

MALTA'S GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS ACT – A SHIFT FROM A BINARY GENDER TO A WHOLE NEW SPECTRUM?

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ABSTRACT

Throughout history, the idea of equality has developed, whether it is within our islands or throughout the rest of the world. As the idea of equality started to expand further than the mere notions of male and female, we find new grounds of protection from discrimination, such as sexual orientation and gender identity, the latter being the topic of discussion found in this article. This article will be analysing the proposed Gender Identity, Gender Expression and Sex Characteristics Bill. However, rather than solely discussing the bill itself, this article will also seek to discuss national criticisms from NGOs and makes reference to international legislation based on the notion of the right to gender identity. This is done to achieve a wholesome perspective, based on a national and a Community level, as regards to what is being done in respect of those people who are transgendered and would wish to seek legal recognition.

KEYWORDS: GENDER IDENTITY BILL - GENDER IDENTITY - GENDER DISCRIMINATION - EQUALITY - HUMAN RIGHTS - EUROPEAN UNION LAW - NATIONAL LAW.

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1. Introduction

Similar to the incredible phenomenon that is mankind, the mere definition of the term 'equality' has developed over the years, adapting itself accordingly to the requisites of a particular period. We have come a long way from thinking that, when it comes to equality among individuals, 'some [people] are more equal than others'⁴²⁸ and although this phrase might have had political connotations over the course of its reference, it could be easily applied within a social aspect. The idea of equality on our islands started to develop in instances such as when women were given the right to vote and also the right to stand for elections on 5 September 1947, or perhaps more recently, when same-sex marriages started to be recognised and permitted as from 16 April 2014 along with the enactment of the Civil Unions Act. Another recent accomplishment in this respect would be the amendments made to the Constitution of Malta in 2014 by inserting 'sexual orientation' and 'gender identity' as forbidden grounds of discrimination.⁴²⁹ The trend to be noticed is that throughout history, and not solely in Malta, the movement towards equality started off between the two sexes: males and females (even if this is not achieved in its entirety), whether it related to both having the right to vote and stand for elections, or both having the right to equal pay for equal work. It is a very recent occurrence that other minorities of our society are being recognised, such as those people being discriminated against on the grounds of sexual orientation or gender identity.

Following Malta's President H.E. Marie Louise Coleiro Preca's assent to the Civil Union's Act⁴³⁰ in 2014, permitting couples of the same-sex to marry, towards the end of that same year, the Civil Liberties Minister, Ms Helena Dalli, proposed the Gender Identity, Gender Expression and Sex Characteristics Act⁴³¹ in Parliament,

⁴²⁸George Orwell, *Animal Farm*, 2003 edition, Secker and Warburg, 1945, p 52.

⁴²⁹Chapter 4 of the Laws of Malta, Constitution of Malta, art 32 and 45.

⁴³⁰Chapter 530 of the Laws of Malta, Civil Unions Act.

⁴³¹Chapter 540 of the Laws of Malta, Gender Identity, Gender Expression and Sex Characteristics Act.

with the intention of giving another minority of our nation the right to fulfil their potential in a democratic society. However in view of the fact that Malta is a predominantly conservative country, the proposal of such an Act was not welcomed with open arms from all members of our society. A change in legislation is not a change in society, especially with such a deep-rooted mentality.

Although the views of several Maltese citizens might not be in favour of the Gender Identity Act, for reasons which are perhaps biased towards conservative Catholic values, the Act to be discussed in this article is not a matter of conflict between State and Church. It should be considered as an attempt to conform to the legislation regarding protection against discrimination based on gender identity of other Member States of the European Union, or rather to pave the way for what other Member States should attempt to follow. This article seeks to explore not only Cap. 540 from a social and national aspect, but also the multitude of views surrounding the said Act alongside decisions from the European Court of Justice on matters of sex discrimination regarding transgender persons. Is the Gender Identity, Gender Expression and Sex Characteristics Act as ground-breaking as those in favour claim it to be, or is it causing social disharmony as the people in favour of tradition fear? Would it be possible to change the views pertaining to the idea of 'gender,' even if such transition happens over a long period of time?

2. Approaching the Act

2.1 A Historical approach towards transsexuality

Law is largely a binary system. It seeks to compartmentalise and place things in categories. This includes human beings; law seeks to categorise and govern relationships and interaction between human beings. However, how could law seek to regulate something which in itself cannot be categorised? Throughout history, transsexuality has been a complex issue, especially when it comes to legal matters, such as that of inheritance in the time where only males were legible to receive it⁴³², or whether marriage with someone who has undergone gender reassignment surgery was legitimate⁴³³.

There has been a struggle to accommodate transsexuality throughout the years, and thus the legal sphere has sought help from medical science. It is axiomatic that there are physical characteristics apparent at birth, which assign one to a

⁴³²Lesley-Anne Barnes, *Gender Identity and Scottish Law: The Legal Response to Transsexuality*, EdinLR Vol 11 p 162- 186.

⁴³³ibid.

particular sex. However, there are also well-documented instances when even such is obscure, giving rise to hermaphroditism. Unlike transsexualism, hermaphroditism has benefitted more assurance from the law, due to the fact that perhaps, since the issue is more physically apparent in the medical sense, acceptance was easy.

Transsexuality was classified as a psychological disorder⁴³⁴, a form of 'gender dysphormia.' In the case of *Corbett vs. Corbett*⁴³⁵, decided in 1970, Arthur Corbett wished to divorce his wife, who was a trans woman, April Ashley Corbett, whilst also wanting to avoid inheritance issues which normally came about with divorce. At the time, British Divorce Laws required to give proof for adultery or cruelty, and mere mutual consent was not enough. Since no such proof was at Arthur Corbett's disposition, a case was filed on the principle that the marriage was never legitimate in the first place⁴³⁶ since April Ashley Corbett was registered a male at birth.

