

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Elsa Paloranta

**COMPARATIVE ANALYSIS BETWEEN FINNISH AND  
SWEDISH LEGISLATION REGARDING TRANSGENDER  
PERSONS**

Bachelor's thesis

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Supervisor: Jenna Uusitalo, MA in Law

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Elsa Paloranta .....

(signature, date)

Student code: 166277HAJB

Student e-mail address: elsa.paloranta@gmail.com

Supervisor: Jenna Uusitalo, MA in Law

The paper conforms to requirements in force

.....

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.....

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## **ABSTRACT**

This thesis compares the differences between Finnish and Swedish law regarding transgender persons and question the current Finnish legislation. The purpose of this thesis is to demonstrate how Finland comes behind with modernizing legislation as this research finds the Finnish transgender law outdated.

The research question for this thesis is how the laws of Finland and Sweden differ regarding transgender people and their legal recognition, and how Finland should reform its legislation in order to correct the current legal problems. The main issue in this research is Finnish laws' requirement for infertility for a transgender person to get legal recognition.

This thesis is written based on thorough research of legislation and academic literature. All conclusions are based on this research from a legal point of view.

As in several Court decisions across Europe the Court has found that the requirement of being infertile to be legally recognized as a gender different than born in is in breach to equality and a violation of their right to health and integrity, this thesis has come to a conclusion that the forced sterilization in Finnish law requirement is a breach to basic human rights and the ECHR, thus this particular requirement should be lifted from the Finnish legislation.

Keywords: Transgender, Comparative Analysis, Legal Gender Recognition, Sterilization

## INTRODUCTION

The concept of gender exerts great influence within both the law and discourse. Male and female, man and woman, boy and girl: these duos operate to divide and assign different rights and understandings to what are typically understood as highly separated categories and bodies. This conceptualisation is naturalised as simplistic and obvious due to the Western cultural “truth” that there are major psychological, biological and social differences between men and women. These categories are conceptualised as not only being very different but also as being opposite and incommensurate.<sup>1</sup>

Since gender roles are such a major part of our society and gender role stereotypes are basically carved in our heads, it does not come as a surprise that transgender people experience violence and the threat of violence both in public space and by relatives. In addition to physical violence, discrimination against trans people also can produce mental health problems. Mental health problems can lead to suicide, exclusion and deterioration in health.<sup>2</sup> In addition to factual information, the media publishes stories where the existence of identities is questioned, and people's experiences are pathologized. The public debate can either disassemble or provoke discrimination against transgender people.<sup>3</sup>

As the problems mentioned above are social and medical problems, this thesis will focus on the determination of the legal status of a transgender person. The research examines and compares Finnish and Swedish legislation regarding transgender people as an example the extent to which sterilization can violate ones' basic human rights as written in European Convention on Human Rights and with the previous Court decisions regarding this matter. This thesis is written from a legal point of view and is looking for solutions via legislating to the problems transgender people face mentioned in the previous paragraph by looking for problems in legislation and suggesting changes to the current, outdated legislation in Finland. As Hans-Ingvar Roth states: “An act of

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<sup>1</sup> Bennett, T. (2015). *Cuts and Criminality – Body Alteration in Legal Discourse*. Surrey: Ashgate Publishing, 161.

<sup>2</sup> *Transpersoner i Sverige – Förslag för Stärkt Ställning och Bättre Levnadsvillkor: Transgender people in Sweden - Proposals to strengthen the position and improve living conditions*. (2017). Stockholm: Wolters Kluwer, 279.

<sup>3</sup> *Ibid.*

discrimination is characterized by an unequal treatment based on morally irrelevant properties. Discrimination can take place between concrete individuals and be clearly intended. In some cases, the discrimination is more implicit or hidden and could be described as institutional or structural discrimination instead of being personal. In both cases, it is important to invest energy in measures such as anti-racist education and strong anti-discrimination laws.”<sup>4</sup> In turn, Fineman ponders: “Merely pointing out the definitional chaos resulting from attempts to define objective criteria for legal sex will not necessarily entail the collapse of the entire edifice of legal sex classification. It is not enough for transgender advocates merely to describe these inconsistencies; instead, we need to focus on the state’s ability to police the relation between sex and gender. It is this policing power that constitutes one of the central problems for securing the rights of transgender people.”<sup>5</sup>

This thesis will compare the differences between Finnish and Swedish law regarding transgender persons and question the current Finnish legislation, which can be considered severely out of date compared to other Nordic countries’ laws regarding this matter, whereas Sweden is a forerunner. The law regarding trans rights in Finland requiring reproductive disability as a precondition for amending juridical sex does not derive from its sovereignty and remains in a worse course after other Nordic laws evolve.

The research question for this thesis is how the laws of Finland and Sweden differ regarding transgender people and their legal recognition, and how Finland should reform its own legislation in order to correct the current legal problems.

This thesis is written based on thorough research of legislation and academic literature, which are all referred in footnotes and in the list of references. All conclusions are based on this research from a legal point of view. Qualitative methods are used, and sources from different decades are used in order to interpret facts in a logical ensemble and to show how the law and opinions have evolved through time.

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<sup>4</sup> Bexell, G., Andersson, D. (Eds.) (2002). *Universal Ethics – Perspectives and Proposals from Scandinavian Scholars*. The Hague: Kluwer Law International, 85.

<sup>5</sup> Fineman, M., Jackson, J.E., Romero, A.P. (Eds.) (2009). *Feminist and Queer Legal Theory – Intimate Encounters, Uncomfortable Conversations*. Surrey: Ashgate Publishing, 250.

The purpose of this research is to demonstrate how Finland comes behind when it comes to human rights matters in Nordic countries as Finnish legislation is discriminatory against transgender people. This research is aiming to offer concrete suggestions on how to change the Finnish legislation to a more modern form to fix this matter. The hypothesis for the conclusion of this thesis is that Finland should improve its legislation regarding this matter by harmonization and taking examples from Swedish law. Sweden has been ahead of Finland when it comes to regulating human rights law to a modern form throughout history.

This thesis is written from a legal, objective point of view. No survey was done in connection with this thesis, and the facts were acquired from academic sources. Human rights are the essential theme in this research; thus, medical law stays aside in the text.

