedy.

¹⁰³ Protection of property.

¹⁰⁴ F. EDEL, “Case law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity”, *Council of Europe* March 2015, 13.

¹⁰⁵ ECtHR, 11 July 2002, No. 28957/95, Christine Goodwin/The United Kingdom.

¹⁰⁶ L. SIVONEN, “Gender identity discrimination in European judicial discourse”, *The Equal Rights Review* 2011, Vol 7, 12.

¹⁰⁷ ECtHR, 30 November 2010, No. 35159/09, P.V./Spain.

¹⁰⁸ L. SIVONEN, “Gender identity discrimination in European judicial discourse”, *The Equal Rights Review* 2011, Vol 7, 12.

to female transsexual, who prior to the sex reassignment had a son with her wife. The applicant complained that the restrictions imposed by the Spanish court on the contact arrangements with her son were discriminatory and based on her transsexualism. She based her complaint on Article 8 ECHR in conjunction with Article 14. The Court, however, did not rule in favour of the applicant and decided that there had not been a violation of the Convention and that the Spanish courts' decision was not discriminatory.¹⁰⁹

34. The following sections will set out the Court's rulings regarding legal gender recognition. Since the beginning of the 1990s, the ECtHR has gradually changed its case law in favour of the trans community, widening their protection and increasing equality.

a. B v France

35. The *B v France* case is an important cornerstone in the acceptance for legal change of gender. For the first time the Court held that there had been a violation of Article 8 ECHR in a case concerning the legal recognition of transsexuals. The applicant was a male to female transsexual, born in Algeria and living in France. She had undergone sex reassignment surgery and was living her life as a woman. Yet, her request to legally change her birth certificate to her preferred gender and name was denied by the French courts. Following this decision, she brought the case before the ECtHR, relying mostly on a violation of Article 8 of the Convention. In previous cases¹¹⁰, the Court had strictly held that the refusal to change a person's legal gender did not breach Article 8 of the Convention. The Court noted that although there still remained a uncertainty with regards to the nature of transsexualism and the lack of consensus between member state regarding the legal implications of sex reassignment surgery, it was "*undeniable that attitudes have changed, science has progressed and increasing importance is attached to the problem of transsexualism*".¹¹¹ The Court considered the difference between the English and the French civil status system, whereby the former poses great obstacles preventing birth certificates to be amended, and the latter is intended to be updated throughout a person's life. It also took into account the increasing documents indicating a person's sex, which for the applicant, and trans persons in general, included "*disclosing the discrepancy between their legal*

¹⁰⁹ ECtHR, 30 November 2010, No. 35159/09, P.V./Spain; EUROPEAN COURT OF HUMAN RIGHTS PRESS UNIT, "Factsheet: gender identity issues", March 2018, https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf.

¹¹⁰ ECtHR, 17 October 1986, No. 9532/81, Rees/The United Kingdom; ECtHR, 27 September 1990, No. 10843/84, Cossey/The United Kingdom.

¹¹¹ ECtHR, 25 March 1992, No. 13343/87, B/France, para 48.

sex and their apparent sex".¹¹² For these reasons, the Court decided that the applicant "*finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life*"¹¹³ and that there had indeed been a breach of Article 8 ECHR.¹¹⁴

b. Goodwin and I v UK

36. The applicant, Christine Goodwin, was a male to female transsexual who underwent sex reassignment surgery. She complained of the lack of legal recognition of her change of sex. She held that the United Kingdom violated her rights by refusing to issue her with a new national insurance number, making it possible for employers to trace her identity since her documents still showed her sex as male. She further complained that she would not be eligible for state pension at the age of 60, the age of entitlement for women. She also condemned the refusal of the UK government to allow her to marry her male partner. Finally, she complained that she had to forgo certain advantages, such as her study of choice, if she did not want to provide her birth certificate, which would reveal her gender history. Goodwin relied on the Articles 8, 12, 13 and 14 ECHR.¹¹⁵ The Court held that there had indeed been a violation of Article 8 of the Convention. The applicant had undergone sex reassignment surgery, but was for legal purposes still considered male. This had a grave effect on her personal life when her legal sex was relevant, as is the case for the entitlement for pensions and birth certificates. In order to reach the decision, the Court had to take certain things into account. First, it noted the wide international recognition and growing social acceptance of transsexual persons, as well as the sex reassignment being a recognized treatment. Further, the ECtHR acknowledged the "*numerous and painful interventions involved in [sex reassignment] surgery and the level of commitment and conviction required to achieve a change in social gender role*"¹¹⁶. Therefore, the Court dropped the English *Corbett* test, which held that sex had to be determined "*by the application of chromosomal, gonadal and genital tests where these are congruent and without*

¹¹² ECtHR, 25 March 1992, No. 13343/87, B/France, para 59.

¹¹³ ECtHR, 25 March 1992, No. 13343/87, B/France, para 63.

¹¹⁴ ECtHR, 25 March 1992, No. 13343/87, B/France; EUROPEAN COURT OF HUMAN RIGHTS PRESS UNIT, "Factsheet: gender identity issues", March 2018, https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf; F. EDEL, "Case law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity", *Council of Europe* March 2015, 108-111.

¹¹⁵ S. WHITTLE, *Respect and equality: transsexual and transgender rights*, London, Cavendish Publishing Limited, 2002, 153; COUNCIL OF EUROPE/EUROPEAN COURT OF HUMAN RIGHTS, "Information Note on the Court's case-law No. 44: Christine Goodwin v. the United Kingdom [GC] – 2895/95", July 2002; REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, "Press release issued by the Registrar: Grand Chamber judgment in the case of Christine Goodwin v The United Kingdom", July 2002, REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, "Press release issued by the Registrar: Grand Chamber judgment in the case of Christine Goodwin v The United Kingdom", July 2002, <https://www.jiscmail.ac.uk/cgi-bin/webadmin?A2=trans-academic;2397529c.02>.

¹¹⁶ ECtHR, 11 July 2002, No. 28957/95, Christine Goodwin/The United Kingdom, para 81.

regard to any surgical intervention.”¹¹⁷ It decided that biological factors are not sufficient to determine a person’s sex in later life, stating that:

*“[A] test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender.”*¹¹⁸

The Court then went on saying that “[w]here a State has authorised the treatment and surgery alleviating the condition of a transsexual [...] it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads”.¹¹⁹

37. The Court held that this issue could no longer be believed to fall within the margin of appreciation of a state, and – unanimously – held that there had been a breach of Article 8 of the Convention. As for the other claims, the Court also held that there had been a violation of the right to marry enshrined in Article 12 of the Convention. The applicant also held that Article 14 of the Convention, holding the prohibition against discrimination, had been breached. The Court, however, decided that the issue had been already been examined under Article 8 and that no separate issue arose under Article 14. The Court found no violation of Article 13.¹²⁰ It should, however, be noted that the Court only decided that states must provide legal registration for post-operative transsexual persons, though it did not define the notion of ‘post-operative’. Thus, the *Goodwin* judgement does not include legal recognition rights for trans people who did not undergo medical intervention.¹²¹
38. The case of Christine Goodwin’s case was heard together with the case of another transsexual woman referred to as ‘I’. The Court held in the *I* case that “*the unsatisfactory situation in*

¹¹⁷ ECtHR, 11 July 2002, No. 28957/95, Christine Goodwin/The United Kingdom, para 21.

¹¹⁸ ECtHR, 11 July 2002, No. 28957/95, Christine Goodwin/The United Kingdom, para 100.

¹¹⁹ ECtHR, 11 July 2002, No. 28957/95, Christine Goodwin/The United Kingdom, para 78.

¹²⁰ ECtHR, 11 July 2002, No. 28957/95, Christine Goodwin/The United Kingdom, para 153-165; COUNCIL OF EUROPE/EUROPEAN COURT OF HUMAN RIGHTS, “Information note on the Court’s case-law No. 44: Christine Goodwin v. the United Kingdom [GC] – 2895/95”, July 2002; REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, “Press release issued by the Registrar: Grand Chamber judgment in the case of Christine Goodwin v The United Kingdom”, July 2002, REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, “Press release issued by the Registrar: Grand Chamber judgment in the case of Christine Goodwin v The United Kingdom”, July 2002, <https://www.jiscmail.ac.uk/cgi-bin/webadmin?A2=trans-academic;2397529c.02>.

¹²¹ S. WHITTLE, *Respect and equality: transsexual and transgender rights*, London, Cavendish Publishing Limited, 2002, 156.

which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.¹²² Both cases thus establish that all state parties to the European Convention must provide in the legal recognition of ‘post-operative transsexual’ persons. However, the Court does not specify the modalities for recognition which are consequently for the state parties to decide.¹²³ Further challenges before the Court were therefore inevitable.

c. *L v Lithuania*

39. This case concerned the failure to implement legislation to enable transsexuals to undergo sex reassignment surgery and the inability to change gender in legal documents. The new Civil Code of 2000 introduced the possibility for sex reassignment surgery in Lithuanian legislation. Although the law recognized the right of transsexuals to not only change their gender but also their civil status, there was a gap in the legislation since the law regarding full sex reassignment surgery was yet to be adopted. The Court held that “*the circumstances of the case reveal a limited legislative gap in gender reassignment surgery, which leaves the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity*”¹²⁴, therefore violating Article 8 ECHR.¹²⁵

d. *YY v Turkey*

40. In its previous judgements, the Court had decided that a state’s failure to modify a person’s birth certificate to their preferred gender constitutes a violation the right to private life, protected in Article 8 of the European Convention. The Court has also held that states should provide the necessary legislation and procedures for sex reassignment surgery. In the present case, the Court, for the first time, examined the national requirements which are necessary to access sex reassignment surgery, *in casu* sterilization. The applicant in this case was a Turkish transsexual man, whose gender was registered as female. On 30 September 2005, the applicant started proceedings before the Turkish local court in order to get permission to undergo sex reassignment surgery, which had to be granted by a judge under Article 40 of the Turkish Civil Code. According to this article, a person applying for sex reassignment surgery must provide

¹²² ECtHR, 11 July 2002, No. 25608/94, I/The United Kingdom, para 70.

¹²³ J. M. SCHERPE, “The legal status of transsexual and transgender persons – an introduction”, in J. M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, 3.

¹²⁴ ECtHR, 11 September 2007, No. 27527/03, L/Lithuania, para 59.

¹²⁵ ECtHR, 11 September 2007, No. 27527/03, L/Lithuania; EUROPEAN COURT OF HUMAN RIGHTS PRESS UNIT, “Factsheet: gender identity issues”, March 2018, https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf; F. EDEL, “Case law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity”, *Council of Europe* March 2015, 107-108.

medical reports which prove that they are transsexual. A second prerequisite was the inability to procreate. The court denied granting the authorisation for the sex reassignment surgery because he was not permanently unable to procreate and therefore did not satisfy one of the conditions of eligibility for sex reassignment under Article 40 of the Civil Code. Following this decision, the applicant started proceedings before the European Court. He claimed that the Turkish law violated Article 8 of the European Convention, because the discrepancy between his perception of himself as a man and his physical characteristics had been established in medical reports, yet his request to undergo sex reassignment surgery had been denied because he was not infertile. The Turkish government argued that the regulations regarding sex reassignment surgery came within the sphere of protection of public interests and stressed the irreversible nature of the surgery and the physical and mental risks posed to the persons concerned. It furthermore argued that the requirements were put into place to prevent sex reassignment to become commonplace and prevent it from being misused by certain sections of society, such as the sex industry. The Court accepted the government's reasoning with regards to the protection of the second paragraph of Article 8 of the Convention, and stated that the government had a legitimate aim regarding health-protection. The Court, however, also held that:

“[E]ven assuming that the reason for the rejection of the applicant's initial request to undergo gender reassignment surgery was relevant, the Court considers that it cannot be regarded as sufficient. The interference with the applicant's right to respect for his private life arising from that rejection cannot therefore be considered “necessary” in a democratic society.”¹²⁶

The Court also referred to the *Goodwin* case and stated that although state parties have a wide margin of appreciation regarding the legal requirements governing access to sex reassignment surgery, *“the existence of clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transgender persons but of legal recognition of the new gender identity of post-operative transgender persons”* should prevail, rather than *“a common European approach to the resolution of the legal and practical problems”*.¹²⁷ It further mentions the fact that several member states had recently changed their legislation regarding access to sex reassignment surgery and legal change of gender by abolishing the requirement of infertility. Therefore, the Court decided that by denying the applicant for many years the

¹²⁶ ECtHR, 10 March 2015, No. 14793/08, Y.Y/Turkey, para 121.