Lord Justice Ormrod J, who was himself a medical man,⁴³⁷ took note of four principle characteristics to determine the true sex of April Ashley Corbett, and these are namely genital, chromosomal, gonadal and psychological characteristics⁴³⁸. He concluded that the 'biological sexual constitution of an individual is fixed at birth⁴³⁹.' Hence it was infamously concluded that April Ashley Corbett was merely a 'mutilated⁴⁴⁰' man and henceforth denied the legal recognition of her true gender post gender reassignment surgery. The divorce went through solely through this purpose, as two men could not legally get married, and legally, April Ashley Corbett was a male⁴⁴¹.

Moreover, another interesting, yet earlier, judgment concludes in favour of the transgender community and sharply differs from the former case mentioned. The case of Elizabeth or Ewan Forbes-Sempill was kept under great secrecy and was not considered as precedent, unlike the aforementioned judgment. Sir Ewan Forbes-Sempill was a Scottish nobleman who was born a female, however after having grown up uncomfortable with his sex, he began living as a male. In 1965, Forbes-Sempill was legible to stand for his elder brother's inheritance, along with a large estate. A distance relative challenged this, and argued that Forbes-

⁴³⁴ibid.

⁴³⁵*Corbett vs. Corbett* (otherwise Ashley), Probate, Divorce and Admiralty Division, FD 1 Feb 1970

⁴³⁶ibid.

⁴³⁷ibid 8.

⁴³⁸ibid 5.

⁴³⁹ibid.

⁴⁴⁰ibid.

⁴⁴¹ibid.

Sempill was legally considered a woman and not entitled to inherit. Whilst Forbes-Sempill's reregistration through a sheriff court decree passed, in the Court of Session case it was concluded that, when assessed by twelve medical experts, Forbes-Sempill was also physically an intersex individual, although the results were "not wholly conclusive." Forbes-Sempill was considered a male by the Court, and thus could inherit, however what perhaps kept this case private was the fact that the judge desired the estate to be given to the right candidate, indeterminate of the sex.

2.2 A legislation which will attempt to change our perception of sex and gender

Before delving into the content of the Act, it is perhaps essential to consider certain definitions, which are oftentimes muddled, leading to misconceptions. A common misinterpretation occurs between the two terms 'sex' and 'gender.' On one hand, 'sex' refers to the biological and physical aspect of a person, whether someone is born male or female. It is what is listed on a person's identification card, certificates, passports and any other means of credentials. 'Gender', on the other hand corresponds to the social aspect of a person, who that particular person projects himself to be.⁴⁴² A person who is transgender possesses conflicting sex and gender; there is a discrepancy here, concerning the two terms 'sex' and 'gender' compared, as they do not mirror each other. This leads us to the definition of 'gender identity' which is of significant importance before attempting to understand the Act itself,

'Gender identity' refers to each person's 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 and, or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms.⁴⁴³

This definition is indeed an adaptation of the definition found in the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity⁴⁴⁴. Without a doubt, such close reference

⁴⁴² Cristina Castagnoli, 'Transgender Persons' Rights in the EU Members States' (Policy Department C: Citizens' Rights and Constitutional Affairs, June 2010) 3.

⁴⁴³ Chapter 540 of the Laws of Malta, Gender Identity, Gender Expression and Sex Characteristics Act, art 2.

⁴⁴⁴ International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: <http://www.refworld.org/docid/48244e602.html> [accessed 17 September 2015]

to international legislation shows the attempt of this Act to adapt our laws, as soon as possible, to portray and uphold human rights and the preservation of dignity, with particular reference to minorities.

The Maltese legislator has, unequivocally so, always been prone to borrowing from provisions entrenched in foreign codes. Nonetheless, this author finds it necessary to, not only state the definitions of the particular terms which will be discussed in this article, such as 'sex', 'gender' and 'gender identity' but also to invoke the sources concerned and why they ought to be considered the most fitting and equitable for the sake of the topic being discussed. Perhaps in Malta, the mere notion of a transgender person is contaminated with the idea of someone trying to "undermine the [traditional] family", in "shabby schem[ing]"⁴⁴⁵ ways. Some have even referred to the Bill as a Trojan Horse.⁴⁴⁶ With the rise of awareness of gender identity owing to this Act, several institutions, particularly pro-tradition and pro-Catholic institutions, have felt the need to obscure the idea of what it is like to be a transgendered person.

The author of this article is not attempting to undermine such views as they are nonetheless appreciated at the rise of such conflict and inevitably contribute to the argument on gender identity. However, they are also to be used to show the fettered perception of the terms 'gender' and 'sex' in Malta, especially when influenced by religious teachings. This will be further discussed later on in this article, but the critical point to be established concerns the incorrect view of binary gender, rather than solely binary sex. Humans are biologically born either males or females, with the exceptionally rare case of intersex individuals, but the binary view is nonetheless preserved in the term 'sex' and not expanded in terms of gender. Henceforth, it should be clarified that it is a different scenario when it comes to the notion of 'gender' which encompasses a spectrum: one can identify oneself as cisgender, transgender, intersex or queer. It is this belief that gender and sex are both binary, which fogs the view of looking at the minority experiencing a change in gender identity, the appropriate way.

2.3 Criticisms from the local media and NGOs

It is only after clarifying that the above definitions are different in essence that one can move towards understanding the Act, realising its aims and social impacts. The ultimate intention of this Act is to drastically ameliorate the privilege of human rights protection towards transgendered and intersex people. It seeks to simplify the process by which one can change one's personal

⁴⁴⁵ Life Network, 'Beware the Trojan Horse' (LifeNetwork, 08 December 2015, <<http://lifenetwork.eu/index.php/beware-trojan-horse/>>, accessed 04 March 2015.