Chapter 1 starts with an exploration of the term transgender and its aspects and continues briefly on the background and history of both Finland's and Sweden's legislation regarding transgender people. Chapter 2 discusses the legislation and Court decisions on the cases regarding transgender people with the European Convention on Human Rights perspective. Chapter 3 introduces the Finnish Act on Legal Recognition of the Gender of Transsexuals, whereas chapter 4 explores the Swedish equivalent. Chapter 5 discusses Finland's legislation from a critical point of view comparing it to Sweden. Chapter 6 presents a conclusion and concrete suggestions to develop the law in Finland regarding transgender people.

## 1. BACKGROUND

Transgender, or trans, is a term for a person who has a gender identity or expression that differs from their sex assigned at birth. Even though the term is often used when discussing sexual minorities, as it is considered one, being transgender is independent of sexual orientation.<sup>6</sup>

Both scholars and transgender-rights supporters have pointed to the many contradictions in state-formulated construction of gender. Supporters highlight these contradictions to persuade state agencies to adopt more consistent or uniform standards.<sup>7</sup> However, there is disagreement among representatives about what those gender standards should be. Some argue that self-avowed gender identity should be the one and only standard in state recognition of gender or sex.<sup>8</sup> Others promote standards in which professionals make the determination based on particular medicalized metrics.<sup>9</sup> However, this can also be problematic as many transgenders feel that it takes way too much time and mental energy for them to be examined and questioned for years before getting the recognition of being the gender they have always identified to be. Thus, many trans people feel degraded and discriminated when going through this process. Still, according to Currah, others argue that “the gender binary reflects hegemonic and increasingly outmoded gendered social and legal structures, rather than any fundamental truths of bodies and identities, gender should not be an element of any official identifying document.”<sup>10</sup> Some scholars contrarily use the contradictions around state recognition of the legal sex of transgender people to demonstrate the radical instability of gender. Regardless of the contradictions, surveillance apparatuses, such as the birth certificate, are indispensable to our ability to function as sexed and gendered individuals.<sup>11</sup>

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<sup>6</sup> Ekins, R., King, D. (2006). *The transgender phenomenon*. London, United Kingdom: Sage, 13.

<sup>7</sup> Dubrofsky, R.E., Magnet, S.A. (Eds.) (2015). *Feminist Surveillance Studies*. Cornwall: Duke University Press, 59.

<sup>8</sup> International Bill of Gender Rights 1990; The Yogyakarta Principles 2007.

<sup>9</sup> *Feminist Surveillance Studies* (2015), *supra nota* 7, 60.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

Sweden was the first country in the world<sup>12</sup> to allow transgender people to correct their gender legally in 1972.<sup>13</sup> The criteria, according to articles 1-4 of Sweden's Gender Recognition Act, were to be at least 18 years old, unmarried, sterilized Swedish citizen. However, the requirements of being a Swedish citizen, unmarried and sterilized were questioned later in time, and the law was re-evaluated in 2007. The requirement to be sterilized and undergo sex reassignment surgery before legally correct one's gender were lifted officially in 2013<sup>14</sup>, and are no longer part of the law, since in December 2012 the Administrative Court found that the sterilization criteria equals a breach of the Constitution, as well as European Convention on Human Rights. Also, the Administrative Court found the criteria of being unmarried obsolete in 2010 and formally changed it as of July 2010. As of January 2011, the criteria of citizenship has changed to residency.<sup>15</sup>

In Finland, the Castration Act was enacted in 1970, and it was possible to apply for castration from the National Authority for Medicolegal Affairs. Finland had no legislation on gender correction prior to 2002 when the current Act on Legal Recognition of the Gender of Transsexuals<sup>16</sup> was drafted and entered into force at the beginning of 2003, and the Castration Act was repealed.<sup>17</sup> According to the 2002 Act on Legal Recognition of the Gender of Transsexuals, the criteria to legally correct one's gender is similar to the Act Sweden legislated in 1972. A person must be at least 18 years old, unmarried and reproductively disable Finnish citizen to correct their gender legally. The law has not been changed since.

In 2014, Amnesty International published a research report on the status of transgender people in seven European countries.<sup>18</sup> Finland is one of the countries studied in the report. The report is based on people's experiences participating in the gender-reassignment process and shows that trans people in Finland face human rights abuses and degrading treatment.<sup>19</sup> Still, in 2020, the law in Finland remains the same.

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<sup>12</sup> Scherpe, J.M. (Ed.) (2015). *The Legal Status of Transsexual and Transgender Persons*. Cambridge: Intersentia, 281.

<sup>13</sup> Sweden's Gender Recognition Act (1972:119).

<sup>14</sup> *The Legal Status of Transsexual and Transgender Persons* (2015), supra nota 12, 287.

<sup>15</sup> *Ibid.*

<sup>16</sup> No. 563/2002 Act on Legal Recognition of the Gender of Transsexuals. (Finland).

<sup>17</sup> *Translain lyhyt historia*. Seta, Transek. Retrieved from <https://translaki.fi/translaki/translain-lyhyt-historia/> 2019.

<sup>18</sup> Amnesty International. (2013). *Gender Legal Recognition in Finland – Submission to the Working Group Tasked to Propose a New Draft Law*. Seta, Transek. Retrieved from [www.translaki.fi](http://www.translaki.fi).

<sup>19</sup> *Ibid.*

## 2. EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights (ECHR) is an international convention to protect human rights and political freedoms in Europe. It entered into force in 1953. The signing parties agree to abide by its articles regarding freedoms and rights such as the rights to privacy, liberty, security, expression, fair trial and marriage, just to mention a few. It also forbids torture and discrimination. Both Finland and Sweden are signing parties.<sup>20</sup>

The ECHR is an essential pillar on the consolidation of peace and stability in Europe. While the ECHR does not contain national minority rights as such, it prohibits discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>21</sup>

While discrimination on the grounds of sex is prohibited and equality is enforced by the European Union law, trans people are constantly being harassed all around the world. Then again, how could there not be social problems in an area which hasn't yet even been legislated properly? Transgendered people being called "mentally ill, freaks, faggots" and other slurs, and even trans children are frowned upon – calling their gender identity "a phase which will pass", even though when it does not, they will always feel that there is something wrong with them – something needing to be fixed. Although, it is expected that they are often feeling this way especially in Finland, when even the law tells them to get sterilized in order to get legal recognition making them choose between their own identity, which affects their mental health, and founding a family.<sup>22</sup>

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<sup>20</sup> The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms).

