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Human rights integration in action: making equality law work for trans people in Belgium*

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Introduction

In recent years, transgender (trans) issues have made their way into the mainstream media. The picture presented often includes a touch of glamour when celebrities ‘come out’ as trans and ‘pass’.¹ Positive representations of trans people also appear in popular culture, with television series providing a powerful medium for transmitting such messages.² But the phenomenon is not confined to the cover of

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¹ See, for instance, the April 2015 cover of *Vanity Fair* where the 1976 Olympic decathlon champion, Bruce Jenner, father and stepfather to a family of reality TV stars, came out as Caitlyn. For another example, see the four-page spread in *Vogue US* in April 2015 dedicated to Andreja Pejic (born Andrej), a famous model and the first trans model this fashion magazine ever featured. Since then, other examples have been on the rise. In February 2017, the cover of *Vogue France* was entitled “La beauté transgenre” and for the first time, the French magazine featured a trans model, Valentina Sampaio.

² See, for instance, the Netflix TV series *Orange is the New Black*, for which in 2014, Laverne Cox became the first openly trans person to be nominated for a Emmy Award in the acting category. See also the transgender-focused US TV series, *Transparent*.

fashion magazines. In January 2017, *National Geographic* put a ‘strong and proud’³ nine-year-old trans girl on the cover of its special issue about the ‘Gender Revolution’. Two months later, *Time* did the same with a young adult, a tech worker identifying as ‘queer and gender non-conforming’. There are at least two considerations intertwined here. First, a growing number of people are questioning the idea that gender stems from sex. At the same time, gender fluidity is increasingly moving from the margins to the mainstream. This, in turn, challenges the legal trappings which organise society around a binary model of gender. Second, the psychiatric narrative around trans people is shaken up. They are slowly leaving the faraway territory of ‘otherness’. Empathy is growing in some circles as the daily struggles of trans people are unveiled to the general public. This creates fertile ground for legal change, even if the journey is still far from over.

As an introduction to his thought-provoking book, *Normal Life*, Dean Spade wrote that when he first opened the doors of the New York-based Sylvia Rivera Law Project⁴ to provide free legal aid to trans people, he ‘never would have guessed the number of people who would call the organization for help or the gravity and complexity of the problems they face’.⁵ Deliberate transphobia, resulting in humiliation, harassment, loss of employment, refusal of social services, beatings, rape, police brutality and other forms of violence, was only part of the picture. Interconnected with this are other problems faced by trans people relating to their lack of recognition in the administrative system which governs our daily lives and is so significantly organised around official gender markers. All over the world, alarming rates of violence, violations of human dignity and discrimination against trans people are reported.⁶ Europe is no exception to this troublesome assessment. In recent years, major human rights organisations have started to more systematically convey similar patterns.⁷

Nearly everywhere, identification documents govern social participation. ID cards, passports, driving licences, travel cards, bankcards, social security cards, loyalty cards, membership cards, etc. are required for many basic transactions. They contain gendered information such as the first name, gender marker or even a gendered digital code. For trans people, showing these documents means coming out as trans in situations which might trigger humiliation, harassment, discrimination or violence.⁸ Of particular concern are situations of deprivation or limitation of liberty. Wards in prison, asylum seeker facilities and mental hospitals are usually organised around the gender marker. The consequences of being placed in the wrong ward can put the safety, the physical integrity or the life of the individual concerned at risk.⁹

The fear of being ‘outed’ on official documentation or of being suspected of using falsified documents creates a vicious circle. When picking up a parcel, using a personalised transport ticket or opening a bank account becomes a source of major stress, a person might be tempted to hide their head

³ Robin Hammond photographed 80 nine-year-olds in eight countries around the world for the *National Geographic* cover story in January 2017. He looked for different kinds of diversity: geographic, ethnic, socio-economic. According to the editor-in-chief, Susan Goldberg, the portrait of A., ‘strong and proud ... summed up the concept of “Gender Revolution”’ <<http://www.nationalgeographic.com/photography/proof/2016/12/robin-hammond-gender-cover/>> accessed 3 July 2017.

⁴ The Sylvia Rivera Law Project (SRLP) is a collective organisation that works to guarantee that all people are free to determine their gender identity and expression, regardless of income or race, and without facing harassment, discrimination, or violence, <<https://srlp.org>> accessed 3 July 2017.

⁵ Dean Spade, *Normal Life. Administrative violence, critical trans politics, & the limits of law* (2nd edition, Duke University Press, Durham & London 2015) IX of the preface.

⁶ See, for instance, Human Rights Campaign, ‘A Global crisis: Epidemic of violence against transgender people’ by Saurav Jung Thapa (18 November 2016) <<http://www.hrc.org/blog/a-global-crisis-epidemic-of-violence-against-transgender-people>> accessed 5 July 2017.

⁷ See, for instance, Amnesty International, ‘The State decides who I am. Lack of legal gender recognition for transgender people in Europe’ (2014) <<http://www.amnesty.org/en/documents/EUR01/001/2014/en/>> accessed 5 July 2017; EU Agency for Fundamental Rights, ‘Being Trans in the EU. Comparative analysis of EU LGBT survey data’ (2014) <https://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative-0_en.pdf> accessed 5 July 2017.

⁸ Transgender Europe (TGEU), ‘Legal Gender Recognition in Europe. Toolkit’, by Richard Kohler and Julia Ehrt (2nd revised edition, November 2016) <<http://tgeu.org/wp-content/uploads/2017/02/Toolkit16LR.pdf>> accessed 5 July 2017, 8-9.

⁹ Rogers Brubaker, *Trans: gender and race in an age of unsettled identities* (Princeton University Press, Princeton 2016).

in the sand. Self-censorship coupled with avoidance strategies generate social exclusion. In some cases, the issue is not even discrimination at work, but rather not applying for a job in the first place for fear of facing prejudice. This circle of marginalisation is definitely related, at least to some extent, to the disturbing figures of suicide and attempted suicide by trans people.¹⁰

Institutional barriers generate vulnerability and affect every trans person with different trans experiences. Even those with privileges usually attached to citizenship, class, education or ethnic origin experience major impediments. Gender recognition procedures are the bedrock of anti-discrimination measures. Giving legal recognition to a trans person's gender identity is a *first* and *necessary* step towards equality and dignity.¹¹ This alone is not enough, but it is essential. However, even in countries where a change of gender in identity documents is allowed, it often remains subject to disturbing legal requirements such as psychiatrisation, compulsory surgery and sterilisation.

This was the case in Belgium. Our paper reflects the legal battle pursued in Belgium to fight the worrying conditions attached to legally changing one's gender. The Belgian case is highly relevant. According to an EU-wide survey carried out by the European Union Agency for Fundamental Rights, Belgium is at the forefront of the European countries which discriminate most against trans people when looking for work and in the workplace. Of the respondents to the EU survey who were looking for a job in 2012, 53% felt personally discriminated against on this basis.¹² Yet, the Belgian legal situation is far from isolated, and this case study could be expanded to other jurisdictions. The strategies which were developed to successfully challenge the Belgian law were embedded in the *Human Rights Integration* project.¹³ Not only do these strategies embrace an integrated approach to human rights,¹⁴ but they are also anchored in the user's perspective.¹⁵ The Belgian law of 25 June 2017, which drastically revises legal gender recognition procedures,¹⁶ is the result of a participatory process in which many stakeholders were involved. Trans people were at the core of the reform along with representatives of LGBT organisations, grassroots movements and academics linked to the Equality Law Clinic (ELC)¹⁷.

This paper falls into four parts. We begin by sketching the development of a human rights approach to trans issues at the supranational level, which boosted mobilisation in Belgium (Part 1). After an account of the hurdles in translating grassroots demands for sustainable legal claims (Part 2), we move to the development of legal strategies, taking into account the global dimension of human rights and anti-discrimination law (Part 3). The need to seize political momentum illustrates the shift from strategic litigation to the drafting of a model law (Part 4).