⁴⁴⁶ *ibid.*

information regarding his sex, whether it is his identification card, passports, or certificates. The Act eliminates the need for such persons to undergo gender reassignment surgery before attempting the process of amending credentials as listed under article 3(4) of the Act.⁴⁴⁷ This is one of the advantages of the act, as gender reassignment surgery is within itself a financial burden, that is excluding travel costs, hormonal treatments and professional costs. Apart from the financial burden that the gender reassignment surgery imposes, it also has to be done abroad and the individual would have to travel multiple times for pre-op tests, before and excluding the operation itself. Above all, there is also the issue that the gender reassignment surgery is a life-threatening surgery, both when being carried out, and afterwards in which complications may arise. These are borne by the individual alone.

It also seeks to protect those children whose sex and gender is unclear, whether it is because said children were born hermaphrodites or for any other reasons, which might cause future complications related to gender identity, particularly social implications, as listed under article 8(4) of the Act.⁴⁴⁸ The latter article allows that in such cases, the gender of the child need not be listed until that person has acquired eighteen years of age. The Act prevents surgical intervention until the minor could make his⁴⁴⁹ own decisions and give his own consent.⁴⁵⁰ Ultimately, the Act seeks to safeguard the dignity of the persons protected under this Act and to protect them from any discrimination which may occur.

Several pro-Act NGOs such as Aditus and Gender Liberation (purposefully set up to advocate for trans+ individuals' rights and to educate on gender variant realities) have made their recommendations⁴⁵¹ during which the Act was still a Bill, and a handful of newspaper articles criticised any loopholes which might come to appear and pointed out a number of inconsistencies or lack of clarity. A mere example of such could be the problems which arose concerning article 3

⁴⁴⁷ Chapter 540 of the Laws of Malta, Gender Identity, Gender Expression and Sex Characteristics Act, art 3(4).

⁴⁴⁸ Chapter 540 of the Laws of Malta, Gender Identity, Gender Expression and Sex Characteristics Act, art 8.

⁴⁴⁹ All references to the masculine found in this article are taken to refer also to the feminine.

⁴⁵⁰ Chapter 540 of the Laws of Malta, Gender Identity, Gender Expression and Sex Characteristics Act, art 8, 'It shall not be lawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent.

⁴⁵¹ Aditus, 'Gender Identity, Gender Expression and Sex Characteristics Act: Public Consultation Input' (2014) < http://aditus.org.mt/Publications/GIBillinput_281114.pdf> accessed 6 March 2015.

(4)⁴⁵² and article 5⁴⁵³, relating to proof required to make use of the right to gender identity, and the drawing up of the declaratory public deed, respectively. During the second reading, it was pointed out in respect to the aforementioned articles that there was no mentioning of any psychological report or any medical team to counsel and guide the person through his decision. The significance and importance of requiring such reports lies in the fact that oftentimes in such cases, the person either did not wish to continue with the procedures or simply changed his mind.⁴⁵⁴ It is perhaps true that the requirements should be more clearly defined, as to avoid abuse. A person who genuinely seeks to change their gender identity in order to avoid discrimination and to fit in with his desired gender should not be inhibited by any obstacles in obtaining the requirements necessary, such as medical or psychological reports or any other necessary data. On a similar note, the meagre fact that any person could go to a notary with the required declaration and other particulars to amend their gender identity did not seem very reassuring, especially to members of the Opposition.

Other questions and concerns arose, such as in the case of children who do not have a decided gender — which single-sex school⁴⁵⁵ should they attend? Which bathrooms are they to make use of? Upon changing one's sex through this Act, would someone who is in an opposite-sex marriage, be newly classified as being in a same-sex marriage? Will someone who commits a crime during the process of changing one's sex be exempt from charges because the information post-

⁴⁵² Chapter 540 of the Laws of Malta, Gender Identity, Gender Expression and Sex Characteristics Act, art 3(4), 'The person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity'.

⁴⁵³ Chapter 540 of the Laws of Malta, Gender Identity, Gender Expression and Sex Characteristics Act, article 5, '(1) The drawing up of the declaratory public deed shall contain the following elements:

- (a) a copy of the act of birth of the applicant;
- (b) a clear and unequivocal declaration by the applicant that one's gender identity does not correspond to the assigned sex in the act of birth;
- (c) a specification of the gender particulars;
- (d) the first name with which the applicant wants to be registered; and
- (e) all the prescribed elements required in accordance with the Notarial Profession and Notarial Archives Act.

(2) The Notary shall explain to the applicant the legal implications of the change of the assigned gender and shall require the applicant to declare understanding of such implications.

(3) The notarial fee shall be that established in the Notarial Profession and National Archives Act.

⁴⁵⁴ Times of Malta, 'MPs warn Gender Identity Bill could conflict with other legislation' *Times of Malta* (3 March 2015) <<http://www.timesofmalta.com/articles/view/20150303/local/mps-warn-gender-identity-bill-could-conflict-with-other-legislation.558391>> accessed 6 March 2015.

⁴⁵⁵ This might become less of an issue later on considering that government schools will now pertain to cooperative education, meaning single-sex government schools will be removed.

amendment of sex does not comply with the information pre-amendment?⁴⁵⁶
The questions for some time could remain rhetorical, but one has to keep in mind that although the Act inevitably cannot deal with all of these issues in a very specific manner, its pre-eminent concern is to be a means of protection against discrimination.

