

EUROPEAN COURT OF HUMAN RIGHTS

A.M. and Others v. Russia (Application no. 47220/19)

THIRD PARTY INTERVENTION BY THE HUMAN RIGHTS CENTRE OF GHENT UNIVERSITY¹

The interveners submit that the case of *A.M. and Others v. Russia* raises important issues under the right to respect for family life (Article 8 ECHR), taken alone and in conjunction with the prohibition of discrimination (Article 14 ECHR). We respectfully submit that this case provides an important opportunity for the Court to clarify the standards in the area of the human rights protection of trans persons² and children. In order to support our argumentation, this submission will first focus on the context regarding the human rights of trans persons (section 1). This is followed by a section on the interpretation of Article 8 ECHR (section 2) and one on Article 14 ECHR jointly with Article 8 ECHR (section 3). The latter two sections adopt a children's rights perspective, intersecting with a trans rights perspective.

1. The human rights of trans persons

The rights of trans persons are in the frontline of international human rights law as it strives for full human rights justice for individuals in vulnerable circumstances. Needless to say, the European Court of Human Rights deserves credit for its leading case law in this field, in particular the Grand Chamber judgment of *Christine Goodwin v. UK* (no. 28957/95). As the Court further refines its case law, we submit that three issues should be high on its agenda: avoiding the trap of *pathologisation*, rejecting *stereotyping*, and taking into account the *vulnerability* of the circumstances in which these individuals find themselves.

1.1. Rejecting pathologisation and stereotyping of trans persons

LGBTIQ+ persons,³ unlike people who are socially discriminated against on grounds like sex, race, ethnicity or disability, lack a particular international convention which obliges States to ensure that their human rights, and more specifically their right to equality and non-discrimination, are respected, protected and fulfilled. However, according to [the Office of the UN High Commissioner for Human Rights](#), “protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards; the legal obligations of States to safeguard the human rights of LGBT people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights [standards]”. In recent years, several influential international human rights actors have clarified the scope of these human rights standards in the context of gender identity.

On a global scale, the Yogyakarta Principles +10 have been a very influential source of inspiration in the field of LGBTIQ+ rights. Although the Court is yet to refer to the Principles, Judges Sajó, Keller and Lemmens already pointed out their relevance in their dissenting opinion in the case *Hämäläinen v. Finland* (no. 37359/09). The Principles, which promote a LGBTIQ+ inclusive reading of general human rights provisions, call for a total depathologisation of trans persons in law and society.

As the Court noted in its judgment in the recent case *A.P., Garçon, Nicot v. France* (nos. 79885/12, 52471/13 and 52596/13 § 74-77), [the Committee of Ministers](#), [the Parliamentary Assembly \(PACE\)](#) and [the Human Rights Commissioner of the Council of Europe](#) have consistently adopted important guidelines with regard to the legal accommodation of trans persons. For instance, [the Human Rights Commissioner](#) considers that the pathologisation of trans persons “may become an obstacle to the full enjoyment of human rights by trans[gender] people especially when it is applied in a way to restrict the legal capacity”. The Parliamentary Assembly of the Council of Europe has also called for a full depathologisation of trans persons in law and society. In its [Resolution 2048\(2015\)](#), it held that “the fact that the situation of trans[gender] people is considered as a disease by international diagnosis manuals is disrespectful of their human dignity and an additional obstacle to social inclusion”.

Moreover, in its 2019 update of the ‘[International Classification of Diseases](#)’ (ICD-11), the World Health Organisation (WHO) removed gender incongruence from the chapter on mental and behavioural disorders, into

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² We elaborated on all relevant terminology in our intervention in the pending case *R.L. and P.O. v. Russia* (App. Nos. 36253/13 and 52516/13), available at <https://hrc.ugent.be/wp-content/uploads/2019/10/RLnPO-tpi.pdf>.

³ Lesbian, Gay, Bisexual, Trans, Intersex, Queer Persons. The ‘+’ refers to the open-endedness of the categorisation, in order to include all other forms of human variations in sex, gender and sexuality.

the new chapter on conditions related to sexual health. According to [the WHO](#), this update “reflects evidence that trans-related and gender diverse identities are not conditions of mental ill health, and classifying them as such can cause enormous stigma”.