¹²⁷ ECtHR, 10 March 2015, No. 14793/08, Y.Y/Turkey, para 108.

possibility of undergoing gender assignment surgery, Turkey had indeed breached the right to private life and there had been a violation of Article 8 of the European Convention.¹²⁸

e. AP, Garçon, Nicot v France

41. On 6 April 2017, the ECtHR delivered its long-awaited judgement in the *AP, Garçon and Nicot* case. The case concerned the joint application of three transsexual women. They wanted to change their sex and forenames on their birth certificate, but this request was denied by the French court. At the time of the relevant facts, the French law required two conditions in order to change a person's birth certificate, namely proof of the real existence and persistence of the 'syndrome of transsexuality' and the 'irreversibility of the transformation of the bodily appearance' to the opposite sex.¹²⁹ The applicants relied on a violation Article 8 ECHR, stating that the authorities had infringed the respect for their private life by making legal gender change conditional on undergoing an operation involving a high probability of sterilization. Although the French government argued that the condition of irreversibility did not necessarily entailed surgery leading to a person's sterilization, the Court nevertheless aligned it with "*sterilisation surgery or on treatment which, on account of its nature and intensity, entailed a very high probability of sterility.*"¹³⁰ Considering that the issue of sterilization goes directly to a person's physical integrity, the Court decided that states could only have a small margin of appreciation. The Court also pointed out that Article 8 encompasses a right to personal autonomy, of which the freedom of defining their own gender identity is a fundamental aspect. Moreover, the Court held that:

*"Making the recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to respect for their physical integrity as protected by that provision and also by Article 3 of the Convention."*¹³¹

¹²⁸ ECtHR, 10 March 2015, No. 14793/08, Y.Y/Turkey; X, "The Y.Y. v. Turkey case and trans individuals' gender recognition", 24 April 2015, <https://strasbourgobservers.com/2015/04/24/the-y-y-v-turkey-case-and-trans-individuals-gender-recognition/>; REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, "Press release: Refusal to authorize transsexual to have access to gender reassignment surgery breached right to respect for private life", 10 March 2015.

¹²⁹ P. CANNOOT, "A.P., Garçon and Nicot v. France: the Court draws a line for trans rights", 5 May 2017, <https://strasbourgobservers.com/2017/05/05/a-p-garcon-and-nicot-v-france-the-court-draws-a-line-for-trans-rights/>.

¹³⁰ ECtHR, 6 April 2017, No. 79885/12, A.P., Garçon, Nicot/France, para 120.

¹³¹ ECtHR, 6 April 2017, No. 79885/12, A.P., Garçon, Nicot/France, para 131.

42. Therefore, the Court decided that there had indeed been a violation of Article 8 ECHR regarding the obligation to establish the irreversible nature of the change in their appearance, or more specifically sterilization. With regards to the condition of presenting proof of the transsexuality, however, the Court took into account the wide margin of appreciation of states and held that *“this requirement is aimed at safeguarding the interests of the persons concerned in that it is designed in any event to ensure that they do not embark unadvisedly on the process of legally changing their identity”*¹³². Although the Court acknowledged that this condition may contribute to the continued stigmatization of trans persons, it also accepted that it guaranteed that persons do not erroneously change their legal gender, and considered that it did not violate Article 8 ECHR.¹³³
43. The decision of the ECtHR is in line with Principle 3 of the Yogyakarta Principles which holds that *“[n]o one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.”* Some national courts reached this decision before the ECtHR’s judgement. In February 2009 already, the Austrian Administrative High Court ruled that genital surgery was not a prerequisite for gender, and subsequently, name change.¹³⁴ The High Court was not able to establish any need for this specific requirement, leading to the decision that the legislator had to abolish it.¹³⁵

2. European Court of Human Rights only for transsexuals?

44. The European Court of Human Rights has tried to tackle several issues regarding trans persons. It has decided that states should provide the possibility for trans persons to undergo full sex reassignment surgery and that this surgery should be covered by insurance plans as medically necessary treatment¹³⁶. Furthermore, the Court held that states should recognize the legal change of gender in official documents¹³⁷, and has more recently decided on the prerequisites for legal

¹³² ECtHR, 6 April 2017, No. 79885/12, A.P., Garçon, Nicot/France, para 141.

¹³³ ECtHR, 6 April 2017, No. 79885/12, A.P., Garçon, Nicot/France; EUROPEAN COURT OF HUMAN RIGHTS PRESS UNIT, “Factsheet: Gender identity issues”, April 2017; P. CANNOOT, “A.P., Garçon and Nicot v. France: the Court draws a line for trans rights”, 5 May 2017, <https://strasbourgobservers.com/2017/05/05/a-p-garcon-and-nicot-v-france-the-court-draws-a-line-for-trans-rights/>.

¹³⁴ Verwaltungsgerichtshof (A), 27 February 2009, nr. 2008/17/0054.

¹³⁵ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Issue paper: human rights and gender identity”, 29 July 2009, <https://rm.coe.int/16806da753>, 8.

¹³⁶ ECtHR, 12 June 2003, No. 35968/97, Van Kück/Germany.

¹³⁷ ECtHR, 11 July 2002, No. 28957/95, Christine Goodwin/The United Kingdom.

change of gender¹³⁸.¹³⁹ However, the case law of the Court merely focusses on trans persons who intended to undergo, are undergoing or already underwent sex reassignment treatment. Although the Court has granted legal recognition to transitioned transsexuals, it has remained silent on trans persons who do not wish to undergo sex reassignment treatment. Following the Court's case law, pre-operative transsexuals are in an intermediate position, since recognition of their gender is dependent on sex reassignment surgery. Transgender and other gender-defying persons thus also find themselves in this intermediate legal position.¹⁴⁰

45. Similarly, the European Court of Justice (ECJ) has accepted gender identity as a ground for discrimination. Although the ECJ uses a closed set of discrimination grounds, it has explicitly ruled that *“the scope of the directive is also such as to apply to discrimination arising [...] from the gender reassignment of the person concerned”*¹⁴¹, thereby expanding the scope of the Directive on equal treatment between men and women in employment¹⁴². The ECJ, thus, considers gender identity as discrimination of the ground of sex which it has affirmed in later cases¹⁴³.¹⁴⁴ However, in accordance with the case law of the ECtHR, this ground of discrimination only applies to trans persons who intent to undergo, are undergoing or already underwent sex reassignment surgery. The European Union Agency for Fundamental Rights (EU FRA) stated in its report on discrimination on the grounds of sexual orientation that:

“[S]uch protection from discrimination could easily develop into a broader protection from discrimination on grounds of ‘gender identity’, encompassing not only transsexuals, but also other categories, such as cross dressers and transvestites, people who live permanently in the gender

¹³⁸ ECtHR, 10 March 2015, No. 14793/08, Y.Y/Turkey; ECtHR, 6 April 2017, No. 79885/12, A.P., Garçon, Nicot/France.

¹³⁹ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Issue paper: human rights and gender identity”, 29 July 2009, <https://rm.coe.int/16806da753>, 4.

¹⁴⁰ D. A. GONZALEZ-SALZBERG, “The accepted transsexual and the absent transgender: a queer reading of the regulation of sex/gender by the European Court of Human Rights”, *American University International Law Review* 2014, Vol. 29(4), 825-827.

¹⁴¹ ECJ, 30 April 1996, Case C-13/94, P./S. and Cornwall City Council, para 20.

¹⁴² Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31976L0207>.

¹⁴³ ECJ, 7 January 2004, Case C-117/01, K.B./National Health Service Pensions Agency, Secretary of State for Health; ECJ, 27 April 2006, Case C-423/04, Sarah Margaret Richards/Secretary of State for Work and Pensions.

¹⁴⁴ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, “Homophobia and discrimination on the grounds of sexual orientation in EU member states, part I legal analysis”, 2009, <http://fra.europa.eu/en/publication/2010/homophobia-and-discrimination-grounds-sexual-orientation-eu-member-states-part-I>, 129-130.

‘opposite’ to that of their birth certificate without any medical intervention, and all those people who wish to present their gender differently.’¹⁴⁵

3. A move towards self-determination

46. Despite the Court’s rulings there is still a long way to go for states to fully protect trans rights. Today, 33 European countries still require a diagnosis of mental health, 14 require sterility and 26 require a medical intervention.¹⁴⁶ Yet, gradually things are changing. In April 2018, the Portuguese parliament passed a reform of the Portuguese legislation regarding legal gender recognition. The reform bases legal gender recognition on self-determination. This law allows trans persons from the age of 16 to legally change their gender without the need of a medical report. This makes Portugal only the sixth European state to adopt a self-determination system of gender recognition after Malta, Norway, Denmark, Ireland and Belgium.¹⁴⁷

4. Legal gender recognition in other regions

47. A UNDP review of nine Asian countries found that in most Asian countries, the vast majority of trans people cannot obtain any official documents that reflect their gender identity. Yet, in parts of the region there has been progress in guaranteeing the right to legal gender recognition. In 2007, the Supreme Court of Nepal accepted the possibility to recognize a third gender in the citizen documents. In that same year, the Supreme Court of Pakistan ruled that a third gender column should be added to national identity cards for trans persons, which gave them the right to register to vote. In 2014, the Supreme Court of India directed India’s government to recognize trans people as a third gender. It furthermore called for specific health and welfare programmes in order to support the needs of trans people.¹⁴⁸ Despite these court rulings, implementation measures have been inconsistent. India is the only South Asian country whose Supreme Court recognized trans people’s right to identity as male, female or as a third gender. However, this is susceptible to eligibility criteria, including sex reassignment surgeries in order to amend passport details. Nepal’s government has gradually set out a system for legal change

¹⁴⁵ Ibid 24.

¹⁴⁶ TGEU, Trans rights Europe map & index 2018, 14 May 2018, <https://tgeu.org/trans-rights-map-2018/>.

¹⁴⁷ BBC, “Portugal’s parliament approves new legal gender change law”, 13 April 2018, <https://www.bbc.com/news/world-europe-43740417>; TGEU, “Portugal votes for self-determination”, 13 April 2018, <https://tgeu.org/portugal-votes-for-self-determination/>.

¹⁴⁸ UNDP, “Stigma, discrimination, violence and human rights”, <http://www.undp.org/content/undp/en/home/search.html?q=stigma+discrimination+violence+and+human+rights>, 34.

of gender, but it remains focused solely on a third gender identity, with no option for trans women to be recognized as female or trans men to be recognized as male.¹⁴⁹

48. Regulations regarding legal change of gender in South-American countries greatly vary. For example, legal change of gender is not possible in Peru and Venezuela.¹⁵⁰ Argentina, on the other hand, passed a Gender Identity Law¹⁵¹ in 2012, which assures access to legal gender recognition to trans people over the age of 18 without judicial, psychiatric or medical intervention. Persons younger than 18 can do so with the consent of their legal representatives or through summary proceedings before a judge. Furthermore, it provides in the free and voluntary health care for transition. Mexico changed its national legislation in 2015, adopting similar provisions as Argentina.¹⁵²
49. In September 2017, the South-African Western Cape High Court decided that divorce is not a precondition for legal change of gender. In October of that last year, the High Court of Botswana ruled that a transgender man should be allowed to hold official documents that represent his gender identity, which ended a seven year-long case for legal gender recognition.¹⁵³ Yet, legal change of gender is still not possible in many African states, for example in Angola and Namibia.¹⁵⁴
50. Laws and policies regarding legal change of gender in the United States of America vary from state to state. Each state has its own policy and there are great differences between states. Access to sex reassignment surgery is not always easy, yet more than a quarter of US states require trans individuals to undergo this surgery before legal change of their gender is possible. Certain states do not allow legal change of gender under any circumstance, being Idaho, Ohio and Tennessee. Other states do not have specific laws regulating the legal change of gender, but will do so if the person has undergone sex reassignment surgery. California, New York, Oregon, Vermont, Washington and the District of Columbia do require surgery as a precondition for

¹⁴⁹ UNDP and APTN, “Legal gender recognition: a multi-country legal and policy review in Asia”, 2017, http://www.aidsdatahub.org/sites/default/files/publication/UNDP_APTN_Legal_Gender_Recognition_2017.pdf, 3.

¹⁵⁰ TGEU TvT, “Legal gender recognition: change of gender”, 2018, <https://transrespect.org/en/map/pathologization-requirement/#>.

¹⁵¹ Ley 26.743 de identidad de género of 9 May 2012, <http://www.buenosaires.gob.ar/derechoshumanos/convivencia-en-la-diversidad/normativas/ley-26743-de-identidad-de-genero>.

¹⁵² N. GHOSHAL and K. KNIGHT, “Rights in transition: making legal recognition for transgender people a global priority”, 2016, <https://www.hrw.org/world-report/2016/rights-in-transition>.

¹⁵³ HUMAN RIGHTS WATCH, “Human Rights Watch country profiles: sexual orientation and gender identity”, 16 April 2018, <https://www.hrw.org/video-photos/interactive/2018/04/16/sexual-orientation-gender-identity-country-profiles>.

