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A transgender studies approach to gender identity and expression-based asylum claims based on a critical doctrinal and discourse analysis of CJEU and ECtHR jurisprudence

Volume 1

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Dedication

Relationships are what we become with them. To the love that has transformed (us) and its everyday practice. To those who remained.

Acknowledgments

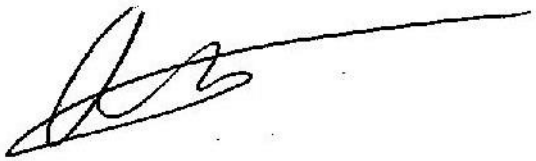
I am immensely grateful for Prof. Dr. Fergus Ryan's support throughout these 4 years, and the respect and attention he has shown to me and my work. The encouragement and help of Prof. Dr. Delia Ferri in my first steps as a legal scholar, have been invaluable. The Faculty and Staff of Maynooth Law School of Law and Criminology, which has hosted and fostered my research, have been more than supportive. Finally, I want to thank Dr. Sinéad Ring and Dr. Claire Thomas for their time, energy and expertise invested in reviewing this PhD thesis. Each and every one of these people made this endeavour possible and the completion of this thesis a rewarding experience. This would not have been possible without the John and Pat Hume Doctoral award, which I was honored to receive in 2018.

DECLARATION

I have read and understood the Departmental policy on plagiarism.

I declare that this thesis is my own work and has not been submitted in any form for another degree or diploma at any university or other institution of tertiary education.

Information derived from the published or unpublished work of others has been acknowledged in the text and a list of references is given.

Signature: 

Date: 1/5/2013

Abstract

This research project seeks to conceptualize an inclusive framework for the Refugee Status Determination of gender identity and expression-based claims. It seeks to critically evaluate current practice, drawing also on a doctrinal and discursive analysis of the jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). In order for current challenges to be identified in the context of the doctrine and practice of Refugee Status Determination, I will attempt to develop a Transgender Studies Framework for asylum adjudication, based on Transgender Studies and its relation to Queer Theory, to which I will juxtapose the CJEU and ECtHR case law on asylum and LGBTQ+ rights. Given that gender identity is a complex concept often articulated in heteronormative or medical terms, the refugee determination process will be analyzed in relation to the challenges but also the potential it provides for encompassing the experience of transgender and gender nonconforming asylum claimants, including gender expression claims. Contemporary developments in good practices in the field of gender identity/expression and evolving human rights norms will inform the study. The purpose of this thesis is twofold: to reveal the judicial cisheteronormativity in asylum practice and to reimagine a respectful, just and diverse experience-encompassing framework for transgender and gender nonconforming asylum claims expanding the protection of Human Rights Law in EU and Europe.

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Introduction

Refugee status determination for claims of individuals who identify as lesbian, gay, bisexual, transgender, queer, intersex and/or other gender and sexually diverse people (henceforth LGBTQI+)[1]. LGBTQI+ asylum claims have become an increasingly important issue in recent years, since this group of people is forced to flee their home countries due to persecution and discrimination.[2] LGBTQI+ individuals face a range of challenges and risks in many countries, including criminalization, violence, and harassment, which can make it unsafe or impossible for them to live openly and freely.[3]

In order for someone to be granted asylum they must prove in the refugee status determination procedure, that usually entails an interview and has two judicial instances, that they are fleeing their country due to a reasonable fear of persecution that has to do (this is called the nexus requirement) with their membership in a particular social group, their ethnicity, their nationality, their religion or political beliefs. Due to this fear, they do not want to return to their country of origin or last habitual residence and put themselves under their state's protection which is unable or unwilling to guarantee their safety.[4]

In order for someone to be granted asylum they must prove in the refugee status determination procedure, that usually entails an interview and has two judicial instances, that they are fleeing their country due to a reasonable fear of persecution that has to do (this is called the nexus requirement) with their membership in a particular social group, their ethnicity, their nationality, their religion or political beliefs. Due to this fear, they do not

[1] Throughout the thesis, different versions of the umbrella term LGBTQI+, with some omissions, will be used depending on which sexual and gender minorities are included in the statement in each case. In Chapter I, it will be explained why intersex identities will not be addressed in this thesis. It must be noted also that queer identity or the plus symbol is not included in every statement paraphrased, quoted or analysed in the thesis.
[2] UNHCR, 'LGBTIQ+ persons' <https://www.unhcr.org/lgbtiq-persons.html> accessed 28 March 2023.
[3] Idem.
[4] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (April 2019, HCR/1P/4/ENG/REV. 4) <https://www.refworld.org/docid/5cb474b27.html.> accessed 25 July 2020.

want to return to their country of origin or last habitual residence and put themselves under their state's protection which is unable or unwilling to guarantee their safety[5].

However, even in countries that recognize and protect LGBTQI+ rights, there may be significant challenges for individuals seeking asylum based on their sexual orientation or gender identity.[6] This can include difficulties in proving their LGBTQ+ identity and the risks they face in their home country, as well as bias and discrimination from immigration officials.

As will be discussed in Chapter III, to be granted refugee status, LGBTQ+ asylum seekers must demonstrate that they have a well-founded fear of persecution based on their sexual orientation or gender identity. This can be challenging, as the criteria for determining refugee status can vary significantly between countries and may not always reflect the unique experiences and challenges faced by LGBTQ+ individuals.

In recent years, as will be discussed in Chapter III, there have been efforts to address these challenges and ensure that LGBTQ+ asylum claims are given proper consideration and protection. This includes providing training and resources for immigration officials on LGBTQ+ issues and refugee law, as well as increasing awareness of and advocacy for the unique needs and experiences of LGBTQ+ asylum seekers.

Overall, refugee status determination for LGBTQI+ asylum claims remain a complex and challenging issue, but there are growing efforts to address these challenges and ensure that LGBTQI+ individuals are able to access the protection and support they need. With continued advocacy and support, it is possible to create a more just and equitable system for LGBTQI+ asylum seekers around the world.

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[5] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (April 2019, HCR/1P/4/ENG/REV. 4) 87 <https://www.refworld.org/docid/5cb474b27.html.> accessed 25 July 2020.

[6] The Guardian, 'LGBT asylum seekers claims routinely rejected in Europe and UK' <https://www.theguardian.com/uk-news/2020/jul/09/lgbt-asylum-seekers-routinely-see-claims-rejected-in-europe-and-uk> accessed 28 March 2023.

Asylum claims based on gender identity, which is the focus of this thesis, have become increasingly prevalent in Europe in recent years, as individuals who identify as transgender, nonbinary, or gender nonconforming face persecution and discrimination in their home countries. While the issue of gender identity and arguably expression has gained more recognition and acceptance in some parts of the world (as will be discussed in Chapter III), many countries still criminalize, stigmatize, and discriminate against individuals who do not conform to traditional gender norms.

For those who face persecution based on their gender identity and expression, as will be presented in the main body of this thesis, seeking asylum in a new country may be the only option for safety and protection. However, navigating the asylum process can be complex and challenging, particularly when it comes to proving one's transgender status and demonstrating the risks and harm, they face in their home country.

The European Union has established primarily through the Recast Qualification Directive a framework for assessing asylum claims based on gender identity, which requires member states to ensure that individuals who face persecution based on their gender identity are granted the protection they need.[7] This framework recognizes that gender identity is a protected characteristic under international law and that individuals who face persecution based on this characteristic are entitled to protection under the Refugee Convention.[8]

However, despite this legal framework, many asylum seekers face significant challenges in proving their gender identity and demonstrating the harm they face in their home country.

As a result, there is a growing need for legal and advocacy support for asylum seekers based on gender nonconformity in Europe. This includes providing guidance and resources for asylum seekers, training for immigration officials on how to properly assess asylum claims

[7] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 2011/95/EU.
[8] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

based on gender identity, and advocacy to ensure that member states are fulfilling their obligations to protect individuals who face persecution based on their gender identity (see Chapter III).

Significance and research questions

Increasingly more commentary and case law analysis are being available lately and will be reviewed in Chapter III. However, this generally does not engage in depth with the EU and European asylum acquis drawing on gender theory and human rights jurisprudence. Moreover, relevant guidance from the UNHCR and national level determination bodies is increasingly available.[9] However, the application of gender theory -namely the conceptualization of sex/gender, as well as of queer and transgender phenomena that contest cis/hetero-normativity to the potentially more challenging questions of gender nonconformity and gender identity in asylum law, is significantly more limited. By bringing in valuable insights from gender theory, this study aims to contribute to but also complicate in a constructive manner the scarce existing literature on the subject. This theoretical endeavour will be complemented with the examination and analysis of LGBTQ+ and asylum related jurisprudence of the European Court of Human Rights (henceforth ECtHR) and the Court of Justice of the European Union (henceforth CJEU). Such focus is crucial in order to understand refugee status determination in LGBTQ+ claims and provide an interpretative point of reference for gender identity and expression related refugee status determination (RSD). This, in turn, can be used to make inferences drawing on the European Courts' case law on the asylum adjudication of transgender and gender nonconforming claims. Finally, informed by gender theory, this study will employ a critical perspective in response to the doctrinal analysis performed in respect of the CJEU and the ECtHR jurisprudence on asylum claims and LGBTQ+ rights.

[9] UN High Commissioner for Refugees (UNHCR), UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008 <https://www.refworld.org/docid/48abd5660.html> accessed 28 March 2023.

A Transgender Studies approach[10] on gender identity and expression in the context of RSD examination could have two important implications: a) the clarification of an appropriate framework for determining particular social group membership on gender identity/expression related claims, and b) the clarification of what can constitute persecution in gender identity/expression related claims of discrimination (serious violation of fundamental human rights or cumulative violations with the same effect, serious harm). Furthermore, a Transgender Studies approach on gender identity in RSD can contribute to the clarification from a legal theory perspective of the fundamentality of gender identity/identification and/or gender expression, which unfortunately often burdens the applicant in the form of proving credibly the psychological necessity or inevitability of their specific gender identity on an individual basis. Given, however, that the latter practice does not provide epistemologically more validity to the assessment of claims by decision-makers and results in severe ambiguity and stereotyping in the decision-making process, I consider it critical for concepts related to gender identity to be legally clarified in order for them to be in turn applied coherently by RSD bodies in the *ad hoc* assessment of individual asylum claims.

Further, given that gender identity remains a contested term, often defined through medicalization and/or in binary (heteronormative) and fixed terms, one should turn to a relevant conceptualization of gender identity in Human Rights and Refugee Law, one that conforms with the normative stance of individual yet equal protection. International and European anti-discrimination norms, although often incomplete and in-process, could help in that direction, in order for the relevant interrelations of sex and gender to be legally demarcated, so as to promote human rights protection without reproducing the exclusion of personal experiences and claims. Most importantly, they could help in the framing of the impact of gender nonconformity, as a state of the individual which is inherently relational to the social context though with pragmatic and severe implications for the individual. This framing is crucial for understanding and addressing gender-based discrimination, which has

[10] Transgender theory will be thoroughly examined in Chapter II. A Transgender Studies Framework in asylum law is based on the assumptions of transgender theory that sex characteristics/gender identity/gender expression incongruence- according to the standards of cisnormativity which prescribes certain gender roles to sex assumed at birth in a binary, fixed and medicalized way- are other just as valid configurations of sex/gender.

become an essential task in the context of both Human Rights and Refugee Law in need of a more flexible but less ambivalent analysis.

Given the above, this research seeks to provide answers to the following questions:

- What are the developing human rights norms on an international and European level that can help us demarcate the fundamentality of gender identity as an integral part of one's personality and identify the fundamental content of the right to gender identity/identification and gender expression? What is the implicit or explicit definition of gender identity provided by the judicial review of the European Courts, EU Legislation and International Human Rights bodies? Can we provide a qualified theoretical critique to this conceptualization within the normative context of Transgender Studies that can help us refine the content of transgender human rights?

- How can a Transgender Studies based approach on gender identity and expression, informed by developing human rights norms in the EU and European context, provide a more stable legal framework for establishing membership of a 'particular social group' (henceforth, 'PSG') so as to limit the ambiguity and stereotyping that arises in the context of credibility assessment in relation to the gender identity and arguably the gender expression of the applicant?

- How can RSD bodies assess the effects of gender nonconformity in a particular social context? Should they be assessed on an objective (social/official treatment) or subjective (psychological impact) basis in relation to membership of a PSG and/or 'well-founded fear of persecution'? What is the legal reasoning prohibiting a requirement of discretion by gender nonconforming individuals?

- How can we define the scope of fundamental rights protected by European Law drawing on the case-law of the ECtHR and CJEU regarding gender identity/identification in particular? How is this scope configured in the context of EU Asylum Law (severity of violation assessment)? What are the positive and negative limits of recognized gender identity protection that can derived from the

case-law of the European Courts on related issues and in juxtaposition with privacy rights (Art. 8 ECHR and Art. 7 CFREU)[11] as well as religious freedom (Art. 9 ECHR and Art. 10 (1) CFREU)[12]? Can we arguably apply these limits in the context of gender identity-/expression-based RSD and to which extent?

Overall, while progress has been made in recognizing and protecting the rights of individuals based on their gender identity and expression in Europe, there is still much work to be done to ensure that asylum seekers based on gender nonconformity are granted the protection they need and deserve. My hypothesis here is threefold. Firstly, I argue that we need to conceptualize a transgender studies/human rights framework for transgender phenomena in the refugee status determination process drawing on transgender studies and queer theory (See Chapter II and III). Secondly, I maintain that identitarian claims for transgender and gender nonconforming asylum claimants are not inclusive enough and are deeply embedded in western metanarratives of gender. That is why I propose drawing on gender nonconformity as an inclusive framework for the limitless marginalized configurations of sex assumed at birth/gender identity/gender expression, where there is incongruence between the gender norms that derive from sex assigned at birth and gender identity or gender expression. This view of limitless sex/gender geometries as valid as identities, experiences and expressions is in accordance with Transgender Studies, as one will explore in Chapter II of the thesis. Gender nonconformity is a relational concept that puts the focus on the social location of the applicant in the country-of-origin and the risk of persecutory harm due to not conforming to sex/gender expected congruence. As such, it could be a crucial concept for conceptualizing grounds for asylum and persecution in the country-of-origin. Finally, I argue that gender expression should necessarily be included in the protected characteristics that provide grounds for asylum, as it is fundamental for the personality and exercise of human rights of the asylum claimants and can put them in risk of serious harm at the country-of-origin. I argue that gender identity and gender expression must be considered

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 8; European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 7.
[12] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 9; European Union, European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 10 (1).

a priori fundamental and credibility assessment should not cast doubt on that *per se* and *ad hoc.*

Scope

This project will have a legal-dogmatic character, in particular regarding European and EU Human Rights and Asylum Law. It will concentrate on the identification, systematization, and interpretation of relevant law as it is reflected in the European Asylum Directives, the European Human Rights Conventions and the judgments of the supranational Judicial Bodies of Europe (CJEU, ECtHR). Insights drawn by the European Courts' jurisprudence on private life, freedom of conscience and refugee rights will be the stepping stone for an extended analysis of gender identity jurisprudence. This investigation will then be placed in the particular context of EU Asylum Law. There is a strong relationship that is worth exploring between Human Rights and Asylum Law, especially in the context of the EU legal order, where the Member States are expected to respect the standards of European and EU Human Rights Law as reflected in the CFREU (Charter of Fundamental Rights of the European Union) and the ECHR (European Convention of Human Rights) while implementing their policies and legislation, including those related to their obligation for asylum provisions. This research focuses specifically on the practice of European courts in gender identity and asylum claims, where coherent jurisprudence and standard-setting is currently developing through the authoritative jurisprudence of the CJEU and ECtHR also on LGBTQ+ rights. The focus on the jurisprudence of the CJEU and ECtHR allows for an analysis of human rights/asylum/EU and European law, and its application at the domestic level. It also brings into focus the relevance of evolving European and EU human rights and asylum norms and standards on gender identity/expression, as well as the drawbacks and challenges of current praxis.

This project will offer a critical doctrinal and discursive analytical perspective on the jurisprudence of CJEU and ECtHR. I will systematize the relevant law, by explaining the structure of the law and developing justificatory standpoints for various parts of it.

Arguments based on the description of law and its inner structure will be employed, but also normative ones, to the extent that the latter ones will be drawing on recognized over-arching norms set by relevant statutes and identified as such by the supranational Judicial Bodies of the EU and Europe. Finally, discursive analysis -theoretically and empirically informed by transgender studies as discussed further in Chapters II and III- will be applied in order to conceptually reveal explicit or implicit dominant gender ideology[13] that excludes transgender and gender nonconforming subjectivities from the protection of European and EU Asylum Law by assuming sex/gender incongruence only as an exception and validating it only when fulfilling certain arbitrary and narrow legal or medical standards. My purpose by doctrinally and discursively analyzing CJEU and ECtHR jurisprudence on sexuality, gender identity and asylum is to offer a critical analysis of the current legal approach on transgender and gender nonconforming asylum adjudication and provide a more inclusive and just conceptualization of gender identity and expression in refugee status determination in the context of EU and European asylum law. My view is that, in this way, one can provide substance to the content of the human rights of transgender and gender nonconforming claimants that seek asylum in the territory of the EU and Europe.

This thesis focuses on the EU and Europe when it comes for the adjudication of transgender and gender nonconforming asylum claims for several reasons. Firstly, I focus on the particular European geography of asylum and Human Rights in order to map their socio-legal intersection within a certain territory that is well demarcated by the countries of the Council of Europe and EU. The intersecting clusters of EU and CoE countries have been developing pluralist asylum and human rights frameworks judicially reviewed by the ECtHR

[13] One definition that describes gender ideology 'as a set of beliefs about the proper order of society in terms of the roles women and men should fill'. See Tamar Saguy, Michal Reifen-Tagar and Daphna Joel, 'The gender-binary cycle: the perpetual relations between a biological-essentialist view of gender, gender ideology, and gender-labelling and sorting' (2021) 376: 20200141 Philosophical Transactions of the Royal Society B <https://royalsocietypublishing.org/doi/10.1098/rstb.2020.0141#:~:text=Gender%20ideology%20is%20defined%20as,87%5D> accessed 27 April 2023. In this, gender identity describes the attitudes persons may have to gender roles and expression; Another understanding, however, is that gender ideology is a 'concept adopted by a global movement to articulate opposition to gender equality, abortion, sexual education, and LGBTQI+ rights in areas such as marriage, adoption, surrogacy, and reproductive technologies.' See Teresa Toldy and Júlia Garraio, 'Gender Ideology: A Discourse That Threatens Gender Equality' (Gender Equality, 23 July 2020) <https://link.springer.com/referenceworkentry/10.1007/978-3-319-70060-1_86-1> accessed 23 April 2023.

and CJEU. Secondly, it concerns the pluralist regime of European states, where the Common European Asylum System, CFREU, International Human Rights and Refugee Law and ECHR largely intersect providing a first point of reference to conceptualize a preliminary human rights framework informed by transgender studies for the examination of gender identity/expression asylum claims. At a later stage I would hope that scholars can utilize this framework in order to apply it in particular case studies, and that the intersection of human rights/asylum law explored here will be comparatively examined in several jurisdictions the and Europe.

This thesis focuses on the EU and Europe. The reason for this is that transgender identity and expression need particular attention given their marginalized status in legal and social discourse and their difference from sexual orientation, in matters of substance, performance, practice and experience. Transgender and gender nonconforming experience needs to be mainstreamed distinctively, in order to inhabit the social and legal sphere with its specific challenges and demands. This thesis works towards opening the space in asylum for all subjectivities that are marginalized by the gender binary, assumed sex, as well as sex/gender congruence.

Structure of the thesis

In the last part of the introduction, I will provide a short roadmap of the following chapters. Chapter I's purpose is threefold: first, to present, explain and advocate for the terminology that will be used in respect of transgender subjectivities throughout the thesis, since the terms used for this group and members of this group have been developing and are highly contested. Secondly, the binarism and current state of mainstream gender ideology will be examined through a discussion on nonbinary and intersex subjectivities, making clear that the former but not the latter will be the focus of this thesis' examination of transgender phenomena. Thirdly, the epistemology of the thesis will be outlined in chapter I; given that transgenderism has been a polarizing topic it is very critical when we talk about transgenderism to know how the researcher accesses, builds, and examines knowledge.

Finally in Chapter I, it is essential that I as a researcher lay down my own positionality and relevant background and reveal and how I position myself and how I am socially located in the topic of transgender asylum seeking.

In the second chapter, after the terminology used has been established, I turn to the theoretical framework I will use to approach transgender and gender nonconforming experience, subjectivity and expression. I problematize two theories, namely queer theory and transgender studies, making the connection between them and arguing for the refined theoretical lens that I opt for in this thesis. Finally, in articulating a transgender studies framework for transgender and gender nonconforming asylum claims, I identify three elements that need to be included in this endeavour: intersectionality, anti-essentialism, and the relationships of trans advocacy and the law, including the one that I favour most.

In the third chapter, I turn more specifically to refugee status determination for transgender and gender nonconforming asylum claims. After interrogating the definition of the refugee, I problematize the criteria of inclusion in a particular social group, which is traditionally the ground on which LGBTQ+ asylum claimants have been granted international protection. Secondly, I review the state of the art in the assessment of the risk of persecution as well as its potential content, specifically for gender identity and gender expression related asylum claims. The existence of a plausible risk of persecution, as a serious violation of human rights, is another requirement for all asylum claimants to be granted international protection. Thirdly, I turn to credibility assessment of transgender and gender nonconforming asylum claims, as a practice that needs to be placed under scrutiny and conform to good practices. Furthermore, in the next subchapter, I offer a short decolonizing critique of trans asylum. Finally, by reviewing key commentaries, based on the analysis that precedes, I argue for making good law with queer cases for transgender and gender nonconforming asylum applicants and examine what are some challenges and dilemmas that need to be addressed and how.

In the fourth chapter, I turn to examine the background and context of this study, namely the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union. I provide a background to these two institutions and I also examine some

key components of each, such as, for the CJEU, the sources of refugee and gender law, the CJEU case law precedent in Member States, and the Court's decision-making process and judicial practice. For the European Court of Human Rights, I first present the European Convention of Human Rights and its binding effect for the States of the Council of Europe. I then problematize the relationship of ECtHR case law and EU law and lastly, I again delve in the decision-making process and judicial activism debate regarding the Court's practice. Such a chapter on the background is important in order to be able to assess the findings of the doctrinal and discursive analysis of the two Courts' jurisprudence, how they are produced and how they impact CoE and EU States' refugee status determination practice, by providing authoritative interpretative points of reference.

In the fifth chapter, I turn to the methodology that the thesis adopts and the methods I opt to employ. The reason why I do that after I conceptualize the theoretical framework (Chapter II), scrutinize my hypothesis (Chapter III) and give the background of the jurisprudence to be examined (Chapter IV), is that I expect to have already enabled the reader to understand my perspective and theoretical tools, as well as contextualize the jurisprudence of the institutions I am going to examine with this particular methodology in Chapter VI and VII. Thus, in Chapter V, I justify my choices to employ doctrinal analysis and critical discursive analysis, in a form that derives from Transgender Studies, and that I call 'transnormative discursive analysis'. The latter aims to expose implicit and explicit gender ideology in jurisprudence. After I analyse what I mean by doctrinal analysis and critical textual analysis, I present my conceptualization of transnormative discursive analysis of the CJEU and the ECtHR jurisprudence, which I perform in the later chapters. I proceed to problematize how to import human rights norms and good practices, as well as transgender theory, in the pluralist legal landscape of Europe and the EU through the analysis of the jurisprudence of the two Courts. My view is that outlining the methodological approaches and the methods that the thesis employs, can help the reader conceptualize the analytical findings as they read along, since they contextualize how the doctrinal and textual analysis is performed in the process.

In the sixth chapter, I apply the doctrinal and transnormative discursive analysis of ECtHR jurisprudence. First, I examine jurisprudence on the right to privacy and the right of expression in sexuality cases, in order to conceptualize the content of these rights in LGBTQ+ cases in general, and help make inferences on how protection established in respect of sexual orientation could be envisaged in the case of gender identity/gender expression cases. In this way, and being of the view that sexual orientation and the right to relate, as well as the right to gender identification and to perform one's gender freely permeate the public/private divide, I attempt to follow sexuality cases from the right to privacy to that of expression. Secondly, I review the ECtHR case law on 'transexual' (as they were called until recently) plaintiffs and problematize the lack of nonbinary or nonoperative transgender protection. In the last part of the doctrinal analysis, I focus on the extraterritorial application of the European Convention of Human Rights, and especially on the Articles that are relevant for LGBTQ+ in particular and asylum claimants in general, such as Article 8 and nonderogable rights. Afterwards, I proceed to the critical transnormative analysis, where I review sexual orientation and gender identity cases, and I identify the missing ground of the ECtHR's rationale, namely gender expression coupled with ciscentrism and medicalization.

In the seventh chapter, I turn to the analysis of the jurisprudence of the Court of Justice of the European Union. First, I engage in doctrinal analysis, where I identify cases of sex and sexual orientation discrimination in the jurisprudence, in order to appreciate the scope and the rationale of discrimination protection of LGBTQ+ citizens, in order to infer the type of discrimination due to gender identity/expression that can amount to persecution in asylum. I also deal with the impact of soft law in the development of EU law and practice, since regardless the fact that it is nonbinding, it reflects the developing human rights norms in EU. In the last part of the doctrinal analysis, I mainly turn to sexual orientation refugee status determination cases on which the CJEU has deliberated, in order to envisage how it would deal with transgender and gender nonconforming applicants under the LGBTQ+ umbrella. I proceed with the transnormative textual analysis of CJEU jurisprudence, where I reread sexuality and gender identity cases in order to expose cisnormative ideology, and again I find the lack of gender expression coupled with binarism and medicalization in the

rationale/reasoning of the CJEU on LGBTQ+ cases. The overcoming of such shortfalls would help delineate a more inclusive approach to transgender experience, including nonbinary identities and gender nonconforming subjectivities and expand the right of dignity for them beyond privacy.

Lastly, in the conclusion, I will restate the research objectives and summarize the key findings of the research work performed in the previous chapters. Secondly, I will discuss the interrelationship of the research to existing knowledge and key arguments of the thesis. Finally, I will identify limitations and suggest ways to advance research in relation to trans asylum.

Chapter I: Who counts as trans? Terminology, categories and epistemology[14]

In this chapter, the first of the thesis, I will initially explore the terminology around transgender identities, and justify the linguistic decisions that I make throughout the thesis. Secondly, having opened the scope of transgender identities, I will explore gender and sex characteristic binarism, through the examination of the current conceptualization and regulation of nonbinary genders and intersex identities. In the third subchapter, I will delve into the epistemological decisions that I make throughout the thesis, in opting for a feminist, intersectional, anti-essentialist account of situated knowledge. That brings me to the last part of the chapter, where I attempt to make my positionality visible, in order to clarify my stance and normative perspective as a researcher, since my view and experience of the subject matter shapes the way I collect and produce knowledge in a highly debated field as that of gender concepts as they are reflected in asylum law.

1. Terminology

The terms 'trans' and 'transgender' are nowadays widely used in community settings, but have also come to the forefront of mainstream politics and academia. According to Stryker, some variants of the word 'transgender' started appearing in the United States in the 1960s 'among self-organized communities of predominantly white, middle-class, male-bodied individuals who persistently expressed feminine comportment, identities, and dress'.[15] This

[14] Part of this chapter has been published in a commentary cited as Mariza Avgeri, 'Nonbinary People Around the World and the Elan-Cane Case' (JURIST – Professional Commentary, 8 July 2021) <https://www.jurist.org/commentary/2021/07/mariza-avgeri-non-binary-people-elan-cane/> accessed 7 April 2023 and in the journal articles cited as Mariza Avgeri, 'Trans*it: Narratives of trans and nonbinary asylum applicants in the broader West' (2021) Here Vs There Sexualities Special Issue (April 2021) <https://doi.org/10.1177/13634607211013278> accessed 20 April 2023 and Mariza Avgeri, 'Assessing trans and gender nonconforming asylum claims: Towards a Transgender Studies Framework in Particular Social Group and Persecution' (2021) Refugees and Conflict in Frontiers in Human Dynamics Special Issue (April 2021) <https://doi.org/10.3389/fhumd.2021.653583> accessed 20 April 2023.

[15] Susan Stryker and Paisley Currah, 'Introduction' (2014) 1 TSQ: Transgender Studies Quarterly 5.

was a way to resist medical, psychiatric, or sexological labels such as 'transvestites', which referred to periodical cross-dressing relating mainly to erotic gratification, or 'transsexuals,' which referred to medicalized and binary (male to female or female to male) bodily modification of sex-signifying physical characteristics and usually allowed for the legal change of social gender. On the other hand, 'transgender' was meant to depathologize experiencing a gender other than the one that was assigned at birth, or combining various styles and gender presentations that transcended the cultural alignment of biological sex and gender. From the very beginning, the term 'transgender' entailed a resistance to the medicalization, binarism and heteronormativity of the *status quo* and gave the space for the emergence of 'disruptive potentials of sex/gender atypicality, incongruence, and nonnormativity'.[16] It arose then as a catch-all term for gender variability in the 1990s, when it started being mainstreamed in the intellectual and political sphere.

'Transgender' implies a transcendence of the initial gender position that is expected to derive from the sex assigned at birth. It has been used recently to describe people who identify with a gender other than that assigned at birth and create some other gender location, but it can be used also more widely to describe 'the widest imaginable range of gender-variant practices and identities'.[17] According to the Declaration of the Trans Rights Conference, '[t]rans people […] includes those people who have a gender identity which is different to the gender assigned at birth and those people who wish to portray their gender identity in a different way to the gender assigned at birth. It includes those people who feel they have to, or prefer or choose to, whether by clothing, accessories, cosmetics or body modification, present themselves differently to the expectations of the gender role assigned to them at birth'.[18] In this thesis, the term 'transgender' will be used to refer to people whose gender identity does not align with the sex assigned at birth demarcating a category narrower than gender expression and larger than 'transsexual', a category used initially to describe those who seek morphological changes in their body in order to attain sex-signifying characteristics of a gender other than that they were assigned at birth. People whose gender

[16] Idem 5.
[17] Susan Stryker, *Transgender History* (Seal Press: Distributed by Publishers Group West 2008) 19.
[18] ILGA Europe and Transgender Europe, 'Declaration of the Trans Rights Conference 28th October 2009, Malta' (*Transgender Europe*, 29 October 2019) <https://tgeu.org/malta-declaration/> accessed 28 April 2019.

does not conform with expected societal standards deriving from the sex they were assigned at birth will be referred to as gender nonconforming, in accordance with the most current definition of gender nonconformity in transgender communities.[19] Gender nonconforming expression will be explored in this thesis, in juxtaposition with transgender identities, since it can be argued that the law does not treat both in the same way or uses separate terms and approaches for gender identity and expression. In addition, not all transgender people have gender nonconforming expression, and not all people who have gender nonconforming expression identify as transgender. Many gender nonconforming people are indeed cisgender.

Transgender (unlike transsexual, which is considered a derogatory term for some and has originated in the medical and psychiatric communities) is an umbrella term for people whose gender identity does not align to the sex they were assigned at birth. It includes people who transcend male and female categories whether they identify as nonbinary, genderqueer, genderfluid, pangender, two-spirited, trans women or trans men, and whether they seek medical interventions (hormones and/or gender affirmative surgery) or not.[20] Transgender identities then are related to gender identity, which is the internal, deeply held sense of a person's gender for themselves. It can be expressed through the use of appropriate pronouns, clothing, haircut, mannerisms and so on, namely through their gender expression, but it is not always the case that gender identity is expressed through stereotypical ways that correspond to binary gender roles. On the other hand, people whose gender expression is not conforming to binary and stereotypical gender roles may not identify with a gender other than that assigned at birth, namely they can be *cis-gender* regardless of their nonconforming gender expression. Homosexual orientation is a gender nonconforming characteristic too in that it does not conform with the binary heteronormative roles that are expected by a member of the society, but it is a distinct phenomenon from gender identity, which refers to the deep sense of gender identification and belonging that an individual has.

[19] GLAAD and Refinery 29, 'Gender Nation Glossary', <https://www.refinery29.com/en-us/lgbtq-definitions-gender-sexuality-terms> accessed 29/10/2019.
[20] GLAAD, 'GLAAD Media Reference Guide – Transgender' <https://www.glaad.org/reference/transgender> accessed 28 April 2019.

The above brings me to use of the terms 'sex' and 'gender' which should be clarified too, since they are often used interchangeably, but do not mean the same thing. Gender is generally considered cultural, and sex biological, although queer theory challenges the latter.[21] Sex can be better understood as the designation of a person at birth as male or female, according to their anatomy, namely their genitalia and reproductive organs, or according to their biology, namely their chromosomes and hormones.[22] Gender, on the other hand, is 'the social organization of different kinds of bodies into different categories of people'.[23] Man or woman are gender categories, although historically and cross-culturally a variety of categories of genders has been used. As Stryker notes, '(t)his takes us into one of the central issues of transgender politics—that the sex of the body does not bear any necessary or deterministic relationship to the social category in which that body lives.'[24]

'Trans' is a term that has been used as a short-hand for transgender phenomena, namely people whose gender identity does not align with the sex they were assigned at birth. The term can cover many gender identities, people that identify as transsexual, gender-variant, queer, gender nonconforming, gender fluid and cross-dressers.[25] In this thesis, trans will be used as a short hand for all gender identities which transcend male or female categories, but as noted above it will not cover gender expression, namely the individual's manifestation of gender identity through 'masculine', 'feminine' or gender-variant traits. This is a choice that relates mainly to the legal disaggregation of gender identity from gender expression, categories that are covered differently by the law in many instances. For example, the Recast Qualification Directive, clearly names gender identity as a ground for granting asylum, but not gender expression,[26] which in the European Union legislation is only explicitly protected

[21] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999).
[22] Transgender Equality Network Ireland, 'Trans Terms' <http://www.teni.ie/page.aspx?contentid=139> accessed 28 April 2019.
[23] Susan Stryker, *Transgender History* (Seal Press : Distributed by Publishers Group West 2008) 11.
[24] Idem 12.
[25] European Union Agency for Fundamental Rights, *Being Trans in the EU - Comparative analysis of the EU LGBT survey data* (December 2014) 14.
[26] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L. 337/9-337/26.

in the context of the Victims' Rights Directive.[27] Defining trans identity narrowly in this aspect can help identify the legislation governing gender identity and its shortcomings in relation to gender expression, which is included in most definitions of transgender phenomena, but has not been seen as an inseparable part of gender identity by the law.[28] Also, the reduction of gender identity to the gender expression of the individual can lead to stereotyping gender nonconforming people and defining them as a gender that they are not. Finally, there is the question of whether gender expression should be protected separately from gender identity, since gender nonconforming people can identify as male or female, despite the way they tend or chose to express their gender. In this light, using 'trans' for people whose gender identity does not align with the sex they were assigned at birth is a strategic choice that can help disentangle the complex relationship between gender identity and gender expression, and the way the law deals with it in different circumstances.

In this thesis, the term 'trans*',[29] which has been used widely in the last several years to demarcate a wide range of trans phenomena by including the asterisk, will not be used. The reason for this lies in the fact that it has been severely criticized by the trans community for decentering nonbinary people, trans women, and trans people of colour. The asterisk originates from the Boolean search in the web, where a search would be performed for any words starting with 'trans-' (transgender, transsexual etc), thus providing the term with more inclusivity. On the other hand, trans already includes all trans identities, so the asterisk (according to its critics) works to delegitimize the identities that are already included under the trans umbrella. In addition, it contributes to the silencing of the non-white trans and nonbinary people who do not have access to this sort of language and it has been called out

[27] Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L. 315/57-315/73.
[28] See James C. Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' New York University Journal of International Law and Politics (2011) 44(2) 315.
[29] See Jack Halberstam, *Trans: A Quick and Quirky Account of Gender Variability*, (University of California Press 2018).

for being used as a tool of oppression against these marginalized groups when it is being used in binary, transmisogynistic and inaccessible ways.[30]

Some other terms that should be clarified and are relevant for transgender individuals are gender dysphoria, gender identity disorder and gender affirmative therapies and/or surgeries. Gender Identity Disorder was a diagnostic category in the Diagnostic and Statistical Manual of Mental Disorders (DSM) IV under the category Sexual and Gender Identity Disorders. The word 'disorder' was perceived by many as stigmatizing and as contributing to social discrimination against transgender individuals. The diagnosis was changed in DSM-V to 'Gender Dysphoria' which refers 'to the distress caused by a discrepancy between one's experienced gender and assigned gender'.[31] Gender Dysphoria is still labelled as a mental disorder and the equivalent of this diagnosis is mandatory in all European countries to access gender reassignment treatment, a fact which has been severely critiqued by trans advocacy groups.[32] On the other hand, the American Psychiatric Association clarifies that not all transgender people experience gender dysphoria, and not all those who experience gender dysphoria choose to undergo gender reassignment treatment.[33]

In June 2018, the World Health Organization announced the completion of the process of revision and reform of the International Classification of Diseases (ICD). The creation of a new chapter on Conditions Related to Sexual Health was announced, removing the pathologizing references to trans and gender diverse people from the ICD chapter on Mental Health.[34] The 'Gender Incongruence' diagnosis which is included in the ICD-11 has,

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[30] Trans Student Educational Resources, 'Why We Used Trans* and Why We Don't Anymore' <http://www.transstudent.org/asterisk/> accessed 28 April 2019.
[31] William Byne, Dan H. Karasic, Eli Coleman, A. Evan Eyler, Jeremy D. Kidd, Heino F.L. Meyer-Bahlburg, Richard R. Pleak and Jack Pula, 'Gender Dysphoria in Adults: An Overview and Primer for Psychiatrists' (2018) 3(1) Transgender Health 57.
[32] Transgender Europe, 'Depathologization' <https://tgeu.org/issues/health_and_depathologisation/depathologisation-health_and_depathologisation/> accessed 28 April 2019.
[33] Jack Drescher and Jack Pula, 'Expert Q & A: Gender Dysphoria' (*American Psychiatric Association*) <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a> accessed 28 April 2019.
[34] AKAHATÁ, Asia Pacific Transgender Network, GATE, ILGA World, RFSL, Southern African Trans Forum (SATF), STP, International Campaign Stop Trans Pathologization & TGEU – Transgender Europe, 'Joint Statement for Depathologization and TDoR 2018' (*Transgender Europe, 21 October 2018*) <https://tgeu.org/joint-statement-for-depathologization-and-tdor-2018/> accessed 28 April 2019.

however, been criticized as well as pathologizing of gender diversity, especially among children.[35]

Finally, gender affirming or gender reassignment treatments and surgeries refer to procedures which change primary or secondary sex characteristics so that they correspond with one's experienced gender identity. Research shows that there is a high level of post-operative satisfaction for individuals having experienced gender dysphoria and undergone gender affirming surgeries.[36]

2. Nonbinary and intersex identities

2.1. Intersex identities

'Intersex' is an umbrella term used to denote people whose chromosomal, hormonal and/or anatomical characteristics do not fall strictly or fall in varying degrees between the medical categories of male or female.[37] When a child is born, it is categorised as a boy or a girl; while this may seem an innocent categorization, it demonstrates the fundamentality of sex and gender classifications in our society, and the binarism according to which human sex is primarily and arbitrarily categorized.[38] It also demonstrates the rigid way in which human bodies are classified in mutually exclusive categories, which do not correspond to natural

[35] Sam Winter, 'Gender trouble: The World Health Organization, the International Statistical Classification of Diseases and Related Health Problems (ICD)-11 and the trans kids' (2017) 14(5) Sex Health 423.
[36] See Tim C. van de Grift, Els Elaut, Susanne C. Cerwenka, Peggy T. Cohen-Kettenis & Baudewijntje P. C. Kreukels 'Surgical Satisfaction, Quality of Life, and Their Association After Gender-Affirming Surgery: A Follow-up Study', (2018) 44(2) Journal of Sex & Marital Therapy 138. See also the Foy No. 1 case from the Irish High Court in which McKechnie J confirms that a child must be registered as male or female at birth. The requirement to register a sex is mandatory and the binary or male/female applied.
[37] European Union Agency for Fundamental Rights, *The fundamental rights situation of intersex people* (May 2015).
[38] Council of Europe Commissioner for Human Rights, *Human rights and intersex people* (Issue paper April 2015).

characteristics and variations.[39] Intersex persons cannot be categorized according to medical norms in strictly 'male' or 'female' bodies, and that becomes evident in either 'secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure'.[40] In this way intersex people may or may not 'pass' for the gender they are assigned at birth. By 'passing' one refers to the displaying of gender markers that correspond to one's chosen gender, which in the context of the current binary sex categorization refers to either a female or male sex/gender.

Intersex people may or may not also identify as the gender they are assigned at birth, which makes trans rights and legal gender recognition rights very relevant to this particular group of people (even though intersex and transgender phenomena are distinct and face both similar and different challenges). Some intersex people may identify as nonbinary genders, or as simply intersex, although there are competing views on whether intersex can refer to a gender identity as well. An intersex person can identify as both intersex and trans, when their gender identity does not correspond to the gender they were assigned at birth. They may also face challenges in common with trans people, when they do not 'pass' as the gender with which they identify. On the other hand, intersex people face particular challenges that trans people do not, especially when it comes to 'corrective medical interventions' on their sex characteristics at an early age, in order to fit 'male' or 'female' categories.[41] It must be noted that individual gender identity does not necessarily conform with the sex assigned at birth. When it comes to intersex people, it is estimated that the wrong assignment of sex varies between 8.5% and 40%, making gender recognition laws, as well as gender affirmation discourse very relevant for intersex persons.[42] The process of assuming the wrong gender

[39] Julie A. Greenberg 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41(2), Arizona Law Review 265.
[40] Dan Christian Ghattas, 'Human Rights between the Sexes: A preliminary study in the life of inter* individuals' (2013) 34 Heinrich Böll Stiftung: Publication Series on Democracy 10.
[41] The Maltese legislation is one of first examples banning such interventions for minors, unless exceptionally and medically necessary or with their mature, informed consent. See s.14 of the Gender Identity, Gender Expression and Sex Characteristics Act 2015.
[42] Council of Europe Commissioner for Human Rights, *Human rights and intersex people* (Issue paper April 2015) 23.

for intersex people often becomes a major infringement of intersex persons' psychological integrity.[43]

According to Rubin, intersex (which is an umbrella term for people born with atypical sex characteristics) is a term referring to sexual anatomies that various societies perceive as being non-standard, rather than people with non-standard anatomies. In Rubin's view highlighting the ambiguity and role of societies' perception 'calls attention to the material-semiotic overdetermination of intersex'.[44] According to mainstream medical models, intersex conditions constitute disorders of sex development (DSD), and are seen as 'abnormalities' that require medical intervention.[45] For example, intersex people in many cases are subjected to involuntary 'sex-normalizing' procedures after they are born or during childhood, mainly performed on their reproductive organs in a manner that can also end their reproductive capacity. These procedures are often performed without their informed consent or that of their parents and are rarely medically necessary. Unfortunately, the views of the children are not taken into consideration and the interventions performed have most of the times irreversible consequences on their mental and physical health.[46]

Unlike transgender people, people with atypical sex characteristics can have their right to life violated through 'sex selection' as foetuses and also through 'preimplantation genetic diagnosis, other forms of testing, and selection for particular characteristics'.[47] The practice of such abortions has been said to be incompatible with human rights standards, since it entails discrimination against intersex people on the basis of their atypical sex characteristics.[48] It becomes apparent that intersex people face different challenges in

[43] Paulo Sampaio Furtado, Felipe Moraes, Renata Lago, Luciana Oliveira Barros, Maria Betânia Toralles and Ubirajara Barroso 'Gender dysphoria associated with disorders of sex development' (2012) 9 Nature Reviews Urology 620.
[44] David A. Rubin, *Intersex Matters: Biomedical Embodiment, Gender Regulation, and Transnational Activism* (SUNY series in Queer Politics and Cultures 2018) 1.
[45] Idem 2.
[46] OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement* (2014) 7.
[47] Morgan Carpenter, 'Submission on the ethics of genetic selection against intersex traits' (*Intersex Human Rights Australia*, 29 April 2014) < https://ihra.org.au/25621/submission-ethics-genetic-selection-intersex-traits/> accessed 28 April 2019.
[48] Robert Sparrow, 'Gender eugenics? The ethics of PGD for intersex conditions' (2013) 13(10), American Journal of Bioethics 29.

comparison to trans people, with many of the gross infringements of their rights taking place up to their childhood. On the other hand, gender recognition laws and gender identity affirmation are crucial for both groups, which share common goals when it comes to the protection of their preferred gender identity.

One of the key goals of intersex advocacy groups is putting an end to the normalizing surgeries and other cosmetic procedures that take place in order for people with atypical sex characteristics to fit the male/female binary. The procedures performed on intersex people's reproductive organs are often referred to as 'intersex genital mutilation'.[49] In his report to the UNHCR, Juan E. Mendés, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, views non-consensual surgical intervention on people with atypical sex characteristics as a form of torture. According to his report, '[t]here is an abundance of accounts and testimonies of persons being [...] subjected to [...] a variety of forced procedures such as sterilization, State-sponsored forcible [...] hormone therapy and genital-normalizing surgeries under the guise of so-called 'reparative therapies'. These procedures are rarely medically necessary, can cause scarring, loss of sexual sensation, pain, incontinence and lifelong depression and have also been criticized as being unscientific, potentially harmful and contributing to stigma'.[50] In one of the most progressive provisions for intersex individuals, the Maltese Gender Identity, Gender Expression and Sex Characteristics Act, a right to bodily autonomy and physical integrity is established prohibiting 'medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent […]'.[51]

Both intersex and transgender people suffer the repercussions of a strictly heteronormative society that defines people according to their sex characteristics in a binary manner that assumes that gender identity derives from the societal depiction of primary sex

[49] Council of Europe Commissioner for Human Rights, *Human rights and intersex people* (Issue paper April 2015) 30.
[50] UNHCR (UN High Commissioner for Refugees), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - A/HRC/22/53* (2013).
[51] ACT No. XI of 2015, s 14(1).

characteristics as they are classified after birth. Both groups are expected to adhere to social norms concerning sex/gender and are not allowed their agency over their sex/gender configuration. For this reason, this thesis will not exclude problematics that arise for intersex people, especially relating to the need for affirmation of their gender identity, whether they identify as trans or not. On the other hand, it will focus mainly on gender identity discourses and not on other infringements such as intersex genital mutilation which call for a more focused approach on sex characteristics and their binary classification in particular. The need to protect intersex people has medical implications that are distinct from the need to abolish the medicalization and pathologization of transgender people and call for a more nuanced theoretical and legal approach that examines the binarism of sex classification assignment and not gender identity *per se*.

On the other hand, some rights, such as the right to physical and psychological integrity are particularly important both for intersex and transgender people, in the context of involuntary medical treatment and gender identity medical/psychological affirmation respectively. The interference with the physical integrity of the individual in the case of intersex people and the psychological integrity of the individual in the case of transgender people can result in an infringement of the right to respect for private life under Article 8 of the European Convention of Human Rights according to the European Court of Human Rights since it happens against the individual's will and sense of self. The State has a positive obligation to protect the physical integrity of people within their jurisdiction and their right to live with dignity in accordance with their sexual identity.[52]

Another right that is relevant for intersex people is the right to the highest attainable standard of physical and mental health without discrimination including sexual and reproductive health. This right, which is included in Articles 11 and 13 of the revised European Social Charter, is violated for intersex people by involuntary interventions without consent that have negative lifelong results for physical and mental health. Another aspect of the right to health is having access to health services that are efficient and respectful of bodily diversity,

[52] See *Storck v. Germany*, App No 61603/00 (ECHR, 16 June 2005); *Glass v. the United Kingdom*, App No 61827/00 (ECHR, 9 March 2004); *Christine Goodwin v. the United Kingdom* App No 28957/95 (ECHR, July 11, 2002).

a right that is often at stake also for transgender people who have performed gender affirming interventions.[53]

Finally, for intersex people, whose rights are most often violated during their infancy, childhood or adolescence, the rights of the child are particularly important for advocacy to respect human rights standards. The rights of the child are established in the Convention on the Rights of the Child and include that the best interests of the child are a primary consideration in all decisions affecting children (Article 3), the right to preserve their identity (Article 8), the right of the child to be registered immediately (Article 7), the right of the child to form and express views in matters affecting them (Article 12) and the entitlement to freedom of expression (Article 13).[54] These rights are very relevant for intersex people, whose subjection to unconsented and non-necessary medical interventions does not take into consideration their best interests, and whose difficulty in registration with atypical sex characteristics breaches Article 7. In addition, children's rights to form and express views in matters affecting them, as well as their freedom of expression are not respected when their preferred gender identity is not taken into consideration and validated in an affirming way. This holds true for both intersex and transgender children, since the social barriers in having their gender identity and bodily preferences accepted are many. The medical and legal rules governing children's access to their personal gender identity/expression often exclude children's views from decisions affecting them, and for intersex people, their rights are often violated as early as at birth. For intersex people, an *a priori* choice is made for them regarding their gender identity and sexual characteristics which raises significant issues of infringement of their physical integrity.

Aside from the physical consequences of the above medical intervention, what is also disrupted is the psychological integrity of intersex persons that relates to their right to decide their gender identity. The deep violation of their personality comes both from the lack of consent to medical interventions on their bodies, but also from the societal barriers that are present in claiming the gender identity that they choose. There is a controversy surrounding

[53] Council of Europe Commissioner for Human Rights, *Human rights and intersex people* (Issue paper April 2015) 32.
[54] Idem 33.

'intersex' as a gender identity, with some claiming that it mostly refers to physical aspects of the body and is not a matter of self-perception.[55] On the other hand, for some, the fact that intersex relates to sex characteristics does not necessarily mean that it cannot refer to gender identity, as it happens with male characteristics and the 'man' category. For them, intersex falls in the spectrum of nonbinary gender identities, and must be respected as such for those who claim it.[56]

This thesis will deal also with the theoretical implications of nonbinary gender identities. Whether intersex people identify as trans, nonbinary, or as the gender they were assigned at birth, they do not enjoy 'cisgender privilege' and for that reason, it is important to keep the implications for intersex people in mind when one is focusing on gender identity issues. On the other hand, as stated above, this thesis will deal with intersex issues only to the extent that they intertwine with issues of gender identity, and will not focus on the much more complicated medical and sex classification issues with which the intersex community is confronted.

2.2. Nonbinary identities

Most people in our societies identify as male or female, a man or a woman, but there have been people around the globe in different eras that have claimed other identities regarding their gender identity and have put this binary under challenge. Alternative genders across the globe demonstrate examples of cross-cultural gender diversity. In several Native American societies for example, different gender systems have been documented, which include more than two options for gender identification. In India, 'hijras' are accepted as a third gender.[57] In the First Nations 'two-spirit' is nonbinary gender category, and in Hawaii 'mahuwahine'

[55] OHCHR, *LGBT rights: frequently asked question*s (UN Free & Equal campaign fact sheet 2013) <https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/unfe-28-UN_Fact_Sheets_English.pdf> accessed 28 April 2019.
[56] Hida Viloria and Dana Zzyym, 'How Intersex People Identify' (Intersex Campaign for Equality, 10 July 2015) <https://www.intersexequality.com/how-intersex-people-identify/> accessed 28 April 2019.
[57] See *National Legal Services Authority v. Union of India* [2014] Writ Petition (civil) No. 604 of 2013.

is a culturally accepted gender form.[58] Gender variance has also been documented in other regions such as Brazil, the Philippines, Polynesia, and Thailand[59]. Perceiving gender as a binary category system is a just a feature of some cultures and not a universal classification; it is culturally established within communities by socializing interactions in each one.[60]

According to Corwin, in the U.S. there is a growing number of persons that identify outside the male-female binary. Corwin deals with the term 'genderqueer', which refers to people that either position themselves in a continuum between femininity and masculinity or simply see themselves as falling outside of the male/female dichotomy.[61] Since most legal cultures and many languages include only two options for gender identification, that is male (he) and female (she), genderqueer and nonbinary individuals are faced with the challenge of explaining and claiming space for their gender identity in a social arena where other options for gender are not recognized. Indeed, it is challenging to speak about gender as including more than two options since additional options are not widely recognized, but this thesis holds the view that the gender binary cannot be assumed as necessary when examining gender identity and holds space for nonbinary genders, such as genderqueer, bigender, agender among others. These will be examined under the umbrella of nonbinary identities, which is a catch-all term for people who identify between the categories of 'man' and 'woman' or beyond these categories, either permanently or some of the time.[62] Nonbinary identities fall under the wider definition of transgender phenomena, that refer to people who do not identify with the sex assigned at birth.[63]

The nonbinary community is incredibly diverse with its members occupying different gender positions across and outside the binary. Some of them may undergo a number of surgeries

[58] Jessica Clarke, 'They, Them, and Theirs' (2019) 132 Harvard Law Review 894, 907, 932.
[59] Serena Nanda, *Gender diversity: Crosscultural variations* (Waveland Press 2000).
[60] Penelope Eckert and Sally McConnell-Ginet, *Language and gender* (Cambridge University Press 2003).
[61] Anna I. Corwin, 'Language and gender variance: Constructing gender beyond the male/female binary' (2009) 12 Electronic Journal of Human Sexuality <http://www.ejhs.org/Volume12/Gender.htm> accessed 28 April 2019.
[62] Vic Valentine 'Including Non-binary People: Guidance for Service Providers and Employers' (*Scottish Trans Alliance,* 2015) <https://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-guidance.pdf> accessed 28 April 2019.
[63] LGBT Foundation, 'Non-binary inclusion' <https://lgbt.foundation/who-we-help/trans-people/non-binary> accessed 28 April 2019.

and interventions in order to affirm their gender identity, while others may not.[64] What is common is the rejection of the notion that there are only two genders with which one can identify and the transgression of the binary by appearance, social behaviour or by a mere sense of deep self-identification.

Nonbinary people challenge ontological assumptions about gender, and in particular the assumption that the sex/gender configuration falls into binary categories. Nonbinarism refers to gender and not sexual orientation, as heterosexual, lesbian, gay and bisexual, but it disrupts sexual orientation categories too. People identifying as beyond the gender binary destabilize the gender system and transgress gender stereotypes.[65] Trans, hijra, nonbinary and intersex people pose a fundamental challenge to the ontology of the sex/gender system, since the latter is based on bigenderism, namely the assumption that there are only two gender categories, man and woman, that are mutually exclusive. Bigenderism is the 'systematic division of the population not only by sex, but also by an extraordinarily complex, subtle, and refined system of behavior, manner, communication, presentation, and interaction', which causes great distress to gender-variant people, since it holds no space for self-identification and classification.[66]

Bigenderism is also challenged at a legal level in various jurisdictions. There are developments in several countries that point to an evolving recognition of nonbinary identities. For example, in 2011, the Australian Passport office published updated guidelines regarding the issuing of passports with an X gender, which was up to then a possibility only for individuals with atypical sex characteristics. The X descriptor was extended to encompass binary trans people, but also people transcending binary genders, whether they had proceeded to gender affirmation surgery or not.[67] In addition, in 2013, the Sex

[64] Riki Wilchins, 'Changing the subject', in Joan Nestle, Clare Howell and Riki Wilchins (eds.*), GenderQueer: Voices from beyond the sexual binary* (Alyson Books 2002).
[65] Surya Monro, 'Transmuting Gender Binaries: The Theoretical Challenge' (2007) 12(1) Sociological Research Online < http://www.socresonline.org.uk/12/1/monro.html> accessed 28 April 2019.
[66] Miqqi Alicia Gilbert, 'Defeating Bigenderism: Changing Gender Assumptions in the Twenty-first Century' (2009) 24(3) Hypatia 93, 97.
[67] Department of Foreign Affairs and Trade, Australian Government, 'Sex and Gender Diverse Passport Applicants' (*Australian Passport Office*) <https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport> accessed 28 April 2019.

Discrimination Act 1984 was amended to provide new protections to individuals with diverse sexual orientation, gender identity and sex characteristics in public life. According to the Australian Government Guidelines on the Recognition of Sex and Gender, individuals may identify as a gender other than the one that they were assigned at birth or beyond the gender binary and that should be reflected in the public government records. According to the same guidelines, '[t]he X category refers to any person who does not exclusively identify as either male or female, i.e., a person of a nonbinary gender'.[68] In New Zealand as well, as of 2012, there is an option for an X descriptor in passports, which is reserved for people who are trans or intersex.[69] In the U.S., a number of jurisdictions, including Oregon, Washington, California and New York allow for a nonbinary gender option on the documents they issue.[70]

In Malta, reforms in gender recognition laws have introduced the X category as an option for passports and public documents.[71] In Denmark, where medical prerequisites have been removed for binary legal gender recognition, there is also a provision according to which individuals can change their passport gender marker to X upon application, without approval from the Gender Clinic.[72] In Germany on the other hand, in 2018, the government adopted an act providing the possibility for intersex individuals to choose between binary gender markers, 'diverse' or the removal of gender marker.[73] This act has been criticized, since it does not allow for nonbinary individuals to choose this option if they do not have atypical sex characteristics and for that reason repathologizes intersex conditions.[74] In Ireland, the Criminal Justice (Incitement to violence or hatred or hate offences) Bill 2022 defines gender

[68] Australian Government, *Guidelines on the Recognition of Sex and Gender* (July 2013) <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> accessed 28 April 2019.
[69] Simon Collins, 'X marks the spot on passport for transgender travellers' *NZHerald* (New Zealand, 5 December 2012).
[70] Jessica Clarke, 'They, Them, and Theirs' (2019) 132 Harvard Law Review 894, 896-897. See also Zzyym v. Blinken, open case at the United States Federal Court for the District of Colorado.
[71] Transgender Europe 'Third gender marker options in Europe and beyond' (9 November 2017) <https://tgeu.org/third-gender-marker-options-in-europe-and-beyond/> accessed 28 April 2019.
[72] Transgender Europe, 'Denmark: X in Passports and New Trans Law Works' (12 September 2014) <https://tgeu.org/denmark-x-in-passports-and-new-trans-law-work/> accessed 28 April 2019.
[73] Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben 2018 (Act modifying the information to be entered into the birth register 2018).
[74] Grietje Baars, 'New German Intersex Law: Third Gender but not as we want it' (*Critical Legal Thinking,* 24 August 2018) <http://criticallegalthinking.com/2018/08/24/new-german-intersex-law-third-gender-but-not-as-we-want-it/> accessed 28 April 2019.

for the purposes of the Act as 'the gender of a person or the gender which a person expresses as the person's preferred gender or with which the person identifies and includes transgender and a gender other than those of male and female', challenging again legal bigenderism in hate crimes.

Other countries that have introduced nonbinary options in their government records are India, Nepal and Bangladesh. On April 15, 2014, a third gender was recognized by the Supreme Court of India. According to the Supreme Court, the third gender refers to transgender people that are neither male nor female and the recognition and acceptance of which does not constitute a social or medical issue, but a human rights' one.[75] In Nepal, in a landmark decision on December 27, 2007, the Supreme Court established a third gender category as well, according to which citizens can choose among three gender options, male, female and 'others'. The 'others' option refers to people identifying as a gender different than the one they were assigned at birth, a fact that will be solely defined by their self-identification.[76] In November 2013, the Bangladeshi government announced the recognition of 'hijras', a community of feminine individuals with male sex characteristics numbering over 10,000 people in Bangladesh, as a third gender category in public documents. This was done in order for their rights to be better protected.[77] On the other hand, according to Human Rights Watch, several abuses and discrepancies have been reported in the process of acquiring the third gender marker.[78] Pakistan has also issued in 2017 its first passports with

[75] Deepshikha Ghosh, 'Transgenders are the 'third gender', rules Supreme Court' *NDTV* (New Delhi, 15 April 2014) <https://www.ndtv.com/india-news/transgenders-are-the-third-gender-rules-supreme-court-557439> accessed 28 April 2019.
[76] Michael Bochenek and Kyle Knight, 'Nepal's Third Gender and the Recognition of Gender Identity' (*Jurist*, 23 April 2012) <http://jurist.org/hotline/2012/04/bochenek-knight-gender.php> accessed 28 April 2019.
[77] Farzana Hussain, 'Ensure rights of the third gender' *Dhaka Tribune* (7 January 2015) <https://www.dhakatribune.com/uncategorized/2015/01/07/ensure-rights-of-the-third-gender> accessed 28 April 2019.
[78] Kyle Knight, 'I Want to Live With My Head Held High Abuses in Bangladesh's Legal Recognition of Hijras' (*Human Rights Watch*, 23 December 2016) <https://www.hrw.org/report/2016/12/23/i-want-live-my-head-held-high/abuses-bangladeshs-legal-recognition-hijras> accessed 28 April 2019.

an X gender marker, years after its Supreme Court has declared that 'hijra' could be recognized as a third gender in national identity cards.[79]

On 22 June 2018, the English and Welsh High Court of Justice delivered a landmark judgment on an application relating to the issue of non-gender-specific passport filed by a non-gendered individual.[80] The judgment reflects the changing attitudes towards nonbinary genders and their recognition by public bodies. The application was refused, but the rationale of the decision highlights the dynamic development of gender systems that is taking place in the current social configuration. [81]

In the above case, Christie Elan-Cane asked to be issued with a passport bearing an 'X' gender marker, that would correspond to their non-gendered identification. The claimant, a 60-year-old person assigned female at birth, grew detached from their gender and performed a series of medical interventions to fit their emotional and psychological development. They adopted a non-gendered identity, which they perceive to be a fundamental part of their personality, after having rejected several other terms for their nonbinary gender identity.[82] The applicant was refused a passport without a gender marker denoting male or female. This was in spite of the fact that the International Civil Aviation Organisation (ICAO), permits countries to issue passports with either 'M', 'F' or 'X' in the sex section where X indicated 'unspecified' sex. Although the applicant underlined the latter fact, the response remained the same in refusing to issue them a passport with an X gender marker.[83] The applicant claimed that a declaration of being either male or female in order to acquire a passport, against the international standards, constituted a degrading and humiliating process that forces individuals to deny their identity.[84]

[79] Zeeshan Haider, 'Pakistan issues landmark transgender passport; fight for rights goes on' *Reuters* (Islamabad, 28 June 2017) <https://www.reuters.com/article/us-pakistan-lgbt-passport/pakistan-issues-landmark-transgender-passport-fight-for-rights-goes-on-idUSKBN19J237> accessed 28 April 2019.
[80] *R Christie Elan-Cane v. Secretary of State for the Home Department*, [2018] EWHC 1530 (Admin).
[81] See *R (on the application of Elan-Cane) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2021] UKSC 56- On appeal from: [2020] EWCA Civ 363.
[82] Idem [2]-[3].
[83] Idem [5].
[84] Idem [6].

The Identity and Passport Service (IPS) acknowledged the feelings of the claimant in not identifying as either male or female, but raised technical issues, such as the current computer system, as well as security issues for passports without a gender marker and lack of recognition of non-traditional gender markers at an international level. It also underlined the possibility of acquiring a passport with a binary marker that better corresponds to the individual's gender, upon submission of medical evidence of transition.[85] This statement highlights the additional discrimination that nonbinary transgender people face in the public realm. In addition, although the IPS acknowledged the need to work with the transgender community in order to move forward on this important issue, it stressed that UK law recognizes only two genders, male and female, and that in order for the applicant's claim to be accepted, a fundamental change in UK recognition law would be required.[86] It becomes evident that matters challenging social bigenderism cannot be addressed in isolation from legal frameworks regulating sex/gender in an interrelated and fundamental manner. The judgment makes that clear in dismissing the claim that the Government has a positive obligation under Article 8 ECHR to provide the option of an X marker in passports, based on the fact that '[i]t will be necessary for the Government to consider to what extent if any, in an age of increasing social and legal awareness and acceptance of the importance of issues relating to diversity and equality, the recording of an individual's sex and/or gender in official and other documentation is justified' and that '[i]t will also be necessary to consider the extent to which other identities both within and beyond the binary concept of gender are to be recognised, and if so, whether they are to be self-determined or are to be objectively evidenced'.[87]

Although the claim was refused, the UK courts have recognised for the first time in the body of the judgment that the right to respect for an individual's private life guaranteed by Article 8 ECHR entails gender identification that could include nonbinary individuals[88] and that

[85] Idem [8].
[86] Idem [11].
[87] Idem [151].
[88] See though the Supreme Court decision [2021] UKSC 56 at para. 30 confirming that 'it is no longer in dispute between the parties that the appellant's identification as non-gendered is an aspect of private life within the meaning of article 8'.

gender identification as elaborated by the ECtHR in *Van Kück* does not necessarily refer only to 'transsexuals'.[89] In concluding the UK High Court noted that:

> rights afforded to individuals under the ECHR are ones which have to be interpreted in the light of changing conditions and in a dynamic and evolutionary manner. Therefore, not only may the situation amongst the Member and other States alter, but in particular in the present case the claimant will be entitled to scrutinise with care the results of the Government's current review.[90]

An appeal was lodged at the UK Supreme Court, which dismissed the appeal saying that there was no obligation to issue an 'X' passport in circumstances where (i) the ECHR had not considered the position of individuals who identified as non-gendered and any such decision would go well beyond the jurisprudence of the Court ([30]; [63]); (ii) there was no consensus amongst CoE States that an 'X' marker should be available at passports 9[59]); and (iii) there were public interest considerations such as national security risks, administrative consistency and cost which outweighed the Appellant's interest in being issued with an 'X' passport ([46]-[54]; [62]). Accordingly, the UK Supreme Court dismissed the appeal of Elan-Cane.[91]

The Belgian Constitutional Court ruled on 19 June 2019 that the recent Belgian Gender Recognition Act violates the Belgian Constitution.[92] The Court determined that the limitation of registered sex options to male and female, thereby preventing nonbinary individuals from obtaining recognition of their gender identities, was incompatible with the Belgian legislator's goal of ensuring complete autonomy. The Court found no other objective that could justify this restriction. Therefore, the unequal treatment of individuals with nonbinary gender identities relative to individuals with binary gender identities was deemed

[89] *R Christie Elan-Cane v. Secretary of State for the Home Department*, [2018] EWHC 1530 (Admin). [104]-[106].
[90] Idem [149].
[91] *R (on the application of Elan-Cane) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2021] UKSC 56- On appeal from: [2020] EWCA Civ 363.
[92] Constitutional Court, 'PRESS RELEASE ON JUDGMENT 99/2019: The Belgian 2017 Gender Recognition Act is partly unconstitutional for its discriminatory treatment of persons who define themselves as neither male nor female and of persons with a fluid gender identity' (12.3.2-20190619-Judgment 99/2019) <2019-099e-info (const-court.be)> accessed 7 March 2023.

unconstitutional discrimination.[93] The Court left it to the Belgian legislature to find a solution.

Similar to the Belgian decision, the German Federal Constitutional Court ruled in 2017 that the binary limitation of gender/sex markers violated the German right to human dignity and the equality principle.[94] The Court's decision was partially based on a specific provision of the German constitution pertaining to equality between 'the sexes.' The Court determined that 'the sexes' also includes nonbinary people, granting them the provision's special protection. In 2018, the Austrian Constitutional Court reached the same conclusion, albeit on the basis of article 8 of the European Convention on Human Rights (ECHR) rather than the principle of equality. It ruled that mandatory registration of one's sex violates (the right to privacy under) article 8 ECHR and, as such, can only be justified if, among other things, it is proportionate, which a binary limitation of the gender/sex marker is not.[95] As Austrian law does not explicitly limit 'sex' to 'male or female,' the Court avoided having to strike down any rule by providing a constitutional interpretation of the term 'sex' to include nonbinary individuals. Austrian and German authorities responded by limiting intersex individuals to a third gender/sex marker. This controversial option does not appear to be permitted by the Belgian decision.[96]

In addition to these rulings on the validity of (trans)gender laws, other decisions by higher courts are also pertinent. The French Court of Cassation[97] did not invalidate the authorities' decisions when a nonbinary claimant challenged refusals by the administration to change their sex/gender markers. The French court found justification for a violation of (the right to

[93] Tuur Desloovere, 'Transgender Laws in Transition: European Courts on Non-Binary Gender Recognition' (Oxford Human Rights Hub, 11 August 2019) <https://ohrh.law.ox.ac.uk/transgender-laws-in-transition-european-courts-on-non-binary-gender-recognition/> accessed 13 April 2023.
[94] Federal Constitutional Court, 'Headnotes to the Order of the First Senate of 10 October 2017',1 BvR 2019/16 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html> accessed 7 March 2023.
[95] Tuur Desloovere, 'Transgender Laws in Transition: European Courts on Non-Binary Gender Recognition' (Oxford Human Rights Hub, 11 August 2019) <https://ohrh.law.ox.ac.uk/transgender-laws-in-transition-european-courts-on-non-binary-gender-recognition/> accessed 13 April 2023.
[96] Idem.
[97] Cour de cassation, civile, Chambre civile 1, 'Publié au bulletin' (4 Mai 2017,16-17.189) <Cour de cassation, civile, Chambre civile 1, 4 mai 2017, 16-17.189, Publié au bulletin - Légifrance (legifrance.gouv.fr)> accessed 7 March 2023.

privacy under) article 8 ECHR based on the legal and social order. This is dubious, as it is not included in the interference-justifying goals listed in paragraph 2 of article 8.[98] While the highest court of the Netherlands rejected the question in 2007,[99] a lower court in the Netherlands granted a gender/sex marker change to an applicant in 2018,[100] again citing the right to respect for private life under article 8 ECHR.[101]

Consequently, it appears that European courts employ two distinct methods. First, as in the Austrian, French, English, and Dutch cases, national courts analyze nonbinary gender recognition through the lens of negative or positive obligations arising from article 8 ECHR. Thus, courts are not deterred by the fact that the European Court of Human Rights has not yet taken a position on the issue and that current ECtHR case law makes no reference to nonbinary gender identities. The second approach, utilized by Belgian and German courts, relies on national constitutions' equality provisions.[102] As previously discussed, both paths can lead to different outcomes, and it must be made clear that national legislators should not wait for judicial decisions before bringing their laws in line with requests to recognize nonbinary gender identities from the Council of Europe, the European Parliament, and the Yogyakarta Principles.[103]

In view of the above, one must acknowledge the shifting attitudes that are taking place regarding identities that challenge bigenderism. In a social arena that is regulated according to binary sex/gender categories, nonbinary individuals face many challenges and limited protection while challenging deeply rooted socio-cultural significations. On the other hand, there is a growing number of people identifying as nonbinary, whose identity is not reflected

[98] Tuur Desloovere, 'Transgender Laws in Transition: European Courts on Non-Binary Gender Recognition' (Oxford Human Rights Hub, 11 August 2019) <https://ohrh.law.ox.ac.uk/transgender-laws-in-transition-european-courts-on-non-binary-gender-recognition/> accessed 13 April 2023.
[99] Hoge Raad, Conclusie (ECLI:NL:HR:2007:AZ5686, 30 March 2007) <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2007:AZ5686> accessed 7 March 2007).
[100] Rechtbank Limburg, Eerste aanleg – meervoudig (ECLI:NL:RBLIM:2018:4931, 28 May 2018) <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBLIM:2018:4931> accessed 7 March 2023.
[101] Tuur Desloovere, 'Transgender Laws in Transition: European Courts on Non-Binary Gender Recognition' (Oxford Human Rights Hub, 11 August 2019) <https://ohrh.law.ox.ac.uk/transgender-laws-in-transition-european-courts-on-non-binary-gender-recognition/> accessed 13 April 2023.
[102] Idem.
[103] Tuur Desloovere, 'Transgender Laws in Transition: European Courts on Non-Binary Gender Recognition' (OxHRH Blog, August 2019) <transgender-laws-in-transition-european-courts-on-non-binary-gender-recognition/> accessed 7 March 2023.

in man/woman categories as various studies show[104] and it is essential that nonbinary people be included in the public discourse on gender identity and transgender phenomena. It is crucial to address the concerns that have arisen on how the sense of self of nonbinary persons, as well as their rights, can be accommodated in an environment that is increasingly accepting of gender identity as a fundamental part of one's personality and one that does not necessarily develop in congruence with the classification of sex characteristics.