The pathologisation of trans persons is [clearly reflected](#) in law, predominantly in procedures of legal gender recognition but also in family law. While in *A.P., Garçon, Nicot v. France* (nos. 79885/12, 52471/13 and 52596/13), the Court found compulsory sterility for legal gender recognition a violation of Article 8 ECHR, [the Court is yet to find](#) the requirement of compulsory gender affirming surgery or hormonal treatment – which is as invasive as compulsory sterility – a violation of the Convention. By being embedded in harmful stereotypes of gender incongruence, pathologised or medicalised rhetoric of trans experiences unjustifiably restrict the fundamental rights of trans persons. Since the beginning of the 2010’s, States have reformed national frameworks of legal gender recognition by abolishing invasive medical requirements such as compulsory gender affirming surgery or sterilisation. Nevertheless, [international scholarship](#) notes a lack of complementing positive measures in all spheres of law and society to reduce the stereotypical assumption that there is something ‘abnormal’ or flawed with gender ‘non-conforming’ identities and behaviour. In other words, despite positive developments around the globe and the Council of Europe, the dominant trans ‘narrative’ is one of abnormality, nurtured by decades of pathologisation.

The Court has already tackled the negative and harmful consequences of stereotyping in various cases. In the case of *Aksu v. Turkey* (nos. 4149/04 and 41029/04), it held that “in particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group” (§ 58). In cases such as *Alajos Kiss v. Hungary* (no. 38832/06) and *Carvalho Pinto De Sousa Morais v. Portugal* (no. 17484/15), the Court also considered that the issue with stereotyping of a certain group in society lies in the fact that it prohibits the individualised evaluation of their capacity and needs. In this regard, it seems clear that the generalised negative stereotyping of trans persons in terms of pathologisation often will hinder a proper adjudication of rights.

We therefore respectfully invite the Court to take into account the clear and uncontested international trend towards the full depathologisation of trans persons in law and society when addressing measures taken by Contracting Parties that interfere with the Convention rights of trans people, especially when these measures reflect a stereotyped, medicalised approach towards trans experiences. This would start with naming stereotyping and pathologisation and explicitly labelling them as problematic. In addition, it could lead to heightened scrutiny of measures that are taken on the basis of stereotyping/pathologisation, or in a context in which these are a prominent feature.

1.2. Trans persons as a particularly vulnerable group in society

Moreover, according to the Court’s case law, “if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, [...], then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question” (*Alajos Kiss v. Hungary*, no. 38832/06, § 42). We respectfully invite the Court to find that trans persons form such a particularly vulnerable group in society, since they have been suffering considerable transphobia, i.e. discrimination, stigmatisation and stereotyping on the basis of their gender identity in Europe.

According to [the seminal report by the Council of Europe Human Rights Commissioner](#) on the human rights of trans persons, “many trans[gender] people live in fear and face violence in the course of their lives. This violence ranges from harassment, bullying, verbal abuse, physical violence and sexual assault, to hate crimes resulting in murder. Transphobia – understood as the irrational fear of, and/or hostility towards, people who are trans[gender] or who otherwise transgress traditional gender norms – can be considered as one of the main causes of violence and intolerance that many trans[gender] persons face”. These findings were corroborated by [the Council of Europe Parliamentary Assembly](#) which held that “trans[gender] persons face a cycle of discrimination and deprivation of their rights in many Council of Europe member states due to discriminatory attitudes and to obstacles in obtaining gender reassignment treatment and legal recognition of the new gender”.

Since prejudice and stigma towards a particular group in society have been indicators that have crucially informed the Court’s assessment of group vulnerability, we respectfully invite the Court to apply the concept of vulnerable groups, which it already used in relation to *Roma (D.H. and others v. Czech Republic)*, no. 57325/00, people with disabilities (*Alajos Kiss v. Hungary*, no. 38832/06), people living with HIV (*Kiyutin v. Russia*, no. 2700/10) and asylum seekers (*M.S.S. v. Belgium and Greece*, no. 30696/09), to trans persons.

The Court has already recognised the personal suffering and social stigmatisation of trans persons in its case law. Indeed, in *Christine Goodwin v. United Kingdom* (no. 28957/95), it held that “the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law [...] cannot be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of *vulnerability*, humiliation and anxiety” (§ 77). In its recent judgment in *A.P., Garçon, Nicot v. France* (nos. 79885/12, 52471/13 and 52596/13), the Court pointed out that the psycho-pathologisation of trans persons reinforces the stigmatisation of which they are victims (§ 138). We therefore invite the Court to find that the State’s margin of appreciation in cases regarding gender identity is narrow.

2. The right to family life of parents and children under Article 8 ECHR: integrating children’s rights

2.1 Avoiding a one-sided assessment of harm with regard to contact rights

Steady case law of the ECtHR has established that mutual enjoyment between parent and child of each other’s company is a fundamental element of family life (*Elsholz v. Germany*, no. 25735/94 [GC], § 43). Furthermore, according to the Court, the best interests of the child generally dictate that family ties are maintained, except in cases where the family has proven particularly unfit (*Kacper Nowakowski v. Poland*, no. 32407/13, § 75) and this may harm the child’s health and development (*K.B. and others v. Croatia*, no. 36216/13, § 143). What appears to be decisive in the competent national authorities’ assessment and application of restrictions on parental rights, is the notion of ‘harm’. We hereby respectfully invite the Court to elaborate on what constitutes sufficient harm in such cases.