¹⁵⁴ TGEU TvT, “Legal gender recognition: change of gender”, 2018, <https://transrespect.org/en/map/pathologization-requirement/#>.

legal change of gender, but persons are usually required to present a doctor's certificate stating that the person had "appropriate clinical treatment".¹⁵⁵

§2. Social discrimination

51. Trans women often suffer from social exclusion and stigma, resulting in their marginalization from society. Bruckert and Chabot understand stigma as "*discrediting and 'marking' people as 'other' – as being, in some very significant way, 'not like us'*"¹⁵⁶, which consequently leads to discrimination. The existing stigma on trans women has far reaching consequences on many aspects of their day to day life. This section will focus on how stigma expresses itself through discrimination. In principal, international human rights law protects everyone without discrimination. Although gender identity is usually not a specific ground for discrimination in international treaties, those treaties do apply to all persons and gender identity can be used as a ground for discrimination because of their open non-discrimination clauses. For example, CESCR acknowledged that trans women often face discrimination in schools or in the workplace and stated that gender identity is recognized as among the prohibited grounds of discrimination (*supra* nr. 21). Despite the acknowledgment by the international community that discrimination based on gender identity or expression is not tolerated, trans women still suffer from bias and discrimination at work, at home, in education and in health services. This includes being fired from their jobs, being bullied at school and being rejected by their families. The transphobic environment in which trans women find themselves has a great impact on their lives, leading to further marginalization and exclusion from society.

A. Education

52. Discrimination and bias is an issue that trans women face throughout their lives. Forms of discrimination may already occur at school and higher education of young trans girls. All forms of discrimination and violence constitute an obstacle to children's and young persons' right to quality education, which is protected in Article 26 UDHR. The first two paragraphs of this article proclaim that:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional

¹⁵⁵ A. RAPPOLE, "Trans people and legal recognition: What the U.S. Federal Government can learn from foreign nations", *Md. J. Int'l L.* 2015, Vol. 30(1), 196-198.

¹⁵⁶ C. BRUCKERT and F. CHABOT, "Challenges: Ottawa-area sex workers speak out", *POWER* 2014, 79.

education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Education is a fundamental right. It is essential for a person's human, social and economic development. It is a tool to empower marginalized groups and gives them an opportunity to develop their full potential. The right to education is also linked to many other human rights, such as the right to employment and the right to housing. In the words of the CESCR:

*“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”*¹⁵⁷

The right to education is protected in various international and regional treaties as well as in most national constitutions. For example, education as a fundamental right is enshrined in Article 13 ICESCR, Article 28 of the Convention of the Right of the Child¹⁵⁸ (CRC) and in the UNESCO Convention against Discrimination in Education¹⁵⁹. This right has also been reaffirmed in treaties addressing specific groups, such as in the Article 10 CEDAW.¹⁶⁰ In principle, economic, social and cultural rights are subject to progressive realization. However, the CESCR stated that:

*“The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.”*¹⁶¹

¹⁵⁷ General Comment No. 13: The right to education (Article 13 of the Convention) (8 December 1999), *UN Doc. E/C.12/1999/10* (1999), para 1.

¹⁵⁸ Convention on the Rights of the Child of 20 November 1989, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

¹⁵⁹ UNESCO Convention against Discrimination in Education of 14 December 1966, http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹⁶⁰ RIGHT TO EDUCATION, “Understanding education as a right”, <http://www.right-to-education.org/page/understanding-education-right>.

¹⁶¹ General Comment No. 13: The right to education (Article 13 of the Convention) (8 December 1999), *UN Doc. E/C.12/1999/10* (1999), para 31.

53. Although the right to education is protected in various human rights instruments and the international community has acknowledged its importance, the realization of this right for trans students is not always guaranteed. A study carried out by the EU FRA on discrimination and violence against the LGBT community showed that 60 percent of LGBT students had personally experienced negative comments or behaviour, and an alarming 80 percent had witnessed this towards another student who was thought to be LGBT.¹⁶² The National Discrimination Survey on trans persons carried out in the United States also reported alarming rates of negative conduct, with 78 percent of respondents having experienced harassment, 35 percent physical assault and 12 percent said that they were a victim of sexual violence at school.¹⁶³ A report issued by UNESCO shows that discrimination and violence against children and young people who do not conform to society's sex and gender stereotypes are a worldwide problem.¹⁶⁴ This report collected the results of several national and regional studies on violence against LGBT students and gives an overview of the situation in 106 countries. Trans students are a vulnerable group because they defy these stereotypes and do not conform to society's expectations of masculinity and femininity. The failure to react to the bullying by other people is also linked to the cultural beliefs about gender roles. It should not be surprising that trans students report a higher prevalence of bullying and violence compared to their non-trans peers. A study in New-Zealand showed that trans persons are five times more likely to be bullied in school.¹⁶⁵ They do not only experience violence from other students, but also from teachers and other academic staff.¹⁶⁶ Examples of institutionalized discrimination in education are forced dress codes or inappropriate toilet facilities.¹⁶⁷ Nadal and colleagues described how trans students may experience microaggressions. Microaggressions are *"brief and commonplace daily verbal, behavioural or environmental indignities, whether intentional or unintentional, that*

¹⁶² EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, "Memo: FRA's EU LGBT Survey", 17 May 2013, <http://fra.europa.eu/en/event/2013/presenting-findings-largest-ever-lgbt-hate-crime-and-discrimination-survey>, 2.

¹⁶³ J. M. GRANT, L. A. MOTTET, J. TANIS, J. HARRISON, J. L. HERMAN and M. KEISLING, "Injustice at every turn: a report of the National Discrimination Survey", 2011,

https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 33.

¹⁶⁴ UNESCO, "Out in the open: education sector responses to violence based on sexual orientation and gender identity/expression", 2016, <http://unesdoc.unesco.org/images/0024/002447/244756e.pdf>.

¹⁶⁵ M. F. G. LUCASSEN, T. C. CLARK, and E. MOSELEN, E. ROBINSON, E.M. and THE ADOLESCENT HEALTH RESEARCH GROUP, "Youth'12 The health and wellbeing of secondary school students in New Zealand: results for young people attracted to the same sex or both sexes", Auckland, The University of Auckland, 2014, <https://www.fmhs.auckland.ac.nz/assets/fmhs/faculty/ahrg/docs/Youth'12%20Young%20People%20Attracted%20to%20the%20Same%20or%20Both%20Sexes%20Report.pdf>.

¹⁶⁶ UN FREE & EQUAL, "Bullying and violence in schools", <https://www.unfe.org/wp-content/uploads/2017/05/Bullying-and-Violence-in-School.pdf>.

¹⁶⁷ UNDP, "Stigma, discrimination, violence and human rights", <http://www.undp.org/content/undp/en/home/search.html?q=stigma+discrimination+violence+and+human+rights>, 40; RIGHT TO EDUCATION, "The right to education of transgender people", 17 November 2017, <http://www.right-to-education.org/news/right-education-transgender-people>.

communicate hostile, derogatory, or negative slights and insults toward members of oppressed groups".¹⁶⁸ This is detrimental to trans students' education and, consequently, also their employment prospects. Trans students often feel unsafe at school, achieve lower academic results, miss school or drop out completely. According to a study held in Argentina in 2007, 49 percent of trans students dropped out of school due to transphobic bullying or being excluded by school authorities.¹⁶⁹ This education gap causes social marginalization and poverty among the trans community.¹⁷⁰ There is a clear correlation between the mistreatment of trans students at schools and lower income levels in their future lives. Moreover, educational attainments are no guarantee to be protected from poverty since lower incomes are even common among trans college graduates. Furthermore, a correlation can also be found between harassment at schools and homelessness. Almost half of the respondents of the National Discrimination Survey who said to have left school due to harassment also said to have been homeless at least once in their life.¹⁷¹ Not only their academic performances suffer from transphobic violence and bullying. The consequential isolation and stigmatization of trans students also negatively affects their physical and mental health and may lead to depression and suicide attempts.¹⁷² Trans students may experience increased risk of anxiety, fear, stress, loss of confidence, low self-esteem, loneliness, self-harm and depression. Studies have shown that trans persons are five times more likely to have thought about, considered or attempted suicide, than their cisgender peers. As a form of self-protection, many trans students choose to hide their true gender identity within educational settings, leading to self-censorship.¹⁷³

54. Many UN bodies have expressed their concern regarding the discrimination and harassment of trans students, for example the HRC, the CESCR and the Committee on the Rights of the Child

¹⁶⁸ K. L. NADAL, "Preventing racial, ethnic, gender, sexual minority, disability, and religious microaggressions: recommendations for promoting positive mental health", *Prevention in Counseling Psychology: Theory, Research, Practice and Training* 2008, Vol. 2, 23.

¹⁶⁹ UN FREE & EQUAL, "Bullying and violence in schools", <https://www.unfe.org/wp-content/uploads/2017/05/Bullying-and-Violence-in-School.pdf>; UNESCO, "Out in the open: education sector responses to violence based on sexual orientation and gender identity/expression", 2016, <http://unesdoc.unesco.org/images/0024/002447/244756e.pdf>, 29.

¹⁷⁰ UNDP, "Stigma, discrimination, violence and human rights", <http://www.undp.org/content/undp/en/home/search.html?q=stigma+discrimination+violence+and+human+rights>, 40.

¹⁷¹ GRANT et al, "Injustice at every turn: A report of the National Discrimination Survey", 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 33.

¹⁷² Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc. 1/HRC/19/41* (2011), para 58-60.

¹⁷³ UN FREE & EQUAL, "Bullying and violence in schools", <https://www.unfe.org/wp-content/uploads/2017/05/Bullying-and-Violence-in-School.pdf>; UNESCO, "Out in the open: education sector responses to violence based on sexual orientation and gender identity/expression", 2016, <http://unesdoc.unesco.org/images/0024/002447/244756e.pdf>, 30.

(CRC), but also UNESCO and the OHCHR.¹⁷⁴ They urge for states to adopt effective legislation prohibiting discrimination based on gender identity and to strengthen measures combating *de facto* discrimination. They also call for campaigns raising awareness on violence and discrimination against trans students, and aimed at combating the existing stereotypes. This includes providing adequate sexual education in schools, emphasizing diversity.¹⁷⁵ In the words of the Special Rapporteur on the right to education:

*“In order to be comprehensive, sexual education must pay special attention to diversity, since everyone has the right to deal with his or her own sexuality without being discriminated against on grounds of sexual orientation or gender identity.”*¹⁷⁶

1. Good practice

55. Although legal frameworks generally fail to protect trans students from bullying and discrimination there are a few examples of good practice that safeguard the right to education of trans persons. For instance, in 2015, the Japanese Ministry for Education, ordered schools to accept trans students according to their preferred gender. In that same year, a Brazilian government council on LGBT rights adopted a resolution which allowed trans students to attend both public and private schools using their preferred names and pronouns, and ask to be referred as such. They are also allowed to wear the uniform of their choice and have access to toilet facilities of their preferred gender.¹⁷⁷ More recently, the Chilean Ministry of Education has taken steps to explicitly address discrimination against trans students. It sent out guidelines to schools to combat discrimination and promote trans rights and foster acceptance and equality. The guidelines forbid discrimination based on gender identity by not tolerating any kind of

¹⁷⁴ Concluding observations of the Committee on Economic, Social and Cultural Rights: Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant – Poland (2 December 2009), *UN Doc.* E/C.12/POL/CO/5 (2009), paras 12-13; Concluding observations of the Human Rights Committee: Consideration of reports submitted by States Parties under article 40 of the Covenant – Mexico (17 May 2010), *UN Doc.* CCPR/C/MEX/CO/5 (2010), para 21; General comment No. 13: The right of the child to freedom from all forms of violence (18 April 2011), *UN Doc.* CRC/C/GC/13 (2011), paras 60 and 72; UN FREE & EQUAL, “Bullying and violence in schools”, <https://www.unfe.org/wp-content/uploads/2017/05/Bullying-and-Violence-in-School.pdf>.

¹⁷⁵ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc.* 1/HRC/19/41 (2011), para 59.

¹⁷⁶ Report of the United Nations Special Rapporteur on the right to education (23 July 2010), *UN Doc.* A/65/162 (2010), para 23.

¹⁷⁷ UNDP, “Stigma, discrimination, violence and human rights”, <http://www.undp.org/content/undp/en/home/search.html?q=stigma+discrimination+violence+and+human+rights>, 40.

harassment. The guidelines also allow students to wear the uniform of their choice and use the toilets of their preferred gender.¹⁷⁸

56. In general, the discrimination in education against trans students is more and more challenged. Not only by trans students and their parents, but also lawmakers and legislators are more willing to strengthen the protection of the right to education. There has also been a tendency towards court rulings in favour of trans persons.¹⁷⁹ An example is the case of a trans student who brought a case against her high school in Colombia for denying her admission based on her gender identity. She claimed that her fundamental right to education was violated. The lower court decided that homosexuality was abnormal and that the free personal development was not absolute and that the applicant should therefore conform to the institute's rules. The Constitutional Court, however, overruled this decision and upheld her right to education. The Court directed the school to accept her according to her gender identity. Moreover, following this ruling the Ministry of Internal Affairs issued decree 1227 of 2015¹⁸⁰, which allows trans persons to officially change their sex and name without a prior psychiatric evaluation.¹⁸¹

B. Employment

57. The importance of employment cannot be underestimated. Not only is paid work essential to support a person and their family, it also contributes to the sense of accomplishment and dignity.¹⁸² The right to work is a fundamental right, protected in various human rights instruments. Article 23 UDHR, paragraph one and two state that:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.

¹⁷⁸ RIGHT TO EDUCATION, "The right to education of transgender people", 17 November 2017, <http://www.right-to-education.org/news/right-education-transgender-people>.