3. Epistemology

3.1. Feminist approaches and debates

But how can we know what we know and what are the researcher's assumptions when examining the legal regulation and designation of transgender phenomena? The researcher begins from an epistemological standpoint, making some assumptions for the nature of knowledge and the process of knowing. As Harding describes, the overarching theory of knowledge is referred to as epistemology.[105] Epistemology examines the criteria used to evaluate knowledge, and simply why we believe something to be true or not. The distinctions among paradigms, epistemologies and methodologies can help us understand the relevance of competing epistemologies.[106] Paradigms constitute interpretative frameworks such as intersectionality, which are used to examine social phenomena. The broad principles of how to conduct research and how the above paradigms need to be applied is referred to as methodology. Epistemology is crucial then because it determines which questions are

[104] See Jack Harrison, Jaime Grant and Jody L. Herman, 'A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey' (2012) 2(1) LGBTQ Public Policy Journal at the Harvard Kennedy School 13; Christina Richards, Walter Pierre Bouman, Leighton Seal, Meg John Barker, Timo O. Nieder and Guy T'Sjoen 'Non-binary or genderqueer genders' (2016) 28(1) International Review of Psychiatry 95.
[105] Sandra Harding, 'Introduction: Is There a Feminist Method?' In Sandra Harding (ed) *Feminism and Methodology* (Indiana University Press 1987) 1.
[106] Idem.

relevant for examining, which interpretative frameworks will be used to analysed findings and to what the knowledge acquired will contribute.[107]

Positivist approaches aim to produce objective generalizations in order to create a scientific depiction of reality. Researchers, having very different experiences, values and emotions, seek to eliminate their subject position to ensure that rationality alone will help them produce genuine objective science. Following strict methodological standards, positivist scientists aim to distance themselves from their personal values, subjective experiences and vested interests generated by their unique position in terms of race, class, sex or other status. They decontextualize themselves in order to become detached observers of nature and social phenomena.[108]

On the other hand, according to Collins, Black women have promoted another kind of epistemology that incorporates standards to evaluate truth that is widely accepted in communities of African-American women. Collective experiences and the worldviews that accompany them, which were sustained from the particular history of Black women of the U.S. constitute the material, experiential base that grounds a Black feminist epistemology. The series of experiences that connect Black women, whether they refer to work conditions or civil society participation, became shared wisdom that constitutes Black women's standpoint. A set of principles then was developed in order to assess these knowledge claims on the part of the community. This alternative epistemology uses different criteria that conform with the standards of Black women for methodological efficacy and substantiated knowledge, that are devalued certainly by dominant knowledge validation.[109] For example, '(e)xperience as a criterion of meaning with practical images as its symbolic vehicles is a fundamental epistemological tenet in African-American thought systems'.[110] Also, as Bell Hooks argues, '(d)ialogue implies talk between two subjects, not the speech of subject and object. It is a humanizing speech, one that challenges and resists domination'.[111] Namely,

[107] Patricia Hill Collins, *Black Feminist Thought* (2nd edition, Routledge 2000) 252.
[108] See Sandra Harding, *The Science Question in Feminism*. Ithaca, NY: (Cornell University Press 1986) and Alison M. Jaggar, *Feminist Politics and Human Nature* (Rowman & Allanheld 1983).
[109] Patricia Hill Collins, *Black Feminist Thought* (2nd edition, Routledge 2000) 256.
[110] Idem 258.
[111] Bell Hooks, *Talking Back: Thinking Feminist, Thinking Black* (South End Press 1989) 131.

'(f)or Black women new knowledge claims are rarely worked out in isolation from other individuals and are usually developed through dialogues with other members of a community'.[112] In view of the foregoing, a foundational epistemological assumption in using dialogue as a means to evaluate knowledge is not separation, but rather connectedness is a substantive component for the processes of knowledge validation.[113] People become more empowered in communities and can better experience the powers of words there.[114]

The alternative epistemology of African-American women also touches upon the ethics of caring, one of the components of which is the focus on individual uniqueness based on the tradition of African humanism. The second interrelated component of the ethics of caring is that 'emotion indicates that a speaker believes in the validity of an argument', and that personal expressiveness 'heals this binary that separates emotion from intellect'.[115] The third component of the ethics of caring is, according to Collins, the development of the capacity to empathy which many Black women writers explore.[116] This thesis, as much as it is based on legal doctrine and comparative analysis in terms of written analysis, subscribes to the ethics of caring and the alternative epistemology of Black women, that suggests that connectedness is a fundamental element of accessing knowledge through empathy and community empowerment.

As Smitherman argues, it is impossible to strictly filter out the linguistic, cognitive and abstract meaning from the social, cultural and psycho-emotive meaning.[117] The focus of African-American epistemology on emotion and expressiveness relates greatly to the importance of personality in feminist perspectives of connected knowing. According to Belenky et al., there are two opposing orientations that characterize the process of acquiring knowledge: one suggesting separation of the researcher and impersonal procedure to validate truth, where the knower distances themselves to avoid bias; and another suggesting

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[112] Patricia Hill Collins, *Black Feminist Thought* (2nd edition, Routledge 2000) 260.
[113] Mary Field Belenky, Blythe McVicker Clinchy, Nancy Rule Goldberger and Jill Mattuck Tarule, *Women's Ways of Knowing* (Basic Books 1986) 18.
[114] Patricia Hill Collins, *Black Feminist Thought* (2nd edition, Routledge 2000) 261.
[115] Idem 263.
[116] Idem 263.
[117] Geneva Smitherman, *Talkin and Testifyin: The Language of Black America* (Houghton Mifflin 1977) 135, 137.

connection and seeing truth as emerging from care and empathy, where the contours of personality are considered to enrich the observed phenomena's understanding. The second one can be found in feminist accounts of epistemology and also in Black American thought.[118]

Feminist standpoint theory, which is based on the second orientation, suggests that knowledge is socially located, that marginalized groups are in a privileged position to acquire knowledge in awareness-raising ways exactly due to their social situatedness, and research should always begin with the experiences of marginalized people. According to Collins, an implication of some of the uses of standpoint theory 'is that the more subordinated the group, the purer the vision available to them'.[119] Standpoint theorists, who draw on Marxist social theory, reflect the binary thinking of their Western tradition and 'by quantifying and ranking human oppressions (…) invoke criteria for methodological adequacy that resemble those of positivism'.[120] This according to Collins is very problematic. Black women (and trans people) could claim that they have the best standpoint to understand oppression due to their heavy marginalization, but this, Collins argues, is not the case.[121]

According to Collins, with whom the current author sides:

> Each group speaks from its own standpoint and shares its own partial, situated knowledge. But because each group perceives its own truth as partial, its knowledge is unfinished. Each group becomes better able to consider other groups' standpoints without relinquishing the uniqueness of its own standpoint or suppressing other groups' partial perspectives. Partiality, and not universality, is the condition of being heard; individuals and groups forwarding knowledge claims without owning their position are deemed less credible than those who do.[122]

[118] Mary Field Belenky, Blythe McVicker Clinchy, Nancy Rule Goldberger and Jill Mattuck Tarule, Women's Ways of Knowing (Basic Books 1986).
[119] Patricia Hill Collins, *Black Feminist Thought* (2nd edition, Routledge 2000) 270.
[120] Idem 270.
[121] Idem 270.
[122] Idem 270.

Intersectionality, which will be used as a framework to conceptualize experiences in the intersections of oppression due to gender identity, gender expression, race, nationality and citizenship status (see chapter II), was used initially to highlight how Black women and other subordinated groups were positioned socially in unjust social relations, but it does so by identifying the cross identifications of the group members in terms of class, race and gender. The fluidity that characterizes intersectionality and the way it looks on intra-group difference, does not make groups disappear 'to be replaced by an accumulation of decontextualized, unique individuals whose personal complexity makes group-based identities and politics that emerge from group constructions impossible'.[123] Instead, complementing standpoint theory, 'the fluidity of boundaries operates as a new lens that potentially deepens understanding of how the actual mechanisms of institutional power can change dramatically even while they reproduce long-standing group inequalities of race, class, and gender'.[124]

According to Higgins, a second problem with standpoint epistemology, which places importance on women narrating their stories as they understand them, is that 'the problem of untangling the connection between the oppression of women and their own definition of their condition persists'.[125] The possibility of internalized oppression, a core feminist assumption, makes problematic the acceptance of all women's accounts of experiences in the name of agency. The relevance of consciousness-raising through self-examination and sharing of experience is minimized under this view, and a marginalized individual account of their own conditions may not be as fully scientifically credible due to the lack of their own awareness of their position and context.[126]

Looking more broadly at the overarching tendencies of second wave feminism, one realizes that most of the feminist political analysis of that wave was grounded on 'moral narratives' that link 'woman' with 'natural', 'natural' with 'good', 'good' with 'true' and 'true' with

[123] Patricia Hill Collins, 'Some Group Matters: Intersectionality, Situated Standpoints, and Black Feminist Thought' in Tommy L Lott and John P Pittman (eds), *A Companion to African-American Philosophy* (Blackwell Publishing 2007) 208.
[124] Idem 208.
[125] Tracy Higgins, 'Anti-Essentialism, Relativism, And human Rights' in Kamminga Menno T. (ed), *Challenges in International Human Rights Law* (1st edition, Routledge 2017) 118.
[126] Idem 119.

'right' predicated on modernist epistemology.[127] Transgender practices were considered as unnatural, wrong and bad in the context of the representational fiction of Eurocentric modernity which saw 'gender as the superstructural sign of the material referent of sex' and transgender practices as misaligning the proper relationship of sex to gender.[128] There was a considerable failure of second wave feminism from the 1970s and afterwards to do justice to transgender concerns and subjectivities. According to Stryker, that is due to the failure of second wave feminists to identify the conceptual limits of modernist epistemology.[129]

Transgender theorizing, on the other hand, in the context of third wave feminism starts from a different epistemological position, one that is arguably grounded in postmodern thought and imagines a multiplicity of ways for sexed bodies to signify gender. According to Stryker:

> Within the feminist third wave, and within humanities scholarship in general, transgender phenomena have come to constitute important evidence in recent arguments about essentialism and social construction, performativity and citationality, hybridity and fluidity, anti-foundationalist ontologies and non-referential epistemologies, the proliferation of perversities, the collapse of difference, the triumph of technology, the advent of posthumanism and the end of the world as we know it.[130]

The issues above engage with the nature of theorizing needed in order to dismantle power relations that reproduce both privileges related to normativity and injustices to those marginalized by it. Postmodern theory, which is much more celebratory of diversity than the dismissiveness of other models of feminism, has embraced transgenderism as an expression of diversity that plays a strategic role 'in breaking down the binary dualisms of Western metaphysical thought'.[131] On the other hand, according to McDonald it bears the risk of not

[127] Susan Stryker, 'Transgender feminism: queering the woman question' in *Third Wave Feminism: A Critical Exploration* (Palgrave Macmillan 2007) 63.
[128] Idem 63.
[129] Idem 63, 64.
[130] Idem 64.
[131] Eleanor MacDonald, 'Critical Identities: Rethinking Feminism Through Transgender Politics' (1998) 23 (1) Atlantis 4.

recognizing the specific social locations of the subjects and validating their experience.[132] According to McDonald, '(i)n its promotion of transgender identity as a transcendence of identity, postmodern theory assimilates transgender to its own intellectual project through presenting transgendered experience as chimera, play, performance or strategy'.[133] This comes at a cost, the lack of exploring and examining particular transgender experiences, political demands or the feelings of transgender people who view their gender identity experience as integral to their personality.[134]

According to McDonald, some aspects of transgender subjectivities 'have appeared to align it most closely with postmodern theory in its celebration of fluidity, dispersal, liminality, and so forth'.[135] On the other hand, the same characteristics can also help identify the conceptual limits of postmodern theory, namely that difference is validated at the linguistic level without exploring the lived experience of it.[136] According to McDonald:

> Outside of concrete proposals for social change, such an approach seriously risks minimizing the experience of really living on borderlines, of the incoherence that often accompanies shifts in identity, of the difficulty in establishing a self that can withstand its contestation, and thus risk taking an attitude of indifference or complacency toward these experiences.[137]

Transgender subjectivities may argue that postmodern theory needs to examine the structures which socially reinforce stability and congruity between sex and gender and explore the lived realities of difference; identity-based theories, on the other hand need to destabilize the hegemonic categorization of gender and sexuality and the ways it reproduces marginalization and instead expand and complicate the normative categorical frameworks

[132] Idem 10.
[133] Idem 4.
[134] Idem 4.
[135] Idem 10.
[136] Idem 10.
[137] Idem 10.

of sex/gender in a way that validates the myriad geometries of identity, experience and expression.[138]

Another debate within feminist epistemology has been between theorists seeking to make universal claims on the basis of feminist theorizing, cultural relativists who see judgments and knowledge as having to be culturally contingent and the most recent strand of anti-essentialists. While universal claims on women and marginalized groups are highly problematic, since they do not take into account the particular positions of each of their members and their conditions and contexts, one cannot abandon human rights activism and critique. As Higgins argues '(s)urrendering the assumption of a transcendent grounding for evaluative judgments deprives the critic not of her capacity for evaluation but of her confidence in the truth of her position'.[139] Judgments should be made, but made contingently. One needs a legitimate source of knowledge in the quest for freedom that is neither Nature nor God, but their reason and their own conception of justice that should be viewed as culturally contingent. Thus, abandoning universal claims does not put the feminist critic 'into a realm of irresponsible relativism nor mandates a position of conservative nonintervention'.[140] Indeed, what is required from the theorist is to be clear about their normative vision and assume responsibility for their use of power and expertise on the basis of their values.[141]

Anti-essentialists on the other hand, are mainly concerned with the interrelationship of culture and self. They explore how culture constructs gendered individuals but does not privilege the action of the individual or group in the creation of culture. Instead, they assume a more complex relationship between culture and the limits of human agency. Anti-essentialists argue that the sex/gender framework is essentially 'a product of culture rather than divine will, human biology or natural selection'.[142] According to Higgins and very much

[138] Idem 10.
[139] Tracy E. Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 Harvard Women's Law Journal 89, 108.
[140] Idem 108.
[141] Idem 108.
[142] Idem 114.

in accordance with the stance that this thesis takes in exploring the position of transgender phenomena in the law and their culturally informed agency:

> Implicit in this assumption is the claim that cultural norms - language, law, myth, custom - are not merely products of human will and action but also define and limit the possibilities for human identity.[143]

As Grillo notes, 'an essentialist outlook assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts'.[144] Anti-essentialist feminism, on the other hand, wants normative categories to represent not merely privileged narratives of marginalized individuals, but reflect the intra-group differences and expand the categories to encompass different kinds of experience. It addresses the problems of misdescription by encompassing cultural, ethnic, racial, economic and religious difference -arguably also gender identity and citizenship status differences - among women and marginalized groups. Anti-essentialism demands not to make cross-cultural assumptions, to pay attention to women's particularities and to the fact they are not a homogenic category, but individuals from different backgrounds and with different statuses.[145] In this light, my view is that an anti-essentialist understanding of normative categories would best serve the purpose of this thesis, in designating and reflecting on transgender phenomena in the context of the asylum regime by expanding the categories in order to accommodate complicated gendered experiences and validate them against an essentialist view on gender.

The final challenge to the above debates in feminism is posed by postmodern thought, which claims that knowledge is shaped by power networks and relations. So, '(h)ow do we argue effectively if we can no longer claim access to truth?', Higgins wonders.[146] In response to that question, it is my view that the above-mentioned view of anti-essentialist feminism

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[143] Idem 114.
[144] Trina Grillo 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 Berkeley Women's Law Journal 16, 19.
[145] Tracy E. Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 Harvard Women's Law Journal 89, 124.
[146] Tracy E. Higgins, 'By Reason of Their Sex: Feminist Theory Postmodernism and Justice' (1995) 80 Cornell Law Review 1536, 1590.

attempts to replace a substantive vision of truth (the designation of a category of 'true' women) with a non-substantive normative scheme that values inclusivity and subjective experience. As Higgins argues,

> In other words, rather than evaluate an account of gender against a particular conception of woman, these approaches encourage us to focus on whether the account is the product of a particular methodology or a sufficiently inclusive process.[147]

In this way anti-essentialist feminist epistemology is a very important stance in designating transgender phenomena, since it reflects on the inclusivity of social categories. It draws both from the subject positions of the subjects of knowledge and the analytical reason and feminist normative vision of the researcher. It is culturally informed and can encompass intersectionality. Feminist anti-essentialism thus informs the basic assumptions of this thesis.

3.2. Positionality of the researcher

Seeking to answer the feminist debates, Haraway argues for 'a doctrine of embodied objectivity that accommodates paradoxical and critical feminist science projects: Feminist objectivity means quite simply situated knowledge'.[148] According to Haraway, there are certain qualities that relate to developing the capacity to see from the depths and the peripheries, but 'here there also lies a serious danger of romanticizing and/or appropriating the vision of the less powerful while claiming to see from their positions'.[149] There is nothing that says that seeing from below is not problematic or it is easily learnt, even if we ourselves inhabit the terrain of subjugated knowledges. According to Haraway:

[147] Idem 1590.
[148] Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 Feminist Studies 581.
[149] Idem 184.

> The positionings of the subjugated are not exempt from critical reexamination, decoding, deconstruction, and interpretation; that is, from both semiological and hermeneutic modes of critical inquiry. The standpoints of the subjugated are not 'innocent' positions. On the contrary, they are preferred because in principle they are least likely to allow denial of the critical and interpretive core of all knowledge.[150]

These preferred positionings are hostile both to various forms of relativism and of totalizing objectivity. But one must have in mind that the opposite to relativism is not totalizing claims to scientific authority, which then constitutes the unmarked category and power of systematic narrowing and obscuring. According to Haraway, with whom this thesis sides:

> The alternative to relativism is partial, locatable, critical knowledges sustaining the possibility of webs of connections called solidarity in politics and shared conversations in epistemology. Relativism is a way of being nowhere while claiming to be every-where equally. The 'equality' of positioning is a denial of responsibility and critical inquiry.[151]

Relativism is the other side of the coin of idealizing objectivity. They both ignore embodiment, location and partial perspective. They promise 'vision from everywhere and nowhere equally and fully, common myths in rhetorics surrounding Science'.[152] But the possibility of rational, sustained, objective knowledge lies in the acceptance of the epistemology of partial perspectives.[153] Haraway argues for 'politics and epistemologies of location, positioning, and situating, where partiality and not universality is the condition of being heard to make rational knowledge claims'.[154] Haraway in other words argues for claims on people's lives that are founded on a 'view from a body, always a complex,

[150] Idem 584.
[151] Idem 584.
[152] Idem 585.
[153] Idem 585.
[154] Idem 589.

contradictory, structuring, and structured body, versus the view from above, from nowhere, from simplicity'.[155]

According to Romero, 'feminist methodology therefore tends to involve making theory more concrete, by, for example, emphasizing lived experience, context, situation, and specifics, not abstractions'.[156] Harris argues that feminist theory tends to avoid dangerous essentialisms by considering ideas and concepts as unstable, tentative and relational.[157] This tendency to complicate rather than simplify, to be both critical and descriptive can be well grounded on the epistemologies of partial perspectives. When it comes to law, according to Levit and Verchick:

> Rather than develop any substantive theory of sex inequality or how to remedy it, feminist legal methodology focuses on the tools of how to practice feminist legal thinking and the ways of documenting the experiences of gender.[158]

Queer theory, on the other hand, drawing on poststructural theory, focuses on the historical contingency and contradictions at the heart of social constructions 'such as the polarization and compartmentalization of men from women, male from female, masculinity from femininity, or heterosexual from homosexual'.[159] It does not suffice for queer theory to add a category of 'transgender' in order to complicate gender; instead it seeks volatility, fluidity and precariousness in order to fulfil the goal of liberation and greater self-determination'.[160] Therefore, it remains suspicious of identity politics and categorization and the law.

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[155] Idem 589.
[156] Adam P. Romero 'Methodological Descriptions: 'Feminist' and 'Queer' Legal Theories' in Martha Albertson Fineman, Jack E. Jackson and Adam P. Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate 2009) 185.
[157] Angela P. Harris, 'Race and essentialism in feminist legal theory' (1990) 42 Stanford Law Review 581.
[158] Nancy Levit and Robert R.M. Verchick, *Feminist legal theory: A primer* (New York University Press 2006), 45.
[159] Adam P. Romero 'Methodological Descriptions: 'Feminist' and 'Queer' Legal Theories' in Martha Albertson Fineman, Jack E. Jackson and Adam P. Romero (eds), Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations (Ashgate 2009) 190.
[160] Idem 191.

In Bartlett's words:

> While standpoint epistemology relocates the source of knowledge from the oppressor to the oppressed, the postmodern critique of foundationalism questions the possibility of knowledge, including knowledge about categories of people such as women.[161]

Many feminists, on the other hand, who still consider law as a manifestation of power in society that 'has developed over time to reflect dominant ideologies and historical arrangements', at the same time argue that 'law is recognized to be an important source of power and site of democratic contestation'.[162] This thesis sides with the latter statement in order to explore transgender phenomena and critically locate them in the legal system according to their gendered experience.

In the latter endeavour, this thesis adopts Bartlett's view on positionality, which accords with Haraway's view on situated knowledge. Positionality argues for a concept of nonarbitrary truth based upon experience, which is not external or final, but provisional and situated. It seeks the best tools to continue to extend and transform knowledge claims, by rejecting both the model of objectivism which is founded on fixed, whole and impartial truth but also the relativism of equal but different truths. Positionality argues that what is correct in law comes from being particularly situated, from a partial perspective from which the researcher strives to improve their view. Positionality then retains experience as a foundation of knowledge and argues for commitment to openness and exploration of points of view that would otherwise be easily excluded.[163]

The positional stance is a stance from which many feminist assertions make sense: Positionality acknowledges both the existence of empirical knowledge, truth and values but also their contingency. It provides a ground for feminist political action and commitment,

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[161] Katharine T. Bartlett, 'Feminist Legal Methods' (1989) 103 Harvard Law Review 829, 877.
[162] Adam P. Romero 'Methodological Descriptions: 'Feminist' and 'Queer' Legal Theories' in Martha Albertson Fineman, Jack E. Jackson and Adam P. Romero (eds), Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations (Ashgate 2009) 186.
[163] Katharine T. Bartlett, 'Feminist Legal Methods' (1989) 103 Harvard Law Review 829, 829.

but sees the latter as provisional and in need of further critical examination and transformation. Drawing on standpoint theory, it maintains experience as a ground for knowledge, since it interacts with the researcher's perceptions to reveal new understandings and make sense of the previous ones. Marginalized groups have come to know some things about marginalization due to their experience. Positionality, drawing also from post-modern theory, 'rejects the perfectibility, externality, or objectivity of truth'.[164] Instead, it perceives it as partial and situated, emerging from particular engagement and relationships, which define the researcher's perspective providing the location for identity and meaning.[165] According to Bartlett, '(t)ruth is partial in that the individual perspectives that yield and judge truth are necessarily incomplete'.[166] Thus, no researcher can understand except from their limited perspective.

Since positionality considers truth to be partial and provisional, this epistemological stance differs from both relativism and essentialism. As Moira Gatens argues, positional meanings are meanings of 'becoming rather than being, [in] possibilities rather than certainty and [in] meaning or significance rather than truth'.[167] Positional understanding means that the truth-seeker never arrives at the destination; indeed, there is no such thing as a final destination.[168] Positionality is committed to continuing critical engagement, and as Gatens suggests, 'there cannot be an unadulterated feminist theory which would announce our arrival at a place where we could say we are 'beyond' patriarchal theory and patriarchal experience'.[169]

The key to refining knowledge lies in the continuous effort to extend one's limited perspective, since knowledge comes always in different social contexts and forms. Personal perspective gives a source to one's special knowledge, which is nevertheless limited and can be improved in an effort (as Gatens puts it) 'to step beyond it, to understand other

[164] Idem 881.
[165] Idem 881-882.
[166] Idem 882.
[167] Moira Gatens, 'Feminism, Philosophy and Riddles Without Answers', in Carole Pateman and Elizabeth Gross (eds) *Feminist Challenges: Social and Political Theory* (Allen and Unwin 1986) 26.
[168] Katharine T. Bartlett, 'Feminist Legal Methods' (1989) 103 Harvard Law Review 829, 885.
[169] Moira Gatens, 'Feminism, Philosophy and Riddles Without Answers', in Carole Pateman and Elizabeth Gross (eds) Feminist Challenges: Social and Political Theory (Allen and Unwin 1986) 29.

perspectives, and to expand my sources of identity'.[170] Personal perspective cannot be transcended, but 'I can improve my perspective by stretching my imagination to identify and understand the perspectives of others'.[171] Positionality is ultimately a feminist stand, since it promotes empathy and understanding and acknowledges social location both as a source of knowledge and one of limitation.

Being myself a nonbinary person assigned female at birth and attracted to mainly female identified people, who prescribes cautiously to the queer political project, I identify with several narratives included under the trans umbrella. I experience my gender identity as fluid, but away from the initial location that was assigned to me, although I am often perceived as a ciswoman, with which I experience no severe discomfort. My gender expression has varied along the years, from quite conforming to the sex I was assigned at birth to evidently androgynous. I have indeed experienced stigma mostly because of my sexuality and gender nonconforming expression but I have not been through the same with my experienced gender identity, mainly because I have come out only in more tolerant contexts. Given the above, I relate to the suppression of trans identities in several cultural environments and the desire to live freely, which blurs the public/private divide in matters of gender and sexuality.

Having experienced myself and in my community the intersecting marginalization of sexuality, gender identity and expression, and having worked with LGBTQI+ and migrant individuals as a lawyer at the Greek Asylum Service, both as a Member of the Appeals' Committees in Greece and as a case worker, this project reflects my need to further social justice and give back to my community. In the above capacities, I have seen first-hand the discrepancies arising in the refugee determination status for trans applicants that come from outside the Global North-West. I consider this research area quite relevant for the purposes of gender justice but also for our understanding of what gender is and the deconstruction of double standards when it comes to non-westernized notions of queerness. Coming from Greece, which is a Mediterranean and Balkan country, and having lived also in Germany, the Netherlands, Brussels and Ireland, I fully understand the differences in the content of

[170] Katharine T. Bartlett, 'Feminist Legal Methods' (1989) 103 Harvard Law Review 829, 881.
[171] Idem 882.

identity categories and the need for a more culturally informed perspective when it comes to social constructs such as that of gender. In addition, coming from a country with huge immigration flows, I am very sensitive to the politicization of this issue by the migration management regime. I am therefore an advocate for an expanded view of human rights in refugee law, so as to do justice to those who need protection.

In light of the foregoing, I understand that my experience does not entail most experiences found under the trans and queer umbrella. For that reason, I find that it is crucial to be aware both of my Greek and EU citizenship privilege, of my whiteness, of the fact that I do not come from an asylum claimant background and do not experience gender dysphoria or persecution. Furthermore, it is important to acknowledge that in my effort to speak about gender identity, I might appropriate experiences that I do not possess or exclude narratives with which I am not personally familiar. In view of the above, I find it very important to ground my research on feminist values and epistemologies that advocate for awareness on these problematics towards social justice and address them overtly.

After having justified the terminology that is going to be used in this research endeavour for transgender phenomena, as well as having mapped the current state of legal gender regulation, I have made visible in this chapter the epistemological assumptions and the researcher's positionality, on which the theory and analysis employed by the author in this thesis will draw. In the next chapter, I focus on the theoretical underpinnings of this work, trying to conceptualize a framework for transgender and gender nonconforming asylum adjudication which conforms to the epistemological feminist anti-essentialist epistemological perspectives underlined here.

Chapter II: Towards a theoretical framework for assessing transgender and gender nonconforming asylum claims[172]

In the context of refugee law and when it comes to the legal category of gender identity, the choice of a theoretical framework becomes a tricky task bearing the potential of critically deconstructing legal categories and/or advocating for individual and groups' rights. While the productive power of law and its role in gender identity formation is broadly acknowledged,[173] applicants often have to invoke identity claims in order to support their applications for international protection. Identity labels are exclusionary given the process of othering they entail in the making of their definition and center certain experiences over or towards others. On the other hand, however, they provide a basis for the acknowledgement of the particular vulnerability of gender-variant applicants, the validity of their experiences, as well as a means to institutional protection. This chapter problematizes two key theories, namely queer theory and transgender studies, in relation to what they have to offer in the case of marginalized social groups and in particular trans and gender nonconforming asylum claimants.

1. Queer theory

Theresa De Lauretis is widely credited with the first use of the term 'queer theory'.[174] She demarked in this way a field that viewed critically the normativity and identitarian politics present in lesbian and gay studies. David Halperin on the other hand suggests that queer does

[172] Part of this chapter has been published by the author in the journal article cited as Mariza Avgeri, 'Assessing trans and gender nonconforming asylum claims: Towards a Transgender Studies Framework in Particular Social Group and Persecution' (2021) Refugees and Conflict in Frontiers in Human Dynamics Special Issue (April 2021) <https://doi.org/10.3389/fhumd.2021.653583> accessed 20 April 2023.
[173] Damir Banović, 'Queer Legal Theory' (February 9, 2022) <http://dx.doi.org/10.2139/ssrn.4031017> accessed 26 April 2023.
[174] Teresa de Lauretis, *Queer Theory: Lesbian and Gay Sexualities* (Indiana University Press 1991).

not refer to nothing in particular,[175] wanting to highlight the resistance of queer to being something definite and categorised and its importance as an in-process project of political resistance.[176] In this light, queer is an anti-identitarian and anti-normative concept since it disrupts the determinate foundations of identity, hetero- and homo-normativity.

In the field of lesbian and gay studies, the thinker that has most prominently contributed to the mainstreaming and advance of queer theory is arguably Judith Butler. In Gender Trouble,[177] Butler disentangles and theorizes the risks and limits of identity using Foucault's argument about the role of regimes of power and resistance in shaping the subject. In this way, Butler attempts to demonstrate complicated ways in which excluded identities rely on the identificatory regimes they seek to contest and produce new margins of legible identities.[178]

Butler's argument is that feminism challenges its own goals if it represents 'women' as a single category since there is no natural unity in the term. 'Women' is a regulatory construct used to normalize heterosexuality by reproducing normative gender ideology that relates sex to gender and desire. According to Butler '[t]he cultural matrix through which gender identity has become intelligible (…) requires that certain kinds of 'identities' cannot 'exist' —that is, those in which gender does not follow from sex and those in which the practices of desire do not 'follow' from either sex or gender'.[179] Butler nonetheless has a different strategy from the usual one of gay and lesbian movements, that is to destabilize the truth of gender and how it is produced instead of legitimizing homosexual subjects as a distinct category. Instead of arguing for a natural basis of solidarity between those who identify as homosexual, Butler argues for the denaturalization of gender and its conceptualization as a performative effect of reiterative acts which construct gender as a cultural fiction. According to them,[180] '[g]ender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance,

[175] David M. Halperin, *Saint Foucault: Towards a Gay Hagiography*, (Oxford University Press 1995) 62.
[176] Idem 66.
[177] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990).
[178] Annamarie Jagose, *Queer Theory: An Introduction*, (New York University Press 1996) 83.
[179] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 17.
[180] Judith Butler's preferred pronouns are they/them, although they use she/her as well.

of a natural sort of being'.[181] In this light, 'gender' has no authenticity of its own, no substance productive of its expressive identificatory signs. In their own words, 'there is no gender identity behind the expressions of gender' because 'identity is performatively constituted by the very 'expressions' that are said to be its results'.[182] Heterosexuality then is a discursive production with no need for further explanation and categorization, as it arises as an effect of the gender/sex relations that define it and subscribe it. Following Foucault, Butler imagines the disruptive potential of discursive acts such as sexuality, since gender is 'an ongoing discursive practice open to intervention and resignification'.[183] They strategically resignify heterosexuality as a normative gender model by conceptualizing the 'unity of gender' as 'the effect of a regulatory practice that seeks to render gender identity uniform through a compulsory heterosexuality'.[184]

'What kind of subversive repetition might call into question the regulatory practice of identity itself?' is Butler's question after laying down some of their explanatory arguments.[185] Their stance is that failed or confused attempts to reproduce gender through performative repetitions underline the discursive construction of gender. In this way they highlight the absence of a core or essence of the latter. Repetitions of gender do not consolidate the norm and the law, but they are generated by them following Foucault's argument, normalizing heterosexuality by performing normative gender identities. In this light, Butler argues for a contestation of that naturalization by displaced performative repetitions that highlight the mechanisms of consolidation of gender identities.[186] In this way, Butler challenges many presumptions of the gay and lesbian movements, that had based their politics on appeals to a common and collective sexual identity.[187]

Butler is indeed politically invested in all displaced performativities, but focuses especially on drag as practice that reproduces the heterosexual norms within a gay context:

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[181] Idem 33.
[182] Idem 25.
[183] Idem 33.
[184] Idem 31.
[185] Idem.
[186] Annamarie Jagose, *Queer Theory: An Introduction* (New York University Press 1996) 84-84.
[187] Idem 85.

> As much as drag creates a unified picture of 'woman' [...] it also reveals the distinctness of those aspects of gendered experience which are falsely naturalized as a unity through the regulatory fiction of heterosexual coherence. In imitating gender, drag implicitly reveals the imitative structure of gender itself—as well as its contingency. Indeed, part of the pleasure, the giddiness of the performance is in the recognition of a radical contingency in the relation between sex and gender in the face of cultural configurations of causal unities that are regularly assumed to be natural and necessary.[188]

Later, in the book 'Bodies That Matter', Butler reflects on the reductive interpretations of her work and especially approaching drag as an example of performativity that is performed both in a literal and theatrical way.[189] Drag was taken as 'exemplary of performativity' that fulfilled 'the political needs of an emergent queer movement in which the publicization of theatrical agency has become quite central'.[190] But Butler distanced themself from the conceptualization of gender as voluntarily or deliberately performed and instead underlined that 'performativity is neither free play nor theatrical selfpresentation; nor can it be simply equated with performance'.[191] In this light, they introduced the concepts of constraint and constitutedness. Performativity, according to Butler, can only be understood within a context of constrained and regularized iteration of norms. In their own terms:

> [T]his repetition is not performed by a subject; this repetition is what enables a subject and constitutes the temporal condition for the subject. This iterability implies that 'performance' is not a singular 'act' or event, but a ritualized production, a ritual reiterated under and through constraint, under and through the force of prohibition and taboo, with the threat of ostracism and even death controlling and compelling the shape of the production, but not, I will insist, determining it fully in advance.[192]

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[188] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 137-138.
[189] Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge 1993).
[190] Idem 231.
[191] Idem 95.
[192] Idem 95.

Butler goes further to challenge the immutable essence of sex by posing the questions of what is sex, and whether it is a natural feature that is derived by chromosomal, anatomical and hormonal characteristics or whether it is a product of scientific discourses.[193] They reflect on whether there can be a feminist critique on the establishment of such 'facts' and they suggest that we reflect on the history and genealogy of sex and the exposition of its binarism to male and female. They wonder which socio-political interests have been invested in the scientific discourse that produce discursively this 'natural' categorization. Furthermore, they refuse to see sex as natural and gender as cultural and make a distinction between the two by placing the cultural instability at the very heart of sex itself and deconstructing the definition and assumed causality that distinguishes sex from gender in the first place.[194]

Performativity then denaturalizes gender, sex, and sexuality as consequential identities. It offers an explanatory model that reflects on how identity categories are constructed and how they shape and influence the knowledge position of those who inhabit them. Performativity has contributed to the suspicion about how lesbian and gay studies reflect on collective identities, such as 'gay' and 'woman'. Homosexuality, as heterosexuality, becomes conceptualized as an effect of the signification of practices that are demonstrated in some bodies. As Halperin argues, 'Homosexual', like 'woman', is not a name that refers to a 'natural kind' of thing (…). It's a discursive, and homophobic, construction that has come to be misrecognized as an object under the epistemological regime known as realism'.[195]

In this light, identities - in current lesbian and gay studies - are often treated as complicit in the same structures they seek to dismantle. In Butler's own terms, 'identity categories tend to be instruments of regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression'.[196] What was formerly seen as a prerequisite for collective action and intervention, namely the assertion of common identity positions, is now understood to jeopardize the liberation

[193] Idem 6-7.
[194] Annamarie Jagose, *Queer Theory: An Introduction* (New York University Press 1996) 90.
[195] David M. Halperin, *Saint Foucault: Towards a Gay Hagiography* (Oxford University Press 1995) 45.
[196]Judith Butler, 'Imitation and Gender Insubordination' in Fuss (ed.) *Inside/Out* (Routledge 1991), 13-14.

movement's own purpose. One must acknowledge the political manifesto that is implied in Butler's work, that puts liberation at the forefront and sees regulatory institutions as an exertion of power and subjectification, which on the other hand is what enables subjects to be shaped and challenge the very norms that constrain and constitute them.

As much as Butler's contribution has offered a powerful, subversive tool for liberatory politics on gender and sexuality, it has not been immune to critique, especially when it comes to the empowerment of transgender individuals. According to Vivian Namaste, the account of transgender phenomena within 'queer studies' does not account for the everyday living condition and the social location in which transgender people find themselves.[197] Namaste argues that queer theory does little to take as the unit of analysis trans people and the challenges they face, which is an unacceptable oversight when it comes to study of gender and gender identity. According to Namaste, '(…) at worst, it belies a kind of academic inquiry that is contemptuous and dismissive of the social world'.[198]

Prosser also challenges Butler's performative approach on gender, by focusing on the dismissal of gender as 'the end of narrative becoming', especially for people who transition from one gender to another. This view of gender as 'repetitious, recursive, disordered, incessant, above all, unpredictable and necessarily incomplete' excludes people in need of validation of their gender identity, which according to Prosser is rather a narrative than a performative process. [199]

According to Prosser, '(t)here are transsexuals who seek very pointedly to be non-performative, to be constative, quite simply, to be'.[200] On the other end, this longing for a stable identity, in Butler's approach, reinforces the heterosexual matrix which naturalizes normative gender ideology. For Prosser, this account is severely problematic to people who want to transition biologically since it negates them from the signified materiality of the body, and places all the focus on the destabilization of sex, and to an extent on the

[197] Viviane K. Namaste*, Invisible lives: the erasure of transsexual and transgendered people* (University of Chicago Press 2000).
[198] Idem 16.
[199] Jay Prosser, *Second Skins: The Body Narratives of Transsexuality* (Columbia University Press 1998) 263.
[200] Idem 264.

deconstruction of performative gender.[201] This, in my view, can also hold true for people who do not chose or do not want to transition medically, since it deprives them of the validation of the identity that they want to inhabit and legitimize. Naturalization can also be an empowering process, that contributes to liberation, and should not be seen just as the result of regularizing norms that reinforce power relations. Individual or collective identity even if empowered through the intervention of institutions, enables collective action where these identities remain marginalized and is a necessary step to liberation from power hierarchies that have been already established.

Speaking of a transgender woman, Venus Xtravaganza, Butler states:

> When Venus speaks her desire to become a whole woman, to find a man and have a house in the suburbs with a washing machine, we may well question whether the denaturalization of gender and sexuality that she performs, and performs well, culminates in a reworking of the normative framework of heterosexuality.[202]

This statement turns a trans individual's existence into a political prerogative by implying that Venus Xtravaganza (the name of the actual transgender woman, who was a known performer) fails to disrupt the hegemony of normative gender ideology with her desires and longing for becoming. This does not take into account the validity of the desires and identity of Venus, and her subjective experience of being. It axiologically and implicitly evaluates her position in the context of regulatory institutions, but not the marginalization she encounters because of her social location. This approach bears the risk of transposing the burden of dismantling the hegemony to these very ones who are suffering by it. It also fetishizes certain categories of transgender people (those whose existence delegitimizes gender) against those who reinforce normative ideologies. In that way, the nonconforming transgender person becomes an exemplary for political liberation, and a binary or conforming marginalized trans person is dismissed on certain implied liberatory grounds. Transgender is seen as a queer rupture and symbol of the place where sex cannot form itself.

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[201] Idem 264.
[202] Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge 1993), 133.

It is not read as a gender that can be possibly politically and socially naturalized, but as a continuous political contestation of the process of subjectification of norms of sex. According to Butler,

> Her (Venus) desire—to be a complete woman for a man—is heterosexual, and it is more this desire in combination with her transsex that kills her: not as a homosexual man, then, but as a transsexual woman whose desire is heterosexual—or, as the failure to be (an ontological failure) a biological woman.[203]

Later, in the book *Undoing Gender* (2004)[204], Butler seeks to balance the implicit expectation for autonomy, which is derived from the democratic ideal to which they clearly subscribe and the fact that one cannot expect this autonomy to derive from an atomistic idea of the individual.[205] They acknowledge that the demand for this autonomy is grounded in institutions and ideologies which connect us with each other but refuse certain subjects the status of human.[206] What rises as a demand then is to distinguish between those institutions that limit the possibilities for 'liveable lives' resulting in further marginalization, and those that provide possibilities 'to live and breathe and move'.[207] Butler tries to offer a more nuanced approach on identity politics in the context of democratic governance, trying to explore the 'tension that arises between queer theory and both intersex and transsexual activism' which 'centers on the question of sex assignment and the desirability of identity categories'.[208] Butler seems to acknowledge the fact that queer theory seeks to undermine stable categories of identity and challenge their potential to lead to viable political interventions. This does not encompass and do justice to much of trans and intersex activism which is based on identity, and Butler themself concedes here that a liveable life 'does

[203] Idem 273.
[204] Judith Butler, *Undoing Gender* (Routledge 2004).
[205] Talia Bettcher, 'Feminist Perspectives on Trans Issues', The Stanford Encyclopedia of Philosophy (Spring 2014 Edition), Edward N. Zalta (ed) <https://plato.stanford.edu/archives/spr2014/entries/feminism-trans/> accessed 9 December 2019.
[206] Judith Butler, *Undoing Gender* (Routledge 2004), 37-38, 223-227.
[207] Idem 8,31, 219.
[208] Idem 7.

require various degrees of stability',[209] while their earlier work was merely focused on this very stability at the heart of identity claims.

Concluding, sexuality, gender and identity are seen by queer studies as effects of normative power. This very conceptualization of identity can erode the grounds on which transgender individuals ask for the innate sense of gender to be recognized as valid. This can further replicate the denial of transgender experience and perpetuate the stigma that has shaped medical and political discourses. By giving value to transgender phenomena only when and in so far as they disrupt gender norms, queer theory 'has historically sorted, cited, and disciplined some portions of trans into itself while rejecting others as retrograde or conformist (crossdressing, genderqueer, and androgyny are welcome; transsexuality is not)'.[210] Early on, queer theory was criticized by scholars from the transgender studies discipline, that one will explore in the next subchapter, for its treatment of trans as an exemplary of the disruption of gender. Hale for example suggests that scholars 'beware of replicating the following discursive movement: Initial fascination with the exotic; denial of subjectivity, lack of access to dominant discourse; followed by a species of rehabilitation'.[211] Prosser suggest that queer theory treats trans as 'a symptom of the constructedness of the sex/gender system and a figure for the impossibility of this system's achievement of identity'[212] and in this way institutionalizes homosexuality as queer.[213] Finally, according to Namaste, queer theory as it is currently practiced must be rejected both for political and theoretical reasons because of its citational relationship with transgender phenomena, namely their employment as cases to make a point.[214]

Queer theory, although distinct now from transgender studies, remains central in the realm of gender theory. On a positive note, it gives us the opportunity to focus on marginalized

[209] Idem 8.
[210] Cáel M Keegan, 'Getting Disciplined: What's Trans* About Queer Studies Now?' (2018) Journal of Homosexuality 1, 8.
[211] Jacob Hale, 'Suggested rules for non-transsexuals writing about transsexuals, transsexuality, transsexualism, or trans' (1997) <https://sandystone.com/hale.rules.html> accessed 9 December 2019.
[212] Jay Prosser, *Second Skins: The Body Narratives of Transsexuality* (Columbia University Press 1998) 6.
[213] Idem 5.
[214] Viviane K. Namaste, *Invisible lives: the erasure of transsexual and transgendered people* (University of Chicago Press 2000) 9.

subjective experiences that are not consolidated as identities, which is very relevant in a post-colonial context, where practices often do not conform to identity-based notions of politics and collective action. Queer theory's focus on performativity allows us to understand disruptive configurations of gender that are not yet defined, institutionalized or normalized. It warns us against the normative categorization of identities that can be taken up by power structures to reproduce exclusion, although the demand was initially the right to a 'liveable life' for those who are marginalized. In the case of trans asylum claimants, where the current institutional approach is mainly based on westernized notions of identity, it is very important to acknowledge that not all subjective and gender nonconforming experiences fall into neat categories, and not all have been politically advocated for on the basis of collective identity claims. Gender performativity is very relevant for understanding the social impact that for example nonconforming gender expression has and how it renders individuals subject to violence, material and relational vulnerability and exclusion especially when they do not submit to particular norms of 'passing' or of binarism.

2. Transgender studies

Transgender studies arguably first came into the foreground as a distinct field with Sandy Stone's foundational book, firstly presented at a conference in 1988, 'Posttranssexual Manifesto'[215], which was published in 1992.

Stone attempted to explore the concept of the 'transsexual' that was often experienced by people leading transsexual lives as a category limiting transgender people to mainstream narratives and forcing them to be silent about their own stories in order to access legal and medical procedures that they needed. Stone attempted to break the silence surrounding the issue and reshape what she saw as 'textual violence inscribed in the transsexual body' into a challenging 'reconstructive force'.[216] Stone suggested opening up 'new and unpredictable

[215] Sandy Stone, 'The Empire Strikes Back: A Posttranssexual Manifesto' in Julia Epstein and Kristina Straub (eds) *Body Guards: The Cultural Politics of Gender Ambiguity* (Routledge 1992).
[216] Idem 295.

dissonances' in which 'we may find the potential to map the refigured body onto conventional gender discourse and thereby disrupt it'. In order to pursue this disruption and reconfiguration, Stone juxtaposed 'medically constituted transsexual embodiments against the backdrop of culturally intelligible gendered bodies'.[217] Her goal was to 'to take advantage of the dissonances created by such a juxtaposition to fragment and reconstitute the elements of gender in new and unexpected geometries'.[218] One can understand that Stone's attempt was both one of deconstruction and validation of marginalized gender variety. She embarked on an exploratory project that went beyond the then meaning of 'transsexual' and gave birth to new sets of questions and phenomena 'whose potential for productive disruption of structured sexualities and spectra of desire has yet to be explored'.[219]

According to Stryker and Currah, since as early as the nineteenth century, scientific, medical and legal discourse in the U.S. and Europe has dealt with transgender phenomena in a way that has rendered people that manifest gender transgressing characteristics and behaviours as distinct types of beings whose bodies and minds need social or medical intervention, consensually or not.[220] In that sense, the 'science' of transgender phenomena has been there for a long time, as has technical and professional literature on the matter. The project of naturalization of 'gender congruence', while disciplining 'gender incongruity' has been a biopolitical project of the modern world which was heavily institutionalized in the last centuries. It has produced the development of expert organizations, academic research, clinics, legal jurisprudence and medical standards and discourse.[221]

The interdisciplinary field of transgender studies takes a different approach from the above discourse, especially that found in medical and juridical frameworks. It moves away from investigating transgender phenomena as the object of study. It attempts to archive and explore the practices of knowledge/power that delegitimize gender-variant bodies and treat them instead as valid subjects with their own narrative. It denaturalizes the gender ideology

[217] Susan Stryker and P Currah, 'Introduction' (2014) 1 TSQ: Transgender Studies Quarterly 1, 3.
[218] Sandy Stone, 'The Empire Strikes Back: A Posttranssexual Manifesto' in Julia Epstein and Kristina Straub (eds) Body Guards: The Cultural Politics of Gender Ambiguity (Routledge 1992) 296.
[219] Idem 296.
[220] Susan Stryker and Paisley Currah, 'Introduction' (2014) 1 TSQ: Transgender Studies Quarterly 1, 4.
[221] Idem 4.

that demands gender congruence as a status quo. It does so by dismantling previously existing agendas that frame transgender phenomena as the targets of psychotherapeutic, medical, legal or social intervention.[222] Transgender studies seeks to contest normative knowledge on gender that was developed mainly in the 20th century and draws from critical theory, postcolonial studies, postmodernist epistemologies and identity-based critiques of dominant culture. The latter one is its main difference from queer studies, namely the fact that it does not deny the relevance of identity claims, especially those which emanate from feminism, people of colour, displaced and diasporic communities, disability studies and AIDS activism. Queer subcultures and lives of gender transgressive people have informed transgender studies, which nonetheless is a distinct field from queer theory.[223]

Transgender studies' most important contribution though, is the fact that it makes it possible for transgender individuals or people to whom the transgender identity is attributed to be both the subject and object of knowledge. Their own articulation of critical knowledge from their own embodied position is put to the forefront, by contesting dominant organizations and normative power/knowledge that would otherwise render them unintelligible, pathological, invisible, silenced and certainly marginalized. Like disability studies, feminist studies and ethnicity studies, transgender studies as part of a broader movement for social transformation and justice seeks to dismantle hierarchies of the social world that are rooted in forms of bodily difference and the gender congruence that the latter is designated to mean by offering a critique of knowledge itself.[224]

Queer theory arose from the conjunction of feminism and sexuality studies, and transgender studies can be considered, according to Stryker, as its evil twin, since it emerges from the same schools of thought. In addition, it deliberately disrupts dominant heteronormative and homonormative family narratives that favour sexual orientation labels over the gender categories and embodiment that enable desire to be framed and find its target.[225]

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[222] Idem 9.
[223] Idem 4.
[224] Idem 9.
[225] Susan Stryker, 'Transgender Studies: Queer Theory's Evil Twin' (2004) 10 GLQ: A Journal of Lesbian and Gay Studies 212, 212.

Stryker notes that Stone's essay does not make reference to the term 'transgender'. In 1992 when the 'Posttranssexual Manifesto'[226] was published, the term 'transgender' was on the rise as an alternative less medicalized and more encompassing term than transsexuality and was used as a point of reference for collective organizing. At the same time, 'queer' was also gaining ground as a critique to U.S. gay and lesbian integrationist politics. The proximity and relationship between these movements created a complicated dynamic around what 'transgender' could signify, both as a personal identifier as well as a social location from which one gains knowledge of the world. In Stryker's words:

> transgender became associated with a 'queer' utopianism, the erasure of specificity, and a moralizing teleology that condemned certain practices of embodiment that it characterized as transsexual. From other positions, 'queer' became something that excluded the consideration of gender altogether. Depending on one's subject position and political commitments, these trends could be embraced or bemoaned.[227]

Stryker goes on to argue that all of these terms, namely 'transgender', 'queer' and 'trans' have been historically interrelated in carrying out the critical project that Stone envisioned with the neologism 'posttranssexual'.[228] One cannot forget that transgender studies emerged in the early 1990s closely connected with the rise of 'queer theory'. What it mainly addressed was the coming-to-voice of transgender subject, who were up to then seen as the object of research concerning sexology, psychoanalysis, psychiatry, and cis feminist theory. What Stone's manifesto sought to do was transposition transgender people from the object to the subject position of a (post)transsexual. By normalizing this social location, Stone's endeavour to give voice to trans people as human beings with their own experiences of transness and transphobic violence led to the recognition of mechanisms of transphobic oppression. Stone opened up a path to theorize transness in a way that does not reinforce

[226] Sandy Stone, 'The Empire Strikes Back: A Posttranssexual Manifesto' in Julia Epstein and Kristina Straub (eds) *Body Guards: The Cultural Politics of Gender Ambiguity* (Routledge 1992).
[227] Susan Stryker, 'The Transgender Issue: An Introduction' Gay and Lesbian Quarterly (1998) 4 (z), 145, 153.
[228] Idem 148.

transphobia but resists established gender normativity that excludes alternative embodied gender positions.[229]

Furthermore, in a way, transgender studies begins with the suggestion to leave behind the figure of the transsexual, conceptualized mainly in medical terms. On the other hand, it is argued, that what gives critical relevance to the figure of the transsexual is the fact that it is an obstacle to 'romantic narratives of antinormative queerness'.[230] It has been debated whether queer theory can be possible without antinormativity,[231] but it is certain that trans studies has brought forward a new way of theorizing without negating normativity. According to Chu and Drager, the most relevant contribution that researchers working within the transgender field can make, is 'defend the claim that transness requires that we understand, as we never have before, what it means to be attached to a norm—by desire, by habit, by survival'.[232] In light of this realization, this thesis does not view attachments and identity claims critically, but rather seeks to encompass and accommodate them in the context of naturalizing alternative personal and social locations.

In view of the above, Kimberlé Crenshaw has also argued that there is crucial importance in defending those identity categories through which oppression is channelled as part of the strategic empowerment of marginalized groups:

> At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it.[233]

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[229] Talia Bettcher and Ann Garry, 'Introduction to Hypatia Special Issue: Transgender Studies and Feminism: Theory, Politics, and Gendered Realities' (2009) 24 (3) Hypatia 1, 1.
[230] Andrea Long Chu and Emmett Harsin Drager, 'After Trans Studies' (2019) 6 TSQ: Transgender Studies Quarterly 103, 103.
[231] Robyn Wiegman and Elizabeth A. Wilson, 'Introduction: Antinormativity's Queer Conventions' (2015) 26 (1) differences 1.
[232] Andrea Long Chu and Emmett Harsin Drager, 'After Trans Studies' (2019) 6 TSQ: Transgender Studies Quarterly 103, 108.
[233] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241.

Furthermore, transgender studies provide us with an alternative way to reimagine human personhood beyond mainstream gender ideology, in the same sense as queer studies, but also gives voice to the subjective foundational claims of transgender individuals and naturalises their subject positions. As Stryker notes,

> As a field, transgender studies promises to offer important new insights into such fundamental questions as how bodies mean or what constitutes human personhood. And as individuals, transgender scholars who can speak intelligibly from their positions of embodied difference have something valuable to offer their colleagues and students.[234]

Stryker uses the term transgender 'to refer to people who move away from the gender they were assigned at birth, people who cross over (trans-) the boundaries constructed by their culture to define and contain that gender'.[235] In this way, transgender studies encompasses both gender identity and gender expression, including all these locations that challenge established gender norms. It includes those who feel they belong to another gender than that which they were assigned at birth, and those who strive to find another not yet defined, acknowledged and already occupied gender location/space to express/be themselves. Transgender studies encompasses the need to break away from conventional expectations that are prescribed to the gender positions that subjects are initially given and acknowledges the need to transcend this position or its prerequisites as something completely valid with no need of further explanation.[236] That is transgender studies' main ontological assumption which lies beyond the reality of gender categories as they are assigned and developed in mainstream western gender ideology.

In Stryker's own words:

[234] Susan Stryker. 'The Transgender Issue: An Introduction' (1998) 4 (2) GLQ: Gay and Lesbian Quarterly 145, 153, 155.
[235] Susan Stryker, *Transgender History* (Seal Press: Distributed by Publishers Group West 2008), 1.
[236] Idem 1.

> In any case, it is the movement across a socially imposed boundary away from an unchosen starting place—rather than any particular destination or mode of transition—that best characterizes the concept of 'transgender' that I want to develop here.[237]

We see that in this definition both gender expression and nonbinary identities are included. This is as opposed to most of the research in the 1990s and early 2000s that had not addressed the experience of transgender individuals with nonbinary identities. Transgender studies operate in a wide gender framework, as opposed to many, even transgender groups up to the early 2000s.[238] In this thesis though, a distinction will be made between gender nonconforming people, which refers mainly to gender expression, and transgender people, namely trans men, women, or nonbinary people, which refers to identity. In this way, one will attempt to disentangle the specific social and institutional complications for each group and reflect on a way to better address them in a legal framework that encompasses both gender identity and expression. The reason to theorize them distinctly has to do mainly with the legal complications of each term, so that seeing them separately can shed light on the limitations and exclusions of a given framework. A transgender studies framework though will be used throughout the analysis, since it accounts for nonconforming gender variation of expression and identity that varies from expected norms.

Diving somewhat deeper into transgender theory, one realizes that it engages with many of the foundational questions in life sciences and social science, for example the biological body. For transgender studies there is no such thing as the 'single organically unified natural object characterised by one and only one of two available sex statuses'.[239] The sex of the body is understood to be 'an interpretive fiction that narrates a complex amalgamation of gland secretions and reproductive organs, chromosomes and genes, morphological characteristics and physiognomic features'.[240] It is the core assumption of transgender studies that there are more than two viable configurations of bodily sexed being. The

[237] Idem 1.
[238] Genny Beemyn and Susan Rankin, *The Lives of Transgender People* (Columbia University Press 2011) 1.
[239] Susan Stryker, 'Transgender feminism: queering the woman question' in *Third Wave Feminism: A Critical Exploration* (Palgrave Macmillan 2007) 62.
[240] Idem 62.

questions that transgender studies attempt to ask is what the purposes and the cost behind the collapse of the diversity of embodiment to two mutually exclusive categories of man and woman are and through which means this is institutionalized. Its call is for the embodied subject, which is shaped in this material and institutional context, to become aware of its position in society and gain awareness of its embodied self. It is also a call to acknowledge that the pronouns 'he' and 'she' enable personhood that we learn to claim and that there is agency and a process in disavowing these pronouns as the cost of finding a location that accommodates the self. This process varies from place to place, time to time and person to person. These are questions usually delegated to the fields of psychology and biology but transgender studies help us to think about them through a different lens that challenges mainstream/normative gender ideology and classification. In Stryker's terms:

> Transgender feminism gives us another axis, along with critical race studies or disability studies, to learn more about the ways in which bodily difference becomes the basis for socially constructed hierarchies, and helps us see in new ways how we are all inextricably situated, through the inescapable necessity of our own bodies, in terms of race, sex, gender or ability.[241]

Having said the above, one must acknowledge that transgender studies has emerged in a white, anglophone context and it has recently begun to disentangle its own specificity in terms of its legacy of white, anglo-feminism. The struggle of the latter with the nature of gender, sexuality, class, race and disability is being echoed in the problematics of transgender studies as well and one must be aware of the cultural specificity it may entail.[242] Furthermore, especially in the context of trans asylum claims, one must be cautious not to reproduce the nation-centeredness of a field that has largely emerged in the context of the United States, and must find new ways of approaching transness for people not enjoying the protection or guarantees that are afforded to citizens.[243]

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[241] Idem 62.
[242] Talia Bettcher and Ann Garry, 'Introduction to Hypatia Special Issue: Transgender Studies and Feminism: Theory, Politics, and Gendered Realities' (2009) 24 (3) Hypatia 1, 5.
[243] Viviane Namaste, 'Undoing Theory: The 'Transgender Question and the Epistemic Violence of Anglo-American Feminist Theory' (2009) 24 Hypatia 11.

In view of the foregoing, queer theory has provided us with a subversive analytical tool regarding gender and sex representations.[244] This subversive dynamic of queer theory involves challenging the still persistent heteronormativity in how we perceive and reconstruct social reality through the use of theoretical, literary and activity-based means.[245] For Whittle though, this subversiveness needs to expand in Transgender Studies to encompass '… not just deconstruction but also reconstruction' in order to provide more validity to those sexes/genders/sexualities that are real to those who experience them.[246] Given, however, the constant identity-contesting nature of queer theory and its suspicion towards self-categorizations, it may become problematic for those seeking acknowledgment of what they experience as oppression deriving from the lived reality of their gender. This is especially true in cases where the social location of a particular subjectivity and the preservation of its referential foundations appear essential. Whittle's 'reconstruction' imperative calls for the theoretical involvement of critical and arguably normative transgender studies perspectives grounded in socio-political realities as a necessary precondition for the reconceptualization of the legal and moral content of rights.

According to Butler,

> [i]f sexuality is conceived as liberated from gender, then the sexuality that is 'liberated' from feminism will be one which suspends the reference to masculine and feminine, reinforcing the refusal to mark that difference, which is the conventional way in which the masculine has achieved the status of the 'sex' which is one. Such a 'liberation' dovetails with mainstream conservatism and with male dominance in its many and various forms.[247]

[244] Adam P. Romero 'Methodological Descriptions: 'Feminist' and 'Queer' Legal Theories' in Martha Albertson Fineman, Jack E. Jackson and Adam P. Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate 2009) 190.
[245] Stephen Whittle (1996) 'Gender Fucking Or Fucking Gender? Current Cultural Contributions To Theories of Gender Blending' in Richard Ekins and Dave King (eds.) *Blending Genders* (Routledge 1996).
[246] Idem 204.
[247] Judith Butler, 'Against Proper Objects' in Elizabeth Weed and Naomi Schor (eds) *Feminism Meets Queer Theory* (Indiana University Press 1997) 23.

Transgender theory, on the other hand, does not attempt to refuse differences but rather to encompass new geometries of gender configurations as equally valid. One must not forget that transgender status is more like race and class, since it cuts across sexual identity categories.[248] Furthermore, 'transgender' is also both more and less than an identity term like 'man' or 'woman', since it designates a way of being a man or woman or marking a resistance to this binary. According to Stryker:

> Transgender analyses of gender oppression and hierarchy, unlike more normative feminist analyses, are not primarily concerned with the differential operations of power upon particular identity categories that create inequalities within gender systems, but rather with how the system itself produces a multitude of possible positions that it then works to centre or to marginalise.[249]

Finally. the words of Leslie Feinberg become very relevant when one thinks of transgender phenomena and studies. According to her/hir,[250]

> I think most people don't understand how transsexuals feel about our original biological selves. Everyone experiences this discontinuity between identity and body slightly differently, but there's a commonality. For me, it wasn't so much that I hated my body or hated being a woman. First of all, even as I say that I was a woman, that feels as though somehow, it really wasn't true. At some point, I realized that my deepest, most abiding sense of myself was male. When 1 saw that there was an alternative, that the hormones really work, I knew that I would rather live my life as a man. As a man, a more integrated sense of myself began to emerge.[251]

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[248] Susan Stryker, 'Transgender feminism: queering the woman question' in *Third Wave Feminism: A Critical Exploration* (Palgrave Macmillan 2007) 67.
[249] Idem 67.
[250] Leslie Feinberg's preferred pronouns were she/zie and her/hir according to her personal website available at: <https://www.lesliefeinberg.net/self/> accessed at 29/02/2019.
[251] Leslie Feinberg, *Transgender Warriors: Making History From Joan of Arc to RuPaul* (Beacon Press 1996) 142.

The fact that queer theory tries to deconstruct the idea of some form of substance in the idea of gender is the reason why this thesis sides more with transgender theory that encompasses the narratives of many transgender individuals that feel the need to be acknowledged for and as the gender that they experience. Also, queer theory does not provide an adequate tool to address social inequalities that relate to biological configurations of dimorphic sex characteristics, gender norms or other social statuses, such as race and nationality, as well as categories that are experienced from different positions of privilege and power, which are attributed even if theoretically deconstructed. More specifically, one must have in mind that the concept and the impact of gender nonconformity in the form of, for example, persecution is a highly material and relational one. It is related not only to what is experienced by the individual, but largely to what is expected from them according to their sex classification and the restrictive gender roles prescribed by culture. In view of the above, queer theory, which delegitimizes fixed binary categories as natural, falls short in that it does not focus on their trueness as an unequal social condition. Contrary to that, transgender studies, which are queer theory's evil twin, have in my view a better potential to address social inequality without presupposing sameness and by relying on subjective experience while reaffirming notions of dignity, safety, and the need for acknowledgment and institutional protection.

Transgender studies provide a standpoint with a moral imperative of individual yet relationally defined freedom, in that what is socially mediated (gender) does not conflict with human agency per se nor is it untrue either as an experience or a pragmatic condition (positive or negative). Gender may be fluid but it is still integral although often marginalized and excluded through its lack of social and legal recognition. Avoiding naturalist reductionism but also poststructural deconstruction through transgender studies is arguably the best way to address the legal complications of the protection of transgender/gender nonconforming people who are need of international protection. It provides us with a critical lens to both address the productive power of law when it comes to gender ideology, but also focus on the need for institutional protection.

3. Conceptualizing a transgender studies framework for trans asylum claimants

3.1. Intersectionality

In exploring the subject of trans asylum claims, intersectionality can provide a valuable tool for assessing and conceptualizing the intersecting oppressions that gender-variant asylum seekers suffer. Intersectionality refers to the notion that subjectivities are founded in a context of mutually reinforcing marginalizations due to gender, class, sexuality, race, and nationality. It has emerged as a primary theoretical tool developed to resist feminist essentialism, exclusivity, hierarchies, and hegemony. Leslie McCall underlines intersectionality's relevance arguing that it is 'the most important theoretical contribution that women's studies, in conjunction with related fields, has made so far'.[252] This critical theoretical contribution has become an important tool in multidisciplinary approaches aimed at exploring and analyzing subjects' identities, experiences and oppression.

The term 'intersectionality' was first coined by legal scholar Kimberlé Crenshaw to demonstrate the 'multidimensionality' of marginalized subjects' lived experiences.[253] Intersectionality then emerged in the late 1980s and early 1990s drawing on critical race studies, which is an academic discipline of the legal academy oriented towards complicating law's assumed colour-blindness, objectivity, and neutrality. The initial focus of intersectionality was on the particular intersection of race and gender, but it has come to encompass other intersections such as class, disability and nationality. Intersectionality refuses the 'single-axis framework' very often demonstrated in feminist or anti-racist work

[252] Leslie McCall, 'The Complexity of Intersectionality', (2005) 30 (3) Signs 1771, 1771.
[253] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', Forum (1989) 1 (8) University of Chicago Legal 139, 139.

by instead analyzing 'the various ways in which race and gender interact to shape the multiple dimensions of Black women's experiences.[254]

According to Crenshaw, however, the embrace of identity politics has been in tension with several conceptions of social justice. Race, gender, as well as other identity categories have been treated from mainstream liberal discourse as vehicles of domination or bias, namely as intrinsically disempowering concepts through which social power excludes or marginalizes deviant bodies. This understanding leads to accepting as a liberatory objective the designification of any such categories. Yet, certain feminist and racial liberation movements accept the fact that this delineation of difference can be socially empowering and a source of reconstruction, and not only the effect of domination if claimed by those who are marginalized. What Crenshaw critiques is more the fact that identity politics fail to recognize intra-group difference and not that they fail to transcend difference, as some other critics argue. For example, in the case of violence against women, there is a problem with the elision of difference in identity politics, since the violence that many women experience is shaped by race, class and nationality status. Similarly, when exploring the experience of trans asylum seekers, identity politics should not be limited to their trans status, but also to other dimensions of their identities, such as nationality and social status, race, and ethnicity. Oppression does not happen in mutually exclusive terrains but in intersections of oppression which reinforce each other; in other words, oppression and violence are often multidimensional and that story must be able to be narrated. In this narration of the multidimensionality of oppression, intersectionality provides a tool to advance the telling of the location between the intersections of oppression which is often silenced.[255] The objective is not to marginalize the experiences of people within 'single-axis' identity frames.

Crenshaw distinguishes between structural, political, and representational intersectionality. Structural intersectionality refers to the ways in which the location of women of colour shapes their actual experience of issues such as violence, rape, and remedial reform in qualitatively different ways than those of white women. When exploring the experiences of

[254] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241, 1244.
[255] Idem 1242.

trans asylum seekers, structural intersectionality could by analogy refer to those social-political conditions that shape the reality of trans people seeking asylum in ways other than the ones of trans people who are guaranteed basic human rights by the state whose citizenship they have. Political intersectionality concerns the ways that groups at the intersections of several oppressive factors are marginalized within 'single-axis' political movements, as for example addressing sexuality and gender without addressing race or class, or the opposite. Lastly, representational intersectionality refers to the cultural construction of women of colour and issues that affect them. It explores the representation of women in popular culture - and in the case of this thesis, the representation of trans asylum claimants in public and legal discourse. Representational intersectionality also refers to the ways in which the location of women of colour is marginalized - and in the case of this thesis, to the ways in which the location of trans asylum seekers is marginalized and the respective groups disempowered.[256] Crenshaw makes clear that intersectionality is not offered as a totalizing theory of identity between race and gender, and it can encompass many factors such as class and sexuality. The rationale behind it is 'to account for multiple grounds of identity when considering how the social world is constructed'.[257]

Crenshaw makes clear the distinction between anti-essentialism and intersectionality. While intersectionality refers to the multi-dimensional shaping of oppression, anti-essentialism critiques focus on the fact that feminism has essentialized the category of woman, to refer to only particular kinds of women. While, as Crenshaw admits, both are very relevant, anti-essentialism has been shaped by postmodernist ideas that 'categories we consider natural or merely representational are actually socially constructed in a linguistic economy of difference'.[258] This thesis sides with Crenshaw in that it subscribes to the descriptive project of postmodernism to question ways in which the meaning of categories is socially constructed, but with a caution not to misread the meaning of social construction to the point

[256] Idem 1244-1245.
[257] Idem 1245.
[258] Idem 1296.

that it distorts the social and political relevance of categories and their empowering nature for certain marginalized groups.[259]

Crenshaw makes it clear that to say that a category like race and gender is socially constructed, does not mean that it has no significance in the social world. Indeed, one of the projects of postmodern theories has been to explore how power has clustered around several categories while marginalizing others, and that is arguably a continuing liberatory project for subordinated people. This project's attempt is to disentangle processes of subordination and how these processes are experienced by the people that are marginalized by them and the people privileged by them. In this light, it is presumed that categories have consequences and meaning; according to Crenshaw, the problem is not the categories themselves, but the values attached to them, resulting in the creation of social hierarchies.[260]

The process of categorization is, of course, an exercise of power, but it is not unilateral. Marginalized people also participate in this process, challenging and subverting the naming of categories, in a way that empowers them and puts them to the forefront of political movements. The current transformation of 'queer' or 'black', are examples of this empowerment and the agency performed by marginalized people in claiming their name and social location in admittedly unequal structures.[261] In view of that, categories can indeed be reclaimed in the social justice enterprise.

According to Crenshaw:

> when identity politics fail us, as they frequently do, it is not primarily because those politics take as natural certain categories that are socially constructed but rather because the descriptive content of those categories and the narratives on which they are based have privileged some experiences and excluded others.[262]

[259] Idem 1296.
[260] Idem 1297.
[261] Idem 1297.
[262] Idem 1298.

For Crenshaw, the problem of feminism essentializing womanhood, or anti-racism essentializing Blackness is not simply linguistic or philosophical in nature; it is highly political: 'the narratives of gender are based on the experience of white, middle-class women, and the narratives of race are based on the experience of Black men.'[263] The solution for Crenshaw does not lie in abstractly challenging essentialism or arguing for the multidimensionality of identities. What can help is asserting the crucial aspect of the subjects' location which is erased, stating what difference the particular difference makes.[264] In the case of trans asylum seekers, it is not enough to focus of the trans status of the subjects, but it is necessary also to explore what difference their citizenship status and origin makes. Otherwise, one will rely upon westernized reflections of transness, that usually represent white middle-class citizens.

For example, De Vries has particularly examined the situation of transgender people drawing on an intersectional approach. De Vries asserts that trans people in the United States change genders 'in relation to androcentric, heterocentric, and middle-class whitenormative cultural narratives'.[265] His work shows that in transgender people of colour, 'gender, race, social class, and sexuality all combine to create specific background identities—intersected identity frames—which others attribute in interaction'.[266] One can better understand the notion of intersected identity frames through the experience of trans people of colour who engage in identity management. Through the ethnographic data of De Vries, what becomes evident is that some audiences apply white, dominant cultural narratives while others attach meaning to ethnic cultural narratives on the gender transition.[267] This is relevant both for the audience which interacts with a trans person and how they perceive them, but it also has to do with how a trans person's subjectivity is shaped in different cultural contexts, so that it may become unintelligible in certain other contexts or severely misread.

[263] Idem 1298.
[264] Idem 1299.
[265] Kylan Mattias Vries, 'Intersectional Identities and Conceptions of the Self: The Experience of Transgender People: Intersectional Identities' (2012) 35 Symbolic Interaction 49, 49.
[266] Idem 49.
[267] Idem 49.

What is demonstrated through De Vries' work is that the process of developing a sense of self does not only involve individual self-concepts but also others' perception of the transgender individuals. In the case of trans individuals, their gender identification may not 'match' how they are perceived by society. It is quite self-evident that the confirmation of others (often referred to as 'passing') is a very powerful force. For some trans people who make use of hormones or affirmation surgeries, the change in physical characteristics impacts severely on how they are perceived and if they 'pass'. For other transgender people, the change of physical characteristics is not wanted or not a priority, although they need to be validated for the gender they are. According to De Vries, however, socialization into the new gender has a lot to do with the ways race, social class, and sexuality interplay. Many times, trans individuals must learn the various ways in which the latter factors inform the meanings that others attach to their gender transition and presentation.[268] In light of the above, people attach meaning to gender norms according to the several statuses of the individuals that demonstrate them, namely their race, origin and class. In addition, gender norms vary according to the cultural context in which they are encountered and shaped. That presents a particular challenge for transgender asylum seekers, who perhaps perceive gender differently to the way it is perceived in the country of reception, but who are also seen as 'others' in certain racialized and sexualized terms by asylum authorities.