<sup>21</sup> *Ibid.*

<sup>22</sup> Meadow, T. (2018). *Trans Kids – Being Gendered in the Twenty-First Century*. Oakland: University of California Press, 152.

It is said that the improvement of the equality of the genders is today a major goal in the Member States of the Council of Europe which means that very heavy reasons would have to be advanced before a difference of treatment on the grounds of sex could be regarded as harmonious with the Convention.<sup>23</sup>

In 2012, Council of Europe Commissioner for Human Rights Nils Muiznieks called on Finland to remove the conditions to be sterilized and unmarried from the requirements of legal gender correction. The previous Commissioner for Human Rights, Thomas Hammarberg, drew the attention of the Member States to the same issue. The law in Finland remains the same.<sup>24</sup>

## **2.1. Right to Respect for Private and Family Life (Article 8)**

European Convention on Human Rights article 8(1) provides that “everyone has the right to respect for his private and family life, his home and his correspondence.” Article 8(2) states that “there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”<sup>25</sup>

We live in a very gendered society where sex distinctions have significant legal consequences, particularly within the realm of family and these distinctions affect issues such as whom you can marry, whether you can inherit your spouse’s estate, or whether you provide what society sees an “appropriate” role model for your children. Currah’s opinion is that transgender family law decisions reflect society’s almost fetishistic attitude towards trans individuals.<sup>26</sup> Evident in the Court’s reductionist tendency to replace substantive analysis with a relentless focus on sexual anatomy, as the Court did in the case *Kantaras v Kantaras*, indicating a special interest towards the genitals of plaintiff Michael Kantaras, a trans man fighting for the right to be a parent to his child.<sup>27</sup>

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<sup>23</sup> Moucheboeuf, A. (2006). *Minority Rights Jurisprudence – Digest*. Strasbourg: Council of Europe Publishing, 162.

<sup>24</sup> *Sterilisaatiopakko*. Seta, Transek. Retrieved from <https://translaki.fi/translaki/sterilisaatiopakko/> 2019.

<sup>25</sup> The European Convention on Human Rights, Article 8.

<sup>26</sup> Currah, P., Juang, R.M., Minter, S. (Eds.) (2006). *Transgender Rights*. (2006). Minneapolis: University of Minnesota Press, 32.

<sup>27</sup> *Kantaras v. Kantaras*, 884 So.2d 155 (2004), District Court of Appeal of Florida.

The protection of transgender persons' right to respect for their private life prohibits those who seek information about an individual's gender recognition, in an official capacity, from disclosing such information. This type of person may hold public office or be associated with the functions of a local or public authority, an employer, or prospective employer, or in other way in connection with the conduct of a company or the supply of professional services. As an example, article 5 of the German Transsexual Law<sup>28</sup> has a certain disclosure ban. State registry files of a person who has corrected their gender under this legislation are automatically blocked and can only be accessed by authorized personnel. Based on this article, the Higher Labour Court Hamm held that "a supplier of an earlier employment certificate has to issue a new one, even if doing so entails additional efforts for the institution." The UK Gender Recognition Act<sup>29</sup> is also very detailed concerning the protection of privacy in different areas of life about transgender persons.

In addition, forced sterilization as a precondition for legal recognition contradicts with the European Convention on Human Rights article 12, since according to this article, every person should have the right to marry and found a family. The idea that someone should be infertile and get a divorce if married to get legal recognition as the gender they have always identified as is absurd. While the right to marry and the right to found a family are two separate rights, it seems from the wording of the article that only married couples can claim the right to found a family. If the article had been worded "everyone has the right to marry and to found a family," it might have been easier to infer that unmarried people or same-sex couples also had the right to found a family. Of course, it is not necessary to point out this in Finland, since homosexual people gained the right to get married legally in Finland in 2017. It may be significant, also, that the article ends with reference to "this right," rather than "these rights," thus apparently envisaging a close connection between the two. However, even if unmarried persons may have no right to found a family under article 12, the term "family" in article 8 has a wider meaning.<sup>30</sup> And then again, discrimination on the grounds of sex or other status is prohibited by article 14 ECHR, so the discussion about whom article 12 is directed at seems irrelevant.

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<sup>28</sup> German Transsexual Law 1980 as reformed in 2006.

<sup>29</sup> UK Gender Recognition Act 2004.

<sup>30</sup> Jacobs, White, Ovey (2010). *The European Convention On Human Rights*. 6th ed. Strasbourg, Oxford University Press, 359.

## 2.2. Case Law of the European Court of Human rights

The European Court of Human Rights has issued judgments concerning the recognition of a transgender person's gender identity. The Court has ruled that a state not legally recognising the "new" gender of a person who has undergone gender reassignment constitutes a violation of article 8 of the European Convention on Human Rights. The Court found, in *B. v. France* and in *Christine Goodwin v. the United Kingdom*, that the rejection by a state to legally recognise a completed gender reassignment constituted a violation of article 8.<sup>31</sup> In many Council of Europe Member States, procedures for legal gender recognition include criteria that a person has to fulfil before being able to change their registered gender. The Committee of Ministers of the Council of Europe has stated that such criteria "should be regularly reviewed in order to remove abusive requirements."<sup>32</sup> The explanatory memorandum to Recommendation CM/Rec(2010)5 lists some of the abusive prior requirements for legal recognition of gender: permanent sterilization, hormonal treatment, preliminary surgical measures and proof of the person's ability to live for a long period of time in the new gender.<sup>33</sup> The list is not specified, as requirements in Member States may also include age and civil status.

