

Heading in the Right Direction

A guide book of LGBT rights
in Europe

2011



EQUALJUS
www.equal-jus.eu



This project has been funded with support from the European Commission under the Programme “Fundamental Rights and Citizenship 2007-2013”.

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Heading in the Right Direction – a guide book of LGBT rights in Europe - 2011

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Graphic Design: **Hg blu Srl - Italy**

Printing house: **Grafis - Warsaw, Poland**

Heading in the Right Direction a guide book of LGBT rights in Europe

EQUAL JUS – European network for the legal support of LGBT (lesbian, gay, bisexual and trans) rights aims to combat homophobia and transphobia by increasing the awareness among people that European citizenship has added a new dimension to the protection of fundamental rights and to the inclusion of all. It contributes to the establishment of an open network of lawyers and provides tools for training and consultation, such as publications, newsletters and a database. Further information is available at www.equal-jus.eu.

This publication is part of the EQUAL JUS project. Within this text, you will find information about the legal tools available to you for securing your rights as LGBT citizen of the European Union.



Prejudices, stereotype and homophobia affects the recognition of the dignity and freedoms of many lesbian, gay, bisexual, and trans European citizens because of their sexual orientation, gender identity and expression. Despite clear principles set forth by the European Union, and the Nice Charter of December 1 2009 which is binding upon the Member States, not all States have implemented the measures required to remove all unlawful distinctions based on sexual orientation. Persistent social and geographic inequality is particularly difficult to eradicate. Homophobia and discrimination are manifested in public and private life, in the workplace, in schools, within

the family, between friends and within social groups, as well as public authorities, and the political arena.

The project EQUAL JUS - European network for the legal support of LGBT rights, is partly financed by the EU Commission under the program, "Fundamental Rights and Citizenship 2007-2013". The project aims to combat homophobia and transphobia to provide an analysis of the protection of fundamental rights by the European Union. The project seeks to raise awareness of European citizenship as a new source of fundamental rights protection, and emphasizes the importance of the social inclusion of all.

As this publication is part of the EQUAL JUS project, it aims to share critical information about what it means to be an LGBT European

citizen. Human rights and equality are the most important values of twenty-first century Europe, and thus, being an EU citizen means to be treated equally regardless of your sexual orientation, gender identity and expression. These values are threatened by social, cultural, and legal factors, and sadly many LGBT Europeans still face inequality and homophobia. What is important to remember, however, is that LGBT people have the benefit of European and national legal tools to secure their rights and equality and to fight homophobia. This publication aims to present these tools, explain how they work, and encourage LGBT people to use them to protect their rights – only together can we bring about positive change.

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We are all European Citizens

The European Union is comprised of many minority groups, including LGBT people - and the guiding principle for European legislation is the equality of all citizens.

The 1992 Treaty on European Union (the Maastricht Treaty) introduced and defined the concept of European citizenship: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union." According to the Treaty of the European Union, the European Union is an organization of countries, based on the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minority groups. The EU as a community has decided to deal with the issues involving human rights on a large scale. Therefore, the fundamental rights of all people living in the EU are considered universal, meaning that they belong to all equally, including those who identify as lesbian, gay, bisexual, transsexual, and transgendered.

The European Union works to protect these rights within the 27 Member States within its borders, as well as in its relations with non-EU countries.

The Court of Justice of the European Union includes three sub-courts. The Court of Justice (ECJ) is the highest court and its interpretation



*We are all European citizens,
and we are all equal before law.*

of EU law is binding on all Member States and their respective administrations. The Court of Justice recognizes fundamental rights protection as a general principle of EU law and plays a key role in creating the human rights policy of the Union.

The European Convention on Human Rights (ECHR) is a convention of the Council of Europe, a body entirely separate from the EU although

all EU Member States are members of the Council of Europe and have signed the ECHR. When the Lisbon Treaty entered into force, the European Union decided to also join the ECHR as one of the legal parties to the Convention. This means that European citizens may bring legal actions before the European Court of Human Rights against the European Union. The European Court of Human Rights (ECtHR) was established in 1959 to rule on the ECHR and is based in Strasbourg, France. This international court deals with the civil and political rights that are found in the ECHR, with the goal of consolidating the rule of law and democracy in Europe. The Court is responsible for ensuring that the human rights for 800 million Europeans are respected within the 47 Council of Europe member States that have ratified the Convention. Individuals can apply to the Court directly, and it has delivered more than 10 000 judgements – many of which have related to LGBT rights.