De Vries' work shows that how meanings attached to transgender individuals vary according to interconnections of gender, sexuality, race and social class, and the way they shape social interaction. It can arguably be said that interaction, both in the context of the country-of-origin and of reception, shapes transgender individuals' perceptions of self, gender and transition. Drawing on the work of Lewis [269] and Ward [270], who highlight the relevance of analyzing dominant cultural narratives, such as whiteness, De Vries links the interconnection of class and sexuality, and I may also add of citizenship and nationality status, to the

[268] Idem 49-50.
[269] Amanda E. Lewis, 'What Group?' Studying Whites and Whiteness in the Era of 'Color-Blindness' (2004) 22 (4) Sociological Theory 623.
[270] Jane Ward, 'White Normativity: The Cultural Dimensions of Whiteness in a Racially Diverse LGBT Organizations' (2008) 51 (3) Sociological Perspectives 563.

perception of a transgender individual's sense of self.[271] The work of De Vries offers accounts of primarily transgender people of colour, and it is emphasized that most of them indicate a desire for more diverse voices to be mainstreamed in the public space, both in the context of trans communities, and in academic research.[272] Gendered meanings are very relevant to transgender people, as transgender studies emphasize, but what is often ignored is how these gendered meanings are classed, racialized and sexualized. As Stryker and Whittle have noted:

> [T]he analytical framework for understanding gender diversity that has emerged from transgender studies—valuable though it is—is impoverished by the relative lack of contributions from people of color, and is therefore ultimately inadequate for representing the complex interplay between race, ethnicity, and transgender phenomena.[273]

What becomes evident from the scholarly research on transgender phenomena is that the universalizing of 'transgender' bears the risk of perpetuating white and predominantly middle-class trans identity, experience and collective understandings (see Valentine 2007).[274] De Vries' research highlights the relevance of considering race, class and sexuality when exploring transgender phenomena.[275] Burnes and Chen also show how the framework of intersectionality can be utilized in order to address the multidimensional identities of transgender individuals in terms of sexuality, race and ethnicity.[276] The way that gender representation and expression shift across different contexts needs to be acknowledged. The fact that gender transgression involves the internalization of gender norms which vary across

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[271] Kylan Mattias de Vries, 'Intersectional Identities and Conceptions of the Self: The Experience of Transgender People: Intersectional Identities' (2012) 35 Symbolic Interaction 49, 63.
[272] Idem 64.
[273] Susan Stryker '(De)Subjugated Knowledges: An Introduction to Transgender Studies' Susan Stryker and Stephen Whittle (eds) *The Transgender Studies Reader* (2006) 15.
[274] David Valentine*, Imagining Transgender: An Ethnography of a Category* (Duke University Press 2007).
[275] See Kylan Mattias de Vries, 'Intersectional Identities and Conceptions of the Self: The Experience of Transgender People: Intersectional Identities' (2012) 35 Symbolic Interaction 49 and Kylan Mattias de Vries, 'Transgender People of Color at the Center: Conceptualizing a New Intersectional Model' (2015) 15 Ethnicities 3.
[276] Theodore R. Burnes and Mindy M. Chen, 'The multiple identities of transgender individuals: Incorporating a framework of intersectionality to gender crossing' in Ruthellen Josselson and Michele Harway (eds) *Navigating multiple identities: Race, Gender, culture, nationality, and roles* (Oxford University Press 2012).

cultural spaces needs further exploration.[277] Asylum authorities and researchers must be wary of the ways in which different subjects across different locations experience gender nonconformity and transness, namely they need to be aware of the fact that there are many different ways of experiencing or expressing a gender that was not assigned at birth. The latter must be linked both to the credibility assessment of transgender identity and gender nonconformity and the evaluation of the persecution these features led to in the country-of-origin. This variability is very relevant also for ensuring that authorities and researchers do not project westernized middle-class notions of gender expression and identity onto the asylum claimants.

Finally, trans subjectivities pose a challenge to normative categorical frameworks, as is also reflected in the feminist work on intersectionality. They challenge us to extend our conceptualization of bodies beyond normative categories thinking about the relations between and within those. As Kimberlé Crenshaw suggests, categories are indeed mutually implicated.[278] Transgender feminism should give its own epistemological account to the challenge it poses for hegemonic ontological frameworks in order not to have to rely on stable identities while performing intersectionality. This calls for the complication of how categories are understood, in a way that categorizing and labelling are not considered self-evident but indeed relational processes.[279] As Simpkins argues:

> Instead of directly locating the subjects/selves who inhabit specific identities in relation to power, intersectionality as a method actually requires an onto-epistemological framework that can incorporate the dynamic variation of matter—a framework that understands matter both as context specific and as an overarching systemic whole that cannot simply be taken apart and put back together.[280]

[277] Idem 119.
[278] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', Forum (1989) 1 (8) University of Chicago Legal 139, 139.
[279] Silvia Walby, Jo Armstrong and Sofia Strid, 'Intersectionality: Multiple Inequalities in Social Theory' (2012) 46 (2) Sociology 224.
[280] Reese Simpkins, 'Trans*feminist Intersections' (2016) 3 TSQ: Transgender Studies Quarterly 228, 232.

That means that when discussing trans, one must not define it as separate from 'other categories' which would only misread the function of power and identification. Transgender people have identifications and concerns additional to their transgender, status such as racialization, nationality, class, and citizenship status. Transfeminist theory then should provide for a nuanced understanding of identificatory processes in the 'complex terrain of category mixing'.[281] As Puar argues,

> Crenshaw indicates . . . [that] identification is a process; identity is an encounter, an event, an accident. In fact, identities are multi-causal, multidirectional, liminal; traces aren't always self-evident. In this 'becoming of intersectionality', there is emphasis on motion rather than grid lock; on how the halting of motion produces the demand to locate.[282]

The 'becoming of intersectionality', then, 'points toward normative categorical ontologies as those which halt movement and require identification'.[283] This is the assumption for the category designation and identification, upon which identity claims rely.

3.2. Narrative

As mentioned before, Prosser makes a theoretical starting point to underline the contrast between the centrality of performativity in queer theory, and narrative for transsexual people. He underlines the tendency of postmodern queer theory to challenge the political implications of narratives.[284] According to queer theory, such narratives involve the illusion of a false unity, which may lead to exclusionary politics. According to Prosser, however, narratives are very central to the experienced accounts of transsexuals involving the notions

[281] Idem 232.
[282] Jasbir Puar, 'I would rather be a cyborg than a goddess' Becoming-Intersectional in Assemblage Theory' (transversal texts, October 2012) < https://transversal.at/transversal/0811/puar/enaccessed 9/12/2019> accessed 20 April 2023.
[283] Reese Simpkins, 'Trans*feminist Intersections' (2016) 3 TSQ: Transgender Studies Quarterly 228, 232.
[284] Jay Prosser, 'No Place Like Home: The Transgendered Narrative of Leslie Feinberg's Stone Butch Blues' (1995) 41 (3) MFS Modern Fiction Studies 483, 484.

of belonging and home.[285] It can be argued that they are central for most transgender people, both binary and nonbinary, and that they are the creation of a lived reality that corresponds to the inner perception of the self. The idea of queer theory - that highlights the fragmentation of self-narratives into diverse and dispersed performances whether constrained and constituted by larger structures - seems in tension with the appeal to narrative as a means of constructing an intelligible self-perception. Queer theory sees the fragmentation of the coherence of narratives as a practice that subverts narrative-based identities, which (however) often does not correspond to the needs and desires of transgender people seeking validation of their gendered self. According to Prosser, undermining the coherence of narratives of transgender people, even if those are ultimately fictional, undermines the intelligibility-conferring assumptions that transgender people make in order to experience their lives fully and as desired.[286]

One should look closer at the narrative basis of identity as Prosser suggests we do. Especially for transgender individuals, and in the context of asylum interviews, narratology plays a significant role for both stating experiences, describing the sense of self and its shaping and on the part of the asylum authorities for conceptualizing the applicant's story and assessing the claims they make. According to Prosser, transsexual narratives often involve not feeling at home in one's body and ultimately coming home to oneself.[287] Prosser speaks more about transsexual bodies and bodies that desire surgical intervention, but his argument can hold true for the whole journey of identifying as a gender that one was not assigned at birth having experienced body dysphoria or just social and identity dysphoria. In this light, bodily or social discomfort may constitute the deep reality that comes in contrast to the account that the body is gendered through the performative behaviour that constitutes the meaning of gender itself.

This thesis sides with the view that narratology is very important for transgender individuals in the conception, shaping and communicating of one's self. It must be taken into account especially in the context of assessing transgender status through narrative, as is the case in

[285] Idem 488.
[286] Idem 483.
[287] Idem 490.

the process of assessing trans individuals' asylum claims by asylum authorities. Queer theory's performativity, although very relevant as analysed above, fails to do justice to the importance of narratives and belonging that shape trans peoples' experiences.

In order to account for narratology in transgender phenomena, I will draw on the work of Lois McNay,[288] which in turn draws on Paul Ricoeur's conception of the narrative structure of the self. According to Lois McNay, the idea of the coherence of the self has implications for our conceptualizing of gender identity. The ways in which coherent notions of personhood are sustained puts at the forefront a substantive account of agency that emerges in these processes.[289] Agency plays a critical role in the negotiations and identity management that take place in the processes of gender structuring. Paul Ricoeur's conception of the narrative structure of the self suggests a more temporalized, creative, and active approach to agency than the post-structuralist paradigm of subjectification which involves in Butler's terms the function of power:

> Power acts on the subject in at least two ways: first, as what makes the subject possible, the condition of its possibility and its formative occasion, and second, as what is taken up and reiterated in the subject's 'own' acting.[290]

In their later work though, *Giving an Account of Oneself,* Judith Butler discusses the relationship between account-giving and societal norms. In her words,

> The very terms by which we give an account, by which we make ourselves intelligible to ourselves and to others, are not of our making. They are social in character, and they establish social norms, a domain of unfreedom and substitutability within which our 'singular' stories are told.[291]

Thus, Butler in this work emphasizes the paradoxical nature of giving an account of oneself. The singularity of the self cannot be expressed in any other way than through a narrative

[288] Lois McNay, 'Gender and Narrative Identity' (1999) 4 Journal of Political Ideologies 315.
[289] Idem.
[290] Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press 1997) 14.
[291] Judith Butler, *Giving an Account of Oneself* (Fordham University Press 2004) 21.

account that undermines that singularity and necessarily folds the account into the accounts of others, into categories, truths, as well as expectations and norms. To become recognizable as a subject, one must, to some extent, make oneself interchangeable.[292] The social nature of this account-giving also imparts a degree of obscurity to the self. Butler argues that if the self is socially constructed, it cannot be considered reflexively aware of everything that goes into its construction. This opacity is therefore intrinsic to the self, and the inability to provide a full account of the self is not so much an ethical problem as it is a prerequisite for the maintenance of ethical bonds.[293] The question then becomes if a subject can be held accountable if it is opaque to itself?

Agency then arises in the form of disidentification, and subjectivity is conceptualized as emerging from a dialectic of freedom and constraint. But according to McNay, 'it is the latter moment which is privileged within post-structural thought; subjectivity emerges from processes of exclusion, negativity and disavowal'.[294] This paradigm of subjectification is arguably exclusionary, and it provides a one-dimensional account of agency that deals with the individual's capabilities in the cases of conflict and difference only in terms of repression and disavowal. In opposition, the narrative structure of the self suggests that all forms of identification involve moments of distantiation, where reflexive understanding occurs even if not realized. This demarcates a substantive counter-argument to the rejection of categories and the politics of non-identity that is dominant in certain strands of feminist and post-structural theory. It also overcomes certain binary ways of thinking around identity, 'notably the dualism between essential versus constructed concepts of identity and that of authentic experience versus ideological distortion'.[295]

Post-structural thought, especially the work of Michel Foucault, has been of huge significance in feminist understanding of the construction of gender identity. Post-structural thought traditionally deconstructs unified and idealist notions of the subject and underlines the arbitrary nature of social meaning. The conceptualization of these issues from a post-

[292] Idem 37.
[293] Idem 20.
[294] Lois McNay, 'Gender and Narrative Identity' (1999) 4 Journal of Political Ideologies 315, 318.
[295] Idem 315.

structuralist perspective has had a significant impact on queer and feminist work's theorizing of sexuality and gender identity. According to McNay, however, there are dangers in the appropriation of post-structuralism from feminism, since post-structural accounts of gender identity lack a detailed theorization of subjectivity and agency, and downplay the question of coherence of the self against the dispersed and contradictory nature of subjectivity.[296]

The narrative dimension of identity thus becomes very relevant in reflecting about agency and accounts of self-coherence. Many scholars have argued that it plays a foundational role in the construction of social life. Barthes has argued that 'narrative is international, transhistorical, transcultural: it is simply there, like life itself'.[297] The implications of understanding social life in terms of constitutive narrative structures have been discussed in cultural, history and literary studies. Most importantly, the notion of narrative has been central in feminist critiques of objectivist accounts in subjectivation which are not only regarded as deterministic, but are considered to reproduce a masculinist account of the world. Finally, narrative is a highly relevant analytical tool when it comes to gender and sexuality, since these features are especially amenable to narration. For this reason, the reflection on narrative can contribute much to feminist and arguably trans studies.[298]

Narrative can be argued to have ontological status. It constitutes a privileged medium for individuals to express the inherent temporality of their experience. It represents the fundamental mode, by means of which the temporal being of subjects is experienced, shaped, and their selfhood expressed. Narrative identity can provide one with a tool to work through the oppositions between constructivism and essentialism which have prevailed in the theorization of identity.[299]

Narrative is neither false nor authentic. It does not constitute 'an illusory coherence imposed upon the heterogeneity of experience';[300] but it also does not imply authenticity, since

[296] Idem.
[297] Roland Barthes, 'Introduction to the structural analysis of narrative' in Susan Sontag (ed) *Barthes: Selected Writings* (Fontana 1982), 251-2.
[298] Lois McNay, 'Gender and Narrative Identity' (1999) 4 Journal of Political Ideologies 315, 318.
[299] Idem 319.
[300] Idem 325.

narration 'always effects a metaphorisation of the real'.[301] It is also very crucial to understand that both in order for a narrative to be meaningful and possess a certain level of social validity it must draw to certain extent on 'culturally dominant discourses of truth telling'.[302] This is especially relevant for trans asylum seekers since their narratives may correspond to other cultural contexts than the ones where their asylum claims are assessed. In light of the above, one must not deny the role of ideological narratives in the construction and reproduction of social hierarchies and power structures. On the other hand, the relation between narrative self-perception and meta-narratives of gender is highly complicated, fluctuating and by no means unilateral. That challenges the dualisms of exclusion/inclusion and subjection/resistance that run through Butler's work. Butler's model of domination is static in that it does not encompass temporality. Furthermore, it excludes a substantive account of agency that could work towards a constructive notion of decomposition from within. In short, it relates subject formation to disavowal and subjection.[303]

It is true that this negative logic in the accounts of subject formation does not pre-empt a conceptualization of agency per se, but they do not provide a thorough understanding of the mechanisms of autonomous action beyond the logic of displacement and resistance. In McNay's words, '(a)gency is imputed to the individual almost by default; she is able to act autonomously by virtue of her contradictory social location'.[304] Subjects, which are never situated in a single axis of subjectification, experience cross-cutting identifications which produce different replications of dominant norms. While this theory of contradictory social location provides the conditions for the emergence of agency, it remains a highly structural explanation which does not provide space for a substantive account of the distinct and unique capabilities of a subject when faced with social contradiction. On this account, agency is still perceived in mainly negative terms such as disidentification, resistance and the subversion of dominant norms. Narrative, on the other hand, provides us with a tool to conceive the

[301] Idem 325.
[302] Idem 327.
[303] Idem 328.
[304] Idem 329.

innovative, autonomous, and productive capacity of the subject to reflect, narrate, and act. In McNay's words:

> Accounts of the subject formed in domination provide little explanation of the capabilities of the subject beyond the paradigm of identification-disidentification; the ability to respond to difference openly, to creatively respond to contradiction and so forth may be implied, but are not explicitly theorised.[305]

By focusing on the irreconcilable aspects of temporal experience, narratives provide a conceptual lens in order to explore the breakdown of established gender relations upon the self and its hermeneutic dimensions. Narrative regards experience as not exclusively linear, additive, or iterative in a way that change is experienced in a negotiated and uneven way, neither as a rupture nor as a nuanced progression. In that way, life becomes the biographical solution of systemic contradiction, as Beck's notion of 'biographies in transition' suggests.[306]

This thesis will be based on a transgender studies' theoretical viewpoint, which has long been attentive to the process of narratology, namely 'the project of locating narrative structures that will adequately allow for the existence of trans* bodies and becomings'.[307] These concerns draw heavily on the political and epistemic needs of transgender people, whose experiences have only recently been brought forward as experiences that matter. In transgender scholar Bettcher's words:

> For the longest time, I thought I needed a story that secured my claims to womanhood and that illuminated my (often confusing) life experiences. How else to justify my claims? How else to understand my experiences? [308]

[305] Idem 329.
[306] Idem 333.
[307] Cáel M Keegan, 'Getting Disciplined: What's Trans* About Queer Studies Now?' (2018) Journal of Homosexuality 1, 4.
[308] Talia Bettcher, 'Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance' (2014) 39 (2) Signs Journal of Women in Culture and Society 383, 384.

According to Keegan, one can approach transgender studies as one such story, namely 'a story that seeks to illuminate the experiences of transgender people and give an account of our claims to sex and gender, without which we cannot fully appear as other than a problem in someone else's narrative'.[309] This thesis will attempt to contribute to trans theorizing from this viewpoint.

3.3. Trans and the law

In her anti-essentialist critique of feminist theory, Angela Harris argues that an important contribution of black women to feminism is 'the recognition of a self that is multiplicitous, not unitary' as well as 'the recognition that differences are always relational rather than inherent'.[310] This can constitute a valuable basis for the formulation and acknowledgement of gender identity as non-deterministic and gender nonconformity as a socially contextualized experience, that is still in need of recognition. Along the same lines, Franke argues that the law needs to accommodate the experiences of persons that lie beyond the hegemonic ideas of sex and gender.[311] Although she challenges the legal persistence on biological sex given that 'every sexual biological fact is meaningful only within a gendered frame of reference',[312] Franke suggests that one should acknowledge the gender conformity imperatives that are founded on basis of biological sex through a gendered lens leading to discrimination against nonconforming individuals because of sex.[313] Sex and gender as socially mediated constructs challenge the idea of sex as natural and fixed and gender as plainly cultural and constructed and redefine sexual agency beyond biological and constructionist determinism.[314] The insight provided from such a perspective becomes an even stronger imperative in the context of transgender related jurisprudence, since, as Shultz

[309] Cáel M Keegan, 'Getting Disciplined: What's Trans* About Queer Studies Now?' (2018) Journal of Homosexuality 1, 4.
[310] Angela P. Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 (3) Stanford Law Review 581, 608.
[311] Katherine Franke 'The Central Mistake of Antidiscrimination Law: The Disaggregation of Sex from Gender' (1995) 144 (1) University of Pennsylvania Law Review 1, 1, 8.
[312] Idem 98.
[313] Idem 4.
[314] Idem 8.

argues,[315] courts are not mere factfinders on issues of sex and gender; instead, they have the capacity to reinforce normatively accepted ideas that have led to the disenfranchisement and oppression of various experiences by presenting as 'foundational fact that which is really an effect of gender ideology'.[316]

In the modern world, one can argue that the regulatory system of sex classification has reached a point of crisis given the growing divergence between legal sex designation and individual gender identification. There has been a growing number of people who identify as a gender other than the one they were assigned at birth and seek for this gender to be validated. Furthermore, the increasing number of individuals whose gender expression does not comply with the normative stereotypes attached to the gender assigned at birth is posing a serious challenge to the legal and social institutions of sex/gender classification. The former two categories refer to people who either chose to undergo gender affirming medical intervention or people who chose not to medically transition, but present themselves in gender nonconforming ways. Contrary to that, in the traditional gender classification system, sex birth classification is assumed to guarantee and predict a stable gender identity conforming to the stereotypes of what a man or a woman is, according to binary biological features. In this light, 'the series of cultural constructions and normative assumptions that so tightly link birth sex to gender identity and expression continue to remain largely masked, shrouded by naturalized discourses of the body and its truths'.[317]

On the other hand, the evolving number of different legal constructions of sex, and the contradiction they internally present, sheds light on the fundamental impossibility of articulating gender as consisted by roles, identities, characteristics, and expressions in terms of biological sex. At first, it can be argued that the legal constructions of sex are in conflict inter se. It can be also said, according to Currah, that these inconsistencies advance the purpose of the advocates of transgender rights, since if there is no universal, objective, or

[315] Vicky Schultz, 'Women 'Before' the Law: Judicial Stories About Women, Work, and Sex Segregation on the Job' in Judith Butler and Joan W. Scott (eds.) *Feminists Theorize the Political* (Routledge 1992).
[316] Katherine Franke 'The Central Mistake of Antidiscrimination Law: The Disaggregation of Sex from Gender' (1995) 144 (1) University of Pennsylvania Law Review 1, 2.
[317] Paisley Currah 'The Transgender Rights Imaginary' in Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero (eds) *Feminist and Queer Legal Theory* (Ashgate, 2009) 246-247.

uniform way to define sex, sex identification should be left to individuals.[318] Nonetheless, according to the same author, it is a mistake also to think of these incongruities as a problem for the state or for common sense, since 'state policies can accommodate any number of logical contradictions'.[319]

Currah suggests that 'gender pluralism' is the way to go forward in the 'transgender rights imaginary'.[320] For practical political reasons, transgender rights advocates have a broad approach to gender pluralism, since they seek to accommodate the rights of many groups under the 'trans' umbrella term, namely cross-dressers, gender queers, trans men and women, non-operative transgender people and nonbinary people. It is very important to work towards a robust notion of gender pluralism that 'includes as many ways of embodying gendered subjectivities as possible' independently of what we think gender is or should be and how it ought to be related to the body.[321]

On the other hand, Dean Spade argues that we must approach law reform tactically, suggesting that meaningful transformation does not occur through various government institutions pronouncing equality. He sees law from a radically critical viewpoint arguing for the mass mobilization of populations directly impacted by the institutions that distribute vulnerability and security. He too argues that law reform strategies can be relevant in mobilization-focused strategies, but the latter ones cannot and should not constitute the sole purpose of trans politics. In seeking transformation that is more than symbolic, one must go beyond the 'politics of recognition and inclusion' in order to face the most harmful manifestations of transphobia.[322]

Spade, however, moves further to argue that antidiscrimination and hate crime law strategies rely on the belief that if we reform the law on people's rights and obligations, trans people's lives will improve. According to Spade, this approach, which is based on the individual

[318] Idem 250.
[319] Idem 250.
[320] Idem 255.
[321] Idem 255.
[322] Dean Spade, *Normal life: administrative violence, critical trans politics, and the limits of law* (South End Press 2011) 8.

rights framework, emphasizes the harm that certain individuals suffer as members of a group from other individuals motivated by bias against that group.[323] For Spade, this analysis misreads how power functions and can lead to law reform approaches that actually expand the reach of harmful systems. According to Spade, in order to understand transphobic harm, one must move beyond this framing of discrimination to think how gender categories imposed on all people have particularly violent outcomes for trans people. This can be achieved by examining how regulatory norms create structural inequality and insecurity and maldistributed life chances across populations. This approach, according to Spade, leads to the acknowledgment that even if transgender people are officially protected by the law, the group will still experience disproportionate harm in terms of poverty, access to health care, education and housing, criminalization and immigration enforcement. Spade argues that even if non-discrimination is achieved, legal systems operate in ways that that disadvantage large portions of the population, and that is not due to individual bias, which non-discrimination and hate crime laws address.[324] On the other hand, this thesis sees law as an evolving system, a site of democratic contestation, which can accommodate complicated demands for justice according to the societal needs that arise. This is particularly the case with trans asylum claimants who can collectively constitute a particular social group in the terms of refugee law and are in need of protection in the country of reception. Since these individuals seek international protection on the basis of their gender identity or expression, this thesis takes a pragmatic approach to their articulated needs and does not explore further the legal system as a site of cultural production or a social superstructure.

Similarly, however, Spade argues for a focus on trans-related law reform that most directly impacts the survival of trans people as a part of a broader trans resistance strategy that is not limited to demands for formal legal equality or recognition. He exposes the limits of formal legal equality, explores the conditions facing trans communities, and reflects on whether legal recognition and inclusion are suitable goals for trans politics. Opposing the view this thesis takes, Spade suggests ‘that such goals undermine the disruptive potential of trans resistance and also threaten to divide potential alliances among trans people, such as cross-

[323] Idem.
[324] Idem 9.

race, cross-class, and cross-ability alliances, as they have in lesbian and gay politics'.[325] Like critical legal scholars before him, Spade argues that '(l)egal equality goals threaten to provide nothing more than adjustments to the window-dressing of neoliberal violence that ultimately disserve and further marginalize the most vulnerable trans populations'.[326] Spade instead proposes 'a politics based upon the so-called impossible worldview of trans political existence',[327] which this thesis does not negate as a driving force. Instead, it is seen as long-term systemic goal that does not come into conflict with the short-term goal of institutionalizing formal protection for those persecuted due to their gender identity/expression and their pressing needs which they can only currently address to the state.

Similar to Spade, Sharpe argues that transgender bodies of law are crucial sites for the production and non-production of gendered, sexual, and sexed identities. [328] Law, according to Sharpe, aims to reproduce - when encountering transgendered bodies across different legal cultures - 'medico-legal binary understandings of sex, gender and sexuality as well as a particular interrelationship of that constellation'.[329] As noted above, however, this thesis views law as an evolving structure reflecting social contestations. It advocates for a critical view of law that does not downplay the power of law to encompass the needs of those whom it has formerly marginalized. Such an inclusive view of law does not disregard its productive capacity. Instead, it strategically incorporates it into its tools for everyday survival and justice in a context that is particularly disadvantaging for some people, who should not bear the burden of systemic liberation.

In response to the challenge to the idea of sex as naturally immutable that transgender bodies pose to the law, Sharpe argues that:

> law, in a number of different contexts, deploys pre/post-operative, transgender/crossdresser, transgender/homosexual, natural/unnatural, sexual/non-

[325] Idem 12.
[326] Idem 12.
[327] Idem 12.
[328] A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish Pub 2002).
[329] Idem 5.

> sexual and sexually functional/dysfunctional dyads as regulatory strategies around bodies.[330]

Traditional legal scholarship has failed to examine these attempts to defuse the transgender challenge and has consequently ignored the possible wider interrelationships and intersections of transgender jurisprudence. According to Sharpe, '(t)his has served to conceal the ways in which medico-legal discourse has deployed transgender people in furtherance of much wider regulatory strategies around sexual practice and gender performance'.[331]

While not ignoring that transgender jurisprudence is a field in the wider sexual political arena, Currah's argument, with which this thesis sides, is that it is wrong to assume that defending gender as a legal category and disestablishing it need to be characterised by conflict. The reason is that one can advocate for the accommodation of many conflicting narratives of transgender identity in the social arena and in the law, without trying to make sense of all the different accounts of sex and gender that present in subjective individual narratives, as well as the relationship between them. The development of one grand theory to unify the latter ones would be contrary to celebrating the creative incoherencies between them while pursuing rights claims based on several constructions of gender definition. The incoherencies in gender definition shows that the concept of gender is already being expanded.

According to Currah:

> it may well be that the best strategy is the one that is already occurring in the hurly burly of political contestations over the legal meaning of sex: the assertion of multiple narratives of gender nonconforming identities and practices in multiple legal venues (or even in the same venue) on behalf of many different kinds of gender different people, people who inhabit their gender as differently.[332]

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[330] Idem 4.
[331] Idem 4.
[332] Paisley Currah 'The Transgender Rights Imaginary' in Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero (eds) *Feminist and Queer Legal Theory* (Ashgate, 2009) 256.

In a pragmatic approach, whatever the truth of sex and gender, the legal concepts and meanings that the regulatory regime attaches to them, as for example in marriage laws, single sex bathrooms and gender recognition bills, have very material consequences for transgender individuals. It can be argued of course that we experience ourselves as gendered in some way (or also non-gendered) subjects and we take pleasure and validation in that identification. People often organize themselves around the notion of their gendered identity, as well as their social interaction. The confirmation of their gender identity is something that matters to them, whether they are cis-gender or transgender, whether they present as gender nonconforming or if they meet the expectations that social gender norms prescribe. The difference is that many transgender people are refused acknowledgement as the gender they are by the state and hegemonic ideological apparatuses. These apparatuses are also racialized and classed, adding to the scrutiny to which trans people of colour or asylum seekers are subjected.

Currah draws on the work of Crenshaw to argue that:

> it is important to make a distinction between the larger imaginary that I hope would animate the transgender rights movement as a whole and the needs of individual transgender clients to have the state agencies correctly recognize their gender, and to have judges recognize that discrimination against transgender people is a kind of sex discrimination.[333]

Currah suggests that defending gender as a legal category and disestablishing it is indeed not a zero-sum game. Transgender individuals should not abandon rights claims to be acknowledged, respected and protected by the state in favour of the long-term goal of sex/gender abolitionism.[334] Currah suggests that transgender rights advocates have a lot to learn from critical race theorists that have reflected on the positive and negative consequences of the racial classification system.[335] These debates were analogous to some that are circulating among transgender rights activists, for example if the racial classification

[333] Idem 252-253.
[334] Idem 252-253.
[335] Idem 250.

system could be used to advance the rights of those denied equality because of their race or whether they should focus on dismantling the system of race classification that enabled segregation in the first place. Similarly, trans advocates reflect on whether dismantling the sex/gender system, or basing rights claims on it, is the best strategy going forward. Critical race theory arose as a response to two distinct trends in legal studies: firstly, the traditional civil rights framework and secondly, the more radical critique of the productive capacity of law in critical legal studies. Critical race theorists, such as Crenshaw, regarded the traditional civil rights model as inadequate to transform race relations.[336]

On the other hand, critical race theory also took issue with the critique that liberal reform efforts to modify the system just represented hegemony reasserting itself. According to Fitzpatrick and Hunt, for example, legal institutions reinforce a pervasive system of inegalitarian and oppressive relations since they only allow reforms that do not radically challenge the power structures that are embedded within them.[337] Critical legal studies exposed as fundamentally flawed the idea that 'the legal institutions employ a rational, apolitical, and neutral discourse'.[338] As is happening now with many queer theorists, critical studies scholars argued that 'even ending blatant discrimination still leaves intact underlying legal categories and classical liberal precepts, such as race, property, autonomy, and contract, which still perpetuate hegemonic power structures'.[339] Critical studies and queer scholars are heavily influenced by critiques of the classical liberal subject and rights-based claims framed around identity. Critical race theorists did side with much of that critique, but on the other hand were not willing to abandon racial categories, also considering the problematic of the colour-blindness of law and the need for affirmative action. They chose instead to contribute to traditional rights discourse. Critical race theory then, emerges as a mediating force between the rights model and critical legal studies. It attempts to view law critically and expose categories as a means of reproducing social hierarchies, while focusing on how it can

[336] Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, *Critical Race Theory: The Key Writings That Formed the Movement* (The New York Press 1995).
[337] Peter Fitzpatrick and Alan Hunt, 'Introduction' (1987) 14 (1) Journal of Law and Society 1, 1-3.
[338] West Cornel, Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, *Critical Race Theory: The Key Writings That Formed the Movement* (The New York Press 1995) xvii.
[339] Paisley Currah 'The Transgender Rights Imaginary' in Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero (eds) *Feminist and Queer Legal Theory* (Ashgate, 2009) 251.

instrumentalize legal categories in order to advocate for rights for those who are marginalized.[340] This thesis takes a similar approach in examining transgender asylum claims in that it sees this identity category as a means to empower transgender individuals and make their voice heard in the process of international protection assessment by decolonizing what transgender means for the law and encompassing marginalized transgender and gender nonconforming experiences.

The larger project to which Currah subscribes is:

> a radical revision of the politics of identity, of rights talk, and of the rights claims of sexual minorities in order to develop an account of them that reinscribes neither the 'identity fundamentalisms' so prevalent among the new social movements, including the U.S. gay and lesbian rights movement, nor the deconstructive 'identity iconoclasms' so rampant in the academy and in queer theory in particular.[341]

Currah underlines that, rightly so, queer theorists have highlighted that identity-based political claims do not challenge categories of homosexuality and heterosexuality upon which subjection is based. Lisa Bower, for example, claims that the 'politics of official recognition' are an attempt to 'fit the 'queer other' within some space already acknowledged by the liberal nation-state'.[342] In opposition to assimilationist politics of gay and lesbian movements, queer theories have aimed to expose the constructedness, contingency and fluidity of identities and argue for the destabilization of categories as an effective political practice. Together with the call for abandonment of identity-based politics has come the dismissal of the state as 'the site of privileged political action' and the replacement of such action by 'cultural contestations'.[343] Currah's viewpoint, however, mediates both identity iconoclasm versus identity fundamentalism and state-centred political intervention versus

[340] Idem 251.
[341] Paisley Currah, 'Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities' (1997) 48 (6) Hastings Law Journal 1363, 1363-1364.
[342] Lisa Bower, Queer Problems/Straight Solutions: The Limits of a Politics of 'Official Recognition' in Shane Phelan (ed) *Playing with Fire: Queer Politics, Queer Theories* (Routledge 1997), 268-269.
[343] Paisley Currah, 'Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities' (1997) 48 (6) Hastings Law Journal 1363, 1365.

cultural interventions. It does so, because, as he explains, these oppositions have 'sometimes had the unfortunate effect of eliding the very material violence that people suffer from the discursive construction of the identity categories that many queer theorists are so eager to dismantle'.[344]

According to Currah:

> (t)he contingency of identity does not make it less 'real' to the subjects who experience it and who organize their lives around it, whether those subjects' identifications are male, female, masculine, feminine, lesbian, gay, bisexual, transsexual, transgendered, and/or non-transgendered.[345]

Currah stresses the need for political action addressed towards the state. He argues that identity-based political claims should not be abandoned before the system of sex/gender as regulated by the state is being dismissed. Indeed, he argues that these aims, freeing queer and transgender identities from official classification that reproduces hierarchies and freeing them from state-sponsored violence and discrimination based on legal provisions can be articulated together. It is the view of this thesis that they must be articulated together since sexual minorities, being groups that are severely disadvantaged in the social sphere, indeed have to enjoy special protection by the law. A polymorphous simultaneous legal project would be to combine the latter with the struggle to deconstruct and delegitimize the capacity of law to reproduce social hierarchies and shape or center dominant gender ideology labels, as queer theorists argue.[346]

According to Currah, transgender subjectivities are indeed belittled by queer theorists, since they consider 'their rights claims as interesting only insofar as their subjectivity works to deconstruct categories'.[347] Instead, they must be viewed as 'identity-bearing subjects like 'everyone else' who (also like 'everyone else') might wish to enjoy freedom from state-

[344] Idem 1365.
[345] Idem 1366.
[346] Idem 1366.
[347] Idem 1367.

sponsored violence and discrimination'.[348] In view of the above, the short-term goal of rights advocates, according to Currah, should be the fight for legislation, legal interpretation and practice that protects all sexual minorities including trans and gender nonconforming individuals from discrimination.

Indicative of the evolving nature of law as a site of contestation is the fact that, as Whittle acknowledges, the identity politics of transgender people are indeed changing from wanting to be recognized as men and women to wanting additionally their 'trans status' to be validated, acknowledged, and protected. This status 'goes beyond the dichotomous structures of sex and gender roles recognised within and by the law',[349] and leads to a powerful expansion of the conceptualization of gender and gender identity, together with the gradual recognition of nonbinary and intersex identities. In the next Chapter, I am going to turn to the developments on gender identity and expression in the legal and institutional sphere, which show exactly how the legal regime is trying to respond to the pressure and the need for an expanding and evolving conceptualization of gender, gender identity and gender expression in different contexts.

4. Concluding remarks

In this chapter, I have tried to delve into the theoretical underpinning of queer theory, which has contributed greatly to the way cisheteronormativity has been delegitimized and dominant gender ideology deconstructed by gender theory scholars. I have provided an overview of the critique that has been addressed to queer theory, turning to Transgender Studies, in order to find a more validating framework for gender norms that are foundational for certain marginalized identities and experiences, as well as a non-hierarchical reconstruction of the myriad configurations of sex/gender/expression as worthy of acknowledgment and institutional protection. I have underlined the significance of intersectionality in engaging with transgender and gender nonconforming asylum not in a monothematic but in a

[348] Idem 1368.
[349] Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* (Cavendish Pub 2002) 189.

multidimensional way, as well as the central role of narratology for Transgender Studies and gender diverse experiences, that can be very important also in the context of refugee status determination. I have drawn on the work of Currah and Crenshaw, in order to support my view of the law as multiply contested terrain, both in a reformist way, in order for it to become as inclusive and accommodating as possible to marginalized groups and individuals but also in a delegitimizing way, in terms of deconstructing the productive power of law, that reproduces social inequalities and hierarchies.

In the next chapter, I turn to the specific issue of transgender and gender nonconforming asylum claims, and I review the scholarly debate regarding particular social group and persecution as prerequisite to be granted refugeehood. In this endeavour, I use the theoretical toolkit from Transgender Studies, intersectionality and narratology as it has been outlined in this chapter.

Chapter III: The case of transgender asylum seekers[350]

According to the Yogyakarta Principle 23, part of a human rights instrument set out in 2007 by human rights experts, States shall

> ensure that a well-founded fear of persecution on the basis of sexual orientation, gender identity, gender expression or sex characteristics is accepted as a ground for the recognition of refugee status, including where sexual orientation, gender identity, gender expression or sex characteristics are criminalised and such laws, directly or indirectly, create or contribute to an oppressive environment of intolerance and a climate of discrimination and violence.[351]

Though this formulation is quite explicit, several issues arise in the adjudication of asylum claims based on gender identity and gender expression. These relate mainly to the fulfilmentof the refugee definition, according to Article 1(A) of the 1951 Refugee Convention,[350] namely elements of the definition relating to the membership in a Particular Social Group, which has been the main ground where LGBTQ+ claims fall (henceforth 'PSG'), and the well-founded fear of persecution, as well as in relation to the credibility assessment of the applicant and regarding LGBTQ+ status as a ground for asylum. For reference, all elements of the refugee definition must be fulfilled in order for someone (due also to their status as transgender or gender nonconforming) to be declared as a refugee. According to the Refugee Convention Article 1(A), which is the core piece of international law that States refer to for Refugee Status Determination, a refugee is a person who:

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[350] Part of this chapter has been published by the author in the journal articles cited as Mariza Avgeri, 'Trans*it: Narratives of trans and nonbinary asylum applicants in the broader West' (2021) Here Vs There Sexualities Special Issue (April 2021) <https://doi.org/10.1177/13634607211013278> accessed 20 April 2023 and Mariza Avgeri, 'Assessing trans and gender nonconforming asylum claims: Towards a Transgender Studies Framework in Particular Social Group and Persecution' (2021) Refugees and Conflict in Frontiers in Human Dynamics Special Issue (April 2021) <https://doi.org/10.3389/fhumd.2021.653583> accessed 20 April 2023.

[351] International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007).

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[352]

In the first part of this chapter, I present a literature review on the issue of membership in a PSG of transgender and gender nonconforming applicants, providing a roadmap based on gender nonconformity and narratives of gender identification and gender expression as a means to include this group of applicants in the Convention grounds. In the second part, I look at the well-founded fear of persecution criterion in order to identify the core challenges presented there for transgender and gender nonconforming individuals, inferring good practices for the Refugee Status Determination (henceforth 'RSD') procedure mainly from jurisprudence on sexuality claims. In the third part, I problematize credibility assessment for transgender and gender nonconforming applicants, focusing on widespread problematic practices in western states. In the fourth part, I reflect on issues of colonization of gender identity in refugee law in the current western framework. Finally, I conclude making remarks on how to make good law with transgender cases making a critical commentary on the work of Hathaway and Pobjoy[353] on queer cases and laying down my research questions for the following part of the thesis.

[352] Idem.
[353] James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York Journal of International Law and Politics 315.

1. Criteria of inclusion in 'a particular social group' (henceforth 'PSG')

According to Article 1(A) of the 1951 Refugee Convention, a refugee is:

> any person who…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country…[354]

Thus, when refugee status determination bodies come across Sexual Orientation and Gender Identity (henceforth 'SOGI') asylum applicants, they try to determine whether they belong to a particular social group, and because of that reason have a well-founded fear of being persecuted in their country-of-origin.

UNHCR defines 'a particular social group' for this purpose as a: group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.[355] The characteristic according to the first test, the 'protected characteristics' test, will often be one which is innate, unchangeable, or which is otherwise fundamental to a person's identity, conscience or the exercise of one's human rights. According to the jurisprudence, such characteristics include gender identity and sexual orientation as well, mainly under the notion of innate and unchangeable characteristics.[356] On the other hand, there are several issues that arise in the identification of transgender, gay and bisexual individuals as belonging to a particular social group.

The 'protected characteristics' test, when it comes to the sexual minority refugee, has indeed some negative aspects, which relate for example to issues for applicants who are uncertain

[354] Convention Relating to the Status of Refugees (28 July 1951) 189 *Treaty Series* 137, art 1(A).
[355] UNHCR (UN High Commissioner for Refugees), *Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (7 May 2002, HCR/GIP/02/02) <https://www.refworld.org/docid/3d36f23f4.html.> accessed 25 July 2020.
[356] UNHCR (UN High Commissioner for Refugees), *Guidelines on International Protection No 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (23 October 2012) <http://www.unhcr.org/509136ca9.pdf.> accessed 25 July 2020.

of their sexuality and gender identity. These applicants have difficulty in proving that their gender identity is fundamental to their identity; this is the reason why identity-based questions exclude these kinds of applicants alongside those who cannot establish a link between their gender expression and identitarian frameworks (gender nonconforming applicants). There are also applicants who experience their gender identity and/or expression as a choice and thus cannot present it as a characteristic which is innate and unchangeable. Furthermore, given that sexuality and gender identity/expression can be fluid and not easily categorised, there could be a problem for some applicants to establish it as a protected characteristic. On the other hand, given the foregoing, one could move to the formulation of the protected characteristics including gender identity or expression as *a priori* fundamental to the exercise of human rights, since they are fundamental traits of personhood and conscience, such as religion and political opinion, instead of trying to prove every time in the RSD procedure how innate and unchangeable they are in terms of identity. As researchers from the University of Sussex report, Angel, an asylum seeker from Zimbabwe, was not believed to be lesbian by a case worker at the UK, since she only had one homosexual relationship, which was considered to be in a phase of adolescence or confusion.[357] This makes clear that it is necessary that the immutability of sexual orientation and gender identity should not burden the applicant with stereotypical notions of what a credible LGBTQ+ person is. A transgender applicant should not have to prove that their gender identity is innate, just that they experience it with a social impact. It seems that immutability is a substitute for medicalized notions of sexual orientation and gender identity, that prescribe how one should experience their sexuality or gender in order for it to be real.

It is obvious that some applicants will make clear identitarian claims which have to be assessed as valid. For other applicants it will be a matter of expression of their conscience, convictions or personhood. For some it may be just the will to live freely, and one has to see whether that corresponds to a valid claim for the exercise of fundamental human rights. Gender identification and expression have been acknowledged as basic human rights through the Yogyakarta principles and in various jurisdictions, and it is doubtful whether one needs

[357] Anna Ford, 'Radical overhaul required of system for asylum claims on grounds of sexual orientation and gender identity' (University of Sussex, 2020) <https://www.sussex.ac.uk/news/all?id=52387> accessed 25 July 2022.

to prove ad hoc that their gender identity/expression is fundamental for them in order for it to be protected. It would be preferable if, as in the case of religious freedom and political opinion, they would be considered basic human rights, whose prohibition of enjoyment constitutes a human rights violation that can lead to persecution.

The optimistic aspect of the protected characteristics test may be the ability to define a group negatively. For example, one may say that a group of people does not conform to the heteronormative standards of society and that lack of conformity is fundamental for them in terms of identity, conscience, and the exercise of human rights. It may also be the case that, since refugee status determination asks for the examination of the risk of persecution, one is really on the right side in identifying a group based on its lack of exhibiting certain traits, a fact which potentially has a clear social impact. It is my view that it is the factual background of the social impact that needs to be examined, based on the individual's social location according to their exhibited characteristics, and not the level of fundamentality of these characteristics for one's identity. The latter is something that needs to be analytically and legally clear from the start for the authorities, regardless of how the individual experiences it. Credibility tests then can be based on a variety of experiences and can focus mainly on the social location of the individual, and not their experience of gender identity/expression.

As far as the 'social perception' test goes, 'a group must share a common, uniting, characteristic that sets them apart in the society'.[358] In cases involving sexual minority refugees, there are also issues arising mainly related to the invisibility of a group or individual and the fact that an applicant can have a socially obscure gender identity or expression. In order to qualify as a particular social group with the social perception test, the individuals of this group must be perceived as a group by the society. On the other hand, there is the possibility to define an individual as a member of a particular social group based on the perception that is imputed to them, in this case the perception that they are a member of that group, even if they actually are not.[359] So, for example, if gender nonconformity

[358] UN High Commissioner for Refugees (UNHCR), Membership of a Particular Social Group: Analysis and Proposed Conclusions (Draft) [Global Consultations on International Protection/Second Track], 1 August 2001, 11 <https://www.refworld.org/docid/3bf92b584.html> accessed 26 April 2023.
[359] UNHCR (UN High Commissioner for Refugees), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967*

cannot be established by reason of an identitarian claim, it can be so that the authorities examine whether their nonconformity makes them be perceived as a member of an identifiable group (for example lesbian, gay, transgender) that is imputed to them by reason of certain behaviours or certain presentation. Social perception of a group is also closely linked to its persecution, but the reason for the identification of a particular social group has to be different from its persecution.[360] On the other hand, the examination of the social perception of a group can help us establish the link between the persecution and the particular social group requirement. If an applicant is perceived as belonging to a socially identifiable group that is excluded and persecuted, then the definition of the refugee is fulfilled.

It is undeniable though that, as Berg and Millbank have noted after their study of relevant decisions by administrative tribunals in Australia, New Zealand, Canada, the United Kingdom and the United States, Refugee State Determination bodies' jurisprudence in the area of transgender asylum claims remains fundamentally incoherent.[361] This condition calls for the re-evaluation of the legal framework that is applied by RSD bodies and throughout the decision-making process on gender identity related claims. In light of this, Berg and Millbank argue for an RSD framework that seriously takes into account both gender nonconformity in a particular social context and the applicants' own sense of gender identification.[362] Indeed, this is a valid and positive direction, since it allows for the conceptualization of transgender persecution and warns against the erasure of transgender identity.[363] Adding to this, a reconceptualization of the RSD framework on these issues could work towards ensuring the conditions that allow the acknowledgment of different forms of experiencing transgender identity in its various forms of experience and addressing transgender persecution in terms that safeguard both the protection of the applicant's human

Protocol Relating to the Status of Refugees (April 2019, HCR/1P/4/ENG/REV. 4) 87 <https://www.refworld.org/docid/5cb474b27.html.> accessed 25 July 2020.

[360] UNHCR (UN High Commissioner for Refugees), *Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (7 May 2002, HCR/GIP/02/02) 4 <https://www.refworld.org/docid/3d36f23f4.html.> accessed 25 July 2020.

[361] Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group' in Thomas Spijkerboer *Fleeing* (UTS: Legal Studies Research Paper Series No. 2013/1, 2013) <http://ssrn.com/abstract=2312887> accessed 25 July 2020.

[362] Idem 1-2.

[363] Idem 30.

rights and the human rights' dimension of international protection. As Millbank notes, 'the wider the gulf between the experiences of the applicant on the one hand and the knowledge base and cultural frame of the decision-maker on the other, the greater the likelihood that credibility assessment may be problematic'.[364]

This is particularly true in gender identity asylum claims. Social stereotyping is widely used for inferences of credibility, and identities are often categorized in medical, psychiatric or psychological terms, although they are primarily a matter of gender identification.[365] The fixed categories that are most often assumed in Refugee Status Determination in essence negate the fluidity, personal configuration and social connotations of gender identity. Instead, they impose other applicant criteria that may not be relevant to the impact of gender nonconformity and fear of persecution as they experience it.[366] As LaViolette neatly points out, it is very dangerous to make assumptions about or universalise the lives of particular members of a sexual minority, especially given the diversity of the global environment.[367]

One also needs to think about gender expression when it is not really linked with identitarian claims. Gender nonconforming applicants will possibly identify as such due to their social location but may not make clear identity claims. For example, applicants, whether they identify as transgender, gay, bisexual or straight may be persecuted because they look too feminine or masculine according to gender norms that derive from their perceived sex characteristics[368] without self-identifying as LGBT+. One needs to scrutinize whether gender expression as the expression of one's conscience and personality is an exercise of fundamental human rights, whether these persons have the right to look and express themselves as feminine or masculine as they want, to what extent the need to renounce these

[364]Jenni Millbank, 'The ring of truth': A case study of credibility assessment in particular social group refugee determinations' (2009b) 22 (1) International Journal of Refugees 1, 32.
[365] Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (COC Nederland/Vrije Universiteit Amsterdam, September 2011).
[366] Thomas Spijkerboer, 'Sexual Identity, Normativity and Asylum' in Thomas Spijkerboer (ed), *Fleeing homophobia: Sexual orientation, gender identity and asylum* (Routledge 2013).
[367] Nicole LaViolette, 'Overcoming problems with sexual minority refugee claims: Is LGBTQ competency training the solution?' in Thomas Spijkerboer (ed), *Fleeing homophobia: Sexual orientation, gender identity and asylum* (Routledge 2013).
[368] CTDC (Centre for Transnational Development and Collaboration), *Conceptualising Sexualities in the MENA Region: Undoing LGBTQI Categories Implications for Rights Based Advocacy Approaches* (2017) 12.

characteristics is inhuman and degrading treatment, and whether they constitute *a priori* core rights of personhood. In addition, certain characteristics may be imputed and lead to persecution: for example, a gender nonconforming applicant (for instance a cross-dresser) can be perceived as gay although they do not identify as such.[369] One needs to decide whether they are protected as belonging to a group whose sexuality is imputed, or a group that is gender nonconforming or both. There must be ways to protect these individuals from persecution even if they are not imputed a clear sexual orientation but are just persecuted due to gender nonconformity (for example the cross-dresser may not perceived as clearly gay, but as an effeminate person that unacceptably defies gender norms), and that is the reason why the RSD framework on LGBT+ persons will not be complete without the addition of gender expression.

In my view, questions in the asylum interview should take into account the narratives of gender identification and/or gender expression of the applicants, and the configuration of their personality according to their narrated practices and experiences, and not be exclusively identity-based. For example, a nonbinary male-presenting person that was assigned female at birth may not make clear identity claims as a transgender person, or may not be or may just have partially socially transitioned. This person will have gone through identification processes but still experiences their identity as not easily categorizable. That is the reason why I propose that the assessment of a person as transgender or gender nonconforming should not require an identity claim, but rather credible narratives of gender identification, expression, and nonconformity. The gender identification process does not require a fixed identity, but rather relates to the process of self-reflection and perception that can be fluid and continuous. There is the risk also that strictly identity-based questions will deeply reflect westernized notions of gender identity and expression. In light of the above, I propose a framework that is centred around gender nonconformity and the narratives of the applicants around it, whether they are identification- or practice-based.

[369] See Gail Mason, *The Spectacle of Violence* (Routledge 2002); Leslie J. Moran and Andrew. N. Sharpe, 'Violence, identity and policing: The case of violence against transgender people' (2004) 4 (4) Criminal Justice: International Journal of Policy and Practice 395, 403.

As Millbank and Berg suggested in their article of 2013, transgender identity was often assumed to be just a subset of sexual orientation in the judgments of the English-speaking jurisdictions examined.[370] This needs to change by introducing gender identity and expression as a protected characteristic in theoretically informed and inclusive way. Furthermore, Berg and Millbank suggest that often applicants were deemed credible mainly because they conformed with western standards of gender dysphoria and visual typologies. The classic 'born in the wrong body' narrative[371] played a role, although, as the American Psychiatric Association has pointed out, gender dysphoria is not essential for transgender identity status.[372] Also, transgender identity does not always manifest itself with specific external presentations that are stereotypically attributed to one gender or the other, i.e., there can be masculine transgender women and feminine transgender men, trans women and men that 'pass' and others who do not. Finally, there are nonbinary transgender individuals who do not conform to the psychological profile of experiencing themselves from an early age as the opposite gender.

As Berg and Millbank note, '[g]ender and sexual orientation were increasingly accepted as eligible bases for PSG in many receiving nations through the 1990s; trans has often been appended to these categories without additional analysis or explicit articulation'.[373] Gender and sexual orientation related jurisprudence as qualifying grounds for a PSG group have been critiqued as incoherent and unpredictable.[374] Moreover, according to Berg and Millbank, in many transgender-related RSD cases the jurisprudence has been inconsistent,

[370] Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group' in Thomas Spijkerboer *Fleeing* (UTS: Legal Studies Research Paper Series No. 2013/1, 2013) <http://ssrn.com/abstract=2312887> accessed 25 July 2020.
[371] See Dave King, *The Transvestite and the Transsexual: Public Categories and Private Identities* (Avebury 1993); Robert J. Stoller, *Perversion: The erotic form of hatred* (Pantheon Books 1975).
[372] Jack Drescher and Jack Pula, 'Expert Q & A: Gender Dysphoria' (*American Psychiatric Association* 2020) <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a> accessed 25 July 2020.
[373] Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group' in Thomas Spijkerboer *Fleeing* (UTS: Legal Studies Research Paper Series No. 2013/1, 2013) 11.
[374] Aid (United Kingdom), Comisión Española de Ayuda al Refugiado (Spain – the co-ordinator), France terre d'asile (France), Consiglio Italiano per i Rifugiati (Italy) and the Hungarian Helsinki Committee (Hungary), *Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States* (GENSEN project 2012); Catherine Dauvergne and Jenni Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 The Modern Law Review 57; Michelle Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'.* (UNHCR, August 2012, PPLA/2012/02) <https://www.refworld.org/docid/4f7d94722.html.> accessed 25 July 2020.

with a large variety of identified particular social groups based on a combination of sexualities, gender identities and expressions and imputations. Some groups were quite broad, such as 'transsexuals', while others were very specific such as 'transgender women in Malaysia without familial or financial support or protection' or a 'bisexual man who prefers men and being a transvestite'.[375] This highlights the fact that particular social groups based on gender identity and/or expression are undertheorized in the refugee status determination. Analytically, some concepts are yet unclear when it comes to definitions that entail legal implications.

Moreover, as Sharalyn Jordan notes '[c]laimants are being asked to give a narrative account of a sexuality or gender identity that they have had limited experience articulating' and 'may inhabit only uneasily'.[376] Transgender applicants may find it very difficult to establish both stable identities, and gender dysphoria.[377] That is firstly because gender and sexuality can be fluid; secondly because such expectations are culturally subscribed; and thirdly because many applicants 'form an identity under conditions of erasure'.[378] Additionally, many cultures do not have language for transgender identity or expression, and some applicants may have limited comprehension of what that means in a western context.[379] Many times, applicants use homophobic language used by persecutors in order to describe their protected traits.[380] Other times, actual or imputed sexual orientation is used in order to present the evidence of persecution since there is more available data from country-of-origin information on sexual orientation (Landau 2004; Neilson 2004, 284-288).[381] One must be

[375] Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group' in Thomas Spijkerboer *Fleeing* (UTS: Legal Studies Research Paper Series No. 2013/1, 2013) 17 <http://ssrn.com/abstract=2312887> accessed 25 July 2020.
[376] Sharalyn R. Jordan, 'Un/Convention(al) Refugees: Contextualizing the Accounts of Refugees Facing Homophobic or Transphobic Persecution' (2009) 26 (2) Refuge: Canada's Journal on Refugees 165, 175.
[377] Idem 167, 173-177.
[378] Idem 170.
[379] Leslie J. Moran and Andrew. N. Sharpe, 'Violence, identity and policing: The case of violence against transgender people' (2004) 4 (4) Criminal Justice: International Journal of Policy and Practice 395.
[380] Joseph Landau, 'Soft immutability and imputed gay identity: recent developments in transgender and sexual-orientation-based asylum law' (2005) 32 Fordham Urban Law Journal 237, 260-261; Victoria Neilson, 'Uncharted Territory: choosing an effective approach in transgender-based asylum claims' (2004) 32 Fordham Urban Law Journal 266, 288.
[381] Joseph Landau, 'Soft immutability and imputed gay identity: recent developments in transgender and sexual-orientation-based asylum law' (2005) 32 Fordham Urban Law Journal 237; Victoria Neilson, 'Uncharted Territory: choosing an effective approach in transgender-based asylum claims' (2004) 32 Fordham Urban Law Journal 266, 284-288.

aware of the complications between gender, sexuality, gender identity and expression and be able to identify the nature of a heteronormative and patriarchal society that persecutes transgender and gender nonconforming applicants since gender roles are based on a heterosexual orientation, which implies a refusal on the part of the applicants to behave in ways dictated by their biological sex and social classification.[382]

In their 2018 article, Nasser-Eddin, Abu-Assab and Greatrick propose the shift from Sexual Orientation and Gender Identity protection to Sexual Practices and Gender Performance protection, which would allow for a less identity-based framework of refugee status determination.[383] That indeed is a valid point. On the other hand, it excludes cases where identity, practice and performance formation are prohibited due to the restrictive and oppressive environment from which the applicants originate. According to Nasser-Eddin, Abu-Assab and Greatrick, one must move beyond identity categories such as those presented in LGBTQ+ rights frameworks in RSD. The latter ones often fail to encompass the local context and the intersection between gender, sexuality, race, ethnicity and religion. As Johnson and Repta note, 'gender roles can be described as social norms, or rules and standards that dictate different interests, responsibilities, opportunities, limitations, and behaviours for men and women'.[384] That must, they add, be evident in the narratives of the claimants, whether it is a conscious and reflected-upon fact or not. Interrogating just identity categories is deficient, since some applicants may make identity claims, but other non-normative individuals possibly may not.

According to Nasser-Eddin, Abu-Assab and Greatrick, it is also very important to identify the binarism reflected in the gender oppression, which makes individuals abide by the roles that are prescribed to them, and be at risk when they do not.[385] The binary reflected in complementary and mutually exclusive notions of femininity and masculinity is, according

[382] Nicole LaViolette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary' (2010) 22 (2) International Journal of Refugee Law 173, 180-181.
[383] Nour Abu-Assab, Aydan Greatrick and Nof Nasser-Eddin, 'Reconceptualising and contextualising sexual rights in the MENA region: beyond LGBTQI categories' (2018) 26 (1) Gender & Development 173.
[384] Joy L. Johnson and Robin Repta, 'Sex and gender: beyond the binaries.' in John L. Oliffe and Lorraine Greaves (eds), *Designing and conducting gender, sex, & health research* (SAGE Publications, Inc 2012) 23.
[385] Nour Abu-Assab, Aydan Greatrick and Nof Nasser-Eddin, 'Reconceptualising and contextualising sexual rights in the MENA region: beyond LGBTQI categories' (2018) 26 (1) Gender & Development 173.

to the authors, the starting point for the discrimination against gender nonconforming individuals in the MENA region and is reflected in gender performance, as opposed to gender identity, since it is exhibited in the way people dress, behave, style their hair, and speak. Gender performance indeed moves away from fixed and unchangeable identities, though there is the possibility that we conceptualize identity as something fluid and fundamental at the same time, and complement it with gender expression whether that is connected to an identity claim or not. In that way RSD could provide more protection both to transgender applicants that for example are in the 'closet' and gender nonconforming applicants that view their self-expression as not necessarily deriving from a particularly gendered self-perception.

What is needed, in my view, is a framework that protects identities and expressions that are non-normative and correspond to the sexual minority characteristics of the applicant, whether these are externalized or reflected upon or not or attached to a particular identity. In that context, the practice of Refugee Status Determination bodies that seek to identify to what extent sexual and gender identities are fundamental for the applicants in order to assess them as a particular social group, becomes less relevant. It is my view that this would move RSD policy and practice in a positive direction, since this line of interrogation requires westernized notions of self-awareness on the part of the applicants, and it views sexual orientation and gender identity as ad hoc relevant and fundamental. Furthermore, as Nasser-Eddin, Abu-Assab and Greatrick argue,[386] it is very important to acknowledge the fact that the expectations for gender performances in fact vary across cultures, classes and nationalities, so it is important as well to examine the social location of the individuals and their gender nonconformity within the prevalent gender ideology. Non-normativity and gender nonconformity are very important to identify a particular social group without exclusively relying on identity claims. The distance assumed between heteronormative and patriarchal societies and the non-normative individual can shed light in the determination of their belonging to a particular social group and can largely fall under the categories of nonconforming identity and/or expression.

[386] Idem.

In this light, Raj uses the term 'queer refugee', since 'queerness' according to him is not confined to a particular sexual identification but it reflects discursive and affective subjectivities encompassing the negotiation of sexual attachments, displacements and intimate practices.[387] Given the foregoing, the term 'queer refugee' could replace the terms gay, lesbian, bisexual and transgender as identity categories of sexual minority asylum applicants in the legal discourse, since it provides more space for the way individuals perceive themselves and their desires. On the other hand, 'queer' has come to be reclaimed from a slur to a self-signifier for some individuals and communities under the LGBTIQ+ spectrum with philosophical and political connotations, since also cis straight people can indeed identify as queer if they defy and socially deconstruct gender norms. For this reason, it is doubtful whether 'queer' can consist a particular social group, in that it may require a particular stance towards the dominant norms. That reasoning for sure makes space for queer individuals to qualify for asylum under the grounds of political opinions, whether that intersects with a particular social group or not.

On the other hand, the term 'queer' can help us delineate the distance between heteronormativity and the social location of the applicant, which potentially puts them under risk of persecution. In my view, given the many connotations, philosophical, social and political, of the term 'queer', gender nonconformity would indeed be a preferable term for transgender and gender nonconforming applicants. It too denies epistemological categories and focuses on the social location of the applicant, without focusing on their critical stance or attachment to particular gender norms. Raj, however, is very careful in underlining how difficult it is to defy identity categories in the law. Georgia Warnke notes that identity cannot be reduced to a biological reality but should rather be perceived as a culturally and historically contingent phenomenon.[388] Gender identity in particular is a very complex term since it is frequently used as an umbrella term for transgender, transsexual and gender-variant including nonbinary individuals.

[387] Senthorun Raj, 'A/Effective Adjudications: Queer Refugees and the Law' (2017) 38 (4) Journal of Intercultural Studies 453, 456.
[388] Georgia Warnke, *After Identity: Rethinking Race, Sex and Gender* (Cambridge: Cambridge University Press 2007) 97.

Raj also uses the term 'gender diversity' saying that '(s)exual orientation and gender identity are not reducible to an oblique script of genital penetration, sexual object choice, bodily features, mannerisms, dress, or incidence of partners'.[389] Gender diversity is indeed a term that could possibly capture both gender identity and gender expression configuration, without assigning a particular causal relationship between identity and expression. On the other hand, it is very difficult to draw on already established legal norms on identity and expression doctrinally, and extend those to the protection of gender diversity as such without referring to identity and expression. Nevertheless, understanding identities as textual surfaces through which legal, social, cultural and biological meaning is understood and inscribed would be very valuable for the purposes of refugee law and the large variety of gender nonconforming in-progress subjectivities to which it applies.[390] Identity can be seen as a means through which individuals understand themselves and their relationships to others and society at large. In that sense, narratives of gender nonconformity can shed light in this ongoing negotiation between the society and the individual and be considered together with self-identification as a part of the process of identity construction, namely fall under the broad term 'gender identity' that is currently used.

Furthermore, immutability has been central to the formulation of the particular social group. Immutability has been understood to refer to an innate trait or a shared past experience – it must be an aspect of fundamental significance to personhood. In *Hernandez-Montiel v. Immigration and Naturalization Service*[391] in the U.S., the judicial idea of immutability was rendered more inclusive by acknowledging that '[s]exual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance'[392] when accepting the membership to a PSG of Geovanni as a gay man in Mexico with female sexual identity.[393] By this it is not clear but it is plausible that the Court had in mind that Geovanni identifies as a gay man who wishes to express himself as a woman e.g. by dressing in female

[389] Senthorun Raj, 'A/Effective Adjudications: Queer Refugees and the Law' (2017) 38 (4) Journal of Intercultural Studies 453, 455,460.
[390] See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 30-34.
[391] *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service* [2000] 225 F.3d 1084, A72-994-275, United States Court of Appeals for the Ninth Circuit.
[392] Idem, para 2[6].
[393] Idem, para 4[10].

clothing. The case illustrates how gay, bisexual or men who have sex with men can be treated differently from each other in some cultures depending on their gender expression. This serves as an indication of the fact that PSG could stretch to include gender nonconforming individuals, in addition to transgender individuals, and protect gender expression which is not always causally linked to identity as well. This could be so, under the condition that gender expressions are sites of personhood (not necessarily permanent, but fundamental).[394] Although the U.S. 9th Circuit Court of Appeals in *Hernandez-Montiel* did not consider essentially transsexuality as a particular social group and conflated sexuality with gender identity, it indicates a possible expansive use of identity and expression linked to fundamental traits of personhood.

Back in Europe, oddly enough, Recital No. 30 of the Qualification Directive 2011/95/EU refers to 'gender, including gender identity and sexual orientation' in the context of 'particular social group',[395] as if sexual orientation and gender identity are subsets of gender. This could have a positive connotation, since gender is conceived as a broad category including gender identity indicatively and possibly by extension also gender expression. It nonetheless creates discrepancies between different legal categories, the links between which may not be clear or necessarily there. There are, for example, undeniable links between gender norms, gender expression and sexuality,[396] but on the other hand, one cannot assume one to be a subset of the other and many times one can identify the presence of one but not the other. These categories are in a discursive relationship with each other, which can be seen under the lens of gender nonconformity, and are not mutually exclusive, but they also do not exist in a categorical relationship between one another. An additive formulation

[394] Anna Kirkland, 'Victorious transsexuals in the courtroom: A challenge for feminist legal theory' (2003) 28 (1) Law and Social Inquiry 1, 32.
[395] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L. 337/9-337/26.
[396] James D. Wilets, 'International Human Rights Law and Sexual Orientation' (1994) 18 (1) Hastings International and Comparative Law Review 1.

would have been preferable, and the addition of gender expression to it according to this section should be examined.[397]

In this context, one needs to highlight the recent decision on a nonbinary asylum claimant in the UK. On October 22, 2020, the Upper Tribunal (UT) released its decision in Mx M. Mx M, a national of El Salvador, originally sought asylum in the United Kingdom as a gay man. Mx M further explored their identity in the United Kingdom, and by the time of their unsuccessful appeal to the First Tier Tribunal (FTT), they identified as nonbinary. This decision makes visible in a ground-breaking way the unique configuration for each individual between gender norms, and their gender expression and identity, as well as sexuality.

The judge noted:

> I am satisfied that the Appellant is a member of a particular social group. At the time that the Appellant was refused protection the Respondent had accepted this, defining the group as 'homosexual men'. As I set out above, the Appellant's identity had by the time of the First-tier Tribunal hearing evolved so that they considered themselves 'non-binary', that is to say they consider themselves to fall outwith the fixed gender binary of female-male; shortly before the final hearing before me Mr Wood confirmed that this remains the case, but that his client would also be happy with the terms 'she' or 'her'. Regardless of what label we, or Salvadorans, might affix to the Appellant I am satisfied that for the purpose of this risk assessment their identity is visibly 'other'. When the Appellant arrived in this country, they wore their hair short and dark; today it is long and platinum blond. They will appear, and will be perceived, to be a transgender woman.[398]

[397] SOGICA (Sexual Orientation and Gender Identity Claims of Asylum), *The reform of the Common European Asylum System: Fifteen recommendations from a Sexual Orientation and Gender Identity Perspective* (May 2018, University of Sussex).
[398] Mx M El Salvador [2020] UKUT 00313 (IAC).

One can see here how otherness enters the field of law, as a porous category that interrelates with not yet established identities through the existing tools of refugee law, such as particular social group due to the existence of protected characteristics. The judge understands here that the purpose of the law is to protect marginalized identities and experiences, that are fundamental regardless as to whether they are fluid and how they are perceived.

Indeed, the framework of gender nonconformity is one that validates the interrelationship of (imputed or actual) sexuality, gender identity and gender expression, as well as the relationality of protected characteristics with the social environment that targets them. In that way gender otherness becomes always socially located and inclusive.

In this context, asylum authorities must put at focus the country-of-origin information against the narration of the impact of gender nonconformity of the applicant, who experiences gender identity or expression that does not conform with the sex assumed at birth for credibility purposes. Under the umbrella of gender nonconformity, gender expression must absolutely be explicitly added since several gender performances and practices are not based on identitarian claims. What can help in this endeavour for asylum case workers, is centring the narratives of gender identification and expression of the applicant without filtering them through western, homo- and cisnormative stereotypes.

2. Well-founded fear of persecution due to gender identity and gender expression

According to the 1951 Refugee Convention 1(A),[399] in order for someone to be declared as a refugee they should have a well-founded fear of persecution. The well-founded fear has both a subjective and an objective element consisting of fear and the well-foundedness of it, the fact that it must be reasonably expected. The persecution must constitute a serious violation of human rights, especially those for which no derogation is allowed under Human Rights treaties, such as the right to life, dignity and the prohibition of torture and arbitrary

[399] Convention Relating to the Status of Refugees (28 July 1951) 189 *Treaty Series* 137, art 1(A).

deprivation of liberty,[400] or a systematic violation of other rights including socio-economic rights.[401] I shall examine these concepts in relation to people belonging to particular social group due to their gender identity or expression. One issue that clearly arises is whether the suppression of the right to live freely as transgender or gender nonconforming, besides the violation of rights without a derogation clause that it may bring (right to life), is a serious violation of human rights in and of itself, given its systematic nature.[402] Another issue that arises is whether the link between serious harm and the membership of a particular social group can be disrupted by an expectation to act and live discreetly. This has been a huge issue, especially in sexuality-related claims, but one will try to assess this requirement in specific relation to gender identity and expression.

The UNHCR Guidance Note No. 8 states that '[b]eing compelled to forsake or conceal one's sexual orientation and gender identity, where this is instigated or condoned by the State, may amount to persecution'.[403] This is in accordance with Yogyakarta Principle 19, which states:

> Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means [...][404]

It becomes clear that the UNHCR considers forced concealment a severe human rights violation. If one takes into consideration principle 19 of the Yogyakarta Principles, it is easy to conclude that gender expression in and by itself is a fundamental human right, whether it

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[400] Nuala Mole, *Human rights files, No. 9 (revised): Asylum and the European Convention on Human Rights*. (Council of Europe Publishing 2000) 10. <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-09(2000).pdf.> accessed 25 July 2020.
[401] UNHCR (UN High Commissioner for Refugees), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (April 2019, HCR/1P/4/ENG/REV. 4) 13, 173 <https://www.refworld.org/docid/5cb474b27.html.> accessed 25 July 2020.
[402] Idem 13, 173.
[403] UNHCR (UN High Commissioner for Refugees), *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (21 November 2008) <https://www.refworld.org/docid/48abd5660.html> accessed 24 July 2020.
[404] International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) principle 19.

is causally linked with an identity claim or not. Following that, rational gender expression constitutes a human right and its suppression by the threat of harm is a serious violation.

Looking closely at the discretion requirement, one can look at the decisions of Callinan and Heydon JJ. in *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs,* decided by the High Court of Australia.[405] In their dissenting opinion, they found that the appellants were not oppressed as their discreet mode of conduct was voluntarily chosen and not a product of external imposition.[406] The responsibility was placed on the applicants to claim that their discretion was due to fear of serious harm and not the product of their own choice, so that the link between sexuality and serious harm would not be disrupted by volition and in that way not amount to persecution.[407] Nonetheless, given that the burden of proof in RSD is shared, that the persecution must be plausible (likely to happen),[408] and that volition is shaped by material reason and social context, it is doubtful whether this line of reasoning is correct. Subjective fear should be assessed according to the UNHCR Handbook by their credibility on particular asylum claims, which should then be examined in light of country-of-origin information.[409] There is also the benefit of the doubt if the narrative is arguably consistent according to the same guidelines.[410] Seeing discretion as a voluntary option ignores the above, and makes obvious the fact that it is not analytically clear whether gender expression, as religious expression, is considered a fundamental human right. One must also have in mind that even if a claimant considers discretion their own choice, the tribunals have to examine whether this could be potentially causally linked to a threat of serious harm. Case workers should examine even reasons for asylum that are not

[405] *Appellant S395/2002 v. Minister for Immigration* [2003] 216 CLR 473 (Callinan and Heydon JJ).
[406] Idem para 106.
[407] Janna Wessels, *Sexual orientation in Refugee Status Determination.* (Working Paper Series No. 73, Refugee Studies Centre, University of Oxford, 2011) 23.
[408] UNHCR (UN High Commissioner for Refugees), *Note on Burden and Standard of Proof in Refugee Claims* (16 December 1998) <https://www.refworld.org/docid/3ae6b3338.html.> accessed 25 July 2020.
[409] UNHCR (UN High Commissioner for Refugees), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (April 2019, HCR/1P/4/ENG/REV. 4) 19, 20 <https://www.refworld.org/docid/5cb474b27.html.> accessed 25 July 2020.
[410] Idem 44.

presented consciously by the applicant and guide the applicant in providing the relevant information.[411]

Millbank has argued that that the concept of discretion has shifted from asking a claimant to be secretive by their own initiative to asking a claimant to reasonably tolerate secrecy imposed on them by society and continue their affairs in private.[412] The toleration of secrecy, however, again sheds light on the discrepancies arising as to whether sexuality or gender identity claims should be examined under the light of freedom of expression or not. In the case of *HJ (Iran),*[413] which was examined together with the case of a gay man from Cameroon, HT, in 2010, the UK Supreme Court decided that the reasonably tolerable test was out of line and contrary to the Refugee Convention. On the other hand, it proposed a complicated test to distinguish between discretion because of fear of persecution and volitional discretion (owing to other factors such as a concern to avoid social or family disapproval).