The first concern in this regard, is to avoid a one-sided assessment of harm, by focusing only on the potential harm that could be caused by contact with a parent, while obscuring the harm that could be caused by breaching such contact. Thus far, the Court’s case law has paid little consideration to the intrinsic harm of parental absence to the child’s health and development. In the recent case of *Y.I. v. Russia* (no. 68868/14), the Court did emphasise that the Russian authorities had not assessed the impact which the children’s separation from their parent and grandparent could have had on their well-being (§ 93). Building further on this reasoning, the Court is respectfully invited to elaborate on the adverse effects on the child’s well-being when children lose contact with a loving parent and to underline the importance of always assessing the attachment of the child to each of the child’s parents (as already pointed out in *Magomadova v. Russia*, no. 58724/14), irrespective of the parent’s gender identity. The benefits of the involvement of both parents in their child’s upbringing for the development of the child are also stressed in the Council of Europe Parliamentary Assembly Resolutions [1921](#) and [2079](#).

Research shows that a sudden breach of contact with a parent can result in a child developing attachment disorders and perceiving the environment and the adults they grow up in and with as unsafe ([Bruning et al., 2020, p. 144](#)). Children perceive the loss of contact with a parent as the primary negative impact amid and after a divorce ([Kelly and Emery, 2003, p. 354](#); [Green, 1998](#)). While both parties in a parental relationship share an equally important role, it is often the case that the attachment to the non-custodial parent is threatened when there is no or limited contact with the child ([Lowenstein, 2010, pp. 157-168](#)). The possibility of estrangement between the child and the parent who does not reside with the child is considerably higher when the relationship between the separated parents is hostile (especially when one of the ex-spouses is trans). Similarly, the cisgender parent may cultivate a negative image of the absent or rarely present trans parent, and thus intensify the latter’s estrangement from the child and the child’s feelings of distress ([Green, 1998](#)). This extensively documented harm that typically results from breach of contact between a child and a parent, should be put in the balance against the potential harm that may exceptionally be caused by maintaining child-parent contact.

2.2 Avoiding a stereotypical assessment of ‘harm’ in the context of a parent’s gender transition

An additional concern is to avoid bias in the assessment of harm, when the parent whose contact rights are under consideration, belongs to a group that is subject to discrimination, marginalization or negative stereotyping.

In light of the prejudice against trans parents and the expressed – yet not empirically supported – heteronormative concern that children of trans parents may exhibit ‘atypical’ gender behaviour, gender identity, or sexual orientation ([Dierckx et al., 2017, p. 81](#)), the assessment of harm becomes even more complex when one of the parents has transitioned. As family ties may be severed only in very exceptional cases, the judicial authorities may

be called on to examine the question whether the parent's gender identity has any negative impact on the child's well-being. However, this question in itself reveals either ignorance or bias, as there is no evidence affirming that a trans parent may adversely influence a child's developmental milestones, including their gender identity and sexual orientation, nor cause long-term mental health problems to the child ([Stotzer et al., 2014](#), p. 11). Research also demonstrates that "transsexual parents can remain effective parents and that children can understand and empathise with their transsexual parent, [it also demonstrates] that gender identity confusion does not occur" ([Green, 1998](#), p. 4) and children can adjust to a parent's gender change ([Chang, 2003](#), p. 698). With regard to Green's research, "a separate investigation was conducted in the United Kingdom in 2002 to examine whether and how parental gender roles influence children's gender development, mental health, family relationship and peer relationships. The data collected from the investigation repeated the conclusion of the [Green] study and reported that none of the children developed any characteristics of their own gender identity disorder." ([Carter, 2006](#), p. 224). "The authors of the 2002 report [...] report similarities between the feelings of loss and disruption of a child of a trans[gender] parent and those of children experiencing other familial losses or disruptions, such as the separation of parents, a new partner of a parent, or the prolonged illness or medical treatment of a parent. Both the [Green] study and the 2002 report suggest that children of trans[gender] parents are likely to experience difficulties in the familial relationship. However, nothing in either study indicates that these difficulties are much different from other, similar difficulties that children of non-trans[gender] parents experience while growing up" ([Carter, 2006](#), p. 224).