1. The human rights approach to trans issues at the supranational level: a boost for further

¹⁰ Ann P Haas, Philip L Rodgers and Jody L Herman, *Suicide attempts among transgender and gender non-conforming adults: Findings of the national transgender discrimination survey*, American Foundation for Suicide Prevention and the Williams Institute (ULCA School of Law, Los Angeles 2014) <<http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>> accessed 3 July 2017. Joz Motmans, 'Being transgender in Belgium. Mapping the social and legal situation of transgender people' (*Institute for Women and Man*, 2010) <http://igvm-iefh.belgium.be/sites/default/files/downloads/34%20-%20Transgender_ENG.pdf> accessed 5 July 2017, 68, see also *id.* tables 50-51 at 105.

¹¹ According to the EU survey, 'Being Trans in the EU', 73% of trans respondents 'expressed the belief that easier gender recognition procedures would allow them to live more comfortably as transgender people'. EU Agency for Fundamental Rights, *supra* note 7, at 5.

¹² EU Agency for Fundamental Rights, *supra* note 7, at 30. See also Joz Motmans, *supra* note 10; Human Rights League (*Ligue des droits de l'homme*), 'Le genre idéal' (*Chronique no. 169*, 2015) <http://www.liguedh.be/images/PDF/documentation/la_chronique/chro169_legenreideal.pdf> accessed 5 July 2017.

¹³ <<http://hrintegration.be>> accessed 3 July 2017.

¹⁴ See the dossier 'Human Rights Integration: theorizing the multi-layered nature of human rights law', (2014) (3) EJHR; Eva Brems, 'Smart Human Rights Integration', see chapter X of this book.

¹⁵ Ellen Desmet, 'Methodologies to study Human Rights Law as an Integrated Whole from a Users' Perspective', see chapter X of this book.

¹⁶ Law of 25 June 2017 reforming regimes relating to transgender people as regards the reference to a change in the registration of sex in civil status documents and its effects, O.J. (*Moniteur belge*), 10 July 2017.

¹⁷ <<http://www.philodroit.be/-ELC->> accessed 5 July 2017.

mobilisation

The legal approach is evidently neither a response to all the problems faced by trans people nor will it be able to end the exclusion they experience. The role of the law as a tool for social mobilisation is, however, well documented.¹⁸ In particular, the importance of human rights law and equal opportunity law as a template for the claims of lesbian and gay people has been made evident by several authors.¹⁹ Although using the law to support these claims has not been without controversy, it is generally recognised that several legal milestones, such as the decriminalisation of homosexual relations or the condemnation of the most glaring examples of discrimination,²⁰ are the first steps towards achieving equality in practice.²¹

Relying on the expertise and language of human rights law, equality and non-discrimination is also present in the trans movement, although its development is more recent.²² With the exception of certain decisions of the European Court of Human Rights²³ the main advancements in Europe and internationally began at the turn of the millennium. Here, we only point to the landmarks in this evolution.²⁴

In 2002, in the famous *Goodwin* case, the Grand Chamber of the European Court of Human Rights considered that ‘in the twenty first century the right of transsexuals²⁵ to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved’.²⁶ The European Court overruled its *Rees* ruling adopted 16 years earlier²⁷ and obliged the United Kingdom to legally recognise the gender re-assignment of post-operative transsexual persons.²⁸

Embraced by a group of experts in international human rights law in 2007, the Yogyakarta Principles ‘on the Application of Human Rights Law in Relation to Sexual Orientation and Gender

¹⁸ Stuart A Scheingold, ‘Preface to the Second Edition: the New Politics of Rights’ in Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd edn, University of Michigan, Press Ann Arbor 2004); Liora Israël, *L’arme du droit* (Sciences-Po les Presses 2009) 17-38.

¹⁹ Philip Alston and Ryan Goodman, *International Human Rights* (OUP, Oxford 2013) 220-238; David Paternotte and Hakan Seckinelgin, ‘“Lesbian and Gay Rights are Human Rights”: Multiple Globalisation and LGBTQI Activism’ in David Paternotte and Manon Tremblay (eds), *The Ashgate Research Companion to Lesbian and Gay Activism* (Ashgate 2015) 209-224; David Paternotte, *Revendiquer le ‘mariage gay’. Belgique, France, Espagne* (Éditions de l’Université de Bruxelles, Brussels 2011); Robert Wintemute, ‘Libertés et droits fondamentaux des personnes gays, lesbiennes et bisexuelles en Europe’ in Daniel Borrillo (ed.), *Homosexualités et droit: de la tolérance sociale à la reconnaissance juridique*, Collection ‘Les voies du droit’ (PUF, Paris 1999) 180-204; Olivier De Schutter, ‘Homosexualité, discours et droit’ (1993) RIEJ 83-143.

²⁰ Thus, for example, the European Court of Human Rights condemned the denial of child custody (*Salgueiro Da Silva Mouta v Portugal*, App no 33290/96 (ECHR, 21 December 1999)), exclusion from the armed forces (*Smith & Grady v the UK*, App no 33985/96 & 33986/96 (ECHR, 27 September 1999)), and the denial of legal status to same-sex couples (*Vallianatos and others v Greece*, App no 29381/09 & 32684/097 (ECHR, 7 November 2013); *Oliari v Italy*, App no 18766/11 and 36030/11 (ECHR, 21 July 2015)).

²¹ Robert Wintemute, *Sexual orientation and human rights* (OUP, Oxford 1997); Daniel Borrillo (ed.), *Homosexualités et droit. De la tolérance sociale à la reconnaissance juridique*, Collection ‘Les voies du droit’ (PUF, Paris 1999); Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013); Paul Johnson, ‘Are gay rights human rights?’ (16 May 2017) <<https://ssrn.com/abstract=2971762>> accessed 3 July 2017.

²² Janneke van der Ros and Joz Motmans, ‘Trans Activism and LGB Movement: Odd Bedfellows?’ in David Paternotte and Manon Tremblay (eds), *supra* note 19, at 163-180.

²³ See, for instance, *B. v France* App no 13343/87 (ECHR, 25 March 1992).

²⁴ For a more detailed presentation, see *A.P., Garçon & Nicot v France* App no 78995/12, 52471/13 and 52596/13 (ECHR, 6 April 2017) section V (‘Documents from international source’), paras 73-81 (judgment available only in French).

²⁵ The use of this controversial terminology indicates that the European Court of Human Rights has, for a long time, only dealt with trans people undergoing sex reassignment surgery.

²⁶ *Goodwin v the UK* App no 28957/95 (ECHR, 11 July 2002), para 90.

²⁷ *Rees v. the UK* App no 9532/81 (ECHR, 17 October 1986).

²⁸ *Id.* at para 93.

Identity' is another milestone.²⁹ Starting from the fragmented and inconsistent international response to human rights violations based on sexual orientation and gender identity, these Principles bring greater clarity and coherence to States' human rights obligations.³⁰ While not formally adopted as an international standards, these Principles were endorsed by several UN and regional human rights bodies, by quite a few national courts, by some governments and by NGOs. They were used as a tool for identifying State obligations to respect, protect and fulfil the human rights of all persons, regardless of their gender identity.³¹ In Europe, the former European Commissioner for Human Rights, Thomas Hammarberg, was the first to support them in 2009. Stressing that trans people remain one of the most vulnerable and discriminated-against group due to inadequate laws and social marginalisation, he delivered guidance to the Member States of the Council of Europe in order to fully implement the human rights of this group both in law and in everyday life.³² Over the following years, the Council of Europe worked closely on the subject and issued several recommendations and resolutions to foster the rights of trans people.³³

In one decade, intense civil society and legal mobilisation has contributed to a paradigm shift, moving from a gatekeeping, medical and paternalist approach to a rights-based approach.³⁴ This shift is still ongoing while social acceptance and awareness about trans people are growing.

These supranational resources promote an integrated approach to human rights, combining the instruments which protect civil and political rights with those dedicated to economic, social and cultural rights, as well as with those which relate to a specific group of people (for example, women or children). This integrated approach also relies on the resources available at different levels, such as the UN, the Council of Europe or the European Union. Although these are mostly not binding, they provide a beneficial framework to facilitate the emergence of national movements. The collection of data in the comparative research, as well as the increasing involvement of transnational NGOs specialising in the rights of trans people, also plays a part in creating this fertile ground.³⁵ At the European level, the 'legal gender recognition tool kit' created by Transgender Europe (TGEU), an umbrella organisation gathering more than one hundred member organisations over the Council of Europe, is a significant step. It aims to build expertise, disseminate good practices, overcome myths and stereotypes, and accompany national reforms on legal gender recognition by assessing their conformity to human rights standards.³⁶

2. The Equality Law Clinic and the grassroots trans movement

²⁹ These Yogyakarta principles followed the 'Montreal Declaration' which the participants in the International Conference on LGBT Human Rights adopted in 2006. See 'The Yogyakarta Principles. The application of International Human Rights Law in relation to Sexual Orientation and Gender Identity' (2016) <http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf> accessed 7 July 2017.