The core of the Judgment in *HJ (Iran) and HT (Cameroon) v. SSHD*[414] is in paragraph 82, which is entitled 'The approach to be followed by Tribunals' and was delivered by Lord Rogers. It explains how a decision-maker should decide whether a person is entitled to asylum on the basis of their sexual orientation. According to the test, a decision-maker deciding whether a claimant ['X'] is qualified for asylum on the basis of sexual orientation should ask four questions. These are:

> (i) Is it reasonably likely that X is homosexual or will be perceived to be homosexual?

[411] UNHCR (UN High Commissioner for Refugees), *Note on Burden and Standard of Proof in Refugee Claims* (16 December 1998) 2 <https://www.refworld.org/docid/3ae6b3338.html.> accessed 25 July 2020.
[412] Jenni Millbank, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009a) 13 (2-3) The International Journal of Human Rights 391, 398.
[413] *HJ (Iran) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) and one other action*. [2010] UKSC 31.
[414] Idem para 82.

(ii) Is there a real risk that homosexuals would face persecution if they lived openly in X's country-of-origin?

(iii) Would X in fact live 'openly' (or would X conceal X's sexual orientation) if returned to the country-of -origin?

(iv) If the answer to question (iii) is that X would conceal X's sexual orientation, why would X do so?

The Supreme Court goes on to give two possible answers to question (iv). Answer (a) is that X chooses to conceal their sexual orientation simply (only) because of social pressure or personal choice and it entails a negative decision on refugee status determination of the LGBTQ+ individual. Answer (b) is that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a homosexual.[415] As the UNHCR stated in its intervention in *LC (Albania),* a material reason should be assumed if openly LGBTQ+ people are persecuted in the country-of-origin.[416]

The test of the Supreme Court in *HJ (Iran),* which asks if gay people who live openly are persecuted and whether discretion is a personal choice, places the responsibility on the applicants to prove that their discretion is based on fear of harm and ignores the shared burden of proof, especially in the case where volition is formed under potentially threatening homophobic or transphobic societal pressures. Discrimination in itself of course does not amount to persecution[417] but the obligation to conceal one's sexual orientation or gender identity/expression is on the one hand systematic, and secondly a harm *per se*. Concealment

[415] Idem.
[416] UNHCR (UN High Commissioner for Refugees), *L.C. (Albania) v. Secretary of State for the Home Department: Case for the Intervener* (22 March 2017, C5/2014/2641) 9 <https://www.refworld.org/docid/58de68dd4.html.> accessed 25 July 2020.
[417] UNHCR (UN High Commissioner for Refugees), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (April 2019, HCR/1P/4/ENG/REV. 4) 21 <https://www.refworld.org/docid/5cb474b27.html.> accessed 25 July 2020.

should not be a variable in an RSD decision, and the clarification of its parameters should not burden the applicant.

The test, that can be extended to gender identity claims, ignores homophobia and transphobia as factors of potential harm from which apparently there is no state protection. As far as the state nexus is concerned, Kassisieh argues that it must be satisfied in sexuality claims and by extension to gender identity claims by the applicant's inability or unwillingness, due to well-founded fear, to secure state protection because of their sexuality or gender identity/expression whatever the motives of the persecutors may be.[418] Persecution can come from both state and non-state actors, but it is necessary that the applicant is unwilling or unable to be protected by the state in order for them to be granted refugee status in the country of reception.[419] In cases where the persecutor is a non-state actor, and there is fear of the state by the applicant, which is supported by the country-of-origin information, the claim should be seen as reasonable.[420] Even if, as if Millbank suggests, anti-gay, or by extension anti-trans legislation is not enforced, the claimant would not be able to ask for state protection unless they are willing to be characterized as a criminal.[421] Consequently, where disclosure of gender identity is not an option, and there is fear of serious harm, state protection must be deemed absent and the state nexus requirement fulfilled.

Another issue that arises is when persecution cannot be proven to be linked to transphobic attitudes. It is the case when an individual suffers serious harm, but the motivation of the persecution is concealed. In this case, authorities should examine general societal attitudes, the claims of the applicant and country-of-origin information. The applicant cannot be burdened to prove motivation of the persecutors, whose plausibility must be assessed based

[418] Ghasan Kassisieh, 'From Lives of Fear to Lives of Freedom: A review of Australian refugee decisions on the basis of sexual orientation' (2008) Gay & Lesbian Rights Lobby, Glebe 64, 65.
[419] UNHCR (UN High Commissioner for Refugees), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (April 2019, HCR/1P/4/ENG/REV. 4) <https://www.refworld.org/docid/5cb474b27.html.> accessed 25 July 2020.
[420] Janna Wessels, *Sexual orientation in Refugee Status Determination.* (Working Paper Series No. 73, Refugee Studies Centre, University of Oxford, 2011) 28.
[421] Jenni Millbank, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009) 13 (2-3) The International Journal of Human Rights 391, 395.

on the country-of-origin information. Furthermore, case workers should examine whether transphobic attitudes are prevalent among the country-of-origin authorities, so that for example a persecuted gender nonconforming individual would not be able to ask for state protection even if they are not themselves criminalized because of their gender identity/expression. Finally, in the case of an internal relocation alternative, one should examine whether the reasons that a person is fleeing would be present in the whole territory of the country-of-origin, especially when one can infer an absence of the option to claim state protection and live freely and safely at the same time.

As underlined above, the *HT* judgment formulates a complicated test for RSD in sexuality claims. What authorities need to establish is that openly gay people are persecuted, the choice of discretion is not volitional or based on societal or familial pressures for which the state is not responsible but because of fear of serious harm, and additionally, that the applicant intends (or would choose but for the fear of persecution) to live openly upon their return to the country-of-origin. In my view, the last part of the test is especially problematic, since this is especially difficult to figure out. Toohey J explicates in *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs* (decided by the High Court of Australia in 1989) that 'well founded' fear implies a 'real chance' of serious harm which is not remote or insubstantial on the one hand, and on the other hand it is indeed future oriented.[422] But to ask from authorities to infer if the applicant would conduct their sexual orientation, and by extension gender identity, discreetly, obscures the fact that homophobia and transphobia have a twofold effect: on the one hand they activate serious harm due to societal and political persecution; on the other hand they activate serious harm due to stigma and shame.

The will to live openly and the threat of harm if one does so should be enough for the establishment of well-founded fear of persecution. The requirement to show intent and a future choice to live openly in light of the threat of persecution, as established in the test in *HJ (Iran)*[423] question (iv) (see above), is unreasonable and unnecessary to prove fear of serious harm and establish the nexus requirement. It is even more so if one accepts that living

[422] *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs (Australia)* [1989] 169 CLR 379.
[423] *HJ (Iran) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) and one other action*. [2010] UKSC 31.

as one's gender is an exercise of fundamental human rights of the applicant. Intent of living openly also refers to a projection of a future-oriented choice, and not a desire that can be interrogated and established in the present in the context of the asylum process. Furthermore, the risk of exposure in the duration of a lifetime should be deemed at least likely, both for sexual orientation and transgender identity claims and could be remote only in timely terms but not in terms of certainty even if claimants are 'discreet'.

What is very heartening in Lord Rodger's decision in the *HJ (Iran)* judgment is the fact that he is clear that the discretion argument (that claimants can avoid persecution by being discreet) goes against the core international and European refugee and human rights norms, and the fact that he parallels sexuality and gender identity with political opinions and religious beliefs, in that one cannot ask of applicants not to express them and be open about them.[424] Renouncing these characteristics would be a serious violation *per se*, since they constitute the persecution ground. Even if that is theoretically possible, it cannot form a reasonable argument.[425] As a side note, the applicant should not have to have disclosed their orientation or identity in the country-of-origin in order to live with fear of persecution. The link between their choice of discretion and the persecution ground is the fear of persecution itself, and if openly LGBT+ people are indeed persecuted in the country-of-origin, a material reason for the concealment should be assumed.[426]

As is stated in paragraphs 55, 77 and 78 of Lord Rodger's judgment, the underlying rationale of the Refugee Convention is that people should live freely without fearing serious harm in terms of intensity or duration because of, for example, their race or sexual orientation.[427] It is clear in the judgment that living freely may mean not being cautious about socialization, affect or disclosure, differently from straight oriented people. According to the judgment, any aspect of the applicant's life that is informed by their sexuality should indeed be protected from the threat of serious harm. By extension, I would argue that a transgender or

[424] Idem (Lord Rodgers).
[425] Idem para 82.
[426] UNHCR (UN High Commissioner for Refugees), *L.C. (Albania) v. Secretary of State for the Home Department: Case for the Intervener* (22 March 2017, C5/2014/2641) <https://www.refworld.org/docid/58de68dd4.html.> accessed 25 July 2020.
[427] *HJ (Iran) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) and one other action*. [2010] UKSC 31 (Lord Rodgers).

gender nonconforming applicant should have the same personal and public variety of options about their life conduct as a gender conforming person. This would relate not only to their innate gender identity but to all aspects that are informed by the gendered experience of their subjectivities. As Gummow and Hayne JJ underline in the High Court of Australia in *Appellant S395/2002 v. Minister for Immigration* (2003), para. 81:

> Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.[428]

In light of the above, Barrister Chelvan argues that a way of framing queer experiences is using the Difference, Stigma, Shame and Harm (DSSH) model,[429] which in my view could find a good application in the examination of persecution and the fulfilment of the nexus requirement linking persecution with gender identity/expression even more so than in the examination of credibility. Chelvan argues one should focus on when the applicant identified as different, how this difference was stigmatised by others, how the stigma generated (self) shame and the extent to which the shame and stigma resulted in harm.[430] A real chance of harm can come in both psychological or social terms, and that needs to be clarified in the jurisprudence, so that the applicant or the authorities are not burdened with proving intent to live openly or not upon return to the country-of-origin. If indeed an applicant gives inferences that they want, not necessarily intend, to live freely, their right to do so should be protected; if not, the psychological impact of extended and intense homophobia and transphobia in the country-of-origin should be adequate to establish the link between the applicant's discretion and their persecution.

[428] *Appellant S395/2002 v. Minister for Immigration* [2003] 216 CLR 473 (Gummow and Hayne JJ).
[429] S. Chelvan, 'From Silence to Safety: Protecting the Gay Refugee?' (2013) May 2013 Counsel 26.
[430] Idem 28.

What becomes apparent is that inferences can be made about gender identity and gender expression asylum claims from the jurisprudence on sexual orientation claims, but one has to be careful since the applicants may suffer particular forms of persecution, frequently also sexualized violence, and on different grounds.[431] As Millbank and Berg suggest, it is important not to erase transgender identity in the jurisprudence, which is based mainly on sexual identity, as applicants many times self-identify as or are perceived as homosexuals.[432] This can be seen also from the fact that several gender identity claims are presented as claims related to sexual orientation by the applicants, in order to make the evidence of 'persecution' consistent or in order to make use of available country-of-origin information.[433]

In addition, one must be wary of the private nature of many harms suffered by transgender and gender nonconforming individuals by, for example, family or community members. Domestic or private harms for which there is no state protection qualify as persecution if they are severe. The threat of living without family ties and a systematic lack of access to subsistence means or education, can constitute a serious violation of human rights that qualifies as persecution. A systemic failure of a state to remedy such acts is equivalent to the lack of state protection.[434] The causal link between the absence of state protection and gender identity or expression can be difficult to establish,[435] especially since many of the violations happen in domestic or community spaces. Private harm (perpetrated by non-state actors), as opposed to public harm (perpetrated by the state), needs to coincide with inability or unwillingness to access state protection. The grounds for this inability or unwillingness must be the persecution grounds, whether the violations suffered are due to the same reasons or not. As with the case of domestic violence towards women, the inability or unwillingness of

[431] Connie Oxford, 'Queer Asylum: US Policies and Responses to Sexual Orientation and Transgendered Persecution.' in Marlou Schrover and Deirdre M. Moloney (eds), *Gender, Migration and Categorisation: Making Distinctions between Migrants in Western Countries, 1945-2010* (Amsterdam University Press 2013) <www.oapen.org/download?type=document&docid=459571> accessed 25 July 2020.
[432] Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group.' in Thomas Spijkerboer *Fleeing* (UTS: Legal Studies Research Paper Series No. 2013/1, 2013) <http://ssrn.com/abstract=2312887> accessed 25 July 2020; Ellen A. Jenkins, 'Taking the Square Peg out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers' (2009) 40 Golden Gate University Law Review 67, 88-89, 94.
[433] Joseph Landau, 'Soft immutability and imputed gay identity: recent developments in transgender and sexual-orientation-based asylum law' (2005) 32 Fordham Urban Law Journal 237.
[434] James Hathaway, *The Law of Refugee Status* (Butterworths 1991) 112.
[435] Senthorun Raj, 'A/Effective Adjudications: Queer Refugees and the Law' (2017) 38 (4) Journal of Intercultural Studies 453, 461-462).

the state to address it amounts to persecution.[436] Rodger Haines and Jenni Millbank argue for broader constructions of persecution that recognize the private, rather than strictly 'public' context, through which applicants experience violence. [437]

Furthermore, regarding the nature of persecution, according to the UNHCR's intervention in *YD (Algeria),*

> Persecution is not confined to acts of physical violence, as demonstrated by the non-exhaustive list of persecutory acts in Article 9(2) of the Qualification Directive. In S395/2002 v. Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473 the High Court of Australia held that persecution covers 'many forms' of harm, ranging 'from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment' ([40]).[438]

This is particularly true for transgender and gender nonconforming asylum claimants, who are subjected to psychological, domestic and sexual violence from non-state actors due to their nonadherence to gender roles prescribed by society and hegemonic culture, in addition or regardless to state transphobia and criminalization/discrimination. In the case of *YD (Algeria)* the UNHCR states regarding gay (and arguably LGBTQ+) applicants that:

> […] the Tribunal should have asked whether the adverse consequences of living as an openly gay man in Algeria were, taken together, severe enough to meet the threshold of being persecutory. This would have involved consideration of the predicament that homosexuals face in living in a country which criminalises same-sex sexual activity, the near-universal social disapproval and stigma surrounding

[436] Senthorun Raj, 'Asylum and Gender.' in Nancy A. Naples (ed), *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* (John Wiley and Sons Ltd 2016) 2.
[437] Rodger Haines, 'Gender-related persecution' in Refugee Protection in International Law' in Erika Feller, Volker Türk and Frances Nicholson (eds), *UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 327-338; Jenni Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003) 18 Georgetown Immigration Law Journal 71, 75-76.
[438] UN High Commissioner for Refugees (UNHCR), *YD (Algeria) v. Secretary of State for the Home Department: Skeleton Argument of the Intervener*, 21 February 2020, Appeal No. C5/2018/0718 (B) [13] <https://www.refworld.org/docid/5f3cdf314.html> accessed 2 May 2023.

> homosexuals in Algeria, the fact that homosexuals live an 'almost underground existence' their need to cut ties with their family, and the persistent risk of discovery (including by failing to marry a woman by a certain age).[439]

These observations have the implications that the systematic marginalization of transgender and gender nonconforming individuals and/or the pressure to conceal their gender identity due to the risk of social and psychological violence, despite of what was stated at the *HJ (Iran)*, may amount itself to persecution.

Finally, further doctrinal research needs to examine whether the failure or unwillingness of the state to provide legal gender recognition through a process that is neither inhuman nor degrading constitutes persecution *per se*, when the applicant claims that it is their will to be legally recognized by the law as the gender they are.[440] That is particularly true given that the failure to recognize legal gender leads to political and socio-economic marginalization and harassment of transgender individuals, which according to the UNHCR,[441] can amount to persecution if it takes place in an additive and systematic way. Transgender and gender nonconforming applicants are indeed systematically marginalized in countries where there is extended and deep social disapproval of their gender experience and, which obliges them to conceal their identities.

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[439] Idem [36.d].

[440] See also YY v. Turkey, App No. 14793/08 (ECHR, 10 March 201); AP, Garçon and Nicot v. France, App Nos 79885/12, 52471/13 and 52596/13 (ECHR, 6 April 2017).

[441] UNHCR (UN High Commissioner for Refugees), Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (April 2019, HCR/1P/4/ENG/REV. 4) [36] <https://www.refworld.org/docid/5cb474b27.html.> accessed 25 July 2020; European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26 [9.1.b].

3. Credibility assessment and stereotyping - good practices

In Guidance Note No. 9, the UNHCR notes that '[s]elf-identification as a LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity.[442] It goes on to say:

> The applicant's own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community. Where there is a lack of country-of-origin information, the decision maker will have to rely on the applicant's statements alone.[443]

The above can arguably extend also to gender identity and expression. The Guidance note makes it clear that decision-makers should not rely on stereotypical preconceptions, whether the applicant has come out or has been married and should consider the fact that applicants may not be aware that sexual orientation or gender identity may be a ground for international protection or be reluctant to talk of such a private issue.[444] When it comes to the asylum procedure, a claim of sexual identity must be presented as early and comprehensively as possible in order to have more chances of being deemed credible.[445] This is not in line with the UNHCR Guidance Note indications and ignores the private nature of the issue as well as the fact that asylum applicants may not be aware of such an asylum ground. Furthermore, the UNHCR Handbook clearly states that 'if the applicant's account appears credible, he [or

[442] UNHCR (UN High Commissioner for Refugees), *Guidelines on International Protection No 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (23 October 2012) 16 <http://www.unhcr.org/509136ca9.pdf.> accessed 25 July 2020.
[443] Idem 17.
[444] Nicole LaViolette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary' (2010) 22 (2) International Journal of Refugee Law 173, 189,191.
[445] Rosemary Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2008) 19 (4) International Journal of Refugee Law 609, 627; Guy Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15 (3) International Journal of Refugee Law 377, 388-389.

she] should, unless there are good reasons to the contrary, be given the benefit of the doubt'.[446]

By contrast with sexual orientation, which refers to intimate feelings or acts towards people of the same or other gender and is rarely a visible characteristic, gender identity and expression may have clearer identification markers in the presentation of the applicant, who does not conform with stereotypical gender roles. On the other hand, this is not a prerequisite for trans identity or gender nonconformity. What is common in sexuality and gender identity claims is that, in order to be successful, what is often required is a demonstration of a very internal form of self-identity. This subchapter proposes instead, as discussed in the first section, the assessment of credibility based on narratives of gender identification or expression and the assessment of gender nonconformity and its social impact. The term 'gender identification' is preferred over gender identity, since it delineates the process of identity construction but does not require a consolidated gender identity claim *per se*. Narratives may not be consolidated and may make reference to specific cultural or globalized meta-narratives of gender, but they are indeed constitutive of an applicant's self-perception when it comes to gender nonconformity threatened by fear of serious harm. The assessment of demeanour, consistency and plausibility are tools that the adjudicators have in hand, but they must be applied with respect to privacy, cultural background and in consideration of the diverse experience of gender-variant individuals.[447]

There are two issues in respect of which applicants are mainly interrogated and assessed as credible: firstly, their membership in a particular social group as transgender, and arguably also gender nonconforming, and secondly, concerning the fear of serious harm because of gender nonconformity. When it comes to their identity, applicants must demonstrate 'a fixed, deep-rooted, hidden but visualizable, narratable, in short accountable fundamental structure

[446] UNHCR (UN High Commissioner for Refugees), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (April 2019, HCR/1P/4/ENG/REV. 4) 43 <https://www.refworld.org/docid/5cb474b27.html.> accessed 25 July 2020.
[447] Janna Wessels, *Sexual orientation in Refugee Status Determination.* (Working Paper Series No. 73, Refugee Studies Centre, University of Oxford, 2011) 34.

that organizes the self'.[448] They need to reveal what is assumed to be a deeply internal form of self-definition.[449] What is indeed proposed is the conceptualization of gender as the disparate social practices that constitute identities, experiences and roles that are stereotypically associated with the binary categorization of sex,[450] but may well supervene in it and reconfigure it in unlimited geometries, as Stone points out.[451] According to Raj, 'gender works as a set of culturally and historically situated expressions that give shape to individual psyches and subjectivities'. The narration of this conscious or unconscious process may take many forms, that should be equally validated.[452] As Gorman-Murray suggests, queer identities must be allowed to demonstrate slippage, contradiction and movement, and not be aligned to fit sedentary categories.[453]

According to Millbank and Berg, while many claims for refugee status are based largely on the personal narratives of the applicants, this is more prone to happen with sexual orientation and gender identity claims. Claims based on nationality, political opinion, race or religion more often present external verification markers of group membership.[454] There is the common perception that allegations of gay, and arguably gender identity, are easier to make and harder to disprove.[455] There are also the issues of trauma, stigma, shame that are unique

[448] Maja Hertoghs and Willem Schinkel, 'The state's sexual desires: the performance of sexuality in the Dutch asylum procedure' (2018) 47 Theory and Society 691, 694.
[449] Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 (1) Journal of Refugee Studies 1; Susan A. Berger, 'Production and reproduction of gender and sexuality in legal discourses of asylum in the United States' (2009) 34 (3) Signs: Journal of Women in Culture and Society 659; Jenni Millbank, 'The ring of truth': A case study of credibility assessment in particular social group refugee determinations' (2009) 22 (1) International Journal of Refugees 1; Victoria Neilson, 'Homosexual or female - Applying gender-based asylum jurisprudence to lesbian asylum claims' (2005) 16 (2) Stanford Law and Policy Review 417.
[450] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 22-34.
[451] Sandy Stone, 'The Empire Strikes Back: A Posttranssexual Manifesto' in Julia Epstein and Kristina Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity* (Routledge 1992) 296.
[452] Senthorun Raj, 'Evolving bodies: Mapping (trans) gender identities in refugee law.' in Kath Browne and Gavin Brown (eds), *The Routledge Research Companion to Geographies of Sex and Sexualities* (ProQuest Ebook Central, Taylor and Senthorun Francis 2016) 222.
[453] Andrew Gorman-Murray, 'Rethinking queer migration through the body' (2007) 8 (1) Social & Cultural Geography 105, 109.
[454] Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 (1) Journal of Refugee Studies 195, 196.
[455] Jenni Millbank, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009) 13 (2-3) The International Journal of Human Rights 391.

in those experiences and that touch upon very private issues that can be difficult to narrate.[456] An applicant may be not be able to talk about related experiences, or even vaguely or totally not remember them. Dissociation from traumatic experiences emerges as a protective mechanism and the RSD environment is an obvious trigger for such a symptom.[457] Depression and post-traumatic stress disorder (PTSD), which are often triggered by traumatic events, but also because of the shame and stigma surrounding gender nonconformity, can result in an overly generic memory and difficulty in retrieving specific events and narrating consistently.[458] Clinical research has showed that high post-traumatic stress has raised discrepancy rates in autobiographical narratives.[459] Finally, the configuration of one's identity may still be in a state of flux or uncertainty which may also affect the way experiences of nonconformity are narrated.[460] Adjudicators may be able to interpret silences, delays, contradictions based on the above and be adequately trained in matters of transgender identity and gender nonconformity, in order to be able to assess the credibility of a wide variety of experiences.

As Sarah Keenan notes on lesbian asylum claimants, in order be declared as refugees their vulnerability must be 'out there'.[461] That means they must confirm the 'victim' narrative at the asylum procedure, and perform successfully according to stereotypes their queer identities in order to be deemed credible.[462] That reinforces neo-colonial understandings of Western liberalism and does not focus on the particularities of queer identities that can be very different between them, but they do meet under the anti-essential umbrella of gender

[456] Nicole LaViolette, *Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group* (May 2004) 5 <https://ssrn.com/abstract=2294763> accessed 25 July 2020.
[457] Diana Boegner, Jane Herlihy and Chris Brewin, 'Impact of Sexual Violence on Disclosure during Home Office Interviews' (2007) 191 British Journal of Psychiatry 75, 80; Jane Herlihy and Stuart Turner, 'Memory and Seeking Asylum' (2007a) 9 (3) European Journal of Psychotherapy and Counselling 267, 269.
[458] Jane Herlihy and Stuart Turner, 'Asylum Claims and Memory of Trauma: Sharing Our Knowledge' (2007b) 191 (1) British Journal of Psychiatry 3, 3.
[459] Jane Herlihy, Peter Scragg, and Stuart Turner, 'Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interview Studies' (2002) 324 British Medical Journal 324, 326.
[460] Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 (1) Journal of Refugee Studies 195, 201.
[461] Sarah Keenan, 'Safe spaces for dykes in danger? Refugee law's production of the vulnerable lesbian subject' in Sharron FitzGerald (ed) *Regulating the International Movement of Women: From Protection to Control* (Routledge 2011) 29-47.
[462] Idem.

nonconformity.

What many times gets in the way of an anti-essentialist interrogation of credibility is the expectation of a 'typical' evolution of self-identity. According to Berg and Millbank, decision-making in Canada, Australia and the UK is underpinned by a western understanding of sexual identity development that has been deeply influenced by the concept of a linear process of self-knowledge, which moves from denial, to confusion, to 'coming out' as a milestone of self-actualization.[463] LGBTQI+ identities are at risk of being reduced to linear and rational definitions that should correspond with innate and unchangeable traits.[464] Refugee protection seems to privilege idealized notions of sexual and gender identity that originate from the sociological and psychological disciplines of the 1970s and have permeated mainstream western culture.[465] Most such research has been conducted among white middle-class men in the United States and has largely ignored non-western experiences of sexual identity development, especially among women.[466]

This understanding of sexual and gender identity largely reflects western understandings and experiences and overlooks the culture and social context of non-western gender nonconforming individuals and how these have an impact on the development of their self-perception.[467] There are great variances among stages of sexual and gender identity development also within the West.[468] Expecting the same order and stages of development of identity and narration among nonconforming individuals ignores this variety[469] or the fact that someone may be qualified for asylum without having made a consolidated identity claim

[463] Idem 207.
[464] Mengia Tschalaer, 'Between queer liberalisms and Muslim masculinities: LGBTQI+ Muslim asylum assessment in Germany' (2020) 43 (7) Ethnic and Racial Studies 1265, 1270.
[465] Anita C. Liang, 'The Creation of Coherence in Coming–Out Stories.' in Anna Livia and Kira Hall (eds), *Queerly Phrased: Language, Gender and Sexuality* (Oxford University Press 1997).
[466] Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 (1) Journal of Refugee Studies 195, 208.
[467] Carole Vance, 'Social Construction Theory: Problems in the History of Sexuality.' in Dennis Altman, Carole Vance, Martha Vicinus, Jeffrey Weeks and others (eds), *Homosexuality, Which Homosexuality?* (GMP 1989).
[468] Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 (1) Journal of Refugee Studies 195, 208.
[469] Donna Johns and Tahira Probst, 'Sexual Minority Identity Formation in an Adult Population' (2004) 47 (2) Journal of Homosexuality 81, 82.

if they are in fact under a threat of persecution because of their gender nonconformity. This reflects an essentialist view of what sexual minority subjectivities are and in turn reinforces the expectation to prove that sexual identity is innate rather than *a priori* fundamental for the exercise of human rights.

This essentialist view of sexual and gender identity expands on the expectation to present a narrative of a clear and fixed identity established early in life, particular stages of development[470] and a full and final disclosure as an ideal and final state.[471] These expectations define the 'real' self of the applicant which in turn translates to membership of a distinct and knowledgeable category, as delineated by the legal text of the Refugee Convention.[472] Sexuality, however, like gender identity and expression, can take varying meanings in an individual's life and it may qualify an applicant for asylum under different legal rationales based on the particular social group ground. What this chapter suggests is that what must be deemed credible is not the identity of the applicant, but rather their gender nonconformity that is a ground for persecution. The narratives of identity and expression can be assessed as well, but only in order to present a plausible claim of membership of a particular social group and the delineation of this legal concept. What must be given much more weight is the impact of gender nonconformity, with the examination of available country-of-origin information that verifies the claims of the applicant of fear of harm due to the above.

Furthermore, the asylum procedure, if one relies on the credibility assessment of a truthful gender or sexual identity performance, comes to constitute a particular kind of epistemological practice, where the adjudicator and not the asylum claimant as subject

[470] Sabra L. Katz-Wise, Stephanie L. Budge, Ellen Fugate, Kaleigh Flanagan, Currie Touloumtzis, Brian Rood, Amaya Perez-Brumer and Scott Leibowitz, 'Transactional pathways of transgender identity development in transgender and gender nonconforming youth and caregiver perspectives from the Trans Youth Family Study' (2017) 18 (3) International Journal of Transgenderism 243.
[471] Kathryn Dindia, 'Going Into and Coming Out of the 'Closet': The Dialectics of Stigma Disclosure.' in Barbara Montgomery and Leslie Baxter (eds), *Dialectical Approaches to Studying Personal Relationships* (Lawrence Erlbaum Associates 1998) 88.
[472] Nicole LaViolette, 'The Immutable Refugee: Sexual Orientation in Canada (AG) v. Ward' (1997) 55 University of Toronto Faculty of Law Review 1, 30-31.

speaks about the object of knowledge, that is the claimant's sexuality or gender identity.[473] This presupposes a fixed and present identity that needs to be legible in dominant registers. It is assumed that a true narrative will be able to be expressed in terms of names, objects, dates and preferences and it will be translated into external traces,[474] when in fact it may not.

Formally, the asylum assessment based on sexuality and gender identity must be implemented according to the UNCHR[475] and the Court of Justice of the European Union (C-473/16 and Joint Cases C-148/13, C-149/13, C-150 /13)[476] protection guidelines. Such guidelines instruct that fundamental rights of the applicants, such as the right to respect for private life, should not be infringed during the asylum process. The guidelines also condemn the use of stereotypes and tests for credibility assessment. On the other hand, as Ferri notes, EU secondary law does not prevent authorities from using such tests, and EU member states are granted some leeway in the credibility assessment.[477] Thus, the rights of the applicants in credibility assessments are in a precarious position, especially when it comes to gender identity, where many remnants of medicalization are present in the context of asylum.

It should be noted, however, that ICD-11 has removed gender incongruence from mental health disorders.[478] The American Psychiatric Association notes that gender dysphoria is not an indicator of transgender identity.[479] In addition, a compulsory medical examination, even if of minor importance, must be considered as an interference with the right to privacy laid

[473] Maja Hertoghs and Willem Schinkel, 'The state's sexual desires: the performance of sexuality in the Dutch asylum procedure' (2018) 47 Theory and Society 691, 691.
[474] Idem 714.
[475] UNHCR (UN High Commissioner for Refugees), *Guidelines on International Protection No 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (23 October 2012) <http://www.unhcr.org/509136ca9.pdf.> accessed 25 July 2020.
[476] *F v. Bevándorlási és Állampolgársági Hivatal (Office for Immigration and Citizenship, Hungary)* App No Case C 473/16 European Union: Court of Justice of the European Union, 25 January 2018); *A, B, C v. Staatssecretaris van Veiligheid en Justitie* App No C-148, C149 and C-150 (European Union: Court of Justice of the European Union, 2 December 2014).
[477] Federico Ferri, 'Assessing Credibility of Asylum Seekers' Statements on Sexual Orientation: Lights and Shadows of the F Judgment' (2018) 3 (2) European Papers: a Journal on law and Integration 875, 876.
[478] WHO (World Health Organization), 'ICD-11 International Classification of Diseases 11th Revision: the global standard for diagnostic health information' (2019) https://icd.who.int/en> accessed 25 July 2020.
[479] Jack Drescher and Jack Pula, 'Expert Q & A: Gender Dysphoria' (*American Psychiatric Association* 2020) <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a> accessed 25 July 2020.

down in Article 8 ECHR,[480] if it is not legitimate and necessary for the aim involved. This is further supported by Principle 18 of the Yogyakarta Principles (2007), which states: 'No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity'.[481] In accordance with the prohibition of 'phallometry' tests used in the Czech Republic and in Slovakia in sexuality claims, which constitute inhuman and degrading treatment (Article 3 ECHR),[482] as well as an invasion of applicants' privacy (Article 8 ECHR),[483] all medical tests and private evidence in sexual orientation and arguably also gender identity claims should be abandoned.[484] This is also what the CJEU has ruled on two occasions in sexual orientation asylum claims, in C-473/16 and Joint Cases C-148/13, C-149/13 and C-150 /13.[485] Sexual orientation and gender identity are a matter of self-identification, not a matter of medicine, psychiatry or psychology, as Jansen and Spijkerboer note.[486] I would argue that even that is not necessary, given that the applicants demonstrate traits of gender nonconformity and a fear of harm because of them, even if they do not identify as LGBTQI+ but simply show an emotional attachment to the above traits. The fixed categories that are most often assumed in Refugee Status Determination in essence negate the fluidity, personal configuration and social connotations of gender identity and expression. Instead, they impose other applicant criteria that may not be relevant to the impact of gender nonconformity and fear of persecution as they experience it.[487]

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[480] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 8.
[481] International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) principle 18.
[482] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 3.
[483] Idem art 8.
[484] Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (COC Nederland/Vrije Universiteit Amsterdam, September 2011) 50.
[485] *F v. Bevándorlási és Állampolgársági Hivatal (Office for Immigration and Citizenship, Hungary)* App No Case C 473/16 European Union: Court of Justice of the European Union, 25 January 2018);
A, B, C v. Staatssecretaris van Veiligheid en Justitie App No C-148, C149 and C-150 (European Union: Court of Justice of the European Union, 2 December 2014).
[486] Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (COC Nederland/Vrije Universiteit Amsterdam, September 2011).
[487] Thomas Spijkerboer, 'Sexual Identity, Normativity and Asylum'. in Thomas Spijkerboer (ed), *Fleeing homophobia: Sexual orientation, gender identity and asylum* (Routledge 2013)

Another issue that makes credibility assessment difficult in gender identity claims is the use of stereotypes. As Jansen and Spijkerboer state, '[p]eople use stereotypes in order to structure the sensory impulses they receive', and use their lived experience as a benchmark to assess claims from people from different cultures, nationalities and backgrounds.[488] Although stereotypes do interfere with adjudication, decision-makers must be made aware of them and be ready to question them. Training modules raising awareness of the predisposition to rely on stereotypes must be made available for gender identity and gender expression asylum claims. The use of stereotypes is particularly evident in the examination of the social group with the expectation of common personal tastes, common media and physical social spaces, patterns of behaviour and attitudes. In addition, they are used in the milestones of development of gender identity, such as coming out, as pointed out above. Instead, during the personal interview as envisaged by Articles 14 to 16 of the recast Procedures Directive 2013/32/EU,[489] LGBTQI+ applicants should be given the opportunity to describe how their sexual orientation or gender identity has developed, answering open-ended questions with no expected boxes to tick. They should be allowed to describe the impact of their environment; fear of harassment, violence, as well as feelings of difference, stigma, fear and shame.[490]

As LaViolette has noted, the above would lead to three main lines of enquiry during asylum interviews: (i) personal and family (ii) lesbian and gay contacts in both sending and receiving countries and (iii) experience/knowledge of discrimination and persecution.[491] What is proposed for gender identity and gender expression asylum claims is the adjustment of this list to (i) personal and familial narratives of gender identification and gender expression (ii) experiences of gender nonconformity in both the sending and receiving countries and (iii)

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[488] Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (COC Nederland/Vrije Universiteit Amsterdam, September 2011) 9.

[489] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L. 180/60 -180/95.

[490] Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (COC Nederland/Vrije Universiteit Amsterdam, September 2011) 63.

[491] Nicole LaViolette, *Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group* (May 2004) <https://ssrn.com/abstract=2294763> accessed 25 July 2020.

experience/knowledge/fear of discrimination and persecution. Narratives could be based both on gender identification and gender nonconforming traits that defy dominant gender roles and are of emotional importance to the applicant. Stigmatized behaviours and attitudes that are an expression of personhood should be included, given that they lead to the identification of the applicant as gender nonconforming.

Furthermore, the image of victimhood of gender nonconforming applicants should be abandoned. An applicant should not be expected to show disassociation from their country-of-origin, culture and community and identify the West as the site that liberal discourses of sexual freedom suggest will guarantee their safety.[492] The reproduction of cultural hierarchies should not be expected in the asylum procedure, not only for ethical reasons, but because it privileges certain cultural and class narratives that submit to transnational liberal discourses and silences non-normative asylum seekers.[493] Asylum adjudicators should not look for 'morally legitimate suffering bodies',[494] since this imagery allows emotional proximity to certain individuals, but dehumanizes those who are 'othered', including their communities.[495] Instead, in gender identity and gender expression asylum claims, adjudicators should look for traits that express personhood in ways that jeopardize the safety of the applicant in the country-of-origin.

What is clearly needed is a safe and reassuring environment where the applicants can use their preferred terminology, and the adjudicators will be informed enough to link it to the Convention grounds. Potentially intrusive and irrelevant questioning should be avoided.[496] The intimate and stigmatized nature of the issue should be acknowledged so that delay in revealing it would not result in a negative decision on credibility, as well as the lack of corroborative evidence. Adjudicators should not rely on pre-determined notions of sexual

[492] Mengia Tschalaer, 'Between queer liberalisms and Muslim masculinities: LGBTQI+ Muslim asylum assessment in Germany' (2020) 43 (7) Ethnic and Racial Studies 1265, 1271.
[493] Eithne Luibhéid, 'Queer/Migration: An Unruly Body of Scholarship' (2008) 14 (2) GLQ: A Journal of Lesbian and Gay Studies 169, 180.
[494] Miriam I. Ticktin, *Casualties of Care: Immigration and the Politics of Humanitarianism in France* (Los Angeles: University of California Press 2011).
[495] Mengia Tschalaer, 'Between queer liberalisms and Muslim masculinities: LGBTQI+ Muslim asylum assessment in Germany' (2020) 43 (7) Ethnic and Racial Studies 1265, 1275.
[496] UKLGIG (UK Lesbian and Gay Immigration Group), *Still Falling Short: The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity* (July 2018) 6.

self-realization, and more importantly not expect a particular type of emotional journey. It is very important to note that internal conflict may not arise in transgender and gender nonconforming applicants, and that would be the case also regarding their religious beliefs even if these seem contradictory. It has been seen that many adjudications expect a particular kind of conflict between religious beliefs of the applicants and their sexuality or gender identity or a particular kind of resolution. Furthermore, risk-taking behaviour must not be seen as either making a claim not credible, or supporting it. One must not forget that a claimant must prove that their account is 'reasonably likely' and that is the standard of proof that must be applied.[497] Furthermore, stereotypical notions of femininity and masculinity in the assessment of transgender claims should be avoided as they are not a clear marker of identity and they reinforce gender binarism. Finally, the reliance on medical interventions history or the will to proceed to such is unnecessary and inappropriate too, since it does not indicate the validity of a transgender identity and given of course the very private nature of the issue.

4. Decolonizing gender identity in refugee law

According to Betts, decolonization has figured in recent years in the intellectual attempt to reconfigure the world by decentring it from its Eurocentric representation. The effort is for the former acclaimed Eurocentric vision of the world to be replaced as a mindset.[498]

When asylum claims based on gender identity and gender expression are examined, one must be very cautious about whether western assumptions and classifications can capture non-western experiences of gender nonconformity. In this chapter, one proposes the addition of nonconforming gender expression to the refugee grounds for asylum, in order to be able to capture discursive performances that may lead to persecution without clear rights-based identity claims. In addition, as Mannur and Braziel note, the diasporic background of gender

[497] Idem 7.
[498] Raymond F. Betts, 'Decolonization A brief history of the word' in Els Bogaerts and Remco Raben (eds), *Beyond Empire and Nation* (Brill 2012) 31.

nonconforming asylum claimants complicates their narratives, in that they are historically and culturally specific and are shaped by the dispersal and movement from a geographic location to other disparate sites.[499] In addition, Mishra's analysis argues that the diasporic imaginary is framed within an 'episteme of real or imagined displacements',[500] precariously positioned between material and imagined differences. Trans and gender nonconforming diasporic subjectivities reflect different configurations of desire, nostalgia and belonging, full of disruptions and contradictions when it comes to the imaginary of 'home'.[501]

Diasporic subjectivity is also connected with the position of the 'subaltern'. The subaltern in Spivak's work is characterised by analytical ambiguity. According to Spivak, the group of subalterns, which is oppressed by colonialism, lives 'deeply in shadow' since it is positioned 'in between' spaces of culture'.[502] One must be very cautious about the invisibilities that such a state produces when it comes to trans and gender nonconforming applicants. As it is with the subaltern woman, this group of applicants is positioned in a 'double bind', between the spaces of patriarchal nationalism and colonising Western discourses. When it comes to conceptualizing refugeehood in a postcolonial discourse, Kapur argues for an analysis that focuses on the corporeal position of subaltern sexualities instead of a monolithic legal paradigm which views sexual minorities as lacking agency.[503] Colonial knowledge production obscures the ways that subjects resist conditions of subordination and privileges linear narratives of victimhood.[504]

In order to resist those tendencies, decision makers must interrogate the space between the knower and the interrogated subject.[505] Especially when assessing fear of disclosure or

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[499] Jana Evans Braziel and Anita Mannur, 'Nation, migration, globalization: Points of contention in Diaspora studies' in Jana Evans Braziel and Anita Mannur (eds), *Theorizing Diaspora* (Blackwell Publishers 2003) 3.
[500] Vijay Mishra, *The Literature of the Indian Diaspora: Theorizing the Diasporic Imaginary* (Routledge 2007) 1.
[501] Gita Gopinath, *Impossible desires: Queer diasporas and South Asian public cultures* (Duke University Press 2005) 4.
[502] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *The Post-Colonial Studies Reader* (Routledge 2006); Homi K. Bhaba, *The Location of Culture* (Routledge 1994).
[503] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glass House Press 2005) 13.
[504] Idem 21.
[505] Sherene Razack, *Looking White People the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (University of Toronto Press 1998) 37.

exposure in the country-of-origin, one needs to think how the 'closet' functions in a diasporic context, as a shifting mode of self-regulatory violence in queer bodies. Sedgwick argues that 'the closet is the defining structure of gay oppression this century',[506] which operates through the performance of silence.[507] 'Coming out' of the closet, a milestone of LGBTQI+ identity in the western representations, signifies ways in which queer subjects are concealed or shamed into managing their visibility.[508] In international protection status determination, however, silence and speech are not interpreted under the above lenses, but rather what is expected is a confirmation of the account of victim and saviour. Positionality of adjudicators is something that needs to be reflected upon, in order to minimize these projected representations.[509]

Also, according to Nasser-Eddin, decolonizing refugee law can help us familiarize ourselves with terminologies other than the dominant ones, with which non-western trans and gender nonconforming individuals may well not identify.[510] That does not mean that concepts such as gender identity or gender expression will or should be abandoned but that they need to be expanded and problematized in order to capture the complex narratives and identifications of asylum applicants. There is, of course, normative authority in classifying individuals according to a legal framework, but there is also responsibility involved in understanding - without preconceptions- the narratives of the asylum claimants, and being able to relate those to the legal definitions one has in hand. It is true that there is a totalizing effect of legal definitions, which reflects western hegemony, but one can resist this effect by a) historicising the issue, that is by being aware of the cross-cultural history of the phenomena one is studying, b) politicizing the issue, that is by thinking about the political agendas that are involved in it, c) contextualizing the issue, that is by identifying the interlocking and intersecting structures of oppression that are present there, and finally d) globalizing the issue, that is by thinking about the global structures that shape the specific phenomena that

[506] Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990) 7.
[507] Idem 3.
[508] Michael P. Brown, *Closet Space: Geographies of metaphor from the body to the globe* (Routledge 2000) 1.
[509] Nour Abu-Assab and Nof Nasser-Eddin, 'Decolonial Approaches to Refugee Migration: Nof Nasser-Eddin and Nour Abu-Assab in Conversation' (2020) 3 Migration and Society: Advances in Research 190, 197.
[510] Idem 197.

one is trying to address.[511] These strategies can help us decolonize sexuality and gender in the refugee process combined with positioning one's self and trying to expand one's knowledge based on the marginalized person's perspective, having in mind that they too are knowledge bearers.[512]

Neo-colonial epistemic categories of, among others, gender, race and sexuality do sustain colonial heteronormativity. Decolonizing gender entails interrogating systems of classification and taxonomies, that classify people according to their skin colour, biological composition or body configuration. Delinking knowledge and being from coloniality means rethinking and reconfiguring experience. We use legal concepts in order to address pre-existing phenomena and deliver justice for previous wrong doings, but one must be aware of the potential reproduction of hierarchies of power through the processes of institutional protection from a position of authority towards oppressed people. One needs to examine the conditions of erasure of diverse ways of being that exist against progressive queer championship of the West. Our systems of knowledge have largely been produced by institutional and formal education, writing and inquiry that privileges narratives of Euro-American domination and ignores violent colonization of non-Euro-American spaces. Epistemological practices that are detached from the subjects of inquiry are presented as scientific and objective, and deemed *a priori* progressive. Coloniality has been constitutive and not derivative of modernity, so it is indeed very difficult to question its assumptions. Decoloniality means delinking from discourses that privilege Euro-American centric knowledge and giving voice, learning from the subaltern subject.[513]

Feminism, LGBT+ rights, decolonialism, pacificism, ethnic minority rights and anti-fascist critiques of refugee law in North Europe have largely been initiated by activists who do not have irregular migrant background linked with their demand for refugee justice.[514] Changes

[511] Idem 198.
[512] Idem 200.
[513] Sandeep Bakshi, Suhraiya Jivraj and Silvia Posocco 'Introduction' in Sandeep Bakshi, Suhraiya Jivraj and Silvia Posocco (eds), *Decolonizing Sexualities: Transnational Perspectives, Critical Interventions* (Counterpress 2016) 4.
[514] Thomas Spijkerboer, *European Sexual Nationalism: Refugee Law after the Gender & Sexuality Critiques* (Key Note Speech, Nordic Asylum Seminar, University of Uppsala, 8 May 2015) 9 <https://ssrn.com/abstract=2607476> accessed 20 June 2020.

in refugee law, and the fact that it now addresses gender and sexuality claims, as opposed to the 1950s and 1960s, reflects mostly western gender equality and LGBTQI+ historical developments, and not the fact that such claims based on gendered persecution did not exist before. One must be aware of the fact that these Euro-American developments reflect Euro-American representations of experience and demands, but need to be delinked from them since they do not do justice to a variety of global and specifically situated gendered trajectories.[515]

According to Colpani and Habed, through the advancement of LGBTQI+ rights, 'Europe establishes itself as a space of sexual exceptionalism and ultimately as a sexual fortress under siege'.[516] In *Terrorist Assemblages,* Puar similarly argues that the politics of homonormativity, the appropriation of heteronormativity by homosexuals, normalize western homosexuality. At the same time, homonationalism deems non-western queers inappropriate. Homonationalism is 'a form of sexual exceptionalism – the emergence of national homosexuality'.[517] Puar argues that homonormativity is the normalization of homosexuality in western countries according to western standards of sexual regulation similar to those of hetero relationships. These countries use homonationalism 'as a regulatory script not only of normative gayness, queerness, or homosexuality, but also of the racial and national norms that reinforce these sexual subjects'.[518] The same can hold true for transgender individuals that assume their subjectivity in terms of their whiteness and western citizenship. For Puar, the display of domesticated homosexual individuals demonstrates national progress, which in turn reinforces material, cultural and discursive domination over non homonational countries.[519]

Assigning asylum status to non-western queers can be such a homonationalist project, in which 'the myth of sexual exceptionalism, the freedom for people of all sexual orientations and practices is invested upon to gloss the atrocities in the war economy of homonationalist

[515] Idem.
[516] Gianmaria Colpani and Adriano José Habed, 'In Europe It's Different': Homonationalism and Peripheral Desires for Europe' in Phillip M. Ayoub and David Paternotte (eds), *LGBT Activism and the Making of Europe: A Rainbow Europe?* (Palgrave Macmillan 2014).
[517] Jaspin Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007) 2.
[518] Idem 2.
[519] Idem 39-40.

countries'.[520] This can be argued to apply in all LGBTQI+ asylum applications, but it is particularly the case when asylum becomes a means for decision makers to always discover homophobia and transphobia elsewhere. Reinforcing binaries between the progressive west and the barbaric elsewhere and misrepresenting non-western gender nonconformity by submitting subjects to the normative boundaries of western queerness is usually the way asylum can be transformed into a means of western domination. Expectations to demonize the home country as homo- and trans-phobic and provide a shock value victimhood spectacle on the part of western adjudicators in the asylum interview come at the cost of complicated diverse experiences of non-western queers and help to reinforce the homonationalist project.[521]

According to Murray,

> LGBT refugee claimants face daunting challenges negotiating a system in which questions of authenticity are constructed through an evaluation of bodily appearances, comportment and narratives that are consistently evaluated for their fit with western homonationalist sexual categories.[522]

Razack notes that tribunal members, legislators, lawyers and the media are the ones whose descriptions, imaginaries and gazes construct asylum seekers as worthy of protection from the tyranny of their own culture or unworthy of it.[523] In this process, the assessment of sexual and gender persecution operates in highly racialized and essentialist terms and privileges narratives of violence from the applicant's community against narratives of violence as colonized subjects.[524] As Haritaworn argues, the West enshrines narrow concepts of diversity defined in terms of freedom and choice, that not incidentally conform with the

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[520] Raihan Sharif, 'White Gaze Saving Brown Queers: Homonationalism Meets Imperialist Islamophobia' (2015) 21 (1) Limina: A Journal of Historical and Cultural Studies 1.
[521] Idem 13.
[522] David A. B. Murray, 'Real Queer: 'Authentic' LGBT Refugee Claimants and homonationalism in the Canadian Refugee System' (2014) 56 (1) Anthropologica 21, 29; Sherene Razack, *Looking White People the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (University of Toronto Press 1998) 97.
[523] Sherene Razack, *Looking White People the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (University of Toronto Press 1998) 97.
[524] Idem 99.

neoliberal free market ideology whose own inherent exclusions are harder to identify.[525] Luibhéid has argued that successful refugee claims often require producing a racialized, colonialist narrative of disassociation from the nation state from which the claimant comes. In addition, the claimant must construct their gender identity and sexuality as immutable characteristics through colonialist frameworks universalized and also void from all other material and emotional relations between the applicant and their community (2008:179).[526] It is very important not to disadvantage narratives of imperialism, colonialism and racism in the asylum applicant's process of sexual identity configuration, in order to be able to identify 'how these systems of domination produce and maintain violence against racialized sexual minorities both within and beyond national borders.'[527]

5. How to make good law with transgender cases

There are several issues that arise in the refugee status determination process of transgender and gender nonconforming asylum applicants. Firstly, one must deal with the criteria of inclusion within the PSG group. There are, as mentioned above, two tests: the protected characteristics test and the social perception test. First and foremost, these tests should not be applied cumulatively as is currently the case in some jurisdictions, but alternatively, according to the UNHCR guidelines.[528] Secondly, especially when it comes to the protected characteristics test, which states that the characteristic that defines the PSG must be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or

[525] Jinthana K. Haritaworn, *The Biopolitics of Mixing: Thai Multiracialities and Haunted Ascendencies* (Ashgate 2012) 3.
[526] Eithne Luibhéid, *Entry Denied: Controlling Sexuality at the Border* (University of Minnesota Press 2002) 179.
[527] David A. B. Murray, 'Real Queer: 'Authentic' LGBT Refugee Claimants and homonationalism in the Canadian Refugee System' (2014) 56 (1) Anthropologica 21, 29.
[528] Michelle Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*. (UNHCR, August 2012, PPLA/2012/02) <https://www.refworld.org/docid/4f7d94722.html.> accessed 25 July 2020; UNHCR (UN High Commissioner for Refugees), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted* (COM (2009) 551, 21 October 2009) <https://www.unhcr.org/4c5037f99.pdf> accessed 25 July 2020.

the exercise of one's human rights, adjudicators must examine the nature of gender variance not only in the light of fundamentality to identity, but also to conscience and the exercise of human rights. The immutability approach, the fact that the applicants should prove that the characteristics are innate and unchangeable, should be abandoned, since it is not supported by current gender theory and reflects westernized notions of gender identity, as Greg Mullins notes.[529] A stable sexual identity, a 'fateful fixation' as it is called in Germany ('*Schicksalhaften Festlegung*'), is not the only experience of gender variance, and it implies that necessity is at the core of human rights. This is not applied in political or religious claims and reflects a reductive reading of human rights.[530]

The recognition of human rights of gender minorities remains a contested space in international law. There is no specific treaty that recognizes the Human Rights of LGBT+ individuals. On June 2011, however, the United Nations Human Rights Council issued a resolution expressing its concern at the grave human rights violations that this group of people suffer globally, emphasizing the principles of human dignity, non-discrimination and equality.[531] The 2007 Yogyakarta Principles also express evolving norms and act as persuasive interpretations of Human Rights Treaties that relate to LGBT+ individuals.[532]

In *Ward v. Attorney-General (Canada),* decided by the Supreme Court of Canada, La Forest J. provides an instructive point of reference when delineating the 'particular social group' as: 'groups defined by innate or unchangeable characteristics; groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the associated; and groups associated by a former voluntary status, unalterable due to its historical permanence'. [533] This indeed is a good starting point since it

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[529] Greg A. Mullins, 'Seeking Asylum: Literary Reflections of Sexuality, Ethnicity and Human Rights' (2003) 28 (1) MELUS 145, 146.
[530] Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (COC Nederland/Vrije Universiteit Amsterdam, September 2011) 62.
[531] United Nations Human Rights Council Resolution 17/19 [2011] A/HRC/17/L.9/Rev.1.
[532] Senthorun Raj, 'Protecting the persecuted: sexual orientation and gender identity in refugee claims' (2013) Winston Churchill Trust 1, 25.
[533] *Ward v. Attorney-General (Canada)* [1993] 2 SCR 689 (La Forest J) para 739. See also UN High Commissioner for Refugees (UNHCR), Membership of a Particular Social Group: Analysis and Proposed Conclusions (Draft) [Global Consultations on International Protection/Second Track], 1 August 2001 <https://www.refworld.org/docid/3bf92b584.html> accessed 26 April 2023.

reflects a better application of the UNHCR guidelines on the PSG, and is more inclusive of gender variance as a persecutory ground, and a ground for international protection. It delinks from linear expectations of gender identity development and medicalized notions of gender nonconformity, and leaves space for diverse transgender experiences and narratives.[534] It also limits the ambiguity of positivist legal adjudication which favours certainty and closure against representational fluidity in gender identity and gender expression claims. Doctrinally, it is more coherent and open to analytical clarifications since it puts human rights at the core of the refugee adjudication, instead of the ambiguous notion of immutability.[535]

The lack of a coherent legal approach to determining membership in a PSG for gender identity related claims becomes especially apparent when closely examining Refugee Status Determination and the decision-making process. In their attempt to unravel complex legal issues relating to sexual identity asylum claims (but equally relevant to gender identity claims), Hathaway and Pobjoy have developed the concept of 'endogenous harm' as an alternative prerequisite for 'persecution' under Refugee Law.[536] 'Endogenous harm' according to their words 'is the modification of behavior itself, or the impact that the modification has on the applicant, that is the relevant persecutory harm'.[537] According to their analysis, a well-founded fear of persecution in sexual orientation related asylum claims has to involve a real risk of serious harm since 'the exogenous consequences of being openly gay are remote in cases of enforced discretion, [but] the endogenous harms that follow from self-repression are likely to be readily established'.[538]

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[534] Senthorun Raj, 'Protecting the persecuted: sexual orientation and gender identity in refugee claims' (2013) Winston Churchill Trust 1, 27.
[535] Senthorun Raj, 'Queering Fears: Pro-LGBTI Refugee Cases'. in Chris Ashford, Alan Reed and Nicola Wake (eds), *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016) 130.
[536] James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York Journal of International Law and Politics 315; Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms is Not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 New York Journal of International Law and Politics 497.
[537] James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York Journal of International Law and Politics 315, 333.
[538] Idem 347.

For them, an implausible risk of serious harm cannot be considered real for the purposes of Refugee Status Determination. Nevertheless, given that the discretion requirement is not applied in religious or political beliefs, one has to be clear about the scope of the right to sexual orientation and/or gender identity/expression. If, indeed, the content and the scope of these rights is such that forced concealment constitutes itself a violation, it is doubtful whether the risk remains implausible or unreal and whether RSD bodies can expect applicants to choose this particular violation (whether it is assessed as severe or not) over the risk of other serious harm. In addition, the rights to gender nonconformity should be established drawing on human rights norms, and should be juxtaposed with religious freedom and freedom of political opinion. Furthermore, if the applicant expresses a will to live freely, then the harm is established. If not, then the possibility of the threat of serious harm and homo/transphobia shaping their choices must be examined, as well as risk of exposure in the course of a lifetime. Plausibility of exposure, in my view, should be examined in terms of long-term likelihood not in terms of a timely frame. Resorting to the 'endogenous harm' approach should be the last resort for adjudicators, since it not only burdens unreasonably the applicant proof-wise, if applied in a standard-setting manner, but also leaves even more space to RSD bodies for ambiguous assessments regarding the criteria by which the harm will indeed be considered a serious violation and the credibility of the applicant.

According to Hathaway and Pobjoy, the voluntary concealment of one's sexual, and arguably gender identity eliminates the well-founded fear of persecution due to 'exogenous harm'.[539] What is wrong with this line of reasoning is the fact that it ignores that volition is shaped within a social, possibly threatening context, and that it is quite impossible to disentangle the rational and subconscious choice that it entails, especially when fear of serious harm coexists. Furthermore, on a practical level, applicants would have to show the impact the modification of their behaviour has had on them, and this brings us back to medicalized notions of sexual identity and particular assumptions of how that is experienced, as well as its concealment. One does not have to examine the psychological impact of not having the freedom to practice one's religion or express one's political opinion. The

[539] Idem.

persecutory harm that is feared by sexual minority applicants is not the 'endogenous harm', which is an impact of the fear and the forced concealment, but the material conditions of living freely that can be verified by country-of-origin information. Asking adjudicators to assess 'endogenous harm' as persecution raises many challenges and space for stereotypical assumptions on how gender and sexual identity and expression are or are not experienced. Renouncing sexual and gender identity should be a persecutory harm *per se*, without resorting to assessment of endogenous harm or impact. This falsely makes a distinction between physical and non-physical harm, with the first being considered as exogenous and self-evident, and the second one as endogenous, although activated by exogenous factors, and thus in need of assessment.

According to Hathaway and Pobjoy, 'only persons able to show a forward-looking risk of persecutory harm can establish a 'well-founded fear,' and hence qualify as refugees'.[540] This though ignores the fact that the lack of freedom of expression in relation to fundamental aspects of conscience and personhood and the inability or unwillingness of the state to guarantee it is itself a serious material harm without having to assess psychological impact, and can be considered a severe violation of human rights of the applicant especially given its systematic nature and broad-ranging impact, both physical/social and mental/emotional. Furthermore, psychological/mental and physical harm do not exclude each other, and many times coexist and interrelate as aspects of harm, as it is most often evident in cases of torture.[541]

Hathaway and Pobjoy go on to say that although the courts were right to reject the rigid is/does dichotomy in sexuality claims, trivial activities of gay identified applicants should not be protected under the Refugee Convention. They make a distinction between integral activities for sexual orientation and peripheral ones such as lifestyle choices.[542] This focus

[540] Idem 331.
[541] Connie Oxford, 'Connie Oxford Responds to James Hathaway & Jason Pobjoy' (2012) 44 (2) Panel 1 of the NYU JILP, 44: Online Symposium <http://opiniojuris.org/2012/03/08/connie-oxford-responds-to-james-hathaway-jason-pobjoy/> accessed 25 July 2020.
[542] James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York Journal of International Law and Politics 315, 374; See also Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms is Not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 New York Journal of International Law and Politics 497, 560.

on activities is misleading in addressing the nexus and persecution question. As Millbank notes, what is protected by refugee law are the stigmatized traits (identities) that can be expressed or revealed by any kind of activity.[543] This is also supported by the protection of refugee law in cases of imputed characteristics, which shows that it is not the activities per se that are protected from persecution; these are only the means through which a stigma is attributed. What needs to be established instead is a violation of the human rights of a stigmatized group, whether the exposure or expression happens though a trivial activity or not and independently of whether the characterization is valid or imputed. Hathaway and Pobjoy argue that 'the protected status of sexual orientation ought . . . to encompass any activity reasonably required to reveal or express an individual's sexual identity.'[544] The emphasis on reasonably required expression sets very low standards for the protection of human rights and leaves unnecessary space for ambiguous assessments regarding reasonableness of expression on the part of adjudicators. Instead, the emphasis must be put on whether applicants are at risk to be classified as belonging to a stigmatized particular group that is in fear of serious harm independently of whether the activities validly reflect membership or not or whether they are conscious of it.[545] As mentioned above, it is not activities that are protected, but rather the rights of a stigmatized group.

In particular, for transgender and gender nonconforming applicants, the focus on activities, and the distinction between peripheral and integral is highly problematic and brings back medicalized notions of gender identity that may require bodily modification claims or particular stereotypical presentations. Viewing certain activities, such as for example engaging in particular socializing lifestyles or hobbies, as trivial aspects of subjects instead of significant expressions of identity obscures the fact that personhood is protected as a whole from serious violations regardless of the activity that exposes the applicants. The stigmatized identity traits not their practices are protected and no reasonableness criterion

[543] Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms is Not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 New York Journal of International Law and Politics 497, 512.
[544] James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York Journal of International Law and Politics 315, 382.
[545] Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms is Not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 New York Journal of International Law and Politics 497, 513.

could be applied objectively on aspects of behaviour of stigmatized individuals protected by the Convention as such.[546]

6. Concluding remarks and Research Questions

Finally, it should be noted that a wider range of scholarship on the legal treatment of transgender asylum claims has emerged in this century, mainly in the U.S.[547] Moreover, relevant guidance from the UNHCR and national level determination bodies is increasingly available. However, the application of gender theory to the potentially more challenging questions of gender nonconformity and gender identity/expression in asylum law is significantly more limited. By bringing in valuable insights from gender theory, this study aims to contribute but also complicate in a constructive manner the scarce existing literature on the subject. This theoretical endeavour will be complemented by the doctrinal examination of the CJEU and ECtHR jurisprudence on gender identity and asylum in chapters VI and VII. Such focus is crucial in order to understand current practice and provide a socio-legal point of reference regarding gender-identity related jurisprudence. This, in turn, can shed light on the discrepancies that arise in the decision-making process. In a nutshell, this study will employ a critical perspective to the refugee determination decisions and apply doctrinal and discursive analysis informed by gender theory to the RSD procedure. Below are some of the questions, that the thesis either explored in this chapter or will attempt to synthetically answer in the chapters VI and VII, where I will analyse the jurisprudence of

[546] Idem 515.

[547] Christi Jo Benson, 'Crossing borders: a focus on treatment of transgender individuals in US asylum law and society' (2008) 30 Whittier Law Review 41; Ellen A. Jenkins, 'Taking the Square Peg out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers' (2009) 40 Golden Gate University Law Review 67; Joseph Landau, 'Soft immutability and imputed gay identity: recent developments in transgender and sexual-orientation-based asylum law' (2005) 32 Fordham Urban Law Journal 237; Victoria Neilson, 'Uncharted Territory: choosing an effective approach in transgender-based asylum claims' (2004) 32 Fordham Urban Law Journal 266; Connie Oxford, 'Queer Asylum: US Policies and Responses to Sexual Orientation and Transgendered Persecution.' in Marlou Schrover and Deirdre M. Moloney (eds), *Gender, Migration and Categorisation: Making Distinctions between Migrants in Western Countries, 1945-2010* (Amsterdam University Press 2013) <www.oapen.org/download?type=document&docid=459571> accessed 25 July 2020.

the ECtHR and CJEU, after I present background and methodology of the research in Chapters IV and V.

- What are the developing human rights norms in an international and European context that can help us demarcate the fundamentality of gender identity/expression as an integral part of one's personality and identify the core content of the right to gender identification? What is the implicit or explicit definition of gender identity provided by the judicial review of the European Courts, EU legislation and International Human Rights bodies? Can one provide a qualified theoretical critique to this conceptualization within the normative context of Human Rights on the basis of current scientific, societal as well as institutional developments?

- How can one define the scope of fundamental rights protected by EU Law and the ECHR drawing on the Case Law of ECtHR and CJEU regarding gender identity/identification/expression in particular? How is this scope configured in the context of EU Asylum Law especially regarding the severity of violation assessment? What are the positive and negative limits of gender identity protection that can be derived from the related Case Law of the European Courts? What are the insights that can be derived from the jurisprudence on gay rights (Art. 8 ECHR and Art. 7 CFREU)[548] as well as religious freedom and freedom of conscience (Art. 9 ECHR and Art. 10 (1) CFREU)?[549] Can we arguably apply these limits to gender identity in Refugee Status Determination and to what extent?

- How can a Human Rights based approach on gender identity informed by relevant human rights norms provide a more articulate legal framework for establishing membership of a 'Particular Social Group' (PSG) so as to limit the ambiguity and stereotyping that arises

[548] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 8; European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 7.
[549] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 9; European Union, European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 10 (1).

in the context of credibility assessment by RSD bodies in relation to the gender identity of the applicant?

- How can Refugee Status Determination bodies assess the effects of gender nonconformity in a particular social context? Should they be assessed on an objective (social/official treatment) or subjective (psychological impact) basis in relation to 'well-founded fear of persecution'? What is the legal reasoning prohibiting a requirement of discretion by gender nonconforming individuals? Does the lack of a legitimate process for legal recognition of gender identity constitute persecution?

This chapter has offered an insight into Particular Social Group and persecution assessment for transgender and gender nonconforming asylum claims. It has also dealt with the decolonization of concepts of refugee law, and how one can perform international protection assessments based on the theoretical toolkit of that has been outlined in Chapter II and based on the epistemological antiessentialist feminist assumptions laid down in Chapter I. Now, before I turn to the case law which I will analyse, namely the ECtHR and CJEU jurisprudence on asylum and LGBTQ+ rights, I will give the background of the latter institutions and their judicial deliberations (Chapter IV), and then justify my methodological choices (Chapter V). My main theoretical arguments have been presented in this chapter and will be juxtaposed with the doctrinal and discursive analysis of ECtHR and CJEU relevant case law performed in Chapters VI and VII. My attempt is to reveal the authoritative interpretation of the ECtHR and the CJEU on gender identity/expression and asylum, and critically evaluate the access to protection that EU and CoE states offer to transgender and gender nonconforming asylum claimants.

Chapter IV: Background of the research- the CJEU and the ECtHR

In this chapter, I will present an overview of the constitution and functions of the institutions whose jurisprudence I am going to consider in the next chapters (particularly chapters VI and VII). My goal is to make visible the connection between the Court of the Justice of the European Union's competence and doctrine and the Member States' practice and policies in Refugeehood, Gender and the Law, which I will do in subchapter 1. In subchapter 2, I will look into the configuration of the European Convention of Human Rights and the European Court of Human Rights, its decision-making and the interrelationship between, on the one hand, the Convention and the Court's jurisprudence and, on the other, EU law. My purpose is to offer an insight in these judicial institutions' political and legal functions as well as highlight their interrelationship, in order to be able to better interpret the research findings.

1. Court of Justice of the European Union

The CJEU is based in Luxemburg, and it is the Court of the European Union. The Court of Justice in the narrow sense is also called the European Court of Justice (ECJ), attached to which is the General Court (GC), and the specialized court, the Civil Service Tribunal (CST). All together they form the institution called the Court of Justice of the European Union.[550]

The three main categories, into which the functions of the ECJ can be divided are:

(i) References for a preliminary ruling – which are submitted mainly through Article 267 TFEU by domestic courts and tribunals seeking authoritative interpretation of an EU measure or evaluation of the validity of an act of an EU institution. The decision delivered

[550] Consolidated version of the Treaty on European Union [2016] OJ C 202/27/2016, Title I, art 19 (1).

by the ECJ (only within the scope of EU law) is then applied by the referring court, but must also be followed by other courts of Member States.

According to Bobek, the Court of Justice is also responsible for the following:

(ii) Judicial review directly or more often on appeal of the legality of acts of institutions of the Union pursuant to Article 263 TFEU. At stake is the possible annulment of the act under examination either through appeal against a first instance decision by the GC when the applicant is not a Member State, or brought by the Member States directly to the ECJ,[551] or in the context of incidental review of legality of EU acts through other types of proceedings.

(iii) (Inter-)Institutional disputes, namely types of actions that challenge mainly Union institutions and/or the Member States, such as actions for failure to act (Article 265 TFEU) or infringement proceedings (Article 258 TFEU and its extension in Article 260 TFEU). The decision constitutes a declaration that an EU institution or a Member State has acted in violation of the Treaties or has failed to comply with them.[552]

According to Carrera,[553] the CJEU is at the heart of the new structure of protection of fundamental rights, and the key guarantor that these will be respected in accordance with EU law. The Charter of Fundamental Rights of the European Union, which became primary EU law under the Lisbon Treaty, confers the right to an effective remedy on anyone whose freedoms and rights laid down by the Union Law may have been violated by executive power

[551] Consolidated version of the Treaty on the Functioning of the European Union - PART SIX: INSTITUTIONAL AND FINANCIAL PROVISIONS - TITLE I: INSTITUTIONAL PROVISIONS - chapter 1: The institutions - Section 5: The Court of Justice of the European Union [2008] OJ 115/2008, art 256 TFEU and its (partial) derogation in art 51 of the Statute.
[552] Michal Bobek, 'The Court of Justice of the European Union' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) II <https://ssrn.com/abstract=2445422> accessed 1 July 2021.
[553] Sergio Carrera, Marie De Some, and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (CEPS Papers in Liberty and Security in Europe, No. 49, 29 August 2012) <https://ssrn.com/abstract=2145891> accessed 1 July 2021.

(Art 47).[554] All EU institutions have declared their commitment to respecting the rights and freedoms guaranteed by the CFREU throughout administrative and legislative processes.[555]

The Treaty on the Functioning of the European Union (TFEU), by repealing the constraints under the previous Art. 68 of the Treaty establishing the European Community (TEC),[556] gives full judicial review authority to the CJEU in the context of the especially fundamental rights-sensitive areas of border control, asylum and migration.[557] Art. 263 TFEU also foresees the capacity of the CJEU to scrutinize acts of EU agencies that produce 'legal effects'. As a consequence, agencies like the European Asylum Support Office (EASO) and Frontex could theoretically be held accountable before the ECJ for any conduct that violates fundamental rights. As Carrera, Guild, den Hertog and Parkin have argued, the official discourse surrounding agencies in the context of EU home affairs agencies is that they are 'only' involved in coordinating operational cooperation and assisting Member States which does not, however, discharge them from legal responsibility and liability in cases of violations of fundamental rights before the Court.[558] Finally, Art. 52(3) of the EU Charter, which requires the Luxembourg Court to interpret EU fundamental rights provisions in the light of the ECHR, has in this way established a threshold of EU protection which legally binds the CJEU by not permitting it to narrow the scope of protection that the Strasbourg Court has granted with its jurisprudence.[559] In this way, consistency between the European

[554] Charter of Fundamental Rights of the European Union- TITLE VI – JUSTICE [2016] OJ C202/2016, art 47.
[555] Sergio Carrera, Marie De Some, and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (CEPS Papers in Liberty and Security in Europe, No. 49, 29 August 2012) 5-6 <https://ssrn.com/abstract=2145891> accessed 1 July 2021.
[556] Treaty establishing the European Community (Nice consolidated version) - Part Three: Community policies - Title IV: Visas, asylum, immigration and other policies related to free movement of persons [1997] 340/1997, art 68.
[557] Sergio Carrera, Marie De Some, and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (CEPS Papers in Liberty and Security in Europe, No. 49, 29 August 2012) 6-7 <https://ssrn.com/abstract=2145891> accessed 1 July 2021.
[558] Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies*: *Frontex, Europol and the European Asylum Support Office* (report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE)-2011).
[559] Art 52(3) of the EU Charter states that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

Convention of Human Rights and the Charter of Fundamental Rights of the EU is ensured, since the former constitutes also general principles of EU law. The second indent of Art. 52(3), however, explicitly allows the CJEU to grant a more extensive level of protection than that offered by the ECtHR, establishing broader and more substantive protection for fundamental rights in the EU.[560]

Taken together, Carrera argues, these provisions are expected to bring about an increase in litigation on issues relating to border control, migration, and asylum before the CJEU.[561] The EU harmonisation processes in the Area of Freedom, Security and Justice (henceforth 'AFSJ') with the establishment of the Common European Asylum System (henceforth 'CEAS') is further contributing to this development. As far as Member States act 'within the scope of EU law', the CJEU will be called upon to interpret and review the validity and implementation of EU policies according to EU general principles and Treaties, including the Charter. Similar exposure to judicial review may be observed in the case of EU home affairs agencies, like Frontex and EASO.[562]

1.1. Sources of refugee and gender identity/expression EU law

The Area of Freedom, Security and Justice, and especially policies on external border control, international protection and immigration, have been the focus of scrutiny for many academics, international organizations, and for civil society since it is becoming apparent that the efficient protection of fundamental human rights in the context of immigration is

[560] See Art 53 of the ECHR – 'Safeguard for existing human rights' – which states '[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party'.
[561] Sergio Carrera, Marie De Some, and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (CEPS Papers in Liberty and Security in Europe, No. 49, 29 August 2012) 6-7 <https://ssrn.com/abstract=2145891> accessed 1 July 2021.
[562] Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies*: *Frontex, Europol and the European Asylum Support Office* (report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE)-2011) 82-87.

doubtful.[563] According to Carrera, the multifaceted shortcomings of harmonizing EU policies on refugee protection, including the implementation of the CEAS directives in a manner that does not violate fundamental rights of migrants, seems not to be addressed and accounted for in the context of the multilevel governance of the EU and its Member States.[564] The high degree of vulnerability of asylum claimants and refugees, the divergence in fundamental rights protection in law and practice across Member States, despite the common strands, and the gaps of accountability in addressing violations of the former in EU border and migration management control regimes reveal the tension at the heart of the CEAS and the EU fundamental rights protection when it comes to RSD procedures, substance, and reception.[565]

The AFSJ is a crucial test of the application of the post-Lisbon fundamental human rights protection EU regime and the status and implementation of the CFREU (Charter of Fundamental Rights of the European Union) after it acquired Treaty status. The CJEU then appears as the main institution that can guarantee the right to access fundamental rights protection for vulnerable individuals subject to EU migration, asylum, and border control regimes. It also has the capacity to address the accountability gap and discrepancies between Member States' implementation of EU human rights protection standards also in accordance to the CFREU as primary law of the Union.[566] The conversion of the CFREU into the binding 'bill of rights' of the Union, codifying the foundational principles and values of the latter,[567] is also enshrined in Art. 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,

[563] See idem.
[564] Sergio Carrera, Marie De Some, and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: 'Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (CEPS Papers in Liberty and Security in Europe, No. 49, 29 August 2012) 3 <https://ssrn.com/abstract=2145891> accessed 1 July 2021.
[565] Idem 3.
[566] Idem 5.
[567] Consolidated version of the Treaty on European Union- TITLE I - COMMON PROVISIONS [2016] OJ C 202/2016, art 6 (ex art 6 TEU).

including the rights of persons, equality between women and men, solidarity between generations and protection of the rights of the child'.[568]

Meanwhile, EU Member States are bound by the Recast Qualification Directive (henceforth 'QD'), with the exception of Ireland and Denmark, which are bound by the previous version (2004). Both the UK and the EU Member States have signed the 1951 Refugee Convention[569] and the 1967 Protocol,[570] which set out the conditions for international protection.