We are all European citizens, and we are all equal before law. Discrimination is not admissible under EU law, as it is based on values of human dignity, freedom, democracy and equality. Every European citizen can bring their discrimination cases before the ECtHR against their national administrations as well as EU authorities.

Different and equal

The fundamental rights enjoyed by LGBT people cover many aspects of everyday life. The right to equal treatment is only one of them.

Human rights are enshrined in many official documents (such as the founding Amsterdam Treaty) which legally require that your rights be protected in the European Union. They have been reinforced by the Charter of Fundamental Rights which was meant to consolidate the rights already guaranteed to you, which were outlined in various legislative acts and case-law. Article 21 of the legally binding Charter contains the general prohibition of discrimination, including on the grounds of your sexual orientation. Nevertheless, a significant number of lesbian, gay and bisexual (LGB) people across the European Union are not open about their sexual orientation, often because of negative cultural attitudes towards homosexuality, or persisting prejudice that exists within society at large.

A study by the Fundamental Rights Agency reveals progress in a number of Member States, in relation to the scope of legal protections of lesbian, gay and bisexual people against discrimination. At the same time, many European citizens strongly believe that **there is a need for new EU anti-discrimination legislation, including on grounds of sexual orientation,**

If you are a same-sex couple, you will encounter very uneven landscape in Europe with respect to your freedom of movement and family reunification.



in areas outside employment. Equal protection against discrimination in all walks of life throughout the European Union will enable the free movement of citizens and workers, whereas unequal protection may force LGBT citizens to move only to Member States which treat them equally.

Only a few EU Member States have amended their legislation and practice to simplify **access to gender reassignment treatment for trans people.** It is still problematic in some countries to alter your recorded name or sex on official documents if you have undergone, or intend to undergo, gender reassignment.

In the majority of Member States, you can enjoy the freedom of assembly and expression, as well as protection from violence motivated by prejudice, homophobia or transphobia. In Poland, Romania and Bulgaria, LGBT pride marches have been held successfully for the first time. In contrast, restrictions on LGBT public events in various European cities constitute public expression of disapproval towards sexual and gender minorities.

If you are a same-sex couple, you will encounter an uneven landscape in Europe with respect to your freedom of movement and family reunification. You might be not recognised in law as a “family member”. In the context of the right to asylum, Austria, France, Hungary, Ireland, Luxembourg, Portugal, and Spain have provided adequate protection for same-sex couples recently. Marriage is also reserved for different-sex couples only in a number of Member States. You might be denied the recognition of your partnership or marriage concluded abroad. As a recent Eurobarometer survey showed, a majority of people in Europe are opposed to marriage and adoption by same-sex couples.

For LGBT individuals, there is a great potential for change at European level and especially for legislation allowing mutual recognition of civil status documents (for example, concerning name changes and adoption), a core problem for LGBT families in the EU.

Each year, hundreds of LGBT people apply for asylum in the EU. However, Member States apply different rules to LGBT refugees. A universal European approach to address these specific needs is required.

Advocacy groups and governments in a number of Member States have taken proactive measures to foster education and dialogue about LGBT issues, thus challenging negative attitudes towards homosexuality and LGBT people.

There is a need for new EU anti-discrimination legislation prohibiting discrimination on grounds of sexual orientation in areas outside employment. Equal protection against discrimination throughout the EU will allow for free movement of citizens and workers.

If you are a same-sex couple, you will encounter very uneven landscape in Europe with respect to your freedom of movement and family reunification.

Does it really work?

European law provides different legal instruments prohibiting discrimination based on sexual orientation and gender identity.

The **European Convention on Human Rights** (ECHR) provides the major source of international legal protection of rights of LGBT people. The ECHR is an international treaty under which the Member States of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction. Article 14 of the ECHR States: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Though the international treaty itself does not include direct reference to sexual orientation, the case-law adopted by the European Court of Human Rights clearly states that discrimination on the grounds of sexual orientation or gender identity is prohibited and must be abolished.