¹⁷⁹ Ibid.

¹⁸⁰ Decreto 1227/2015 por el cual se adiciona una sección al Decreto número 1069 de 2015, Único Reglamentario del Sector Justicia y del Derecho, relacionada con el trámite para corregir el componente sexo en el Registro del Estado Civil of 4 June 2015, <http://www.suin-juriscal.gov.co/viewDocument.asp?ruta=Decretos/30019850>.

¹⁸¹ UNDP, "Stigma, discrimination, violence and human rights", <http://www.undp.org/content/undp/en/home/search.html?q=stigma+discrimination+violence+and+human+rights>, 41; OUTRIGHT, "The situation for trans people in Colombia", 23 November 2016, <https://www.outrightinternational.org/content/situation-trans-people-colombia>.

¹⁸² GRANT et al, "Injustice at every turn: a report of the National Discrimination Survey", 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 50.

The right to work is also protected in the ICESCR. Article 6 ICESCR in conjunction with Article 2(2) ICESCR stipulates a right “*of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right*” “*without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*”¹⁸³ In General Comment 18, the CESCR highlights the obligation of states to respect the right to work. It held that states should “*refrain from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups [...].*”¹⁸⁴ Furthermore, according to the Committee “*any discrimination in access to the labour market or to means and entitlement for obtaining employment constitutes a violation of the Covenant.*”¹⁸⁵

58. Despite the protection of the right to employment in international human rights law, trans women are not seldom denied these basic rights. Those who identify as trans, often face great discrimination in the workplace. Studies in the United States showed that almost half of surveyed trans persons has never been offered a job while living openly as trans. Moreover, the unemployment rate among trans women is twice as high as for cisgender persons.¹⁸⁶ The high unemployment rate goes hand in hand with a higher rate of poverty and homelessness. According to the National Transgender Discrimination Survey, a trans American is four times more likely to have a household income of less than \$10,000 per year compared to the general population. One in five of surveyed trans persons were homeless, due to unemployment, poverty and housing discrimination. Even when having a job, trans women may experience difficulties and hostile work environments. 90 percent of the persons that were surveyed admitted to experience harassment and discrimination on the job. This includes anti-trans jokes and remarks or verbal and physical harassment. Trans women may also experience discriminatory consequences, such as negative evaluations, missed promotions and unfair terminations of their employment contracts. Almost half of the respondents said that they had experienced adverse

¹⁸³ General Comment No. 18: The right to work. Article 6 of the International Covenant on Economic, Social and Cultural Rights (24 November 2005), *UN Doc. E/C.12/GC/18* (2006), para 1.

¹⁸⁴ *Ibid* para 23.

¹⁸⁵ *Ibid* para 33; Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc. 1/HRC/19/41* (2011), para 51.

¹⁸⁶ MAKE THE ROAD NEW YORK, “Transgender need not apply: a report on gender identity job discrimination”, March 2010 (updated May 2010), <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.pt/&httpsredir=1&article=1020&context=institutes>, 4; MOVEMENT ADVANCEMENT PROJECT, CENTER FOR AMERICAN PROGRESS, HUMAN RIGHTS CAMPAIGN and NATIONAL CENTER FOR TRANSGENDER EQUALITY, “A broken bargain for transgender workers”, September 2013, <https://www.lgbtmap.org/file/a-broken-bargain-for-transgender-workers.pdf>, 14; A. ATTIA, “Explicit equality: the need for statutory protection against anti-transgender employment discrimination”, *Southern California Interdisciplinary Law Journal* 2016, Vol. 25(151), 151.

job actions because they are trans, with 26 percent losing their job directly due to their gender identity. A majority of the respondents who lost their jobs due to bias reported that they were still unemployed, which suggests that they were unable to find new employment. This shows that discrimination against trans women is also present in the hiring processes.¹⁸⁷ Nadal and colleagues did research on trans discrimination in employment and also found that potential employers are reluctant to hire trans women.¹⁸⁸ These percentages and the experienced discrimination is also highly influenced by race. According to the National Survey, the discrimination in the workplace is even more pervasive for black, Latino and Latina, American Indian and multiracial trans persons. This sometimes results in percentages twice or three times as high.¹⁸⁹

59. Furthermore, harassment in the workplace is a great issue for trans women. An alarming 90 percent of the respondents said to have experienced harassment one way or another. Not only do they face harassment and discrimination directly from co-workers and superiors, they also sometimes feel forced to hide their true gender identity in order to stay protected from discrimination. The manifestations of these harassments are numerous. They range from verbal and physical violence, to co-workers using the wrong pronouns and names repeatedly and on purpose. Furthermore, trans persons are sometimes forced to present themselves as the opposite gender to keep their jobs, were asked inappropriate questions about their gender identity and surgical status or they are not allowed to use the toilets of their preferred gender.¹⁹⁰ Although discrimination remains a great issue for trans women, and many of them delay or hide their transition, the great majority of respondents claimed that they felt more comfortable when living full-time in their preferred gender and noticed an improvement of their performance at work. Yet, this does not mean that those who felt more comfortable did not experience harassment at the workplace. Indeed, 51 percent of the respondents who said their job performance improved after transitioning also reported being harassed.¹⁹¹

¹⁸⁷ GRANT et al, “Injustice at every turn: A report of the National Discrimination Survey”, 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 53-54.

¹⁸⁸ K. L. NADAL, V. VARGAS, V. METERKO, S. HAMIT and K. MCLEAN, “Transgender female sex workers: personal perspectives, gender identity development, and psychological processes”, in M. A. PALUDI (ed), *Managing diversity in today’s workplace: strategies for employees and employers: Vol. 1. Gender, race, sexual orientation, ethnicity, and power*, Santa Barbara, Praeger, 2012, 132.

¹⁸⁹ Ibid 151-152.

¹⁹⁰ GRANT et al, “Injustice at every turn: A report of the National Discrimination Survey”, 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 56-62.

¹⁹¹ Ibid 63-64.

60. A recent report carried out in the United Kingdom showed once more how prejudice against trans women impedes their chances of finding employment. According to this survey, a third of UK employers are less likely to hire a trans worker. Furthermore, only three percent of employers have sufficient equality procedures for trans persons in the workplace.¹⁹² The British Social Attitudes Survey also showed that people are more transphobic than they think. Despite the large majority claiming that they are not prejudiced against trans persons “at all”, only a little over 40 percent think trans persons should “definitely” be teaching children or be police officers. Half of those trans women who manage to find employment hide their trans status, either by delaying their transition or they transitioned earlier and are able to hide their gender history. Furthermore, even when trans women are able to be out at work, not all work available to them is good work or work they are qualified for. Examples are low-paying and anonymous jobs such as working at call centres.¹⁹³ Sausa and colleagues found that trans women who looked more biologically female and were less frequently recognized as being trans had a higher chance of finding and keeping employment outside of sex work and were less susceptible to stigma.¹⁹⁴ Yet, physical transition is expensive and trans women depend on employment to finance the treatment, which creates a vicious circle: the more you look like society’s idea of a women, the more likely you are to find employment.¹⁹⁵
61. It is thus clear that discrimination exists at all levels of the employment process, starting with recruitment but also regarding job advancing opportunities. Most trans women find that their job opportunities are limited to beauticians, entertainers or, what this thesis focuses on, sex work. Legal gender recognition is also important with regards to the employment issue. It enables and empowers trans persons to apply for jobs that they are qualified for and prevents confusion.¹⁹⁶ Employment is of crucial importance for trans women. It helps build financial stability and

¹⁹² R. CLARKE, “Transphobia rife among UK employers, says report”, 18 June 2018, <http://www.hrreview.co.uk/hr-news/diversity-news/transphobia-rife-among-uk-employers-as-1-in-3-wont-hire-a-transgender/111393>.

¹⁹³ S. FAYE, “The fight for trans equality must be recognized as a class struggle”, *The Guardian* 25 June 2018, https://www.theguardian.com/commentisfree/2018/jun/25/trans-equality-class-struggle-obsessive-arguments-boundaries-identity?utm_source=esp&utm_medium=Email&utm_campaign=Opinion+UK+connected&utm_term=279173&subid=13816887&CMP=ema_opinionconnectuk.

¹⁹⁴ L. A. SAUSA, J. KEATLEY, and D. OPERARIO, “Perceived risks and benefits of sex work among transgender women of color in San Francisco”, *Archives of Sexual Behavior* 2007, 36, 773.

¹⁹⁵ S. FAYE, “The fight for trans equality must be recognized as a class struggle”, *The Guardian* 25 June 2018, https://www.theguardian.com/commentisfree/2018/jun/25/trans-equality-class-struggle-obsessive-arguments-boundaries-identity?utm_source=esp&utm_medium=Email&utm_campaign=Opinion+UK+connected&utm_term=279173&subid=13816887&CMP=ema_opinionconnectuk.

¹⁹⁶ UNDP, “Stigma, discrimination, violence and human rights”, <http://www.undp.org/content/undp/en/home/search.html?q=stigma+discrimination+violence+and+human+rights>, 41-42.

opens access to housing and health care. This issue is especially striking in states where sex reassignment treatment is not covered by a person's health insurance, thus making the income from employment the only way for trans persons to pay for their specific health care.¹⁹⁷ Given the existing prejudice towards trans women, however, they are often pushed to the outer circle of society and make up one of the most marginalized groups. Due to the few employment options and, consequently, limited economic resources, many trans women turn to the sex work industry for survival (*infra* Chapter III).

C. Housing

62. Housing is another vital need in people's life. However, trans women also face discrimination when seeking housing or risk being subject to eviction because of their transition. Housing discrimination combined with family rejection (*infra* D) causes high rates of homelessness among the trans population, and especially among the younger population. A study showed that almost 20 percent of the respondents had experienced refusal of housing due to their gender identity, and 11 percent had been evicted from their homes for that reason. More than half of the respondents who were homeless at the time of the study reported harassment when attempting to access homeless shelters, either by being refused access or by being sexually and physically assaulted by staff and other residents. In case of gender specific shelters, trans women are often housed in a gendered space they do not identify with. Homeless trans women find themselves exposed to assault in public places, violence by police and health problems, such as higher rates of HIV infection.¹⁹⁸

D. Family rejection

63. Another key factor adding to the marginalization of trans women is the lack of family support. Unlike other stigmatized groups – for example based on race, ethnicity or religion –, trans women and their family members do not often have a shared stigmatized identity. Other stigmatized groups can rely on the primary group support. Primary group members are people to whom someone is closely related and who they consider influential in their lives, called

¹⁹⁷ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Issue paper: human rights and gender identity", 29 July 2009, <https://rm.coe.int/16806da753>, 12.

¹⁹⁸ GRANT et al, "Injustice at every turn: a report of the National Discrimination Survey", 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 106-121; PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, "La discrimination à l'encontre des personnes transgenres en Europe", 2 April 2015, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=55b241eb4>, 8-9.

significant others.¹⁹⁹ Primary group support, thus, refers to the support by a significant other who has experienced similar stigma, which is often absent in the case of trans persons.²⁰⁰ Family rejection is a negative change in the relationship between the trans woman and their spouse or partner, and their family. This can manifest itself in various ways, such as exclusion from family homes, disinheritance, prevention from going to school, being sent to psychiatric institutions and being forced to marry or relinquish their children.²⁰¹ According to a study by Klein and Golub on family rejection, more than half of the respondents (54 percent) experienced no or a low level of family rejection. Yet, 31 percent experienced a moderate amount of rejection, and 14 percent reported that they felt highly rejected by their family after coming out.²⁰² Another study of the Philippines and Thailand showed that 40 percent of Filipina trans women and 21 percent of Thai trans women experienced paternal rejection.²⁰³ Family rejection is proven to be correlated with several negative consequences. Firstly, the study showed that trans women who feel rejected by their family, are almost 3,5 times more likely to commit or attempt suicide. Furthermore, family rejection is also associated with lower incomes and unemployment. Other health implications are a higher rate of HIV infections and substance misuse, especially among the younger trans population. The National Transgender Discrimination Survey showed similar results to Klein's and Golub's study. They also noted a higher rate of homelessness – up to three times more than trans persons whose families were accepting –, and a higher rate of persons engaged in sex work. Occasionally, family rejection takes severe forms and several respondents reported domestic violence due to their gender identity. This was associated with the most alarming rates and negative outcomes later in life. Trans women who experience domestic violence were four times more likely to be homeless than persons whose families were accepting. They were also four times more likely to have done sex work for income, and reported higher rates of HIV infection, suicide and substance

¹⁹⁹ P. A. THOITS, “Mechanisms linking social ties and support to physical and mental health”, *Journal of Health and Social Behaviour* 2011, Vol. 52(2), 146.

²⁰⁰ A. KLEIN and S. A. GOLUB, “Family rejection as a precondition of suicide attempts and substance misuse among transgender and gender nonconforming adults”, *LGBT Health* 2016, Vol. 3(3), 193-194.

²⁰¹ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (17 November 2011), *UN Doc.* 1/HRC/19/41 (2011), para 66.