³⁰ Introduction to the Yogyakarta Principles (2016) <<http://www.yogyakartaprinciples.org/introduction/>> accessed 7 July 2017.

³¹ Thomas Hammarberg, Human Rights Commissioner of the Council of Europe, 'Issue Paper on Human Rights and Gender identity', CommDH/IssuePaper(2009)2 (29 July 2009).

³² *Id.*

³³ See, for instance, the Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity (31 March 2010); Parliamentary Assembly Resolution 1728(2010) on discrimination on the basis of sexual orientation and gender identity (29 April 2010); Congress of Local and Regional Authorities Resolution 380(2015) on guaranteeing lesbian, gay, bisexual and transgender (LGBT) people's rights: a responsibility for Europe's towns and regions (24-26 March 2015); Parliamentary Assembly Resolution 2048(2015) on discrimination against transgender people in Europe (22 April 2015). See also Council of Europe, 'Protecting human rights of transgender persons. A short guide to legal gender recognition' (2015) <<https://rm.coe.int/1680492119>> accessed 5 July 2017.

³⁴ TGEU, *supra* note 8, at 6.

³⁵ Kelly Kollmann and Matthew Waites, 'The global politics of lesbian, gay, bisexual and transgender human rights: an introduction' (2009) 15(1) Contemporary Politics 1-17.

³⁶ TGEU, *supra* note 8. See also the resources on trans issues available on the website of ILGA Europe <<http://www.ilga-europe.org/resources/thematic/trans>> accessed 5 July 2017.

In Europe, multiple and overlapping sources of equality law are coupled with a diversification of actors who shape the right to non-discrimination, and who often and increasingly operate transnationally. Migration of legal arguments is well documented, and these have become a major tool of strategic litigation.³⁷ In our opinion, the traditional segregated approach to anti-discrimination law, which studies different courts and legal orders in isolation from one another, no longer provides adequate conceptual and normative tools to fully grasp the current evolutions and challenges in this domain.³⁸ Instead, there is a genuine need for a global approach to anti-discrimination law in which comparative law plays a central role.

Founded in the autumn of 2014, the Equality Law Clinic takes its roots in this context. Only issues with both national and transnational dimensions are taken on board. This has allowed us to develop pilot action research within the academic project *Human Rights Integration*.³⁹ As a legal clinic, it involves a small group of Masters students in law, researchers and professors, who closely collaborate with grassroots organisations, and national and transnational NGOs to produce a practical contribution that promotes equality and social justice. Outcomes take different shapes: third party interventions, guides for practitioners, codes of conduct, model laws, lawsuits with a strategic dimension, etc.

From the very beginning, experiences of social exclusion faced by many trans people in Belgium and around the globe were a major concern for the ELC. The Belgian law ‘on transsexualism’ adopted on 10 May 2007⁴⁰ is a topical case to illustrate the extent to which poor gender recognition procedures foster social exclusion and discrimination. This law was adopted to end the legal uncertainty caused by different lines of precedent on officially changing gender on birth certificates. At the time, it was considered innovative by many as it replaced a judicial procedure with an administrative one which had no discretionary criteria.⁴¹ According to this procedure, a person who legally wishes ‘to change sex’ could do it by a ‘mere declaration’ to the civil registrar. In practice, such a declaration should be accompanied by statements from the referring psychiatrist and the treating surgeon who certify:

1. that the individual has a constant and irreversible inner conviction that s/he belongs to the sex other than the one stated on the birth certificate;
2. that the individual has undergone sex reassignment that makes her/him correspond with the other sex to which the individual in question is convinced s/he belongs, as far as it is possible and justified from a medical point of view;
3. that the individual is no longer capable of conceiving children in accordance with her/his previous sex.⁴²

In addition, the right to change one’s first name was also limited to individuals ‘with a constant, and irreversible inner conviction that they belongs to the sex other than the one stated on their birth certificate’. They had to produce a statement from their psychiatrist in this respect, and an endocrinologist had to certify that they were undergoing hormone replacement therapy for the purpose of inducing the physical characteristics of the ‘other sex’. It was also necessary to demonstrate that the change of first name was an essential part of the ‘change of sex’.⁴³

During the parliamentary process, no real voice was given to trans people. It was as though MPs were not aware of the fact that the medical criteria excluded a large group of people from claiming the right to change their first name and gender. Debates focused on therapeutic freedom and appropriate

³⁷ Emmanuelle Bribosia and Isabelle Rorive, ‘Anti-discrimination Law in the Global Age’ (2015) (1) EJHR 3-10.

³⁸ Emmanuelle Bribosia and Isabelle Rorive, ‘Chronique - Droit de l’égalité et de la non-discrimination’ (2014) (2) EJHR 205-237; (2015) (2) EJHR 223-243; (2016) (2) EJHR 254-268; (2017) (2) EJHR in press.

³⁹ <<http://hrintegration.be>> accessed 5 July 2017. See, for instance, Kurt Lewin, ‘Action Research and Minority Problems’ (1946) 2(4) *Journal of Social Issues* 34-46

⁴⁰ O.J. (*Moniteur belge*) 11 July 2007.

⁴¹ Caroline Simon, ‘Au-delà du binaire: penser le genre, la loi et le droit des personnes transgenres en Belgique’ (2016) 28(3) *Canadian Journal of Women and the Law* 521-547. See also Joz Motmans, *supra* note 10, at 51.

⁴² Belgian law ‘on transsexualism’ adopted on 10 May 2007, Art. 2, introducing Art. 62*bis* in the Civil Code.

⁴³ *Id.*, Art. 9; Joz Motmans, *supra* note 10, at 52.

legal process. Human rights were hardly touched upon.⁴⁴ The grassroots organisation *Genres pluriels* ('Plural Genders') was formed in response to the federal law.⁴⁵ It strongly rejected the medical premise on which the law was built, i.e. that trans people suffer from a mental disorder, formerly called 'gender identity disorder' and now labelled 'gender dysphoria'.⁴⁶

Tackling trans issues from a user's perspective required an inter-disciplinary approach. Hiding behind the formal human rights discourse was not enough. The legal battle was entangled in a medical debate, and sociological, anthropological and psychosocial resources were needed to get the full picture. Gender studies were valuable to move from a biomedical approach (where gender is considered biologically determined) to an approach where gender is a social and cultural construct that is rooted in history. Most of all, meeting on a regular basis with *Genres pluriels*, LGBT organisations from across the country and trans people with diverse backgrounds was key to the success of the collaboration. Our decision to contribute to the realisation of the fundamental rights of trans people required us to embrace a human adventure. This approach enabled us to address three challenges.

The first challenge was the diversity of trans people, a group which encompasses not only diverse personal situations but also different political stances.⁴⁷ This is reflected in the history of the word 'transgender',⁴⁸ often described as an umbrella term to refer to the wide variations of identities and expressions within the gender identity spectrum.⁴⁹ Transgender man, transgender woman, female-to-male (FTM), male-to-female (MTF), non-binary, cross-dresser, genderqueer, genderfluid, genderless, agender, non-gendered, pan-gender, gender non-conforming, ... this list illustrates how simplistic it is to define trans people as those who experience a mismatch between the gender assigned at birth and the one they identify with.⁵⁰ Moreover, there are individuals who experience this lack of correspondence but do not want or are not able, sometimes for medical reasons, to initiate and go through transition-related treatments such as hormonal therapy and surgery. Some trans activists are fundamentally questioning the binary system altogether. This is sending tremors through society at large, which relies on gender roles to dictate the type of behaviour considered appropriate, acceptable or desirable, depending on the perceived gender of individuals.