The **Charter of Fundamental Rights of the European Union** brings all the personal, civil, political, economic and social rights enjoyed by people in the European Union together into



a single text. Since the entry into force of the Treaty of Lisbon on December 1, 2009 the Charter has become legally binding on the Union. This means that the EU institutions must respect the rights that are enshrined in the Charter. The Charter also applies to Member States, but only when they implement Union law. The Charter does not give the EU a general power

to intervene in fundamental rights and does not expand the competence of the European Union. Each Member State has its own well-established system for protecting rights, through national constitutions and courts. If citizens feel that national authorities have infringed upon their rights, they should take their case to a national court, or first seek help from a national ombudsman.

People all over Europe are victims of discrimination due to their sexual orientation when it comes to employment. You, as a European citizen, should know that the **Council Directive on Equal Treatment in Employment and Occupation 2000/78/EC** protects you. This Directive deals with four grounds of discrimination: religion, belief, age and sexual orientation. The Directive applies to workers in both the private and public sectors and to all types of working arrangements, whether it be full-time, part-time or contracted work. The Directive prohibits both direct and indirect discrimination, and also explains the concept of harassment. The Directive also prohibits employers from requesting others to discriminate against persons on any grounds. So, for example, someone looking to hire can not ask a recruitment agency to search for candidates using discriminatory methods. The Directive requires that the Member State must provide remedies to those who feel have been the victims of discrimination. These options can be in the form

of civil or administrative procedures, including a conciliation procedure. Anyone who starts proceedings against their employer because they feel they have experienced discrimination is protected by the Directive, which prohibits what is known as 'victimization'. Thus an employer cannot discriminate against a person because they have previously taken proceedings against their employer. As a victim of discrimination, you are also assisted by the



Directive because the burden of proof is on the person accused of discrimination. So, your employer must show that they treated you fairly.

The EU law regards discrimination against transgender individuals as a form of sex discrimination. This principle was established by the European Court of Justice in the 1996 case of *P v S and Cornwall County Council*, where it was held that the dismissal of an individual undergoing or following gender reassignment was unlawful discrimination on the grounds of

her sex. In addition, the EU has also provided a legal framework to protect workers that are discriminated against on the grounds of their gender identity. The Directive 2006/54/EC, binding all EU Member States on the principle of equal treatment of men and women in employment, prohibits discrimination against transgender people.

Be aware that there is more. Other international organisations like the United Nations and the Council of Europe adopted many legal in-

struments that protect against discrimination. European Union law reaches today well beyond employment. For instance, according to Directive 2010/13/EU audiovisual commercial communications shall not include or promote any discrimination based on sex or sexual orientation.

EU law is clear, YOU can't be discriminated against! Different legal instruments help YOU to avoid discrimination and to feel safe.

A lot of work is being done now to make transgender rights more visible. In the meantime, transgender people are protected through existing equality legislation which prohibits discrimination on grounds of sex.



The guardians of equal treatment

The EU has implemented many programmes to ensure fundamental rights for all citizens of Member States.

One of the most active parts of the EU in this field is the Agency for Fundamental Rights (FRA), an advisory board based in Vienna. The FRA supplies information to the European Union on the situation “on the ground” for people facing discrimination. One of their first activities was to produce a very comprehensive legal and social report on the situation of LGBT people in all EU countries.

The EU also supports many social programs, like the Programme for Employment and Social Solidarity (PROGRESS), which has dedicated funds to fight discrimination through a wide range of activities that combat racism and xenophobia within its borders. Along with these issues, a large part of the budget is devoted to fighting other types of discrimination.

As a community based on equality, a European Ombudsman for EU institutions was established by the Maastricht Treaty in 1992, with a permanent seat in Strasbourg. The EU Ombudsman is called into service for five years by the European Parliament, and his/her main responsibility is to accept claims from European citizens or individuals living in EU and carry out



One of main objectives is to protect human rights – and therefore, including LGBT rights.

controls in EU institutions, excepting the Court of Justice of the European Union.