The Court has emphasized that the criteria that every Member State can legislate of gender recognition must be "having regard to scientific and societal developments," thus these requirements should not be illogical.<sup>34</sup> Within this margin of appreciation, Member States have to guarantee that a fair balance is kept between the interests of the individual and the community and that the change of name and gender on official documents of a gender fixing person guarantees a full legal recognition in all areas of life.<sup>35</sup> Member States have to count in not only the individual's right to respect for private life but also other individual human rights at stake, such as the respect for human dignity and physical integrity, the prohibition of torture, the right to a fair trial and an effective remedy as stated in the European Convention on Human Rights.<sup>36</sup> CM/Rec(2010)5 states that the content and scope of procedures relating to the legal recognition of a person's gender identity need to be adequate for making possible the change of a persons both name and gender in

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<sup>31</sup> Court judgments *B. v. France*, 13343/87 (1992); *Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, Nos. 28957/95 and 25680/94 (2002).

<sup>32</sup> CM/Rec(2010)5, Appendix, paragraph 20.

<sup>33</sup> Explanatory Memorandum to CM/Rec(2010)5, section IV. Right to Respect for Private and Family Life.

<sup>34</sup> *Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, 28957/95 and 25680/94 (2002).

<sup>35</sup> *Hämäläinen v. Finland*, 37359/09 (2014).

<sup>36</sup> Agarwal, G.P., Sunil K. Choudhary, Gupta, R. (2013): *Human Rights in Changing Times*. Newcastle: Cambridge Scholars Publishing, 67.

all official documents and “corresponding recognition and changes by non-state actors with respect to key documents.”<sup>37</sup> Thus, Member States need also to ensure that documents provided by non-state actors, such as educational and employment certificates can also be changed to match a person’s legal gender. Gender recognition procedures should also ensure the protection of a transgender person’s private life by assuring that third parties cannot get information on gender reassignment.<sup>38</sup>

In the case of *B. v. France*,<sup>39</sup> the Court held that official documents revealing a discrepancy between the legal sex and the apparent sex of a transgender person constitute a violation of article 8 right to respect for private and family life, since to the difficulties in everyday life they create for trans people. Additionally the Court of Justice of the European Union (CJEU) has granted trans persons protection against discrimination based on their gender identity. In the case of *P. v. S. and Cornwall County Council*,<sup>40</sup> the CJEU held that the dismissal of a transgender woman because of her gender reassignment constituted discrimination on the grounds of sex. Moreover, both the Court in the case of *Grant v. the United Kingdom*<sup>41</sup> and the CJEU in the case of *Richards v. Secretary of State for Work and Pensions*<sup>42</sup> have confirmed that transgender women are legally entitled to a retirement pension at the age applicable to other women, regardless of whether their female gender has been legally recognized or not.

In the spring of 2017, the European Court of Human Rights ruled that sterilization in order to get legal recognition is a breach of article 8 of the ECHR on the privacy and protection of family life in a case of *A.P., Garçon & Nicot v. France*.<sup>43</sup> In its assessment of the French law on reproductive disability, which closely resembles the Finnish regulatory solution, the Court of Human Rights made a clear distinction between its earlier solutions. Compared to its previous solutions, *V.C. against Slovakia*<sup>44</sup> and *Y.Y. against Turkey*<sup>45</sup> it is now stated more steeply that the imposition of forced sterilization as an absolute condition for the recognition of gender violates article 8 of the

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<sup>37</sup> *Protecting Human Rights of Transgender Persons; A Short Guide to Legal Gender Recognition*. Council of Europe. (2015) Retrieved from <https://www.slideshare.net/ssuser47a019/protecting-human-rights-of-transgender-persons>

<sup>38</sup> CM/Rec(2010)05, Appendix, paragraph 21, Explanatory memorandum, paragraphs 20-21.

<sup>39</sup> *B. v. France*, 13343/87 (1992).

<sup>40</sup> *P. v. S. and Cornwall County Council*, C-13/94 CJEU (1996).

<sup>41</sup> *Grant v. the United Kingdom*, 32570/03 (2006).

<sup>42</sup> *Richards v. Secretary of State for Work and Pensions*, C-423/04 CJEU (2006).

<sup>43</sup> *A.P. Garçon and Nicot v. France*, 79885/12+, §§ 120-131 (2017).

<sup>44</sup> *V.C. v. Slovakia*, 18968/07 (2011).

<sup>45</sup> *Y.Y. v. Turkey*, 1479/08, §§ 65-66 and 114-112 (2015).

ECHR. The Court withdrew from its earlier line of observation on the development of the European Consensus and has now stressed that the Member States' own margin of discretion in this fundamental human rights issue is very narrow. In this way, the Court sent a message to mainly to over twenty Member States of the Council of Europe located mainly in Eastern Europe where the requirement for reproductive disability is currently in use. There is no room for interpretation in the Court's message: if the Member States do not change their own transposition legislation based on the absolute requirement of reproductive disability, they may also be considered to be in breach of the ECHR.<sup>46</sup>

In April 2017, the Human Rights Court, *A.P., Garçon & Nicot*, became final in July and thus legally binding on the Member States of the Convention. The solution shows that the absolute requirement for reproductive disability contained in Finland's current law violates the European Convention on Human Rights unambiguously.

While the *A.P., Garçon & Nicot* solution appears to be a clear victory for those who fought for the rights of trans people from a Finnish perspective, the solution for the Finnish people in this area in the more advanced Member States of the Council of Europe has been received even as a small disappointment. Instead of explicitly referring to its legal arguments as a focal point and approaching the prohibition of discrimination, the Court of Justice merely set out in *A.P., Garçon & Nicot* a word of caution, limiting the legal significance of the solution to the requirement of reproductive disability.

### **3. LEGISLATION IN FINLAND**

Finland is known in the Nordic countries for lacking behind when it comes to regulating human right issues into modern form. As an example, Finland was the last one of the Nordic countries to allow homosexual marriages. This time, the issue lays in transgender rights. Finland is the only Nordic country that demands sterilization as a precondition for legally correcting gender. Finland has gotten a lot of negative feedback from associations such as the UN, Amnesty, The Universal Periodic Review and the CEDAW committee for not having yet updated its legislation on

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<sup>46</sup> *A.P. Garçon and Nicot v. France*. (2017). *supra* nota 43.

transgender persons, thus the Finnish government is aware of the problem but simply lacks the will to reform the legislation as it has postponed this matter for nearly a decade.