A number of factors – which may fall within the scope of the State's positive obligations (see *infra*) – reportedly influence the adjustment process for children while a variety of emotions may be experienced during this process by both parents and children ([Dierckx et al., 2017](#), p. 3). In fact, recent findings indicate that trans people seem to be as invested and committed to their families as any other persons ([Hafford-Letchfield et al., 2019](#), pp. 1111-1125). According to studies, the majority of respondent trans parents report positive experiences in reference to the quality of the relationship with their children, during and after the transition phase ([Stotzer et al., 2014](#), p. 9; [Veldorale-Griffin, 2014](#)).

Given the sensitive nature of both a post-divorce period and the revelation of a gender transition, safeguarding the relationship between a trans parent and their child highly depends upon trust, honesty and the expression of care ([Hafford-Letchfield et al., 2019](#), p. 1119). To that end, it is pivotal that parents communicate their gender transition (possibly with the help of a skilled professional) and smoothen the process of adjustment for all parties. Otherwise, restriction of communication with the trans parent or keeping the gender transition secret from the child could intensify the adverse emotions of loss, abandonment and betrayal, and may irreversibly estrange parent and child ([Dierckx et al., 2017](#)).

We conclude that a human rights analysis should detect and reject any bias in the 'harm' assessment regarding contact rights. Such bias occurs when gender transition, gender identity or gender expression is in itself considered a source of (likely) harm.

2.3. The State's positive obligation to assist trans families

In addition, when a risk of harm is detected, we argue that the State has a responsibility to assist families with a view to containing that risk. In the context of custody and access disputes, the Court has held that the boundaries between positive and negative obligations under this provision do not lend themselves to precise definition and that custody decisions can also entail the positive obligation to adopt certain measures because children and other vulnerable individuals are entitled to effective protection (*M. and M. v. Croatia*, no. 10161/13, § 176). In the exceptional circumstance that contact with a parent could prove harmful to the child, State Parties should not restrict or bar contact rights too lightly. Instead, they are under the positive obligation to assess the less restrictive means available to reach a solution that protects the child and preserves contact rights (see, *mutatis mutandis*, *Y.I. v. Russia*, no. 68868/14, § 92). As the Court has already stressed, expert opinions should not only focus on the existence of barriers to facilitate contact but should also tackle the question as to how these barriers can be overcome. In this context, the Court is respectfully invited to further validate its reasoning in the recent case of *A.V. v. Slovenia*, no. 878/13, in which the relevance of therapeutic measures such as family therapy in complex custody cases was discussed at length. Moreover, the [Council of Europe Explanatory Report to the Convention on Contact concerning Children](#) states that supervised contact should always be considered when contact is restricted, as a judicial decision regarding custody and access rights at a given time can give rise to a *fait accompli* making a review of the decision in the future impossible. Subsequently, in its [recommendation on children's rights and social services friendly to children and families](#), the Council of Europe stresses the importance of multidisciplinary services and/or programmes that preferably work with evidence-based interventions. Those programmes should include services for children and parents with regard to parents in special need of parenting skill training, for

example due to deficient parental practices (p. 10). Considering the additional challenges trans parents face in adjusting to their role following disclosure and social gender transition, their need for assistance becomes essential.

We conclude that, in assessing whether a contact rights arrangement is in conformity with the Convention, it is important for the Court to consider what measures State authorities have taken to assist the family to mitigate any risk of harm, and that providing such assistance may be considered a positive obligation under the Convention.

2.4 Careful assessment of the child's best interests

While the previous sections considered contact rights under Article 8 ECHR mostly as rights of the parents, the present section adopts the perspective of the child's Article 8 rights. From that angle, the Court frequently refers to the child's best interests concept. However, due to its vagueness, judicial approaches to the assessment of this concept are susceptible to bias. When a decision majorly impacts the child, a greater level of protection and detailed procedures to consider their best interests is appropriate (CRC Committee, *General Comment (GC) No 14*, § 19-20). The Court is therefore invited to very carefully apply and assess the child's best interests concept in these cases for several reasons listed below.

In custody cases, courts often interpret the 'best interests of the child' in a heteronormative way that perpetuates a single homogenous view of what a family should look like (Chang, 2003). Both the CRC Committee (GC No 14, § 34) and the UN High Commissioner (*Access to justice for children*, A/HRC/25/35, § 38) are aware that the open and flexible nature of the 'best interests' principle may lead to problematic outcomes, including manipulation and bias. To mitigate this risk, the CRC Committee recommends the adoption of a non-exhaustive and non-hierarchical list of elements, offering concrete guidance and flexibility, that could be included in the 'best interests' assessment (GC No 14, § 50). These include the child's views, the child's identity, preservation of the family environment and maintaining relations, the safety of the child, the situation of vulnerability, the child's right to health and the child's right to education (§ 13-17). Furthermore, decisions and conclusions should be supported by reasoned arguments, eliminating bias or prejudice (Freeman, 2007, p. 28). Similarly, the education and training of the various professionals involved in judicial and other proceedings, especially the ones providing evidence (such as experts and psychologists), are crucial. The Belgian study centre KEKI conducted research which revealed that the background, knowledge and communicative skills of the individuals who perform the best interests assessment can be more important than the tool used for the assessment itself. This finding proves the pivotal value of training and educating the professionals involved in understanding child psychology, development and children's rights (KEKI, 2014, p. 34; Van Hooijdonk, 2016, p. 41).