Because the recast Qualification Directive is a mechanism established under EU primary law (Article 78(1) TFEU), the subject of its accurate interpretation is primarily a matter for the CJEU, and the CJEU's judgments are binding in all Member States. The CJEU has made it clear in its jurisprudence that the 2004 Qualification Directive – and, by extension, the recast Qualification Directive - must be interpreted in light of its general spirit and purpose, and in a manner that is consistent with the Refugee Convention and other applicable treaties referred to in Article 78(1) of the TFEU.[571] In the recent *Alo and Osso* case, the CJEU decided that the Refugee Convention is relevant for the interpretation of the recast Qualification Directive.[572] The Refugee Convention, as stated in recitals (4), (23) and (24) recast Qualification Directive, is the cornerstone of the international legal structure for refugee protection. It was emphasized that the Directive's provisions for establishing who qualifies for refugee status and the content of that status were established to assist Member States' competent authorities in applying the Convention using common concepts and

[568] Sergio Carrera, Marie De Some, and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: 'Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (CEPS Papers in Liberty and Security in Europe, No. 49, 29 August 2012) 2 <https://ssrn.com/abstract=2145891> accessed 1 July 2021.
[569] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, 153, art 1A(2).
[570] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, 267.
[571] See CJEU, *X and Y and Z v. Minister voor Immigratie en Asiel* judgment, Joined Cases C-199/12 to C-201/12 [2013] ECLI:EU:C:2013:720, para 40; CJEU judgment of *El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, Case C-364/11 [2012] EU:C:2012:826, para 43; and CJEU judgment *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. Region Hannover*, Joined cases C-443/14 and C-444/14 [2016] ECLI:EU:C:2016:127, para 29.
[572] *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. Region Hannover*, Joined cases C-443/14 and C-444/14 [2016] ECLI:EU:C:2016:127, para 25.

criteria.[573] Nonetheless, recitals 8, 9 and 39 of Directive 2011/95 state that the EU legislature intended to establish a uniform status for all beneficiaries of international protection in response to the Stockholm Programme's call. It accordingly chose to grant beneficiaries of subsidiary protection the same rights and benefits as refugees, unless derogations apply. As a result, unless otherwise specified, chapter VII of Directive 2011/95, which deals with the content of international protection, applies to both refugees and beneficiaries of subsidiary protection status, in accordance with Article 20(2).

An EU judge interprets the QD (recast)[574] while having regard to EU primary law, including the CFREU and 'other relevant treaties' referred to in Article 78(1) TFEU. The interpretation of the QD must, according to the CJEU, be consistent with the rights recognized by the EU Charter.[575] Recital (16) highlights as well that the QD (recast) 'respects the fundamental rights and observes the principles recognised in particular by the [EU Charter]'.[576] According to the preamble, the CFREU 'reaffirms […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the [Union] and by the Council of Europe and the case-law of the [CJEU] and of the European Court of Human Rights [ECtHR]'.[577]

First, the CJEU ruled in *NS v. Secretary of State for the Home Department and ME and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law*

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[573] Idem, para 28.

[574] When national courts or tribunals are required to interpret the provisions of EU law, the national judge is required to act as an 'EU judge', as elaborated in European Support Asylum Office (EASO), *Qualification for international protection (DIRECTIVE 2011/95/EU): A Judicial Analysis* (European chapter (IARLJ-Europe) under contract to EASO-2016) <https://easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf> accessed 1 July 2021, 61.

[575] See CJEU judgment *Bundesrepublik Deutschland v. Y and Z*, Joined Cases C-71/11 and C-99/11, [2012] EU:C:2012:518, para 48; CJEU, *Mostafa Abed El Karem El Kott, Chadi Amin A Radi, Hazem Kamel Ismail v. Bevandorlasi es Allampolgarsagi Hivatal (BAH)* Case C-364/11 [2012], para 43; and CJEU, *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. Region Hannover*, Joined cases C-443/14 and C-444/14 [2016] ECLI:EU:C:2016:127, para 29.

[576] Recital (16) also notes that the QD (recast) '[i]n particular [...] seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter, and should, therefore be implemented accordingly'.

[577] European Support Asylum Office (EASO), *Qualification for international protection (DIRECTIVE 2011/95/EU): A Judicial Analysis* (European chapter (IARLJ-Europe) under contract to EASO-2016) 16 <https://easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf> accessed 1 July 2021.

Reform [578] that the CEAS wording indicates that it was developed in a setting that supports the presumption that all Member States uphold fundamental rights. This covers rights based on the Refugee Convention and Protocol, as well as the European Convention on Human Rights.[579] Fundamental rights, as defined in the EU Charter, are part of basic EU law.[580] However, where the provisions of the EU Charter and the ECHR are identical, Article 52(3) of the EU Charter precludes the EU's organizations and bodies, as well as Member States, from weakening the protection offered by the ECHR. Nevertheless, this cannot prevent EU law providing more extensive protection.[581]

In terms of hierarchical status, general principles are usually regarded as either part of primary law (at least when codified in the Treaty) or as a special category of norms just below primary law but above all other EU law, including secondary legislation and international agreements signed by the EU.[582] The topic of whether general principles can even trump the Treaties themselves, and hence the will of the Member States as 'Masters of the Treaty,' is complicated by the hierarchical standing of general principles. Although some recent case law may hint that some key principles may gain supra-Treaty status in some instances, the conventional position remains that this is not conceivable.[583] Even though many general principles of EU law have been codified in the Treaty throughout time, many remain unwritten, and judge made. Many of the more institutional-type principles, such as the idea of true cooperation, conferral, Member State equality and respect for national constitutional identity, subsidiarity, and proportionality, are now located at the start of the TEU.[584] The core Treaty provision addressing the more substantive general principles

[578] *NS v. Secretary of State for the Home Department and ME and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Joined Cases C-411/10 and C-493/10 [2011] EU:C:2011:865.
[579] Idem para 7.
[580] European Support Asylum Office (EASO), *Qualification for international protection (DIRECTIVE 2011/95/EU): A Judicial Analysis* (European chapter (IARLJ-Europe) under contract to EASO-2016) 18. <https://easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf> accessed 1 July 2021.
[581] Idem 18.
[582] Armin Cuyvers 'General Principles of EU Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, and Armin Cuyvers (eds) *East African Community Law* (Brill 2017) 217.
[583] See particularly Case C-402/05 *P Kadi* [2008] ECRI-6351. About the claim that this principle can circumvent primary law, see Allan Rosas and Lorna Armati, *EU Constitutional Law* (Hart 2010) 38–39. 1
[584] See Consolidated version of the Treaty of the European Union (TEU) TITLE I [2012] OJ C 326/2012, art 4 and 5.

relating to basic rights is Art. 6 TEU, which was only inserted with the 1992 Maastricht Treaty.[585]

> 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> (. . .)
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[586]

Furthermore, some other rules, such as Articles 18, 45, and 157 TFEU, contain essential non-discrimination principles. Several essential elements of EU law, on the other hand, lack a Treaty grounding and are instead founded on CJEU case law.[587] Direct impact, primacy,[588] and effectiveness, three of the most characteristic elements of EU law, are among these unwritten principles.[589]

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[585] Armin Cuyvers 'General Principles of EU Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, and Armin Cuyvers (eds) *East African Community Law* (Brill 2017) (Brill 2017) 217.
[586] Consolidated version of the Treaty of the European Union (TEU) TITLE I [2012] OJ C 326/2012, art 6.
[587] Armin Cuyvers 'General Principles of EU Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, and Armin Cuyvers (eds) *East African Community Law* (Brill 2017) 218.
[588] See, however, Declaration 17 annexed to the Lisbon Treaty.
[589] The CJEU has also elaborated on several other, less overwhelming principles in its case law, such as the principle of national procedural autonomy, legal certainty and legitimate expectations. See for example CJEU Case C-453/00 *Kühne & Heitz* [2004] ECR I-837or Case C-234/04 *Kapferer* [2006] ECR I-2585. For an example of a principle that was not accepted by the Court, however, see Case C-189/01 *Jippes* [2001] ECLI:EU:C:2001:420 on animal welfare.

As far as EU law in gender equality and gender identity/expression is concerned, apart from the EU principle of non-discrimination, several legislative initiatives have been brought forward by the EU that mainly deal with the issue of gender equality, and cover direct and indirect discrimination, harassment, including sexual, and instruction to discriminate because of sex in the provision of goods/services and employment/social security.[590] According to ECJ judgment *P v. S* (1996), sex includes people intending to undergo, currently undergoing, or having undergone gender reassignment.[591] The issue in the 1996 case of *P v. S* involves the dismissal of a British transsexual. In its judgment, the ECJ took an unwavering stance and ruled that discrimination against a person who intends to or has undergone a gender reassignment operation equalled discrimination on the ground of belonging to a particular sex, thus stretching the scope of Directive 76/207 on equal treatment for men and women.[592]

The issue of what happens with transgender people who do not wish to undergo affirmative medical interventions, or what exactly gender reassignment means in this context remains to be clarified by further jurisprudence elaborating on the right to gender identity/expression. Whether social transition or gender expression that leads to discrimination would be included in the notion of discrimination because of sex is a highly contested question. If reassignment (an outdated term) relates to particular medical interventions it reinforces binary/medicalized notions of gender identity/expression and needs to be challenged in legal practice according to current theoretical and scientific developments.

On the other hand, in the Victims' Rights (2012) Directive 2012/29/EU it is stated that an individual assessment should take place for every victim to prevent repeat victimisation and retaliation, which includes the examination of the victim's gender identity and gender

[590] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/2004; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/2006.
[591] *P v. S and Cornwall County Council*, Case C-13/94 [1996] ECLI:EU:C:1996:170.
[592] Council Directive 76/207/EEC, of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, [1976] OJ L39, 40.

expression, whether the crime was hate or bias induced, and whether the violence was gender-based. In this context, gender-based violence refers to violence directed against a person 'because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately'.[593] One sees that EU law in this context is open to including gender nonconformity as a reason for discrimination. Finally, in the Gender recast Gender Recast Directive 2006/54/EC, Recital 3 it is stated:

> 'The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person'.[594]

Again, the same questions arise, namely if 'gender reassignment' applies to physical transition of transgender individuals, or if social transition would be sufficient for claiming discrimination because of sex/gender, like in the *O' Byrne* case.[595] That could be resolved if gender expression that does not conform to sex assigned at birth was included in the protected-from discrimination grounds. In that way, the road would be open for gender nonconformity to be used as a test ground for illegal discrimination.

Finally, in the recast qualification directive on asylum grounds it is stated that: 'Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'.[596] We see a particular mention of gender identity, which was missing from the

[593] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/2012.
[594] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/2006, Preamble, Recital 3.
[595] See High Court of Ireland, *Deirdre O'Byrne v. Allied Irish Banks* [1974] DEC-S2013-015.
[596] European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26.

previous qualification directive,[597] and an explicit reference to gender identity as grounds for international protection (a much more inclusive term than gender reassignment as an indicator of transgender identity). What this thesis argues, though, is that in order to have full protection of gender nonconforming identities one needs to de-medicalize gender identity and include gender expression in the protection grounds. This way the law would depathologize and disentangle gender identity and gender expression, both of which alone or in combination are in full need of institutional protection because of sexism, transphobia, and cisheteronormativity. This would also allow for the much-desired normalization of trans normativity and the contestation of the hegemonic status of obligatory sex/gender congruence.

The EU and the CJEU must make use of the cutting-edge research and legislation on trans identity and gender nonconforming expression and further practice its judicial capacity in order to affirm protection of gender nonconforming individuals, who do not fulfil binary/medicalized standards.

1.2. The jurisprudence of the CJEU and its impact on EU Member States' legal systems

The CJEU is empowered by the EU Treaties to make authoritative rulings on all elements of EU law interpretation. Once the CJEU has interpreted an EU Treaty or legislative provision, its interpretation of the written law is unchallengeable; it effectively substitutes the apparent meaning of the underlying written law, unless the CJEU changes its mind in a subsequent case. The only way for the treaty signatories — i.e., the EU Member States — to overrule the Court is for each treaty to be amended unanimously.[598] The EU Treaties have been revised several times since their inception, but never with the intent or effect of overturning

[597] Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, [2004] OJ L 304/2004, 12-23.
[598] Gunnar Beck 'Judicial activism in the court of justice of the EU' (2017) 36 The University of Queensland Law Journal (2017) 36 (2) 333, 334.

a CJEU decision. Treaty amendments are particularly difficult to agree upon due to the necessity of unanimity, and nearly impossible in the situation of judgments that are opposed by some Member States but benefit others.[599] As a result, the CJEU operates in an extraordinarily permissive political context, placing the Court in a far more powerful position than national courts, including supreme courts, in respect to national governments. National governments can typically overrule judicial interpretations through simple super legislative majorities or, over time, by altering the composition of supreme courts. To accomplish anything comparable in the EU, all 28 member states must agree.[600]

The CJEU is not a court of appeal like national supreme courts. The CJEU can be accessed directly or through a referral from a national court. There is no right of appeal against CJEU rulings, whether following direct action (Article 263 TFEU) or the preliminary referral procedure (Article 267 TFEU). The CJEU claims exclusive jurisdiction over the validity of EU legislation. The EU institutions and EU Member States have in most cases essentially exclusive access to the CJEU. Individuals ordinarily do not have direct standing before the CJEU in most cases although they can take action for failure to act and damages.[601] Individuals may also bring legal action against a Member State for non-compliance with EU law under the doctrine of direct effect.[602] Unless there is CJEU case law on the matter or the answer is glaringly evident, national courts may, and the highest national courts must, submit a question of EU law interpretation or application to the CJEU under Article 267 TFEU. The CJEU will give a preliminary judgment on the issue, which the referring national court will apply to the facts of the case. Individuals, on the other hand, can only bring a direct action to overturn EU law in limited circumstances, such as when a national court deems a review of the underlying EU legislation necessary to the review of national legislation or with reference to overriding national constitutional law requirements. to Art. 263 CFEU (para 4):

[599] Idem.
[600] Idem.
[601] Gunnar Beck 'Judicial activism in the court of justice of the EU' (2017) 36 The University of Queensland Law Journal (2017) 36 (2) 333, 334-335. See also Art 263 TFEU.
[602] *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1.

> Non-privileged applicants, i.e., legal persons, such as businesses, and natural persons, such as individuals, can bring action for judicial review, but they are subject to more stringent conditions as regards satisfying the legal standing ('locus standi') requirement.[603]

As a result, the legality of EU law can normally only be contested by Member States who, in the vast majority of situations, agreed to it through the EU's legislative procedure.[604] The situation is doubly disagreeable when a Member State is outvoted in the relevant EU legislative chamber, the Council of Ministers, because the voters are subject to laws to which neither their government nor their parliament agreed. Furthermore, EU law does not always mean what it says in the written text; it means what the CJEU decides it should mean, and citizens have no broad right to contest its interpretation. At the same time, national courts assess national law for compliance with EU law on a regular basis. The preliminary judgment of the CJEU is binding, and in cases of contradiction, the national court must set aside national law.[605]

In conformity with the hierarchy of courts and the principle of ratio decidendi, EU law does not expressly acknowledge the binding force of judicial precedents, as is also the case in civil law systems. Preliminary referrals by national courts and the majority of direct actions – with the exception of competition and sanctions matters – proceed straight to the CJEU, from which there is no right of appeal.[606] All quasi-constitutional cases, in particular those affecting the allocation of competences between Member States and the EU, are reserved for the CJEU. All rulings of the Court of Justice of the European Union are binding on all national courts. Preliminary judgments in current national litigations, as well as any CJEU ruling on the interpretation of EU law in any other sort of action before it, are binding. Despite the fact that the CJEU's preliminary reference procedure relies on the assistance of national courts, there is no substantial sanction for national courts if they do not refer a matter

[603] EUR-lex, 'Annulment of legal acts by the Court of Justice' (2023) <https://eur-lex.europa.eu/EN/legal-content/summary/annulment-of-legal-acts-by-the-court-of-justice.html> accessed 27/4/2023.
[604] Gunnar Beck 'Judicial activism in the court of justice of the EU' (2017) 36 The University of Queensland Law Journal (2017) 36 (2) 333, 334-335.
[605] Idem.
[606] Idem 336.

or fail to apply a CJEU preliminary judgment. National courts have nonetheless shown a high level of voluntary collaboration.[607] In effect, the CJEU established an EU-wide judicial system in which national courts are required to obey both EU and national law and, in the event of a conflict, to favour EU law over national law. As a result, national courts became agents of the CJEU, guaranteeing that EU law, as defined and interpreted by the CJEU, is enforced uniformly throughout the EU. There has, however, been some judicial rebellion or non-acceptance of CJEU judgments within some Member States.[608] A German Constitutional Court decision from 2020 ruled that an ECJ decision was not binding in Germany because it was ultra vires. 'The CJEU', the Constitutional Court said, had 'exceeded its judicial mandate'.[609] This was not, perhaps, a sustained challenge but it was serious and deliberate, and suggests some strain in the relationship between the German Constitutional Court and the CJEU.

Overall, national authorities — both political and judicial — have shown a high level of recognition of the CJEU's binding force and unchallengeable status, as well as the solely judge-made doctrines of supremacy and direct impact of EU law. This is even more remarkable considering that the CJEU's transformation of EU law into a quasi-constitutional legal order runs counter to both general principles of international law and the generally accepted principles of treaty interpretation codified in the Vienna Convention on the Laws of Treaties' Articles 31 and 32.[610]

[607] Idem.
[608] Idem.
[609] BVerfG, Urteil des Zweiten Senats vom 5. Mai 2020 - 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR1651/15 - Rn. (1 – 237), ECLI:DE:BVerfG:2020:rs20200505.2bvr08591 <http://www.bverfg.de/e/rs20200505_2bvr085915en.html ECLI> accessed 23/2/2023.
[610] Gunnar Beck 'Judicial activism in the court of justice of the EU' (2017) 36 The University of Queensland Law Journal (2017) 36 (2) 333, 335; BVerfG, Urteil des Zweiten Senats vom 5. Mai 2020 - 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR1651/15 - Rn. (1 – 237), ECLI:DE:BVerfG:2020:rs20200505.2bvr08591 <http://www.bverfg.de/e/rs20200505_2bvr085915en.html ECLI> accessed 23/2/2023.

1.3. Decision-making and judicial activism by the CJEU

Finally, the ECJ's now-distinctive judicial style is defined by (i) abstract and logical reasoning; (ii) relatively brief decisions, at least in comparison to common law courts; (iii) the unchangeable and fixed form of the judgments; and (iv) the lack of any dissenting or concurring opinions.[611] The answer given by the ECJ in a preliminary ruling decision is commonly 'announced', rather than being considered in full. The reasoning begins with the declaration of one or more broad principles, with the solution adopted coming from those ideas, sometimes more, sometimes less obviously. The writing is formal and technical. The ethical, moral, and other value decisions that had to be taken in deciding the case will not be presented publicly.[612] As Bobek points out, there are some distinctive characteristics in the ECJ's reasoning in Case C-423/04 Richards [2006] ECR I-3585 in comparison with the ECtHR's reasoning in *Christine Goodwin v. the UK*, GC ruling of July 11, 2002, No. 28957/95. Both cases initially involved a transsexual who had undergone a gender reassignment procedure and requested that her retirement pension be awarded in accordance with her new gender.[613] The ECJ, presented the (identical) answer as 'naturally coming' from a number of very abstract and technical general principles of EU law and the directive in question, whereas the ECtHR would freely admit and debate the deeper and contradictory moral options in its reasoning.[614]

Whatever ECJ composition decides a matter, the result is always a single, collegiate judgment. This could have a regressive effect on the ECJ's thinking. If dissent is not permitted, a court may choose to reach unanimity, even if it means making concessions. Alternatively, even if outvoted, the minority may be able to get parts of its ideas into the decision, even if the majority solution prevails.[615]

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[611] Michal Bobek, The Court of Justice of the European Union in Anthony Arnull and Damian Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) IV <https://ssrn.com/abstract=2445422> accessed 1 July 2021.
[612] Idem.
[613] Idem.
[614] Idem IV.
[615] Idem IV.

The CJEU's excessive judicial activism, according to Beck, is founded in its ultra-flexible interpretative approach. In times of dispute, the CJEU prefers a purpose-based and gap-filling approach, which increases judicial discretion and frequently prioritizes the aims of EU integration over a more text-based interpretation, especially if the latter supports a less integrationist outcome. An exceptionally permissive political context has aided the CJEU's excessive judicial activism.[616]

The Treaty on European Union ('TEU') provides that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'.[617] The CJEU has utilized its powers to interpret the EU Treaties and EU legislation issued under them to construct constitutional principles as part of the EU legal system with a view to safeguarding 'the rule of law' within the EU. It has also formed its own human rights jurisdiction and asserted the power to rule on the boundaries of EU competences in opposition to the Member States' top courts as an interpretation of the Treaties. The CJEU's expansive interpretation of its own authority has resulted in the EU's powers being significantly expanded at the expense of its Member States over time. The CJEU's broad interpretation of its own competence has gone well beyond the plain language of numerous Treaty articles. As a result, the CJEU is frequently referred to as 'a motor for the integration process'.[618]

The pro-Union tilt of the CJEU can be seen in both its reading of written EU law and its approach to its own case law. The CJEU considers itself free to rely on literal, systemic, teleological, and metateleological factors, without respect to priority or hierarchy, and without assigning a fixed weight to each.[619]

The CJEU has practically unlimited interpretive freedom thanks to its ultra-flexible interpretative methodology, which reduces methodological constraints. The CJEU can use

[616] Gunnar Beck 'Judicial activism in the court of justice of the EU' (2017) 36 The University of Queensland Law Journal (2017) 36 (2) 333, 333.
[617] Consolidated version of the Treaty of the European Union (TEU) TITLE III [2016] C 202/2016, art 19.
[618] See Trevor Hartley, 'The European Court, judicial objectivity, and the constitution of the European Union' (1996) 112 Law Quarterly Review 95; Patrick Neill, 'The European Court of Justice: a case study in judicial activism' (European Policy Forum 1995).
[619] Gunnar Beck 'Judicial activism in the court of justice of the EU' (2017) 36 The University of Queensland Law Journal (2017) 36 (2) 333, 352.

this methodological flexibility to assign the most weight to whatever arguments, mainly teleological criteria, support its preferred conclusion. The purposes that the CJEU may use are not limited to those stated in the Treaty or those that are immediately apparent from the legislative context.[620] Rather, the CJEU believes that the purpose can be presumed as well as Treaty-based, and that it can refer to metateleological considerations just as easily as direct or indirect purposes, each of which can be construed subjectively or objectively, depending on which best supports its preferred solution. Furthermore, the CJEU may allude to outcomes, means, functional criteria, or general repercussions as a result of its aim. Where the Court uses purposive interpretation criteria, whether directly or implicitly, it nearly invariably goes with what best suits EU integration, even when this contradicts particular Treaty articles and conflicts with the lex specialis norm in international law.[621]

In its earlier decisions, the CJEU took a similarly broad approach. When past decisions offer an air of legal objectivity to legitimize an integrationist decision, it will liberally rely on them, while ignoring earlier decisions that run opposite to its pro-Union, integrationist goals. For example, in *Gauweiler*, the CJEU ignored both significant portions of its *Pringle* decision and established case law, which states that the goal of any EU act must be examined objectively, not subjectively.[622] The CJEU must be put at the extreme 'activist' end of the judicial spectrum because of its methodological flexibility and willingness to rely on nontextual and meta-teleological considerations. A trustworthy demurral, on the other hand, as de Waele and van der Vleuten suggest, is that the evidence for the above is selective and that judicial activism occurs in a small proportion of cases.[623] According to de Waele and van der Vleuten, the ECJ has succeeded in establishing itself as an autonomous norm-setter in the area of LGBT rights, awarding greater rights and advantages to lesbian, gay, and

[620] Idem.
[621] Idem.
[622] Idem 353; Case C-62/14, *Peter Gauweiler and Others v. Deutscher Bundestag* [2015] ECLI:EU:C:2015:400.
[623] Albertina Albors Llorens, 'The European Court of Justice, More Than a Teleological Court' (1999) 2 Cambridge Yearbook of European Legal Studies 373, 398.

transgender people than their national governments were ready to provide them, as it did in *P v. S* and *Maruko* and *Coman*, which will be discussed in the next chapters.[624]

2. The European Court of Human Rights

The European Court of Human Rights is based in Strasbourg, France. It has jurisdiction over 46 European countries that are members of the Council of Europe and have signed the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), which established the court.[625] Each member state has one permanent judge on the court.[626] Individuals or member states can petition the court for a ruling that a member state has violated the Convention.[627] Individual applications, on the other hand, have sparked practically all of the cases the court has heard.[628]

If a court finds that a member state has breached the Convention, it must take corrective action. Previously, the court allowed the state to pick the means of redress, which might range from specific steps like reopening unjust processes to more general measures like altering legislation to prevent future violations.[629] More recently, the court has been directing states to take specific acts to correct infringement in certain circumstances, most typically where only one path of action is practicable or when the government must deal with a systemic problem. Complying with the court's judgments, whether individual or broad in

[624] Henri de Waele, Anna van der Vleuten, 'Judicial Activism in the European Court of Justice – The Case of LGBT Rights' (2011) 19 (3) Michigan State International Law Review 639, 663.
[625] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950 henceforth European Convention of Human Rights [1950] ETS 5. For further information on the court, see Council of Europe, European Court of Human Rights, *The ECHR in 50 Questions* (Council of Europe-2010) <http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG.pdf> accessed on 1 July 2021. See European Convention of Human Rights Act 2003, art 30–31, 42–44.
[626] European Convention of Human Rights [1950] ETS 5, art 20, 22.
[627] European Convention of Human Rights [1950] ETS 5, art 33, 34.
[628] See Dragoljub Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2009) 42 Creighton Law Rev 361, 372 quoting ('[I]ndividual applications represent more than ninety-five percent of the Court's work').
[629] European Convention of Human Rights [1950] ETS 5, art 46.

scope, necessitates significant acts on the part of the state.[630] In addition, the ECHR has the power to award monetary damages known as 'just satisfaction'.[631] The ECHR cannot enforce its decisions; instead, the Council of Europe's Committee of Ministers is responsible for overseeing the remedy of infringement by member states.

However, as compared to the costs of complying with the court's declaratory judgments, these monetary losses are usually insignificant.[632] Expulsion from the Council of Europe is the only coercive sanction that can be employed against a recalcitrant state.[633] Because this action has never been employed against noncompliant states, the threat of its use is worthless.[634] Despite this, most states, according to most reports, follow the court's decisions although this may involve resistance or time.[635] States are concerned about their reputation for adhering to ECHR judgments. This reputation is claimed to reflect the importance they place on international law compliance and membership in the European and international communities. Individual applications have become the lifeblood of the Convention system, given the extinction of interstate complaints.[636] The Committee of Ministers of the Council of Europe has its own procedure for determining whether or not rulings in favour of an applicant are adequately implemented by the state concerned.[637]

The fact that governments voluntarily agree to be bound by the ECHR is treated as ethically relevant in commitment-based arguments for legitimacy.[638] The morality of pledges or agreements, as expressed in the *pacta sund servanda* concept, is vital here: states are viewed as agents whose will or consent matters in connection to the obligations they have. All states,

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[630] Shai Dothan, *Judicial Tactics in the European Court of Human Rights* (University of Chicago Public Law and Legal Theory Working Paper No. 358-2011) 118.
[631] European Convention of Human Rights [1950] ETS 5, art 41.
[632] See idem at art 46(2).
[633] See Statute of the Council of Europe [1949] UN Treaty Ser No 103, art 3, 8, 87.
[634] The Committee came close to using that measure against the military dictatorship in Greece in 1970. Greece, however, denounced the European Convention and left the Council of Europe without being expelled, following the decision of the European Commission of Human Rights in The Greek Case, 1969 YB European Convention on Human Rights 1 (1969). See Clare Ovey and Robin White, Jacobs and White, The European Convention On Human Rights 504 (Oxford 4th ed 2006). See also notes 71–72.
[635] Shai Dothan, *Judicial Tactics in the European Court of Human Rights* (University of Chicago Public Law and Legal Theory Working Paper No. 358-2011) 119.
[636] Idem 121.
[637] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006).
[638] Idem.

whether or not they have signed a human rights treaty, are arguably bound by a basic list of fundamental rights, which includes - but is not limited to - *jus cogens* rules.[639] However, just because governments have non-consent-based obligations does not mean they also have a duty to follow the judgment of certain institutions on what these commitments are. The fact that China has human rights duties, for example, does not imply that it is bound by the views of the ICCPR Human Rights Committee or the judgment of the European Court of Human Rights on the nature of those obligations. This is one area where states' will matters: by establishing or entering a treaty with a binding enforcement mechanism, such as the ECHR, states gain an obligation to follow supranational organizations' judgments on what these responsibilities are, such as the Strasbourg Court.[640] This obligation is founded on the morality of agreements, and its force is not instrumental, in the sense that it is unaffected by whether or not following the Court's decisions is beneficial to states or makes it more likely to comply with the reasons that apply to states. Treaty-based obligations, in other words, are not morally neutral or 'formal': they are deontic, founded on the morality of agreements; they bind states not because of the agreement's consequences, but because states have agreed to accept the judgments of the institution that the treaty established.[641] Strasbourg's legitimacy, according to this viewpoint, originates from the treaty, particularly article 46 para 1 ECHR: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

Treaty-based obligations, like promissory obligations, are not absolute; they just present governments with a defensible basis to follow the Court's decision. However, this explanation is sufficient to establish the Strasbourg Court's pro tanto legitimacy. Other things being equal, governments are obligated to follow Strasbourg's decisions, whether they are good or harmful. For not complying with the Court's judgment, a state must present some rather compelling arguments. Simply disagreeing with the ruling would not be enough to invalidate the treaty-based obligation.[642]

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[639] Idem
[640] Idem.
[641] Idem.
[642] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy' (Cambridge University Press 2012) 22 <https://ssrn.com/abstract=2021836> accessed 1 July 2021.

2.1. The Council of Europe and the ECHR

The Council of Europe (CoE; French: Conseil de l'Europe, CdE) is an international organization that was established in the aftermath of World War II to promote human rights, democracy, and the rule of law throughout Europe. It was founded in 1949 and now has 46 member states with a combined population of almost 675 million people.[643]

The European Convention on Human Rights (henceforth ECHR) (officially the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international treaty that protects European citizens' human rights and political liberties. The agreement was drafted in 1950 by the then-newly created Council of Europe and came into effect in 1953.[644] The Convention is ratified by all Council of Europe member nations, and future members are expected to ratify it as soon as possible after joining the CoE.[645]

The European Court of Human Rights was founded as a result of the Convention (also referred to by the same initials as the convention, ECHR, though sometimes as ECtHR). Anyone who believes their rights have been violated by a state party under the Convention can file a complaint with the Court. Judgments finding infractions bind the states involved, and they are required to carry them out.[646] The Council of Europe's Committee of Ministers oversees the execution of judgments, notably to guarantee that the monies awarded by the Court to the applicants in compensation for the harm they have suffered are paid.[647]

The Council of Europe does not have the authority to enact binding legislation, but it does have the authority to enforce some international agreements established by European

[643] Council of Europe, 'The Council of Europe in Brief' (CoE 2021) <https://www.coe.int/en/web/about-us/who-we-are> accessed 1 July 2021.
[644] Equality and Human Rights Commission, 'What is the European Convention of Human Rights?' (EHRC, 19 April 2017 <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> accessed 1 July 2021).
[645] Resolution 1031 (1994) on the honouring of commitments entered into by member states when joining the Council of Europe (Parliamentary Assembly of the Council of Europe, 10 January 2010).
[646] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 1.
[647] Idem.

countries on a variety of issues. The European Court of Human Rights, which enforces the European Convention on Human Rights, is the Council of Europe's most well-known entity.

The European Convention on Human Rights (ECHR) is an international convention that protects fundamental (primarily) civil and political liberties in rule-of-law European democracies. It was founded in 1950 by the ten member states of the Council of Europe, which had been established the previous year as part of the post-World War II reconstruction of western Europe. It has subsequently grown to encompass states many states in Eurasia, totalling forty-six states with a population of approximately 675 million people.[648]

The European Convention on Human Rights, according to Simpson, is the result of 'conflicts, compromise, and happenstance', and there are no easy answers for what it is or why it was created.[649] Although debates around the ECHR were inevitably influenced by the intellectual and political debates about rights that had been going on since the early modern period, they were overwhelmingly driven by the urgent need to find workable institutions and procedures that could be accepted by all parties, rather than grand theories about the relationship between the individual, the state, and civil society.[650]

Despite the fact that the text of the Convention, which was signed by the Committee of Ministers at the Barberini Palace in Rome on November 4, 1950, was unavoidably a historic compromise, it represented a clear victory for the affirmation of certain human rights, as opposed to rights skepticism, and for the non-integrationist conception of postwar Europe, with all that entailed.[651] The Convention's main functions were to help prevent another war between western European states, to provide a statement of common values that contrasted sharply with Soviet-style communism (and nazism/fascism) capable of serving as a Cold War totem, to re-enforce a sense of common identity and purpose should the Cold War turn

[648] Idem 1.
[649] Alfred W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2010) ix.
[650] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 17.
[651] Idem 20.

'hot', and to establish an early warning deterrent.[652] Despite the fact that enforcement followed the judicial approach advocated by the Assembly and the European Movement, the final text defined rights broadly, subject to various constraints, and was largely based on UK ideas.[653] There would be a Court and a right of individual petition, but neither would be mandatory for member nations.[654] In any case, the founding states' governments saw the Convention as only a reflection of their own beliefs and laws, and they did not expect it to be used against them in the future.[655]

Although the Convention is widely credited with being inspired by the United Nations' Universal Declaration of Human Rights, the fact that it focuses almost entirely on civil and political rights rather than the Universal Declaration's much broader rights catalogue indicates a much stronger debt to the liberal rights tradition expressed, in particular, by the French Declaration of the Rights of Man.[656] However, this does not imply that it is based on the doctrine of natural rights or that it is bound by classical liberalism's constitutional, political, and legal theories. The ECtHR has been, though time, criticized as a faulty, partial, or out-of-date attempt to give inhabitants of Europe a pan-continental legal process that should provide remedies for claimed violations of the full range of fundamental rights, including social, economic, and other rights.[657]

The Convention's second goal was to serve as an early warning system, allowing a movement toward authoritarianism, particularly in weak democracies, to be identified and addressed through complaints to pan-European judicial and political institutions by another member state or states. Each of these two goals, one symbolic and the other instrumental,

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[652] Idem; See also Paul Mahoney, 'An Insider's View of the Reform Debate' (paper presented at the Symposium on the Reform of the European Court of Human Rights, Strasbourg, 17 November 2003) <https://njcm.nl/wp-content/uploads/ntm/T2b_NTM2FNJCM-bull2E_040211_Final_LR.pdf> accessed 1 July 2021.
[653]Alfred W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2010) 715.
[654] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 20.
[655] Alfred W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2010) 553.
[656] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 20.
[657] Idem.

was inextricably linked to war. The Convention was designed not only to aid in the prevention of war in Western Europe (its third purpose), based on the largely correct assumption that authoritarian regimes are more belligerent than democracies, but also to aid in its effective prosecution by making Western Europe a more cohesive unit in the Cold War and by giving it a clearer sense of collective purpose should this turn into a military battle (its fourth objective). However, it is impossible to estimate the role it and the Council of Europe may have had in maintaining international peace and security in Europe because this contribution is now inextricably linked with that of the European Commission and the European Union.[658]

2.2. The relationship between ECtHR jurisprudence and EU law

The European Economic Community (EEC) -where the EU dating back to 1992 sees its origins- and the Council of Europe (CoE) were founded in the aftermath of WWII and the atrocities that occurred during that time of European history, and were motivated by a desire to create a united Europe based on close links and collaboration among European governments.[659] The division of labour between the two organizations has been, broadly put, economic integration at the regional level and thus promotion of an internal market for the European Union, whereas the Council of Europe has been tasked with protecting the individual and fundamental human rights, as well as working to ensure democracy and the rule of law. Despite the fundamental contrasts between the two organizations, collaboration and coordination have long been the logical choice for inter-organizational relations and policies – particularly when the two organizations' member states overlap significantly, with Turkey and some other states who are not part of the EU being members of CoE. It is

[658] Idem 56-57.

[659] On background information see Ernst Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957* (University of Notre Dame Press 1958); Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998); Joseph H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999); Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010); Mikael Rask Madsen and Jonas Christoffersen, *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011).

commonly agreed in scholarly debate that the judiciaries of both regimes have played important roles in institutional coordination and cooperation in the European Union.[660]

The relationship between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has been described as one of 'gradual rapprochement,' with the ECtHR and CJEU developing an inter-systemic basic rights regime. This rapprochement has been seen in recent years, with the Lisbon Treaty's Charter of Fundamental Rights providing the EU with its own defined and extended system of fundamental rights.[661] As a result, it has been argued that the Lisbon Treaty and Charter usher in a new era of supranationality founded on human rights.[662] Unwritten basic rights represented general principles of EU law prior to the Charter, which have since been woven into the EU's constitutional structure, notably through judicial law-making by the CJEU.[663] The Charter consolidated the inventory of individual rights that had accumulated through time, through many processes and in various forms, into a single document. The Charter's rights include dignity, freedom, equality, solidarity, justice, and citizens' rights, as well as fundamental human and social rights.[664] According to Article 52(4) of the Charter, the rights enshrined in the Charter are inspired by and reflect the constitutional traditions of the member states, rights developed through the CJEU's practice, and, most importantly, the rights enshrined in the Charter are to a large extent equivalent to the rights in the ECHR.[665]

According to Article 51(2), the Charter does not result in an expansion of the EU's powers or the creation of new responsibilities, and therefore does not expand the CJEU's jurisdictional authority. Article 5(2) TEU requires that the CJEU adhere to the principle of

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[660] See Alec Stone Sweet, *Governing with Judges, Constitutional Politics in Europe* (Oxford University Press 2000); Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); Karen J. Alter, 'Who Are the Masters of the Treaty? European Governments and the European Court of Justice' (1998) 52 (1) International Organization 121.
[661] Amalie Frese and Henrik Olsen 'Spelling It Out−Convergence and Divergence in the Judicial Dialogue between CJEU and EctHR' (2019) 88 Nordic Journal of International Law 429, 430.
[662] Idem 431.
[663] Koen Lenarts and Jose A. Gutiérrez-Fonz, 'The Charter in the EU Constitutional Edifice' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1559.
[664] Charter of Fundamental Rights of the European Union [2007] 2007/C, 303/01.
[665] Explanations Relating to the Charter of Fundamental Rights [2007] OJ 2007/C,303/02 <http://eur-lex.europa.eu/legal-content/EN/All/?URI=CELEX:32007X1214(01)> accessed 1 July 2021.

conferral, namely the principle that only competences directly conferred by the Member States to the European Union through the Treaties are within the scope of the EU and the CJEU Other limitations on the CJEU's power to rule on the basis of the Charter are found in the scope of the Charter's application and its interpretation. Article 51(1) of the Charter's scope of application specifies that the Charter only applies to member states and EU institutions in the context of implementing EU law.[666] Thus, the Charter only applies when member state actions are acting in compliance with regulations and directives. This also means that the Charter does not apply to national law, which is precisely the scope of application of the ECHR, i.e., the laws and practices of the CoE member states. As the distinction between EU law and national law is frequently hazy, the meaning of 'implementing EU law' has been the subject of some confusion and skepticism. This has been the subject of a trend in CJEU case law.[667]

With regards to its interpretation, the Charter states in Article 52(3):

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention …[668]

This means, at the very least, that the CJEU will have to rely on the ECtHR's case law to determine the meaning and scope of rights developed by that Court. Certain EU Treaty clauses, the EU Charter, and the ECHR Protocols can be used to summarize the formal connection between the two Courts. To begin with, Article 6(3) TEU makes explicit reference to the ECHR, as the Treaty Article states that the Convention's fundamental rights should establish general principles of EU law.[669] Furthermore, the EU has committed to ratifying the ECHR (Article 6(2) TEU), and the Charter clearly mandates that EU rights that

[666] Amalie Frese and Henrik Olsen 'Spelling It Out−Convergence and Divergence in the Judicial Dialogue between CJEU and EctHR' (2019) 88 Nordic Journal of International Law 429, 430.
[667] See *Stefano Melloni v. Ministerio Fiscal*, Case C-399/11 [2013] ECLI:EU:C:2013:107; *Åklagaren v. Hans Åkerberg Fransson,* Case C-617/10 [2013] ECLI:EU:C:2013:105.
[668] Charter of Fundamental Rights of the European Union [2007] 2007/C, 303/01.
[669] Amalie Frese and Henrik Olsen 'Spelling It Out−Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR' (2019) 88 Nordic Journal of International Law 429, 436.

correspond to ECHR rights be given the same meaning and scope (Article 52(3) CFREU). There are no comparable provisions in the ECHR legal framework, with the exception of an acknowledgment of the possibility of EU membership of the ECHR in Protocol No. 14 to the Convention, which states: 'The European Union may accede to this Convention'. In other words, the EU fundamental rights system has committed to upholding the Convention, but the Convention has made no reciprocal legal promise to uphold EU fundamental rights.[670]

In addition, the Full Court of the CJEU's Opinion 2/13 on the EU's accession to the ECHR, issued on December 18, 2014, has been noteworthy in the recent interactions between the two Courts. The goal of such an accession would be to increase basic rights protection in Europe by formalizing the EU's commitment to the Convention, but an assessment of the accession proposal by the CJEU revealed significant roadblocks. Two fundamental points should be highlighted in particular. To begin with, the CJEU viewed the autonomy of EU law as an impediment, stating that an admission should not impact the EU's competencies and, in particular, should not impede the interpretation of EU rules. The lack of compatibility between Article 53 of the Charter and Article 53 of the ECHR, which both state that the rights in each instrument must not be interpreted as adversely affecting the rights already enshrined in member states' instruments and constitutions, is problematic, according to the CJEU. The CJEU raised the possibility that a higher threshold of protection may alter the EU's interpretation of EU law, putting the constitutional notions of supremacy, direct effect, and unity in EU law at jeopardy. Second, the CJEU stated in the Opinion that joining the ECHR violated the European Courts' monopoly of dispute resolution under Article 344 TFEU because it would allow member states to initiate procedures against other member states or the EU itself under Article 33 ECHR.[671]

Despite the CJEU's explanation in Opinion 2/13 of its identification of severe obstacles to EU accession to the ECHR, as well as the legal bases and institutional settings of the two Courts, and in addition to the tasks and practices of the Courts, the Charter introduces a fundamental rights catalogue within EU law, indicating a strong version of normative

[670] Idem.
[671] Idem 436.

parallelism. This means that the CJEU, in particular, will be expected to go to Strasbourg for guidance on the meaning and extent of the Charter's rights.[672]

2.3. ECtHR decision making and judicial activism

According to Harmsen, the ECtHR has a tendency to use an 'overly conservative' and 'casuistic' approach that lacks principled consistency.[673] President Wildhaber says that it must find methods to 'focus its energies on choices of 'principle,' decisions that build jurisprudence'.[674] On the other hand, the parts of a more coherent approach are already there, and some of them have been used. They just need to be used more consistently to solve the Convention's core constitutional problems, which are also present in some form in all modern democratic constitutions: the division of power between judicial and non-judicial bodies. [675]

The application so 'interpretive principles' is supposed to control the process of interpretation, in addition to the guidance offered by the specific term of certain clauses, which often define restrictions on rights. Some are stated directly in the text, while others are inferred by the Strasbourg institutions. Some are diametrically opposed to one another, while others are inextricably intertwined. In recent years, the role they play in affecting the outcome of litigation, whether directly or indirectly, has become better recognized.[676] While the principles of interpretation can be categorised and separated in a variety of ways, the widely held belief is that they are not in any particular sequence.[677] They should not be

[672] Idem 437.
[673] Robert Harmsen, 'The European Convention on Human Rights after Enlargement' (2001) 5 International Journal of Human Rights 1843.
[674] Luzius Wildhaber, 'The Role of the European Court of Human Rights: An Evaluation' (2004) 8 Mediterranean Journal of Human Rights 9, 28.
[675] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 193.
[676] Idem.
[677] See François Ost, 'The Original Canons of Interpretation of the European Court of Human Rights' in Mireille Delmas-Marty and Christine Chodkiewicz (eds), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martinus Nijhoff 1992); Franz

considered in isolation, or as a hierarchical system, but as part of a single complicated exercise aimed at ensuring that the Convention's purpose and intent are met, as Simor and Emmerson put it.[678]

It is odd, though, that such an ad hoc approach has gained such widespread and unthinking acceptance, given some interpretive concepts (such as democracy, effective protection, and legality) are evidently more closely linked to the Convention's primary purpose than others (for example, the margin of appreciation, or evolutive and autonomous interpretation).[679] This reveals a more formal and hierarchical structure than has previously been recognized. But how does this manifest itself?[680] The first step in determining an answer is to recognize that the principles of interpretation address two distinct and quintessentially constitutional questions: 'the 'normative question' of what a given Convention right means, including its relationship to other rights and collective interests; and the 'institutional question' of which institutions (judicial/non-judicial, national/European) are responsible for interpreting the Convention rights'.[681]

The teleological concept is the bedrock of the Convention's interpretation principles. The text must be interpreted in good faith according to the usual meaning of its phrases in context unless any particular interpretation was intended by the parties and in light of its general intent and purpose, as stated in Articles 31-33 of the Vienna Convention on the Law of Treaties of 1969.[682] Where the meaning of the text is ambiguous or obscure, or where it would otherwise lead to a manifestly absurd or unreasonable result, preparatory work, any subsequent practice or agreement between the parties regarding interpretation, and the circumstances in which the Convention was drafted, may be taken into account.[683] The

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Matscher, 'Methods of interpretation of the Convention' in Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993).

[678] Ben Emmerson and Jessica Simor, *Human Rights Practice* (Sweet and Maxwell 2000) para 1.026.

[679] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 193.

[680] Idem.

[681] Idem 196.

[682] Idem.

[683] See Ian Brownlie, *Principles of Public International Law* (6th edn Oxford University Press 2003) 602-607; Heribert Golsong, 'Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties?' in Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993) 147-162. The

Convention, however, is a 'constitutional instrument of European public order in the field of human rights,' generating a 'network of mutual bilateral undertakings (and) objective responsibilities,' unlike other international treaties, which are just reciprocal agreements between states.[684] The Convention, like many national constitutions and pieces of legislation, is the result of compromise and chance, and does not appear to reflect a carefully articulated and theoretically founded design.[685] It is difficult to deny, however, that its principal goal is to protect specific recognized individual rights against violations by contracting nations in the framework of the core Council of Europe objectives of democracy and the rule of law (ECHR 195).[686]

The principle of effective protection of Convention rights, which is implied rather than stated explicitly in the text, presupposes that the Convention 'is meant to safeguard not theoretical and illusory rights, but practical and effective rights'.[687] As a result, the actuality of the applicant's employment, rather than its formal status, is most important.[688] The Court has also stated this principle in various ways, for example by stating that the Convention should not be interpreted in a way that results in irrational or ludicrous effects.[689]

While no one can deny that the ideals of 'rights,' 'democracy,' and 'rule of law' are at the heart of the Convention, their connection is far more contested.[690] Indeed, because these ideals lie at the heart of every modern western constitution, political, legal, and constitutional

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ECtHR has endorsed this approach as a crucial element in the interpretation of the Convention, see *Lithgow v. United Kingdom* [1986] 8 EHRR 329, paras 114,119; Golder v. United Kingdom [1979] 1 EHRR 524, paras 29, 30.

[684] *Ireland v. United Kingdom* (1980) 2 EHRR 25, para 239; *Austria v. Italy* [1961] Y. B. 116, 138.

[685] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 196.

[686] *Golder v. United Kingdom* [1979] 1 EHRR 524, para 34. The Court has recognized the Preamble to the Convention as part of the context of the substantive text and indicative of its object and purpose.

[687] *Peltier v. France* [2003] 37 EHRR 197, para 36; *Soering v. United Kingdom* [1989] 11 EHRR 439, para 87.

[688] *Welch v. United Kingdom* [1995] 20 EHRR 247, para 27; *Deweer v. Belgium* [1980] 2 EHRR 439, para 44.

[689] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 197; François Ost, 'The Original Canons of Interpretation of the European Court of Human Rights' in Mireille Delmas-Marty and Christine Chodkiewicz (eds), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martinus Nijhoff 1992) 304.

[690] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 203.

thinkers have spent a lot of time debating their relationship.[691] The important question is how they should resolve their differences. Most judges and jurists believe that conflicting constitutional, fundamental, or human rights should be 'balanced' against one another, as well as against democratically determined public objectives.[692] 'The issue that runs through the Convention and its case law is the need to find a balance between the general interest of the community and the preservation of the individual's fundamental rights', said Rolv Ryssdall, former President of the European Court of Human Rights.[693] Robert Alexy, a German constitutional thinker, affirms that balancing is likewise 'the essential notion' in the German Federal Constitutional Court's adjudication from a 'methodological standpoint'.[694]

The remaining interpretation principles are subservient to the principles of 'rights,' 'democracy,' and 'priority,' and provide a complicated web of overlapping and indistinguishable support. The concepts of subsidiarity, positive obligations, and non-discrimination mediate between the principles of 'rights,' 'democracy,' and 'priority,' albeit subsidiarity in regard to the 'rights' principle has the effect of rendering the Court's position subordinate exclusively to national judicial organs. The strength of the 'priority' principle in different contexts is determined by the principles of proportionality and strict/absolute necessity; the principles of review, commonality, evolutive, dynamic, and autonomous interpretation are derived from the 'rights' principle; and the margin of appreciation doctrine (strictly interpreted) is derived from the 'democracy' principle.[695]

Furthermore, armed with the principle of autonomous interpretation, the Court can define some of the Convention's key terms for itself, either because they do not have a common meaning among member states, or, more commonly, to prevent states from redefining their way out of Convention obligations, such as by designating certain crimes as merely

[691] Idem 203. For a useful overview of the alternatives see Martin Loughlin, 'Rights, Democracy, and Law' in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human* Rights (Oxford University Press 2001).
[692] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 203.
[693] Rolv Ryssdall, 'Opinion: The Coming Age of the European Convention on Human Rights' (1996) 1 European Human Rights Law Review 18, 23.
[694] Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131,134.
[695] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 213.

'administrative infractions'.[696] The principle of positive obligations allows the Court to interpret the Convention in a way that, in addition to the negative obligation on states to refrain from violating Convention rights, also requires them to actively protect those rights, such as by passing laws prohibiting citizens from violating each other's Convention rights.[697] Some articles specifically establish positive obligations, such as the obligations under Articles 2 and 13 to defend the right to life by legislation and to provide an adequate national remedy in the event of a Convention breach, respectively.[698] The principle of effective protection, its sub-principles, and Article 1 of the Convention, which requires states to secure Convention rights to everyone within their jurisdiction, however, suggest, but do not state, that in some circumstances negative obligations alone are insufficient to secure Convention rights.[699]

The twin principles of subsidiarity and review imply that the Court's duty is secondary to that of member states, and that it is limited to assessing Convention conformity rather than acting as a final court of appeal or fourth instance.[700] Article 35 further requires applicants to pursue domestic enforcement processes before petitioning the Court, while Articles 1 and 13 make it clear that national authorities bear primary responsibility for ensuring the rights and freedoms guaranteed by the Convention.[701] The Convention establishes basic and non-exhaustive criteria, with states free to provide enhanced protection, guarantee new rights, and, because they are in a better position to do so, to pick from a variety of equally Convention-compliant options.[702] The notion of review is enshrined in Article 19, which

[696] Idem 213; *Ezeh and Connors v. United Kingdom* [2004] 39 EHRR, paras 82-89; *Engel v. Netherlands* [1979] 1 EHRR 647.
[697] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004). See for example *Moreno, Go'mez v. Spain* [2005] 41 EHRR 899, para 55.
[698] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 215.
[699] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 221.
[700] Herbert Petzold, 'The Convention and the Principle of Subsidiarity' in Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds) *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 41-62.
[701] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 216.
[702] Herbert Petzold, 'The Convention and the Principle of Subsidiarity' in Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds) The European System for the Protection of Human Rights (Martinus Nijhoff 1993) 44 and 60.

states that 'the European Court of Human Rights shall oversee the observance of the undertakings committed by the High Contracting Parties'.[703]

The anti-discrimination provision laid down in Article 14 of the Convention[704] can be viewed as a guiding principle that mediates disputes and as a right in and of itself. It is a 'principle' in the sense that it determines how the other rights and freedoms in the Convention are applied, i.e., without discrimination.[705] It is a 'right' in the sense that its infringement constitutes a violation of the Convention, even if no other substantive provision is in breach, even though its independence or complementary nature as a right has been debatable.[706] In the famous Belgian Linguistics decision, the Court defined discrimination under Article 14 as a distinction between categories of people in the enjoyment of Convention rights that has 'no objective and reasonable explanation'.[707] Creating a distinction between reasonable 'different' treatment, which can be justified under the Convention, and 'discrimination,' which would be illegal under Article 14, is essential for interpreting and applying the Convention.[708]

Recognizing that the margin of appreciation is subject to the Convention's major constitutional principles, which discipline it in two ways, is the key to comprehending it.[709] First, the primary constitutional principles suggest that there is no genuine margin of appreciation on the part of national non-judicial institutions when it comes to the definition of Convention rights and how they interact with one another, though there may be some 'implementation' discretion, such as over the mechanics of Convention application.[710] This is not to say that national legislative, executive, and administrative bodies should abandon attempts to understand what a Convention right means or refuse to draw lines between

[703] European Convention of Human Rights [1950] ETS 5, art 19.
[704] Art 5 of the ECHR of Protocol No. 7 also provides a right of equality between spouses in private law.
[705] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006).
[706] European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (Council of Europe, 31 August 2022), para 3, para 6.
[707] *Belgian Linguistics Case* (No. 2) [1979]1 EHRR 252, para 10.
[708] See for example *Swedish Engine Drivers Union v. Sweden* [1979] 1 EHRR 617, paras 44-48.
[709] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 226.
[710] Idem.

Convention rights, because these tasks are clearly and inescapably part of their daily functions, as well as encompassed by the democracy principle.[711] What this means is that, in cases where the definition of Convention rights is in question, national courts, and eventually the European Court of Human Rights, must resolve the subject authoritatively, with no genuine margin of appreciation given to national non-judicial agencies. Second, where the exercise of a Convention right and a public interest conflict, the Court's primary responsibility is to ensure that the priority-to-rights principle has been properly observed by national judicial and non-judicial authorities, in accordance with the terms of the relevant Convention provision(s).[712] As previously said, this is a very different form of balancing than that which is commonly thought of in the literature. When the margin of appreciation is constrained in this way, it legitimately allows for different resolutions of the tension between Convention rights and the common good in different settings and in different nations.[713]

According to Carozza, the margin of appreciation is rooted in subsidiarity.[714] In *Ireland v. the United Kingdom* the Court elaborated on the substance for the margin of appreciation as '[b]y reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it'.[715] This is a standard dictum up to today.[716] Greer argues that the main rationale of the doctrine is the 'better position rationale'[717] but identifies others rationales as

[711] Idem 226.
[712] Idem.
[713] Idem.
[714] Paolo G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 (1) American Journal of International Law 38, 40. See also Janneke H. Gerards, *Judicial review in equal treatment cases* (Martinus Nijhoff 2005) 166.
[715] *Ireland v. the United Kingdom,* Application No. 5310/71 [1978] ECLI:CE:ECHR:1978:0118JUD000531071, para 207.
[716] Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 (3) Netherlands Quarterly of Human Rights 324. See also *Zehentner v. Austria*, Application No. 20082/02 [2009] ECLI:CE:ECHR:2009:0716JUD002008202, para 57.
[717] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 34.

well, such as deference to democratic decision-making in Member States, proportionality and subsidiarity.[718]

The principle of evolutive, or dynamic, interpretation, which the Court has developed for itself, makes it easier to abandon outdated interpretations of the Convention when significant, long-lasting, and pan-European shifts in public opinion occur, such as the recognition that homosexuality and transsexualism are aspects of private life that require respect from public authorities.[719] Prebensen distinguishes three applications of this principle: the majority of cases in which evolutive argument has supplemented other means of interpretation, typically where domestic approaches in member states are similar; cases in which evolutive argument has been outweighed by primary means of interpretation, to prevent the emergence of new rights, for example; and cases in which evolutive argument has been used as a substitute for primary means of interpretation.[720] According to Mahoney, the principle of evolutive interpretation allows for the proper amount of judicial activism, while the margin of appreciation allows for the proper amount of judicial restraint.[721] While these principles undoubtedly play important roles, their contribution is best viewed as a means of mediating and applying the Convention's basic constitutional principles.[722]

The ECHR's consistent interpretation doctrines reveal a trend toward less constrained thinking and decisions that are more demanding to comply with. The idea of evolutionary interpretation, which says that the Convention is a living instrument that should be read differently as time passes, is one avenue for constantly increasing the number of the court's judgments. This concept also encourages the use of creative thinking because it empowers the court to make decisions that are not based on precedent. This theory should be viewed in light of the court's main interpretation doctrine: the principle of effectiveness, which makes

[718] Idem 23-24.
[719] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 214.
[720] Søren C. Prebensen, 'Evolutive interpretation of the European Convention on Human Rights' in Paul Mahoney, Franz Matscher, Herbert Petzold and Luzius Wildhaber (eds.), *Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal* (Carl Heymans 2000).
[721] Paul Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 Human Rights Law Journal 57.
[722] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 214.

the Convention's safeguards practicable and effective.[723] To ensure the effectiveness of the Convention system, the court used this principle to raise the human rights standards demanded by the court.

Another interpretation doctrine that the Court uses is teleological interpretation.[724] The ECHR has accepted increasingly less limited approaches of interpretation during the previous two decades.[725] The connection between the three modalities of interpretation enables the court to continuously raise the expectations from its rulings. Because the treaty's object and purpose are flexible and dynamic, as opposed to the language or the parties' subjective viewpoints, teleological interpretation can be utilized to understand the treaty in an evolutionary manner.[726] Teleological interpretation can also be used to make the Convention more effective; it permits the court to read the state's obligations broadly and the reservations to these obligations narrowly.[727]

The concept of a living instrument comprises three basic characteristics, according to the European Court of Human Rights. First, in interpreting the Convention, the Court will consider 'current-day norms;' it will very rarely delve into what was considered acceptable state behaviour at the time the Convention was drafted, or what specific rights the drafters of the Convention sought to safeguard.[728] Second, the current criteria that the Court considers must be common or shared across contracting states in some way. The ECtHR has never defined what it means to have a common or shared norm. The Court does not require that all contracting states expressly embrace the standard through legislative enactment.[729] Third, in the issue at hand, the Court will not give crucial weight to what the respondent state (whether

[723] See *Soering v. United Kingdom* [1989] 11 ECTHR 439.
[724] See François Ost, 'The Original Canons of Interpretation of the European Court of Human Rights' in Mireille Delmas-Marty and Christine Chodkiewicz (eds) *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martinus Nijhoff 1992) 292.
[725] Shai Dothan, *Judicial Tactics in the European Court of Human Rights* (University of Chicago Public Law and Legal Theory Working Paper No. 358-2011) 131.
[726] Idem 131.
[727] See Dragoljub Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2009) 42 Creighton Law Review 361, 396 for the claim that the court has moved over the last two decades to the use of more activist measures of interpretation that allow for greater discretion to the judges.
[728] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy' (Cambridge University Press 2012) 2 <https://ssrn.com/abstract=2021836> accessed 1 July 2021.
[729] Idem 2.

through its officials or popular opinion) thinks to be an acceptable standard. This is especially true if the respondent state's practice differs from the Council of Europe's generally accepted standards. The European Court, on the other hand, has varied its emphasis on the various features of the living instrument approach throughout time.[730]

In 2002, the Court considered whether the UK had an affirmative duty under article 8 of the ECHR to recognize post-operation transsexuals' new gender identity and to update public records accordingly. In the instances of *Goodwin v. United Kingdom* and *I v. United Kingdom*, the Court overruled its earlier case law, deciding unanimously in favour of the applicants. The Court stated in its reasoning that it must consider 'developing convergence as to the standards to be achieved' and respond to 'changing situations within the respondent State and within Contracting States generally'.[731] In other words, it attempted to justify changing its previous case law by claiming that significant changes in Europe had occurred since *Sheffield and Horsham.* However, the Court essentially weakened its requirement for the existence of a common, modern standard. Although the emphasis in *Sheffield and Horsham* was on the lack of a single European approach, it was emphasized that in nations with such various legal systems and traditions, this lack is 'hardly surprising'.[732] The Court accordingly attached less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour of increased social acceptance of transsexuals, as well as legal recognition of the new sexual identity of postoperative transexuals. [733]

In *Goodwin*, the Court, like in *Marckx* but unlike in *Sheffield and Horsham*, was willing to depend on the existence of a current-day common standard to overcome the respondent state's appeal to a margin of appreciation.[734] The ECtHR has not always been consistent in

[730] Idem 2.
[731] Christine Goodwin v. the United Kingdom [2002] 28957/95, para 74.
[732] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy' (Cambridge University Press 2012) 8 <https://ssrn.com/abstract=2021836> accessed 1 July 2021.
[733] Idem 8.
[734] Idem 8.

its approach to the margin of appreciation. International consensus or international trends have not aways been enough for the ECHR to change direction.[735]

3. Conclusion

It becomes evident that both the CJEU and the ECHR are major judicial and political agents in the development and application of legal doctrine across Europe and the EU Member states. Their jurisprudence serves as a point of reference for the interpretation of the European Convention on Human Rights, International Law and the Union's laws and policies. Especially when it comes to the Refugee Law, the ECtHR and the CJEU have offered some landmark judgments which shape the way we engage with refugee rights, particularly also the concepts of persecution due to gender, including gender identity. This has been furthered by key cases of both courts with respect to legal gender recognition and medical gender affirmation procedures. By understanding the CJEU decision-making and impact of jurisprudence on Member States, through binding decision and affirmative interpretation, one can delineate the scope of gender identification and expression protection in Member States' legal configuration and provide both a point of reference as well as a critique of currently standing legal practice. ECtHR and ECtHR jurisprudence serves the amalgamation of the rights framework for trans and gender nonconforming refugees, in the pluralist legal landscape of Europe, that works in parallel and combination with EU law across Member States. Indeed, ECHR and the Court's case law consist general principles of EU law, thus primary EU law, and help also to refine and define human rights standards and developing norms in refugee law, gender identity and related concepts. ECtHR and CJEU are leading judicial agents, that shape legal policy across Europe.

After I have mapped the area of the study, namely the judicial institutions whose case law is going to be examined in this thesis, I turn to my choices of methods to reveal the scope of protection offered by the authoritative interpretation of asylum law and Human Rights by

[735] *A, B and C v. Ireland,* App no. 25579/05 (ECHR, 16 December 2010).

the ECtHR and the CJEU, which specifically affects, among other groups, transgender and gender nonconforming asylum claimants in the refugee determination status process in member states.

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A transgender studies approach to gender identity and expression-based asylum claims based on a critical doctrinal and textual analysis of CJEU and ECtHR jurisprudence

Volume 2

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Chapter V: Methodological approach[1]

This chapter will elaborate on the methodology that I will use in the next chapters, in order to analyse the jurisprudence of the Court of Justice of the European Union, henceforth 'CJEU', and the European Court of Human Rights, henceforth 'ECtHR', on gender identity/expression in refugee status determination. In this chapter, I will discuss what I mean by a doctrinal analysis of gender and sexuality law of the CJEU and ECHR that will be complemented by critical textual analysis of the jurisprudence of the Courts. As initial and preliminary methodological statements that will help the reader identify the purpose and structure of this chapter and its connection with the following chapters, I want to make clear that a doctrinal analysis will be attempted on jurisprudence on gender identity recognition and asylum rights in RSD, based on religious/political beliefs and sexuality/gender; this is because the Courts have not yet deliberated on transgender asylum claims *per se*. This will be complemented by a critical textual analysis approach in relation to dominant gender ideologies reflected in the examined jurisprudence of ECtHR in Chapter VI and CJEU in Chapter VII. Judicial cisheteronormativity will be challenged by evolving human rights norms and contemporary gender theories, mainly transgender theory which was discussed in the chapter II.

In the following subchapter (1), I will elaborate on doctrinal analysis, delineating what I mean by this concept. I will attempt to make visible how I will use argumentation in this context to support legal interpretation that is backed by the case law of the European Courts in relation to gender identity and asylum rights.[2] As a clarifying statement, however, doctrinal argumentation in some instances will be loosely related to the case law, for instance 'when based on unwritten legal principles, or when filling gaps in the law, or when a text is simply put aside in favour of an interest or value that is considered to be more important'.[3] For a brief definition of what I am going to look at, as Van Hoecke

[1] Part of this chapter has been submitted by the current author as an assignment for Legal Research Methodology in the context of the PhD in Law at Maynooth University.
[2] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) 5.
[3] Idem.

notes, legal doctrine is a hermeneutic and argumentative discipline with those aspects being two sides of the same activity, since on the one hand legal argumentation is usually based on interpreted texts, and on the other hand supporting one single interpretation among more divergent but sustainable ones includes argumentation to start with.[4]

In subchapter 2, I will elaborate on critical textual analysis, and the ways I will perform it. I will do so by introducing the concept of transnormative textual analysis, that validates all gender experiences and expressions. This is done in order to give equal normative status to gender incongruence and nonconformity by normalizing them in an affirmative way in the same manner as cis experiences and legal subjectivities. With transnormative critical textual analysis I want both to deconstruct mainstream gender ideology and reveal transphobic and cisheteronormative assumptions that are implicit or embedded in the law and jurisprudence but also affirm different marginalized gender/sex/expression geometries. I draw on discourse analysis, which, according to Lupton, 'is, above all, concerned with a critical analysis of the language and the reproduction of dominant ideologies (belief systems) in textual (defined here as a group of ideas or patterned ways of thinking which can both be identified in discourse and verbal communications and located in wider social structures)'.[5] Indeed, since the thesis is based on a transgender studies perspective, which aims for the depathologization of gender nonconforming phenomena and the collapse of heteronormative and medicalized hierarchies, the critical textual analysis approach used to complement the doctrinal analysis will reveal and critique the heteronormative and pathologizing mainstream discourse that is challenged by current human rights norms and transgender studies scholarship. I move to the two subchapters that present my methodology (as the rationale and framework of the research approach) and methods (as ways of collecting and analyzing the data), in the deliberate quest to make them as suitable as possible to my epistemology (outlined in chapter one) which is intersectional, feminist and anti-essentialist.

In subchapter 3, I will look into the concept of legal pluralism in Europe and the role of human rights norms/good practices in the particular European legal landscape, since the refugee law/gender/human rights configuration in Europe and the EU and its nature as

[4] Idem.
[5] Deborah Lupton, 'Discourse Analysis: A New Methodology for Understanding the Ideologies of Health and Illness' (2010) 16 Australian Journal of Public Health 145, 145.

multiplicitous in a national, European, EU and international level has shaped my methodological deliberation.

1.1. Doctrinal analysis

According to van Hoecke, on the one hand, doctrinal legal study varies from straightforward summaries of (new) laws with some incidental interpretative analysis towards innovative theory construction (systematization).[6] The 'simpler' versions of such study are vital building blocks for the more complex ones. It should be noted that, in the name of (European) harmonisation, a definite level of systematization (theory construction) has been established.[7]

Van Hoecke argues[8] that legal research can be: • explanatory (explaining the law, for example, in comparative research through contrasting historical backgrounds); • empirical (identification of legitimate legislation); determining the optimal legal procedures for achieving a specific aim - in comparative law, the 'best solution'); • exploring (searching for new, potentially fruitful routes in legal research); • hermeneutic (interpretation, argumentation); • logical (coherence, organizing concepts, rules, principles, and so on – for example, the use of Hohfeldian analysis of the concept of rights in domestic legal theory or for comparing legal systems); • evaluative (testing whether rules work in practice, or whether they are in accordance with desirable moral, political, or economic goals, or, in comparative law, whether a particular harmonisation proposal could work, taking into account other significant divergences in the legal systems concerned); • analytical (concept-building).[9]

According to Westerman, legal systems supply the principles needed to research a particular legal or social development.[10] That is to say, the law is not only the subject of study, but also the theoretical framework in which it is examined. Its concepts and

[6] Mark Van Hoecke, 'Preface' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) vi.
[7] Idem vi.
[8] Idem v.
[9] Idem.
[10] Idem v.

categories are not just notions utilized by those who make, interpret, and implement the law, but they are also conceptual tools for legal scholars to use.[11]

Van Hoecke argues that legal doctrine is frequently referred to as a normative discipline, because it is not only a discipline that describes and systematizes norms (a discipline about norms), but it is also, to a considerable extent, a discipline that takes normative stances and makes value and interest decisions.[12] This is unavoidable when, for example, a certain interpretation is favoured over others. In the end, this decision will be made by giving greater weight to some values or interests than to others.[13] For others, the goal of legal philosophy is to find 'better law'.[14] Philosophy, morals, history, sociology, economy, and politics are examples of elements outside of law and legal doctrine. As a result, looking for 'better law' may necessitate actual investigation, particularly when 'better' means 'better' from an economic or sociological standpoint, or when 'prevailing moral (or political) views' are mentioned.[15]

According to van Hoecke, assumptions are the foundation of all scientific research, including legal research.[16] The majority of these assumptions are universal. This means they are the widely accepted assumptions ('truths') of legal scholarship inside that legal system, or the common assumptions of all the legal systems compared in comparative research. They make up the paradigmatic framework, which is rarely discussed inside the profession itself. Aside from that, researchers may also begin with less evident assumptions.[17] They must be made explicit in those situations, but they are not required to be justified. In some of these circumstances, the research's findings will only be meaningful if the underlying assumptions are accepted. Alternatively, a certain technique may prove to be more fruitful than research that (partially) begins with different

[11] Pauline C. Westerman, 'Open or autonomous: The debate on legal methodology as a reflection of the debate on law' in Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 90.
[12] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) 10.
[13] Idem.
[14] Johannes Andries Ivar Wendt, *De methode der rechtswetenschap vanuit kritisch-rationeel perspectief* (Zutphen 2008) 141.
[15] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) 10.
[16] Idem vii.
[17] Idem.

assumptions.[18] The well-known 'legal sources', which are not up for debate within a certain legal system, are a good example (legal scholarship). New legal sources (e.g., 'unwritten general principles of law') or principles (for instance 'priority of European law over local law') are sometimes accepted as assumptions because they appear to be more fruitful, e.g., in terms of maintaining law coherence.[19]

Van Hoecke believes that these assertions have repeatedly led to the claim that 'legal doctrine' lacks key features in order to be termed a 'legal science', despite the fact that legal doctrine had mainly been seen as the model 'science' until then.[20] Lawyers have reacted to this pressure in a variety of ways. Some have embraced the criticism, adopting a restricted empiricist conception of 'science' and attempting to fit legal scholarship into that model.[21] This reaction gave rise to 'legal theory in the sense of a 'positive science of law', a form of empirical 'natural law', a search for universal legal conceptions, legal rules, and legal principles in the nineteenth century.[22] Similar to this reaction, we have seen the formation and development of additional social sciences centred on law, beginning at the end of the nineteenth century and mostly in the twentieth century: legal sociology, legal psychology, and law and economics. In legal matters, all the fields provide empirical research and theory development.[23] They never intended to replace legal doctrine, but rather to provide helpful information about legal reality to legal scholars, practitioners, and policymakers.