A bill to remove the requirement of sterilization was drafted in by a congressman Silvia Modig in 2016, and it got roughly 90 000 signatures. The bill proceeded to the Committee of Social Affairs and Health. According to Tuula Haatainen, the chairman of the committee, the bill could be considered if a majority of the 17-member committee so wishes. The bill has been signed by 85 congressmen, of whom eight sit on the committee. There are signatories from all government parties except the extreme right-wing party, Sininen Tulevaisuus.<sup>47</sup>

### **3.1. The Constitution of Finland**

In Finland, the Constitution is the basis of all legislation and exercise of government power. It specifies the fundamental rules and values of Finnish democracy. The Constitution details the foundations of the connection between an individual and the government. The latest version of Constitution of Finland entered into force on 1<sup>st</sup> of March 2000.<sup>48</sup>

#### **3.1.1 Equality**

Basic rights and liberties in chapter 2, section 6 in the Constitution of Finland provides that everyone is equal before the law. “No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.”<sup>49</sup>

According to this law, transgender people are entitled to the same benefits and rights as anyone else. However, since in Finland a person needs to be unmarried and infertile to correct their gender legally, this particular law is breached by forcing trans people to get divorced and sterilized. According to the law of equality, everyone should have the right to healthcare. Cisgender people<sup>50</sup>

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<sup>47</sup> *Translain lyhyt historia*. Seta, Transek. (2019) supra nota 17.

<sup>48</sup> European Union Agency for Fundamental Rights; Constitution of Finland. Retrieved from <https://fra.europa.eu/en/law-reference/constitution-finland>.

<sup>49</sup> Constitution of Finland, Chapter 2, Section 6.

<sup>50</sup> \*A term used for people whose gender identity matches the sex that they were assigned at birth.

do not have to get divorced and sterilized by law in any kind of situation. Thus, it can be considered that transgender people are discriminated on the grounds of sex.

The precondition to get sterilized is also at variance with the equal right to found a family, which is legislated in the Constitution of Finland. In addition, equality being legislated in the Finnish Constitution, ECHR strictly forbids any kind of discrimination based on any ground, such as sex.<sup>51</sup> However, trans people face discrimination and unequal treatment all around Member States. As Fredman states, “the equality right arises even if the right has not been specifically granted, but inferred from a duty imposed upon a public authority.”<sup>52</sup> That being said, the Finnish government is responsible for discriminating transgender people for not updating Finnish legislation on transgender people after 2002.

### **3.1.2. The Right to Life, Personal Liberty and Integrity**

Chapter 2 – Basic rights and liberties Section 7 in the Constitution of Finland provides that:

“Everyone has the right to life, personal liberty, integrity and security. No one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity. The personal integrity of the individual shall not be violated, nor shall anyone be deprived of liberty arbitrarily or without reason prescribed by an Act. A penalty involving deprivation of liberty may be imposed only by a Court of law. The lawfulness of other cases of deprivation of liberty may be submitted for review by a Court of law. The rights of individuals deprived of their liberty shall be guaranteed by an Act.”<sup>53</sup>

This particular Section in the Finnish law affects transgender people in multiple ways. If a trans person has not yet, for any reason, received legal recognition, their everyday life can get complicated every time they are required to present identification. Often the cases are on airports when security personnel wonder why the person in question does not look like his/her passport picture or even the gender their passport claims them to be as the official gender in the documents is not the gender this person identifies with. This can be very undignifying experience, especially when this type of situation happens in public.

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<sup>51</sup> European Convention on Human Rights, Article 14.

<sup>52</sup> Fredman, S. (2011). *Discrimination Law*. Second ed. London: Oxford University Press, 86.

<sup>53</sup> Constitution of Finland, Chapter 2, Section 7.

The complexity of receiving legal recognition as a trans person in Finland does not keep a balance between public and private interests as it is made unnecessarily time consuming and emotionally hard experience. The constant disbelief trans people are forced to face both with civilians and with officials is not consistent with the law in Finland or in the European Union. Consequently, this policy is in breach with the Chapter 2 Section 7 the right to life, personal liberty and integrity.

### **3.2. Act on Legal Recognition of the Gender of Transsexuals**

The current Finnish Act on transgender persons provides that a person can be legally recognised to the opposite gender than he or she is recorded in the population information system if; he or she presents a medical statement stating that he or she feels to belong to the gender that was assigned to him or her, that he or she lives in that gender role, is of age, he or she has been sterilized or is for some other reason infertile, is a Finnish national or has his or her place of residence in Finland and is not married or living in a registered partnership.<sup>54</sup> However, an exemption for the preconditions for legal recognition for a person who is married or lives in a registered partnership can be legally recognised to belong to the gender opposite if the married spouse or the other partner in the registered partnership has personally and formally given his or her consent to that. When belonging to gender legally recognised, marriage will be converted into a registered partnership without any measures, and registered partnership into a marriage.<sup>55</sup> This policy made some sense when homosexual marriage was not legal in Finland yet, but as it has been legal since March 2017, it seems unnecessary to force married people to convert their marriage into a registered partnership when the other spouse wants to fix his or her gender.

The incorporation of the medical process into law is contrary to the Finnish Constitution. Finland's constitution protects everyone's personal freedom, which means, in addition to physical freedom, self-determination. Current law regarding transgender people is at variance with the right to gender self-determination in a way that creates a real risk to their well-being.

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<sup>54</sup> 563/2002 Act on Legal Recognition of the Gender of Transsexuals (Finland), Article 1.

<sup>55</sup> *Ibid.* Article 2.