²⁰² A. KLEIN and S. A. GOLUB, “Family rejection as a precondition of suicide attempts and substance misuse among transgender and gender nonconforming adults”, *LGBT Health* 2016, Vol. 3(3), 195.

²⁰³ S. WINTER, “Lost in transition: transpeople, transprejudice and pathology in Asia”, *The International Journal of Human Rights* 2009, Vol. 23(2-3), 375; UNDP, “Discussion Paper: Transgender Health and Human Rights”, December 2013, <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights.html>, 12.

misuse.²⁰⁴ Trans women who experience domestic violence in countries where transsexuality and cross-dressing is criminalized, face an additional barrier to report the violence to the authorities for fear of the criminal consequences.²⁰⁵ These negative effects underline the importance of family acceptance, and of emotional and logistical social support.²⁰⁶ Family support can have a positive effect on the lives of trans persons, even outside of the direct family relations.²⁰⁷ Klein claims that “[s]upport from close others can often mitigate the negative effects of the structural and institutional discrimination and violence experienced by transgender people.”²⁰⁸

E. Access to health care

64. Access to health is a fundamental human right that has been implemented in numerous legal instruments, which encourage states to provide measures that ensure the enjoyment of the highest attainable standard of health.²⁰⁹ The right to health is a component of the right to an adequate standard of living under Article 25(1) UDHR. This was later implemented in various international and regional human rights treaties. For example, Article 12 recognizes the human right to health. This article states that “*the State Parties [...] recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*”, while also providing a list of steps to be taken by states in order to fully realize this right.²¹⁰
65. As mentioned before, the discrimination and stigmatization of trans women negatively affects their mental and physical health. However, trans women have the tendency to avoid health services, in fear of negative or discriminative attitudes by health care providers. According to a study commissioned by the EU, the treatment of trans women by health care providers is a striking issue, as well as a lack of awareness of the needs of the trans community.²¹¹ The feeling

²⁰⁴ GRANT et al, “Injustice at every turn: a report of the National Discrimination Survey”, 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 94-103.

²⁰⁵ Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nations High Commissioner for Human Rights (4 May 2015), *UN Doc. A/HRC/29/23* (2015), para 66.

²⁰⁶ A. KLEIN and S. A. GOLUB, “Family rejection as a precondition of suicide attempts and substance misuse among transgender and gender nonconforming adults”, *LGBT Health* 2016, Vol. 3(3), 195-197.

²⁰⁷ GRANT et al, “Injustice at every turn: a report of the National Discrimination Survey”, 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 103.

²⁰⁸ REUTERS, “For trans people, family rejection tied to suicide attempts, substance abuse”, 27 May 2016, <https://www.medicaldaily.com/lgbt-transgender-family-rejection-suicide-388031>.

²⁰⁹ General Comment No. 14: The Right to the highest attainable standard of health (Art. 12) (11 August 2000), *UN Doc. E/C.12/2000/4* (2000), para 1.

²¹⁰ Article 12 (2) ICESCR.

²¹¹ ILGA EUROPE and TGEU, “Transgender EuroStudy: legal survey and focus on transgender experience of health care”, April 2008, https://www.ilga-europe.org/sites/default/files/Attachments/transgender_eurostudy.pdf, 52.

that being trans adversely affects the way trans women are treated by healthcare professionals results in many trans woman seeking medical aid only in case of emergency. Generally, trans women have a higher risk of having health problems than the general population. Due to discrimination and marginalization by society, studies show higher rates of alcoholism, self-harm, substance use and HIV infection.²¹² A study conducted by Van Griensven showed that trans women have almost 50 times the odds of HIV infection than the average adult male and female population of reproductive age.²¹³ Although the health care system poses several barriers for trans persons, they often still are able to access transition-related care, for example by receiving counselling or obtaining hormones. Yet, sex reassignment treatment, and especially genital surgery, remains out of reach for many transsexuals, despite being highly desired.²¹⁴ Furthermore, several states still require trans women to meet the requirements set by the medical community to receive hormones or other sex reassignment treatment. In that case, they will need to convince the medical staff that they are indeed trans and wish to transition.²¹⁵ These barriers sometimes lead trans women to risky behaviour, such as unsupervised hormone intake and injection of silicones.

²¹² PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, “La discrimination à l’encontre des personnes transgenres en Europe”, 2 April 2015, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=55b241eb4>, 8.

²¹³ F. VAN GRIENSVEN, P. P. NA AYUTTHAYA and E. WILSON, “HIV surveillance and prevention in transgender women”, *The Lancet* 2013, Vol. 13(3), 185-186.

²¹⁴ GRANT et al, “Injustice at every turn: a report of the National Discrimination Survey”, 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 84.

²¹⁵ K. GREENBERG, “Still hidden in the closet: trans women and domestic violence”, *Berkeley J. Gender L. & Just.* 2012, Vol. 27, 210.

CHAPTER III. TRANS SEX WORKERS

SECTION I. INTRODUCTION

67. In the previous chapter, various aspects of discrimination on the lives of trans women have been discussed. One of the key conclusions that can be deduced from this chapter is that trans discrimination and stigma still exists today. Consequently, trans women are excluded from many aspects of society and pushed into marginalization. In countries that criminalize any form of gender defying behaviour, trans women are vulnerable to prosecution and harassment. States that do not allow trans women to undergo sex reassignment surgery or legal change of gender impede the possibilities of trans women to enjoy basic human rights. Even in countries where trans individuals can change their physical and legal gender, they still face structural barriers to organize their lives and to have equal access to education, employment, housing and healthcare. This naturally has an impact on the lives of trans women. Due to their marginalized position, trans women suffer from a higher unemployment rate: lack of legal gender recognition leads to confusion, stigma on trans women in education negatively affects their academic performances, bias in hiring processes are a barrier for trans women to find employment. Therefore, limited economic resources are not rare for trans women. One of the most striking characteristics of the trans community is the high rate of trans sex workers. This chapter will address the main research question of this thesis: why are so many trans women active in the sex work industry? Is it rooted in the discrimination against trans women or are there other factors at play? A second section will address the consequences of their work, in particular with regards to HIV infection and other STIs and the violence they face during their work. Finally, the legal framework regarding sex work and the current push for decriminalization will briefly be reviewed.

SECTION II. SEX WORK

§1. What is sex work?

68. UNAIDS defines sex work as *“female, male and transgender adults and young people who receive money or goods in exchange for sexual services, either regularly or occasionally.”*²¹⁶ Sex work and prostitution are not synonyms, but they are related. Sex work refers to sexual

²¹⁶ UNAIDS, “UNAIDS Guidance Note on HIV and Sex Work”, http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf, 3.

commerce of all kinds, whereas prostitution is the sexual exchange for money or other valuables. Sex work thus serves as an umbrella term which includes – but is not limited to – prostitution, escorting, street-based sex work, massage, pornography, professional domination and submission, fetish and phone sex work.²¹⁷ Another definition by the Network of Sex Work Projects (NSWP) holds that sex work is the “[n]egotiation and performance of sexual services for remuneration with or without intervention by a third party; where those services are advertised or generally recognized as available from a specific location; where the price of services reflects the pressure of supply and demand.”²¹⁸

69. There are various aspects of, and views to be taken on commercial sex. A starting point in discussing commercial sex is the question why a person engages in sex work. Those reasons can be divided into three groups, namely choice, circumstances and coercion, which may be understood as a spectrum. On one end of the spectrum, you have the individuals who choose freely to engage in sex work. They often have a high social, economic and cultural status, and engage in sex work because they hold pro-sex and pro-money attitudes. They are usually referred to as escorts and high-end prostitutes. On the other side of the spectrum are the individuals who lack any form of agency or capital. They are directly or indirectly forced to engage in sex work, through mental or physical manipulation and abuse. The individuals who engage in sex work due to circumstances stand in the middle of that spectrum. This category is also a spectrum ranging from individuals who believe that they should have the right to sell any part of their body for financial gains to those who are in serious financial difficulties due to mental issues or drugs and alcohol addictions. In between those extremes are the individuals who find themselves in challenging economic and social situations, such as poverty or financial desperation.²¹⁹ Trans sex workers can generally be placed in this last group.
70. Sex work may occur in a variety of settings. This can range from brothels or other dedicated establishments such as bars, to roadsides, markets, petrol stations and other public or private spaces. These places may be recognized by the authorities or hidden. The setting in which

²¹⁷ M. H. DITMORE (ed.), *Encyclopedia of Prostitution and Sex Work*, Westport, Greenwood Press, 2006, xxv; E. VAN DER MEULEN, E. M. DURSIN and V. LOVE (eds.), *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada*, Vancouver, UBC Press, 2013, 2; E. JEFFREYS, “Sex Worker Politics and the Term ‘Sex Work’”, *Research for Sex Work* 2015, Vol. 14, <http://www.nswp.org/resource/sex-worker-politics-and-the-term-sex-work>, 1.

²¹⁸ NSWP and J. BINDMAN, “Redefining Prostitution as Sex Work on the International Agenda”, 1997, <https://walnet.org/csis/papers/redefining.html>; M. H. DITMORE (ed.), *Encyclopedia of Prostitution and Sex Work*, Westport, Greenwood Press, 2006, xxvi.

²¹⁹ D. BOYD, “What anti-trafficking advocates can learn from sex workers; the dynamics of choice, circumstances, and coercion”, 16 August 2012 (updated 6 December 2017), https://www.huffingtonpost.com/danah-boyd/what-anti-trafficking-advocates-can-learn-from-sex-workers_b_1784382.html.

someone engages in sex work also has an impact on their safety and has profound health implication, as will be discussed later.²²⁰

§2. Trans women engaged in sex work

A. Worldwide phenomenon

71. Engaging in sex work is a reality for many trans women. There is limited data on the trans sex workers' engagement in the sex industry since there are very few projects working specifically with trans people. However, several studies show that trans engagement in sex work is a worldwide and widespread phenomenon. The European Network for the Promotion of Rights and Health among Migrant Sex Workers' mapping report from 2009 estimates that 6 percent of all sex workers in Europe are trans.²²¹ Despite the limited data, studies affirm the idea that a great part of the trans population is or was at a moment in their life active as a sex worker. According to the TvT's Survey on the Social Experiences of Trans and Gender-diverse People²²², 99 percent of respondents in Colombia, 76 percent in Turkey, 68 percent in Venezuela, 47 percent in the Philippines, and 14 percent in Serbia stated that they were engaged in sex work.²²³ A UNAIDS study showed similar results, and estimated that the percentage of trans women selling sex for a living in India is as high as 90 percent, 84 percent in Malaysia, 81 percent in Indonesia, 47 percent in El Salvador, and 36 percent in Cambodia.²²⁴

B. Reasons for engaging in sex work

1. Discrimination and stigma

72. As for cisgender sex workers, trans women's reasons for engaging in sex work are very diverse. Yet, the high number of trans women engaging in sex work reflects the limited economic resources and employment options. Due to the systematic discrimination explained in the previous chapter, many trans women find themselves excluded from the formal economy. The

²²⁰ UNAIDS, "UNAIDS Guidance Note on HIV and Sex Work", April 2012, http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf, 4.

²²¹ ICRSE, "Intersection briefing paper #1: LGBT rights and sex workers' rights", October 2015, http://www.sexworkereurope.org/sites/default/files/resource-pdfs/icrse_briefing_paper_october2015.pdf, 5.

²²² TGEU TvT, "The social experiences of trans and gender-diverse people in Colombia, India, the Philippines, Serbia, Thailand, Tonga, Turkey and Venezuela", 2015, <https://transrespect.org/wp-content/uploads/2015/08/TvT-PS-Vol9-2015.pdf>.

²²³ TGEU, "International Day to End Violence Against Sex Workers fact sheet", 17 December 2015, https://tgeu.org/dec-17/#_ftn4.

²²⁴ B. FEDORKO and L. BERREDO, "The vicious circle of violence: trans and gender-diverse people, migration, and sex work", *TvT Publication Series* 2017, Vol. 16, 7.

WHO acknowledged that a great number of young trans women engage in sex work as a result of social exclusion, economic vulnerability and difficulty in finding employment.²²⁵ As a means to address the lack of immediate needs due to poverty, homelessness, and other basic necessities, they turn to sex work.²²⁶ Although many trans individuals undertake active efforts to find alternative sources of income, many were unsuccessful. Few manage to even get an initial interview, and many report direct discrimination based on their gender identity and expression.²²⁷ The International Committee on the Rights of Sex Workers in Europe (ICRSE) believes that the most common reason for trans people to engage in sex work is because they live in transphobic environments and face structural barriers in education and employment, leading to limited economic and employment opportunities. The lack of clear regulations regarding sex reassignment surgery and legal gender recognition in certain countries, is another driving factor. As a result of these barriers and the far-reaching discrimination experienced by trans persons, they are exposed to poverty, homelessness and inadequate access to healthcare. This includes not being able to finance sex reassignment treatment. Financial incentives are thus also important in discussing the pathway of trans women to sex work and further explains the large number of trans people among sex workers.²²⁸ Sausa and colleagues researched the many facets of the trans sex work industry, including the reason why trans women become involved and continue doing sex work. One of their main findings was that trans women often remain in the sex work industry due to the discrimination and transphobia that they experience in other workplaces.²²⁹ Many trans women turn to sex work as a way of survival, when they find themselves pushed out of the labour market.²³⁰ Monetary incentives were also highlighted in Sausa's report, stating that they were "*particularly potent among participants who needed to finance hormone therapy and trans[...] related surgeries.*"²³¹ In 2012, Nadal and colleagues conducted a quality research on the experiences of trans women in the sex industry and

²²⁵ WHO, "Technical brief: HIV and young transgender people", 2015,

http://www.unaids.org/sites/default/files/media_asset/2015_young_transgender_en.pdf, 10.