A second challenge was to understand the social claims of trans people in a comprehensive manner. Human rights lawyers have tended to focus on the issue of sterilisation. For a few years, it had been quite obvious that having sterilisation as a condition to gender recognition would not last.⁵¹ In April 2017, the European Court of Human Rights held for the first time that compulsory sterilisation for legal gender recognition violated the right to private life.⁵² Around twenty Member States of the Council

⁴⁴ Caroline Simon, *supra* note 41, at 525-536.

⁴⁵ *Genres pluriels* was founded on 16 October 2007. See its annual reports (in French) on <<https://www.genrespluriels.be/Rapports-Annuels->> accessed 5 July 2017.

⁴⁶ Note that 'gender identity disorder' was replaced by 'gender dysphoria' in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) released by the American Psychiatric Association (APA) in 2013. In the explanation note called 'Gender Dysphoria', one can read that 'DSM-5 aims to avoid stigma and ensure clinical care for individuals who see and feel themselves to be a different gender than their assigned gender. ... gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition'. Note that in 2016, the World Health Organization announced that it was moving towards declassifying transgender identity as a mental disorder in its global list of medical conditions. The revised volume of the last ICD-10 (Classification of Mental and Behavioural Disorders) adopted in 1993, is scheduled to be approved in May 2018.

⁴⁷ Patricia Elliot, 'Engaging Trans Debates on Gender Variance: A Feminist Analysis' (2009) Vol. 12 (I) *Sexualities* 5-32..

⁴⁸ On the history of the word 'transgender', see Joz Motmans, *supra* note 10, at 18.

⁴⁹ See, for instance, National Centre for Transgender Equality, 'Transgender Terminology' (updated January 2014) <http://www.transequality.org/sites/default/files/docs/resources/TransTerminology_2014.pdf> accessed 5 July 2017.

⁵⁰ Note that the term is seen as derogatory due to its psychiatric history.

⁵¹ See, the comparative legal material referred to in the model law written in collaboration with the Equality Law Clinic ('loi relative à l'identité de genre, l'expression de genre et les caractères sexuels' (2016) <http://www.philodroit.be/IMG/pdf/_elc_projet_de_loi_mode_le_pour_les_personne_trans_.pdf> accessed 5 July 2017, 7-8).

⁵² *A.P., Garçon & Nicot v France* Application no. 78995/12, 52471/13 and 52596/13 (ECHR, 6 April 2017). See also *Y.Y. v Turkey* Application no. 14793/08 (ECHR, 10 March 2015).

of Europe will have to reform their legislation in this respect.⁵³ Since the autumn of 2014, working with civil society organisations and trans people has made clear that, in their daily life, the legal sanctioning of psychiatric pathologisation is the major issue. The trans people we met do not want to be ‘cured’. Those who wish to go through a transition process leading to gender reassignment surgery made a clear distinction between medicalisation, on one hand, and pathologisation, on the other hand. Pathology is linked to ‘abnormality’ and ‘deviant’ behaviours. It causes pain.⁵⁴ At the same time, fighting pathologisation should not be detrimental to the right to healthcare.

A third challenge was to translate social issues that trans people face into accurate legal questions. The pitfalls of this act of translation have been extensively analysed in Sally Engle Merry’s work on the ‘vernacularisation’ of human rights.⁵⁵ In her study concerning the reconstruction of local instances of gender violence as defined in international human rights instruments, Merry shows that activists from NGOs and social movements fulfil a key function when they ‘translate rights claims into frameworks that are relevant to the life situations of grassroots people’.⁵⁶ Yet the process of reframing ‘everyday problems in human rights terms’⁵⁷ is a delicate one and entails a risk of alienation. Besides, social issues are embedded in assumptions about what is and what is not politically feasible, and these assumptions are not constant. All in all, if one takes gender fluidity seriously, if one cares about the full range of intersex people who have biological variations that do not fit with the typical definitions of female or male, if one takes the full measure of what it means to describe gender as a social construct, then gender as a category on our birth certificate or our ID might well disappear altogether. The time did not seem right to bring this debate into the legal arena. And many women’s advocates rightly stressed that gender could not disappear altogether as discrimination against women is real and extensive.

In any case, pleading for a comprehensive right to self-determination is only one side of the picture. Major social issues faced by trans people are embedded into social rights, such as access to healthcare and protection against social exclusion. This had to remain at the core of the legal battle.

3. Developing legal strategies

Social reform movements commonly rely on a number of strategies to achieve their goal of creating a more egalitarian society. Although some groups within the movement tend to focus their efforts on one strategy to the exclusion of others, most employ a variety of approaches including lobbying government officials, political mobilisation, public education and litigation.⁵⁸ All were used in our case.

Once the collaboration between the Equality Law Clinic and *Genres pluriels* was initiated, its goal was to construct a mobilisation strategy to change the law. The coalition agreement adopted in December 2014 was an important lever. The federal government made a pledge to adapt the so-called law ‘relating to transsexuality’ of the 10 May 2007 in order to comply with its international human rights obligations.⁵⁹ This time, civil society wanted to be closely involved in the reform. However, any State initiative seemed to be a stalemate. It is in this context of frustration that the contentious approach established itself. At a roundtable on ‘Law and Legislation’ organised during the annual festival on ‘All

⁵³ See Transgender Europe (TGEU), ‘Trans Rights Europe Map & Index 2016’ (2016) <http://tgeu.org/trans-rights_europe_map_2016/> accessed 5 July 2017.

⁵⁴ Judith Butler, *Défaire le genre. Nouvelle Édition* (Éditions Amsterdam 2016), postface ‘Le transgenre et “les attitudes de révolte”’, 347-370, esp. 356.

⁵⁵ On these developments, see Moritz Baumgärtel, *From Deficit to Dilemma. An Evaluation of the Contribution of Europe’s Supranational Courts to the Promotion of the Rights of Vulnerable Migrants*, PhD thesis supervised by Emmanuelle Bribosia and Isabelle Rorive and defended at the ULB in December 2016, 42.

⁵⁶ Sally Engle Merry, *Human rights and gender violence: Translating international law into local justice* (University of Chicago Press, Chicago 2006) 216 and 219.

⁵⁷ *Id.*

⁵⁸ Susan Gluck Mezey, ‘Lesbian and Gay Rights and the Courts’ in David Paternotte and Manon Tremblay (eds), *supra* note 19, at 195-208.

⁵⁹ Government Agreement (2014) <<http://www.premier.be/fr/accord-de-gouvernement>> accessed 5 July 2017, 226.

Genders are in Culture’ in November 2015, the Equality Law Clinic was invited to present ‘The European Legal Resources for the Protection of the Rights of Trans People in Belgium’. At this event, the appeal lodged before the European Committee of Social Rights by Transgender-Europe and ILGA-Europe against the Czech Republic, in March 2015, was debated.⁶⁰ Once again, the requirement of sterilisation in order to be eligible for gender reassignment surgery and, in turn, to modify one’s ‘legally registered sex’ was at the core of the litigation. Interestingly, this was challenged under the right to health and the prohibition of discrimination.⁶¹

Less well-known than the European Court of Human Rights, the collective appeals mechanism established by the European Social Charter, in our case, offered several advantages in terms of strategic litigation. First, this mechanism provides an opportunity to challenge the whole Belgian legal framework without having to rely on an identified ‘victim’.⁶² It was not necessary to wait for the ‘right plaintiff’ or the ‘right case’, nor to exhaust domestic remedies before launching the strategic complaint. It was only necessary to find the support of international NGOs authorised to lodge a collective complaint under the Additional Protocol.⁶³ Second, the pending case against the Czech Republic before the European Committee of Social Rights could be built upon and used as a first step to allow us to move beyond the issue of sterilisation. Third, the Committee offered a better structure of opportunities to translate the social issues that trans people were reporting. Pathologisation was not the only issue to be contested. Discriminatory behaviours against trans people reflected ‘institutional transphobia’.⁶⁴ This could be addressed through a claim constructed around a combination of the right to health,⁶⁵ the protection against social exclusion⁶⁶ and the prohibition of discrimination.⁶⁷ The right to private life of the European Convention of Human Rights seemed ill-suited to address this side of the issue. It was feared that the Court would give a wide margin of appreciation in the absence of a European consensus on this matter, which was considered to be a significant disadvantage. This concern was proven to be well-founded after the European Court of Human Rights’ recent ruling in the *A.P., Garçon and Nicot* case, where only the requirement of sterilisation was censured.⁶⁸

The plan to bring a collective complaint before the European Committee of Social Rights was warmly welcomed by the *Genres pluriels*’ legislative working group, which considered it as a means to put pressure on the government, with a view to achieving the desired reforms, but also as a way to alert national judges who deal with cases of violations of the rights of trans people. At the national level, the

⁶⁰ Complaint no 117/2015 (ECSR, 27 April 2015).