3. The conflict between Traditional or Religious Values and the Act — Playing God is never an easy task

3.1 A National Perspective

Throughout history, there has been an ever-occurring attempt to separate the values of the Maltese Catholic Church from the initiatives of the State. For a long period of time, the Church and the State were interrelated and oftentimes could be easily considered as one. It was only until 1971, after facing several hardships due to the interference by the authority of the Church, that Dom Mintoff, after winning the general election, attempted to separate the authority of the Church from that of the State and other political endeavours. Negotiations were made, which at the time forbade the Church from interfering with politics of the general elections.⁴⁵⁷ However, what Mintoff made sure was that the Church kept its authority as being the fundamental educator of the Maltese citizens teaching them the moral values between right and wrong. Having said so, and now speaking in more modern terms, although the Church itself does not interfere with such sensitive issues such as the drafting of such an Act, this does not mean that a great number of Maltese citizens' Catholic views and values do not seep through.

Certain misconceptions regarding the views of these pro-tradition organisations and institutions must be addressed and considered. In a rather compelling article, the Act, being a Bill at the time, was addressed as being another 'shabby scheme to undermine the family' and another 'assault on the unassailable concept that a family is made up of a man and a woman',⁴⁵⁸ perhaps also subtly referring to the recent divorce referendum and the Civil Unions Act⁴⁵⁹ permitting the recognition of same-sex marriage.

⁴⁵⁶ *ibid* [16]

⁴⁵⁷ Josef Grech, 'Fl-1958 Duminku Mintoff beda l-Ġlieda għall-Helsien', *Ġrajjet Malta: Ahbarijiet u ġrajjet Kurrenti*, (31st March 2015), <<http://www.grajjetmalta.com/?p=6182>> accessed 2nd September 2015

⁴⁵⁸ LifeNetwork, 'Beware the Trojan Horse' *LifeNetwork* (8 December 2014) <<http://lifenetwork.eu/index.php/beware-trojan-horse/>> accessed 4 March 2014.

⁴⁵⁹ Chapter 530 of the Laws of Malta

LifeNetwork has made strong points for the sake of 'religious freedom', that the Act should be 'repealed'.⁴⁶⁰ Their claim that the law will inevitably affect the whole population and not simply the minority group concerned is indeed veritable. However, the approach and view surrounding that statement is not correct. When a minority is being protected through legislation, the triggering of this legislation is undoubtedly due to the discrimination which came beforehand, which organisations such as LifeNetwork often forget. The idea of someone changing their gender identity to that which fits better for them, after a journey of self-discovery, has been ridiculed by being compared to the concept of age – in comparison, if someone felt to belong to a different age group, they should be able to register themselves into their desired age⁴⁶¹. Furthermore, comparing gender identity to 'gender dysphoria' as a symptom of schizophrenia⁴⁶² is indeed another means of discrimination and unnecessary prejudice, which further reassures the need of such legislation. This act may, perhaps, be wrongly perceived as the promotion of the traditional family, being formed of a man and a woman, as being a homophobic instance. The logic which was used to derive this understanding is somewhat baffling, but it must be similar to the reasoning formulated before the 1940s, much before universal suffrage was achieved, were women were considered unworthy of having the right to vote and the right to stand for general elections. History does repeat itself after all.

Would it be politically correct to address the said trends, against allowing transgender persons to address their gender identity, as being too uninformed or bias to formulate an opinion on the issue? Their primary concerns, seem to be formulated without the basis of reason and not taking into consideration the fundamental rights of minorities. Such include whether the expenses will be covered by the government or whether it will go against the children's need for a mother and a father. Of course, issues will arise. However, the fact that a handful of European Union Member States, such as Italy, the Federal Republic of Germany, Sweden and the Netherlands,⁴⁶³ already tackled the said issues regarding individuals seeking their right to their self-determined gender identity seems to place one at ease. The fact that these aforementioned states awarded these people with their fundamental human rights should be reassuring for us, perhaps even consider their legislation to be a model for our own.

⁴⁶⁰ LifeNetwork, 'Equality is the name of the game' *LifeNetwork* (8 December 2014) <<http://lifenetwerk.eu/index.php/equality-name-game/>> accessed 6 March 2015.

⁴⁶¹ LifeNetwork, 'Submission for the Gender Identity (GIGESC) Consultation by Life Network and Gift of Life Foundation Malta' *LifeNetwork* (28 November 2014) <<http://lifenetwerk.eu/index.php/submission-gigesc-consultation-life-network-gift-life-foundation-malta/>> accessed 6 March 2015.

⁴⁶² *ibid.*

²⁰ Case C-13/94 P v. S and Cornwall County Council [1996] ECJ I-2159, para 10.

3.2 The situation on maintaining traditional values throughout the rest of Europe

With regard to LGBTIQ persons, and not exclusively transgender persons, there has been a frequent occurrence of discrimination in regard to maintaining and preserving the religious or traditional values of gender roles, sexuality and the notion of the family. Such discrimination is unfortunately witnessed and replicated around the rest of the continent. Consequently, all Member States have too taken the approach that being a transgendered person is a “betrayal” towards traditional and national values⁴⁶⁴. 77% of respondents of a research conducted in Bosnia and Herzegovina, for the sake of an example, believed that accepting LGBT persons would be destructive to the harmony and order of the nation⁴⁶⁵, while in a Serbian research, 50% of the respondents picture homosexuality as a danger to the culture and society, and that the government and other means of authority should work in combatting the ‘problem’⁴⁶⁶. Oftentimes, such Member States, as is the situation in Malta, would want to preserve the perhaps archaic ideas extracted and developed throughout the years from the Genesis — the idea that a family consists of a man and a woman, and a child being the fruit of their unity. Traditional belief considers deviation from tradition to ultimately translate into disharmony and the damage of moral and ethical standard of the country.