²²⁶ B. FEDORKO and L. BERREDO, "The vicious circle of violence: trans and gender-diverse people, migration, and sex work", *TvT Publication Series* 2017, Vol. 16, 7.

²²⁷ URBAN INSTITUTE, "Surviving the streets of New York: experiences of LGBTQ youth, YMSM, and YWSW engaged in survival sex", February 2015, https://www.urban.org/research/publication/surviving-streets-new-york-experiences-lgbtq-youth-ymsm-and-ywsw-engaged-survival-sex/view/full_report, 7.

²²⁸ ICRSE, "Intersection briefing paper #1: LGBT rights and sex workers' rights", October 2015,

http://www.sexworkeurope.org/sites/default/files/resource-pdfs/icrse_briefing_paper_october2015.pdf, 4.

²²⁹ SAUSA et al, "Perceived risks and benefits of sex work among transgender women of color in San Francisco", *Archives of Sexual Behavior* 2007, 36, 772-773; NADAL et al, "Transgender women and the sex work industry: roots in systemic, institutional, and interpersonal discrimination", *Journal of Trauma and Dissociation* 2013, Vol. 15(2), 174.

²³⁰ J. C. OPARAH, "Feminism and the (trans)gender entrapment of gender nonconforming prisoners", *UCLA Women's Law Journal* 2012, Vol. 18(2), 258.

²³¹ SAUSA et al, "Perceived risks and benefits of sex work among transgender women of color in San Francisco", *Archives of Sexual Behavior* 2007, 36, 774.

concluded similar findings. They found that employers are reluctant to employ trans persons, which impedes their ability to secure legal employment. Instead, many trans individuals felt that sex work was their only option because of discriminatory hiring processes and the lack of a support system.²³² This was also affirmed by trans sex workers in Lisbon. They said that finding employment outside of the sex work industry was nearly impossible. Even if they managed to find employment, it was difficult to keep it for long periods.

2. *Survival sex*

73. Sometimes trans sex work is referred to as survival sex. According to the *Encyclopaedia of Prostitution and Sex Work*, survival sex refers to people with extremely few resources who “trade sex for food, shelter, and other necessities.”²³³ This is usually the case for homeless trans youth rejected by their family. Individuals engaging in survival sex generally share a few common characteristics and experiences. These experiences are for example racism, family rejection, poverty and homelessness. For LGBT persons, this also includes homophobic and transphobic harassment, discrimination and violence, and for trans persons specifically, also limited or no access to sex reassignment treatments and rejection and discrimination based on their gender identity and gender expression. Studies have shown that homelessness plays a key role in choosing to engage in sex work for survival. This issue is particularly pressing for trans women. According to a study carried out in New York, trans women are eight times more likely to engage in survival sex, with 48 percent of trans sex workers also reporting homelessness.²³⁴ Similarly, the National Transgender Discrimination Survey showed that 33 percent of trans women who had experienced homelessness had done sex work for income, which is four times the rate of those who did not experience homelessness. Moreover, of those who were currently homeless 55 percent reported having done sex work. Furthermore, homelessness has a dramatic effect on the percentage of HIV infection, showing a rate up to eight times higher than those not homeless.²³⁵

²³² NADAL et al, “Transgender women and the sex work industry: roots in systemic, institutional, and interpersonal discrimination”, *Journal of Trauma and Dissociation* 2013, Vol. 15(2), 174.

²³³ M. H. DITMORE (ed.), *Encyclopedia of Prostitution and Sex Work*, Westport, Greenwood Press, 2006, 498.

²³⁴ THE URBAN INSTITUTE, “Surviving the streets of New York: experiences of LGBTQ youth, YMSM, and YWSW engaged in survival sex”, February 2015, <https://www.urban.org/sites/default/files/publication/42186/2000119-Surviving-the-Streets-of-New-York.pdf>, 5-8.

²³⁵ GRANT et al, “Injustice at every turn: a report of the National Discrimination Survey”, 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf, 119-120.

3. Support from the trans community and sex work as an expression of gender identity

74. Although the social and economic exclusion of trans women greatly influences the overrepresentation of trans people engaged in sex work, there are also other reasons why so many trans women choose to work as sex workers that must be considered. Sex work is seen as a way to generate income without the social transphobia that they experience in other employment. Sausa and colleagues found that sex work appeared to be integrated within trans culture. Young trans sex workers seek the support and community of other trans women.²³⁶ Indeed, sex work is viewed as a way to enter a community of other trans women. Young trans women often lack support from their own family. Since many trans women are also sex workers, they find acceptance and support among the trans community in the sex industry.²³⁷ Sex work is accepted as a cultural norm within the trans community. It is a means for young trans women to gain social support and mentorship by more experienced trans women.²³⁸ Another important finding of Nadal and colleagues was that trans women reported positive experiences in the sex work industry. An incentive for trans women to engage in sex work is that it may be the only occupation where they are fully able to express their gender identity and be treated as female, which is emotionally rewarding and a validating experience.²³⁹ They are received as desirable women in sex work spaces, while expressing their womanhood and femininity.²⁴⁰ They feel appreciated as real women by their male clients. In this sense, engaging in sex work is a way to express and affirm their gender identity. This is also an important factor in choosing to continue their sex work.²⁴¹

²³⁶ SAUSA et al, "Perceived risks and benefits of sex work among transgender women of color in San Francisco", *Archives of Sexual Behavior* 2007, 36, 772; J. C. OPARAH, "Feminism and the (trans)gender entrapment of gender nonconforming prisoners", *UCLA Women's Law Journal* 2012, Vol. 18(2), 258. (239-271).

²³⁷ B. FEDORKO and L. BERREDO, "The vicious circle of violence: trans and gender-diverse people, migration, and sex work", *TvT Publication Series* 2017, Vol. 16, 7.

²³⁸ E. WYLAND, "You better work: the decriminalization of sex work as a transgender women of color rights issue", 2016, <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1002&context=mcleod>.

²³⁹ UNDP, "Discussion Paper: Transgender Health and Human Rights", December 2013, <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights.html>, 19; E. WYLAND, "You better work: the decriminalization of sex work as a transgender women of color rights issue", 2016, <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1002&context=mcleod>.

²⁴⁰ Z. SAMUDZI and J. MANNELL, "Cisgender male and transgender female sex workers in South-Africa: gender variant identities and narratives of exclusion", 2015, http://eprints.lse.ac.uk/63263/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Samudzi,%20Z_Samudzi_Cisgender%20male_2015.pdf, 18.

²⁴¹ NADAL et al, "Transgender Women and the sex work industry: roots in systemic, institutional, and interpersonal discrimination", *Journal of Trauma and Dissociation* 2013, Vol. 15(2), 174.

C. Discrimination as the root cause for engaging in sex work

75. The above discussion shows the correlation between the discrimination experienced by trans persons and their engagement in the sex work industry. The previous chapter discussed the discrimination faced by trans women. Discrimination in education can affect trans youth from a young age already through transphobic bias by their peers and teachers. Discrimination in employment and, consequently, the economic vulnerability is one of the main motives for trans persons to engage in sex work. States that criminalize cross-dressing and trans individuals, or do not recognize the right to legally change one's gender seriously impede the possibility for trans persons to find employment when their gender expression does not match the sex that is indicated on official documents. The discrepancy between a person's official sex and their gender expression makes it nearly impossible for trans women to find a job in the formal economy. Despite many states now allowing trans persons to undergo sex reassignment surgery and legally change their gender – although usually only after fulfilling several conditions –, social discrimination and stigma towards trans persons is still a great issue. Discrimination in educational settings naturally impede trans students from developing their full potential and limits their future employment opportunities. Negative attitudes and harassment towards trans students goes hand in hand with a lower education level and early drop out of school. Yet, unequal employment opportunities are even common among trans college graduates due to transphobic attitudes in professional environments. Stigma on trans women remains an issue for many recruiters and potential employer, which leads to difficulties in finding employment, missed promotions and unfair terminations of employment contracts. Unemployment causes economic vulnerability, which is especially pressing for young trans women who suffer from family rejection and homelessness. Trans persons are dependent on an income for their basic needs for survival and to afford sex reassignment treatment, such as hormones and sex reassignment surgery. Ultimately, many trans women turn to sex work as a means of survival and to be able to afford sex reassignment treatment. The critical economic situation caused by unemployment, homelessness and stigma leaves sex work as a last option for trans women. The step towards sex work is facilitated by the acceptance of being a sex worker in the trans community. The support from other trans sex workers and the positive experience of being perceived as desirable women by their clients are additional incentives to engage in sex work and to continue doing it. However, according to Nadal and colleagues, if given to chance to

choose a different career, most trans sex workers would choose to do so.²⁴² In conclusion, the high rate of trans women involved in the sex work industry is ultimately rooted in the systemic discrimination of trans women, both through legal systems and social stigma pushing trans women to the margins of society.

SECTION III. NEGATIVE OUTCOMES

§1. Transphobia and whorephobia at an intersection

76. Engaging in sex work entails certain risks that should be considered. Trans sex workers are amongst the most marginalized and vulnerable sex workers. This is again due to widespread social stigmatization and transphobic prejudice. Not only do they have to face the stigma that is connected to being trans, but they are also subject to negative attitudes towards sex workers, or whorephobia. This term “*is used to denote forms of hatred, disgust, discrimination, violence, aggressive behaviour or negative attitudes directed at individuals who are engaged in sex work.*”²⁴³ The acceptance of trans non-sex workers is partially undermined due to whorephobia because trans women are often perceived as sex workers.²⁴⁴ Trans sex workers find themselves at the intersection of transphobia and whorephobia, making them vulnerable to abuse and violations of their rights. Other factors that might affect their status as trans sex workers and increase the impact of discrimination are poverty, ethnic and religious background, disability, HIV status and residency status.²⁴⁵ The human rights protection of sex workers in general is a great issue, and the issues are even more profound when talking about trans sex workers, since they must confront different layers of stigma, legal ambiguity, transphobia, and very often also classism, racism and homophobia.²⁴⁶ There are several negative consequences that are directly related to the marginalized position of trans sex workers. They have a higher risk of HIV infection – a risk which is enhanced by the discrimination in health care – and are more susceptible to violence.

²⁴² NADAL et al, “Transgender female sex workers: personal perspectives, gender identity development, and psychological processes”, in M. A. PALUDI (ed), *Managing diversity in today’s workplace: strategies for employees and employers: Vol. 1. Gender, race, sexual orientation, ethnicity, and power*, Santa Barbara, Praeger, 2012, 145.

²⁴³ NSWP, “Briefing paper #09: The needs and rights of trans sex workers”,

<http://www.nswp.org/sites/nswp.org/files/Trans%20SWs.pdf>, 2.

²⁴⁴ TGEU, “Sex work policy”, <https://tgeu.org/wp-content/uploads/2014/12/TGEU-sex-work-policy.pdf>, 3-4.

²⁴⁵ *Ibid* 2.

²⁴⁶ T. FLETCHER, “Trans sex workers: negotiating sex, gender, and non-normative desire”, in E. VAN DER MEULEN, E. M. DURSIN, and V. LOVE, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada*, Vancouver, UBC Press, 2013, 65.

§2. HIV and other STIs

77. The stigmatization, marginalization and discrimination of trans women, and particularly trans sex workers, also have an impact on their health and well-being. Since the clear majority of HIV infections are sexually transmitted, sex workers and their clients have a higher risk of HIV infection. This is mostly due to unprotected sex with a larger number of sex partners. The vulnerability to HIV affects female, male and trans sex workers. Although the co-relation between sex work and a higher risk of HIV infection has been acknowledged since the early beginning of the epidemic, adequate treatment and prevention programs are not always available. The still growing population of HIV infected sex workers shows the failure to adequately protect the human rights of sex workers and the failure to respond to health needs.²⁴⁷ Trans persons are among the population most heavily affected by HIV. They are 49 times more likely to be infected by the virus. UNAIDS estimates that 19 percent of trans women are living with HIV globally. This percentage is even higher for trans sex workers. Similarly, the WHO together with UNAIDS have noted that trans women are more likely to be diagnosed with HIV than the general population, sometimes reaching more than 40 percent of the trans community.²⁴⁸ Other studies conducted by the WHO also show higher rates of infections with other STDs such as syphilis, which affects up to 50 percent of the trans population in several parts of Asia.²⁴⁹ A 2008 research reported an overall HIV prevalence of 27.3 percent among trans women who engaged in sex work.²⁵⁰
78. Sex workers in general have a higher risk of HIV infection. However, trans sex workers are often more marginalized among sex workers, forcing them to work in unsafe environments. A study showed that trans sex workers experience significantly higher risks of HIV infection than male and, particularly, other female sex workers.²⁵¹ HIV prevalence among trans sex workers is

²⁴⁷ UNAIDS, “UNAIDS Guidance Note on HIV and sex work”, April 2012, http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf, 2.