In a given society, says van Hoecke, legal doctrine explains why a rule is a valid legal rule.[24] This explanation could be historical, sociological, psychological, economic, or political, but it could also be founded on internal logic, as it is in this thesis. The presence

[18] Idem.
[19] Idem.
[20] Idem 2.
[21] Julius von Kirchmann, 'Welcher Abstand zeigt sich hier für die Jurisprudenz gegen die Naturwissenschaften' in *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* (Julius Springer 1848) 14; Samuel van Houten, *Das Causalitätsgesetz in der Socialwissenschaft* (HD Tjeenk Willink and FA Brockhaus 1888) arguing in favour of the use of the methods of natural sciences in legal scholarship, mainly by focusing on causal relations.
[22] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) 2.
[23] Albert Hermann Post, *Einleitung in eine Naturwissenschaft des Rechts* (Verlag der Schulzchen Buchhandlung, 1872).
[24] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) 8.

of a rule will be 'explained' in this way by the existence of a higher norm from which the rule is derived,[25] or the existence of underlying beliefs or concepts, or a larger network of legal norms and principles.[26]

1.2. What does the doctrinal analysis of CJEU and ECHR jurisprudence contribute?

This project will be of a critical legal-dogmatic character enunciated from a gender theory informed transfeminist perspective. I will seek to answer the foregoing research questions using a combination of methodological approaches. In the first part of the two following chapters (on CJEU and ECtHR jurisprudence respectfully), I will use doctrinal analysis in order to incorporate insights from the Case Law of the European Courts (CJEU, ECtHR) in relation to the current legal conceptualization of gender identity and its protection within the context of EU Asylum Law. In this process, I intend to combine legal interpretation 'with the systematic effort to see law as integrity and with the historical effort to see law as continuity', like the chain novel that appears in Dworkin's writings.[27] I will attempt to articulate the developing legal rationale behind gender identity jurisprudence and analytically juxtapose it with relevant European Case Law on sexual orientation and refugee rights, as well as on the right to a private life. This methodological approach will provide a first point of reference to the analytical task of defining gender identity and gender nonconformity in the context of Refugee Law. Insights drawn by the European Courts' jurisprudence on private life, freedom of conscience and refugee rights will be the steppingstone for an extended analysis of gender identity jurisprudence. This investigation will then be placed in the particular context of EU Asylum Law.

I will look for conflictual interpretations of values and principles underscoring shifting hierarchies and understandings that are reflected, produced and validated by the Courts'

[25] Mark Van Quickenborne, 'Rechtsstudie als wetenschap' in *Actori incumbit probatio* (Kluwer 1975) 223.
[26] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) 8.
[27] Pauline C. Westerman, 'Open or autonomous: The debate on legal methodology as a reflection of the debate on law' in Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 92.

decisions. The developments in medical science, psychology, gender studies as well as western social and political conditions, governance and law are also crucial here to reveal the legal elaboration by the European Courts of gender identity/expression, persecution, private life, conscience, fundamental human rights and their scope. I will attempt to reflect on the argument that the extension of legal rights so as to include formerly marginalized persons is a direction towards a better and more consistent protection of the individual, a principle on which most modern democracies as well as human rights law are based. In that aspect, Dworkin's conception of law as integrity could be seen there in the light of conflicts that arise in the process of constant contextualization of overarching legal norms that are being gradually resolved according to the societal needs and consensus that are judicially weighted each time.

2. Critical transnormative textual analysis of CJEU and ECtHR jurisprudence

In my critical textual analysis, I draw on Critical Discourse Studies, which first considers what a text says and then considers what it does. It provides examples of how the text as a whole might be interpreted from both what it says and what it does. Many CDA theorists express the general ideas of the discipline in their own words.[28] The key tenets of CDA are summarized by Fairclough and Wodak as follows:

1. The CDA focuses on social issues.

2. Power relationships are discursive in nature.

3. Discourse is the foundation of society and civilization.

[28] Lilie Chouliaraki and Norman Fairclough, *Discourse in Late Modernity: Rethinking Critical Discourse Analysis* (Edinburgh University Press 1999); Norman Fairclough, 'Critical discourse analysis and the commodification of public discourse'(1993) 4 (2), Discourse and Society 133; Norman Fairclough, *Discourseand Social Change*, (Polity Press 1992); Norman Fairclough, *Language and Power* (Longman Inc 1989); RogerFowler, Bob Hodge, Gunther Kress and Tony Trew (eds), *Language and control* (Routledge 1979).

4. Discourse is ideological in nature.

5. Discourse is historical in nature.

6. The text-society connection is mediated.

7. Discourse analysis is interpretive and explanatory.[29]

I draw on these statements on Critical Discourse Analysis, in order to perform my own idea of critical textual analysis, namely see how text incorporates particular hegemonic social ideologies. As far as sexuality is concerned, critical discourse analysis questions 'the hegemonic, stereotypical or essentialising identity discourses, of gender binarism as the fundamental mechanism on which heteronormativity is based, and of other mechanisms that lead to certain sexual identities, desires and practices to be perceived as preferable or more legitimate in comparison to others'.[30] The regularities associated with descriptive norms may become prescriptive norms, which are then used as yardsticks for acceptable behaviour and enforced by society through the enactment of sanctions.[31] The ideological nature of 'gender' is emphasized in feminist critical discourse analysis. Considering ideologies as group-based socio-cognitive representations of practices in the service of power, Feminist Critical Discourse Analysis (FCDA) views 'gender' as an ideological structure and practice that divides people hierarchically into two blocs based on the assumed naturalness of sexual difference. Despite the fact that recent theories have revealed that gender in context is fluid and multiple, common sense understanding still favours a fixed binary with accompanying gendered stereotypes. Through the complicity of men and women in general, this 'common sense' gender structure is (re)produced institutionally and refreshed in everyday practice, while the asymmetrical dualism can also be destabilized by those who challenge its commonsensical premise.[32] According to Feminist Discourse

[29] Norman Fairclough and Ruth Wodak 1997. 'Critical Discourse Analysis' in Teun van Dijk (ed), *Discourse as Social Interaction* (Sage 1997) 271-280.
[30] Heiko Motschenbacher, 'Sexuality in critical discourse studies' in John Flowerdew and John E. Richardson (eds), *The Routledge Handbook of Critical Discourse Studies* (Routledge 2017) 389.
[31] Idem 390.
[32] Michelle M. Lazar, 'Feminist critical discourse analysis' in John Flowerdew and John E. Richardson (eds), *The Routledge Handbook of Critical Discourse Studies* (Routledge 2017) 373.

analysis, on which I mainly draw, discourse (in this case, the text of the judgments) and the social have a dialectical relationship in which discourse both creates and is created by social behaviours. Every act of signifying, whether through language or other types of semiosis, contributes to the reproduction, maintenance, and transformation of social identities, relations, and orders.[33]

Many scholars believe that gender is 'considered to be cultural' while sex is 'thought to be biological'. According to Susan Stryker's definition,[34] however, they are both mediated by cultural and social norms. A cisgender gender/sex paradigm is formed when a culture normalizes and naturalizes cisgender gender/sex formulations and experiences.[35] This thesis claims that unique forms of logic and legal objectivity found in judicial proceedings contribute to the perpetuation of the cisgender paradigm. Transgender people's epistemic capacities as knowers are harmed as a result of the procedure. Transgender individuals are at a disadvantage in the realm of liberal legal discourse since (cis)gender(ed) knowledges are already pre-fashioned conceptions – i.e., legal precedent. Is there a danger in colonizing transgender experiences with a cisgender-privileged, cisnormative standard of being?[36] 'The concept of cisgender privilege provides a necessary critique of structural hierarchies constructed around binary sex/gender', according to Finn Enke and 'when cis-privilege is taken up as an acknowledgment of privileged identity, it is cis-privilege that reifies trans as the most oppressed – so oppressed, in fact, that it is unable to speak out of character'.[37] As a result, the courts caricature the transgender body from the cisgender body, and thereby discipline transgender narratives within legal language to mirror matching cisgender discrimination narratives. The law, however, has 'tremendous ability to reflect and create larger societal messages of acceptance or rejection', as Kylar Broadus points out.[38] Courts are not

[33] Idem 374.
[34] Susan Stryker, *Transgender history* (Seal Press 2008) 11.
[35] B Lee Aultman, 'Epistemic Injustice and the Construction of Transgender Legal Subjects' in Franziska Dübgen (ed) *Epistemic Injustice in Practice* (2016) 15 (Summer) Special issue, Wagadu: A Journal of Transnational Women's and Gender Studies 11, 12.
[36] Idem.
[37] Finn A. Enke, 'The education of little cis: Cisgender and the discipline of opposing bodies' in Suzan Stryker and Aren Aizura (eds), *The Transgender Studies Reader 2* (Routledge 2013) 240.
[38] Kylar W. Broadus, 'The evolution of employment discrimination protections for transgender people' in Paisley Currah, Richard M. Juang, and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 99.

merely symbolic in this way. They are both knowledge repositories and agents. They describe how human subjects become legal subjects, how human claims are understood in court, and how social categories (race, sex, gender, age, ability, and so on) are to be understood in the context of a set of rights and statutes.[39] Fricker's analysis is a strategy for looking at more than only the flaws in legal systems. It seeks suggestions on how they should be reinvented to include the potential of epistemic justice in the legal system.[40] How may 'transgender' escape the capture of the cisgender experience that seems to narrate and render it legible, in light of successes for some (but not necessarily all) transgender persons in the sphere of employment discrimination?[41]

Even when they produce judgments that benefit transgender communities, how do courts contribute to the persistence of epistemic injustices? Courts develop legal subjects based on what is available, such as precedent, court pleadings, and a judge's personal expertise and experience with a subject. The gender binary - the man/woman distinction – is used to establish the most lasting legal construction of the gendered subject.[42]

There can be no basically 'genuine' voice, no idealized individual subject, for epistemic justice to exist at all. Rather, the mix of voices and experiences that make up a person's identity should be considered.[43] As a legal heuristic, 'sex stereotyping' normalizes cisgender gender/sex notions. Where the body is the site of the difference, how can legal discourse take disparities seriously?[44] Paisley Currah finds that most successful arguments follow the standard pursued in the court that reaffirm alternative gender construction before the law.[45] Others have made similar arguments, being both critical and open to the symbolic triumphs these cases represent.[46] Yet, in organizing the legal

[39] B Lee Aultman, 'Epistemic Injustice and the Construction of Transgender Legal Subjects' in Franziska Dübgen (ed) *Epistemic Injustice in Practice* (2016) 15 (Summer) Special issue, Wagadu: A Journal of Transnational Women's and Gender Studies 11.
[40] Miranda Fricker, *Epistemic injustice: Power and the ethics of knowing* (Oxford University Press 2007).
[41] B Lee Aultman, 'Epistemic Injustice and the Construction of Transgender Legal Subjects' in Franziska Dübgen (ed) *Epistemic Injustice in Practice* (2016) 15 (Summer) Special issue, Wagadu: A Journal of Transnational Women's and Gender Studies 11, 13.
[42] Idem 18.
[43] Idem.
[44] Idem 28.
[45] Paisley Currah, 'The transgender rights imaginary' in Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero (eds), *Feminist and queer legal theory* (Ashgate 2009).
[46] Demoya R. Gordon, 'Transgender legal advocacy: What do feminist legal theories have to offer?' (2009) 97 California Law Review 1719.

imaginary of sex/gender, the inherent ability of this judicial reasoning to produce a gendered subject consistently rests on cisgenderism. The anchor is always a cisgender body that has been pre-fashioned.[47] What can the courts do to understand the complexities of transgender identity and the experiences that come with it? In order for legal systems to achieve epistemic fairness, there must be a persistent epistemic commitment to include transgender discourses and gendered selfhood narratives in these multiple frames of reference.[48]

In light of the above, in the next two chapters, in addition to the doctrinal analysis, I will perform what I will call transnormative textual analysis, which starts from the assumptions of transgender studies, that there are unlimited gender/sex geometries and that assigned sex/gender congruence is only one of them, albeit hegemonic. I will draw from Feminist Discourse Analysis, discourse analysis in sexuality and the concept of normativity. Normativity is a major term in language and sexuality studies that has proven to be a useful tool for describing sexuality discourses in different cultures. The battle between dominant and marginalized discourses manifests itself in the view of sexual practices, desires, and identities as (non-)normative, affecting sexuality-related communication, and arguably gender identity/expression related communication.[49] Cisnormativity can be seen as a dominant macro-level discourse, which can be challenged in translational or local realms, as sexuality and feminist discourse scholars have argued for homonormativity and patriarchy.[50] I will try to identify in the next chapters that analyze ECHR and CJEU jurisprudence notions that promote cisnormativity as the normal status quo, and binarism and medicalizations as means to achieve it. In juxtaposition, I will assume transnormativity as the standard according to which I will examine such hegemonic notions and beliefs. Transnormativity refers to the ideal normalization and undoubted legitimization of gender nonconforming expression and transgender identity to the point of full institutional protection without any medicalized/binary requirements and a new normativity that views gender incongruence

[47] B Lee Aultman, 'Epistemic Injustice and the Construction of Transgender Legal Subjects' in Franziska Dübgen (ed) *Epistemic Injustice in Practice* (2016) 15 (Summer) Special issue, Wagadu: A Journal of Transnational Women's and Gender Studies 11, 28,
[48] Idem.
[49] Heiko Motschenbacher, 'Sexuality in critical discourse studies' in John Flowerdew and John E. Richardson (eds), *The Routledge Handbook of Critical Discourse Studies* (Routledge 2017) 389.
[50] Idem 390; Michelle M. Lazar, 'Feminist critical discourse analysis' in John Flowerdew and John E. Richardson (eds), The Routledge Handbook of Critical Discourse Studies (Routledge 2017) 383.

as a/the normal state of being experienced in a myriad of ways and that exposes the mainstream bias towards gender nonconformity. Transnormativity also accepts that trans identity and expression builds on existing gender norms as part of culture, and as a way of self-expression but challenges a view of the world where gender ideology[51] favours and imposes particular sex/gender/gender expression combinations, while marginalizing and disciplining (medically, legally and socially) other experiences.

3.1. Pluralism in Europe

Griffiths defines 'legal pluralism' as 'the presence of a social environment with more than one legal regime'.[52] Different legal traditions have distinct ways in which current nations with a pluralistic legal system function and are characterized by different kinds and ideals of legal pluralism.[53] Some governments, for example, may allow ethnic or religious communities to establish their own rule systems with formal legal implications for family law, for example as in Lebanon, where there are different legal rules for the formation of Muslim and Christian marriages.[54] As Broadus notes, '[o]n the basis of governmental sanction, marriage, divorce, inheritance, and other aspects concerning

[51] One definition that describes gender ideology 'as a set of beliefs about the proper order of society in terms of the roles women and men should fill'. See Tamar Saguy, Michal Reifen-Tagar and Daphna Joel, 'The gender-binary cycle: the perpetual relations between a biological-essentialist view of gender, gender ideology, and gender-labelling and sorting' (2021) 376: 20200141 Philosophical Transactions of the Royal Society B. <https://royalsocietypublishing.org/doi/10.1098/rstb.2020.0141#:~:text=Gender%20ideology%20is%20defined%20as,87%5D> accessed 27 April 2023. In this, gender identity describes the attitudes persons may have to gender roles and expression; Another understanding, however, is that gender ideology is a 'concept adopted by a global movement to articulate opposition to gender equality, abortion, sexual education, and LGBTQI+ rights in areas such as marriage, adoption, surrogacy, and reproductive technologies.' See Teresa Toldy and Júlia Garraio, 'Gender Ideology: A Discourse That Threatens Gender Equality' (Gender Equality, 23 July 2020) <https://link.springer.com/referenceworkentry/10.1007/978-3-319-70060-1_86-1> accessed 23 April 2023.

[52] John Griffiths, 'What Is Legal Pluralism?' (1986) 18 Journal of Legal Pluralism and Unofficial Law 1.

[53] Roberto Scarciglia, 'Comparative Methodology and Pluralism in Legal Comparison in a Global Age' (2015) 6 Beijing Law Review 42, 44.

[54] Immigration and Refugee Board of Canada, *Lebanon: Treatment of persons of different faiths who are married to each over; in particular, whether an Orthodox Roman Catholic who is a foreigner and a Muslim who is a citizen of Lebanon can marry in Beirut without the Christian partner converting to Islam; if so, form of the marriage ceremony and status of marriage under the law of Lebanon*, 22 June 2001. <https://www.refworld.org/docid/3df4be5b0.html> accessed 27 April 2023.

personal status may be regulated by the rules of that particular community'.[55] They may, however, be unaware of, or intentionally strive to avoid, state censure. 'Muslims are relating to something greater than the standards of the English legal system alone', for example, in the United Kingdom.[56] The question then becomes how the various regulatory systems interact and coexist. We could have at least two types of legal pluralism from this perspective: 'where, inside a state, enclaves with separate legal rules may function; and legal systems that sanction or enforce diverse systems of legal rules in state-wide but independent and parallel court systems'.[57] For a lawyer accustomed to the notion of hierarchy coined inside national state constitutional law, the cohabitation of diverse sources of law poses a serious difficulty.[58] This challenge is not just about legal plurality; it is also about globalization, which can lead to uniformity in some regions and integration in others.[59] Statutes, acts, cases, and customs, for example, can coexist and circulate in the global arena. It is understandable to be curious about what occurs when different norms collide in a case.[60] It is obvious that power to judge what is and is not legal, or what is legal and what is not, plays a fundamental part in such arguments and processes. All of these globalization or regionalization processes, such as Europeanization, 'threaten the mechanistic conception of methodology',[61] as well as legal centralism's coercive and uniting functions.[62] Furthermore, if the state's participation is required to allow the introduction of norms from other geographical areas, there are systems that may allow the opposite to occur.[63]

Some comparative attorneys have concluded that 'legal pluralism is a restricted, unique, and fading phenomenon'.[64] According to Michaels, 'The irreducible diversity of legal

[55] Kylar W. Broadus, 'The evolution of employment discrimination protections for transgender people' in Paisley Currah, Richard M. Juang, and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006).
[56] Roberto Scarciglia, 'Comparative Methodology and Pluralism in Legal Comparison in a Global Age' (2015) 6 Beijing Law Review 42, 44.
[57] Idem 44.
[58] Idem.
[59] Annelise Riles, 'Comparative Law and Socio-Legal Studies' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative* Law (OUP 2006) 775.
[60] Roberto Scarciglia, 'Comparative Methodology and Pluralism in Legal Comparison in a Global Age' (2015) 6 Beijing Law Review 42, 44.
[61] Jaakko Husa, 'The Method Is Dead, Long Live the Methods! European Polynomia and Pluralist Methodology' (2011) 5 Legisprudence 249.
[62] Roberto Scarciglia, 'Comparative Methodology and Pluralism in Legal Comparison in a Global Age' (2015) 6 Beijing Law Review 42.
[63] Idem 44.
[64]John Griffiths, 'What Is Legal Pluralism?' (1986) 18 Journal of Legal Pluralism and Unofficial Law 1.

orders in the globe, the coexistence of domestic state law with other legal orders, the lack of a hierarchically superior position transcending distinctions, all of these topics of legal pluralism re-emerge on the global sphere'.[65] Because all legal systems, Western and non-Western, are plural, legal pluralism must be considered a global phenomenon.[66]

The gradual construction of a specific European legal order since the 1960s, as evidenced by the establishment of claims regarding direct effect, supremacy, and the preemption clause of EU law vis-à-vis the legal orders of Member States, represents the legal embodiment of this transnational state-building effort.[67] The legal claim-making exercises were reworked as part of the integration process, making the conflict between national sovereignty claims and the EU legal system Europe's major faultline. In other words, the birth of a new sort of legal plurality in Europe coincided with the establishment of unitary sovereignty.[68] The EU legal order has emerged as an autonomous and distinct legal order that does not consist of the total of its Member State legal orders, but rather runs concurrently with them.[69] Member State (constitutional) courts have accepted the operational validity of direct effect, supremacy, and preemption, while maintaining the claim to act as the final authority in the event of a conflict, the latter most notably being seen from the German Bundesverfassungsgericht.[70] A carefully crafted conflict-of-laws structure has arisen, allowing mutual recognition and stabilization between the EU legal order and the legal orders of Member States without the central claim of either part's supremacy being realized.[71]

International law, such as the Refugee Convention and the European Convention of Human Rights, do not have direct effect and supremacy (at least in dualist states like Ireland), but their status is elevated by the authority they have in the supranational order

[65] Ralf Michaels, 'Global Legal Pluralism' (2009) 5 Annual Review of Law and Social Science 243.
[66] Roberto Scarciglia, 'Comparative Methodology and Pluralism in Legal Comparison in a Global Age' (2015) 6 Beijing Law Review 42, 45.
[67] Alexandre Kojève, *Introduction à la lecture de Hegel: leçons sur la Phénoménologie de l'Esprit* (Gallimard 1980).
[68] Poul F. Kjær, 'Claim-making and parallel universes: legal pluralism from Church and empire to statehood and the European Union' in Gareth Davies and Matej Avbelj Cheltenham (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar Publishing 2018) 19.
[69] Idem 19.
[70] Poul F. Kjær, 'Claim-making and parallel universes: legal pluralism from Church and empire to statehood and the European Union' in Gareth Davies and Matej Avbelj Cheltenham (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar Publishing 2018) 20.
[71] Idem 20.

of EU law. Given the coexistence of International Treaty and Customary Law, EU law, the ECHR and all the ways the former ones are linked to domestic law, European states are a truly pluralist legal arena with a particular Human Rights regime which is interconnected and complementary.[72]

Still, the jurisdictional dispute over human rights between the ECtHR and the CJEU remains unresolved.[73] Clearly, a more comprehensive approach to the protection of basic rights in the European Union is required. The CJEU, on the other hand, has previously demonstrated leadership in the area of human rights protection. It has taken positions on human rights that are, in certain cases, more expansive than the ECHR's given that it is bound both by it, as principles of EU law and by the CFREU, as primary EU law. Furthermore, both courts are increasingly looking to each other's rulings and jurisprudence for direction.[74] While neither court will be bound by the other's rulings, there is clear deference, and increased cooperation between the two courts can be expected as the ECJ's human rights authority expands. A fundamental premise of European Union law is that a community citizen who travels to a member state and uses Treaty rights, such as the freedom to work, is entitled to the same living and working conditions as the host state's residents.[75] Community citizens should also be able to expect that their fundamental human rights, particularly those enshrined in the European Convention on Human Rights (ECHR), will be respected, and administered consistently throughout the European Union.[76]

[72] Elizabeth F. Defeis. 'Human Rights and the European Union: Who Decides - Possible Conflicts between the European Court of Justice and the European Court of Human Rights' (2001) 19 (2) Penn State International Law Review 301, 331.
[73] Idem 331.
[74] Idem.
[75] Idem.
[76] Idem.

3.2. How to import human rights standards and good practices through a transgender studies framework in the critical pluralist analysis of CJEU and ECtHR jurisprudence?

In addition to the critical analysis of ECHR and CJEU jurisprudence in order to identify hermeneutic norms and principles which can be imported in refugee status determination, textual analysis findings will be juxtaposed with transgender studies frameworks in order to reveal and contest judicial gender ideology which privileges cisgenderism, binarism or medicalized notions of gender identity. The position that gender expression may occupy in the systematization and interpretation/scope of the EU legal order and the ECHR will be also examined. In this process of examining the pluralist fundamental rights regime in Europe, deriving from the Member States, the EU and ECHR as well as the Refugee Convention in the context of international protection claims, I will attempt to draw from evolving human rights norms and informed good practices on transgender and gender nonconforming individuals.

After performing the critical textual analysis of the jurisprudence and reflecting on it by the means that transgender studies theory provides, I will then evaluate it in comparison with empirically informed depathologizing and inclusive good practices, coming from stakeholders and experts. Mainly I will use WPATH standards for trans care relating to care of transexual, transgender and gender nonconforming individuals[77] which assures that gender identity/expression is not a matter of pathology, but one of diversity. WPATH released a statement in May 2010 urging the de-psychopathologization of gender nonconformity worldwide.[78] This statement noted that 'the expression of gender characteristics, including identities, that are not stereotypically associated with one's assigned sex at birth is a common and culturally-diverse human phenomenon [that] should not be judged as inherently pathological or negative'.[79] This principle, in line with transgender studies theory and the epistemology outlined in Chapter I, will be the driving

[77] World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Conforming People* (7th Version, 2012) <https://www.wpath.org/publications/soc> accessed 2 July 2021.
[78] World Professional Association for Transgender Health, 'Statement of May 26, 2010' (Board of Directors 2010) <WPATH urges for de-psychopathologisation of gender variance worldwide - TGEU> accessed 2 July 2021.
[79] Idem.

force and the point of reference for the evaluation of past, current and future legal practice. The clarification of the empirical assumptions employed in the research endeavour are mainly derived by the WPATH standards of care relating to transgender, transexual and gender nonconforming people:[80] These state that, for many people, gender affirming medical treatment options include feminization or masculinization of the body through hormone medication and/or surgery, which are effective in treating gender dysphoria and are medically necessary for some transgender people.[81] Gender identities and expressions are varied, and hormones and surgery are just two of the numerous alternatives available to help people feel at ease with themselves and their identities.[82] Treatment can help to reduce gender dysphoria to a considerable extent.[83] Gender dysphoria affects just a small percentage of gender nonconforming people at some time in their lives. Gender dysphoria is a feeling of dissatisfaction or suffering produced by a mismatch between a person's gender identity and the sex assigned to them at birth (together with the accompanying gender role and/or primary and secondary sex characteristics).[84] People in such discomfort may need treatment to help them explore their gender identity and discover a gender role that is comfortable for them, but it is not essential for a person to identify as transgender or have a gender nonconforming expression and gender discomfort is not constitutive nor should it be a criterion for diagnosing transgender identity.

This thesis also relies on the premise that legal gender recognition is a fundamental human right, according to stakeholders. Resolution 2048 of Council of Europe (2015) highlights that the Parliamentary Assembly is 'concerned about the violations of fundamental rights, notably the right to private life and to physical integrity, faced by

[80] World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Conforming People* (7th Version, 2012) <https://www.wpath.org/publications/soc> accessed 2 July 2021.
[81] Idem.
[82] Idem.
[83] Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin, Victor M. Montori, 'Hormonal therapy and sex reassignment: A systematic review and meta-analysis of quality of life and psychosocial outcomes' (2010) 72 (2) Clinical Endocrinology 214.
[84] Norman M. Fisk, 'Editorial: Gender dysphoria syndrome—the conceptualization that liberalizes indications for total gender reorientation and implies a broadly based multi-dimensional rehabilitative regimen' (1974) 120 (5) Western Journal of Medicine 386; Gail Knudson, Griet De Cuypere and Walter Bockting, 'Recommendations for revision of the DSM diagnoses of gender identity disorders: Consensus statement of The World Professional Association for Transgender Health' (2010) 12 (2) International Journal of Transgenderism 115.

transgender people when applying for legal gender recognition; relevant procedures often require sterilisation, divorce, a diagnosis of mental illness, surgical interventions, and other medical treatments as preconditions. In addition, administrative burdens and additional requirements, such as a period of 'life experience' in the gender of choice, make recognition procedures generally cumbersome'.[85] The good practice that stakeholders and their advocates argue for, is for legal gender recognition to rely on self-determination and non-judicial processes, such as is the case with Malta, Ireland, Argentina and Denmark and Norway and not to link medical procedures to the legal recognition of gender identity, by making gender affirmative surgeries compulsory for the access to recognition of one's gender by the state.[86]

Although these premises have not yet developed into binding law, they are evolving human rights norms based on empirically-informed inputs by stakeholders (TGEU, ILGA) and validated by experts (WPATH, see Yogyakarta principles), and they will be used to assess existing CJEU and ECtHR jurisprudence.

4. Methodological reflections and implications

The choice of methods in this research endeavour has mainly to do with the state of the field. Limited commentary and case law analysis on transgender asylum is available to date, particularly in the work of Millbank and Berg, and Sethorun Raj.[87] However, this does not engage with the EU asylum acquis, ECHR and human rights. Furthermore, the goal of this project is to apply a depathologizing framework of Transgender Studies theory in European Asylum Law and assess the fundamental rights' protection of transgender and gender nonconforming asylum applicants in the pluralist system of

[85] Resolution 2048 (2015 Council of Europe) <PACE - Resolution 2048 (2015) - Discrimination against transgender people in Europe (coe.int)> accessed 2 July 2021.
[86] Marjolein van den Brink and Peter Dunne, 'Trans and intersex equality rights in Europe - a comparative analysis' (European Commission, November 2018) <trans_and_intersex_equality_rights.pdf (europa.eu)> accessed 2 July 2021.
[87] Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group'. in Thomas Spijkerboer *Fleeing* (UTS: Legal Studies Research Paper Series No. 2013/1, 2013) <http://ssrn.com/abstract=2312887> accessed 25 July 2020; Senthorun Raj, 'Evolving bodies: Mapping (trans) gender identities in refugee law'. in Kath Browne and Gavin Brown (eds), *The Routledge Research Companion to Geographies of Sex and Sexualities* (Routledge 2016).

Europe in relation to evolving human rights norms on gender identity/expression. Relevant guidance from the UNHCR and national level determination bodies is increasingly available; however, the application of gender theory, to the potentially more challenging questions of gender nonconformity and gender identity in asylum law, is significantly more limited.

At the beginning of this project, several methodological approaches were examined. A comparative study across Refugee Tribunals of Member states was a very intriguing option, as was a Critical Legal Studies approach to the gender identity/expression asylum legal jurisprudence. A more empirical approach, with participatory research from transgender asylum claimants as well as case workers and judges could also shed light on the current practice of transgender asylum. These options were dismissed on the basis that there was not enough literature and scholarship on how law is really interpreted and doctrine applied when it comes to gender nonconforming asylum claimants. Sexuality claims have been more mainstreamed in scholarship and jurisprudence throughout the years, but when it comes to transgender and gender nonconforming applicants, there has been significant incoherence in jurisprudence across EU and ECHR Member States. What then became the endeavour is to identify the interpretative principles at the authoritative EU and ECHR level that are used in gender identity/expression and sexuality cases and apply them in refugee status determination, where European jurisprudence is only available in sexuality/religion/political belief claims in the context of asylum and distinctively on transgender recognition. In this attempt, it was made clear that one cannot rely on jurisprudence alone, since human rights norms and good practices have been evolving far beyond judicial practice in the field of civil society and gender theory.

What started being clear is that a refined framework on gender identity/expression asylum claims is urgently needed. A framework that will conform to theoretical and scientific developments on gender identity/expression. Critical legal analysis, sociolegal research and comparative research could be a second step in that direction, in order to reveal the reasons why a more nuanced approach on transgender asylum jurisprudence is not applied, what are the themes that adjudicators and stakeholders highlight and where practice diverges and converges across states and jurisdictions. On the other hand, what

seems more crucial at this point is to have a point of reference as to how law, science and theory suggest that we should examine those cases in the current state of art and what are the gaps between jurisprudence, medical developments and gender theory at this stage. By delineating the state of the art in this threefold way, and providing doctrinally, theoretically and discursively a refined legal framework, this study aims to provide a point of reference for future studies that will seek to examine, critique, evaluate, highlight or enrich this emerging RSD framework on transgender asylum and its distance from current practice with sociolegal, CLS or comparative research.

Europe emerged as a crucial focus of research in order to assess and refine the framework on transgender asylum. That is because many human rights regimes intersect in Europe, regimes that complement each other in practice or judicial review. The ECHR provides a point of reference for evolving human rights norms, and its jurisprudence constitutes general principles of EU law judicially reviewed by the CJEU. In this way we have two European Courts, whose interrelated jurisprudence can shed light on evolving human rights norms that can be imported in transgender asylum. All states of the CoE and EU have ratified the Refugee Convention and the 1967 protocol which provides a solid ground to assess how this is being applied when it comes to transgender and gender nonconforming asylum applicants in Europe.

After having mapped my choices of methods and delineated the form the analysis is going to take in Chapters VI and VII, I now firstly turn to the analysis of the jurisprudence of the ECtHR.

Chapter VI: A doctrinal and transnormative analysis of ECtHR jurisprudence on gender identity/asylum law

In this chapter, I will consider the jurisprudence of the ECtHR in relation to sexuality, gender identity and asylum. In the first doctrinal part, I will look first into sexuality cases, since they demarcate the scope of protection of Article 8 (privacy), which has been examined mainly for LGBTQI+ cases. What I want to underline here, as was mentioned in Chapter III, is the fact that sexual intimacy and the right to relate have mainly been seen as protected by the right to privacy and family life, and have been intertwined socially with transgender rights and the right to legal gender recognition, as part of private life. The argument I want to make is that sexuality and the right to relate are connected with gender identity/expression in that the latter can be articulate in the public sphere as the right to relate and present in one's true gender. The public/private divide is blurred by the need for validation of one's gender performance, by state actors and society. One can see that the same argument can be made for sexuality claims, and for this reason I examine both Article 8 cases and Article 11 (freedom of assembly and association), as well as article 10 (freedom of expression) cases, that have been linked with LGBTQ+ rights. In the 2nd subchapter of the doctrinal analysis, I will explore the jurisprudence of ECtHR in transexual identities, mainly considering legal gender recognition protection and its requirements. In this way I will demarcate the protection of gender identity outside asylum cases. At the next stage, I will examine the extraterritorial application of the Convention in asylum, with emphasis on Article 8, which has been the main provision protecting transgender rights, and LGBTQI+ rights in general.

In the next part of the chapter, I will attempt to perform critical transnormative analysis, as it was defined in the previous chapter on Methodology, on the LGBTQI+ jurisprudence of the ECtHR. This will be first examined with regards to sexuality, and afterwards with regards to gender identity, since these two notions interconnect in order to create the cis-heterosexual matrix (See subchapter II.1. Queer Theory). The latter is reflected in legal jurisprudence through assumptions on sex, sexuality, and gender that represent the dominant gender ideology, which legitimizes gender/sex congruence and validates certain types of bodies and relationships between them. I seek to make this assumption

visible by re-examining the ECtHR on sexuality/gender identity through the Transgender Studies lens (See subchapter II.2. Transgender Studies), which does not treat gender incongruence and gender nonconformity as an exception, but as a normalized condition, and a valid possibility of (a)gendered living. In this process, I need to underline again, as I did in Chapter I (epistemology), that I take an anti-essentialist perspective on gender, and an intersectional feminist approach that validates trans experience and narrative as knowledge. I use knowledge, consolidated within a 'Transgender Studies Framework' (See Chapter III) to problematize gender ideological assumptions in ECtHR jurisprudence through transnormative analysis. Critical textual analysis is performed by contextualizing ECtHR judgments text containing gendered legal choices, in order to reveal the cisheteronormative assumptions and erased gender subjectivities.

Finally, I conclude the chapter by bringing together the doctrinal and critical textual part of the analysis, in order to demarcate how a move forward could be made by the ECtHR in linking gender and sexual rights, as aspects of the right to privacy and moral autonomy, within the public sphere, since relatability and social expression is fundamentally linked with one's intrinsic traits of identity, preference and desire.

1. Doctrinal analysis

1.1. ECHR judgments on the right to privacy in homosexual practices

The first cases involving the prohibition of same-sex sexual activity under the Convention[88] originate from the 1950s. They were all filed against Germany's Federal Republic, and they all challenged Article 175 of the German Penal Code.[89] The applicants asserted their rights under Article 8 on respect for private life[90] and Article 14 on non-

[88] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (Hereinafter ECHR).
[89] Strafgesetzbuch für das Deutsche Reich vom 15. Mai 1871 Besonderer Teil Dreizehnter Abschnitt. Straftaten gegen die sexuelle Selbstbestimmung Paragraf 175 [11 June 1994].
[90] Art.8 ECHR provides that: '1) Everyone has the right to respect for his private and family life, his home and his correspondence. 2) There shall be no interference from public authority with the exercise of

discrimination.[91] Because Paragraph 175 did not extend to sexual behaviour between women, they solely used 'sex' as a basis for discrimination (and because sexuality would probably have been too controversial a category). All these applications were found to be unacceptable by the Commission, which justified the criminalization on the grounds of protecting public health and morals. Applicants tended to establish homosexuality as a dignified and immutable status to counter such court discourse. As Grigolo notes,[92] the applicant stated in a 1960 lawsuit that 'all democratic states... tolerate homosexuality among those who have an innate propensity toward it, which is the case with him'.[93] 'To declare it an offence is a breach of the right to life, the corollary of which is the right to love', he continued, and 'love cannot be denied to homosexuals since they are men as well'.[94]

As Grigolo notes,[95] the applicant distinguished between a 'innate' and a 'non-innate' (apparently chosen) homosexuality in these words, arguing that the 'innate' one, which characterizes the applicant's sexuality, should be decriminalized. In this case, innate homosexuality is linked to 'love', a characteristic of 'men' that cannot be denied to a specific group of men, namely (innate) homosexuals.[96] It wasn't until 1975 when the Commission, while still refusing to depart from its precedent, held that 'a person's sexual life is unquestionably part of his private life, of which it constitutes an important aspect'.[97]

Homosexuality is a component of 'sexual life', which is a part of 'private life', and certainly an 'essential aspect' of it. The first concrete effect of the acknowledgment that sexual life is a significant component of 'private life' came in 1981, when the well-known

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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 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 the others'.

[91] Art.14 ECHR provides that: 'The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

[92] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023.

[93] *X v the FRG* App No 530/59 (1960), 3 Y.B. at 188.

[94] Idem 188-189.

[95] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023.

[96] See also *David Norris v Attorney General* [1983] IESC 3, [1984] IR 36.

[97] *X v the FRG* App No 5935/72 (1975), 3 D.R. at 284.

case of *Dudgeon v. UK* [98] challenged Northern Irish (UK) legislation criminalizing same-sex sexual behaviour. To frame the case, both the Court and the applicant employed specific arguments. Mr. Dudgeon said that he had been a 'conscious homosexual' since he was 14 years old. Following a police search of his home and the seizure of personal papers, he claimed that he had and continued to suffer an unjustified interference with his right to respect for his private life, as well as discrimination on the basis of 'sex, sexuality, and residence' under Article 14 combined with Article 8. Even though it does not feature in the list of grounds explicitly listed in Article 14, 'sexuality' became for the first time a plausible ground of discrimination. As a result, the Court concentrated on 'the negative effects that the mere existence of the contested legislative provisions can have on the life of a person of homosexual orientation like the applicant'.[99] The Court considered whether the legislation in question was still 'necessary in a democratic society' characterized by tolerance and openness.[100]

It found for the first time that '[Mr. Dudgeon] has suffered and continues to suffer an unjustified interference with his right to privacy. As a result, there is a violation of Article 8'.[101] In this area, the Court limited the state's margin of appreciation[102] and clearly endorsed toleration, stating that 'decriminalization' does not entail acceptance'.[103] This conclusion was contested by four of the 19 judges. The clash between individual sexual behaviour tolerance and the defence of religious morals was one of the key causes of contention. However, as Grigolo notes,[104] because Mr. Dudgeon's homosexuality was presented as a case 'fact', a permanent and unavoidable condition, there was an element of inevitability in his practicing it, weakening the 'sin' argument and making intervention with it unjustified. Even though the Court did not find it necessary to examine the case under Article 14, a declaration that Article 14 had been violated would likely have

[98] *Dudgeon v UK* Application no. 7525/76 (ECHR, 22 October 1981).
[99] Idem [60].
[100] Idem [53].
[101] Idem [63].
[102] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023; On the margin of appreciation doctrine see Susan Marks, 'The European Convention on Human Rights and its 'Democratic Society', 66(1) British Yearbook of International Law (1995) 209.
[103] *Dudgeon v UK* Application no. 7525/76 (ECHR, 22 October 1981), supra note 22, [61].
[104] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023.

strengthened the (political) 'status' of homosexuality to what the judges may have considered an excessive extent.[105]

Furthermore, the Court recognised that 'some degree of regulation over homosexual behaviour is a fundamental necessity in a democratic society', particularly to protect vulnerable youngsters. This was definitely a reference to discriminatory legislation relating to the age of consent to same-sex sexual acts. It took nearly 16 years after *Dudgeon* for the Commission to condemn unequal ages of consent for the first time in *Sutherland v. UK*,[106] where claims of immutability became even stronger and contributed crucial to the case's success. The facts of the case are presented in the context of a typical récit on 'coming out',[107] a process of discovering and realizing something that has always been there in the subject. Sutherland 'became aware of attraction to other boys around the age of twelve' and 'felt his sexual orientation was homosexual', according to his biography.[108] Sutherland indicated that he tried going out with a female when he was fourteen to ensure that the Commission was aware of his efforts to establish heterosexuality. They were still friends, but there was no sexual connection between them, and the applicant's experience reinforced that he could only have a satisfying relationship with another man.[109] Finally, when he was 16, he met a young man his own age with whom he had sexual contact, although they were both concerned about the law.[110] At the time, in England and Wales, consent for sexual behaviour between men was 18 years old, whereas consent for sexual conduct between men and women or between women was 16 years old. At this point, the Commission compared the British

[105] Subsequent and similarly successful cases on decriminalization of same-sex sexual activity in Ireland and Cyprus used essentialist arguments. See *Norris v Ireland* App no 10581/83 (ECHR, 26 October 1988), where Mr. Norris claimed that he suffered 'depression and loneliness on realising that he was irreversibly homosexual' (at 10); *Modinos v Cyprus* App No 15070/89 (ECHR, 22 April 1993).
[106] *Sutherland v UK* App No 25186/94 (report of the Commission, 1 July 1997).
[107] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023; See Yves Roussel, 'Les récits d'une minorité' in Daniel Borrillo (ed.) *Homosexualités et droit* (PUF 1998) 9. Roussel scrutinizes the social pressure exerted on young people to come out as LGBTQ+. He considers such attitude 'as the prescription of a trajectory, the acceptance or refusal of which determines the spiritual qualities of the individual' (at 33- my own translation from French). Asserting one's homosexuality is a process of defining one's personal and social identity that emphasizes the stigmatized attribute of homosexuality. Coming out is frequently interpreted as a form of betrayal to the discriminated community to which the girl or boy inevitably belongs, and, ultimately, as evidence of a lack of self-acceptance. Roussel is sceptical of this process being 'an instance among others of cooperation between the stigmatized and the normal' (at 33- my own translation from French).
[108] *Sutherland v UK* App No 25186/94 (ECHR, 27 March 2001) supra note 29, [17].
[109] Idem [17]. Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023.
[110] Idem [18].

Policy Advisory Committee's 1981 opinion, which stated that 'the sexual pattern of the overwhelming majority of young men is fixed by the age of 18... [so that] young men between the ages of 16 and 18 could still benefit from the protection of the law',[111] with the conclusions of the British Medical Association's (BMA) 1994 report supporting equalization.

The Commission struck a balance by stating that 'the risk posed by predatory older men appears to be as substantial whether the victim is a man or a woman',[112] and concluding that Articles 8 and 14 require an equal age of consent (which could be 14, 16 or 18).[113] Starting from the premise that sexual development towards a homosexual or heterosexual orientation (regardless of gender) had ceased by a set and 'equal' age, the Commission found no need to protect youngsters after this age because nothing can be done to change what are now 'fixed' tendencies. In two cases involving Section 209 of the Austrian Penal Code,[114] the Court agreed with the Commission's conclusions in Sutherland in 2003[115] (which provided for an age of consent of 18 for male-male sexual activity, compared with 14 for male-female and female-female). This strategy is nearly identical to that employed in successful 1999 cases involving the ban of gays from the British military.[116]

Furthermore, the Court's approach in the Austrian age of consent cases undermines any argument for human rights protection of sexuality and sexual conduct in terms of personal choice by confirming the 'equal status' perspective.[117] As a result, while the 'equal status' argument has been effective when the issue is formal discrimination in legislation, it has been ineffective when 'unconventional' sexual behaviour is engaged in for personal reasons, where a breach of Article 14 was by that time not identified. This became clear when the Court decided two instances involving 'group sex', with each case being

[111] Idem [23].
[112] Idem, see para. 64. After the ages of consent in the United Kingdom were equalized in 2001 by the Sexual Offences (Amendment) Act 2000, the Court stroke out Sutherland from the list of cases.
[113] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023.
[114] Criminal Code (Strafgesetzbuch, StGB) as promulgated on 13 November 1998, see *L. and V. v Austria* App Nos 39392/98 and 39829/98 (ECHR, 9 January 2003) and *S.L. v Austria* App No 45330/99 (ECHR, 9 January 2003).
[115] *Sutherland v UK* App No 25186/94 (ECHR, 27 March 2001) supra note 29, [17].
[116] *Smith and Grady v UK* App nos 33985/96 and 33986/96 (ECHR, 27 September 199) [97], and *Lustig-Prean and Beckett v UK* App no 31417/96 and 32377/96 (ECHR, 25 July 2000 [90].
[117] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023.

decided differently based on the nature of the acts involved.[118] In the first case, *Laskey, Jaggard, and Brown v. UK*, the applicants and 'forty-four other homosexual men' engaged in sado-masochist intercourse.[119] During routine investigations, the police obtained videotapes documenting their discussions. They were all accused of causing bodily harm in violation of the Offenses against the Person Act of 1861. When imposing a prison sentence, the British trial judge remarked that 'the unlawful conduct... would be dealt with equally in the prosecutions of heterosexuals or bisexuals if carried out by them',[120] thus avoiding claims of sexual orientation bias.[121]

The applicants argued in the House of Lords *(R. v. Brown)*[122] that the Offences against the Person Act 1861 applied only if the individual harmed or assaulted not consented, and that 'every person has a right to deal with his or her own body as he or she chooses'.[123] By a vote of three to two, the Law Lords rejected these arguments, determining that consent was not a defence in this case. Additionally, they accused the applicants of corrupting a young man participating in the sexual activities. The judgment devotes an entire section to the potential risk of HIV transmission during such interactions. The Court of Appeal distinguished *R. v. Wilson*[124] from *R. v. Brown*, in which a husband was charged with 'occasion[ing] actual bodily injury for having branded his initials on his wife's buttocks with her consent'.[125] 'According to our view, consensual behaviour between husband and wife in the privacy of their married household is not an appropriate subject for criminal investigation, let alone prosecution', the Court of Appeal stated[126] making clear the different legal treatment of homosexuality and heterosexuality. Stychin believes that *R. v. Brown* is an attempt by the Law Lords to re-pathologize homosexuality.[127] The European Court did not go quite so far, but it likewise found no infringement of the Convention in the Law Lords' ruling. The Court voiced doubts regarding the case's inclusion of 'private sexual behaviour'. Even if it did, the breach of

[118] Idem.
[119] *Laskey, Jaggard and Brown v. UK* App nos 21627/93; 21628/93; 21974/93 (ECHR, 19 February 1997).
[120] Idem [11].
[121] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023.
[122] *R v Brown* [1993] UKHL 19 [1994] 1 AC 212.
[123] Idem [20].
[124] *R v Wilson* [1996] 2 Cr App Rep 241.
[125] *R v Brown* [1993] UKHL 19 [1994] 1 AC 212.
[126] Idem [30].
[127] See Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge 1995) 126–139.

privacy was, the court reasoned, justified by public health concerns. Additionally, the court claimed that it had reached its decision based on 'the extreme nature of the practices involved, not the applicants' sexual proclivities'.[128] In comparison with *R. v. Wilson*, it rejected the charge of prejudice because the Wilson facts lacked the same seriousness. Finally, the Court determined that there was no violation of Article 8 because the sanctions imposed on the applicants were not disproportionate.

This scenario demonstrates how difficult it is to conceive of sexual activity and sexuality in the absence of prevailing behavioural and moral standards.[129] The majority of candidates were categorised as sado-masochists rather than homosexuals. There was no distinction made based on sexual orientation, as heterosexuals in a similar scenario would (it was claimed) have received the same treatment. On the other hand, the reference to a comparable circumstance in a heterosexual setting was clearly hypothetical, as no comparable case in a heterosexual setting had ever been presented before the Court.[130] The Court's reasoning was predicated on the principle of universal (hetero)sexual normativity, as articulated sensitively in this reference. What I am arguing here is that sexual orientation boundaries could have been pushed further if sado-masochism had been viewed as a distinct, and ultimately preferred, mode of experiencing pleasure, rather than as 'violence', and thus as a 'sexual expression' deserving of equal recognition with more traditional sexual expressions. If the peculiarity of the sado-masochistic scenario had been considered, a beneficial outcome for the petitioners could have been attained. The Court described the applicants' activities as voluntary, private, and 'for no apparent purpose other than the attainment of sexual gratification'.[131]

According to Weinberg, 'what may appear to the uninitiated observer as a violent act may actually be a theatrical and carefully controlled 'performance' from the participants'

[128] *Laskey, Jaggard and Brown v. UK* (ECHR, 19 February 1997) supra note 40, [47].
[129] In this respect, see the Commission's negative view of prostitution. See *F. v Switzerland* no 11680/85 [1988] D.R. 55, at 178–181. The applicant, a transsexual woman, was arrested before her transition 'for having engaged professionally at her residence . . . in homosexual relations with [male] adults'. Switzerland criminalized same-sex but not different-sex prostitution. She 'made contacts with her partners by advertising in specialised magazines' (at 180). The Commission stated here that prostitution '[does] not belong to the sphere of private life protected by Art.8' (at 181) at all, which meant that the applicant was not able to challenge the discriminatory provision on prostitution under Art. 1.
[130] See *K. A. and A. D. v Belgium* App nos 42758/98, 45558/99 (ECHR, 17 February 2005).
[131] *Laskey, Jaggard and Brown v. UK* App Nos. 21627/93; 21628/93; 21974/93 (ECHR, 19 February 1997). supra note 40, [8].

perspective'.[132] At this point, it is worth looking into the second instance of 'group sex', *A.D.T. v. UK*. [133] The petitioner was charged with violating the 1956 and 1967 Sexual Offences Acts by having intercourse 'not in private'.[134] The applicant was arrested and tapes were discovered following a police search of his apartment. The tapes contained 'footage of the applicant and up to four other adult men engaging in acts, primarily of oral sex, in the applicant's home'.[135] 'There was no sado-masochism or bodily harm involved in the acts depicted on the video tape', the applicant said immediately.[136] Furthermore, the Court agreed with him that 'There are no provisions under domestic law for the regulation of private homosexual acts between consenting adult women[137] and that 'there no provisions under domestic legislation affecting heterosexual behaviour which correspond to section 13 of the Sexual Offences Act 1956. Thus, acts of oral sex and mutual masturbation between more than two consenting adult heterosexuals (as long as there are no homosexual acts between any two males) do not constitute an offence'.[138] Nonetheless, the Court did not address the equality argument, and ruled solely on the basis of Art.8 ECHR. The government stated, 'The precise level of permitted legislative intervention with group operations is difficult to determine'.[139] Aside from the fact that 'the sexual activities involved more than two men', the Court recognized no discernible difference between this case and *Dudgeon*.[140] As a consequence of 'the narrow margin of appreciation' granted to the state, as well as 'the absence of any public health considerations and the purely private nature of the behaviour',[141] the Court found that such regulation was unnecessary and violated Article 8 of the Constitution.[142] Notably,

[132] See Weinberg as quoted in Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge 1995) supra note 44, [122].
[133] *A.D.T. v UK* App No 35765/97 (ECHR, 31 July 2000). See Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023.
[134] Section 1, para.2 of the 1967 Act provides that sexual activity does not take place in private if it occurs 'a) when more than two persons take part or are present, or b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise . . .'
[135] *A.D.T. v UK* App no 35765/97 (ECHR, 31 July 2000) supra note 50, [9].
[136] Idem [10].
[137] Idem [37].
[138] Idem [19].
[139] Idem [27].
[140] Idem [34].
[141] Idem [38].
[142] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law 1023.

the court did not rule on the Art.14 argument, suggesting the primary issue was interference with private life rather than the inequality of treatment.

The ECtHR ruled in ADT that legislation prohibiting consenting sexual intercourse between more than two adult men was also a breach of the right to privacy.[143] The applicant was found guilty of gross indecency in this case. Videotapes of him and other adult men enjoying group sex were discovered in his home by the police. Nonetheless, the applicant's sexuality was protected by the right to respect for private life, according to the Court. Johnson has presented a solid case for the significance of privacy to the Court.[144] The applicant's sexuality was truly private, according to the Court, because he and his sexual partners wanted to remain nameless and keep their sexuality disguised.[145] The Court explicitly described the applicant's sexual acts as private in its decision, because they were carried out in secret. Although the events were videotaped, the applicant was prosecuted for the activities themselves, not for the recording or any risk of it entering the public domain, according to the Court. As a result, the events were truly 'private'.[146] The fact that the homosexual acts took place on the private side of the private/public boundary was undoubtedly a key factor in the case's outcome. Nonetheless, the Court stated that the main issue in the case was not the likelihood of the video becoming public, but rather the fact that the law enabled gay activities to be criminalized. The applicant was prosecuted for the activities themselves, according to the Court.[147]

Furthermore, the ruling stated that domestic legislation would have treated heterosexual group sex differently,[148] suggesting that the problem was not actually about the private/public distinction of the actions, but rather about the sexuality of individuals involved. In reality, the applicant's sexual identity was there from the beginning of the

[143] *A.D.T. v UK* App No 35765/97 (ECHR, 31 July 2000) [38].
[144] Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2012) 104–5.
[145] The Court's decision on admissibility in F v United Kingdom reaffirmed the Court's strong link between privacy and secrecy. On that occasion, the Court ruled that the prohibition against criminalizing same-sex sexuality did not preclude extraditions to states with harsh punishments for homosexual acts, where a judicial conviction was unlikely for 'closet' homosexuals. See *F v United Kingdom* App no 17341/03 (ECHR, 22 June 2004). While the Court appears to be maintaining its stance on extraditions, it has affirmed that sexual orientation is a fundamental aspect of an individual's identity and conscience and that it should not be required of individuals seeking international protection based on their sexual orientation to conceal it in *IK. v Switzerland* App no 21417/17 (ECHR, 19 December 2017) [24].
[146] *A.D.T. v UK* App No 35765/97 (ECHR, 31 July 2000) [37].
[147] Idem.
[148] Idem [19].

judgment and supported the Court's decision. The case was described as follows: 'The applicant is a practicing homosexual',[149] and the Court went on to say that the applicant had gone to great lengths to conceal his sexual orientation.[150] This suggests that the case wasn't only about sexual activities, but about the actions of a person who had a distinct sexual identity. The Court's entire case law is based on the idea of homosexuality as an identity, though notably the court did not rule on Article 14.

In several cases, clear indications of this homosexuality conception can be seen. In *Norris v. Ireland*, for example, the Court stated that 'Mr Norris is an active homosexual'. [151] In *Modinos v. Cyprus*, the Court stated, 'The applicant is a homosexual'.[152] This is demonstrated once more in *Sutherland v. United Kingdom*, when the Court stated: 'He had his first gay relationship... with another person his age who was also homosexual'.[153] In *F v. United Kingdom*, the Court stated: 'due to the fact that he is a homosexual',[154] and in *IIN v. The Netherlands*, the Court stated: 'on account of his homosexuality'.[155] As a result, in certain circumstances, all of the candidates are homosexuals. The candidates' homosexuality was used to characterize a type of person in all of these instances, not to refer to sexual behaviours or to mention a personal attribute.[156]

1.2. ECHR judgments on the right of assembly and expression for homosexual identities

The majority of the ECtHR's decisions on same-sex sexuality have been based on the right to privacy. In fact, the Court did not have to consider issues involving homosexuality in the public domain until 2007 and 2010.[157] On several occasions, the

[149] Idem [8].
[150] Idem [25].
[151] *Norris v Ireland* App no 10581/83 (ECHR, 26 October 1988) [9].
[152] *Modinos v Cyprus* App No. 15070/89 (ECHR, 22 April 1993) [7].
[153] *Sutherland v United Kingdom* (striking out) (GC) App no 25186/94 (ECHR, 22 March 2001) [11].
[154] *F v United Kingdom* App no 17341/03 (ECHR, 22 June 2004) [10].
[155] *INN v The Netherlands* App no 2035/04 (ECHR, 9 December 2004) [12].
[156] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019) 67.
[157] The Scherer case was before them, and it concerned freedom of expression, but it was ruled inadmissible by the Court for technical reasons. *Scherer v Switzerland*, Series A no 28 (ECHR, 25 March 1994).

Court dealt with government prohibitions placed on marches held in the capital cities of Poland and Russia to raise public awareness about discrimination based on sexual orientation. The Court specifically recognized in *Bączkowski and others v. Poland* that sexuality was not merely a private matter, but that the right to publicly express one's sexual identity was also guaranteed by the Convention.[158] This issue was emphasized even more in *Alekseyev v. Russia*, in which the Supreme Court confirmed individuals' right to openly identify as gays and lesbians.[159] The Court found a violation of the right to assembly in both cases, which ran counter to the prohibition on discrimination based on sexual orientation.[160] The refusal of the authorities to allow the marches in issue was deemed an unjustifiable interference with the right to peaceful assembly, according to the Court. Furthermore, the fact that the denied permits were tied to the Mayor's strong anti-same-sex sexuality views presented the Court with sufficient evidence to conclude that the prohibitions were discriminatory in nature.[161] The Court demonstrated that homosexuality was a protected public characteristic through these decisions. This point was made by the ECtHR in the Alekseyev case, when it rejected the government's claim that homosexuality was purely a personal matter. The authorities were offended not by the participants' behaviour or appearance, but by the fact that they wanted to openly identify themselves as homosexual men or lesbians, individually and collectively. The government had reasoned that the authorities' tolerance threshold would be reached when gay activity migrated from the strictly private sector into the arena shared by the general public.[162]

The Court's rejection of the state's argument demonstrated that the grounds for considering homosexuality as a human rights issue went beyond the protection of one's private sexuality. The basis for homosexuality's protection, on the other hand, was its

[158] *Bączkowski and others v Poland* App no 1543/06 (ECHR, 3 May 2007).
[159] *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010) [84].
[160] *Bączkowski and others v Poland* App no 1543/06 (ECHR, 3 May 2007) [101]; *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010) [110]. In the Genderdoc-M v Moldova case, a non-governmental organization was denied permission from the Mayor of Moldova's capital city to hold a peaceful demonstration calling for the adoption of laws to protect members of the LGBT community from discrimination. On that occasion, the Court also found violations of the right to peaceful assembly, both alone and in conjunction with the prohibition on discrimination. *Genderdoc-M v Moldova* App no 9106/06 (ECHR, 12 June 2012).
[161] *Bączkowski and others v Poland* App no 1543/06 (ECHR, 3 May 2007) [68], [100] and [101]; *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010) [86]–[88] and [109]–[110].
[162] *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010) [82].

conception as a coherent identity, independent of its private or public nature. In the Bączkowski judgment,[163] the Court also strongly endorsed public protection of a homosexual identity. The Court justified the importance of the right to peaceful assembly in that case by citing diversity as one of the trademarks of a democratic society and emphasizing the importance of recognizing different identities as a requirement for pluralism. According to the Court, pluralism is also based on a genuine appreciation of diversity and respect for artistic, literary, and socioeconomic ideas and conceptions and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs. For social cohesion to be achieved, people and groups with various identities must interact harmoniously.[164] As a result, the applicants' right to peaceful assembly in public was protected since homosexuality was seen as an identity worthy of public protection.

Nonetheless, the Court's most unequivocal endorsement for homosexuality's public nature came in 2017, when it decided *Bayev and others v. Russia*.[165] The Court was considering whether Russia's statutory ban on the promotion of homosexuality and non-traditional sexual relations among minors was compatible with the Convention at the time. The Court determined that Russia's legal ban violated freedom of expression both on its own and in combination with the prohibition of discrimination. It specifically rejected the government's attempts to defend the relevant legislative provisions as protecting public morals, public health, or other people's rights. The ECtHR ruled that such restrictions only served to promote stigma and discrimination while also encouraging homophobia.[166] It stated unequivocally that there is a broad European consensus on the acceptance of people's right to publicly identify as members of a sexual minority and to promote their own rights and freedoms.[167] In other words, the Court left no room for debate about homosexuality's public nature.

The protection of a homosexual identity necessitates states not only respecting homosexual people, but also taking steps to guarantee that others respect LGBTQI+ rights. On several instances, the Court has addressed the issue of protecting gays from

[163] *Bączkowski and others v Poland* App no 1543/06 (ECHR, 3 May 2007) [63].
[164] Idem [62].
[165] *Bayev and others v Russia* App nos 67667/09, 44092/12 and 56717/12 (ECHR, 20 June 2017) [84] and [92].
[166] Idem [83].
[167] Idem [66].

discriminatory acts in the public realm, establishing a clear level of protection against homophobia. The Court's approach is illustrated by the following examination of the cases *Vejdeland and others v. Sweden*,[168] *Mladina d.d. Ljubljana v. Slovenia*,[169] and *Eweida and others v. United Kingdom*[170]. In each of these cases, the Court had to evaluate whether the states' responses to homophobic acts provided adequate protection for the public homosexual subject's human rights.

Vejdeland was the first of these decisions, handed out by the Court in 2012. In that case, the Court considered whether a domestic conviction for homophobic speech imposed by a Swedish tribunal was compatible with the right to freedom of expression. The domestic conviction had been imposed for the distribution of leaflets stating that homosexuality was having a 'morally destructive effect on the substance of society'.[171] The Court determined that the statements in question constituted serious and damaging allegations, and that the conviction was justified since it may be seen as necessary in a democratic society to preserve others' reputations and rights.[172] As a result, the Court confirmed that freedom of expression did not encompass the right to use homophobic hate speech,[173] recognizing that homosexual people have some protection in the public realm.

The case of *Mladina d.d. Ljubljana v. Slovenia* also involved homophobic comments. Domestic authorities established a speech limitation this time, but it was not against homophobic expression, but against inflammatory speech used to oppose homophobic views. During a debate in the Slovenian parliament about the legal regulation of same-sex partnerships, a member of parliament described homosexuals as 'undesirable people'.[174] His discourse was further bolstered by the employment of tones and gestures that mocked the way homosexual men were supposed to act and speak.[175] In response to the politician's performance, a political magazine published an article criticizing his speech, claiming that it exemplified the mentality of a cerebral bankrupt who is privileged

[168] *Vejdeland and others v Sweden* App no 1813/07 (ECHR, 9 February 2012).
[169] *Mladina dd Ljubljana v Slovenia* App no 20981/10 (ECHR, 17 April 2014).
[170] *Eweida and others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR, 15 March 2013).
[171] *Vejdeland and others v Sweden* App no 1813/07 (ECHR, 9 February 2012) [8].
[172]Idem [54] and [58]–[60].
[173] Idem. On this point, see Johnson's critical analysis, in which he criticizes the Court for not being clear in including the applicants' actions within the definition of 'hate speech'. See Paul Johnson, Homosexuality and the European Court of Human Rights (Routledge 2012) 176-82.
[174] *Mladina dd Ljubljana v Slovenia* App no 20981/10 (ECHR, 17 April 2014) [39] and [44].
[175] Idem [5,] [44].

to live in a country with such a small pool of human resources that a person with his traits can even wind up in Parliament, but in a normal, respectable country, he would not be permitted to speak in Parliament.[176] Following the publication of the article, the parliamentary deputy filed a lawsuit against the magazine in the domestic courts, claiming mental pain as a result of the publication. Not only did the domestic court order the magazine to pay damages, but it also determined that his parliamentary statement was not offensive to gays.[177] The magazine's publisher alleged before the European Court of Human Rights that the domestic decisions, after unsuccessful appeals, amounted to an infringement of freedom of expression. The Court sided with the publisher, ruling that the domestic courts had failed to strike a fair balance between the conflicting interests in the case.[178] The controversial magazine comment was intended as a counterbalance to the politician's words, which could be construed as propagating negative stereotypes, according to the ruling.[179] While labelling the parliamentary representative as a cerebral bankrupt 'could legitimately be considered offensive',[180] the comment 'did not amount to a gratuitous personal attack', according to the Court.[181] As a result, the Court affirmed that using harsh words to defend the public homosexual against homophobic remarks is permissible under the Article 10 ECHR.

The final judgment to be discussed in this section is *Eweida and others v. United Kingdom*. On this occasion, the Court considered four different applications, two of which concerned LGBTQI+ rights.[182] Ms Ladele and Mr. McFarlane, the applicants, complained about disciplinary actions taken against them at work as a result of their refusal to perform professional services that they deemed to condone same-sex partnerships. While the Court's decision in both cases favoured the protection of LGBTQI+ rights, Ms Ladele's case best shows the protection that the Court provided to the public homosexual individual. Ms Ladele worked as a registrar of births, deaths, and marriages for a local government body. She had refused to discharge her professional duties regarding same-sex civil partnerships since domestic laws enabling same-sex civil

[176] Idem [7].
[177] Idem [13] and [14].
[178] Idem [47]–[49].
[179] Idem [44].
[180] Idem [43].
[181] Idem [46].
[182] *Eweida and others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR, 15 March 2013).

partnerships became law. As an orthodox Christian, she stated that marriage could only be a lifelong commitment between one man and one woman, and that same-sex civil partnerships were against God's law. The local borough council imposed disciplinary actions as a result of Ms Ladele's reluctance to conduct civil partnerships, and the domestic courts upheld the legality of this decision. These judges ruled that Ms Ladele's religious views did not excuse her from following the law prohibiting discrimination based on sexual orientation. The petitioner alleged before the Strasbourg Court that the proceedings against her and the lack of legal protection granted to her constituted religious discrimination. The Court determined that the applicant's rights were not violated since the domestic authorities, both the local authority that initiated the disciplinary proceedings and the domestic courts that dismissed her discrimination claim, acted within their discretion.[183] As a result, the Court confirmed that states had the authority to protect public homosexuals from discrimination based on their sexual orientation.

Judges Vuini and De Gaetano, on the other hand, dissented. They claimed that the Borough of Islington took the doctrinaire course, the road of compulsive political correctness, rather than practicing the tolerance and 'dignity for all' it taught.[184] 'A combination of backstabbing by her colleagues and the Borough of Islington's blinkered political correctness (which obviously supported 'gay rights' over fundamental human rights) eventually led to her dismissal', according to these judges.[185] The dissenting justices' distinction between 'gay rights' and 'fundamental human rights' deserves additional consideration. There was no distinction made between LGBTQI+ rights and religious rights. Rather, it was intended to remove 'gay rights' off the list of essential human rights. The dissenting judges (minority opinion) seemed to feel that, unlike an orthodox Christian's right to discriminate, the right of a public homosexual individual not to be discriminated against is still not a fundamental human right.[186]

[183] Idem [106].
[184] Idem, joint partly dissenting opinion of Judges Vučinić and De Gaetano [7].
[185] Idem joint partly dissenting opinion of Judges Vučinić and De Gaetano [5].
[186] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law'(Bloomsbury 2019) 73.