We conclude that, in assessing domestic actors' 'best interests' reasoning, the Court should be alert to unpack any bias that may have infiltrated this reasoning. In addition, a structured approach, such as proposed by the CRC Committee, may serve as a guidance for such domestic actors, and help prevent bias.

2.5 The child's right to be heard

If it is nearly impossible for adults to understand and negotiate legal systems without legal assistance, this counts even more so for children (Daly, 2018, p. 426). Their vulnerability in this regard is emphasised by the Human Rights Committee (*General Comment No 31, 2004*, § 15) and the CRC Committee (GC No 5, 2003, § 24). In the specific context of custody and access disputes where one (cisgender) parent opposes contact with another (trans) parent, a conflict of interests occurs resulting in a blind-spot in which the child's perspective can be ignored. However, a large body of research, evaluated by Bruning, establishes that participation has many positive effects on children, that children frequently express the wish to be involved in the decision-making process and that neglecting participation can result in negative effects on their mental health (Bruning et al., 2020, p. 126-127).

The Court has already found that children involved in custody proceedings should be heard (*M. and M. v. Croatia*, no. 10161/13, § 185-). Yet it would be desirable to clarify in some more detail what this requirement entails. In line with the interpretation of the CRC Committee, it may be useful to specify that children should be assumed to be capable to form their views and have the opportunity to not only express those views but also have them heard and listened to in all matters affecting them and in accordance with their age and maturity (Lundy, 2009), with the burden of proof to the contrary resting on the State Party. In this context, the Court is respectfully invited to extend its case-law in *Güvec v. Turkey*, no. 70337/01, § 124, which featured children in contact with criminal law proceedings, to children in contact with civil law proceedings by concluding that effective participation requires that children have a broad understanding of the nature of the proceedings and what is at stake.

Furthermore, the Court is invited to specify that the exercise of the child's right to be heard presupposes that the child is properly informed, for instance on issues concerning gender identity, gender variation and sexuality. Any

ideas that it would be undesirable to expose children to such information risk to undermine children's effective participation rights in custody matters involving a trans parent. What is more, exposure of children to such information is in line with Article 29 UNCRC, concerning the goals of education, which embraces the idea of a society that acknowledges, respects and accommodates the existence of diversity in all its forms, whether it be race, ethnicity, gender, sexual orientation or ability ([Tobin 2019](#), p. 1142). The Court expressed a similar view in its judgement in the case of *Bayev and Others v. Russia*, no. 67667/09, establishing that "to the extent that the minors who [...] were exposed to the ideas of diversity, equality and tolerance, the adoption of these views could only be conducive to social cohesion." (§ 82) According to this case's reasoning, children should be aware of the existence of sexual minorities. In addition, the Court in *Bayev* also adopted a strong stance with regard to the importance of children being educated on LGBT issues – "the Court recognises that the protection of children from homophobia gives practical expression to [the Committee of Ministers' Recommendation Rec\(2010\)5](#) which encourages "safeguarding the right of children and youth to education in safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity" (§ 31) as well as "providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials" (§ 32) (*Bayev and Others v. Russia*, no. 67667/09, §82). The law prohibiting so-called "propaganda of homosexuality among minors" (Law on Protecting Children from Information Harmful to their Health and Development) is justified by the Russian Federation as necessary for the protection of children and claims it is in compliance with UNCRC. However, the legislators tend to neglect the idea that people under 18 years may also identify as LGBT, thus, reinforcing the atmosphere of bullying and intolerance in the country ([Human Rights Watch](#)). In essence, this law deprives people under 18 of access to reliable and correct information regarding sexual orientation and gender identity, violating the right of access to information guaranteed by both UNCRC and the ECHR ([Russian LGBT Network](#)).