## 4. LEGISLATION IN SWEDEN

The possibility of persons procreating post-transition has long stalked debates on transgender rights. Sweden became the first European jurisdiction to formally acknowledge preferred gender in 1972. According to the original Swedish trans law, applicants applying for gender recognition were explicitly required to prove an incapacity to reproduce either through natural infertility or through a positive act of sterilisation.<sup>56</sup>

The new, reformed legislation in Sweden did not go through easily, similarly to the current situation in Finland. The requirement of sterilization in the Swedish law was criticized by many Swedish political parties and since the year 2011 the Swedish Parliament was expected to reform the law. However, it ran into opposition from the Christian Democrat party. After the Parliament turned out to not be able to reform the law, the Stockholm Administrative Court of Appeal overturned the law on 19<sup>th</sup> December 2012 declaring it unconstitutional after the law was challenged by an unknown plaintiff.<sup>57</sup>

Since 2013, sterilization is no longer a compulsory part of legal gender recognition treatment. Instead, trans people are nowadays offered fertility preservation as part of their treatment, which is subsidised and part of publicly funded healthcare. In combination with more inclusive marriage and family laws, as well as medical advancements in the field of assisted reproduction and fertility preservation, these legislative changes have substantially improved the possibilities for trans people to become genetic parents.<sup>58</sup>

### 4.1. Gender Recognition Act

The current Sweden's Gender Recognition Act provides that a person can get legal recognition as another gender than the one indicated in the civil registration provided that he or she is at least eighteen years old, has over a long period of time perceived that he or she belongs to the other

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<sup>56</sup> Dunne, P. (2017.) Transgender Sterilisation Requirements in Europe. *Medical Law Review*, 25(4). Oxford Academic, 554-581.

<sup>57</sup> *Ibid.*

<sup>58</sup> Gunnarsson Payne, J., Erbenius, T. (2018). Conceptions of Transgender Parenthood in Fertility Care and Family Planning in Sweden: from Reproductive Rights to Concrete Practises. *Anthropology & Medicine*, 25(3). Taylor and Francis, 329-343.

gender and has presented in accordance with this gender identity. He or she must also be expected to live in accordance with this gender identity in the future.<sup>59</sup>

With support of Article 2, a person can, after an application of his or her own, get recognised that he or she has another gender than the one indicated in the civil registration, provided that he or she has a congenital deviation in the sex development, a change of the gender is consistent with the development of the gender identity and the most consistent with the applicant's physical condition. If the application is referring to someone who has turned eighteen, then the application is made by himself or herself. The same applies to a person younger than eighteen who is not in the custody of someone else. In other cases, the application is made by the custodian. If the application is referring to a child over the age of twelve, the child must give his or her consent. Even if consent is not necessary, the will of the child shall be considered with regard to their age and maturity.<sup>60</sup>

The application cannot be approved if the applicant is in a registered partnership.<sup>61</sup>

Even though many of the people fighting for trans rights in Sweden are still not satisfied with the current Swedish legislation, Sweden has come a long way and is often seen as a role-model when legislating transgender law. The fact that the requirements of being unmarried, infertile and a Swedish citizen has been removed for one to correct their gender legally is a major footstep towards complete equality and modern human rights. Sweden has even started to pay compensation to trans people who were forced to get sterilized.

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<sup>59</sup> Sweden's Gender Recognition Act (1972:119) as reformed in 2012, Article 1.

<sup>60</sup> *Ibid.* Article 2.

<sup>61</sup> *Ibid.* Article 3.

## 5. CHALLENGES IN CURRENT LEGISLATION IN FINLAND

The report due March 2018 from the Human Rights Centre highlighted examples of best practice laws from European countries dealing with trans rights and especially legal recognition. Norway, Malta and Ireland are determined as benchmarks. Finland and many countries mainly in the Eastern Europe have still the requirement of sterilization as a precondition of recognizing legal gender of trans people.

### 5.1. Sex Reassignment Surgery

Sex reassignment surgery is a surgical procedure (or procedures) by which a transgender person's physical appearance and function of their existing sexual features are altered to resemble that socially associated with their identified sex as part of a treatment for gender dysphoria in transgender people.<sup>62</sup>

Many argue that the requirement of sterilization is reasonable, since trans people are infertile anyway after the genital reassignment surgery. Contrary to popular belief, only around 50% of trans people in Finland undergo genital reassignment surgery, so there could be someone who identifies as a man, has outwardly male characteristics, but still has a womb and could biologically carry a baby to full term, or a trans woman who still has male genitals and is able to reproduce if she wants if the hormone replacement therapy has not left them infertile.<sup>63</sup>

For trans people, it is a huge decision to make to get sterilized, especially those who start their transition in their teens, expected to make a choice about having children that will impact the rest of their adult lives. Then again, Finnish trans people who cannot get legal gender recognition face possible difficulties every time they have to show some identification.<sup>64</sup>

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<sup>62</sup> Nay, Yv.E. (2019.) The Atmosphere of Trans\* Politics in the Global North and West. *Transgender Studies Quarterly*, 6(1). Durham: Duke University Press, 64-79.

<sup>63</sup> *Ibid.*

<sup>64</sup> See Chapter 3.1.2.

## 5.2. Sterilization as a legal issue

Currently, the Finnish law requires a transgender person to be sterilized; thus, absolute infertility is a condition to legal gender recognition to trans people. The requirement leads to practically forced hormone treatment, which is one form of inhuman treatment that diminishes human dignity. The requirement for reproductive disability also includes the idea that a transgender person is not expected to have children or a family, violating both the Constitution of Finland and the European Convention on Human Rights articles 3, 8 and 12 to which all Finland is committed to.<sup>65</sup>

Whereas Sweden removed the condition of sterilization at the beginning of 2010s, Finland still has not changed its' legislation – not even after a lot of negative feedback from the European Union. The harmonization and modernization of law are inevitable, yet Finland still seems to be postponing them on this matter. According to an article by Repo, while the sterilization requirement was justified as a replacement for former castration law which had been used by male-to-female transgenders to access genital surgery, it also acted as a disciplinary technology to neutralize the alleged threats to normative forms of kinship that could be produced through gender recognition.<sup>66</sup>

After the case *A.P Garcon and Nicot v. France* European Court of Human Rights has taken a steeper and clearer stance as the demand on sterilization as a condition on legal recognition of trans people is not justified. The Court found that there is no margin of discretion. In its previous rulings, the Court had followed the European consensus when assessing the acceptability or rejection of restrictions. This time, however, the Court delivered a judgment despite the lack of consensus.