It is worth mentioning as more awareness on the rights of minorities is being raised, advancement and innovation in the protection from discrimination is taking place. Discrimination itself might be subsiding in some areas more than others. However, one must bear in mind that this does not eliminate the existence of organised attacks on the basic human rights of minorities, even if they exist less often. A particular instance is the recent statement (2007) made by the Moscow Patriarchate relating to the LGBT Pride Parade in Russia, stating that it, ‘infringe[d] on [their] multi-ethnic nation’s moral norms, on public order, and in the long run – on people’s future. [...] If people refuse to procreate, the nation degrades. So the gay propaganda ultimately aims at ruining [their] nation’.⁴⁶⁷ Wouldn’t this ideology include those opposite-sex couples who cannot procreate for reasons beyond their control, as well as opposite-sex couples who deliberately decide to not procreate? Are they too ‘ruining [their] nation?’⁴⁶⁸

⁴⁶⁴This statement is also applicable to people who identify themselves as lesbian or gay or bisexual.

⁴⁶⁵Thomas Hammarberg, ‘Discrimination on grounds of sexual orientation and gender identity in Europe’ (September 2011) <http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf> 29 accessed 7 March 2015.

⁴⁶⁶ibid.

⁴⁶⁷ibid.

⁴⁶⁸ibid.

The traditional values which relate to the idea of gender and the nuclear family define LGBTIQ persons as trespassing over the boundaries of what it means to be a 'man' or a 'woman'. The concept of having an individual complying to the norms appertaining to one specific gender are claimed to be strong in several countries such as Albania, Italy, Georgia, Greece, Montenegro and Ukraine.⁴⁶⁹ This is, of course, another means of discrimination towards those seeking their right to gender identity, for by not adhering to the strict categorisation between men and women, they are ridiculed and rejected by their State.

Stereotypical assumptions based on religious or traditional beliefs may lead to the violation of basic human rights and the freedom of access without discrimination to several facilities such as education, health care, and the protection from legislation and authorities. Although there has been an improvement, this has not been so profound in respect to the right to gender identity. 38 Member States, in their national legislation have recognised that sexual orientation is one of the grounds of discrimination which ought to be protected, in line with international and European standards⁴⁷⁰. Only 9 Member States do not attempt to safeguard against such discrimination⁴⁷¹. An ever lower number refers to the subject-matter of this article as worthy of legislation, having a mere 20 out of 47 member states of the European Council covering discrimination on the grounds of gender identity, and this is vaguely listed as either 'sex', 'gender' or 'other grounds of discrimination'⁴⁷². The terms are rather ambiguous in them not being properly defined, which inevitable leads to a great deal of uncertainty when it comes to the right to gender identity. Most person seeking such a right would feel unprotected by the law. The remaining 27 Members States remain silent on the issue⁴⁷³.

One must also address the peculiarities of the existing legislation concerning transgendered persons, 29 Members States require gender reassignment surgery for a person to be recognised in the sex they identify with, while another 15 Member States require those persons to undertake gender reassignment surgery to be either unmarried or divorced.⁴⁷⁴ Due to a long history of outdated traditions, transgendered persons seeking their right to their gender identity through gender reassignment surgery are denied their right to adequate health care in several Member States, while also not being covered entirely or not at all by their health care insurances. The ever-developing right to one's self-

⁴⁶⁹ *ibid* 30.

⁴⁷⁰ *ibid* 27.

⁴⁷¹ *ibid*.

⁴⁷² *ibid*.

⁴⁷³ *ibid*.

⁴⁷⁴ *ibid* 9.

determined gender identity in the broader context of the European Union will be discussed in the next section of this article. The Committee of Ministers Recommendation for 2010 has taken the political initiative to take the steps required to develop and implement effective policies in all the Member States of the Council of Europe, to prevent the above-mentioned discriminations towards LGBTIQ persons.

3.3 The Bill Becoming an Act - Instances After Promulgation

The new Act came into force upon Presidential assent on 14 April 2015. Chapter 540 has removed the need to undergo gender reassignment surgery in order to amend official documents, and also gives individuals the choice to not declare their sex, introducing an 'X' marker. Furthermore, with regard to employment law, gender reassignment surgery has been validated as a good reason for sick leave, and hate crimes towards transgendered persons have in advance been given recognition.

In addition to the Act we find the 'Trans, Gender Variant and Intersex Students in Schools Policy',⁴⁷⁵ launched by the Education Minister Evarist Bartolo, together with the Civil Liberties Minister Helena Dalli. A Student Transition Management Plan shall be adopted in schools to help students going through gender variation.⁴⁷⁶ Thus, government schools allow students, who have been experiencing difficulties with their gender or any other issues, to choose their uniform in accordance to their preferred gender, that which they identify themselves with. The same ideology applies in the case of bathrooms and changing rooms. This policy tackles the issue that students are to be addressed according to their preferred name and pronoun, in congruence with their gender identity. This must be done once an application for gender transition has been filed in the Court.

Moreover, it is also stated that upon the filing of such application in the Court, students will then be henceforth given permission to be assigned to their appropriated physical education classes and sports activities, which reflect and are consistent with the gender identity. However this brings forth another argument — if gender appropriation was not so strict, and was rather fluid, would such problems have arisen either way? This author opines that we should no longer live in a time where males and females are categorised in accordance

⁴⁷⁵ Ministry of Education and Employment, Trans, Gender Variant and Intersex Students in Schools Policy, June 2015, <<http://tgeu.org/wp-content/uploads/2015/06/Malta-Education-Policy.pdf>> accessed 2nd September 2015.

⁴⁷⁶ Ivan Martin, 'Policy on trans, gender variant and intersex students unveiled' *Times of Malta* (16 June 2015) <<http://www.timesofmalta.com/articles/view/20150616/local/policy-on-trans-gender-variant-and-intersex-students-unveiled.572787>> accessed 19 July 2015.

to different physical activities or preferences, traced down from years and years of unfounded stereotyping and segregation. As stated above, sex is binary; however, gender is not. By way of example, football should not be assigned to males and volleyball assigned to females, for the sake of tradition. Students who are dealing with dilemmas related to their gender are faced with unnecessary stereotyping.