⁶¹ Article 11 of the 1961 Social Charter and Preamble of the 1961 Social Charter as the Czech Republic did not ratify the Revised European Social Charter of 1996.

⁶² Holly Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights’ (2009) 9(1) HRLR 61; Olivier De Schutter and Matthias Sant’Ana, ‘The European Committee of Social Rights (The ECSR)’ in Gauthier de Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe* (Routledge 2012) 71.

⁶³ Additional Protocol to the European Social Charter Providing for the System of Collective Complaint, *ETS- No. 158*. This Additional Protocol allows international and national non-governmental organisations and social actors which satisfy certain requirements to lodge complaints directly before the Committee with regard to the breaches of the Charter in States that ratified the Protocol, provided that the complaint touches upon an issue for which the non-governmental organisations and social actors have a specific competence.

⁶⁴ Paul Borghs, ‘Les critères médicaux dans la loi relative à la transsexualité: Etude de droit comparé menée pour le compte de l’Institut pour l’Egalité des Femmes et des Hommes’ (2013) <https://www.ilga-europe.org/sites/default/files/transsexualiteit_medische_criteria_fr_tcm336-2371881.pdf> accessed 5 July 2017, 57.

⁶⁵ Article 11 of the revised Social Charter.

⁶⁶ Article 30 of the revised Social Charter.

⁶⁷ Article E of the revised Social Charter.

⁶⁸ *A.P., Garçon and Nicot v France* App no 79885/12, 52471/13 and 52596/13 (ECHR, 6 April 2017). See Pieter Cannoot, ‘A.P., Garçon and Nicot v. France: the Court draws a line for trans rights’ (*Strasbourg Observers*, 5 May 2017) <<https://strasbourgobservers.com/2017/05/05/a-p-garcon-and-nicot-v-france-the-court-draws-a-line-for-trans-rights/>> accessed 5 July 2017.

Ligue des droits de l'homme (LDH - Human Rights League)⁶⁹ was also welcomed on board, not only for its expertise in putting successful collective complaints before the European Committee of Social Rights,⁷⁰ but more importantly, to highlight that addressing the social exclusion of trans people is a matter of principle in a State that abides by the rule of law. It was crucial that an organisation entitled to submit a complaint to the European Committee of Social Rights take part in this project. For this purpose, contact was made with ILGA-Europe, TransGender Europe and the International Federation for Human Rights.

Although the complaint was chiefly drafted by the Equality Law Clinic, its design was a collaborative process involving members from *Genres pluriels*' legislative working group, Amnesty International (AI) and the *Ligue des droits de l'homme*. In order to guarantee the best representation possible in this complaint, and to ensure disagreements within civil society did not undermine it, LGBT organisations from all regions of the country took part in the development of the case.⁷¹ The task involved carefully translating the claims of trans people to fit within the formal framework of a complaint based on the revised European Social Charter. Alleging a violation of human rights in the general, political and moral sense is not sufficient. Specific rights guaranteed by the European Social Charter must be mobilised in order to judiciously denounce the lived experiences of the people concerned and the organisations which represent them.⁷² At the same time, testimonies were being collected by the Equality Law Clinic to support and illustrate the complaint.

The legal basis for the claim was threefold: the right to health,⁷³ protection against social exclusion⁷⁴, taken independently or in conjunction with the prohibition of discrimination.⁷⁵

First, the right to health offers an opportunity to reconsider the sterilisation and psychiatrisation which restrict the modification of one's legally registered gender under the 2007 Belgian law 'on transsexuality'. The pending complaint against the Czech Republic, and also the pending petitions to the European Court of Human Rights in *Y.Y. v. Turkey*⁷⁶ and *A.P., Garçon & Nicot v. France*⁷⁷, served as inspiration for bringing the criteria of sterilisation into question. There still remained a lot to do in order to denounce the institutionalised psychiatrisation at the heart of the claims made by organisations defending the rights of trans people.

Second, our use of the protection against social exclusion was an attempt to go beyond simply challenging the criteria required to change one's registered gender in Belgium. The consequence of this legislation is that it leads to the exclusion of trans people from several areas of social life, most notably, employment, education, housing and healthcare. We therefore endeavoured to stress the positive obligations imposed upon the Belgian State. According to the European Committee for Social Rights, in order to ensure the effective exercise of the right to protection against poverty and social exclusion,

⁶⁹ <<http://www.liguedh.be>> accessed 5 July 2017. For more than a hundred years, the LDH has been fighting, in complete independence from the political authorities, the injustices and attacks on fundamental rights in the French community of Belgium.

⁷⁰ *International Federation for Human Rights (FIDH) v Belgium* Complaint no 75/2011 (ECSR, 18 March 2013), complaint challenging the serious shortage of accommodation for highly dependent adults with disabilities and their families; *International Federation for Human Rights (FIDH) v Belgium* Complaint no 62/2010 (ECSR, 21 March 2012), complaint challenging the global situation of Travellers in Belgium.

⁷¹ As Belgium is a federal State, the country counts three regional lesbian, gay, bisexual, trans and intersex (LGBTI) umbrella organisations: Arc-en-ciel Wallonia, Çavaria (Flanders) and the Rainbowhouse Brussels. For a presentation of the LGBT social movement in Belgium, see Janneke van der Ros and Joz Motmans, *supra* note 22, at 163-177.

⁷² Eva Brems and Ellen Desmet, 'Studying Human Rights Law from the Perspective(s) of its Users' (2014) 8(2) HR&ILD 111, 116; Sally Engle Merry et al., *Law from Below: Women's Human Rights and Social Movements in New York City* (2010) 44(1) Law & Society Review 101-128.

⁷³ Article 11 of the revised Social Charter.

⁷⁴ Article 30 of the revised Social Charter.

⁷⁵ Article E of the revised Social Charter.

⁷⁶ *Y.Y. v Turkey* App no 14793/08 (ECHR, 10 March 2015). The ruling was adopted while the Equality Law Clinic was working on the collective complaint.

⁷⁷ *A.P., Garçon and Nicot v France* App no 78995/12, 52471/13 and 52596/13 (ECHR, 6 April 2017).

States parties (are required) to adopt an overall and coordinated approach, which shall consist of an analytical framework, a set of priorities and corresponding measures to prevent and remove obstacles to access to social rights as well as monitoring mechanisms involving all relevant actors, including civil society and persons affected by poverty and exclusion. It must link and integrate policies in a consistent way moving beyond a purely sectoral or target group approach.⁷⁸

Third, using the non-discrimination clause has enabled us to emphasise the breach of the principle of equal treatment that many trans people face. One aspect of our work was to demonstrate that ‘gender identity’ is a prohibited ground of discrimination which is part of the open list enshrined in Article E of the Social Charter. In line with the integrated approach to human rights that the European Committee for Social Rights pursues, this provision should be construed in light of the case law of the European Court of Human Rights which, for the first time in 2015, used the more respectful term of ‘gender identity’ (instead of ‘transsexuality’) in a case concerning homophobic and transphobic behaviours.⁷⁹ Such a position is also supported by the UN Committee for Economic, Social and Cultural Rights, which clearly stated that ‘gender identity is recognized as among the prohibited grounds of discrimination’ under Article 2, § 2 of the International Covenant on Economic, Social and Cultural Rights.⁸⁰ Another aspect was to stress that intersectional discrimination was at play.⁸¹ As highlighted by the EU Agency for Fundamental Rights’ comparative analysis, among the trans people who reported experiencing discrimination, ‘some groups are particularly vulnerable: those who are young, those not in paid work (among them many young trans persons), and those from the lowest income strata. They are more likely to report experiences of discrimination, harassment and violence’.⁸² Despite the modest amount of data on trans people,

(w)hat is known is that those from minority ethnic or cultural backgrounds are likely to find their own communities heterosexist and rigid in their perception of gender, in the same way or possibly more so than the dominant community. Elderly trans people, who belong to an earlier cohort, might have been discriminated against in all phases of their life cycle, but are particularly vulnerable in old age to infringements on their dignity and privacy as they become more dependent on others for care. Trans children also face unique experiences of multiple discrimination.⁸³

The cumulative disadvantage produced by experiencing discrimination based on more than one ground needs to be tackled through an intersectional approach.⁸⁴ While not entirely consistent, the European Committee for Social Rights has showed some readiness to engage with intersectional discrimination.