3. The need to examine the case under Article 14 jointly with Article 8 ECHR

We respectfully submit that there is also a need to separately examine whether there has been a violation of the prohibition of discrimination in Article 14 ECHR, taken together with Article 8 ECHR, in addition to our arguments concerning Article 8 ECHR taken on its own. We respectfully argue that a limitation of the rights of trans parents on contact with their children on grounds of their gender transition discriminates trans persons in comparison with cisgender persons (3.1). Moreover, the same limitation of contact rights simultaneously discriminates children with one or more trans parents, in comparison with children with (only) cisgender parents (3.2). In this regard, we invite the Court to note the use of transphobic and therefore harmful, negative stereotypes about gender incongruence as a justification for limiting contact between a parent and their children, which also raises issues concerning the State Parties' positive obligations under Article 14 ECHR (3.3). Since, as argued above, trans persons form a particularly vulnerable group in society, it is submitted that their rights may only be restricted on the basis of 'very weighty reasons' (*Horváth and Kiss v. Hungary*, no. 11146/11, § 128). Since trans persons are discriminated on the basis of pervasive stereotypes in law and society, we respectfully argue that no 'very weighty reasons' can be proven by the State.

3.1 Discrimination of trans parents vs. cisgender parents

We respectfully submit that the discrimination of trans persons in law is essentially based on the cisnormative nature of society. On the basis of this cisnormative stereotype, it is commonly assumed that all persons who are born with 'typical' male sex characteristics (especially genitalia) will develop a male gender identity, and all persons who are born with 'typical' female sex characteristics will develop a female gender identity. Although this cisnormative logic is correct for the majority of the population (cisgender persons), a significant group of (trans) persons will (sometimes) (partly) experience incongruence between this assigned identity and their self-defined gender identity. We submit that in this case, discrimination exists because national authorities fail to treat individuals whose situations are similar in an equal way, solely on the basis of their gender identity, without an objective and reasonable justification.

Multiple studies show that trans parents are sometimes subject to discrimination in formal custody battles (see [Dierckx et al., 2016](#)). Their ability to parent is often challenged within judicial divorce proceedings by both the non-trans parent and the court. Owing to an inherently biased handling of their cases, they may face unequal treatment without justification. Several authors suggest that this discrimination stems from the heteronormative social model wherein a co-residing married cisgender heterosexual couple who are the biological parents of their children is still seen as the 'ideal' family type ([Patterson & Hastings, 2007](#)), with the assumption that children with a trans parent would experience negative influences on the development of their gender identity, sexual orientation, and overall well-being.

As we have demonstrated above, there is no inherent reason to assume that the transition of a trans parent will negatively influence the child's welfare. We respectfully argue that it is highly relevant for the Court to name the above-described cisnormative stereotypes that lie at the basis of this failure of equal treatment.

We also invite the Court to draw a parallel with its established case law regarding the parental rights of non-heterosexual parents. Indeed, in the seminal case of *Salgueiro Da Silva v. Portugal*, no. 33290/96, § 36, the Court held that restricting parental rights based on considerations regarding the parent's sexual orientation is not acceptable under the Convention. Moreover, in *Bayev and Others v. Russia*, no. 67667/09, § 68, the ECtHR held that it has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority. It held that these negative attitudes, references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour. Given what we demonstrated above, there is no compelling reason not to extend this line of reasoning to considerations regarding a parent's gender identity or gender transition. Indeed, the Court has held that Article 14 of the Convention prohibits discrimination based on gender identity (*Identoba and others v. Georgia*, no. 73235/12, § 96). Extending the case law on 'gay parents' to 'trans parents' would be in accordance with the similarities between the gradual emancipation of homosexual persons and the emancipation of trans persons in society and law. As the depathologisation of homosexuality in the 1980's cleared the road towards the abolition of openly discriminatory laws and attitudes based on sexual orientation, the more recent move towards full depathologisation of gender incongruence should entail the same consequences for trans persons.

3.2 Discrimination of children with trans parents vs. children with cisgender parents

In addition, we invite the Court to acknowledge that not only trans parents, but also their children are discriminated against when the gender identity of the parent overshadows actual parental abilities and attachment between parent and child. We submit that there is discrimination of children with one or more trans parent(s) in comparison with children with only cisgender parents, in that similarly situated persons are treated differently without compelling justification. The relevant similarity is that both categories of children have a similar right to the enjoyment of both parents' company, as extensively explained above (*Monory v. Romania and Hungary*, no. 71099/01, § 70). We respectfully submit discrimination exists when national authorities fail to treat children whose situations are similar in an equal way, solely on the basis of the gender identity of their parent(s), without an objective and reasonable justification. In the past, the Court found various violations of Article 14 ECHR in relation to children born outside of marriage (see e.g. *Marckx v. Belgium*, no. 6833/74; *Inze v. Austria*, no. 8695/79; *Fabris v. France*, no. 16574/08). In these cases, the Court thus (albeit implicitly) recognised that children may not be discriminated on the basis of their parents' status.