With all the Act's depth and practicality, in the Malta Local Council Elections of 2015, Mr. Alex Mangion became the first ever transgender elected official, when he was elected in the Attard local council elections. When it came for Mr. Mangion to amend his documents and credentials upon being elected, an obstacle was encountered even after the Bill had been enacted — as Mr. Mangion was not granted the ability to amend his documents, in view of the fact that he was adopted as a child. Of course such discrimination created by the law was perhaps unforeseen and unintentional, even if certain criticisms have stated that the Bill was rather rushed, and was created with electoral purposes in mind. This unforeseen loophole in the law was addressed by the amendment of the Act i.e. the introduction of Article 4A in July 2015. Following such amendment, adopted individuals can have their gender changed given they present the required documentation. This change would be followed by an annotation in the margin of the respective individual's registration in the Register of Adopted Persons.

4. A European Perspective — the EU's road towards achieving protection against discrimination based on Gender Identity

4.1 Introducing European Union Legislation

As a Member State of the EU, Maltese legislation must be in line with the legislation of the former, particularly as regards the legislation relating to the fundamental human rights of the individual. The Charter of Fundamental Human Rights⁴⁷⁷ is perhaps one of the most ground-breaking achievements in respect to human integrity and dignity. The EU is considered to be the guardian of basic and fundamental human rights, particularly of its citizens, and any Member State which does not comply with such binding, will be prone to severe consequences.

The Charter of Fundamental Rights has an entire chapter devoted to equality, Chapter III,⁴⁷⁸ which is incorporated in the EU Treaties. Within the said Chapter,

⁴⁷⁷ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html> accessed 2 September 2015.

⁴⁷⁸ *ibid.*

article 21, which speaks of protection towards discrimination states the following,

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Before delving into the legislation aforementioned it is important to take into consideration the evolution of the European Union law on discrimination and equality. As mentioned in the introduction of this article relating to Malta's evolution on equality legislation, likewise, the European Union too has experienced growth and innovation when it comes to the rights of the individual. The European Economic Community in 1957⁴⁷⁹ which established the right for equal pay for equal work in the Treaty of Rome, and building onto much more specific legislation as the Equal Treatment Directive of 1976,⁴⁸⁰ and through the Employment Equality Directive in 2000,⁴⁸¹ it is evident that the European Union has come a long way

This author wishes to refer again and primarily take into consideration article 21 of the Charter of Fundamental Human Rights, in respect to the subject-matter of this article, being the Gender Identity Act. Upon first glance, one would notice that there are several protections against discrimination; however, discrimination towards gender identity is not listed. This author has, upon research, stumbled upon the rather common notion that transgendered person are oft left without the ability to claim legal protection. Researching modern textbooks relating to European Union Law and relevant cases, such as Craig and De Búrca's *EU Law, Text, Cases and Materials*,⁴⁸² it was also evident that the topic of equality and protection from discrimination in respect to transgendered persons or persons seeking their right towards gender identity, was not discussed. The most common form of protection from discrimination was in

⁴⁷⁹ European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, available at: <http://www.refworld.org/docid/3ae6b39c0.html> accessed 2 September 2015.

⁴⁸⁰ European Union, Equal Treatment Directive of 1976, 76/207/EEC.

⁴⁸¹ European Union, Employment Equality Directive of 2000, 2000/78/EC.

⁴⁸² Craig and De Búrca, *EU Law: Text, Cases and Materials*, (5th Edition, Oxford).

cases relating to equal pay for equal work, or equal employment opportunities for all men and women, which are of course great achievements in themselves, but are perhaps worrying in the sense that one must note that these are not the only forms of discriminations which exist. The Treaty on the Functioning of the European Union (TFEU) also aims to combat and protect forms of discrimination with gender identity also not being included. By operation of this newfound knowledge, is it possible to imply that, as the embodiments and guardians of fundamental rights, the TFEU and the Charter is neglecting transgendered persons from the right to gender identity? From the right to be treated equally at their place of work? From their right to equal job opportunities? From any other right which an individual born and living in accordance to his gender identity is entitled to? Or is it simply open to interpretation?

4.2 The European Union — Is it Setting the Scene on Gender Identity Legislation for its Member States?

It would be incorrect to state that the European Union has a legislative framework regarding discrimination which does not go beyond the limits of discrimination between males and females. There are several areas, perhaps rather recent, such as sexual orientation, which are governed by Union law. However, with regard to legislation protecting persons from discrimination on the grounds of gender identity in particular, this protection is very limited. The Gender Recast Directive 2006/54/EC⁴⁸³ was the first piece of legislation which took into consideration transgendered persons, however this reference in itself was also very limited.

Before discussing this further, it is important to take into consideration a pivotal judgment of the European *Court of Justice*, *P vs S. and Cornwall County Council*, of 1996⁴⁸⁴ which raised the question of whether the term 'sex' as one of the grounds of discrimination, should be extended to matters related to gender identity. The situation involved a person, P, who was born male, but was not comfortable with his own sex and felt more inclined to the other, and thus took the necessary procedures to undergo gender reassignment surgery. In the meantime, the plaintiff, was employed as a manager in an educational establishment. The plaintiff informed the defendant, a director of the establishment about the gender reassignment procedure, and at the time 'S' appeared encouraging and sympathetic. However, after undergoing the initial minor operations of the gender reassignment procedure, the plaintiff was given three-months' notice before the final surgical operation. That is when 'P' brought an action against 'S' before the Industrial Tribunal on the ground that he was a

⁴⁸³ European Union, Gender Recast Directive 2006/54/EC.