While the collective complaint against Belgium was taking shape during the spring of 2016, changes were taking place in the federal government. The cabinets of the Secretary of State for Equal

⁷⁸ ECSR, ‘European Social Charter (revised). Conclusions 2003. Vol. 1 (Bulgaria, France, Italy)’ (2003) 214.

⁷⁹ *Identoba and others v Georgia* App no 73235/12 (ECHR, 12 May 2015), para 96.

⁸⁰ UNCESCR General comment no. 20, ‘Non-discrimination in economic, social and cultural rights’ (2 June 2009) 2/GC/20, para 32.

⁸¹ Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’, (1991) 43(6) SLR 1241-1299; European network of legal experts in gender equality and non-discrimination, European Commission, ‘Intersectional discrimination in EU gender equality and non-discrimination law’, by Sandra Fredman (May 2016) <<http://ec.europa.eu/justice/gender-equality/document/files/intersectionality.pdf>> accessed 6 July 2017.

⁸² EU Agency for Fundamental Rights, *supra* note 7, at 98.

⁸³ European network of legal experts in gender equality and non-discrimination, *supra* note 81, at 49.

⁸⁴ *Id.*, at 27-37. On intersectionality and transgender discrimination, see also Heath Fogg Davis, ‘Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique’ (2014) 12(1) Perspectives on Politics <<https://doi.org/10.1017/S1537592713003708>> accessed 6 July 2017, 45-60.

Opportunity and the Minister of Justice were working on a Bill to amend the 2007 Law ‘on transsexualism’. The time to litigate had passed and the collective complaint was never submitted to the European Committee.

4. Surfing on political momentum: Drafting a model law

While the discussion within the federal government started confidentially, in 2016, Belgian Pride put the rights of trans people at the heart of its agenda. This was an opportunity for civil society to present a common position calling upon the federal government and the parliament to make Belgian law in line with international human rights requirements.⁸⁵ Six associations,⁸⁶ supported by the Equality Law Clinic, were calling upon political parties to do background work in order to implement the fundamental rights of trans people. An emerging trend in Europe and beyond was alluded to, which supported discarding the medical doctrine of transgenderism. A human rights approach based on the Yogyakarta Principles, to which the Government Agreement of 2014 made reference, could not be delayed any longer.

From there on, a new strategy was developed. Designing an ambitious, comprehensive and holistic model law seemed to be the best option in order to participate in the legislative process, and to achieve coordinated political lobbying. The ambition was also to contribute to the work carried out in other European countries, where the model law could serve as inspiration.

4.1. A comprehensive model law designed through a participatory process

The process which was initiated to draft the model law is exemplary in several respects. In particular, the intention was to make sure that the voices of the parties concerned would be the first to be heard, and that the diversity of situations could be adequately reflected in the legislative framework. The 40-page model law written in 2016, which is much more comprehensive than the federal Act adopted in June 2017, is the result of an intense collaboration involving trans people, representative NGOs and grassroots organisations as well as the Equality Law Clinic.⁸⁷

Embedded in an integrated approach to human rights, the model law refers to soft law adopted by the Council of Europe and the UN, and to various judicial precedents adopted at the regional level. This integrated approach is in line with current practice whereby supervisory mechanisms and human rights instruments from different continents consult the decisions of others to support interpretation in their own cases. Very emblematic in this respect is the joint statement adopted in May 2016 by the UN Committee on the Rights of the Child, a group of UN human rights experts, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples’ Rights and the Commissioner for Human Rights of the Council of Europe.⁸⁸ They called for ‘an urgent end to the pathologization of lesbian, gay, bisexual and trans (LGBT) adults and children’, underlining that pathologization ‘has historically been, and continues to be, one of the root causes behind the human rights violations that they face (and) is also an obstacle to overcoming negative attitudes, stereotypes, and the multiple barriers for the realization of LGBT people’s most fundamental human rights’.

⁸⁵ Press release by six associations for Belgian Pride 2016, ‘Belgium must respect the fundamental rights of transgender people’ (May 2016) <<https://www.genrespluriels.be/Press-release-by-6-associations-for-Belgian-Pride-2016>> accessed 6 July 2017.

⁸⁶ The six associations were *Genres Pluriels*, together with the country’s three LGBTI umbrella organisations (Arc-en-ciel Wallonia, Çavaria and the Rainbowhouse Brussels), Amnesty International and the Human Rights League.

⁸⁷ See the explanatory memorandum of the model law, *supra* note 51.

⁸⁸ ‘Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness’, for International Day against Homophobia, Transphobia and Biphobia (17 May 2016) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956>> accessed 6 July 2017.

In addition, the model law relies on comparative material to sustain the claim of a European trend towards the social inclusion of trans people. It identifies a dozen changes to legislation and jurisprudence in the legal systems of European States, in particular, Malta and Denmark.⁸⁹

In order to take the Yogyakarta principles and the right to self-determination seriously, the model law not only deals with the civil status, including filiation, but also with the right to health and access to medical care, the specific situation of intersex people and non-discrimination issues. By opting for a holistic approach, this project took due account of the approach recommended in the Transgender-Europe toolkit, acknowledging the snowball effect gender recognition legislation might have on other legal fields and politics.⁹⁰

4.2. Structuring joint political lobbying

In parallel to creating the model law, political lobbying was progressively established. At this stage, the associations requested informal consultations with the aim of influencing the drafting process of the government bill, and were eventually invited to meet members of the cabinets of various ministers of the federal government.⁹¹ However, this dialogue was insubstantial as the government's draft bill was kept confidential, and only a glimpse of it was released orally. The influence of the model law on aspects of the government bill was off-the-record and relied on privileged contacts with members of the cabinet office. The bill was officially submitted to the Federal Council of Ministers, on 9 December 2016,⁹² and shortly thereafter to the Council of State to verify its compliance with the Constitution and international law, as well as to monitor the legislative drafting.⁹³ Confidentiality was maintained at this stage and the government only communicated on its core elements: sterilisation and medical requirements should no longer be part of the administrative gender recognition procedure where adults are concerned.

It is only in April 2017 that the draft bill was made public, when it was submitted to the House of Representatives.⁹⁴ The recently appointed Secretary of State for Equal Opportunities stressed that 'transgenderism is not a disease' and that the reform reflects appropriate respect by the government towards a significant target group.⁹⁵ In the same way as in the model law, the explanatory memorandum to the bill is based on European and international developments in the field of human rights and comparative law,⁹⁶ and put the right to self-determination at the core of the reform: 'None should make a medical diagnosis regarding the gender identity of anyone. It belongs to the individual concerned to decide how he feels'.⁹⁷

4.3. The voice of trans people in parliament

⁸⁹ Recital (4) of the model law, *supra* note 51.

⁹⁰ TGEU, *supra* note 8, at 35.

⁹¹ A delegation gathering some authors of the model law met members of the cabinet of the Secretary of State for Equal Opportunities (N-VA, Nationalist Flemish party), the Chancellery of the Prime Minister (MR, French-speaking liberal party), the cabinet of the Ministry for Justice (Cd&V, Flemish Christian party) and the cabinet of the Ministry for Health (Open VLD, Flemish liberal party).

⁹² Council of Ministers, Press release, 'Modification of the law on transsexualism' (9 December 2016) <<http://www.presscenter.org/fr/pressrelease/20161209/modification-de-la-loi-sur-la-transsexualite>> accessed 6 July 2017.

⁹³ House of Representatives of Belgium, 'Bill reforming regimes relating to transgender people as regards the reference to a change in the registration of sex in civil status documents and its effects' (*Projet de loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'un changement de l'enregistrement du sexe dans les actes de l'état civil et ses effets*), DOC 54 2403/001, Opinion of the Council of State no 60.690/2 (16 January 2017) 56.