²⁴⁸ UNAIDS and WHO, “Technical guidance for Global Fund HIV Proposals Round 11”, 2011, http://www.unaids.org/sites/default/files/sub_landing/files/20110909_Technical_Guidance_Sex_Workers_en.pdf, 2.

²⁴⁹ WHO, “Joint Technical Brief: HIV, sexually transmitted infections and other health needs among transgender people in Asia and the Pacific”, 2013,

http://www.wpro.who.int/hiv/documents/HIV_STI_Other_Health_needs_among_transgender.pdf?ua=1&ua=1, 7-8;

UNDP, “Discussion paper: transgender health and human rights”, December 2013,

<http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights.html>, 18.

²⁵⁰ UNAIDS, “The Gap Report”, 2014, <http://www.unaids.org/en/resources/campaigns/2014/2014gapreport/gapreport>, 3.

²⁵¹ D. OPERARIO, T. SOMA, and K. UNDERHILL, “Sex work and HIV status among transgender women: systematic review and meta-analysis”, *Journal of Aids* 2008, Vol. 48, 97; UNDP, “Discussion paper: transgender health and human rights”, December 2013, <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights.html>, 19.

associated with unprotected sex with male partners, injection drug use, social stigma, and being an ethnic minority.²⁵² Adding to the already higher risk of HIV infection of trans sex workers, is their vulnerability to violence, such as rape, which in turn also exacerbates their HIV risk.²⁵³ Discrimination and stigma lead to low self-esteem and disempowerment, which makes it harder for trans women to insist on condom use.²⁵⁴ Another factor is the possibility of receiving more money for not using condoms.²⁵⁵ Furthermore, the way sexuality and femininity are understood in society also have an impact on the sexual risk behaviour of trans women. The use of condoms could in that way be a contraction to their gender identity, whereas (unprotected) receptive anal intercourse is an affirmation of their femininity, which is what many trans sex workers seek.²⁵⁶

79. A driving factor for the high HIV prevalence among trans sex workers is the poor coverage and availability of affordable, confidential, and respectful HIV and health services, combined with a lack of access and information on trans-specific health care. As was discussed earlier in this thesis, trans persons may face transphobic attitudes by health care givers and stigma and discrimination in health care services. All these factors often lead to high risk behaviour, including unsupervised hormone therapy and other forms of sex reassignment treatment. Usually, these root causes are not addressed by public health policies. On the contrary, trans sex workers are targeted by abusive interventions, such as mandatory or forced testing and treatment.²⁵⁷ Only 39% of countries reported in the National Commitment and Policy Instrument of 2014 that their national AIDS strategies address trans people.²⁵⁸ According to UNAIDS, the prevention of HIV in sex work is based on three essential pillars: “(1) assure universal access to comprehensive HIV prevention, treatment, care and support; (2) build supportive environments, strengthen partnerships and expand choices; and (3) reduce vulnerability and address structural issues.”²⁵⁹ Each of these pillars is essential, and they are interdependent and should be implemented simultaneously.

²⁵² Ibid 97.

²⁵³ UNAIDS and WHO, Technical guidance for global fund HIV proposals round 11”, 2011, http://www.unaids.org/sites/default/files/sub_landing/files/20110909_Technical_Guidance_Sex_Workers_en.pdf, 1.

²⁵⁴ AVERT, “Transgender people, HIV and AIDS”, 16 April 2018, https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/transgender#footnote48_fndpp7x.

²⁵⁵ SAUSA et al, “Perceived risks and benefits of sex work among transgender women of color in San Francisco”, *Archives of Sexual Behavior* 2007, 36, 773-774.

²⁵⁶ S. RODRIGUEZ-MADERA and J. TORO-ALFONSO, “Gender as an obstacle in HIV/AIDS prevention: considerations for the development of HIV/AIDS prevention efforts for male-to-female transgenders”, *International Journal of Transgenderism* 2005, Vol. 8 (2/3), 121.

²⁵⁷ TGEU, “Sex work policy”, <https://tgeu.org/wp-content/uploads/2014/12/TGEU-sex-work-policy.pdf>, 6.

²⁵⁸ UNAIDS, “The Gap Report”, 2014, <http://www.unaids.org/en/resources/campaigns/2014/2014gapreport/gapreport>, 9.

²⁵⁹ UNAIDS, “UNAIDS Guidance Note on HIV and sex work”, April 2012, http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf, 7.

“[These pillars] provide a framework for developing effective strategies to reduce the immediate HIV risk to sex workers and their clients, and to the spouses and regular partners of clients; provide care for sex workers living with HIV; and reform official policies, practices and legislation to protect the human rights of sex workers. These strategies should be accompanied by programmes to build supportive environments to facilitate full and equal participation of sex workers, provide meaningful alternative livelihoods and life choices, ensure full and universal enjoyment of human rights, combat stigma and discrimination, and strengthen partnerships between government, civil society, and community actors.”²⁶⁰

§3. Violence and killings of trans sex workers

80. Sex workers’ health and safety is greatly affected by their workplace setting and contexts. Working outdoors and in more isolated places increases the risk of encountering violent situations. Economic and structural constraints, such as not having a computer or adequate and permanent housing, limit the possibilities to establish safer working conditions. The experience of violence is also influenced by racism and economic barriers, which reflects the broader implication of inequality. Trans sex workers have less chance of working indoors due to discrimination, for example with regards to housing, but also because of the existing sex work hierarchy in which they have a low status. The context in which sex workers work has an impact on their vulnerability to violence. Traditionally, cisgender women and men have occupied indoor spaces, whereas trans sex workers often work outdoors. Although working indoors does not protect sex workers from all kinds of violence, trans sex workers working on the streets are a visible population, making them more vulnerable to violence. Furthermore, they are also vulnerable to hate crimes because of their gender identity.²⁶¹ As they have a low status, the possibility to screen potential clients or negotiate the terms of transaction is limited, thus creating a less safe working environment. Finding a balance between avoiding violence and earning money is of utmost importance. Yet, many trans sex workers claim violence is an unavoidable part of the job.²⁶²
81. Trans persons face different kinds of violence: structural, institutional, societal and interpersonal violence. The multiple types of violence are all interconnected. Structural violence is imbedded in the societal structures in which trans persons live, influenced by society’s idea of sex and

²⁶⁰ Ibid 24.

²⁶¹ NSWP, “Briefing paper #09: The needs and rights of trans sex workers”, <http://www.nswp.org/sites/nswp.org/files/Trans%20SWs.pdf>, 4.

²⁶² T. LYSONS, A. KRÜSI, L. PIERRE, W. SMALL, and K. SHANNON, “The impact of construction and gentrification on an outdoor trans sex work environment; Violence, displacement and policing, *Sexualities* 2017, Vol. 20(8), 881-896.

gender and the continuing believe in the static and unchanging gender binary. The systematic and institutionalized discrimination of trans persons in education, employment, housing and healthcare foster the marginalization and stigmatization and further affects the vulnerability of the trans population. Violence against trans persons is often driven by transphobia and transmisogyny, leading to hate crimes and transphobic crimes, which is called interpersonal anti-trans violence. The incidents include physical, sexual and psychological violence.²⁶³ According to the UN Special Rapporteur on Violence Against Women, violence based on sexual orientation, gender identity and/or gender expression tend to be characterized by serious levels of physical violence that “*exceed those present in other types of hate crimes.*”²⁶⁴

82. A manifestation of the violence against trans persons is the high murder rate that can be observed in all regions of the world among the trans population. The Trans Murder Monitoring (TMM), a project of Transgender Europe, was founded in 2009 and it has since systematically monitored, collected and analysed reports of killing of gender-variant and trans people worldwide.²⁶⁵ TMM reported 2609 murders of trans persons between 2009 and 2017. Yet, due to underreporting this is only a very small fraction of the actual trans murder rate. The vast majority of the reported killings are from Central and South-America. The high rate of killings can be attributed to reporting practices and the socio-political context of violence in that region.²⁶⁶ Violence against trans women is often related to other axes of oppression, such as racism, homophobia and anti-sex work sentiment. 62 percent of the reported killings were sex workers. Most trans sex workers killed in Europe are migrants, mostly from Brazil. Similarly, in the United States, the victims are mostly trans women of colour or native American trans women. In 2015, the Inter-American Commission on Human Rights published a report on the violence against trans people. According to the US National Coalition of Anti-Violence Programs, trans women – and especially trans sex workers – experience the highest risk of being murdered by hate violence, and the number of murdered trans women is consistently rising.²⁶⁷

²⁶³ B. FEDORKO and L. BERREDO, “The vicious circle of violence: trans and gender-diverse people, migration, and sex work”, *TvT Publication Series* 2017, Vol. 16, 18.

²⁶⁴ Report of the Special Rapporteur on violence against women (23 May 2012), *UN Doc. A/HRC/20/16* (2012), para 71.

²⁶⁵ C. BALZER and J. S. HUTTA, “Transrespect versus transphobia worldwide: a comparative review of the human-rights situation of gender-variant / trans people”, November 2012, https://transrespect.org/wp-content/uploads/2015/08/TvT_research-report.pdf, 27.

²⁶⁶ *Ibid* 22.

²⁶⁷ B. FEDORKO and L. BERREDO, “The vicious circle of violence: trans and gender-diverse people, migration, and sex work”, *TvT Publication Series* 2017, Vol. 16, 18.

83. Adding to the vulnerability of trans sex workers to violence, is the high level of police mistreatment and harassment. The 2015 US Transgender Survey showed high rates of police mistreatment.²⁶⁸ Also in 2015, the Inter-American Commission on Human Rights (IACHR) published a report on violence against trans persons. the IACHR indicated that “*trans women are mostly killed before 35 years of age and are particularly vulnerable to violence by law enforcement agents.*”²⁶⁹ Furthermore, “*acts of violence based on prejudice perpetrated by State agents have been reported in almost every OAS Member State*” and “*trans women and trans sex workers are particularly vulnerable to police abuse and are regularly subjected to inhumane treatment by law enforcement when detained.*”²⁷⁰ The lack of police protection adds to the vulnerability of trans sex workers, making them easy targets for violence, as they do not have access to protection and justice. Following the lack of trust in the justice system, victims rarely report incidents to the police, leading to the great underreporting of violence. Even when crimes are reported, trans persons are less likely to get appropriate help from law enforcement, which also adds to the underreporting of crimes.²⁷¹ According to the Red Umbrella Sexual and Human Rights Association, 42 percent of trans sex workers in Turkey who experienced violence did not report these incidents to the police. Furthermore, victims often risk being persecuted themselves if they report violence by police officers. Not rarely, police officers would press charges against trans persons for resisting a police officer’s request or hooliganism.²⁷²
84. The issue of violence based on gender identity and expression has also been addressed by the UN High Commissioner for Human Rights:

“Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bi-sexual, and transgender persons are subjected to, because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unreported and unpunished. Rarely does it

²⁶⁸ NATIONAL CENTER FOR TRANSGENDER EQUALITY, “The report of the 2015 U.S. transgender survey”, 2015, <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>, 14.

²⁶⁹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, “Violence against Lesbian, Gay, Bisexual and Intersex Persons in the Americas”, 2015, <http://www.oas.org/en/iachr/reports/pdfs/ViolenceLGBTIPersons.pdf>.

²⁷⁰ Ibid.

²⁷¹ NADAL et al, “Transgender women and the sex work industry: roots in systemic, institutional, and interpersonal discrimination”, *Journal of Trauma and Dissociation* 2013, Vol. 15(2), 175-176.

²⁷² B. FEDORKO and L. BERREDO, “The vicious circle of violence: trans and gender-diverse people, migration, and sex work”, *TvT Publication Series* 2017, Vol. 16, 18-19.

provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.”²⁷³

SECTION IV. DECRIMINALIZATION OF SEX WORK

§1. Is there anything wrong with sex work?