1.3. The first two decades of ECtHR transexual cases

The European Convention on Human Rights in its wording depicts the subject of human rights as a gendered individual. In the original language, the idea of sex is included as the first banned reason for discrimination in the enjoyment of the treaty's human rights. The Convention states, in Article 14: 'The enjoyment of the rights and freedoms guaranteed by this Convention shall be guaranteed without discrimination on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, membership in a national minority, property, birth, or other status'.[187]

Furthermore, the division of humans based on their sex within the context of the Convention results in two opposite sexed individuals: man and woman. The treaty recognizes both men and women of marriageable age as having the right to marry and start a family under a provision that recognizes the human right to marry and start a family. 'Men and women of marriageable age have the right to marry and to start a family, subject to the national legislation governing the exercise of this right', according to Article 12 of the Convention.[188] It is unlikely that the goal of that article is to intentionally exclude persons of 'marriageable age' who cannot be classed as either 'men' or 'women' from the right to marry. As a result, the concept that every human must fit, or be taught to fit, the binary classification of man or woman can be inferred from the article.[189] As a result, the Convention views its subject, the human being entitled to specified rights, as a binary gendered individual. People who do not fit under this stringent categorisation, on the other hand, may have difficulty seeking protection for their human rights through the Convention.[190] While the Convention considers the subject of human rights to be a binary sexed person, it does not provide a definition of sex or the features that define a person as a man or a woman.[191] The Court has not offered a clear definition of sex, but its

[187] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. Protocol No 12, which also prohibits discrimination on the basis of sex, but this time in the enjoyment of any right granted by national laws, makes a similar use of the concept of sex. See Protocol No 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination (adopted 4 November 2000, entered into force 1 April 2005) ETS 177.
[188] European Convention on Human Rights, Art 12.
[189] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law'(Bloomsbury 2019).
[190] See also *R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent)* [2021] UKSC 56- On appeal from: [2020] EWCA Civ 363.
[191] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law'(Bloomsbury 2019) 73.

interpretation can be derived from the case law. The cases involving trans people, in particular, have contributed to a better understanding of the concepts of gender and man/woman under the Convention's legal system.[192] The Court was forced to clarify these categories in these decisions due to the challenge posed by trans bodies to the accepted understanding of sex. Nonetheless, the Court used a transgender individual to establish the truth about sex in an exclusionary manner.[193]

During the first two decades of dealing with the transsexual body, three specific instances established the Court's understanding of sex. The cases were *Rees, Cossey, and Sheffield and Horsham,* all of which were brought against the United Kingdom.[194]

The claimant in the *Rees* case was a transsexual man who had undergone a gender affirming procedure that was paid for by the NHS.[195] The applicant's identity was altered and his sex was recognized in his passport after his transformation. His request for a birth certificate alteration, however, was denied. For many purposes, such as marriage, pension, and employment, he was still deemed a legal woman.[196] The *Cossey* judgment had a similar context to the *Rees* case.[197] The petitioner was a transgender woman who had gone through the National Health Service's gender affirming process. The applicant's name was legally altered as a result of this process, and her new sex was recognized on her passport, but her request to have her birth certificate amended was denied.[198] For the purposes of marriage, she was still deemed a man, which was affirmed by the annulment of her marriage to a man. Similarly, the applicants in the *Sheffield and Horsham* case were two transgender women who had both gone through gender affirming procedures.[199] They had both changed their names, which were recognized in their passports and

[192] Idem.
[193] Idem.
[194] Idem; Until the 1980s, the ECHR had no opportunity to hear a case involving the rights of transsexuals. The Court issued its first decision on the subject in 1980, but it was simply a rejection of the claim for procedural reasons. *Van Oosterwijck v Belgium* App no 7654/76 (ECHR, 6 November 1980).
[195] *Rees v United Kingdom* App no 9532/81 (ECHR, 17 October 1986) [12]–[17].
[196] Idem [40].
[197] *Cossey v United Kingdom* App no 10843/84 (ECHR, 27 September 1990).
[198] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).
[199] *Sheffield and Horsham v United Kingdom* App Nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998) [27]–[32].

driver's licenses, once more. Despite this, they were still legally recognized as men in many areas, including marriage, employment, social security, and pensions.[200]

In all three cases, the Court's decisions were nearly identical. The applicants' assertions that their birth certificates should be changed to reflect their self-determined sex and that they should be treated as members of this sex category for all legal reasons were denied by the Court.[201] The Rees decision confirmed that the United Kingdom had a broad margin of appreciation due to the lack of unanimity among States Parties to the Convention on the legal recognition of transgender individuals' sex. As a result, the state was regarded free to decide whether or not to extend the legal recognition of transsexual people's gender.[202]

The following two decisions – *Cossey, and Sheffield and Horsham* - followed a similar logic, with the Court stating that there were no compelling reasons to differ from its judgment in Rees.[203] The Court did not propose its own definition of gender in any of the cases discussed, but it did approve the criteria used in the United Kingdom to determine a person's sex.[204] The adopted criteria were based on the 'biological' determination of sex at birth, as established by the English case *Corbett v. Corbett* in 1970.[205] These 'biological' requirements, according to Alex Sharpe, are founded on the belief that a person's sex is legally determined at the time of birth. The purported congruence of chromosomes, gonads, and genitals is used to make this determination.[206] However, in the event of a discrepancy between those factors, the newborn's observable genitals will

[200] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).
[201] Idem.
[202] *Rees v United Kingdom* App no 9532/81 (ECHR, 17 October 1986) [47].
[203] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019); Nonetheless, it is worth noting that the level of agreement among the Court's judges has shifted dramatically throughout the decisions. While Rees received a clear majority of 12 to 3, Cossey and Sheffield and Horsham received 10 to 8 and 11 to 9 votes, respectively.
[204] Idem; The European Court of Human Rights has interchanged the terms 'sex' and 'gender'. The Court has referred to the 'legal definition of sex' in the Rees and Cossey cases, and the 'definition of gender in domestic law' in the Sheffield and Horsham case, when discussing how the legal sex/gender of individuals was established in domestic law. *Rees v United Kingdom* App no 9532/81 (ECHR, 17 October 1986); *Cossey v United Kingdom* App no 10843/84 (ECHR, 27 September 1990); *Sheffield and Horsham v United Kingdom* App nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998).
[205] *Corbett v Corbett* [1970] 2 All ER 33.
[206] A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish 2002) 41–42.

be the deciding criterion.[207] In a nutshell, according to Corbett, a person's sex is determined by their body at the time of birth. The use of Justice Ormrod's 1970 sex definition may be seen in the three instances discussed,[208] and its application by the Court was also reaffirmed by Judge Martens' dissenting opinion in the *Cossey* case.[209] The biological nature of the accepted criteria can be seen in the Court's explanation of the applicants' allegations in the *Sheffield and Horsham* case: '[T]he essence of their criticisms is the authorities' continued insistence on determining gender solely based on biological factors, as well as the immutability of gender information once it is put on the register of births and deaths'.[210]

This biological view of sex also implies that it is unchangeable. The Court, in fact, insisted on the impossibility of altering one's gender. The ECtHR stated in the *Cossey* case that the Court had been informed of no significant scientific developments that have occurred in the interim;[211] in particular, it remained the case – as the applicant did not dispute – that gender reassignment surgery did not result in the acquisition of all biological characteristics of the other sex.[212] To put it another way, the Court affirmed the belief in a biological basis for sex, which was acknowledged as the justification for the difficulty of changing one's gender. Even if genitalia had changed as a result of surgery, it would not (the court seemed to imply) be authentic or realistic.[213] The reality about sex seemed to exist beyond human control. Despite increased scientific advances in the handling of gender reassignment procedures, the Court reiterated its belief in an immutable biological reality of sex in the *Sheffield and Horsham* case,[214] where it stated: '[I]t still remains established that gender reassignment surgery does not result in the

[207] Idem 42; Though see also W v W (Physical inter-sex): FD 31 Oct 2000 where more emphasis was placed on the gender identity of the intersex respondent than the sex assumed at birth regarding nullity of marriage.
[208] *Rees v United Kingdom* App no 9532/81 (ECHR, 17 October 1986) [23] and [29]; *Cossey v United Kingdom* App no 10843/84 (ECHR, 27 September 1990) [20] and [26]; *Sheffield and Horsham v United Kingdom* App nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998) [29].
[209] *Cossey v United Kingdom* App no 10843/84 (ECHR, 27 September 1990) dissenting opinion of Judge Martens [4.3.2].
[210] *Sheffield and Horsham v United Kingdom* App nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998) [53].
[211] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019) 73.
[212] Idem; *Cossey v United Kingdom* App no 10843/84 (ECHR, 27 September 1990) [40. 3].
[213] See also Ormrod J in *Corbett*, who said of Ms Ashley that 'the pastiche of femininity was convincing'. *Corbett v Corbett (otherwise Ashley)* [1970] Probate, Divorce And Admiralty Division.
[214] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).

acquisition of all the biological characteristics of the other sex'.[215] During the first twenty years of case law, the Court's refusal of full legal recognition of transsexual individuals' sex was obviously consistent with the biological requirements already indicated. Since sex was viewed as a biological truth, it was impossible to change one's sex. The indisputable Western belief in genuine sex, as challenged by Foucault, harmed the Court's case law.[216] The Court appeared to believe in the reality of true sex of the body, and this belief is linked to the idea of its immutability, because if sex could be changed, it would no longer be an incontrovertible truth.[217]

As a result, the Court appeared to believe that sex was a unique biological reality imprinted within each human that the law merely recognized on a birth certificate.[218] However, this interpretation of the law, which simply accepts a pre-existing reality, has ramifications. It is important to note that the law is not just a language that describes reality; it is also a source of truth formation.[219] As a result, the legal discourse recognizing the seeming truth of sex's biologic underpinning served to reinforce the belief in sex as biology.[220] Only one judge has argued that the legal concept of sex does not have to be based on biological determinism.[221] According to Judge van Dijk, 'I cannot see any reason why legal recognition of sex reassignment requires that there has also been a (complete) reassignment biologically; the law can give an autonomous meaning to the concept of 'sex', just as it can to concepts like 'person', 'family', 'home', 'property', and so on'.[222] In other words, because sex is nothing more than a legal category, the law has always been free to define and re-define the legal idea of sex.[223] In fact, even outside

[215] Idem; *Sheffield and Horsham v United Kingdom* App nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998) [56].
[216] Michel Foucault, *Herculine Barbin: Being the Recently Discovered Memoirs of a Nineteenth-Century French Hermaphrodite* (Harvester Press,1980) vii.
[217] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).
[218] Idem 73.
[219] Idem; A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish, 2002) 80.
[220] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019) 73.
[221] Idem.
[222] *Sheffield and Horsham v United Kingdom* App Nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998) dissenting opinion of Judge van Dijk [8].
[223] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).

of the law, the concept of sex may be argued to be nothing more than a cultural construct, therefore open to re-definition.[224]

1.4. Goodwin and I and the ECtHR u-turn on transexual legal recognition

With the Goodwin and I cases,[225] both against the United Kingdom, the Court's case law on legal sex and transsexual rights experienced a significant shift in 2002. The applicants in these cases were two transsexual women who had gone through gender affirming procedures through the National Health Service. After undergoing gender change, they both claimed that the absence of full legal recognition of their sex constituted a violation of their human rights. The Court unanimously agreed to overturn its previous case law in these matters. The Court ruled that the applicants were correct and that they should be granted full legal recognition of their gender, including being treated as women for pension, retirement, and marriage purposes, as well as having their birth certificates amended to reflect their acquired gender.[226] The Court's decision in favour of Goodwin and I demonstrated that it had opted to redefine legal sex in such a way that it could include transsexuals who had crossed the binary as members of the sex group on the other side of the line.[227] The law had always been capable of reconstructing the legal concept of sex, as Judge van Dijk had anticipated in the *Sheffield and Horsham* case;[228] rather, it was the Court itself that had declined to do so until 2002. Nonetheless, the Court wasted yet another opportunity to explicitly acknowledge that the legal definition of sex is a legal, not a medical problem.[229] Because medical research did not give any conclusive criteria, the Court opted to change the legal definition of gender. The Court was not

[224] Idem 36.
[225] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019); *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002); *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002).
[226] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019); *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [93] and [104*]; I v United Kingdom* (GC) App no 25680/94 (ECHR, 11 July 2002) [73] and [84].
[227] Ralph Sandland, 'Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights' (2003) 11 Feminist Legal Studies 191, 201.
[228] *Sheffield and Horsham v United Kingdom* App nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998) dissenting opinion of Judge van Dijk.
[229] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).

persuaded that the state of medical research or scientific understanding affords any deciding argument in the legal recognition of transsexuals, in its own words.[230] As a result, the Court reserved the power to redefine its definition of legal sex in the future. However, it was unclear if this change was a recognition of the law's potential to re-define gender, or if it was simply because medical science could not (yet) deliver the 'truth' about gender. As a result, the decisions in Goodwin and I rely more heavily on medical discourse than their predecessors.[231] These cases could be interpreted as reinforcing the medical pathologization of transsexuality, in which the gender affirming process is explained as a medically validated recipe for 'relief',[232] while challenging the fixed legal binary which could not be transgressed in any means.

In reality, medical discourse was one of the key reasons for abandoning the 'biological' criteria for determining gender: an examination of congruent biological variables can no longer be decisive in denying legal recognition to a post-operative transsexual's gender change. Other important factors include the acceptance of gender identity disorder by medical professions and health authorities within Contracting States, the provision of treatment, including surgery, to assimilate the individual as closely as possible to the gender to which they perceive they belong, and the assumption of a gendered social role by the transsexual.[233] Despite this, the conviction in the existence of a genuine biological sex persisted in the judgment: it remains the fact that a transsexual cannot acquire all of the biological traits of the assigned sex; the chromosomal element is the fundamental unchanging biological part of gender identity. The Court did not believe, however, that the chromosomal factor must unavoidably play a prominent role in the legal attribution of gender identity to transsexuals.[234] As a result, the Court chose to grant privilege to another criterion in determining legal sex, despite the recognition of a biological truth of sex. The gender affirming process, according to the Court, did not actually allow the

[230] Idem; *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [83]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [63].
[231] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).
[232] Idem; *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [78] and [81]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [58] and [61].
[233] *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [100]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [80].
[234] *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [82]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [62].

person to acquire their gender. It just served to 'assimilate' this newly acquired gender.[235] In other words, transsexuals could never surpass the sex binary's 'true' barrier. They could barely come close to reaching the limit. Close enough that the law would overlook the 'biological truth' and allow for a sex change.[236] Furthermore, the legal ambiguity in which Goodwin and I had been living due to the partial recognition of their acquired sex was one of the decisive elements for recognising that they had altered their gender.[237] 'The unpleasant condition in which post-operative transsexuals live in a transitional zone, not quite one gender or the other, is no longer sustainable', the Court stated.[238] As a result, the Court appeared hesitant to acknowledge its role in the legal ambiguity imposed on Mr Rees, Miss Cossey, Ms Sheffield, and Ms Horsham as a result of its previous judgments, and decided differently in Ms Goodwin and Ms I case, while drawing on the legal fixity of mutually excluding gender binarism.

To summarize, after the Goodwin and I decisions, gender was no longer established by an unchangeable 'biological reality' of the body, but rather by the surgically altered anatomy of the transsexual individual's genitalia. As the ECtHR observed in the cases of *L v. Lithuania* and *Nunez v. France*,[239] it was this procedure that revealed the truth about sex. The applicant in *L v. Lithuania* was a preoperative transsexual male who protested about Lithuania's lack of legal regulation of sex-reassignment surgery. He had hormone treatment and partial gender affirming surgery after being medically classified as transgender (breast removal).[240] Despite this, the hormone treatment was stopped due to legal concerns regarding the prospect of undertaking additional gender affirming surgery. The law did not fully recognize him as a man because of the 'incomplete' stage of his transformation.[241] As a result, the applicant complained about the statute, which ostensibly recognized transsexuals who had undergone genital surgery but did not actually provide such a service. The petitioner was in the intermediate position of a pre-operative transsexual who had undergone partial surgery and had certain crucial civil-

[235] *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002)[78] and [100]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [58] and [80].
[236] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).
[237] Idem.
[238] *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [90]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [70].
[239] *L v. Lithuania*, App no 27527/03 (ECHR 11 September 2007); *Nunez v France* App no 18367/06 (ECHR, 27 May 2008).
[240] *L v. Lithuania*, App no 27527/03 (ECHR 11 September 2007) [11].
[241] Idem [20]–[21].

status documents modified, according to the Court. However, until he had the whole surgery, his personal code would not be changed, and he would continue to be a woman in certain significant situations in his private life, such as job opportunities or trips overseas.[242]

The Court found the lack of legal acknowledgment of the non-operative transgender person's sex to be unproblematic. The Court realized that all the law needed to do was acknowledge the gender disclosed through surgery.[243] At the same time, the Court found that the state had violated the applicant's rights by refusing to allow him to complete his gender transition.[244]

In the Nunez ruling,[245] the Court reiterated its belief in genital surgery as the new truth about sex. The applicant in that instance was a transsexual woman undergoing gender transformation.[246] The applicant's argument was based on the suffering she was going through as a result of the protracted nature of the entire process, as well as the law's refusal to offer full gender recognition until the transition was completed.[247] The decision noted that the Court did not believe it is unreasonable for the State to condition full recognition of the new gender status on the completion of the hormone-surgical process, i.e. the final surgery, within its margin of appreciation.[248] It is reasonable to conclude that the Court agreed that legal gender recognition could be contingent on the completion of the gender affirming process, particularly the final step. Sharpe's allegation regarding the law's genitocentrism is backed up by the importance accorded to genital surgery as the point that allowed for sex change.[249]

It took the Court one and a half decades to partially overcome the fixation with transsexuals' genitalia that started with the Goodwin and I judgments. The Court adopted a first (timid) step in this direction in 2015, when it decided a case regarding the

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[242] Idem [57].
[243] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).
[244] *L v. Lithuania*, App no 27527/03 (ECHR 11 September 2007) [11]. [59]–[60].
[245] *Nunez v France* App no 18367/06 (ECHR, 27 May 2008).
[246] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).
[247] Idem; *Nunez v France* App no 18367/06 (ECHR, 27 May 2008).
[248] *Nunez v France* App no 18367/06 (ECHR, 27 May 2008). Translation from the original paragraph in French [20]–[21].
[249] A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish 2002) 39.

requirement of sterilisation for gender transition. In the case *YY v. Turkey*, the Court examined whether the legislation that established infertility as a prerequisite for obtaining a judicial authorisation to undergo a gender affirming process was consistent with the Convention.[250] It ruled that such a requirement amounted to a breach of the right to respect for private life. However, while the Court was clear that sterilisation could not be a prerequisite for authorising a gender transition process, it avoided offering a straightforward opinion as to whether sterilisation could ever be a requirement for the legal recognition of gender. In fact, the judgment can be read as implicitly validating the requirement of sterilisation that exists in many states' legislation,[251] provided that sterility was not a condition for undergoing a gender affirming process, but a consequence of the transition. There are different elements in the judgment that certainly pointed in that direction.[252]

In particular, there is a cryptic paragraph in the judgment, which should have been clearer if the Court aimed to object to the requirement of infertility altogether. The paragraph noted that the Court could not understand why the inability to procreate of a person wishing to undergo a gender reassignment surgery should be established even before the person has undergone the gender reassignment procedures.[253] Thus, while the Court was unequivocal that making sterilisation a prerequisite to undergo transition amounted to a violation of the Convention, it opted to remain silent as to whether infertility can be required in order to obtain legal gender recognition. Therefore, this ruling did not offer sufficient reasons for celebrating a (transgender) advancement of the Court's jurisprudence on gender identity, as the requirement of sterility for gender recognition seemed to have been left in place.

If the Court's decision in *YY v. Turkey* did not provide a clear answer as to whether sterility can be made a requirement for gender recognition, this answer can be found in

[250] *YY v Turkey* App no 14793/08 (ECHR, 10 March 2015).
[251] Idem [42]–[43].
[252] In fact, Judge Lemmens' concurring opinion, joined by Judge Kris, specifically stated that 'the present judgment cannot be interpreted as definitely excluding as a requirement for individuals to be permanently unable to procreate in the context of gender transition', clarifying that the judgment was not concerned with infertility as a requisite for gender recognition, but only with sterility as a prerequisite for accessing surgery. Idem [3].
[253] *YY v Turkey* App no 14793/08 (ECHR, 10 March 2015) [116].

the ruling adopted in *AP, Garçon and Nicot* in 2017.[254] Furthermore, in this case, the Court changed its mind about genital surgery. The case concerned three trans women who were refused gender recognition because they did not meet several conditions set forth by domestic legislation. While each applicant's situation was unique, the Court had to decide whether legislation that made legal gender recognition conditional on undergoing intrusive physical and psychological examinations by an inter-disciplinary medical team and being medically diagnosed with a mental disorder was compatible with the Convention.[255] The most significant change resulting from this decision was the assessment of the third of these conditions. The Court had to interpret what the Act meant by the 'irreversible character of the transformation of the appearance'[256] required for gender recognition. It was confirmed that the authorities had sought either sterilising surgery or a medical therapy that was quite likely to produce sterilisation.[257] The state had overstepped its margin of appreciation by imposing such a condition, according to the Court. It held that the legislation's requirement for an irreversible transformation violated the applicants' right to privacy, stating that neither sterilising surgery nor medical procedures likely to result in sterility may be deemed criteria for gaining gender recognition under the Convention.[258]

The Court's implied overturning of its case law's genitocentrism is a crucial consequence of this sterilizing decision.[259] Given that genital surgery is a sterilising treatment, it can no longer be utilized as a criterion for gender recognition.[260] In fact, the Court specifically stated that not every trans person can – or even wants to – have genital surgery as part of their gender change.[261] This means that one's attitude toward genitalia should not determine one's gender, and gender can no longer be naturalized by case law as the

[254] *AP, Garçon and Nicot v France* App nos 79885/12, 52471/13 and 52596/13 (ECHR, 6 April 2017). See this article for a critical analysis of the case: Damian A Gonzalez Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France' (2018) 81 Modern Law Review 526.
[255] *AP, Garçon and Nicot v France* App nos 79885/12, 52471/13 and 52596/13 (ECHR, 6 April 2017) [83]–[85].
[256] Idem [83].
[257] Idem [120].
[258] Idem [135].
[259] Damian A Gonzalez Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France' (2018) 81 Modern Law Review 526, 532.
[260] Idem.
[261] *AP, Garçon and Nicot v France* App nos 79885/12, 52471/13 and 52596/13 (ECHR, 6 April 2017) [126].

obvious expression of an anatomical feature.[262] As a result, it is easy to find reasons to celebrate queer activism in the *AP, Garçon, and Nicot* decision. States Parties can no longer claim gender recognition based on the commonly expected congruence between gender and genitalia. Belonging to a given gender notwithstanding genitalia has made a comeback in the Court's case law, but not as a result of the rejection of gender recognition, as it has in the past. It can now be requested by applicants who wish to do so.[263] The Court, on the other hand, determined that the other two requirements under consideration – the need for a medical diagnosis and the requirement to undertake intrusive medical evaluations – did not constitute violations of the Convention. As a result, this decision can be interpreted as a confirmation that medicine may continue to play a key part in deciding gender recognition in the legal system. The Court appears to have abandoned physical criteria in favour of a solely mental approach for gender recognition.[264] On the other hand, the Court did not outlaw the divorce requirement in *Hämäläinen v. Finland* for the purposes of legal gender recognition, whereby a trans person must dissolve their (after legal gender change) same-sex marriage in order for their gender to legally change.[265] The Court stated that there were alternatives to same-sex marriage, such as civil partnership for former spouses, and that did not violate Art. 8 and 12. ECHR or constitute discrimination under Art. 14. This shows how the Court has not yet challenged cisheteronormativity and is still permitting gatekeeping of binary legal gender in the name of default heterosexuality and the assumption sex/gender congruence.

The following part will focus on trans identities that fail or refuse to conform with the Court's expanding gender recognition requirements, which include biological traits, genital surgery, and medical certification. It will look at the gender 'in-between' established by the jurisprudence for individuals who 'fail' to totally bridge the gender divide, as well as how it might be used to (continue to) queer the Court's gender conception. The Court (inadvertently) validated the existence of a gap in-between binary genders from its early case law on transsexuality. Initially, this occurred as a result of the Court's refusal to declare a violation of transsexual individuals' Convention rights when states refused to recognize them. In several legal areas, the Court enabled states to treat

[262] Damian A Gonzalez Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France' (2018) 81 Modern Law Review 526, 537.
[263] Idem 537.
[264] Idem 533.
[265] *Hämäläinen v. Finland* App no 37359/09 (ECHR, 16 July 2014) [112].

trans people as belonging to distinct genders. Since the Goodwin and I cases in 2002, the Court has been able to recognize the gender of (straight) transsexuals. Those who finished the mandated gender affirming process, however, were considered to have obtained a new legal sex. The Court's early obsession with biology was replaced by a newfound love of genital surgery. The Court continued to allow the legal presence of persons who live in an in-between position, being sometimes a man and sometimes a woman, depending on the subject, by leaving to the margin of appreciation of the Member States to determine whether genital surgery is a necessity for passing across the binary. If the Court viewed the post-operative transsexual as the 'intermediate' sex until 2002,[266] following Goodwin and I, the Court construed the pre-operative transsexual as the 'intermediate' sex[267] 'between two sexes'.[268] The in-between space continues to exist after *AP, Garçon, and Nicot*.[269] It is now populated by those who disagree to being pathologized through the medical diagnosis of suffering from a mental disease, rather than trans people who refuse genital surgery. In fact, the gender in-between will continue to exist as long as the ECtHR upholds the presence of stringent standards for gender recognition. However, as previously said, while a legal space between genders is problematic when imposed on people who want their gender recognized, it might be of interest to people who do not want to conform with binary genders. Because it undermines the requirement of cleanly defined identification categories, the prospect of an in-between existence is an obvious subject of queer fascination.

Gloria Anzaldua's work, in particular, examined the concept of living in the borderland, which she dubbed the neplanta, a Nahuatl word that means 'in-between space'.[270] She believed that borders are set up to define a location, to differentiate one side from the other (and the self from the other), and that, as a result, the in-between zone allows for ambiguity and indeterminacy.[271] For individuals who either fail or refuse to indicate monolithically, the in-between becomes a space of belonging. It is a place where people's

[266] *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [90]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [70].
[267] *L v. Lithuania* App no 27527/03 (ECHR, 11 September 2007) [57].
[268] *Nunez v France* App no 18367/06 (ECHR, 27 May 2008).
[269] *AP, Garçon and Nicot v France* App nos 79885/12, 52471/13 and 52596/13 (ECHR, 6 April 2017).
[270] Damian A Gonzalez Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France' (2018) 81 Modern Law Review 526, 532–33.
[271] Gloria Anzaldúa, *Borderlands / La Frontera: The New Mestiza* (Aunt Lute Books 1999) 25–26.

identities are constantly shifting.[272] Neplanta, according to Anzaldua, becomes a space for self-redefinition as a site where realities collide, idealized ideals are not reached, and thresholds are crossed.[273] Indeed, the space in between can be a catalyst for societal change and an opportunity to abandon epistemic certainty.[274] It can be turned into a place where humans can be reconceived.[275] For some, the in-between position is not transgender enough because it does not yet materialize the lack of belonging to a gender identity (in a queer way of transcending the idea of sex). Individuals in the gender transition are nonetheless identifiable as men or women, even though their affiliation with each group is sporadic and transient. Nonetheless, the space in between is ripe for transformation. This intermediate position could become a potent instrument for queer gender identities if it is re-claimed as a wanted path to fight an enforced binary life, rather than solely the result of a request to belong to the sex binary being rejected.[276]

The ECHR's advancements have solely applied to post-operative transsexuals, despite recent universal and regional bodies' recommendations addressing transgender, gender identity, and expression in general, including transgender, gender nonconforming, and gender queer persons.[277] In its later cases only the Court talks about transgender people [278] and discrimination based on gender identity,[279] and has found a violation of Art. 14 in relation to the rights of trans parents.[280] It is unclear whether the European legal framework covers all transgender people regardless of their self-identification rather than rebuilt biological traits. The Court employs a binary duality of men and women, with transgender people portrayed as shifting between the two. Furthermore, the Court uses the term 'gender transition' rather than 'gender change', which would encompass self-realization and not rely on medicalized concepts of gender identity, such as physical affirmation therapies. However, if European countries adopt the proposals to combat transgender discrimination and, as a result, build legislation to meet the requirements of

[272] Cynthia Weber, *Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge* (Oxford University Press 2016) 157–59.
[273] Gloria Anzaldúa, 'Let Us Be the Healing of the Wound: The Coyolxauhqui Imperative – La sombra y el sueño' in AnaLouise Keating (ed) *The Gloria Anzaldúa Reader* (Duke University Press 2009) 310.
[274] Judith Butler, *Undoing Gender* (Routledge 2004) 228.
[275] Idem.
[276] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019) 57.
[277] AnaLouise Keating (ed), *The Gloria Anzaldúa Reader* (Duke University Press 2009) 322.
[278] *Y v. Poland* App no 74131/14 (ECHR, 17 February 2022).
[279] *A.M and Others v Russia* App no 47220/19 (ECHR, 6 July 2021).
[280] Idem.

everyone who falls under the umbrella term of transgender, the Court is unlikely to ignore this. If a European consensus is formed on matters such as nonbinary genders and the protection of gender expression, the Court will be forced to change its position sooner or later. Nonetheless, based on the Court's prior decisions, it appears that the sluggish progress in recognizing transgender rights will be focused on post-operative transsexuals.

2. ECHR and asylum

2.1. Extraterritorial application of ECHR

The right to asylum is not guaranteed by the European Convention on Human Rights.[281] In contrast, the Court's dynamic interpretation of Articles 2(1) and 3 of the Convention prohibits Member States from deporting foreigners back to their home country if their lives are threatened or they are subjected to torture, or degrading or inhuman treatment. The Court has ruled that if 'substantial grounds have been demonstrated for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3, … the person in question should not be deported to that country'.[282] The current asylum cases before the European Court of Human Rights provide an opportunity to rethink current law. In 2004, the Court decided two cases involving Iranians seeking asylum based on the risk of persecution, degrading, or inhuman treatment if deported to Iran: *F. v. United Kingdom*[283] and *I.I.N. v. The Netherlands*.[284] The Court rejected the applicants' arguments, which were based on Articles 2 and 3 of the Convention, because it did not believe that deportation would pose a real threat. 'Although it must be acknowledged that the general situation in Iran does not foster human rights protection and that homosexuals may be vulnerable to abuse', the Court stated, 'the applicant has not established in his case that there are substantial grounds to

[281] *Saadi v Italy* App no. 37201/06 (ECHR, 28 February 2008) [124], The Court notes that 'neither the Convention nor its Protocols confer the right to political asylum'.
[282] Idem [125].
[283] *F. v United Kingdom* App no 17341/03 (ECHR, 22 June 2004).
[284] *I.I.N. v The Netherlands* App no 2035/04 (ECHR, 9 December 2004).

believe that he will be subjected to treatment contrary to Article 3 of the Convention on the basis of his homosexuality'.[285]

The risk of persecution and/or ill-treatment as a result of homosexuality is recognized as a ground for asylum in 34 Council of Europe Member States, 27 of which are European Union members, according to the FIDH, ILGA-Europe, and the International Court of Justice.[286] This is a point of agreement that the Court cannot ignore. The interpretation of the degree of risk in the country-of-origin is a contentious issue in these cases. The European Court of Human Rights investigated the situation of gay and lesbian people in the countries concerned to determine whether there was a genuine risk of deportation. The petitioning non-governmental organizations (NGOs) criticized the Court's new criterion for rejecting asylum applications, claiming that it was based on the assumption that the asylum-seeker would keep his or her sexual orientation 'secret'.[287] The right to physical integrity should not be limited by undefined criteria, such as keeping one's lifestyle private. It also contradicts the UN High Commissioner for Refugees' 2012 Guideline on International Protection No. 9, which states that the fact that an applicant may be able to avoid persecution by concealing or being 'discreet' about his or her sexual orientation or gender identity, or has previously been so, is not a valid reason to deny refugee status.[288] The case for example of *M.E. v. Sweden*[289] demonstrated the difficulties that can arise when LGBTQI+ rights are recognized incrementally. The applicant (a Libyan man) was married to a Swedish man but was unable to apply for family reunification because the Swedish Aliens Act requires the request to be made in the applicant's country-of-origin, to which he could not return due to the risk of persecution and inhuman and degrading treatment.

In *M.E. v. Sweden*,[290] the applicant, an asylum seeker, specifically stated that if he were forced to return to Libya to apply for family reunion from there, he would face real

[285] Idem 13.
[286] FIDH, ILGA-EUROPE and ICJ, *Written comments in ME v. Sweden case, Application no. 71398/12* (13 March 2013) [9] <http://www.fidh.org/IMG/pdf/fidh-icj-ilga_europe_intervention_-_me_v_sweden_-_app_no_71398_-_12_-_9th_april_2013.pdf> accessed 15 April 2022.
[287] Idem [3].
[288] UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012 [31].
[289] *M.E. v Sweden* App No 71398/12 (ECHR, 26 June 2014).
[290] *M.E. v Sweden* App no 71398/12 (ECHR, 8 April 2015).

persecution and ill-treatment, primarily because of his homosexuality, but also because of previous issues with Libyan military authorities following his arrest for smuggling illegal weapons. The Court noted that on 17 December 2014, the applicant was granted a residence permit by the Migration Board, effectively repealing the expulsion order against him. The Board determined that the security situation in Libya had deteriorated since the summer of 2014, and that if the applicant was deported, he would face persecution because he lived openly as a homosexual and could be expected to continue doing so upon his return. As a result, he required protection in Sweden. Although there was no amicable settlement between the parties, the Court concluded that the potential violation of Article 3 of the Convention (prohibition of inhuman or degrading treatment) had now been removed, and the case had thus been resolved at the national level.[291] The Court also rejected the applicant's argument that it should continue to investigate his case because it raised serious issues of fundamental importance relating to homosexual rights and how to assess those rights in asylum cases throughout Europe, despite the fact that the Migration Court had taken the applicant's sexual orientation into account in its decision of 17 December 2014. As a result, the Court determined that it was appropriate to strike the application from its docket, since the matter was now moot.[292]

In *A.E. v. Finland*.[293] a homosexual male was allegedly threatened with torture and cruel or degrading treatment if he was sent to Iran, in violation of Article 3 of the Convention (prohibition of torture and cruel or degrading treatment).[294] The Court dismissed the claim, pointing out that the applicant had been granted a one-year continuous residence permit in Finland with the option of renewal, and thus was no longer subject to an expulsion order. As a result, the Court determined that the issue that sparked the allegations in the case had been resolved.[295]

On April 19, 2016, the case of *A.N. v. France*[296] was heard. In this case, a homosexual man was allegedly threatened with torture and cruel or degrading treatment if he was sent

[291] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[292] Idem.
[293] *A.E. v Finland* (decision – strike out) App no 30953/11 (ECHR, 22 September 2015).
[294] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[295] Idem.
[296] *A.N. v France* App no 12956/15 (ECHR, 19 April 2016).

to Senegal. The Court ruled that the application was inadmissible because it was clearly unfounded. It determined that the applicant had failed to demonstrate that if he was sent to Senegal, he would face a serious risk of being subjected to treatment in violation of Article 3 of the Convention. Along the same lines, in *I.K. v. Switzerland*,[297] the applicant, a Sierra Leonean who claimed to be homosexual, expressed concern that he would face cruel or degrading treatment if repatriated to Sierra Leone. The Court ruled that the application was inadmissible because it was clearly unfounded. It went on to say that sexual orientation was a fundamental aspect of an individual's identity and awareness, and that anyone seeking international protection on the basis of their sexual orientation could not be forced to suppress it. However, because the applicant's allegations lacked credibility and there were no conclusive documents to back them up, the Court concluded that there were no substantial grounds to believe that he would face a real risk of torture or inhuman or degrading treatment if he returned to Sierra Leone, in violation of Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment).

In *B and C v. Switzerland*,[298] the applicants, a Gambian and a Swiss national, both male and in a same-sex registered partnership, lived in Switzerland together until late 2019, when the second applicant died. The first candidate had been residing in Switzerland since 2008. His asylum application was denied because Swiss authorities did not believe his claims of prior ill-treatment.[299] He was afraid of being deported to Gambia after his partner's application for family reunification was denied, and he claimed he would be tortured if sent back. The Court determined that deporting the first petitioner to the Gambia would be a violation of the Convention's Article 3 (prohibition of cruel or degrading treatment).[300] The Court found that the Swiss authorities had failed to adequately assess the risk of ill-treatment for the first applicant as a homosexual person in Gambia and the availability of State protection against ill-treatment from non-State actors. The Court also highlighted that various independent organizations had stated that the Gambian government was hesitant to provide LGBTQI+ people with protection.[301]

[297] *I.K. v Switzerland* (decision on admissibility) App no 21417/17 (ECHR, 19 December 2017).
[298] *B and C v Switzerland* App nos 889/19 and 43987/16 (ECHR, 17 November 2020).
[299] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[300] Idem.
[301] Idem.

In cases involving extradition, expulsion, or deportation of individuals to third countries, the Court has repeatedly emphasized that Article 3 prohibits expulsion to face a real risk of torture or inhuman or degrading treatment or punishment in absolute terms, and that its guarantees apply regardless of the risk's authors, context, or the applicant's conduct.[302] The Court has been especially concerned with instances in which Article 3 might be violated by expulsion. In most cases, invoking Article 3 has served as a stumbling block to removal. The Court has emphasized the prohibition's absolute nature, as well as the terrible and irreversible nature of the suffering at stake.[303] In other articles of the Convention, such as Article 8, the right to a private life[304] or Article 9,[305] such compelling requirements do not automatically apply namely there is a lower threshold of gravity for establishing a breach, as well as fewer legal implications and narrower scope of protection. However, these ECHR articles are derogable.

Removal can be challenged if it would result in a 'flagrant breach' of a qualified Convention right (such as Articles 5, 6, 8, and 14), especially if the denial of a fair trial would put someone in danger of being executed.[306]

In *Mamatkulov and Askarov v. Turkey*, Judges Sir Nicolas Bratza, Bonello and Hedigan elaborated on this issue:

> 'What constitutes a 'flagrant' denial of justice has not been fully explained in the Court's jurisprudence, but the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. As the Court has emphasised, Article 1 cannot be read as justifying a general principle to the effect that a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with

[302] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010) 88.
[303] Idem 88.
[304] *Z. and T. v the United Kingdom* (inadmissible) App no 27034/05 (ECHR, 28 February 2006).
[305] See also *F. v the United Kingdom* (inadmissible) App no 17341/03 (ECHR, 22 June 2004) on return to Iran where homosexuality is not acceptable.
[306] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010) 88.

each of the safeguards of the Convention.[307] In our view, what the word 'flagrant' is intended to convey is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article'.[308]

While what constitutes a 'flagrant breach' of the Convention may imply that the violation of the right in question is 'fundamental', 'manifest', or 'basic', the Court must decide.[309] Everyone's right to life on the other hand, shall be protected by law, according to Article 2, especially in arbitrary execution.[310]

It has now been determined by the ECHR that extraditing or expelling a person to another country where the death penalty is likely to be imposed is a violation of Protocol 13 to the Convention (concerning the elimination of the death penalty).[311] An asylum seeker or refugee who faces capital charges or execution upon return shall be protected from deportation in a state that has ratified Protocol No. 6 and, a fortiori, Protocol No. 13 (concerning the abolition of the death penalty in all circumstances).[312] The subject of Article 2 has not been successfully invoked in the majority of cases of expulsion. Despite the fact that the appellant in *H.L.R. v. France*[313] claimed that returning to Colombia would put his life in danger, the case was heard under Article 3. *D. v. the United Kingdom*[314] was not considered under Article 2, but the Court, like the Commission in Bahaddar, chose to review it on the merits under Article 3.[315] *M.A.R. v. UK*,[316] in which the petitioner

[307] See *Soering v The United Kingdom* App no 14038/88 (ECHR, 7 July 1989) [86].
[308] *Mamatkulov and Askarov v Turkey* App no 46827/99 (ECHR, 4 February 2005) joint partly dissenting opinion of Judges Sir Nicolas Bratza, Bonello and Hedigan [14]. This was a dissent on the facts.
[309] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[310] According to article 2 ECHR: 'i Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ii Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a. in defence of any person from unlawful violence; b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c. in action lawfully taken for the purpose of quelling a riot or insurrection'.
[311] *Y v. the Netherlands* App no 16531/90 (ECHR, 16 January 1991); *Aylor Davis v. France* (1994) 76 DR 164; *Alla Raidl v Austria* App no. 25342/94 (ECHR, 4 November 1995). See also*, Soering v. The United Kingdon,* App No. 14038/88 (ECHR, 7 July 1989).
[312] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[313] *H.L.R. v France* App no 24573/94 (ECHR, 29 April 1997).
[314] *D. v. the United Kingdom* App no 30240/96 (ECHR, 2 May 1997).
[315] *Bahaddar v the Netherlands* App no 25894/94 (ECHR, 22 May 1995).
[316] *M.A.R. v. the United Kingdom* App no. 28038/95 (ECHR, 16 January 1997).

claimed that if he returned to Iran, he would face arbitrary execution, was also deemed admissible under Article 2.

Bader v. Sweden[317] provided a thorough examination of the Court's current methodology for assessing extraterritoriality under Article 2.[318] According to the Court, an issue may arise under Articles 2 and 3 of the Convention if a Contracting State deports an immigrant who has experienced or is likely to experience a flagrant denial of a fair trial in the receiving state, the outcome of which was or is likely to be the death penalty.[319] According to this logic, the real possibility of a death sentence being imposed as a result of a 'flagrant denial of a fair trial' kept the respondent state from extraditing the applicant to Syria in Bader.[320] In a concurring opinion, Judge Cabral Barreto[321] concluded that the state's actions should be defined as a violation of Article 1 of Protocol No. 13[322] and that the finding of a violation under Article 2 was improper. According to Protocol No. 6, no one shall be sentenced to death or executed. The Supreme Court has ruled that if there are strong and confirmed grounds to believe that an individual will face the death penalty, he or she cannot be extradited or expelled to another country. However, as in *Al-Shari v. Italy*,[323] the court affirmed that this is contingent on the individual first presenting *prima facie* evidence to establish any such risk.[324]

[317] *Bader v Sweden* App no. 13284/04 (ECHR, 8 November 2005).
[318] According to Article 2i, everyone's right to life is protected by the law. No one's life shall be taken intentionally unless it is in the execution of a court sentence following his conviction for a crime for which this penalty is provided by law. [This must be considered in the light of Protocols 6 and 13 which effectively remove this caveat]. ii Deprivation of life is not considered to be inflicted in violation of this article when it occurs as a result of the use of force that is not more than absolutely necessary: a. in the defence of any person against unlawful violence; b. to effect a lawful arrest or prevent the escape of a person lawfully detained; or c. in action lawfully taken to quell a riot or insurgency. Article 6 of the Constitution guarantees the right to a fair trial. According to the Court in ECtHR, the right to a fair trial in criminal proceedings, as embodied in Article 6, plays an important role in a democratic society as stated in *Soering v. The United Kingdom* App No. 14038/88 (ECHR, 7 July 1989).
[319] *Bader v Sweden* App no 13284/04 (ECHR, 8 November 2005) [42].
[320] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010) 91.
[321] Idem [47].
[322] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010) 91; Article 1 of Protocol No. 13 ECHR.
[323] *Al-Shari and others v Italy* App no 57/03 (ECHR, 5 June 2005).
[324] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).

According to Article 15a of the Qualification Directive 2004/83/EC,[325] people facing the death penalty or execution are entitled to 'secondary protection', which includes protection from deportation. According to Article 1 of Protocol No. 13 to the ECHR, no one shall be sentenced to death or executed, even during times of war.[326] While the Court has yet to unanimously establish a violation, the substance of this prohibition was addressed in Judge Cabral Barreto's concurring opinion in *Bader v. Sweden*.[327] While agreeing with the Court's majority finding of an Article 2 violation for an applicant facing the death penalty if deported to Syria, the concurring opinion stated that such a complaint should be classified instead as a breach of Protocol No. 13's Article 1.[328] Judge Cabral Barreto based his reasoning on the Additional Protocol's signature states' goal of strengthening and replacing the Article 2 requirement, ensuring that the death penalty was abolished in all circumstances.

In *Al-Saadoon v. the United Kingdom*,[329] the appellants claimed that their transfer from British custody in Iraq to the Iraqi Higher Tribunal exposed them to a genuine risk of unfair trial before the tribunal and execution by hanging. The Court investigated the matter in accordance with Article 3 of the ECHR.[330] Given that all but two member states had signed Protocol 13 and that all but three governments that had signed it had ratified it, it was assumed that Article 2 had been amended to prohibit the death penalty in all circumstances. The Court ruled that the death penalty was inhumane and degrading, entailing the state's deliberate and premeditated destruction of a human being, resulting in physical pain and intense psychological suffering as a result of the foreknowledge of death, and thus violated Article 3 of the Convention.[331] In Al-Saadoon, there were compelling reasons to believe that the petitioners would be sentenced to death and executed soon after the physical transfer. The Iraqi authorities had never given any binding assurance that they would not execute the applicants; the outcome of the Iraqi

[325] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304.
[326] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[327] *Bader v Sweden* App no 13284/04 (ECHR, 8 November 2005) [42].
[328] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[329] *Al-Saadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECHR, 2 March 2010).
[330] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[331] Idem; See also*, Soering v. The United Kingdon,* App No. 14038/88 (ECHR, 7 July 1989).

trial process could not be predicted; execution could not be ruled out; and the UK authorities had made no genuine effort to negotiate with the Iraqi authorities in order to avoid the risk of the death penalty.[332] Furthermore, due to the 'so high profile', nature of the case, Iraqi prosecutors initially had 'cold feet' about presenting it themselves. The UK authorities may seek alternative arrangements, such as having the applicants tried in a UK court, either in Iraq or in the UK. However, it does not appear that such a solution had been attempted.[333] The Court was not persuaded by the argument that the need to protect the applicants' rights under the Convention clearly required a breach of Iraqi sovereignty. As a result, the applicants were subjected to inhumane and humiliating treatment, in violation of Article 3 ECHR.[334]

Individual liberty and security are guaranteed by Article 5 of the ECHR. The Court has yet to issue a decision on the extraterritorial application of Article 5. The applicant's complaint in *Olaechea v. Spain*[335] included claims of arbitrary confinement if he was extradited to Peru, but the Court chose not to address this component of the application in its combined admissibility determination and conclusion. Extraterritoriality requires that either Article 5 or Article 6 are breached when the applicants are threatened with 'arbitrary detention or unfair procedures that reach the flagrant level necessary for the expulsion to raise issues under [those articles]— mere technical flaws will not suffice'.[336] *Drozd and Janousek v. France and Spain*[337] were the starting point in cases of deprivation of liberty resulting from a gross violation of Article 6, the right to a fair trial, which could also apply to LGBTQI+ asylum claimants.

Stoichkov v. Bulgaria[338] followed the same logic, finding a violation of Article 5 – this is not an expulsion case, but one that sheds light on the subject. Bulgarian authorities imprisoned the petitioner in 2000 based on a 1989 conviction in his absence, for charges he had not been informed of prior to leaving Bulgaria to settle in the United States.[339] The

[332] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[333] Idem.
[334] Idem.
[335] *Olaechea Cahuas v Spain* Application no 24668/03 (ECHR, 10 August 2006).
[336] *Tomic v the United Kingdom* (inadmissible) Application no 17837/03 (ECHR, 14 October 2003).
[337] *Drozd and Janousek v France and Spain* Application no 12747/87 (ECHR, 26 June 1992).
[338] *Stoichkov v Bulgaria* Application no 9808/02 (ECHR, 24 March 2005) [51].
[339] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).

investigation was not reopened by the authorities. In *Drozd and Ilaşcu v. Moldova and Russia*, the Court stated that 'if a 'conviction' results from proceedings that were a 'flagrant denial of justice', that is 'manifestly contrary to the provisions of Article 6 or the principles embodied therein', the resulting deprivation of liberty would not be justified under Article 5 1)'.[340]

Article 6 of the Constitution guarantees the right to a fair trial. According to the Court's decision in Soering, the right to a fair trial in criminal proceedings, as reflected in Article 6, has a significant place in a democratic society.[341] The Court does not rule out the possibility that an extradition decision could create an issue under Article 6 if the fugitive has been denied or is about to be denied a fair trial in the requesting country. However, the facts of this instance do not reveal such a danger, though it did find a breach of Article 3 ECHR.[342] The Court stated in *Drozd and Janousek v. France and Spain* that 'the Convention does not require the contracting parties to impose its standards on third states or territories'[343] and emphasized the significance of improving international cooperation in the administration of justice. 'The contracting states, on the other hand, are obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice', it continued.[344] This commitment must apply a fortiori in circumstances of imminent expulsion to stand prosecution in a country that flagrantly violates the most basic norms of fair trial[345] especially if the trial could end in the death sentence being imposed.[346]

Mamatkulov and Askarov v. Turkey[347] was a Grand Chamber decision that looked at the application of Article 6 to the fairness of criminal proceedings in Uzbekistan. 'The risk

[340] Idem; *Ilascu v Moldova and Russia* Application no 48787/99 (ECHR, 8 July 2004).
[341] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[342] Idem.
[343] *Drozd and Janousek v France and Spain* App no 12747/87 (ECHR, 26 June 1992) [110]. See also Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[344] Idem; See also Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[345] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010); See *M.A.R. v the United Kingdom* App no 28038/95 (ECHR, 16 January 1997); *Hilal v the United Kingdom* App no 45276/99 (ECHR, 8 February 2000).
[346] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[347] *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (ECHR, 4 February 2005).

of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned', the Court reasoned, 'just as the risk of treatment prohibited by Articles 2 and/or 3 must be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned'.[348] Although there were reasons to doubt that they would receive a fair trial in the state of destination based on the information available at the time, there was insufficient evidence to show that any possible irregularities in the trial were likely to constitute a flagrant denial of justice within the meaning of paragraph 113 of Soering.[349]

The Court found in *Stoichkov v. Bulgaria*[350] that the right of the accused to a fair trial is a 'fundamental element of a fair trial' and 'one of the essential requirements of Article 6 and is deeply entrenched in the provision'. In *Al-Moayad v. Germany*[351] the Court offered a list of considerations to consider in determining whether a flagrant denial of the right to a fair trial had occurred. In such circumstances, it is impossible to say whether a violation of Article 6.1 would have been discovered. The Court has consistently ruled that Article 6 does not extend to the asylum determination procedure in the country where asylum is requested. The same is true in extradition proceedings, but, as a result of *Ismoilov v. Russia*.[352] Article 6.2 may be applicable where close links are shown between criminal proceedings in the receiving state and extradition proceedings in the state of origin, such that the applicants may be considered to have been 'charged with a criminal offence'.[353]

The extraterritorial application of the above qualified and not qualified ECHR articles is also very relevant to persons with nonconforming gender identities and expression, since because of this characteristic they can be subjected to persecution which takes the above

[348] Idem [90]; Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[349] *Soering v The United Kingdom* App No 14038/88 (ECHR, 7 July 1989); Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[350] *Stoichkov v Bulgaria* App no 9808/02 (ECHR, 24 March 2005).
[351] *Al-Moayad v Germany* (inadmissible) App no 35863/03 (ECHR, 20 February 2007).
[352] *Ismoilov v Russia* App no 2947/06 (ECHR, 24 April 2008). The petitioners further claimed that their extradition from Russia to Uzbekistan to face terrorism allegations would be in violation of Article 6.1 because they would not be given a fair trial. However, given that Article 3 was found to have been breached, no further violations were discovered under Article 6.1.
[353] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).

forms. As is known, the element which qualifies asylum claimants for a particular social group in refugee status determination (nonconforming gender identity/expression) is different but linked to the form the persecution takes.

2.2. ECHR and the right to privacy/family life/physical and moral integrity in asylum

A right which is heavily linked with sexual orientation and gender identity/expression is the right to physical and moral integrity (an implicit aspect of Article 8) especially in the context of asylum and deportation from a receiving state. The right to moral and physical integrity as an important part of private life will be discussed here. The organs of the Convention were acutely aware of the absolute nature of Article 3.[354] It is limitless: no restrictions can be placed on its use. It is unjustifiable: no justification can be offered to absolve the offending state. It is non-negotiable: even in times of war or national emergency, it must be followed.[355] As a result, all forms of treatment are subjected to a strict examination in order to preserve the essential importance of Article 3 and the absolute character of the right. However, the Court has recognized that in a democratic society, real or threatened treatment that does not meet the high 'threshold of severity' criteria set forth in Article 3 is still objectionable.[356] As a result, the Court has evolved the idea that where there are enough negative impacts on a person's 'physical and moral integrity', Article 8 in its private life aspect may be violated and have extraterritorial application.[357]

In *Costello-Roberts v. the United Kingdom*,[358] the Court held that physical and psychological abuse that did not meet the threshold of Article 3 might nevertheless be considered a violation of Article 8. There is no comprehensive definition of 'private life', and Article 8 protects wide aspects of the personal domain,[359] such as 'gender

[354] Idem.
[355] Idem.
[356] Idem 100.
[357] Idem.
[358] *Costello-Roberts v the United Kingdom* App no 13134/87 (ECHR, 25 March 1993) 60-61 [36].
[359] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).

identifiability'. The ECHR's involvement in preventing expulsion in the face of human rights violations relating to gender identification, name, sexual orientation, and sexual life is included in this Article.[360] Furthermore, mental health is an important part of the right to privacy, as it is linked to moral and physical integrity. This is in line with Hathaway and Pobjoy's concept of 'endogenous harm'[361] as risk of persecution for LGBTQ+ asylum claimants in refugee status determination, against which I have argued in Chapter III. As argued before, it is my view that the law can provide clearer analytical tools and clarify the scope of the right instead of transferring the burden to the applicants/medicine in order to elaborate/prove their sexual identity/activity and gender identity/expression to access protection.

Because Article 8 guarantees a 'right to identity and personal development, as well as the right to establish and develop relationships with other human beings in the outside world', mental stability is required for effective enjoyment of the right to respect for private life.[362] Expulsion cases may fall under the purview of Article 8 if deportation cannot be avoided due to mental suffering or deterioration that does not qualify as inhuman or degrading treatment under Article 3. *In D. v. the United Kingdom,* the Court declined to hear the complaints under Article 8 because the expulsion would be a violation of Article 3.[363] The same was true in the case of *Hilal v. United Kingdom*.[364] In *Bensaid v. the United Kingdom,*[365] the applicant was a schizophrenic who was suffering from a mental condition and hence posed a risk of damage to others as well as himself. Despite the fact that a doctor's assessment stated that the deployment was successful, the Court held that it had not been established that the applicant's moral integrity would be 'substantially affected to a degree falling within the scope of Article 8' and that a decision to deport the

[360] *Bensaid v the United Kingdom* App no. 44599/98 (ECHR, 6 February 2001). See, for instance, *Dudgeon v the United Kingdom* App no 7525/76 (ECHR, 22 October 1981) [41]; *B. v France* App no 13343/87 (ECHR, 25 March 1992) [63]; *Burghartz v Switzerland* App no 16213/90 (ECHR, 22 February 1994) [24]; *Laskey, Jaggard and Brown v the United Kingdom* App nos 21627/93, 21826/93 and 21974/93 (ECHR, 19 February 1997) [3].
[361] James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law'. (2011) 44(2) New York University Journal of International Law and Politics 315.
[362] *Bensaid v the United Kingdom App no. 44599/98 (ECHR, 6 February 2001)* 47, citing *Burghartz v. Switzerland* App no 16213/90 (ECHR, 22 February 1994) and *Friedl v Austria* App no 15225/89 (ECHR, 31 January 1995). Followed in *Paramsothy v the Netherlands* App no 14492/03 (ECHR, 10 November 2005).
[363] *D. v the United Kingdom* App no 30240/96 (ECHR, 2 May 1997).
[364] *Hilal v the United Kingdom* App no 45276/99 (ECHR, 6 March 2001).
[365] *Bensaid v the United Kingdom* App no 44599/98 (ECHR, 6 February 2001).

applicant to Algeria would result in a deterioration in his mental health.[366] To reach the threshold and activate Article 3, the danger of mental health deterioration (as a breach of Article 8 ECHR) must not be speculative or hypothetical, but must be 'substantially affected'.[367]

The question is whether the right to gender identification and expression, such as sexual identity and intimacy, can be acknowledged as a fundamental aspect of the right to physical and moral integrity *per se* seen both in an individual and relational manner under Article 8. In that way, its denouncement under severe threat or risk of serious harm would constitute a severe violation with extraterritorial application. Asylum seekers who claim gender-based persecution, such as persecution based on sexual orientation or domestic abuse, frequently face challenges in both their refugee and human rights claims.[368] In *F. v. the United Kingdom*,[369] the Court held that, while a ban on consensual homosexual acts could interfere with a person's moral and physical integrity (as per *Dudgeon*[370]), in the context of asylum, on a 'purely pragmatic basis', it cannot be required that an expelling state only returns an alien to a country that is 'fully and effectively enforcing' all Convention rights.[371] That does not delineate the scope of extraterritorial protection that Article 8 can provide in sexuality and gender identity/expression cases.

This is a firm stance on this aspect of Article 8's extraterritorial application (and probably some more rights guaranteed by the Convention that are not considered the fundamental ones in a liberal democracy).[372] The severity test level is not the only contrast between the protections given by Articles 8 and 3. As previously stated, once treatment is determined to come under Article 3, the right's absolute character means that the level of protection provided cannot be lessened.[373] An interference with Article 8 rights, on the other hand, can be allowed under the second paragraph if the respondent government can demonstrate that the interference was carried out in compliance with the law, had a

[366] Idem [48].
[367] Idem [3].
[368] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[369] *F. v the United Kingdom* App no 36812/02 (ECHR, 31 August 2004).
[370] *Dudgeon v the United Kingdom* App no 7525/76 (ECHR, 22 October 1981).
[371] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human rights files, No. 9* (Council of Europe Publishing 2010).
[372] Idem.
[373] Idem.

legitimate purpose, and was appropriate to that goal.[374] The 'economic well-being of the country' is commonly emphasized as a legitimate goal.[375] If, however, a discriminatory link of persecution due to gender nonconformity can be identified, it is doubtful whether the violation of a qualified article is legitimate.

3. From personal autonomy to freedom to be and perform one's gender

The European Court of Human Rights' jurisprudence has proven to be a vital source in establishing the constituent elements of private life. The essential object of Article 8 is to protect the individual from arbitrary interferences by public authorities, according to a common description.[376] However, the case law indicates that this right encompasses a wide range of issues. Privacy has several dimensions, and by examining the context and specific privacy issues, we can see that the right to privacy is a broad and diverse human right.[377] Due to the wide range of issues that private life encompasses, cases falling under this concept have been divided into three broad, and sometimes overlapping, categories.[378] These are, first and foremost, a person's physical, psychological, or moral integrity; second, an individual's privacy; and third, people's personal autonomy and identity.[379]

Individuals' physical, psychological, or moral integrity is the first category within the concept of private life. Article 8 provides protection to victims of violence in this category.[380] The reason for this is that violence endangers bodily integrity and thus the right to a private life. Domestic violence[381] and even bullying among schoolchildren[382] have been included. Private life also includes an individual's right to choose medical

[374] Idem.
[375] Idem 103.
[376] See for instance *P. and S. v Poland* App no. 57375/08 (ECHR, 30 October 2012) [94] (on abortion).
[377] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[378] CoE, *Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence* (Council of Europe 2018) 18.
[379] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[380] Idem.
[381] *Bevacqua and S. v Bulgaria* App no 71127/01 (ECJR, 12 June 2008).
[382] *Durdević v Croatia* App no 52442/09 (ECHR, 19 July 2011).

treatment, and the Court has ruled that assisted suicide,[383] like the right to reproductive choice, is a component of private life although the Court has not yet found that bans on assisted suicide breach of Art 8 ECHR.[384] One needs to have always in mind that Article 8 ECHR is indeed derogable. According to the Court's dynamic interpretation, the right to respect for an individual's bodily choices has blossomed into the right to choose the circumstances of becoming a parent,[385] the right to choose to become a genetic parent,[386] and access to IVF.[387] To protect individuals' well-being, the Court has added environmental issues to the right to privacy, such as pollution and excessive noise levels.[388]

Privacy is the second category of private life protected by Article 8. It is understood in this context as the traditional aspect of the right to privacy; people's interests in not being subjected to unwanted attention from the state or third parties, namely 'the right to be let alone'.[389] Even though Article 8 does not mention honour and reputation explicitly, as Article 12 of the UDHR does, they do fall within the scope of private life.[390] It has been interpreted that the protection of one's honour and reputation was purposefully left out, but because it strikes at the heart of the right to privacy, it cannot be excluded.[391] According to the Court, a person's image is one of the most important aspects of their personality.[392] It reveals the individual's distinct characteristics and sets him apart from others.[393] As a result, private life provides a right to one's image and photographs, which concerns the publication of photos, images, and articles.[394] Article 8 may also be used to protect a person's reputation when these publications reach a certain level of seriousness

[383] *Pretty v the United Kingdom* App no 2346/02 (ECHR. 29 April 2002).
[384] *A., B. and C. v Ireland*, [GC] App no 25579/05 (ECHR, 16 December 2010).
[385] *Evans v UK* [GC] App no 6339/05, (ECHR, 10 April 2007).
[386] *Dickson v the United Kingdom* [GC] App no 44362/04 (ECHR, 4 December 2007).
[387] *S.H. and Others v Austria*, [GC] App no 57813/0 (ECHR, 3 November 2011).
[388] *López Ostra v Spain*, App no 16798/90 (ECHR, 9 December 1994) [51].
[389] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[390] Idem.
[391] Maris Burbergs, 'How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born', in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR* (Cambridge University Press 2014) 321. See also the case of *Young, James and Webster v. the United Kingdom* App no 7601/76 and 7806/77 (ECHR, 13 August 1981). The Court held the view that the substance of a right is significant and downplayed the relevance of the omission while drafting Article 8.
[392] *Von Hannover v Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR, 7 February 2012) [97].
[393] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[394] *Von Hannover v Germany (no. 1)* App no 59320/00 (ECHR, 24 June 2004).

that may jeopardize the personal enjoyment of the right to privacy.[395] There are also numerous restrictions on police surveillance, registration in police databases, tracking of individual movements, and communication surveillance.[396]

The third category is concerned with the safeguarding of personal autonomy and identity. This includes the right to personal development as well as the right to form relationships with other people. This concept includes professional and business relationships, restrictions on work[397] or dismissals from office[398] based solely on factors relating to an individual's private life that may constitute an interference with Article 8.[399] To protect personal autonomy, the Court has ruled that disclosing information about personal religious and philosophical convictions may violate Article 8, because such convictions concern some of the most intimate aspects of private life.[400] That relates also to freedom of conscience.

The Court has also established that an individual's personal choices regarding his or her desired appearance fall within the concept of private life, as they relate to the expression of their personality.[401] This includes things like picking out a haircut,[402] growing a beard,[403] and wearing religious clothing, such as a veil.[404] There are also numerous subsets of rights that comprise the personal identity protected by the right to privacy. The Court has determined that elements such as gender identification,[405] ethnic identity,[406]

[395] *Axel Springer AG v Germany* [GC] App no 39954/08 (ECHR, 7 February 2012) [83].
[396] See e.g., *Shimovolos v Russia* App no 30194/09 (ECHR, 21 June 2011) [44] and [66]; *Kruslin v. France* App no 11801/85 (ECHR, 24 April 1990) [33].
[397] *Bigaeva v Greece* App no 26713/05 (ECHR, 28 May 2009).
[398] *Oleksandr v Ukraine* App no 21722/11 (ECHR 9 April 2013).
[399] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[400] *Folgerø and Others v Norway* [GC] App no 15472/02 (ECHR, 29 June 2007) [98].
[401] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[402] *Popa v Romania* App no 4233/09 (ECHR, 18 June 2013) [32]–[33].
[403] *Tığ v Turkey* App no 8165/03 (ECJR. 24 May 2005).
[404] *S.A.S. v France* [GC] App no 43835/11 (ECHR, 1 July 2014) [106]–[107].
[405] *B v France* App no 13343/87 (ECHR, 25 March 1992) [63].
[406] *Ciubotaru v Moldova* App no 27138/04 (ECHR, 27 April 2010) [53].

name,[407] and sexual orientation and sexual life,[408] are critical to the personal sphere protected by Article 8. [409]

Individual reputation and honour have been especially vulnerable in third-party relationships where newspapers are the source of the interference.[410] It was held in the landmark case of *von Hannover v. Germany* that everyone has a legitimate expectation that his or her private life will be protected.[411] This case involved Princess Caroline of Monaco, who was photographed doing everyday things like playing sports, walking outside, and leaving restaurants. As a result of this case, the Court has established that a person's interaction with others, even in a public setting, may fall within the scope of private life.[412] Personal information protection against publication is a form of informational self-determination.[413] In *Gurgenidze v. Georgia*, Mr Gurgenidze was accused in a number of newspaper articles of stealing a famous author's manuscript. Because it involved unverified charges and the publication was deemed to have no public interest, the publication was deemed to be in violation of Article 8.[414] Another case in point is Petrina v. Romania, in which a man was accused in a television show and a newspaper article of cooperating with the security service Securitate during the communist regime.[415] Despite the fact that the allegations were false, his libel case was dismissed by the domestic courts. The Court ruled that the allegations went beyond what was acceptable and found a violation of Article 8.[416]

Article 8 contains a provision entitled 'right to respect for private life'. Traditionally, the term 'respect' refers to a negative obligation of non-interference, whereas the terms 'protect' and 'fulfill' refer to positive obligations.[417] However, since the case of *Marckx*

[407] *Burghartz v Switzerland* App no 16213/90 (ECHR, 22 February 1994) [24].
[408] *Dudgeon v United Kingdom* App no 7525/76 (ECHR, 22 October 1981) [41].
[409] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[410] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[411] *Von Hannover v Germany (no. 1)* App no 59320/00 (ECHR, 24 June 2004) infra, section 5.3.1.
[412] Idem [50].
[413] James Q. Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113(6) The Yale Law Journal 1151, 1161, supra note 48.
[414] *Gurgenidze v Georgia* App no 71678/01 (ECHR, 17 October 2006) [56].
[415] *Petrina v Romania* App no 78060/01 (ECHR, 14 October 2008).
[416] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[417] Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law* (Oxford University Press 1983) 220.

v. Belgium, the Court has inferred from the term 'respect' a positive obligation to protect in addition to the duty of non-interference.[418] The meaning of the provision is unclear, and the Court has acknowledged that it is unclear, particularly in terms of the positive obligations implicit in that concept.[419] Whereas the negative obligations prohibit the state from interfering with the rights of individuals, the positive obligations require states to 'take action'.[420] It may be difficult to establish the necessity and scope of state action in these cases.[421] The jurisprudence of the European Court of Human Rights has proven to be a valuable resource for determining the components of private life.[422]

According to one popular interpretation, 'the main goal of Article 8 is to protect the person against arbitrary intrusion by public authority'.[423] However, case law reveals that this right has several different dimensions. Privacy has many dimensions, and we can see from the context and specific privacy issues that the right to privacy is a vast and complex human right.[424] Because the concept of private life encompasses such a wide range of issues, cases that fall under it have been classified into three broad, often overlapping categories.[425] The first is one's physical, psychological, or moral integrity; the second is privacy; and the third is personal autonomy and identity, whether in public or in private.[426]

The Court considers whether the importance of the interest at stake necessitates the imposition of the applicant's requested positive obligation.[427] Relevant factors for determining the content of the states' positive obligations include whether fundamental values or essential aspects of private life are at stake, the impact on an applicant of a mismatch between social reality and the law, and the coherence of administration and

[418] Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR* (Cambridge University Press 2014) 72, supra note 164.
[419] *Marckx v Belgium* App no 6833/74 (ECHR, 13 June 1979) [31].
[420] See for instance *B v France* App no 13343/87 (ECHR, 25 March 1992).
[421] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[422] Idem.
[423] See for instance *P. and S. v. Poland* App no 57375/08 (ECHR, 30 October 2012) [94] (on abortion).
[424] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[425] CoE, *Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence* (Council of Europe 2018) 18.
[426] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018) 25.
[427] Idem.

legal practices within the domestic system.[428] Furthermore, the Court considers the impact of the alleged obligation on the state, as the alleged obligation may be too narrow and precise or too broad and indeterminate.[429]

Do positive obligations stemming from Article 8 on gender identification/expression such as the lack of gender recognition by the country of origin have application extraterritorially in protecting asylum claimants from deportation? Could it surpass the threshold of severity and activate article 3 on the absolute prohibition of inhumane and degrading treatment? A common justification for the court developing implied positive obligations has been to ensure that the relevant rights are practical and effective in their exercise.[430] This type of obligation stems from the principle of effective protection and Article 1 of the Convention, which requires states to ensure the rights guaranteed by the Convention to everyone within their jurisdiction.[431] This means that states are obligated to protect individuals' rights from both public authorities and other individuals.[432] The obligations of states to take preventive or protective action to protect Convention rights are critical. It has resulted in the recognition of positive obligations in interpersonal relationships, influencing the balancing of human rights, legal protection, and increased procedural safeguards.[433]

The preceding jurisprudence clearly shows that the Court has addressed the rights of transgender people with a growing understanding, and has extended the protection afforded to their private and family life over time. In doing so, the Court has repeatedly emphasized the ECHR's status as a 'living instrument', interpreting it in an evolutionary manner and expanding protection in response to societal changes. The right to legal gender recognition arose as a result of social changes in European countries, prompting the Court to depart from its previous case law and interpret the Convention as a 'living

[428] *Hämäläinen v Finland* App no 37359/09 (ECHR, 16 July 2014] (transgender operations).
[429] Idem.
[430] Alastair Mowbray, *The Development of Positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 221; See also Airey v. Ireland App no 6289/73 (ECHR, 9 October 1979) infra, section 5.6.
[431] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018).
[432] Alastair Mowbray, *The Development of Positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 221; See also Airey v. Ireland App no 6289/73 (ECHR, 9 October 1979) 4, supra note 179.
[433] Martin Westlund, *The development of the right to privacy under the ECHR A study on the effects of Article 8 on third parties* (Uppsala Universitet 2018) 37.

instrument', adapting to social and medical developments.[434] Having said that, the Court has repeatedly stated that each case will be decided based on its unique circumstances, and that the 'fair balance' will shift accordingly.[435] As a result, even though the Court has increasingly found states to be unlawfully interfering with transgender people's private and family lives, some aspects of legal gender recognition continue to fall within the contracting parties' margin of appreciation.[436] However, the Court's analysis has focused heavily on the potential violation of substantive Article 8 at the expense of equality and non-discrimination considerations,[437] as well as the freedom of conscience and expression.

As far as conscience is concerned, the writings of two influential thinkers, Bayle and Locke, reflect the historical development of conscience as a distinct concept that allows for different approaches to ethics and morals.[438] Both agreed that the formation of reasonable moral beliefs is the result of personal life experiences, such as parental or cultural upbringing, and that this results in a wide range of religious and moral perspectives.[439] Attempting to suppress another's viewpoints suffocates the reasoning of all people with a free conscience.[440] As a result, these thinkers established a distinction between truth beliefs, such as God-given law, and reasonable standards of belief that individuals can derive.[441] According to Bayle, conscience serves as both an internal

[434] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019) 163.
[435] Idem.
[436] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019) 163; Paul Johnson, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) 10(1) Human Rights Law Review 67, 68; see *Mamatkulov and Askarov v Turkey* (GC) App nos 46827/99 and 46951/99 (ECHR, 4 February 2005) [121] and joint partly dissenting opinion of Judges Caflisch, Türmen and Kovler [154].
[437] Damian A Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law' (Bloomsbury 2019).
[438] David Richards, *Toleration and the Constitution* (Oxford University Press 1986) 90 noting epistemological and contextual similarities between the two thinkers, with the key difference being Locke's political, republican focus versus Bayle's more philosophical approach to toleration. See also Harry Bracken, 'Toleration theories : Bayle vs. Locke' in Ethel Groffier and Michel Paradis (eds), *The notion of tolerance and human rights: essays in honour of Raymond Klibansky* (Carleton University Press 1991), where he distinguishes Bayle's reliance on conscience as a means of clarifying a person's moral position from Locke's separation of Church and State as a means of regulating an individual's morality.
[439] Leonard M. Hammer, *The International Human Right to Freedom of Conscience* (Routledge 2017) 16.
[440] Idem 17.
[441] Bayle held that it is a moral good to follow one's conscience, even if it is objectively incorrect, as long as the agent intends to do good. John Kilcullen, 'Boyle on the Rights of Conscience' (1985) 11 Philosophical Research Archive 1.

source of ethical knowledge and an external means of shaping one's life and actions.[442] As one's ability to reason for oneself grew, so did one's approach to conscience, especially in terms of the need for a moral standard but arguably other relational and social paradigms as well. Individual reasoning would allow for the emergence of a more moral form of religious and social ethics.[443] The emergence of the concept of liberty was founded on the realization that a person's primary goal should be to live a proper and moral life rather than blindly follow religious ordinances.[444]

Furthermore, because humans are indivisible and have inherent worth that deserves to be protected, the emergence of the liberty principle led to the realization that the state must tolerate all forms of religious beliefs and ideals.[445] The ability to form one's own personal moral and ethical orientation has taken the place of the dominant religion's dictation of what to believe and think.[446] Essentially, the idea evolved that enforcing moral truths through political power deviates from the original intent by becoming an irrational assertion of viewpoints. Because the prospect of persecution for holding beliefs other than the dominant social, political, and religious beliefs was a concern for Enlightenment thinkers, the goal was to remove the religious dimension of conscience from its core,[447] which is yet to be seen and applied.

Despite what appears to be a lack of protection for individual conscientious convictions, the concept of conscience as a belief system distinct from a religiously based standard was gaining acceptance, as evidenced by the case of Upper Silesia before the Permanent

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[442] David Richards, *Toleration and the Constitution* (Oxford University Press 1986) juxtaposing Bayle's rationale with Locke's theocentric mode of thought, which is predicated on a just God and adherence to the Gospel's minimum ethical standards, namely the natural law.

[443] It is worth noting that theological origins continued to play a role for both Bayle and Locke, as they did not give credence to atheist thinkers not because they were immoral, especially since atheists can act morally, but because they were non-believers in God, which precluded the ability for an ethical motivation.

[444] Leonard M. Hammer, *The International Human Right to Freedom of Conscience* (Routledge 2017) 18.

[445] Mieczysław Maneli, *Freedom and Tolerance* (Octagon Books 1984) 100-101 referring to Diderot's Eighteenth-Century Encyclopaedist movement, which aimed for peaceful coexistence, even without approval, with a focus on separating Church and State to eliminate opposition to minority beliefs.

[446] Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, *Human Rights and World Public Order The Basic Policies of an International Law of Human Dignity* (1st edn, Yale University Press 1979) 664; Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* (UN, Subcommission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on the Study of Discrimination in the Matter of Religious Rights and Practices 1960) 3.

[447] Martin Fitzpatrick, 'Enlightenment and Conscience' in John McLaren and Harold Coward (eds), *Religious Conscience, the State, and the Law: Historical Contexts and Contemporary Significance* (SUNY Press 1999) 50.

Court of International Justice.[448] The International Court was confronted with a provision of the German-Polish Upper Silesia Convention of 1922 that allowed a parent to declare whether or not a child is a member of a particular linguistic, racial, or religious minority based on his or her conscience. This declaration would then be used to determine in which language course a parent's child should enrol. The lawsuit centered on whether the state's use of an outside expert to verify the parent's declaration violated the Convention. The Court ruled that the state cannot appoint an objective expert because the development of conscience is an axiomatic expression of a belief, but that a declarant must verify that he is articulating his 'actual' stance on his status.[449] One would be eager to see the same level of protection for transnormative frameworks that normalize gender nonconformity, as opposed to cisnormative that suppress the former, enjoy this protection as social relational beliefs that enable a person to perform their personal gender nonconformity and not prescribe to the cis-heteronormative vision of society and gender ideology.

The right to conscience has been emerging as a distinct right that is not required to be based on religious beliefs. Rather, the right was used to defend individual beliefs in a variety of situations. While the process was lengthy and did not always reflect the genuine goals of the relevant states, shifting attitudes toward religion and conscience had an impact on how religious freedom emerged. The right to religious freedom was expanded to include a variety of previously overlooked minority belief systems, even if it was not fully accepted or adhered to by all states.[450] This historical evolution of conscience as a principle distinct from religion was to be explicitly codified with the establishment of the international human rights framework following World War Two [451] and can have further implications in the future.