⁹⁴ House of Representatives of Belgium, DOC 54 2403/001 (4 April 2017).

⁹⁵ Zuhail Demir (Secretary of State for Equal Opportunities), Opinion 'Only transgender people know who they are and which is their identity' (*Enkel de transgender weet wie hij is en wat zijn identiteit is*) (19 April 2017) <<http://www.zuhaldemir.be/nieuws/enkel-de-transgender-weet-wie-hij-is-en-wat-zijn-identiteit-is>> accessed 6 July 2017.

⁹⁶ House of Representatives of Belgium, DOC 54 2403/001 (4 April 2017), explanatory memorandum, 4-8.

⁹⁷ *Id.*

For trans people and organisations, it was essential to have their voices heard in a forum other than the informal meetings with members of ministers' offices. They needed a rematch against the parliamentary process which led to the 2007 law 'relating to transsexuality'. It was therefore with scepticism that they welcomed the government's intention to adopt the draft law, concerned that the hurried parliamentary process reflected the government's interest in public approval at Belgian Pride a month later. MPs from different political parties were warned: hearings in parliament should be organised.⁹⁸

The substantive work that has been carried out since the first draft of the collective complaint before the European Committee for Social Rights, and afterwards, the model law, prepared the associations for the invitation to the House of Representatives' Committee on Justice. With less than a week's warning, on 25 April 2017, public hearings were organised. They involved representatives of the three major regional LGBT associations in Belgium and of *Genres pluriels*. Also invited were the federal Institute for Equality Between Women and Men, a child psychiatrist from Gent University Hospital's Gender Team, as well as the ULB's Equality Law Clinic, represented by the authors.⁹⁹

The various connections we made in the political sphere since Pride 2016 have shown us the importance of bringing to light, in a very concrete way, examples of the exclusion experienced by trans people. The testimonials collected by *Genres pluriels* and the Equality Law Clinic were key elements in improving awareness. The human dimension was essential. Prejudices had to be deconstructed and bridges built with MPs.

During the hearings, all the interviewees welcomed the progress made concerning the gender recognition procedure open to individuals above the age of 18. Sterilisation was no longer required, nor was the intervention of a psychiatrist or endocrinologist. The provisions on family rights and filiation in line with the Convention on the Rights of the Child were also applauded.¹⁰⁰ Yet, there was a similar unanimity in highlighting the shortcomings of the bill. Three lines of critique could be identified: (i) the need to use appropriate and respectful terminology; (ii) the need to take the right to self-determination seriously; and (iii) the need to address the rights of trans and intersex people more comprehensively.

(i) Appropriate and respectful terminology

During the hearing, Max Nisol, a psychologist speaking on behalf of *Genres pluriels*, stressed the crucial importance of the legislature's use of inclusive, appropriate and respectful terminology for trans people. In this respect, he underlined that

respect can only be full when it is understood very precisely that sex is not gender, that transgender people are therefore not "transsexuals", and that there are not "transgender people" on the one hand and "transsexual people" on the other. ... [C]oncepts and expressions such as "transsexual" and "gender dysphoria", etc., were invented by psychiatry. ... [T]rans identities do not [compulsorily] involve "wanting to belong to the opposite sex", but rather wishing to change the social role of gender, without necessarily linking this to any genital surgery. This phrase also indicates a binary vision of sex and gender, and *de facto* hides the reality of intersex people.¹⁰¹

⁹⁸ Without claiming a conclusive cause and effect link, it seems that the hearings were organised in this way in particular as a result of the insistence on their necessity expressed at a round table organised by the Equality Law Clinic at the ULB (*Université libre de Bruxelles*) on 15 March 2017, entitled 'Stérilisation – Psychiatisation – 2017: les droits des personnes trans toujours bafoués en Belgique', see the outline of this conference <<http://www.philodroit.be/-Les-droits-des-populations-trans->> accessed 6 July 2017.

⁹⁹ For an exhaustive account of the hearings, see DOC 54 2403/000. See also the website of the ELC <http://www.philodroit.be/IMG/pdf/elc_audition_comm_justice_ch_repre_sentant_transmis_24_avril_2017.pdf> accessed 6 July 2017.

¹⁰⁰ See the statement made by *Genres pluriels* on the draft law, 'Nouvelle loi trans: Reconnaissons enfin le statut de pair aux personnes trans' (25 April 2017) <<https://www.genrespluriels.be/Nouvelle-loi-trans-Reconnaissons-enfin-le-statut-de-pair-aux-personnes-trans>> accessed 6 July 2017.

¹⁰¹ DOC 54 2403/000, 14 (our translation).

As is the case for many organisations defending the rights of trans people, the use of appropriate terminology is at the heart of the commitments made in the organisational Charter of *Genres pluriels*, and constitutes one of the main thrusts of its activity.¹⁰² This was reflected in the model law, which begins with precise definitions of terms, as well as examples of the words used in a sentence so as to better facilitate understanding.¹⁰³ We know that the use of words is not merely a question of respect, but also plays a performing role.¹⁰⁴ Language not only represents reality, it also produces reality. In her review of the social science literature, Sara Aguirre stresses that the term “transgender” is used in many instances ‘as a resistance against the medical pathologisation of trans people to which the term transsexual has been traditionally connected’. On the other hand, the terms ‘genderqueer’, ‘trans’ and ‘transgender’ are sometimes used to denote a ‘political claim against essentialist and static views of identity and gender categories (that) calls for a more flexible perspective on gender’.¹⁰⁵

(ii) Taking self-determination seriously

The legislative bill insisted, as a matter of principle, on the need to allow for the full potential of the right to self-determination. Yet, it was not entirely consistent in at least four respects. The last two were removed from the final law following the legislative hearings.

First, the wish to prevent ‘reckless changes’ supports the image of trans persons not in full control of their faculties, which the State must protect from their own decisions. This image contributes to foster social exclusion.¹⁰⁶ Organisations have for some time stressed that this fear of multiple changes is born of the imagination, stemming from a misunderstanding of the experiences of trans people. There is no scientific study or testimony which would support this concern.¹⁰⁷

Second, the ‘irrevocability’ of the change to the registered gender, as foreseen by the government bill,¹⁰⁸ also contradicts the principle of self-determination. Moreover, it does not take into account the phenomenon of gender fluidity.¹⁰⁹ The organisations at the hearing highlighted that beyond the traditional binary attribution of gender, some people feel neither man nor woman. For others, their gender identity may change several times throughout their life.¹¹⁰ In this line, the model law recommends the removal of gender identity from civil status altogether.¹¹¹ This more radical approach was briefly alluded to by some MPs in parliament. However, it was clear that the time was not ripe for such a reform.

¹⁰² Available online in French: <<https://www.genrespluriels.be/Charte-des-membres-de-Genres-Pluriels>> accessed 6 July 2017.

¹⁰³ Article 1.3 of the model law, *supra* note 51. A definition of the following words is provided: gender identity, gender expression, recorded gender, gender marker, registered gender, trans person, cisgender person, trans identity, intersex person, sex, sexual characteristics, recorded sexual characteristics, marked sexual characteristics, registered sexual characteristics, comfort point and gender role.

¹⁰⁴ Sara Salih, Chapter 3 ‘On Judith Butler and Performativity’ in Karen E Lovaas and Mercilee M Jenkins (eds), *Sexualities and Communication in Everyday Life: A reader* (SAGE 2007) 55-68, esp. 61-2.

¹⁰⁵ Sara Aguirre-Sánchez-Beato, ‘Explaining Discrimination Against Trans People: A conceptual journey’, accepted for publication in *Psychology and Sexuality* (forthcoming).

¹⁰⁶ Hearing of Emmanuelle Bribosia and Isabelle Rorive, on behalf of the Equality Law Clinic, before the Justice Committee of the House of Representatives (DOC 54 2403/000, 10-13).

¹⁰⁷ Hearing of the association *Çavaria* before the Justice Committee of the House of Representatives (DOC 54 2403/000, 2-5).