The European Parliament is a democratically elected body which deals with EU legislation and represents interests of all European citizens. Many specialized commissions in the EP structure deal with human rights and consider petitions brought by European citizens and all minorities in the EU. Particularly important is the EP Intergroup for LGBT Rights, an informal group of Members of the European Parliament

that deals with the rights of LGBT people. The Intergroup puts out positive statements on LGBT issues when they draft reports or amendments, when they vote in the Parliament, or when they deal with constituency affairs. They can often help individuals and organizations who find it hard to navigate through the European Parliament when they are looking for support.

Together with the Council of the European Union, the EP is the main legislative institution, which decides about most important legal issues concerning the European Community.

The European Commission is the independent institution established in the EU to enforce European Union law and ensure that Member States implement EU legislation fully including

anti-discrimination directives protecting the rights of minority social groups, such as LGBT people. Every citizen can submit to the Commission an individual complaint and draw their attention on possible infringements.

The Council of Europe gathers 47 countries in Europe from Azerbaijan to Iceland, from Turkey to Russia. It promotes a tolerant and civilized society, indispensable for European stability, economic growth and social cohesion. One of its main objectives is to protect human rights – and therefore, including LGBT rights. All EU Member States are also members of the Council of Europe which is grounded on the European Convention on Human Rights.



Litigation concerning LGBT rights

Case-law is the most powerful legal instrument for making LGBT rights effective.

Legal change in the field of LGBT rights law is often hard to achieve. Case-law is usually the main and the most effective remedy for bringing about a change in the law. The importance of case-law is demonstrated by the decisions of the European Court of Human Rights and European Court of Justice. The European framework of human rights protection, with particular reference to LGBT people's rights, has changed a lot from the first cases to the present day.

Even before any judgments concerning same-sex couples have been made, the European Court of Human Rights has stated many times that stable *de facto* relationship of two adults, preferably living together with or without children create family ties protected by Article 8 of the Convention. There have been numerous judgments that state that unmarried couples who make a deliberate choice not to register their union cannot expect the same preference the State grants partners in 'legalized' relationships (*Shackell v. UK*).

Up until 2008, the European Court of Justice had on numerous occasions expressed the opinion that the situation of same-sex partners cannot be compared to the situation of spouses, even

Same-sex couples have the same right to family life as heterosexual couples!



if the State grants them a possibility to register their union. Therefore, different treatment of same-sex and opposite-sex couples in the employment field was not deemed to be a breach of the general principle of equal treatment. The groundbreaking judgment that overruled the earlier decisions was issued by the Court of Justice in 2008 in the landmark case *Maruko v. Versorgungsanstalt der deutschen Bühnen*.

The issues of discrimination against LGB people have been addressed by the European Court of Human Rights in numerous cases. Two successful applications by UK citizens to the European Court of Human Rights triggered a change in national law. These were, *Smith & Grady v. U.K.*, and *Lustig-Prean & Beckett v. U.K.*

In *Goodwin v. U.K.*, gender identity was accepted as one of the most intimate areas of a person's private life. In *Rees v. U.K.* and *Cossey v. U.K.*, the ECtHR said that the state is not obliged to reflect the desired gender in a transsexual person's birth certificate. In *B. v. France*, however, the ruling was passed in favour of the applicant that the State should allow a transgender person to change their documents of everyday use (ID, drivers license) to fit their corrected gender. Finally in *Goodwin v. U.K.* the right to have one's true gender identity recognized and documents changed was recognized by the ECtHR.

Below we will take a closer look at seven of the most important LGBT rights cases. They truly changed the lives of LGBT people in Europe.

Schalk and Kopf v. Austria ruled that there has been no violation of Article 12 in conjunction with Article 14 of ECHR – but that two gay men or lesbian women living together, without children enjoy family life protected by Article 8 of European Convention on Human Rights.

The European Court of Human Rights stressed by this ruling that same-sex couples enjoy the same right to family life as heterosexual couples. At the same time, the majority of the judges signalled that however strongly the Court feels against discrimination of gay and lesbian minority, it will not require national legislatures to provide for civil partnership or civil marriage for same-sex couples.

Same-sex couples have the same right to family life as heterosexual couples.