The aim of this thesis was to give an overview of the discrimination against trans women and indicate its link with the high rate of sex workers amongst the trans community. It was shown that discrimination is indeed the main cause of trans women engaging in sex work. It is important to note that this thesis in no way tries to condemn sex work and sex workers nor is it a call for “saving” all trans sex workers from perceived sexual exploitation. On the contrary, since so many trans women engage in sex work, the importance of sex workers’ needs and the protection of their rights needs to be underlined, especially given the high rates of HIV infection and violence. Sex work can be placed in a spectrum, ranging from limited choice to full choice. Most sex workers find themselves somewhere in between the two ends of the spectrum. Trans sex workers are often among those with limited choices. According to UNAIDS trafficking falls outside of the spectrum of sex work. It states that:

*“In reality, trafficking and sex work are two very different things. Trafficking involves coercion and deceit; it results in various forms of exploitation, including forced labour, and is a gross violation of human rights. Sex work, on the other hand, does not involve coercion or deceit. Even when it is illegal, sex work comprises freely entered into and consensual sex between adults, and like other forms of labour provides sex workers with a livelihood.”*²⁷⁴

This underlines one of the core aspects of sex work: it is freely entered into and consensual sex between adults. Advocates for the criminalization of sex work often perceive all sex workers as victims, having a negative view on their type of work. This ignores the autonomy and agency sex workers have over their bodies. Furthermore, sex work may give trans women the ability to profit of the objectification and sexualization of their bodies. Engaging in sex work as a means of survival, and thus as a result of limited choice, does not make sex work inherently immoral. However, the problem that arises in the case of trans sex workers is their chance to change work if they wish to do so. For many trans women, doing sex work is the only possible option to

²⁷³ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Issue paper: human rights and gender identity”, 29 July 2009, <https://rm.coe.int/16806da753>, 5.

²⁷⁴ UNAIDS, “UNAIDS Guidance Note on HIV and Sex Work”, April 2012, http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf, 14.

survive. When they choose to step out of the sex work industry, their chances at finding employment are still as limited, let alone finding employment they are qualified for. The continuing discrimination creates a vicious circle whereby trans women return to sex work. A second issue is the great population of young trans sex workers. Minors who were rejected by their families often sell sex for survival, and find themselves outside of legal protection.

85. Whether sex workers enjoy their work should not affect the fact that sex workers need rights. Even if trans women engage in sex work because of the limited choices, this does not mean that their rights to work or their personal security can be violated because their livelihood exists outside of the status quo. In many states sex workers have no legal protection and no labour rights. They are subject to criminal prosecution, and put their safety at risk while trying to earn an income. For many trans women, sex work is a necessity, making sex work emancipation and trans politics ultimately connected. Both movements strive for better labour rights and workplace safety, as well as better access to healthcare and less social stigma and discrimination.²⁷⁵

§2. Legal frameworks on sex work

86. Many states criminalize or penalize in some way the selling or buying of sexual services and the organisation of sex work. These laws are often based on the ideas that sex work is degrading and that no one would choose to do it. There are four main legal systems against sex work. The first one is the full criminalization, which criminalizes everyone involved: buyers, sellers and third parties. This legal system is used in most states in the US. The idea behind the full criminalization of sex work is that the fear of getting arrested should be enough to stop sex work. However, since many sex workers engage in this type of work as a means of survival, making them subject to arrest and prosecution creates a vicious cycle in which they will continue working as sex workers. A criminal record can be a burden to find another legal job. As a result, sex work may be the only option to pay the fines they got for doing sex work. Criminalizing sex work also leads to mistreatment by the state, such as police abuse and arbitrary arrest. Furthermore, carrying condoms may be used as evidence that a person is engaging in sex work and thus result in arrest. To avoid arrest, sex workers may engage in risky

²⁷⁵ S. FAYE, “The fight for trans equality must be recognized as a class struggle”, *The Guardian* 25 June 2018, https://www.theguardian.com/commentisfree/2018/jun/25/trans-equality-class-struggle-obsessive-arguments-boundaries-identity?utm_source=esp&utm_medium=Email&utm_campaign=Opinion+UK+connected&utm_term=279173&subid=13816887&CMP=ema_opinionconnectuk.

sex which elevates the risk of HIV infection. A second legal system is the partial criminalization, which legalizes the buying and selling of sex but everything surrounding it is not, such as brothels and soliciting on the streets. This legal system is used in the United Kingdom and France. It is important to note that a brothel is defined as two or more persons working together. Sex workers are thus forced to work alone, in sometimes unsafe working environments, to avoid prosecution.²⁷⁶ The third legal system is the criminalization of the buying of sex, often referred to as the Swedish or Nordic model. The Nordic model tries to protect sex workers by taking away the root cause of sex work, namely the those who buy sex and traffickers.²⁷⁷ This model is built on the idea of “helping” sex workers by ending demand and thus affirms the idea that all sex workers needs saving and that no one would willingly engage in sex work. However, potentially violent clients may deny sharing personal information in fear of prosecution and sex workers may have less time to negotiate and are forced to make snap decisions, which in turn creates an unsafe working environment for sex workers. Lastly, some countries, such as The Netherlands and Germany, legalize and regulate sex work. This means that sex work is only allowed in designated areas and that sex workers have to officially register as a sex worker. Although this system often appears to work on paper, it also referred to as *backdoor criminalization*. Since more marginalized groups, such as migrant sex workers and trans sex workers, cannot comply with the regulations, they are forced to work illegally, in violent environments and isolated locations.²⁷⁸ Sex work is often a way of surviving for marginalized and vulnerable groups, yet they are often most punished by prohibition laws. Sex work legislations further impede the wellbeing of trans sex workers, as well as their accessibility to services. They risk police violence, incarceration and are forced to work under dangerous working conditions. This does not only affect trans sex workers, but also trans persons who do not engage in sex work, as they are often perceived as sex workers because of stereotypes and prejudice. Trans sex workers are often disproportionately harmed by sex work legislation. Many trans sex workers work on the street, in disadvantaged socio-economic areas. Furthermore, many of them are engaged in sex work for survival, and to pay the high costs of sex reassignment surgery and hormones, they are more likely to have unprotected sex which further raises the risk of HIV infection. Even in countries that legalize and regulate sex work,

²⁷⁶ J. MAC, “What do sex workers want? | Juno Mac | TEDxEastEnd”, 26 February 2016, https://www.youtube.com/watch?v=VJRBx0JjM_M.

²⁷⁷ R. GHUMA, “Situating sex work within globalized capitalism: a case for decriminalization”, *Human Rights and Globalization Law Review* 2013-14, Vol. 5, 94.

²⁷⁸ J. MAC, “What do sex workers want? | Juno Mac | TEDxEastEnd”, 26 February 2016, https://www.youtube.com/watch?v=VJRBx0JjM_M.

trans sex workers often find themselves excluded and experience more police violence and harassment.²⁷⁹

87. What many sex workers and sex work organization are fighting for is the full decriminalization of consensual adult sex work. Decriminalization is not the same as legalization, because it means the removal of laws that punitively target sex workers, and instead treating it like any other work. In 2003, the New-Zealand government passed the Prostitution Reform Act²⁸⁰ which decriminalized all aspects of unforced sex work. It was aimed at promoting their well-being and protecting their labour and human rights. Five years after the law came into force, the Prostitution Law Reform Committee published a report that showed that the reform had had little effect on the number of individuals working the sex work industry, but that it had significant impact on working conditions of sex workers, creating a safer working environment and more autonomy for sex workers.²⁸¹ In its 2014 world report, HRW underlined the importance of the decriminalization of voluntary sex work between adults. According to HRW driving sex workers in the shadows is usually counterproductive to efforts to prevent harm caused to sex workers.²⁸² It held that “[c]riminalization [...] can cause or exacerbate a host of ancillary human rights violations, including exposure to violence from private actors, police abuse, discriminatory law enforcement, and vulnerability to blackmail, control, and abuse by criminals.”²⁸³ HRW shares this view with UNAIDS, which stated that:

“States should move away from criminalising sex work or activities associated with it. Decriminalisation of sex work should include removing criminal laws and penalties for purchase and sale of sex, management of sex workers and brothels, and other activities related to sex work. To the degree that states retain non-criminal administrative law or regulations concerning sex work, these should be applied in ways that do not violate sex workers’ rights or dignity and that ensure their enjoyment of due process of law.”²⁸⁴

²⁷⁹ TGEU, “Sex work policy”, <https://tgeu.org/wp-content/uploads/2014/12/TGEU-sex-work-policy.pdf>, 3.

²⁸⁰ Prostitution Reform Act of 27 June 2003, <http://www.legislation.govt.nz/act/public/2003/0028/latest/DLM197815.html>.

²⁸¹ NEW ZEALAND MINISTRY OF JUSTICE, “Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003”, May 2008, <http://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf>; C. WARNOCK and N WHEEN, “Sex work in New Zealand: the re-importation of moral majoritarianism in regulating a decriminalized industry”, *Can. J. Women and L.* 2012, Vol. 24, 415.

²⁸² NSWP, “Human Rights Watch supports push for decriminalizing voluntary sex work by adults”, 29 January 2014, <http://www.nswp.org/news/human-rights-watch-supports-push-decriminalising-voluntary-sex-work-adults>.

²⁸³ Human Rights Watch, “World Report”, 2014, http://www.nswp.org/sites/nswp.org/files/HRW_world%20report%202014_web_0.pdf, 47.

²⁸⁴ UNAIDS, “Guidance Note on HIV and sex work”, April 2012, http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf.

The WHO has also expressed its concern, saying that policies and practices should be reviewed and revised to push back HIV infections among sex workers. States should work towards the decriminalization of sex work, same-sex activity and non-conforming gender identity.²⁸⁵

§3. Legal recognition of sex work as work

88. Together with the urge for the full decriminalization of sex work, outreach programs focusing on sex workers and sex workers alike call for the legal recognition of sex work as work. This includes the abolishment of a criminalizing framework and the establishment of a labour rights framework. The recognition of sex work as work would enable sex workers to enjoy the same rights and protections as other forms of work, including access to labour regulations and health and safety standards. In addition, sex workers should be able to challenge prejudice and stigma suffered from state authorities and other public and private services via effective complaint procedures and anti-discrimination laws and policies. The removal of oppressing regulations does not guarantee the removal of this oppression. Therefore, regulations and standards should be recognized within the context of historical social stigma, and sex workers need to be recognized as a historically oppressed group.²⁸⁶

²⁸⁵ WHO, “Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations”, July 2014, <http://www.who.int/hiv/pub/guidelines/keypopulations/en/>.

²⁸⁶ NSWP, “Briefing #07 Sex work and the law: Understanding legal frameworks and the struggle for sex work law reforms”, <http://www.nswp.org/sites/nswp.org/files/Sex%20Work%20%26%20The%20Law.pdf>, 14.

CONCLUSION

89. This thesis took a closer look at the discrimination against trans women and the possible correlation with the high rate of sex workers among the trans community. Despite the principle of non-discrimination being very well safeguarded in international and regional human rights instrument, the burden of discrimination faced by trans women remains an issue today. Discrimination is present in almost every aspect of trans women's lives. Several states still criminalize gender defying behaviour and many states still do not recognize the right to sex reassignment treatment and legal change of gender. Trans women are still met with transphobic attitudes in all regions and face discrimination on multiple levels, all pushing them to the margins of society. All forms of discrimination – ranging from discrimination in education and employment to discrimination in access to housing and health care – add to the exclusion of trans women from society. Due to the transphobic environment they find themselves in, many trans women are unable to either keep their job while transitioning, or cannot find employment in the formal economy. As a result, unemployment, precarious economic situations and homelessness are common in the trans community. The effects of trans discrimination are even more profound for trans women of colour or migrant trans women, due to racism. Faced with limited options, trans women often turn to sex work to gain an income to survive and afford sex reassignment treatment. Although there are other factors that play a role in the high rate of trans sex workers – the support of other trans women in the sex work industry and an affirmation of their gender identity through sex work –, I conclude that the main cause remains the discrimination against trans women.
90. The limited economic resources are often caused by unemployment. The high unemployment rate may either be caused because of the discrepancy between a person's gender expression and their legal gender in states where legal change of gender is not allowed or is subject to far-reaching conditions, such as infertility or a medical report implying a mental condition. Another cause is the bias and stigma on trans women, leading to social discrimination. Trans students are often not encouraged in education, and are instead met with transphobic attitudes by teachers and other students. A low level of education already gives trans women a lower status on the labour market. Furthermore, trans women are often disadvantaged in hiring processes when companies do not wish to hire trans women for reasons based on bias and stigma. Unemployment, housing discrimination and family rejection lead to poverty and homelessness. Ultimately, they are left with no other options than the sex work industry. Although trans

women also report positive experiences while engaging in sex work, most trans sex workers wishes to stop doing sex work and find a job in the formal economy. *“If I’d had the chance, I would have stopped yesterday.”*²⁸⁷

91. The discrimination against trans women does not only lead many of them in the sex work industry, it also implies an unsafe working environment. Trans sex workers show one of the highest rates of HIV infection, due to healthcare discrimination and unprotected sex. They are also susceptible to violence while working and hate crimes. These consequences are even further reinforced by laws criminalizing all or some aspects of sex work, driving sex workers to work underground under unsafe circumstances.
92. To secure the safety of trans sex workers, states should move towards the decriminalization of sex work and the recognition of sex work as work. Furthermore, states should start or continue taking steps towards equality for trans women and the trans community in general. This includes abolishing laws criminalizing trans persons and moving towards legal gender recognition based on self-determination. But reaching equality is more than a legislative process, since discrimination also takes place outside of the legal scope through bias, stigma and transphobic attitudes. Many steps have already been taken, but the road towards equality is still long.

²⁸⁷ Interview with trans sex worker in Lisbon.

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2018

Discrimination and transphobia at an intersection : does the discrimination against trans women lead them into sex work?

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<https://doi.org/20.500.11825/901>

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