The UNCRC was the first international treaty to explicitly affirm that a person can be discriminated against not only because of their own status, but also because of the status of someone who is closely linked to them ([Tobin 2019](#)). As laid down in Article 2 of the UNCRC, "States Parties shall respect and ensure the rights set forth in the [present] Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or her or his parent's or legal guardian's race, colour, sex language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status" (§ 1) and "shall ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members" (§ 2). The list of grounds of discrimination included in Article 2 is only indicative and allows for a wide interpretation of the notion "other status". By making extensive use of the non-exhaustive nature of the list, the CRC Committee signals the possibility to extend the protection against discrimination to grounds not discussed during the drafting process ([Tobin 2019](#)). In fact, the Committee has in multiple occasions expressly included, among other, the discrimination based on sexual orientation under the protection of Article 2 (Concluding observations (CO) Romania, [CRC/C/ROU/CO5](#), § 16-17; CO Mongolia, [CRC/C/MNG/CO/5](#), § 15-16; CO United Kingdom and Great Britain, [CRC/C/GBR/CO/5](#), § 21-22). In its [Recommendation CM/Rec\(2010\)5](#), the Council of Europe Committee of Ministers also stressed that "taking into account that the child's best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a child, member states should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity" (§ 26).

[Yogyakarta Principle 24](#) has also called on States to protect children from discrimination, violence or other harm due to the sexual orientation, gender identity, gender expression or sex characteristics of their parents. Moreover, the CoE Parliamentary Assembly [Resolution 2048 \(2015\)](#) on Discrimination against transgender people in Europe invited Member States to ensure that, upon recognition of their gender, trans spouses or children do not lose certain rights and ensure that the best interests of the child are a primary consideration in all decisions concerning children

(§ 6.2.3, § 6.2.5). We thus respectfully invite the Court to safeguard that, in cases discussing custody and visitation rights, children are not discriminated on the basis of their parents' gender identity.

3.3 Positive obligations of the State under Article 14 ECHR, jointly with Article 8 ECHR

Finally, the case at hand raises an issue in terms of positive obligations under Article 14 ECHR. The Court has already addressed the matter of positive obligations under Article 14 ECHR. In this regard, we draw attention to the cases concerning Roma (*D.H. and Others v. Czech Republic*, no. 57325/00; *Nachova and Others v. Bulgaria*, 43577/98 and 43579/98; *Horváth and Kiss v. Hungary*, no. 11146/11), whom the Court has considered to form a particularly vulnerable group in society (see *supra*). As mentioned above, given the considerable transphobia trans persons continue to face in law and society, we have respectfully invited the Court to find that trans persons also form a particularly vulnerable group in society.

We submit that existing negative stereotypes and discrimination against trans persons constitute factual inequalities which the State can and must work towards to correct. Therefore, we argue, States are under a positive obligation under Article 14 ECHR to “use all available means to combat” transphobia and discrimination on the basis of gender identity, and to take measures to counteract the social exclusion of vulnerable groups, which includes trans persons. This obligation contains the instalment of a framework of parental contact rights based on the recognition of gender self-determination of trans parents, and the unbiased protection of children's rights and their best interests.

Another positive obligation regards the harm to the child (such as bullying by peers) that arguably may be caused by the child's association with a trans parent. Rather than taking such harm as a given, and mobilizing it against trans parents' claims for contact rights, States should act to prevent such harm. Unsurprisingly, children with a trans parent may experience difficulties due to transphobia in society ([Dierckx et al., 2016](#)). Notably, the fear of stigmatization and bullying is the most common stress factor associated with trans families ([Dierckx et al., 2016](#); [Veldorale-Griffin, 2014](#)) which is why Member States should enhance their educational and awareness raising efforts. One of the most common forms of bullying and exclusion in schools is homophobic and transphobic behaviour. Thus, schools have an important role to play in addressing this particular form of intolerance. According to a [report by the Danish Institute for Human Rights](#), discussion of issues related to different forms of sexuality in Russian schools is virtually impossible while university curricula, as a rule, do not provide the mandatory inclusion of homosexuality, bisexuality and trans issues in educational plans (however, relevant courses are taught in some universities on the initiative of individual teachers). Social exclusion and violence within the school environment, including bullying and harassment, is a relevant problem; as well as the acts of hate speech in relation to homosexual, bisexual and trans persons remaining virtually unpunished ([Danish Institute for Human Rights](#)).