⁴⁸⁴ P v S and Cornwall County Council [1996] ECR I-2143 (C-13/94).

victim of discrimination on the grounds of sex, with 'S' counterclaiming that the dismissal was due to redundancy. The European Court of Justice concluded that although the sex might perhaps seem ambiguous in the eye of the law, since 'P' is a transgendered person who has undergone gender reassignment, the definition of sex should yet be extended to meet those persons who are discriminated against to the proceedings of gender reassignment.

The Gender Recast Directive 2006/54/EC⁴⁸⁵ codifies the judgment reached in P vs S. and Cornwall County Council through the following statement,

The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.⁴⁸⁶

This judgment give in this pivotal case only makes reference to a restricted section of those people seeking their right to gender identity. It would be indeed correct to assume that the above only applies to those persons who have undertaken gender reassignment surgery and are victims of discrimination, but does preclude those who have not undertaken gender reassignment surgery or do not intend to undergo these procedures, but would simply like to be identified as a particular sex in a legal and social manner. This EGJ judgment has left an influential impact on its Member States, and thus it makes action taken against persons discriminating on the grounds of gender reassignment, to some extent, unquestionable.⁴⁸⁷

As regards the elucidation of certain terms as explained in Section II. B, where "sex", "gender" or "other grounds of discrimination" are too ambiguous, it could easily be ascertained that the Directive 2006/54/EC did not make things much simpler. It did not solve this issue of discrimination entirely; it only seeks to protect a small segment of the entire portion of the minority at hand. However, not only is this protection from discrimination only covering persons who have undertaken gender reassignment surgery, but the mere fact that Member States

⁴⁸⁵ European Union, Gender Recast Directive 2006/54/EC.

⁴⁸⁶ *Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.*

⁴⁸⁷ S Fabeni and S Agius, *Transgendered People and the Gender Recast Directive: Implementation Guidelines* (ILGA-Europe, 2009) 20 <http://www.ilga-europe.org/sites/default/files/Attachments/transgenderpeople_and_the_gender_recast_directive_guidelines_dec2009.pdf> accessed 8 March 2015.

and European Economic Area countries are not specifically obliged to make an express reference to gender identity as a ground of discrimination in their national law is perhaps also quite alarming. Therefore, the underlying denotation of such inadequate protection is that, although gender reassignment is in accordance with the P vs S case, regarded as a ground of discrimination, gender identity is still not accounted for.

This brings us to another arguments — the first conclusion regarded the ambiguity of the term ‘sex’ in anti-discrimination legislation, whether it applies to more than just male and female, and it derived that this extends to persons victims of discrimination on the basis of gender reassignment, as realised in P vs S. The next conclusion, or rather, the next question that is raised is whether the term ‘gender reassignment’, like ‘sex’, extends beyond its parameters. Would it be correct to think that despite the lack of a concrete and substantive definition, gender identity should be considered under the auspices of gender reassignment? There is no clear conclusion, thus leading us to further lack of clarity and further undermining the equality of transgendered persons.

Eighteen years after its publication, this ECJ judgment should perhaps, be challenged or at the very least reconsidered for the purposes of practicality. For the sake of an example, consider a person who was born a male, but lived life as a female with the help of medical intervention and hormonal procedures, but has not undertaken gender reassignment surgery. What is to happen when she would want to claim her pension rights? With appropriate legislation, such complications could be avoided. Malta’s Gender Identity, Gender Expression and Sex Characteristics Act does not require the need for gender reassignment surgery in order for one to be classified as their desired respective sense, which is one step closer to creating a more progressive State and consequently a more progressive Europe.

4.3 The Emergence of Gender Identity in the European Court of Human Rights

There has been varied treatment of gender identity issues under the European Court of Human Rights but with the progression of time, certain notable changes can be observed. Two cases have been chosen, distinct in years, as to show how the European Court of Human Rights has varied and progressed in its decision making.

Rees vs. the United Kingdom (1986) is a case which concerned the rights of transsexuals, where the applicant complained of not being able to amend his birth certificate from female to male. The same reasoning of the *Corbett* case abovementioned where applied to the facts of this case, in the sense that there was no recognition of the change of gender, despite gender reassignment

surgery.⁴⁸⁸ The United Kingdom law did not confer on him a legal status corresponding to his actual condition, regardless of having tried to persuade Members of Parliament to introduce a bill for transgendered persons trying to seek to amend their birth certificate. Rees argued a violation of articles 3, 8 (right to respect for private and family life) and 12 (right to marry) of the European Convention, of which only the latter two were considered. The Court concluded that there had been no violation of either. The changes demanded by the applicant would have required to fundamentally modify the system for keeping the register of births, which would have led to important administrative consequences.⁴⁸⁹ Moreover, the Court emphasises the fact that the United Kingdom had borne the costs of the applicant's medical treatment. However, the Court was aware "of the seriousness of the problems affecting transsexuals and of their distress" and recommended "keeping the need for appropriate measures under review, having regard particularly to scientific and societal developments."⁴⁹⁰ The Court also held that there had been no violation of Article 12 (right to marry and found a family) of the Convention. It found that the traditional concept of marriage was based on union between persons of opposite biological sex. States had the power to regulate the right to marry.

Similarly, in *Christine Goodwin vs. the United Kingdom*⁴⁹¹ (2002), the applicant complained under article 8, 12, 13 and 14 of the Convention which had arisen from the lack of legal recognition of her changed gender, sexual harassment in her place of employment, and other factors related to social security, pension rights, and her inability to marry. She alleged that the fact that she has to keep the same NI number has meant that her employer has been able to discover that she previously worked for them under another name and gender, which resulted in embarrassment and humiliation.⁴⁹² Contrary to the Rees case, the ECHR found a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights; a violation of Article 12 (right to marry and to found a family); but no violation of Article 13 (right to an effective remedy). It found that no separate issue had arisen under Article 14 (prohibition of discrimination).