A ground-breaking judgement of the European Court of Justice was issued in 2008 in the case of *Maruko v. Versorgungsanstalt der deutschen Bühnen*. Mr. Maruko lived with his partner in registered partnership. After his partner had died the Vddb, the pension scheme for German theatres, refused to pay him a survivors pension as such pensions are provided only for married partners. Mr. Maruko sued the Vddb. The Bavarian Administrative Court of Munich referred the case to the European Court of Justice for interpretation of the EU Antidiscrimination Directive. The European Court of Justice ruled that Mr. Maruko has been directly discriminated against. The judges stressed that as a matter of European Union law if the State allows same-sex partners to enter into a registered partnership any denial of benefits that are granted to

married couples is discriminatory and constitutes a violation of anti-discrimination law.

If the State allows same-sex partners to enter into a registered partnership, any denial of benefits that are granted to married couples is discriminatory and constitutes a violation of anti-discrimination law.

The case *Baczowski and Others v. Poland* (2007) was brought to the ECtHR by a group of individuals and the Foundation for Equality who claimed a violation of the European Convention of Human Rights, Article 11 (freedom of assembly) and Article 13 (effective remedy) and 14 (discrimination) taken in conjunction with Article 11, after they had been refused permission for a demonstration raising awareness of discrimination against homosexuals. The Court highlighted the positive obligation of States to secure the effective enjoyment of freedom of association and assembly, particularly for minority groups as they are more vulnerable. The Court unanimously held that there had been violations of Article 11 and Articles 13 and 14 taken in conjunction with Article 11.

This ruling reinforces the LGBT community's right to protest and organize a demonstration and extends protection of the right to peaceful assembly to other groups.

The issues of discrimination of LGB people have been addressed in two applications of U.K. citizens that were positively determined by the Court and triggered the change of national law. In cases of *Smith & Grady v. U.K.*, and *Lustig-Prean & Beckett v. U.K.*, issued in 1999, the ECtHR stated that firing gays and lesbians from the armed forces on the basis of sexual orientation constitutes a breach of Article 12 of the European Convention on Human Rights. The decision, which caused widespread controversy at the time, led the U.K. to adopt a revised sexual-orientation-free Armed Forces Code of Social Conduct in January 2000.

Respect for others is not an optional extra: being an LGBT individual means you must be respected like any other person!

In *Goodwin v. U.K.* for the first time the European Court of Human Rights stated that nothing justifies the prohibition of transsexuals from benefiting from the right to marriage. In the Court's opinion, it would be unreasonable to make one's right to marry conditional on the possibility or willingness to have children, and to use words 'man' and 'woman' only to describe one's biological gender. After the case, Goodwin's solicitor said: "The court has said that the Government's stance falls far short of the standards for human dignity and

human freedom in the 21st Century. Christine Goodwin's victory will be seen as a milestone on the road to change."

This ruling clearly admits that transsexual persons have a right to change sex on their birth certificate, and nothing justifies the prohibition of transsexuals from benefiting from the right to marriage, under no circumstances.

In *Van Kück v. Germany* the European Court of Human Rights found that the interpretation of the term "medical necessity" and the evaluation of the evidence in this respect which led to denial of surgery were not reasonable. The Court stated that there has been a violation of Article 8 of the Convention (right to privacy). In *L. v. Lithuania* the Court found that the circumstances of the case revealed "a limited legislative gap in gender-reassignment surgery" in Lithuanian legislations, which left the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity.

The right to gender reassignment treatment has been held to constitute an aspect of private life within Article 8 of the European Convention on Human Rights.

In *Richards v Secretary of State for Work and Pensions*, the European Court of Justice ruled that a British transsexual woman was discriminated against when she was treated as a man and refused a state pension. When Sarah Richards reached the age of 60 in 2002, the Gender Recognition Act did not exist, and so it had been impossible for her to obtain an appropriate certificate. She applied for a state pension, but was told by the Pensions Agency that she would have to wait until she was 65 before receiving a pension - the standard pension qualification age for men. The European Court of Justice found in favour of Ms Richards, who was born a boy in 1942. It ruled that the refusal to recognize a male-to-female transsexual as a woman and award a pension at 60 flouted several EU directives.

Discrimination against transsexuals is contrary to EU law!

Equal justice for all

Having common European values and legal security means that every European citizen is free to enjoy life without being discriminated against on the basis of sexual orientation or gender identity.