In May 2017, the United Nations Human Rights Council urged the Finnish government to update the country's laws to take out the requirement for sterilization before someone's new gender can be changed on official documents like driving license, KELA card, passport or ID card. A few months later the government decided not to heed the UN's recommendation.<sup>67</sup>

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<sup>65</sup> See Chapter 2.

<sup>66</sup> Repo, J. (2019.) *Governing Juridical Sex: Gender Recognition and the Biopolitics of Trans Sterilization in Finland*. *Apsa – Official Journal of the Apsa Organized Section on Women and Political Research*, 5(1). Cambridge University Press, 83-101.

<sup>67</sup> *Translain lyhyt historia*. Seta, Transek. (2019) *supra nota* 17.

At the end of February 2018, the Finnish Human Rights Council told the Council of Europe that trans people in Finland “continue to face discrimination characterized by transphobic attitudes, gender stereotypes and discriminatory legislation.”<sup>68</sup>

### **5.3. Violation of Human Rights**

The Universal Declaration of Human Rights and the UN Charter provided the base conditions for original activity and the Commission has built on this grounding. In 1994 it stated that “Community action to defend and promote human rights is taken in accordance with the United Nations Charter and the universal principles and priorities adopted by the international community at various world conferences. Later on a more complete picture was provided by suggesting Community action to promote human rights and democratic principles.”<sup>69</sup> In addition of the ECHR and the Constitution of Finland, the Universal Declaration of Human Rights (UDHR) section 1 of the article 16 is valid on the debate if sterilization of trans people is a violation of human rights. It states that “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family.” As sterilization prevents trans peoples’ ability to procreate, making this minority group to choose between the recognition of their gender identity and founding a family is a breach on this article. UDHR was adopted by the United Nations General Assembly on 10 December 1948. The UDHR consists of 30 articles ensuring rights for individuals. The UDHR is not legally binding, but the articles have been used in multiple international treaties where they have become legally binding, thus it binds Finland as well.<sup>70</sup>

Those transgender persons whose official identifications don’t reflect their gender identity find that every-day life is fraught with potential for violence and undignifying experiences whenever their identity documents are checked or their appearance is scrutinized. As a Member State, Finland should have updated its legislation years ago, at the latest in 2012 Council of Europe Commissioner for Human Rights Nils Muiznieks called on Finland to remove the conditions to be sterilized and unmarried from the requirements of legal gender correction as Sweden did the same year.<sup>71</sup>

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<sup>68</sup> *Ibid.*

<sup>69</sup> Williams, A. (2004). *EU Human Rights Policies – A Study in Irony*. New York: Oxford University Press, 41.

<sup>70</sup> Butler, F. (Ed.) (2002). *Human Rights Protection: Methods and Effectiveness*. The Hague: Kluwer Law International, 33.

<sup>71</sup> See Chapter 2.

In the case *Transgender Europe and ILGA-Europe v. the Czech Republic* the Social committee stated: “State recognition of a person’s gender identity is itself a right recognized by international human rights law and is important for guaranteeing the full enjoyment of all human rights.”<sup>72</sup> This judgement should prompt the Czech government to change its law, which is similar to Finland’s current law, and it should resonate with governments across Europe as a call to action. At present, Finland is the only Nordic country where a trans person wants legal recognition needs to be sterilized or otherwise unable to reproduce. The human rights organization Amnesty announced in April 2017 that the European Court of Human Rights outlined the forced sterilization requirement as a violation of human rights. In addition, the European Commission stated during the same year that the forced sterilization policy should be given up to. According to Finnish human rights association Seta, the current Finnish law regarding trans people includes violations of human rights and has fallen behind in international development, as opposed to Sweden.

Lyons has maintained that “the constitutional forces in the EU are aware and desirous of the creation of an identity for the Union and this is formulated in the main in terms of an external identity, one which has manifestation outside rather than inside the entity.”<sup>73</sup> Considering this, the fundamental human rights which affect transgender people as well as all other people should be on the same level within the Member States. Even though there are no regulations in the EU law about transgender people in detail, there is a clear stance on equality regulated in the Treaties and in the European Convention on Human Rights. Thus, the attitude towards legislating human rights should be proportional in all Member States. Sweden has legislated trans rights proportionately, as opposed to Finland. As many authorities have ordered Finland and other countries with similar legislation on transgender people to update their legislation but have not received any action over the years, it should be questioned how the European Union reacts on the situations in which a Member State reacts to these commandments uncaringly, and how it reflects on European Union’s identity. Finland refusing to legislate fundamental human rights correctly and shrugging its shoulders to European Union’s demands on this matter sets a negative example on how harmonization of law within the EU should work.

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<sup>72</sup> *Transgender Europe and ILGA-Europe v. the Czech Republic* No. 117/2015 (2018), European Committee of Social Rights.

<sup>73</sup> Lyons, C. (1998). *The Politics of Alterity and Exclusion in the European Union*. Aldershot: Ashgate, 170.

## 6. CONCLUSION

As in several Court decisions across Europe the Court has found that the requirement of being infertile to be legally recognized as a gender different than born in is in breach of the right to respect for private and family life, breach to equality, breach of the right of integrity and a violation of their right to health and does not maintain a proper balance between private and public interests, this thesis has come to a conclusion that the forced sterilization in Finnish law requirement violates basic human rights and this particular requirement should be lifted from the Finnish legislation.

In order to comply with its international human rights obligations, the Finnish government should take immediate action to eliminate the requirement of reproductive disability. There should be absolutely no reason why the requirement of reproductive inability should not be explicitly eliminated as it is considered a human rights violation in the eyes of the law. From a legal point of view, this is not a matter of political will, as the Court of Human Rights has now found that the Member States of the Council of Europe no longer have any discretion in this matter.