The reasoning behind the abovementioned in the Christine Goodwin case is that no concrete or substantial hardship as regards to the public interest has been apparent to likely flow from any change to the status of transsexuals. Evidently, we find a different train of thought.

⁴⁸⁸European Court of Human Rights Press Unit, *Factsheet – Gender Identity Issues* (May 2015)

⁴⁸⁹ibid.

⁴⁹⁰ibid.

⁴⁹¹European Court of Human Rights, *Christine Goodwin vs. The United Kingdom*.

⁴⁹²ibid 64.

“Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, the Court reaches the conclusion that the notion of fair balance inherent in the Convention now tilts decisively in favour of the applicant”.⁴⁹³

This judgment concluded that the fair balance that was inherent in the Convention now tilted decisively in favour of the applicant, in contrast to the Rees judgment. Consequently, there had been a failure to respect her right to private life in breach of Article 8. The Court also found no justification for barring the transsexual from enjoying the right to marry under any circumstances. It concluded that there had been a breach of Article 12.

m l inen v. Finland (2014)⁴⁹⁴ is a compelling case which concerns the complaint of a male-to-female transsexual who could only obtain legal recognition of her new gender by having her marriage turned into a civil partnership, which was considered as a breach of her fundamental human rights and complained of articles 8, 12 and 14 of the Convention⁴⁹⁵. The Court has considered it to be permissible to request that the marriage is converted into a registered partnership, as it is only that which could legally safeguard and allow same-sex couples. The Court also considered how this would not have any implications on the applicant’s family life, as it would not affect the paternity of the applicant’s daughter or the responsibility for the care, custody and maintenance of the child.⁴⁹⁶ Although the Court stated that such implications were indeed minimal, and there was only little difference between marriage and a civil partnership, the mere fact that one would have to go through such extra procedures could render itself merely distressful. However, had we to go back to earlier cases, we find that there is an increase in the acceptance and legal recognition of transsexualism, and there are only some minor conformities which need to be addressed in order to eliminate gender identity discrimination.

5. Conclusion

The particular focus of this article was directed at the Maltese Gender Identity, Gender Expression and Sex Characteristics Act, which is perhaps an initial step further to what was discussed in the previous sections of this article. It is indeed true that this Act aims to protect not only persons who are victims of discrimination on the basis of gender reassignment, but also people seeking their

⁴⁹³ibid para 93.

⁴⁹⁴European Court of Human Rights, *Hämäläinen vs. Finland*.

⁴⁹⁵European Court of Human Rights Press Release, *Requiring a change of marital status for a transsexual to be recognised as a woman did not breach her human rights*, 16 July 2014.

⁴⁹⁶ibid.

right to their gender identity. Malta has already taken the first step to legalise marriage between same-sex couples, which is rewarding in itself. However how rewarding it truly is to be one of the first countries in Europe, to cover the basic rights of such a minority, where articles even considered the Act to be one of the most progressive pieces of legislation to date.⁴⁹⁷ If the European Union would not create a specific directive, or at least include those seeking their right to gender identity in the Union's legislation, then it is us as a nation which are to take the step forward through implementing such obligations in our national law.

On a continental basis, so far, only six European countries have adopted 'gender reassignment' to be somewhat equivalent to 'gender identity,' and included in national law as a basis of discrimination. Thirty-four European countries still do not allow gender recognition without invasive and humiliating procedures.⁴⁹⁸ With our Act, we attempt to achieve certainty in protecting the rights of those who wish to practice their right to gender identity.

What could create a more momentous change is the way we perceive gender - education is key, and we should no longer look at males as categorised to do one thing and females categorised to do another. Legislation of course is elemental for guidance, but what we do know is that law reflects society. If our culture is exposed to the idea of gender fluidity, then perhaps we would not find persons who struggle to fit within one particular category, as there are no strict boundaries as to what constitutes female or male. The human desire to compartmentalise things is indeed an achievement in comparison to other species, however such a phenomenon could be too great for simplification. We must look at gender as a spectrum, not a binary, and it is with that step forward and new ideology that we could hope that this Act could find itself its deemed acceptance on our Islands.

The Argentinian *Ley de Identidad de Género* is said by human rights activists to be the epitome of human rights legislation, covering the legal recognition of transgendered persons, worldwide.⁴⁹⁹ Perhaps if we neglect the negative comments, stereotypes, the criticisms constructed in a biased manner, and the repercussions which are, in all fairness, unlikely to occur, and rather, look at

⁴⁹⁷J. Lester Feder, "World's Most Progressive Gender Identity Law Passes in Europe", 1st April 2015, BuzzFeedNews, <<http://www.buzzfeed.com/lesterfeder/worlds-most-progressive-gender-identity-law-passes-in-europe#.xhZY7jVj3>> accessed 6 September 2015.

⁴⁹⁸K Knight, 'Dispatches: Malta's Inspiring Gender Recognition Law' (Human Rights Watch, 1 April 2015), <<https://www.hrw.org/news/2015/04/01/dispatches-maltas-inspiring-gender-recognition-law>> accessed 19 July 2015.

⁴⁹⁹R Köhler, A Recher and J Ehr, *Legal Gender Recognition in Europe: Toolkit* (Daniel Moure edn, 2013) 49 http://www.tgeu.org/sites/default/files/Toolkit_web.pdf accessed 18 July 2015.

what has already been achieved in respect to the basic human rights of minorities, we could perhaps take that elemental step forward — an Act on its own is not enough; along with the law, we ourselves must change. Nobody ever achieved success looking back, it is only necessary to look at the road ahead.

This article has hopefully clearly yet subtly expressed not only the necessity of such an Act within our legal system, but also conveyed the problems which arise on a European Union point of view. Whatever the Act might face in respect to criticism by traditionalists and other parties who opposed its coming into force, it should perhaps act as an encouragement to the rest of the European Member States and the Union as whole.