Dear European Citizen,

Today's battle against discrimination based on sexual orientation and gender identity can be fought with a number of legal instruments deriving from international law, European law and national laws. At first glance, they seem complicated. In this publication, by exploring the background, key cases, and important issues, we tried to translate the legal claims and arguments into accessible everyday language and concepts. We hope that this publication is helpful as a tool, where you can find information on European and national legal tools to better secure your rights and equality and fight homophobia.

It is important to remember that you are not alone in this battle – you can always count on the support of other actors, such as lawyers, private or public entities engaged in the field of human rights protection. Of course, there is still a lot to be done to ensure equal treatment of gays, lesbians and transsexual people, but without helping each other, no changes can be made.

Legal instruments are ineffective if they go unused. Understanding how they work and how to use them is only the first step, but using them



and encouraging everyone to use them is what leads us to positive changes in our society. **Be active, and never forget that laws in every European country afford equal justice to all citizens in their private differences, despite their sexual orientation or gender identity.**

Glossary

What do we mean, when we say...

Bisexual – a person who is capable to be emotionally and/or sexually attracted to individuals regardless of their sex. The degree of preference and choice of primary relationship partner varies for each bisexual

Coming out – telling other people that you differ from what is heteronormative. This is a process that is ongoing throughout one's entire life. The expression is often used together with the word "closet" as in "coming out of the closet"

Drag King/Queen – a person who dresses like a member of the opposite sex, often with the aim to entertain and/or play with sex roles and/or gender expression

Gay – a person who feels sexual desire exclusively (or predominantly) for individuals of his/her own sex. This term can be used to describe both homosexual men and women, but it is mainly used to describe men

Gender – an academic term that is used for the description and theoretical education of sex and sex roles

Gender identity – psychological sense of being male or female (or both or neither)

Gender expression – how an individual chooses to express their gender

Heteronormative/Heteronormativity – a norm that takes for granted that there are two separate biological sexes and that we are born into one of them.

According to the heteronorm, there are certain behaviours and sex stereotypes that everybody has to follow. The norm also takes for granted that everyone is heterosexual

Heterosexual – a person who is emotionally and/or sexually attracted to people of the opposite sex

Homophobia – fear of, or anger toward homosexuality and/or homosexual and bisexual people

Homosexual – a person who is emotionally and/or sexually attracted to people of the same sex

Intergender – a person who is intergender feels he/she stands between or beyond the gender binary

Intersexual – a person whose biological sex is hard to categorize as male or female

Lesbian – homosexual woman


LGBT – lesbian, gay, bisexual, transgender people

Out – being openly lesbian, gay or bisexual

Queer – originally an English swearword that meant weird, perverse or different. Today the term is partly used as an identity term for LGBT people and partly as a questioning of norms. A person who is queer questions heteronormativity and does not want to follow traditional categorizations

Queer Theory – an academic theory analysing society's views and norms

Rainbow Family – collective term for same-sex families, with or without children



Rainbow Flag – the international symbol of LGBT solidarity. It was designed during the 1970s by artist Gilbert Baker.

Sex – either of the two traditional forms of individuals that are distinguished respectively as female or male

Sexual orientation – an enduring emotional, romantic, sexual, or affectional attraction toward others. Sexual orientation exists along a continuum that ranges from exclusive heterosexuality to exclusive homosexuality and includes various forms of bisexuality (<http://www.apa.org>)

Sex reassignment – this is a collective term that refers to all medical procedures by which a person's physical appearance and function of their existing sexual characteristics are altered to resemble that of the other sex

Straight – heterosexual person

Transgender person – a collective term that describes individuals whose sexual identity and/or sexual expression partly or always differs from the norm of the sex that they have been assigned at birth. The term includes transsexuals, intersex persons, transvestites and other gender variant people

Transphobia – fear of, or anger toward, transgender people

Transsexual person – person who is transsexual defines oneself by a sex other than the one assigned at his/her birth, and often undergo hormone therapy and operations (sex reassignment) in order to change his/her physical sex

Transvestite – a person who sometimes, often or always dresses in clothes that are traditionally associated with the opposite sex

Information about the project :

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Further information is available at www.equal-jus.eu.

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