### 6.1. Analysis of the Research Findings

As one thinks of the term gender, it might come as a surprise how little we do know about it. It seems certain that it is somehow neurobiological in origin. Then again, science has not yet even solved the puzzle of homosexuality, since we know relatively little of the brain. It seems hard to legislate something that we know so little about. The best approach is considered to be listening to the peoples' experience with patience, not with resistance. Knop states that "gender means "kind" or "genre," it means "what kind of person are you?" You can't divorce the question of gender from the larger question of how the human organism needs to live in culture." Humans are social animals, and we have to be in a society. For one to survive in a society such as ours, human rights and legislation are more than needed.<sup>74</sup>

In the case *A.P Garcon and Nicot v. France*; France posed an unresolvable dilemma to the trans people in France forcing them to choose one: give up their right to physical integrity or give up the fulfilment of their gender identity. Doing this, France did not maintain a fair balance between public and private interests but breached the positive obligation

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<sup>74</sup> Knop, K. (Ed.) (2004). *Gender and Human Rights*. New York: Oxford University Press, 231.

of article 8 ECHR to ensure applicants' right to privacy. The same issue lays when speaking of article 12 ECHR, the right to marry. As in case *Hämäläinen v. Finland*, both spouses wanted to stay married while the other wanted legal recognition as a different sex than assigned at birth. Finnish law forcing them to get a divorce does not maintain a balance between public and private interests as both spouses were satisfied with the idea of staying married. This practise does not follow the principle of proportionality especially now that homosexual marriages are legal in Finland.

Legal gender recognition is about guaranteeing respect for transgender persons' right to privacy, self-determination, non-discrimination and dignity. This can be ensured through fast, accessible and transparent, legally prescribed administrative procedures without any abusive prior requirements. Practically, this means providing transgender persons with identity documents and other relevant paperwork that matches the person's gender identity. States should also consider including, in addition to the male and female gender markers, a third or neutral gender option for those who seek it.<sup>75</sup>

It is clear from this volume and the observations made in this thesis that much has been done and that even more needs to be done in the field of human rights, especially trans rights. I believe that this volume demonstrates the value and utility for the continued development and refinement of human rights. Those in charge should pay attention on the question if the rule of law is being fulfilled towards transgender people. Do laws, policies and practises guarantee equal treatment of various segments of the populations such as trans people?<sup>76</sup> As it is clearly noticeable that it does not, social pressure ought to be put towards those in charge; both in Finland and across the Member States. Violations of human rights such as discrimination against trans people should never be tolerated. As European Union States we can consider ourselves lucky to live in civilized, comparatively wealthy Western countries but never close your eyes to the fact that there are still people suffering because of outdated legislation.

The way I see it, the current legislation on transgender people in Finland works as “compulsory help” for transgender people. Conservative and outdated legislation often adds unnecessary bureaucracy and clarification for people who already are certain about what they want. Surely this

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<sup>75</sup> The EU Survey on LGBT experiences of discrimination (FRA 2012) found that 73% of trans respondents do not identify within the gender binary. See also Parliamentary Assembly Resolution 2048 (2015).

<sup>76</sup> Landman, T., Carvalho, E. (2010). *Measuring Human Rights*. Abington: Routledge, 70.

bureaucracy is often needed but forcing trans people to get medical statements on their sanity from several psychiatrists and forcing them to get infertile before giving them legal recognition on their gender seems highly unnecessary and can even resemble harassment. As many trans people are constantly asked "are you sure you want to change your gender?" even though they have felt their gender identity as long as they can remember, from legal point of view this policy truly violates the person's right to integrity.

## **6.2. Suggestions for Legislator**

When planning legislation, policies and other measures which will have an impact on transgender persons' human rights, as recalled by the Committee of Minister's recommendation, it is important to appropriately consult with the transgender community and non-governmental organizations that defend their human rights.<sup>77</sup>

A concrete suggestion for the legislator drafting the Act on Legal Recognition of the Gender of Transsexuals would be to change the title of the Act. The word "transsexual" can be considered misleading since being trans-gendered person does not tell anything about ones' sexuality. The word "transsexual" has also been translated into Finnish legislation incorrectly to "transseksuaali." This is an easy mistake to make, since the word sex has no double meaning in Finnish like it does in English, in which the word "sex" has multiple meanings; gender and intercourse. When translated into Finnish the word "sex" is mostly linked to sexuality and intercourse, not gender. That is why it would be more appropriate to call the Act "The Finnish Gender Recognition Act," similar to the Swedish Act.

Article 1 of the current Act states the requirements for legal recognition. As the biggest issue and the theme in this thesis has been the requirement for infertility, that should be removed as Sweden did formally in 2013. Other requirement changes should be taken into consideration as well; the condition of being unmarried or not being in a registered partnership is illogical and unnecessary as reasoned in this research, thus should be removed as Sweden did in 2012 especially since homosexual marriage has been legal in Finland since 2017.

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<sup>77</sup> CM/Rec(2010)5, Appendix, paragraph 12.

Whereas the conditions mentioned above are more straight forward changeable, the matter of an age of the person wanting to correct their gender is more complicated. Even though an underage person can be as certain of their gender identity as a person of the full age and it can be even more hard for a young person to struggle with the problems due to not getting legal recognition, a minor is often at the mercy of their legal guardian. However, the current Finnish law does not allow a minor to get legal recognition even with the permission of a parent.

In practise, the suggestion for the legislator of the article 1 of the Act looks like this:

Article 1. Preconditions for legal recognition: A person can be legally recognised to belong to the gender opposite to that according to which he or she is recorded in the population information system referred to in the Population Information Act (507/1993) if he or she:

- 1) presents a medical statement stating that he or she permanently feels to belong to the gender opposite to that assigned to him or her and lives in that gender role;
- 2) is of age, or has a legal guardian who supports the minor's decision on correcting gender;
- 4) is a Finnish national or has his or her place of residence in Finland.

With these changes Finland would finally show the will to modernize the Finnish law following Sweden's footsteps towards the complete equality above the law and legal harmony in the European Union. As the new prime minister of Finland, Sanna Marin wrote in her new years' greeting 2020; "The strength of society is not measured by the strength of its wealthiest, but by the way its most vulnerable citizens cope with their lives. The question is whether everyone has the opportunity to live a good and dignified life." I believe this to be a valid point, as the laws in the European Union binds its Member States to offer to its every citizen the mentioned opportunity to live a good and dignified life. In order for this to happen in Finland, outdated legislation which is still forcing to get transgender people to get sterilized need to be drafted to a modern form, a form which will abide by the Treaties and the Finnish Constitution without being in a clear discrepancy with one another.

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