The CRC Committee has drawn attention to education practices that undermine the rights of young LGBTIQ+ people in its Concluding observations on the periodic reports of the Russian Federation ([CRC/C/RUS/CO/4-5](#)). The CRC Committee has urged the Russian Federation “to adopt a comprehensive anti-discrimination law, including the definition of racial discrimination and ensure that such law includes and criminalises discrimination on all grounds. In particular, it requests the State party to take urgent measures to prevent discrimination against categories of children in marginalized and disadvantaged situations, including children belonging to minority groups. [...] The Committee urges the State party to take measures to prevent involvement of children in nationalist movements by educating them on non-discrimination and human rights principles” (§23). In this respect, the CRC Committee has also recommended that the Russian Federation “takes urgent measures to prevent bullying of LGBTI children in schools by educating children and school staff and punishing the perpetrators accordingly” (§ 56 (e)).

In addition, it is submitted that there is a positive obligation on the State to structurally prevent that State agents take decisions based on discriminatory attitudes or stereotypes. This has implications regarding instructions for, and training of these agents. Indeed, States' commitment to human rights means that they must facilitate a culture of acceptance and encourage tolerance and debate. In that regard, the CoE Parliamentary Assembly [Resolution 2048 \(2015\)](#) on Discrimination against transgender people in Europe has stated that the “[a]wareness of the situation of trans[gender] people is largely insufficient among the general public and accurate, unbiased information in the media is scarce. This leads to higher levels of prejudice and hostility which could be avoided” (§ 2). With regard to information, awareness raising and training, the Parliamentary Assembly encouraged Member States to address the human rights of trans people and discrimination based on gender identity through human rights education and training programmes, as well as awareness-raising campaigns aimed at the general public; as well as provide information and training to education professionals, [law-enforcement officers](#) and health-service professionals, including psychologists, psychiatrists and general practitioners, with regard to the rights and specific

needs of trans people, with a special focus on the requirement to respect their privacy and dignity (§ 6.4.1 and § 6.4.2).

Notably, the CRC Committee has recommended that the Russian Federation ([CRC/C/RUS/CO/4-5](#), §25), along with Great Britain and Northern Ireland ([CRC/C/GBR/CO/4](#), §25), Denmark ([CRC/C/DNK/CO/4](#), §33) and New Zealand ([CRC/C/NZL/CO/3-4](#), §25), ensure full protection against discrimination on any grounds, including by strengthening its awareness-raising and other preventive activities against discrimination and, if necessary, taking affirmative action for the benefit of children in marginalized, disadvantaged and vulnerable situations, such as lesbian, bisexual, gay and trans children and children living with persons from these groups, as well as take all necessary measures to ensure that cases of discrimination against children in all sectors of society are addressed effectively.

These considerations are of course linked to the Russian law prohibiting so-called “propaganda of homosexuality among minors”. The CRC Committee has addressed this issue specifically and recommended that Russia “repeal its laws prohibiting propaganda of homosexuality and ensure that children who belong to LGBTI groups or children of LGBTI families are not subjected to any forms of discrimination by raising the awareness of the public on equality and non-discrimination based on sexual orientation and gender identity” ([CRC/C/RUS/CO/4-5](#), §25) and “take urgent measures to prevent bullying of LGBTI children in schools by educating children and school staff and punishing the perpetrators accordingly” ([CRC/C/RUS/CO/4-5](#), § 60 (e)). With regard to the Russian ‘propaganda law’, the Court in *Bayev and Others v. Russia*, no. 67667/09, also agreed that “by adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society” (§ 83) and reiterated that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group’s rights [...] would become merely theoretical rather than practical and effective as required by the Convention (§ 70). The law has also been declared problematic for several reasons the European Commission for Democracy through Law – the Venice Commission. It concluded that “the measures in question appear to be incompatible with ‘the underlying values of the ECHR’, in addition to their failure to meet the requirements for restrictions prescribed by Articles 10, 11 and 14 of the Convention. In light of the above, the Venice Commission considers that the statutory provisions prohibiting ‘propaganda of homosexuality’, are incompatible with ECHR and international human rights standards. The Venice Commission therefore recommends that these provisions be repealed” ([Venice Commission, 2013](#), § 82, § 83). Moreover, the introduction of the law restricting the rights of LGBT people was accompanied by public statements by politicians and public figures. These included statements about the inferiority of LGBT families, distortion of scientific facts, and public speeches on the hatred of same-sex families with children; such actions clearly contribute to the climate of intolerance toward LGBT families and children raised in such families as well as jeopardize teenagers realizing their homosexuality, bisexuality or transgender status ([Anti-discrimination Centre Memorial, ‘Coming Out’, Russian LGBT Network, 2013](#)).

In conclusion, we respectfully invite the Court to hold that States are under a positive obligation under Article 14 ECHR to use all available means to combat transphobia and discrimination on the basis of gender identity, and to take measures to counteract the social exclusion trans persons and their social environment, including their children.

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