¹⁰⁸ Article 3, para 10 of the bill (‘Le changement de l’enregistrement du sexe dans l’acte de naissance est en principe irrévocable. Moyennant la preuve de circonstances exceptionnelles, le tribunal de la famille peut autoriser un nouveau changement de l’enregistrement du sexe dans l’acte de naissance’).

¹⁰⁹ Hearing of Brice Bernaerts, on behalf of Arc-en-Ciel Wallonie (DOC 54 2403/000, 1-2).

¹¹⁰ Hearing of Katrien Van Leirberghe, on behalf of the association *Çavaria* (DOC 54 2403/000, 2-5).

¹¹¹ Hearing of Joël Le Déroff, on behalf of the association Rainbowhouse Brussels (DOC 54 2403/000, 5-7)..

Third, also in conflict with the right to self-determination was the overprotective requirement to get a ‘proof of information form’¹¹² from a representative trans organisation which should certify that the person who is asking to change her legal gender fully anticipated its consequences. Not only would this be redundant, due to the fact that an information booklet should be provided to any trans person who begins the process of changing her legal gender, but it would also be unworkable given the very limited resources of the non-profit sector.¹¹³ This criticism was embraced by the government which successfully submitted an amendment to the Justice Committee so as to remove the ‘gatekeeper’ role given to the trans organisations.¹¹⁴ In the law adopted in June 2017, anyone wishing to amend their registered gender will receive an information booklet from the registrar as well as the contact information of several organisations dedicated to trans people. The person would be free to decide whether or not contact them before giving a second declaration to the registrar three to six months later to confirm the change of her registered gender.¹¹⁵

Fourth, the draft bill did not fully remove the ghost of pathologisation. Minors of 16 and 17 years old were allowed to change their registered gender provided they produce ‘a medical certificate drawn up by their child psychiatrist who confirms that the concerned party has the enduring conviction that the sex recorded on their birth certificate does not correspond to their intimately experienced gender identity’.¹¹⁶ Even if one might understand the intention to give special support to minors, this should not undermine their right to self-determination. At most, the role of the child psychiatrist should be to certify that an unemancipated minor has *the capacity* to exercise good judgment.¹¹⁷ To win this battle in parliament, trans organisation found a strong ally in the child psychiatrist on Ghent University Hospital’s Gender Team. She stressed that such a medical intervention is neither useful nor necessary for young people, and that ‘allowing this group to change their ‘legal sex’ would contribute greatly to their mental well-being and would positively influence their social integration’.¹¹⁸ The government once again listened to this criticism. In the law, the medical involvement of a doctor is limited to certify that the patient has the ‘the capacity to discern an enduring conviction that the sex registered on their birth certificate does not correspond to their intimately experienced gender identity’.¹¹⁹

(iii) Towards a comprehensive legal framework

Beyond the call to improve the draft bill in order to fully recognise the right to self-determination, the parliamentary hearings provided an opportunity to emphasise the need for a comprehensive legal framework in order to address the structural discrimination that trans and intersex people face. Civil rights are one part of the picture. A coordinated approach to safeguard the effective exercise of the right to protection against poverty and social exclusion is also required. As we saw, Belgian authorities have no choice in this respect.¹²⁰

In line with the approach adopted in the model law, parliamentary hearings showed that a strong commitment should be made to guarantee that health issues are dealt with promptly, and that access to medical treatment and reimbursement of medical expenses is ensured when this is freely chosen by trans people in order to develop their gender identity to a point at which they are comfortable. In addition,

¹¹² Article 3, § 5, 3° of the bill.

¹¹³ Hearing of Emmanuelle Bribosia and Isabelle Rorive, on behalf of the Equality Law Clinic (DOC 54 2403/000, 10-13).
Hearing of Joël Le Déroff, on behalf of the association Rainbowhouse Brussels (DOC 54 2403/000, 5-7).

¹¹⁴ Amendment no. 1 submitted by Mrs Van Hof & consorts.

¹¹⁵ Article 3, para 3 and 5 of the Law of 25 June 2017 reforming regimes relating to transgender people, *supra* note 16.

¹¹⁶ Article 3, § 11 of the bill.

¹¹⁷ Hearing of Emmanuelle Bribosia and Isabelle Rorive, on behalf of the Equality Law Clinic (DOC 54 2403/000, 10-13).

¹¹⁸ Hearing of Karlien Dhondt, child psychiatrist, on behalf of the Kindergenderteam UZ Gent (DOC 54 2403/000, 7-10).

¹¹⁹ Amendment no. 2 submitted by Mrs Van Hof & consorts. Article 3, para 11 of the Law of 25 June 2017 reforming regimes relating to transgender people, *supra* note 16.

¹²⁰ ECSR, *supra* note 78.

specific issues concerning intersex people, which were absent from the bill, should be dealt with without further delay.¹²¹

Ten years after the 2007 law ‘on transsexualism’, Belgium’s legal framework is more respectful of the rights of trans people. Any adult can change their registered gender by a mere declaration to the civil registrar indicating that they have been convinced for some time that the ‘sex’ recorded on their birth certificate does not correspond to their gender identity. They have to renew this declaration after three to six months, adding that they are aware of the administrative and legal consequences that the procedure involves, especially its irrevocable nature (except in extraordinary circumstances). Only the public prosecutor can oppose the modification of the registered gender (within 3 months of the first declaration and only on the ground of contradiction to public order). The legal procedure is no longer linked to any medical procedure. Neither a psychiatrist nor a surgeon is required to intervene. In all cases, changing one’s registered gender is independent of any medical treatment or sex reassignment surgery.

This achievement was greatly aided by the work of trans social movements in Belgium (and internationally) in the last 10 years, which has played an essential role in raising social awareness and helping to create momentum. The language of human rights has acquired new meaning to support the daily struggles of trans people.¹²² For two and half years, the commitment of the Equality Law Clinic was to work on the ground and to realise human rights¹²³ in order to give effect to the right to non-discrimination embedded within the right to self-determination and social rights, such as access to healthcare and protection against social exclusion. A key strategy was to think ‘across boundaries’¹²⁴ and to build legal reasoning based on human rights integration, relying on various rights and non binding legal developments embedded in ‘soft law’ or comparative law. Belgian authorities had to feel like they were backed into a corner. They had no choice but to comply if they wished to avoid slipping to the bottom of the class. Or to take a more positive view, they could rank at the top of the States which take the rights of gender minorities seriously. In other words, the Equality Law Clinic did not adopt a ‘neutral’ stance, which is illusory when working with human rights violations on the ground. This action research was, however, carried out independently. During the parliamentary hearings, the voice of the Equality Law Clinic was an academic one that conveyed a more impartial authority. Working with and as human rights users meant being part of social struggle¹²⁵ where translating what is happening on the ground into suitable human rights legal strategies is crucial. In this respect, the diversity of the personal situation of trans people was a major challenge. An inter-disciplinary approach had to be developed in order to get the full picture.

The partnership between civil society and the Equality Law Clinic will not end here. The method of implementing the new law will also need to be closely monitored, and the adoption of a more comprehensive legal framework should be pursued. The new law is still incomplete regarding access to healthcare, the situation of minors (under the age of 16) and intersex people. If changes on the ground are only felt at the margins, a new strategy must be adopted and the plan to bring Belgium before the European Committee for Social Rights could be revisited once again.

¹²¹ In this line, see the motion for a resolution that Mme Fabienne Winckel & co. submitted to the House of Representatives on 20 April 2017 (DOC 54 2424/001).

¹²² K. De Feyter, ‘Localising Human Rights’ in Wolfgang Benedek, Koen de De Feyter and Fabrizio Marrella (eds), *Economic globalisation and human rights* (Cambridge University Press 2007); K. De Feyter, ‘Sites of rights resistance’ in K. De Feyter and others (eds), *The local relevance of human rights* (Cambridge University Press 2011).

¹²³ See Ellen Desmet, *supra* note 3.

¹²⁴ *Id.* See also Sarah Ganty and Moritz Baumgärtel, ‘Effective Remedies as Capabilities: Towards a User Perspective on the Human Rights of Migrants in Belgium’ 8 *Human Rights & International Legal Discourse* 215, 232 .

¹²⁵ Barbara Oomen, ‘Multi-level renegotiation of human rights – a users’ perspective on the interconnectedness between the fragmentation and integration of human rights law’, see chapter X of this book.