The ECHR jurisprudence has not yet elaborated on freedom of expression of personality as an aspect of Article 10, much less one that may have extraterritorial application or a

[448] *Certain German Interests in Polish Upper Silesia* (International Court of Justice A6, Judgment of 25 August 1925).
[449] Leonard M. Hammer, *The International Human Right to Freedom of Conscience* (Routledge 2017) 26.
[450] Idem 27.
[451] Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen. Human Rights and World Public Order The Basic Policies of an International Law of Human Dignity (1st edn, Yale University Press 1979) 653 and 661; Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* (UN, Subcommission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on the Study of Discrimination in the Matter of Religious Rights and Practices 1960) 15-17.

gender element. The doctrine and the judges of the European Court of Human Rights appears to draw on the complexities inherent in the right to free expression guaranteed by Article 10 of the European Convention on Human Rights.[452] This complication stems from a number of factors, including the text of Article 10.2.[453] Several components of the 'right to freedom of expression', are defined by ECHR jurisprudence, including the freedom to express one's opinion, the freedom to communicate information, and the freedom to receive information. In other words, the Convention upholds several 'freedoms of speech', not just one.[454] The second complexity factor is its cross-border nature, despite the fact that the Strasbourg Court and the previous Commission were successful in limiting the extraterritorial effect of their sphere of control in relation to Article 10,[455] so one would not expect such a generous step on the protection of gender expression as a form of socio-political relational expression for asylum claimants.[456] Finally, the Strasbourg Court's jurisprudence is responsible for much of the complication that comes with the right to free expression. Case law is the work of all chambers, not just the Grand Chamber.[457] In the absence of significant coordination among the multiple chambers as well as systemized harmonization by the Grand Chamber, the obligation to establish a level of cohesion in European jurisprudence is weak.[458]

For now, asylum claims based on sexual orientation and gender identity are examined mainly under article 8 ECHR, respect for private life, which can take the form of personal autonomy. Several Council of Europe agencies have reaffirmed personal autonomy as a human rights principle.[459] For example, in a Committee of Ministers Recommendation on a Cohesive Policy for People with Disabilities, provision is sought for the disabled,

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[452] Jean-François Flauss, 'The European Court of Human Rights and the Freedom of Expression' (2009) 84(3) Indiana Law Journal 810.
[453] Idem.
[454] Idem.
[455] See *Ben El Mahi v. Denmark* App no 5853/06 (ECHR, 11 December 2006) concluding that other rights guaranteed by the Convention derived from freedom of expression are not within the competence of the European Court because the injured parties do not fall within the jurisdiction of a signatory member state under the terms of Article 1.; *Bertrand Russell Peace Found. v. United Kingdom* (decision on admissibility) App no 7597/76, (ECHR, 2 May 1978) concluding that member states have no affirmative obligation to protect freedom of expression when it is exercised across an international border.
[456] Idem.
[457] Idem.
[458]Jean-François Flauss, 'The European Court of Human Rights and the Freedom of Expression' (2009) 84(3) Indiana Law Journal 810.
[459] Jill Marshal, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martin Neijhoff Publishers 2009) 60.

among other things, '[i]n order to avoid or at least alleviate difficult situations... and to develop personal autonomy…'[460] Because there is no explicit right to such personal autonomy in the ECHR, the Court has built its case law by interpreting a right to privacy to include it.[461] The legal right to respect one's private life underpins the individual's right to autonomy, identity, and integrity.[462]

Importantly, Sir Nicholas Bratza states in the case *Botta v. Italy* that positive obligations may arise in the case of the disabled to ensure that they are not denied the opportunity to develop social relationships with others and thus their own personalities.[463] According to him, the determining factor is the degree to which an individual is so constrained and isolated that he is deprived of the opportunity to develop his personality.[464]

According to the European Court of Human Rights, mental health must be considered an essential component of a person's private life.[465] Moral integrity entails a sense of non-invasion from outside forces when desired, as well as the social foundations for the development of a sense of self and moral integrity through mental health improvement.[466] This is linked to the factor of recognizing and treating people as moral beings in and of themselves. These are prerequisites for a person to be able to live a life of self-determination.[467]

In *Bensaid v. United Kingdom*,[468] an Algerian national suffering from schizophrenia claimed that his impending deportation from the United Kingdom would violate his human rights. He claimed that if he did not obtain psychiatric medication in Algeria, he would be subjected to cruel and degrading treatment, a violation of his Article 3 rights. He also claimed that his Article 8 rights had been violated, claiming that it would have a

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[460] Recommendation No R (92)6 of The Committee Of Ministers To Member States On A Coherent Policy
For People With Disabilities (adopted by The Committee Of Ministers on 9 April 1992 at the 474th meeting of The Ministers' Deputies).
[461] Jill Marshal, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martin Neijhoff Publishers 2009) 60.
[462] Idem.
[463] Idem.
[464] *Botta v Italy* App no 21439/93 (ECHR, 24 February 1998) [34]–[35].
[465] Jill Marshal, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martin Neijhoff Publishers 2009) 60.
[466] Idem.
[467] *Bensaid v UK* App no 44599/98 (ECHR, 6 February 2001).
[468] Jill Marshal, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martin Neijhoff Publishers 2009) 184.

significant negative impact on his moral and physical integrity in his private life. Because of the high standard set by Article 3, no violation of Article 3 was found, particularly where the contracting state was not directly responsible for the injury inflicted. There was also no violation of Article 8.[469] Surprisingly, the Court stated that 'not every act or measure that has a negative impact on moral or physical integrity will interfere with the right to respect for private life guaranteed by Article 8'.[470] The applicant had not established that his moral integrity would be seriously harmed to the extent required by Article 8. The court, on the other hand, emphasized that mental health must be recognized as an important aspect of private life linked to moral integrity, emphasizing that Article 8 guarantees the right to identity and personal growth, as well as the freedom to form and develop relationships with others.[471] As a result, the Court stated that maintaining mental stability is a necessary precondition for exercising the right to respect for private life effectively in that context.[472]

It is my view that extraterritorial application of Article 8 in claims of nonconforming gender identity/expression should reach the threshold of persecution by violation of the right to personal autonomy without having to rely additionally on mental health, since that implies that the applicant must prove *ad hoc* that this trait is fundamental in a psychosocial way so that violation leads to severe personalized mental distress. The law being clear on the scope of the right is much preferable than trying to psychologically argue on its cruciality for the applicant each time. Legal protections need to rely not on the medicalization of transgender identities and nonconforming expression in order to respect them.

Nonetheless, while criticizing concepts of autonomy, most of these critics are concerned with human agency and the idea of people having some control over their own lives.[473] 'The problem, of course', says Nedelsky, 'is how to combine the claim of the

[469] Jill Marshal, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martin Neijhoff Publishers 2009).
[470] *Bensaid v UK* App no 44599/98 (ECHR, 6 Febryary 2001) [46].
[471] Jill Marshal, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martin Neijhoff Publishers 2009).
[472] Idem [47].
[473] Jennifer Nedelsky, 'Reconceiving autonomy: sources, thoughts and possibilities' (1989) 1(1) Yale Journal of Law and Feminism 7.

constitutiveness of social relations with the value of self-determination'.[474] Many people – trans, gay, lesbian, bisexual, intersex, queer, of all origins and statuses – require a 'room of one's own'[475] and any form of agency necessitates reflection, choice, and action from the person in question.[476] According to Emily Jackson, it is critical to recognize the significance of the social, economic, and emotional context in which people find themselves.[477]

As can be seen in the development and shifts in the law in these cases, the ECtHR's jurisprudence now provides a legal entitlement to personal freedom in the sense of allowing individuals to choose how they live their lives, including ensuring that enabling social conditions are accessible and available to them.[478] Furthermore, the Court's interpretation of freedom under Article 8 could be interpreted as a type of personal freedom known as self-creation or self-determination – the right to be and become the person one chooses, while keeping in mind that this occurs in a societal context and must not harm others.[479] As a result of the Goodwin decision,[480] the Gender Recognition Act of 2004 in the UK was enacted, although it has had limitations in its binarism and medicalization of transgender identities.

Different types of autonomy have been distinguished, including the distinction between moral and personal autonomy.[481] The ability to follow a moral code and fundamental moral norms has been referred to as moral autonomy. Giving oneself the law, according to Kant, is the fundamental organizing principle of all morality.[482] As a result, a person is capable of rational choice by exercising normative judgments based on logical

[474] Virginia Woolf, *A Room of One's Own* (1967); see also Louise M. Antony, Charlotte E. Witt (eds), *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Westview Press 2002).
[475] Jill Marshal, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martin Neijhoff Publishers 2009) 62-63.
[476] Idem 60.
[477] Idem; See also Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing 2001) 3–7.
[478] Jill Marshal, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martin Neijhoff Publishers 2009) 121.
[479] Idem.
[480] *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [90]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [70].
[481] Jill Marshal, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martin Neijhoff Publishers 2009); See also John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: Cambridge University Press 2005) 2.
[482] Idem.

arguments.[483] Personal autonomy, on the other hand, has been defined as a (supposedly) morally neutral trait that individuals can exhibit in any aspect of their lives, not just moral obligations.[484] Regardless of these distinctions, autonomy continues to find its substantive meaning in the idea of being one's own person, guided 'by considerations, desires, conditions, and characteristics that are not simply imposed externally on one, but are part of what can be considered one's authentic self'.[485] Fineman argues that the focus on personal autonomy is a liberal conceit that does not sufficiently recognise dependence, vulnerability, and solidarity.[486] It presupposes an independent, resourced, rational adult with minimal need for support. Nedelsky suggests that personal autonomy is inherently relational,[487] which is very crucial for asylum law where serious harm and persecution, namely the violation of fundamental rights such as those that personal autonomy entails, must be identified always contextually based on the social location of the applicant and the risk they face due to one of the Geneva Convention grounds. These include gender diverse identities and arguably expressions.

In light of the above, one can draw on Grigolo who distinguishes two core sexual rights: the right to choose sexual activity and sexual identity,[488] as well as the right to form partnerships and start a family based on that choice. Flowing from this, I identify two core gender rights: the right to be recognized as the gender one experiences and the right to relate and participate in society in the gender you feel (which includes gender performance and expression). When the private sphere of sexual and gender rights is diffused to the public sphere (which is an essential relational characteristic of sexual preference and gender identity/performance/expression), then the right to privacy and moral integrity, as well as a relational concept of autonomy invokes the freedom of conscience and expression in the context of a society. It remains to be seen whether the nature of gender identification and relational validation of one's gender expression can

[483] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988); John Christman (ed), *The Inner Citadel: essays on Individual Autonomy* (Oxford University Press 1989).
[484] John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: Cambridge University Press 2005) 2.
[485] Idem 3.
[486] Martha Fineman, *The Autonomy Myth : A Theory of Dependency* (New Press 2004).
[487] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011).
[488] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) European Journal of International Law 1023.

have extraterritorial application and the clarification on the threshold of severity for violation of the right to be and perform one's gender as one's religion and political beliefs.

4. Critical transnormative textual analysis

4.1. Sexuality in ECHR law

Edward Stein has proposed an intriguing paradigm for analyzing major characteristics of sexuality in individuals.[489] He singled out three current debates, each concentrating on a distinct facet of human sexuality. These debates are about essentialism vs. constructionism, nature vs. nurture, and determinism vs. voluntarism. The first is about the origins of sexual identity categories; the second is about the origins of individual sexuality; and the third is about whether sexuality is a matter of choice. This approach can be used to investigate how the Court interpreted the sexuality of the Strasbourg applicants.

Since the end of the nineteenth century, the study of sexual behaviour as an area of scientific inquiry has grown in the Western world. In an attempt to better understand and explain human sexuality, a small group of researchers used medical and psychological insights.[490] Sexuality became viewed as an essential component of human personality as a result of a significant focus on 'deviant' sexual behaviour.[491] The term 'essentialism' refers to a paradigm developed at the time to explain the origins of sexualities. Sexual identities are globally valid, according to an essentialist perspective, and they exist in

[489]Edward Stein, 'The Essentials of Constructionism and the Construction of Essentialism' in Edward Stein (ed), *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Routledge 1990) 325–53.
[490] Sonia Corrêa, Rosalind Petchesky and Richard Parker, *Sexuality, Health and Human Rights* (Routledge 2008) 84.
[491] Momin Rahman, 'Querying the Equation of Sexual Diversity with Modernity: Towards a Homocolonialist Test' in María Amelia Viteri and Manuela Lavinas Picq (eds), *Queering Paradigms V: Queering Narratives of Modernity* (Peter Lang AG,2015) 96.

different eras and locations.[492] While essentialism may still be the prevailing framework for understanding the nature of sexual life in both scientific and popular culture, social scientists have created an alternative theory called social constructionism from the mid-twentieth century.[493]

Social constructionism, in contrast to essentialism, maintains that sexual identities are culturally contingent and develop from specific historical situations.[494] Michel Foucault used a constructionist approach when he proposed homosexual and heterosexual identities as products of nineteenth-century Western thought.[495] Grigolo and Morgan have stated that the Court has resorted to essentialist understandings of homosexuality in the essentialist/constructionist dispute.[496] Johnson, on the other hand, has claimed that the Court's discourse on the subject has been 'both multifarious and unstable', which he interpreted as a reflection of competing discourses in Europe about the origins of sexual categories.[497] Johnson has a point, which will be explored later. Because the Court has not addressed how and when sexual identities arise, I feel it has not firmly endorsed one side of the essentialist/constructionist dispute. Nonetheless, the Court has addressed questions concerning the origins of sexual identities.

It has addressed the controversy over the source of an individual's sexuality, known as the 'nature versus nurture' debate. The Court has addressed the topic of whether an individual's sexuality is an innate trait or one that is learnt or acquired over time on several occasions. The Court's first definitive answer came in 1999, when it handed down

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[492] Edward Stein, 'The Essentials of Constructionism and the Construction of Essentialism' in Edward Stein (ed), *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Routledge 1990) 325.
[493] Steven Epstein, 'Gay Politics, Ethnic Identity: The Limits of Social Constructionism' in Edward Stein (ed), *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Routledge 1990) 250; Sonia Corrêa, Rosalind Petchesky and Richard Parker, *Sexuality, Health and Human Rights* (Routledge 2008) 109; Momin Rahman, 'Querying the Equation of Sexual Diversity with Modernity: Towards a Homocolonialist Test' in María Amelia Viteri and Manuela Lavinas Picq (eds), *Queering Paradigms V: Queering Narratives of Modernity* (Peter Lang AG 2015) 101; Matthew Waites, 'The Fixity of Sexual Identities in the Public Sphere: Biomedical Knowledge, Liberalism and the Heterosexual/Homosexual Binary in Late Modernity' (2005) 8 Sexualities 539, 540.
[494] Edward Stein, 'The Essentials of Constructionism and the Construction of Essentialism' in Edward Stein (ed), *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Routledge 1990) 325.
[495] Michel Foucault, *The History of Sexuality: An Introduction* (Penguin 1978) 43.
[496] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 European Journal of International Law; Wayne Morgan, 'Queering International Human Rights Law' in Carl Stychin and Didi Herman (eds), *Sexuality in the Legal Arena* (Athlone 2000) 218–19.
[497] Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2012) 73.

decisions in the Smith and Grady and Lustig-Prean and Becket cases.[498] These were the two original lawsuits involving the United Kingdom's policy forbidding gays from serving in the military forces, as stated above. The Court specifically endorsed the 'nature' side of the dispute in these decisions. 'The applicants were released on the basis of their innate personal traits', the Court stated.[499] In other words, the Court believed that the petitioners' homosexuality had its origins in nature. Moran, Morgan, and Johnson, on the other hand, have stated that the Court's belief in homosexuality as an inherent trait of people may be seen in the *Dudgeon* case.[500] According to Morgan, Judge Walsh in his opposing opinion in *Dudgeon* brought out the Court's view of homosexuality as intrinsic.[501] On that instance, the opposing judge stated that the majority of the Court considered the petitioner to be 'a male person who is homosexually predisposed or oriented by nature'.[502]

When the Court referred to homosexuality as 'an essentially private manifestation of human personality', Johnson discovered the inherent essence of homosexuality within *Dudgeon*.[503] This naturalistic view of sexuality could also imply an essentialist viewpoint on sexual identity. It would be impossible, according to Stein, to embrace an understanding of people' sexuality as innate while also believing in the social construction of sexual identities.[504] As a result, if the Court considers that nature is the cause of people's homosexuality, it is adopting an essentialist perspective, according to Stein's logic.

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[498] *Lustig-Prean and Beckett v United Kingdom* App nos 31417/96 and 32377/96 (ECHR, 25 July 2000); *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.
[499] *Lustig-Prean and Beckett v United Kingdom* App nos 31417/96 and 32377/96 (ECHR, 25 July 2000) [86]; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 [93].
[500] Leslie Moran, *The Homosexual(ity) of Law* (Routledge 1996) 178–79; Wayne Morgan, 'Queering International Human Rights Law' in Carl Stychin and Didi Herman (eds), *Sexuality in the Legal Arena* (Athlone 2000) 218; Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2012) 50.
[501] Wayne Morgan, 'Queering International Human Rights Law' in Carl Stychin and Didi Herman (eds), *Sexuality in the Legal Arena* (Athlone,2000) 218.
[502] *Dudgeon v the United Kingdom* App no 7525/76 (ECHR, 22 October 1981) partially dissenting opinion of Judge Walsh [13].
[503] Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2012) 50; *Dudgeon v United Kingdom*, 7525/76 (ECHR, 22 October 1981) [60].
[504] Edward Stein, 'The Essentials of Constructionism and the Construction of Essentialism' in Edward Stein (ed), *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Routledge 1990) 330.

However, the Court's belief in the inherent nature of sexuality appears to have been abandoned a few years later in the first two of a series of cases against Austria concerning the differential age of consent for male homosexual sex and heterosexual and lesbian sex, on the one hand, and heterosexual and lesbian sex, on the other.[505]

The Court declared in the *L and v. v. Austria and SL v. Austria* rulings that very compelling grounds were required to support a different age of sexual consent, and that such justification had not been supplied in the cases. As a result, the Court determined that having a distinct age of consent was discriminatory based on sexual orientation.[506] In these instances, the Court appeared to have abandoned its confidence in sexuality's inherent character. The Court used a judgment of the European Commission of Human Rights to examine the cases, which dealt with the problem of unequal age of consent in the United Kingdom. In the Sutherland case, the Commission explicitly stated that it was 'opportune to reconsider its earlier case-law in light of recent research indicating that sexual orientation is usually established before puberty in both boys and girls' and that 'the majority of member States of the Council of Europe have recognized equal ages of consent'.[507] In this sentence, the Court endorsed the Commission's findings, which were based on a conception of sexuality as something acquired at some point prior to puberty. That is, the Court did not refer to homosexuality as a property that existed from birth, as it had previously done, but rather as a feature that develops prior to puberty. As a result, the Court appeared to be abandoning its firm belief in nature as a source of sexuality.

Nonetheless, the Court's strong support for the view of nature as the source of sexuality was reiterated in its Alekseyev decision. The government's argument that 'homosexuality was a result of a conscious, antisocial choice' was rejected by the Court.[508] While defending the importance of public debate concerning sexualities, the Court affirmed that this type of discussion: 'would also clarify some common points of confusion, such as

[505] *L and V v Austria* App nos 39392/98 and 39829/98 (ECHR, 9 January 2003); *SL v Austria* App no 45330/99 (ECHR, 9 January 2003); *BB v United Kingdom* App no 53760/00 (ECHR, 10 February 2004); *Woditschka and Wilfling v Austria* App nos 69756/01 and 6306/02 (ECHR, 21 October 2004); *Ladner v Austria* App no 18297/03, (ECHR, 3 February 2005); *Wolfmeyer v Austria* App no 5263/03 (ECHR, 26 May 2005); *HG and GB v Austria* App nos 11084/02 and 15306/02 (ECHR, 2 June 2005); *RH v Austria* App no 7336/03 (ECHR, 19 January 2006).
[506] *L and V v Austria* App nos 39392/98 and 39829/98 (ECHR, 9 January 2003) [54]; *SL v Austria* App no 45330/99 (ECHR, 9 January 2003) [46].
[507] *SL v Austria* App no 45330/99 (ECHR, 9 January 2003) [39]. Similar wording in *L and V v Austria* App nos 39392/98 and 39829/98 (ECHR, 9 January 2003) [47].
[508] *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010) [86].

whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily'.[509] From this sentence, it is possible to infer that the Court was, once again, embracing the understanding of sexuality as inherent, given its rejection of the idea that homosexuality could be learned.[510]

The Court's stance appeared even more clearly in the Bayev and others ruling,[511] when addressing Russia's attempt at justifying its legislation banning the 'promotion of homosexuality'. As a response to the government's claim that the legislation was enacted as a precaution against the conversion of minors to a homosexual 'life style',[512] the Court asserted: 'The Government were unable to provide any explanation of the mechanism by which a minor could be enticed into '[a] homosexual lifestyle', let alone science-based evidence that one's sexual orientation or identity is susceptible to change under external influence'. The Court therefore dismisses these allegations as lacking any evidentiary basis.[513] In conclusion, the Court seemed to have settled on the nature side of the nature/ nurture divide.

The statements from the Alekseyev and Bayev and others judgments also addressed the question of whether sexuality has been considered by the Court as a matter of choice or as something beyond individuals' will, suggesting the latter understanding. While the Court might not always have been clear as to its stance on the nature/nurture debate, its position in the discussion about whether sexuality is predisposed or voluntary has been firm. In its first encounter with the homosexual subject in the *Dudgeon* case, one of the reasons the Court found for ruling in favour of the applicant was the conviction that his sexuality was beyond his choice. When analysing the applicant's situation under the criminalisation of homosexual acts in Northern Ireland, the Court held: '[E]ither he respects the law and refrains from engaging – even in private with consenting male

[509] Idem.
[510] In 2010, the ECtHR, in a decision related to LGBTQI+ rights, reaffirmed its view of sexual orientation as an innate or inherent trait, noting that: 'it is unsurprising that the Court has considered to constitute 'other status' characteristics which, like some of the specific examples listed in the Article, can be said to be personal in the sense that they are innate or inherent'. Thus, in *Salgueiro da Silva Mouta v Portugal* App no 33290/96 (ECHR, 21 December 1999) [28], it found that sexual orientation was 'undoubtedly covered' by Article 14'. *Clift v United Kingdom* App no 7205/07 (ECHR, 13 July 2010) [57].
[511] Nonetheless, in this instance, dissenting Judge Dedov said unequivocally that social life and social ties play a part in determining an individual's sexuality. *Bayev and others v Russia* App nos 67667/09, 44092/12 and 56717/12 (ECHR, 20 June 2017), dissenting opinion of Judge Dedov [42].
[512] Idem [74].
[513] Idem [78].

partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution'.[514] The Court constructed the applicant's sexuality as beyond his will. He was considered to be 'disposed' to the sexual acts he performed; hence, he was not to be criminalised for them.

Conversely, the conception of homosexuality as a voluntary characteristic appeared only once within the Court's judgments, expressed by a dissenting judge in the *Dudgeon* case. Within this judgment, dissenting Judge Walsh developed his own theory of homosexuality. He reasoned that there were different types of homosexuality, some of which are allegedly innate and others culturally acquired.[515] According to this theory, within the cases in which homosexuality is not innate, there is a clear element of choice in individuals' sexual orientation. In his own words: 'The fact that a person consents to take part in the commission of homosexual acts is not proof that such person is sexually orientated by nature in that direction … It is known that many male persons who are heterosexual or pansexual indulge in these activities not because of any incurable tendency but for sexual excitement'.[516] In the opinion of Judge Walsh, there could be an element of choice in sexuality. It seems that some people may decide to indulge in homosexuality according to this opinion. At the same time, the fact that sexuality as a matter of choice has only appeared in a dissenting opinion comes to reinforce the idea that the Court itself has understood the sexuality of individuals as a characteristic to which they are predisposed.

In sum, the Court's construction of homosexuality has certainly been multifarious.[517] The Court does not seem to have engaged with the biological/constructionist question, and seems to have supported different understandings regarding the nature/nurture debate. Nevertheless, its position regarding whether homosexuality is a matter of choice seems to be clearer. The Court has understood homosexuality as a predisposition. The next

[514] *Dudgeon v United Kingdom* App no 7525/76 (ECHR, 22 October 1981) [41].
[515] See also the decision of O'Higgins CJ in the Irish Supreme Court in *Norris v Attorney General* where he distinguishes between a 'mildly homosexually orientated person' and those who are 'exclusively homosexual in the sense that their orientation is congenital and irreversible'. [1984] IR 36.
[516] Idem, partially dissenting opinion of Judge Walsh [13].
[517] Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2012) 73.

section will discuss another element of the sexuality of individuals, as conceived by the Court: whether sexuality is a characteristic that can be changed.

The idea that sexuality is an immutable characteristic is far from being universally accepted.[518] Therefore, the Court's anxiety about the rigidity of sexuality should not come as a surprise. The Court operates within a legal framework in which heterosexuality continues to be sanctified. The heterosexual subject remains the only true subject of human rights and this understanding has been validated by the Court. Consequently, any threats to the construction of heterosexuality can be seen as a reason for concern. A paradigmatic example of a threat is the latent fluidity of the categories of heterosexuality and homosexuality. The 'potential for mutability that undermines heterosexual identity', in Janet Halley's words,[519] is the issue that will be explored in this section. Both Morgan and Johnson have argued that in the *Dudgeon* case, the Court supported the notion that individuals' sexuality is rigidly fixed.[520] While the Court did not make this understanding explicit, it seems plausible, since the idea of sexuality as fluid was only raised by two dissenting judges. For Judge Zekia and Judge Walsh, homosexuality could be either mutable or immutable, depending on whether it could be 'cured' or not. Both judges drew heavily on the idea of homosexuality as pathology.[521]

In particular, Judge Walsh affirmed: 'A distinction must be drawn between homosexuals who are such because of some kind of innate instinct or pathological constitution judged to be incurable and those whose tendency comes from a lack of normal sexual development or from habit or from experience or from other similar causes but whose tendency is not incurable'.[522] That is to say, Judge Walsh diagnosed certain homosexuals

[518] Janet Halley, 'The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity' (1989) 36 UCLA Law Review 915, 934. See also Shane Phelan, 'Queer Liberalism?' (2000) 94 American Political Science Review 431, 434; Didi Herman, 'Are We Family Yet? Lesbian Rights and Women's Liberation' (1990) 28 Osgoode Hall Law Journal 789, 813; Judith Butler, 'Imitation and Gender Insubordination' in Diana Fuss (ed), *Inside/Out: Lesbian Theories, Gay Theories* (Routledge 1991) 23.
[519] Janet Halley, 'Misreading Sodomy: A Critique of the Classification of 'Homosexual' in Federal Equal Protection Law' in Julia Epstein and Kristina Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity* (Routledge 1991) 367.
[520] Wayne Morgan, 'Queering International Human Rights Law' in Carl Stychin and Didi Herman (eds), *Sexuality in the Legal Arena* (Athlone 2000) 218; Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2012) 50.
[521] *Dudgeon v United Kingdom* App no 7525/76 (ECHR, 22 October 1981), dissenting opinion of Judge Zekia [4] and partially dissenting opinion of Judge Walsh [13].
[522] Idem, partially dissenting opinion of Judge Walsh [13].

as incurable, while others might still have hope of being treated. The diagnosis in these curable cases seemed to be much more complex. However, the Judge took the opportunity to explain that sexuality can be changed (or cured) when the source of the 'tendency' proceeds from abnormal sexual development, from habit, from experience, or 'from other similar causes' (maybe boredom or fashion).[523]

Nonetheless the dissenting opinion of Judge Walsh may present hidden elements of a queer conception of sexuality, in an otherwise very conservative judgment. In one of the most interesting paragraphs, Judge Walsh stated: 'It is known that many male persons who are heterosexual or pansexual indulge in these activities not because of any incurable tendency but for sexual excitement'.[524] And he used this well-known 'fact' to justify his support for maintaining the criminalisation of homosexual sex, in order to preserve the 'moral ethos of the community', under threat from activities such as homosexuality.[525] Various appealing elements can be rescued from this opinion. First, the reference to 'pansexual' individuals has been the only clear mention of a sexual identity beyond the heterosexual/homosexual binary that can be found in the jurisprudence of the Court. Secondly, a deliberate desire for homosexual encounters for the purpose of pleasure instead of an immutable tendency was seen as a possibility for initiating homosexual intimacy in the Judge's opinion. On five different occasions he referred to engaging in male homosexual sex by making use of the verb 'to indulge'.[526] Lastly, Judge Walsh offered a fluid conception of heterosexuality, which did not exclude a heterosexual desire for same-sex sexuality. He predicated that it was common knowledge that many heterosexual men just could not resist engaging in homosexual sex. Finally, Judge Walsh proposed a flexible definition of heterosexuality that did not rule out the possibility of a heterosexual desire for same-sex sexuality. He claimed that it was general knowledge that many straight males couldn't stop themselves from having homosexual intercourse. Even though their heterosexual identity should impose some sort of obstacle, this difficulty is overcome by their excitement, which makes them surrender to desire.

[523] Idem.
[524] Idem.
[525] Idem, partially dissenting opinion of Judge Walsh [14]
[526] Idem, partially dissenting opinion of Judge Walsh [3], [4], [7], and [13]. Also dissenting Judge Zekia refers to 'indulging in homosexuality'. *Dudgeon v United Kingdom* App no 7525/76 (ECHR, 22 October 1981) dissenting opinion of Judge Zekia [4].

Besides the negative connotations behind 'indulging' in homosexuality, the view on agency in sexuality is notable.

In fact, it seemed to be the irresistible character of homosexual sex that justified his appeal to preserve its criminalisation. Perhaps, the fear of a criminal punishment was seen as the only path for stopping heterosexuals from succumbing to homosexuality. Thus, while the Court might have supported a conception of sexuality as rigidly fixed, the latent mutability of heterosexuality was a clear concern in the mind of Judge Walsh.[527] While defending the necessity of public discourse on sexualities, the Court stated that such debate would 'clarify some common points of confusion, such as whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily'.[528]

The Salgueiro da Silva Mouta case is another example of the Court's case law displaying a fluid sexuality.[529] The Court had to assess whether making the sexuality of a child's parents a determining element in evaluating parental responsibility was compatible with the Convention at the time. The Court declared for the first time in its jurisprudence that sexual orientation is a forbidden category of discrimination and, as a result, determined that a domestic court's decision to reject parental responsibility of a child based on the father's sexuality was discriminatory.[530] It is remarkable that this case was founded on the flexibility of sexual desire, yet the Court chose to overlook it. The applicant had been married to a woman and had a child with her, according to the facts. The applicant divorced his wife after seven years of marriage and had an intimate relationship with a man.[531] Nonetheless, when the Court considered the issue, the applicant's sexuality appeared to be unmistakably homosexual, notwithstanding his previous marriage to an opposite sex partner, which was possibly not considered 'genuine' and fulfilling. The Court reiterates its earlier determination that the Lisbon Court of Appeal, in analyzing M's mother's appeal, incorporated a new factor, namely the applicant's homosexuality, while making its decision on the award of parental responsibility.[532] The applicant's homosexuality appeared to be a fact, and the idea of a change in his sexuality was

[527] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019) 86.
[528] *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010) [86].
[529] *Salgueiro da Silva Mouta v Portugal* App no 33290/96 (ECHR, 21 December 1999).
[530] Idem [36].
[531] Idem [9].
[532] Idem [33].

completely ignored in the case study. Since the applicant had always been homosexual, heterosexuality remained false and bisexuality not considered.[533] This though could also be viewed as an epistemological step to validate applicants' narratives of sexuality, since the Court has been accepting what the applicants presumably claim on their identity. On the other hand, it shows the difference of standards in the credibility assessment of sexuality and gender diversity in refugee status determination, where disbelief is the default.[534]

When the Supreme Court decided in the Goodwin and I cases in 2002[535] that persons can change their sex through a gender transition process, the immutability of sexuality may have been questioned. Because sexuality is considered as a relational concept based on gender, it is a natural question to ask whether people who changed their legal sex also altered their sexual orientation categorization. The answer that can be deduced from case law is undoubtedly contradictory and varies depending on the date of the jurisprudence in question. During the 1980s and 1990s, the Court refused to acknowledge that people may change their sex.[536] During this time, transsexual applicants were regarded as homosexuals if they had a relationship with people of the sex 'opposite' to that which the transsexual had acquired (which the Court refused to recognize). The Court's refusal to allow trans women to marry men and trans men to marry women exemplifies this.[537] The denial of marriage between two people of the same sex, according to the Court, is based on their sexualities combined with their recognized sex/gender. Because transsexuals were regarded as homosexuals while their sex was thought to be immutable, it is only natural to assume that if their sex was seen to have changed, their sexual orientation would change as well. To put it another way, maintaining one sex's sexual attraction

[533] The mutability of sexuality was also a topic in the Grand Chamber's ruling in ME v Sweden, but it was not examined: the case was struck out from the list because the state granted permanent residence to the applicant, who was facing expulsion. *ME v Sweden* (striking out) App no 71398/12 (ECHR, 8 April 2015) [15], [16] and [19]. See also the Chamber's judgment, where the mutability of the applicant's sexuality takes on a new dimension, as his spouse is described as a transsexual woman who was transitioning at the time of the application. *ME v Sweden* (striking out) App no 71398/12 (ECHR, 8 April 2015) [15], [16] and [57].

[534] Jenni Millbank, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009a) 13 (2-3) The International Journal of Human Rights 391.

[535] *Christine Goodwin v. the United Kingdom* App no 28957/95 (ECHR, 11 July 2002).

[536] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019) chapter 2, 28-58.

[537] *Rees v United Kingdom* App no 9532/81 (ECHR, 17 October 1986); *Cossey v United Kingdom* App no 10843/84 (ECHR, 27 September 1990); *Sheffield and Horsham v United Kingdom* App nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998).

while changing the sex of belonging involves shifting one's sexual orientation along the heterosexual/homosexual dichotomy. Following this understanding, sexual orientation should have become malleable after the Court changed its case law to recognize that transsexual individuals might really transition sex. That is to say, if a transsexual woman had sexual relations with a male when gender transition was not recognized, the Court would have regarded it as gay at the time and heterosexual afterwards. Nonetheless, when the Supreme Court decided in 2002 to recognize that transsexual people can change sex, it did so on the assumption that transsexual people are primarily heterosexual in their transitioned identity.[538]

The Court has regarded transsexual people as heterosexual since 2002. This was the real motivation for approving sex change surgery. According to the Court's case law in *Goodwin and I*, transsexual people were heterosexual because it was a condition for establishing transsexuality. As a result, whereas gender has since become malleable, sexuality has not. As a result, sexual orientation was originally considered as immutable, and when gender transitioning was recognized by the Court, it should have become malleable (since sexuality based on gender is a relational concept). However, the legal rejection of homosexuality (homophobia) made sexuality appear immutable.

On the other hand, this issue is still up for question, as the Court's subsequent case law dealing with pre-operative transsexual applicants may not be consistent with transsexuals' rediscovered heterosexuality.[539] In *L v. Lithuania*, the ECtHR held 'that the applicant's complaint under Article 12 is premature in that, should he complete full gender reassignment surgery, his status as a man would be recognised together with the right to marry a woman. In these circumstances, the Court agrees with the Government that the key issue is still that of the gap in legislation, which has been analysed under Article 8 above. Consequently, it finds it unnecessary to examine this aspect of the case separately under Article 12 of the Convention'[540]. This called into question the applicant's supposed heterosexuality. Furthermore, if Mr L, a pre-operative transsexual man, could not marry a heterosexual until his sex was properly accomplished, his

[538] See Article 12 ECHR with respect to *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [90]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [70].
[539] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019) chapter 3, 59-93.
[540] *L v Lithuania* App no 27527/03 (ECHR, 11 September 2007) [64].

sexuality became malleable as a result of his transition. To put it another way, (straight) transsexuals may not be as heterosexual as the Court thought in 2002, but their heterosexuality was made conditional on their transition. In conclusion, sexuality was less immutable than the Court supposed for as long as surgery determined sex.

Finally, in 2006, the Court held inadmissible the case of *Wena and Anita Parry v. United Kingdom,* which appeared to be a clear case of changing sexual orientation labelling.[541] Wena and Anita Parry, the applicants, were a married couple with three children. The first candidate got a gender affirming procedure more than 30 years into their marriage. Wena, on the other hand, would not be able to receive complete legal recognition of her gender unless she divorced Anita, as British law at the time prohibited same-sex marriage. The petitioners brought the matter to the Court because they believed that domestic legislation was infringing on their right to privacy and family life without justification. That is, they had to choose between Wena getting full gender recognition and keeping their marriage together. Even the ECtHR acknowledged the dilemma, saying, 'The legislation clearly puts the applicants in a quandary – the first applicant must, invidiously, sacrifice her gender or her marriage'.[542] At this point, I am more interested in examining how the Court perceived Anita's sexuality rather than Wena's. The Court ruled that the application was inadmissible because it believed it was within the state's discretion to limit the institution of marriage to different-sex couples. The Court stated in its conclusion that the state 'cannot be required to make allowances for the small number of marriages where both partners wish to continue despite one of them changing gender'.[543] The Court recognized that due to a change in the gender of one of the persons in the partnership, a heterosexual relationship could become a homosexual one.

It is unclear whether the Court considered the transgender person's sexuality to have changed or not. Nonetheless, it is clear that the Court believed Anita, the cissexual partner, had changed her sexuality in this particular circumstance, that is if sexual intimacy is considered a fundamental aspect of marriage.[544] As a result, the Court was forced to confront the mutability of sexuality by a heterosexual cissexual applicant. The

[541] *Parry v United Kingdom* App no 42971/05 (ECHR, 17 July 2003).
[542] Idem [10.1].
[543] Idem [12]–[13].
[544] The term 'cissexual' has first appeared in the Court's jurisprudence in *Hämäläinen v Finland* App no 37359/09 (ECHR, 16 July 2014] [111]–[112].

Court, on the other hand, did not dare to notice this ostensible shift in its conclusion. The lack of fixity of heterosexuality is inconsistent with the Western sexual model, and acknowledging the mutability of sexuality will not only mean that homosexuality is not a stable identity, but that the heterosexual subject of human rights has a much more fluid sexual identity than previously assumed.[545] In any case, the marital bond (whether romantic or sexual) of the couple was not doubted.

With *Dudgeon*, the Court began to focus on sexual themes in human rights and their binary existence as self/other (heterosexual/homosexual).[546] The homosexual individual was conceived as the polar opposite of the genuine subject of human rights legislation, the heterosexual, through the Court's case law. The Court's formation of a homosexual identity through its case law plainly demonstrates the law's capacity to regulate, contain, and constrain the legal sexuality of the individual who claims human rights.[547] This resulted in the creation of inflexible binary sexual identities that were considered as (mostly) natural, predisposed, and immutable. As previously stated, other sexual behaviours have not been construed as identities, and no new sexual identities have been asserted in front of the Court. If the idea of bisexuality was used at all in the Court's rulings, it was only to refer to parts of local decisions or international soft law instruments.[548] Only a single judge's partially dissenting judgment made an undefined allusion to 'pansexuality'[549] The ECtHR did not demonstrate a readiness to broaden the sexual binary until 2010, when it included gays, lesbians, and 'any other sexual

[545] For an explanation of how heterosexuality's immutability is actually dependent on homosexuality's stability, see Janet Halley, 'Misreading Sodomy: A Critique of the Classification of 'Homosexual' in Federal Equal Protection Law' in Julia Epstein and Kristina Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity* (Routledge 1991) 361 and 367.
[546] *Dudgeon v United Kingdom* App no 7525/76 (ECHR, 22 October 1981).
[547] See Carl F Stychin, 'Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada' (1995) 8 Canadian Journal of Law and Jurisprudence 49, 56; Lisa Gotell, 'Queering Law: Not by Vriend' (2002) 17 Canadian Journal of Law and Society 89, 108.
[548] *Scherer v Switzerland* Series A no 28 (ECHR, 25 March 1994); *Laskey, Jaggard and Brown v United Kingdom* App nos 21627/93, 21628/93 and 21974/93 (ECHR, 19 February 1997) [11] and [47]; *TN v Denmark* App no 20594/08 (ECHR, 20 January 2011) [65]; *EG v United Kingdom* App no 41178/08 (ECHR, 31 May 2011) [45]; *Rubio Dosamantes v Spain* App no 20996/10 (ECHR, 21 February 2017) [46].
[549] *Dudgeon v United Kingdom* App no 7525/76 (ECHR, 22 October 1981), partially dissenting opinion of Judge Walsh.

minority',[550] but this simple mention has had no legal consequences in the Court's case law thus far.[551]

4.2. Gender identity in ECHR law

To reiterate, the transsexual body served as the legal foundation for the Court's concept of sex, as the Court did not elaborate on a definition of sex until it was confronted with a transsexual individual.[552] As previously stated, the Court viewed sex as having an antagonistic relationship with the transsexual body: sex was the one thing that transsexuals could not change about themselves. While the Court has never explicitly defined sex, the opposite is true for transsexuals. The term 'transsexual' is usually applied to those who, while physically belonging to one sex, believe they belong to the other side of the binary;[553] they frequently seek a more unified identity by taking medical therapy and surgical procedures to align their physical qualities with their psychological nature, according to the Court in the *Rees* case.[554] To put it another way, a transgender person was defined as someone whose body and mind were on the opposite side of the binary sex idea.[555] Transsexuals were conceived as people who felt compelled to cross to the opposite side of the sex binary because sex was viewed as an opposing concept.[556] Transsexuality, on the other hand, became a legal impossibility during the period when the Court viewed sex as an unchanging biological category. In other words, while and for so long as sex was established at birth and could not be changed on a birth certificate, transsexual people were not allowed to go beyond the sex binary.

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[550] *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010) [84].
[551] In the more recent case *Identoba and others v Georgia*, the Court made a similar reference, this time to 'various sexual minorities', but it seemed to lack any obvious significance. In this example, counter-demonstrators attacked a group of demonstrators on the International Day Against Homophobia. The lack of concrete steps taken by the state entailed its international responsibilities under the Convention, according to the Court. The Court found infringement of the right to peaceful assembly in conjunction with the prohibition of discrimination, as well as the right to personal integrity in tandem with the ban of discrimination. *Identoba and others v Georgia* App no 73235/12 (ECHR, 12 May 2015) [97].
[552] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019).
[553] Idem.
[554] *Rees v United Kingdom* App no 9532/81 (ECHR, 17 October 1986) [38].
[555] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019).
[556] Idem.

The transsexual's attempt to achieve an 'unambiguous identity' was noted by the Court, but it was initially denied legal recognition.[557] The Court arrived at its conclusion about transsexuality by combining the formidable discourses of science and law.[558] The Court determined that the transsexual's desire to cross the rigid sex binary line was due to a medical condition.[559] The Court used medical language to establish that medical and surgical therapies were available to 'alleviate' the transsexual 'condition', but they were unable to recognize the biological traits of the 'opposite' sex.[560] The transsexual body's biological reality could not be altered.[561] In other words, the Court positioned itself as a bystander to transsexual people's failure to bridge the binary sex divide.[562] Transsexuals' aspirations were shattered by medical and legal discourses that built the truth. Instead of challenging the legal system that required individuals to conform to a gender role that was imposed on them, the Court chose to focus on transsexuality as the issue.[563] The system appeared to be unquestionable, and the transsexual person was the one who did not fit in and hence could not get their sex recognized.[564] Even though the gender affirming process did not allow the applicants to change the sex assigned to them on their birth certificates, one final question remained: What was the legal significance of the gender transition?[565] The applicants whose cases were denied by the Court remained transsexuals who had some human rights recognized but others denied. Domestic law recognized these transsexuals as men in some legal contexts and as women in others. As a result, depending on the legal matter, a law stating that individuals may only be either men or women required the transsexual person to be both. The law failed to acknowledge that a person who had undergone a gender affirming process had definitively transcended

[557] Idem.
[558] See A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish 2002) 48; Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 11.
[559] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019).
[560] *Rees v United Kingdom* App no 9532/81 (ECHR, 17 October 1986) [38]; *Cossey v United Kingdom* App no 10843/84 (ECHR, 27 September 1990) [39]; *Sheffield and Horsham v United Kingdom* App nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998) [56].
[561] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019).
[562] Idem.
[563] Idem.
[564] Idem.
[565] Idem.

the dichotomy's limit, instead forcing them to cross it on a regular basis depending on whatever part of their legal existence they were in. [566]

A dissenting group of judges in the *Cossey* case, who actually supported Miss Cossey's claim to have her sex legally recognized, referred to her as follows: 'biologically she is not considered to be a woman'.[567] Namely, even after the medical procedures and surgery, she is still not a woman. She is in the middle of the sexes.[568] This was just half correct. Miss Cossey, on the other hand, did not fall between the sexes because she was asking to bridge the sex divide; rather, the Court made her legally exist between the sexes. The transsexual individual was unable to cross to the other side of the sex binary due to the Court's rejection to recognize her right to have her gender recognized.[569] While the law portrays the transgender body as ambiguous, contradictory, and discordant, I agree with Gonzalez-Salzberg and Sharpe that it is the transsexual body that has demonstrated that the law is ambiguous and contradictory.[570] Nonetheless, there are some beneficial aspects to be extracted from this reluctance. The Court's decisions have an unintended queer slant to them. Indeed, the Court acknowledged that the binary sexes are not as neat as they should be, and that not everyone fits neatly on one side or the other. That is, the Court recognized and (implicitly though unintentionally) sanctioned a queer existence, a refusal to neatly fit into the man/woman binary in favour of a life in-between gender categories.[571] Unfortunately, this was done in circumstances where transgender applicants wanted to be recognized as belonging to a specific sex category.[572] As a result, the transsexual individual appeared in the Court's case law as someone who had unsuccessfully sought recognition of having crossed the gender divide.[573] As a result of the Court's failure to grant the transsexual individual's claim, a plurality of legal/existential geometries has emerged, enabling the transcendence of the rigid binary categories of men and women.[574] Because transsexual bodies called into question the

[566] Idem 37.
[567] *Cossey v United Kingdom* App no 10843/84 (ECHR, 27 September 1990) joint dissenting opinion of Judges Palm, Foighel and Pekkanen [5].
[568] Idem.
[569] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019).
[570] Idem; A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish, 2002) 44.
[571] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019).
[572] Idem.
[573] Idem.
[574] Idem.

binary division of sex's assumed stability, the law would feel compelled to reintegrate them into the normalizing sex binary.[575]

Nonetheless, before the Court began reconstructing the meanings of sex and transsexuality, a panel of judges would debate who is a 'true' (and who is a 'false') transsexual. Only once in the Court's case law during the first two decades of ECtHR case law on the matter (and before Goodwin and I) was a transsexual individual partially successful in her claim: in the case of *B v. France*.[576] The applicant in that instance was a transsexual woman who had undergone gender transformation, including genital surgery, outside of her own country. When she returned to France, however, she was unable to have her name or sex changed on any legal document. The Court agreed with her argument and found that the state had violated the applicant's right to privacy.[577] To reach this conclusion, the Court stated that the scenario differed from that of the *Rees and Cossey* cases in that Miss B encountered daily situations that were incompatible with reasonable regard for her private life because none of her documentation revealed her present gender. The question in *B v. France* was not whether Miss B should be allowed to cross the sex binary in all legal respects, as it had been in the previous cases. The main point of contention between the majority and the dissenting judges in this case was whether the applicant could possibly be deemed transgender. To put it another way, the Court's decision in favour of the applicant did not obligate the state to completely recognize transsexual individuals as having changed gender in all legal aspects. In fact, the Court decided against France for not providing Miss B the queer intermediate gender existence that Mr Rees and Miss Cossey had been granted by the United Kingdom. At the same time, the dissenting judges opposed upholding the applicant's claim, raising their concern about the truthful character of her transsexuality. In different dissenting opinions, prefaced by a joint introduction, six judges (Matscher, Pinheiro Farinha, Pettiti, Valticos, Loizou and Morenilla) questioned the majority of the Court for failing to distinguish between what they labelled 'true' and 'false' transsexuals. The actual reason for uncovering false transsexuals remains a mystery, as these six judges have ruled

[575] See A Sharpe, *Foucault's Monsters and the Challenge of the Law* (Routledge, 2010) 14 and 88.
[576] This case has been dubbed a 'false positive' since it did not award the acknowledgment of more rights than previous judgments, but rather the recognition of certain basic rights that the state had previously guaranteed in previous cases. See Marie-Bénédicte Dembour, 'Why Should Biological Sex be Decisive? Transsexualism Before the European Court of Human Rights' in Alison Shaw and Shirley Ardener (eds), *Changing Sex and Bending Gender* (Berghahn 2005) 49.
[577] *B v France* App no 13343/87 (ECHR, 25 March 1992) [63].

against trans rights in every case they sat on, regardless of how 'truthful' the transsexual applicants were in those cases.[578] Nonetheless, the truth (and the untruth) about transsexuality was explicitly questioned in the Court's case law for the first time. The dissenting judges highlighted that it should be medical doctors (if psychiatrists, even better) who diagnose and decide whether Miss B should have had access to gender transition (which had occurred already), since medicine was considered to hold the recipe for recognising true transsexuals and uncovering false ones.

Even so, these judges were not afraid to offer their own medical opinions for evaluating the human rights of the applicant. In his dissenting opinion, Judge Pettiti affirmed: 'Many cases of true or false transsexual applicants correspond to psychiatric states which should be treated by psychiatry only, so as not to risk disaster, and for this reason a medical report is essential. Furthermore, cases of double personality and schizophrenia are known to medicine'.[579] If one were to be guided solely by the wish to make the individual will of the patient coincide with his social life, one would then have to accept change of civil status even in such deviant cases.[580] That is to say, Judge Pettiti took it upon himself to propose that Miss B could be a case of double personality or schizophrenia. Consequently, his judicial opinion was that treatment might have been better with psychiatry only, rather than hormones and surgery.[581] Judge Pinheiro Farinha concurred with Judge Pettiti in that psychiatric treatment was his suggested cure, instead of irreversible surgical operations.[582] In fact, he manifested his disagreement with the surgery undergone by the applicant/patient by affirming that the operation was performed 'voluntarily and intentionally'.[583] This double confirmation of the unnecessary character of the followed treatment highlighted the capricious nature of the surgery. Even more,

[578] Apart from B v France, Judge Matscher voted against transsexual petitioners in the cases Rees, Cossey, X, Y, and Z, and Sheffield and Horsham; Judge Pinheiro Farinha voted similarly in the Rees case; and Judge Pettiti voted similarly in Rees, Cossey, and X, Y, and Z.; Judge Loizou dismissed transgender applicants' claims in Sheffield and Horsham; Judge Morenilla dismissed applicants' claims in Cossey, as well as Sheffield and Horsham; and Judge Valticos dismissed applicants' claims in X, Y, and Z, as well as Sheffield and Horsham. See *Rees v United Kingdom* App no 9532/81 (ECHR, 17 October 1986); *Cossey v United Kingdom* App no 10843/84 (ECHR, 27 September 1990); *Sheffield and Horsham v United Kingdom* App nos 31–32/1997/815–816/1018–1019 (ECHR, 30 July 1998); *B v France* App no 13343/87 (ECHR, 25 March 1992); *X, Y and Z v United Kingdom* 75/1995/581/667 (ECHR, 22 April 1997).
[579] *B v France* App no 13343/87 (ECHR, 25 March 1992) dissenting opinion of Judge Pettiti [34].
[580] Idem.
[581] Idem.
[582] *B v France* App no 13343/87 (ECHR, 25 March 1992) dissenting opinion of Judge Pinheiro Farinha [1].
[583] Idem [6].

Judge Pinheiro Farinha considered that the Court's decision in favour of the applicant's claim was paving the way for the 'trivialisation of irreversible surgical operations'.[584] Nonetheless, Judge Valticos' diagnosis, which he shared with Judge Loizou, was the most succinct. Judge Valticos remarked, 'As we all know, there are many different types of transsexuals'. As a result, the psychological or physiological element, as well as the natural or acquired character, differ significantly from one example to the next (acquired to a greater or lesser extent as a result of surgical operations, themselves very diverse as to motivation and scope).[585] Obviously, the prognosis would vary depending on the sort of transsexuality. After considering the psychological and physiological aspects of the case and classifying the applicant's transsexuality as natural or acquired, Judge Valticos asked himself, '[w]hy does it seem to me that the facts of the case do not justify the decision that has been made?'[586] The response he gave was that while the applicant, who claims to be a woman, seeks legal recognition for the alleged change of sex, the situation here is one in which the change in question is incomplete, artificial, and voluntary'.[587] Judge Valticos' diagnosis was persuasive because it was based on 'reality' (twice) and agreed with Judge Pinheiro Farinha's conclusion that the applicant's gender transition was voluntary as well as 'artificial'.

Furthermore, Judge Valticos claimed to have asserted proof of Miss B's maleness and, arguably, the source of her untruthful transsexuality by referring to her with male pronouns. In judge Valtico's framing of the case, '*he* (the applicant) was originally of male sex, at least in essence, and had served in the military, in *his* own words'.[588] Miss B's maleness was discovered 'in essence' and confirmed in praxis, according to Judge Valticos' diagnosis. She was not only essentially a man, but she was also a military veteran. The applicant's sex essence was confirmed by the fact that Miss B had served in the military, which seemed to override her gender affirming surgery. Judge Valticos' diagnosis was bolstered when he explained what he meant by 'change of sex'. He stated that this definition should not be limited to psychological or social factors alone, but that it was also necessary to consider the psychological perspective, because 'dubious

[584] Idem [1].
[585] *B v France* App no 13343/87 (ECHR, 25 March 1992) [36], dissenting opinion of Judge Valticos, joined by Judge Loizou.
[586] Idem.
[587] Idem.
[588] Idem 36.

hermaphrodites and ambiguous situations' could not be tolerated.[589] At the same time as arguing that ambiguous situations should not be accepted, he was gendering the applicant in an ambiguous manner. He refused to recognize Miss B as a woman (her claim before the Court), and while referring to her as a man, Judge Valticos stated: 'he found himself in a position where he was no longer completely a man, nor indeed truly a woman, but to some extent had some of the characteristics of both sexes'.[590] While there are many reasons to applaud the Court's earlier jurisprudence's queer twist on gender, this was problematic when used to deny a transsexual's claim of belonging to one specific sex. Judge Valticos also supported the existence of two idealised binary genders in order to impose this queer belonging on Miss B. Because he stated that Miss B 'was no longer completely a man, nor indeed truly a woman', Judge Valticos' binary model was based on the assumption that there is a 'complete man', on the opposite side of the binary to which is a 'true woman.[591] Miss B, on the other hand, was left out of Judge Valticos' binary model because she 'had some of the characteristics of both sexes'.[592]

According to Judith Butler, binary conceptions of identity categories such as gender not only allow for the understanding of those who fall on either side of the binary (men/women), but also create a domain of those who are excluded from the binary.[593] Because they cannot be conceived within the constructed binary, these excluded bodies are clearly unintelligible. Miss B was constructed as an excluded body in Judge Valticos' dissenting judgment, and she was unable to have her claim (to be recognized as a woman) accepted because she could not be comprehended within the gender binary. It is unclear who Judge Valticos had in mind as the 'complete' man, who served as the justification for Miss B's exclusion from the binary gender cosmos because she was neither his idealized opposite nor a reflection of the self. In truth, don't we all exhibit features that different perspectives attribute to one gender or the other? Whatever the case, Miss B was

[589] Idem.
[590] Idem [37].
[591] Idem. See also the discussion of authenticity in Corbett v Corbett [1971] P. 83, [1970] 2 All E.R. 33, where Ormrod J speaks of a 'pastiche of femininity': 'Her outward appearance, at first sight, was convincingly feminine, but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitude became increasingly reminiscent of the accomplished female impersonator'.
[592] *B v France* App no 13343/87 (ECHR, 25 March 1992) [37], dissenting opinion of Judge Valticos, joined by Judge Loizou.
[593] Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge 2011) xi. This concept is also used by Ralph Sandland in his examination of the UK Gender Recognition Act 2004. See Ralph Sandland, 'Feminism and the Gender Recognition Act 2004' (2005) 13 Feminist Legal Studies 43, 50.

portrayed as being outside of the traditional binary sexes; she was neither a man nor a woman. She was considered as a 'phony' transsexual in the eyes of some of the judges. Miss B's failure to qualify as a true transsexual in the perspective of the dissenting justices left the Court with the task of answering the question of an alleged 'truth' of transsexuality in the future. Despite the fact that all of the dissenting judges had opinions on the real/false transsexual issue, only Judge Pettiti went so far as to define who was a true transgender person. The actual transsexual, he claimed, was someone who was 'operated on in public hospitals with medical supervision and documentation'.[594] Despite this, he confirmed that states were allowed to determine the criteria for recognizing authentic transsexuals, 'based on undisputed scientific knowledge', in an ironic twist given the extensive medical jargon of the judgments.[595]

The Court took over ten years to respond to the question of the truth of transsexuality. On the one hand, the Court dismissed as unsubstantiated the dissenting justices' statements concerning transsexuals' voluntary and almost random decision to undergo a sex confirming procedure. On the other hand, the Court endorsed the medicalization path advocated by the dissenting judges, as well as the premise that there is a reality about sex and transsexuality. When trans persons become understandable, as Susan Stryker and Aren Aizura suggest, they become the subject of more biopolitical regulation, which includes explicit criteria determining when, how, and where gender transition can occur.[596] In order to control transsexual bodies, the Court recreated the definition of both sex and the transsexual subject. The Court's case law served as a striking example of the law's normalizing power, regulating and redefining the applicants' sex.[597] The law established a new 'truth' about the sex of transsexual persons as a result of the Court's decisions.[598]

The Goodwin and I decisions had a wide range of ramifications. On the one hand, the Court normalized Goodwin and I's bodies by cleanly fitting their transsexual bodies into the gender system and letting them cross the sex frontier.[599] The consistency of law and

[594] *B v France* App no 13343/87 (ECHR, 25 March 1992) dissenting opinion of Judge Pettiti [32]-[33].
[595] Idem [33].
[596] Susan Stryker and Aren Aizura (eds), *The Transgender Studies Reader 2* (Routledge 2013) 7.
[597] See Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 6 and 162; Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge 1995) 156.
[598] See A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Routledge 2002) 80.
[599] See A Sharpe, *Foucault's Monsters and the Challenge of the Law* (Routledge 2010) 14 and 109.

its rigid gender system were no longer threatened by these naturalized bodies. The Court's suppression of the ambiguity represented by unrecognized transsexual bodies, on the other hand, contributed to reinforcing the gender system's binary nature. In reality, the Court appeared to be closing the queer path that the early cases had opened. The Court's ruling in Goodwin and I, on the other hand, revealed the performative nature of legal and anatomical sex.[600] Sex was no longer thought to be a permanent trait.[601] The Court used surgery to show that the applicants' sex may be different from what was originally recorded on their birth certificates.[602] Despite the Court's ongoing belief in the presence of an unmistakable biological truth, gender determination no longer required strict biological criteria.[603] Gender was discovered in the surgically altered genitalia of transsexuals. Requiring gender affirming surgery for gender recognition, on the other hand, did not just set a time limit. It also meant that only trans people who wanted to have genital surgery may have their sex legally changed in certain CoE jurisdictions, as this matter was left in the margin of appreciation of contracting states, which could employ different models of legal gender recognition, either requiring specific medical interventions or just self-determination. When a tribunal normalizes the post-operative transsexual's body, trans bodies that affirm themselves physically stay in the unacknowledged domain.[604] This erasure and invisibility is not seen as imposed from elsewhere, but as a choice made deliberately by trans people as a clear statement of their unwillingness to conform to the binary sex paradigm. According to Goodwin and I, trans people who have not had their genitalia surgically transformed may be denied their rights because they rebuffed the Court's invitation to join the gender system. The 'arbitrariness' and 'capriciousness' that the Court found wanting in the behaviour of normalised transsexuals[605] can be seen in the rejection of trans identities who fail to fit neatly into the binary sexes. On the other hand, in *AP, Garcon and Nicot* the court found a breach of Article 8 due to the requirement to undergo for the purposes of legal gender recognition irreversible physical interventions that may lead to sterilization. It seems that the line was

[600] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019).
[601] A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish 2002) 480 and 194.
[602] *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [82]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [62].
[603] *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [100]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [80].
[604] Sharpe, Foucault's Monsters and the Challenge of the Law (n 49) 101 and 103.
[605] *Christine Goodwin v United Kingdom* (GC) App no 28957/95 (ECHR, 11 July 2002) [81]; *I v United Kingdom* (GC), no 25680/94, (ECHR, 11 July 2002) [61].

drawn due to the fundamental status of reproductive rights, though still certain genital intervention may be required for legal gender recognition. The Court has left up the conditions of legal gender change to the discretion of the Member States while the Court accorded transsexuals who have transitioned the recognition they sought, it kept silent on the legal limbo in which other trans identities were legally condemned.[606] As the *Hämäläinen* judgment shows,[607] whereby the divorce requirement for legal gender recognition was not deemed in violation neither of the right to privacy, nor family life, the regulation of trans identities by the Court arguably serves the purpose of checking, not abolishing, the requirements of changing legal gender. The Court has not yet contested the relevance of surveillance of gender status by the state. Finally, it only started using the terms 'transgender', 'sex assigned at birth' and 'discrimination because of gender identity', namely more inclusive concepts in 2021, without making clear the definition of these terms.[608]

4.3. The missing ground: Gender expression and the cisnormative medicalization of gender identities

There were protests in the 1980s, 1990s, and 2000s against the pathologization of transsexualism as a mental condition. The medical model is being critically examined. Since the 2000s, there have been international trans-depathologization manifestations and activism.[609] Healthcare issues for trans people have frequently evolved as a result of health social movements. GATE[610], ILGA[611], and TGEU[612] stand out when it comes to social mobilization in trans depathologization. These global activist networks have been

[606] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019) 45.
[607] *Hämäläinen v. Finland* App No 37359/09 (ECHR, 16 July 2014) [112].
[608] Y v. Poland App no 74131/14 (ECHR, 17 February 2022); A.M and Others v Russia App no 47220/19 (ECHR, 6 July 2021).
[609] Patricia Navarro-Péreza, Teresa Ortiz-Gómezb and Eugenia Gil-Garcíac, 'Scientific output on transsexuality in the Spanish biomedical literature: bibliometric and content analyses (1973-2011)' (2015) 29 Gaceta Sanitaria 145.
[610] GATE, 'GATE campaigns globally for trans, gender diverse and intersex equality' (2022) <https://gate.ngo/> accessed on 16 April 2022.
[611] ILGA, 'ILGA- World- The International Lesbian, Gay, Bisexual, Trans and Intersex Association' (2022) <https://www.ilga.org/> accessed on 16 April 2022.
[612] TGEU, 'Transrespect vs Transphobia Worldwide: A project by TGEU' (2022) <https://transrespect.org/en/> accessed on 16 April 2022.

successful in influencing policy decisions made by countries and organizations such as the World Health Organization and the United Nations. Depathologization is supported by European bodies such as the Council of Europe and the European Parliament,[613] as well as professional associations such as the WPATH.[614] WPATH's case is notable because it combines advocacy and 'the promotion of the highest standards of health care for Transsexual, Transgender, and Gender Nonconforming People'.[615]

As a result, the WPATH's SOC-7 (Standards Of Care, version 7)[616] has numerous improvements, including the recognition of trans people's cultural diversity, the use of non-discriminatory language, the inclusion of broad expressions of gender, transitions, and identities, the need to adapt and make trans healthcare pathways more flexible, the explicit condemnation of reparative therapies, and the conceptualization of trans people's cultural diversity.[617] Activist networks, on the other hand, condemn the use of a pathologizing diagnostic framework and a process model that deviates from the current person-centered care approach.[618] As previously stated, the contributions of activist movements have been able to contribute to a 'democratized turn' in the process and review of depathologization recommendations to be included in the ICD and DSM.[619] A recent study, however, discovered that depathologization initiatives have little impact on trans-healthcare therapeutic practices.[620] Even in limited health treatments, however, a shift toward informed consent and person-centered care is taking place, albeit slowly and

[613] Amets Suess Schwend, *Transitar por los Géneros es un Derecho: Recorridos por la Perspectiva de Despatologización* (Universidad de Granada 2016) <https://digibug.ugr.es/handle/10481/42255> accessed 16 April 2022.
[614] WPATH, 'World Professional Association for Transgender Health' (2022) <https://www.wpath.org/> accessed on 16 April 2022.
[615] WPATH, 'Standards of Care Version 7' (2012) <https://www.wpath.org/publications/soc> accessed on 16 April 2022.
[616] Idem.
[617] Idem.
[618] Zowie Davy, Anniken Sørlie, Amets Suess Schwend, 'Democratising diagnoses? The role of the depathologisation perspective in constructing corporeal trans citizenship' (2018) 38(1) Critical Society Policy 13; WPATH, 'Standards of Care Version 7' (2012) <https://www.wpath.org/publications/soc> accessed on 16 April 2022.
[619] Maria Elisa Castro-Peraza, Jesús Manuel García-Acosta, Naira Delgado, Ana María Perdomo-Hernández, Maria Inmaculada Sosa-Alvarez, Rosa Llabrés-Solé and Nieves Doria Lorenzo-Rocha. 'Gender Identity: The Human Right of Depathologization'(2019) 16(6) International Journal of Environmental Research and Public Health 978, 980.
[620] WPATH, 'Standards of Care Version 7' (2012) <https://www.wpath.org/publications/soc> accessed on 16 April 2022.

steadily.[621] An informed accompaniment and shared decision-making paradigm are still required, rather than just an evaluation approach. That is, a multidisciplinary approach to healthcare is needed, which has not yet been incorporated into the Court's medicalized transgender framework.

Homosexuality was removed from the DSM in 1973, and from the ICD in 1975. Trans identities were finally removed from the ICD-11 mental health chapter,[622] which was published in June 2018 and presented for approval at the World Health Assembly in 2019.[623] According to that, 'gender dysphoria' may or may not affect people with gender incongruence, who may choose to only transition socially to binary or nonbinary genders (name change, dress, mannerisms adjustments) or proceed to gender affirmative medical interventions.

Gender diversity being defined as a disease or otherwise abnormal is illogical, discriminatory, and clinically ineffective and rests on the cisnormative assumption that gender/sex at birth congruence is the default. Psychological anguish and suffering are caused by society's failure to value body diversity, not by abnormality. The ICD-11, which now classifies 'gender incongruence' as a condition rather than a disease, addresses this in large part. Advances in the legal and medical professions have resulted in a shift from treating sexual body and gender diversity as a mental condition to treating it as a human right albeit still with conditions attached, and gatekeepers. In this context, additional steps must be taken. The new ICD-11 diagnosis is 'gender incongruence', so it is worth considering what 'incongruence' entails and why binary congruence is the normalized default.

The key human rights institutions of the United Nations (UN) have reaffirmed states' obligations to provide effective protection for all people against discrimination based on

[621] Zowie Davy, Anniken Sørlie, Amets Suess Schwend, 'Democratising diagnoses? The role of the depathologisation perspective in constructing corporeal trans citizenship' (2018) 38(1) Critical Society Policy 13.
[622] World Health Organisation, *ICD-11 for Mortality and Morbidity Statistics* (WHO, February 2022) <https://icd.who.int/dev11/l-m/en> accessed on 16 April 2022.
[623] Maria Elisa Castro-Peraza, Jesús Manuel García-Acosta, Naira Delgado, Ana María Perdomo-Hernández, Maria Inmaculada Sosa-Alvarez, Rosa Llabrés-Solé and Nieves Doria Lorenzo-Rocha. 'Gender Identity: The Human Right of Depathologization'(2019) 16(6) International Journal of Environmental Research and Public Health 978.

sexual orientation or gender identity.[624] However, the international response has been fragmented and inconsistent, necessitating a consistent understanding of the comprehensive system of international human rights law and its applicability to questions of sexual orientation and gender identity, and arguably gender nonconformity in general, which includes gender nonconforming expression beyond identity claims.[625] In the context of international human rights law, the depathologization of transsexuality has been considered in a limited way. As a result, depathologization may fall under the purview of Article 8 of the European Convention on Human Rights (ECHR), which guarantees the right to privacy with a focus on legal albeit still binary gender identity recognition.[626] Gender identity is one of the most personal aspects of a person. Article 8 protects a person's right to personal development and identity, as well as their physical and psychological well-being.[627] A person's integrity is jeopardized when they are diagnosed with a mental disorder (according to article 8). Depathologization is based on the right to health and non-discrimination because of the stigma associated with mental illness and how it affects trans people.[628] At the moment, a growing corpus of norms and regulations is attempting to promote these points of view, with the Yogyakarta Principles[629] serving as a key example. Although the Yogyakarta principles are not legally binding, they are widely recognized internationally as an essential tool for member states to identify, respect, and protect the human rights of all people, regardless of sexual orientation or gender identity.[630] Some states have also proceeded in the

[624] Idem 981.
[625] Yogyakarta Principles 2017 <http://yogyakartaprinci ples.org/principles-en/about-the-yogyakarta-principles/> accessed on 16 April 2022.
[626] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[627] Maria Elisa Castro-Peraza, Jesús Manuel García-Acosta, Naira Delgado, Ana María Perdomo-Hernández, Maria Inmaculada Sosa-Alvarez, Rosa Llabrés-Solé and Nieves Doria Lorenzo-Rocha. 'Gender Identity: The Human Right of Depathologization'(2019) 16(6) International Journal of Environmental Research and Public Health 978.
[628] Zowie Davy, Anniken Sørlie, Amets Suess Schwend, 'Democratising diagnoses? The role of the depathologisation perspective in constructing corporeal trans citizenship' (2018) 38(1) Critical Society Policy 13; Jens T. Theilen, 'Depathologisation of transgenderism and international human rights law' (2014) 14(2) Human Rights Law Review 327.
[629] Yogyakarta Principles 2017 <http://yogyakartaprinci ples.org/principles-en/about-the-yogyakarta-principles/> accessed on 16 April 2022.
[630] Maria Elisa Castro-Peraza, Jesús Manuel García-Acosta, Naira Delgado, Ana María Perdomo-Hernández, Maria Inmaculada Sosa-Alvarez, Rosa Llabrés-Solé and Nieves Doria Lorenzo-Rocha. 'Gender Identity: The Human Right of Depathologization'(2019) 16(6) International Journal of Environmental Research and Public Health 978.

declassification of sex/gender status in official documents or the introduction of an X marker, as it has been elaborated in Chapter I of the thesis.

Legal recognition of gender identity becomes a problem when people want to change their gender marker on identity documents such as birth certificates, passports, and national identity cards. Markers on secondary documents such as degrees, driver's licenses, national health insurance cards, and other certifications also frequently pose problems resulting from inconsistencies in identification documents. Whether the lack of gender recognition constitutes a severe human rights violation extraterritorially remains to be seen for the violation of a qualified article, such as article 8 ECHR. Individuals may also seek to change their names to reflect their self-identified gender, since sex assigned at birth and assumed gender is very much embedded in gendered first names.[631] The issue is extremely important to the people affected because establishing one's identity and expression is necessary on a daily basis in everyday life. Without proper documentation, enrolling in school, obtaining a job, opening a bank account, renting an apartment, or crossing borders becomes extremely difficult.[632] The option to change the gender marker on identity documents protects transgender people's privacy; otherwise, an individual's personal history is exposed every time they are required to produce identification. Recognizing people's self-identified gender can thus help to avoid the stigma and discrimination associated with gender identity or gender expression. [633] In general, the right to be recognized based on gender identification is a natural extension of the right to be recognized before the law, the right to equality before the law, and the right to privacy and family life protection.[634]

In Europe, the procedure for legal gender recognition varies from country to country. While some countries had no legal framework until recently, others require individuals to go through a lengthy process that includes medical procedures, proving infertility, and

[631] International Commission of Jurists, *Sexual Orientation, Gender identity and Justice: A Comparative Law Casebook* (ICJ 2011) 173 <https://www.icj.org/sexual-orientation-gender-identity-and-justice-a-comparative-law-casebook/> accessed 16 April 2022.
[632] Amnesty International, *The State Decides Who I Am – Lack of Recognition for Transgender People in Europe* (Amnesty International Ltd. 2014) 20 <https://www.amnesty.eu/wp-content/uploads/2018/10/the_state_decides_who_I_am.pdf> accessed 16 April 2022.
[633] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019).
[634] See for instance Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 993 UNTS 3; Articles 8 and 14 of the ECHR.

possibly divorcing their current partner.[635] Such regulations have recently been criticized by the UN Special Rapporteur on Torture and the Council of Europe's Commissioner for Human Rights.[636] As a result of these declarations and other recent developments, there has been an emerging trend in the process toward greater respect for self-determination, with an increasing yet still small number of Council of Europe member states abandoning or revising such requirements in their domestic legislation.[637] The debate and subsequent legislative changes in European countries reflect a shift in the discussion of transgenderism. Initially considered a medical issue, it has gradually gained traction in the human rights field, raising concerns about the right to be free from inhuman and degrading treatment, discrimination, and invasions of privacy.[638] The lack of legal gender recognition affects more than just private life; it also has implications for other rights such as health, education, and civil and political rights, arguably also social conscience and expression.[639]

In comparison to 'gender identity', 'gender expression' is a newer concept in Anglo-American discourse, emerging in tandem with the rise of performative gender theories in the 1990s.[640] Nowadays, when the term 'gender expression' is used, it usually refers to how people present their gender to the outside world.[641] With the birth and growth of performative gender theories, most notably those of Judith Butler, in the 1990s, the term

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[635] Steering Committee on Antidiscrimination, Diversity and Inclusion (CDADI), *First thematic implementation review report on Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* (Council of Europe, June 2022) <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3> accessed 29 April 2023.

[636] Juan E. Méndez*, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* A/HRC/22/53 (UN Human Rights Council 2013) [78] and [88]; Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity*, CommDH/IssuePaper (2009) 2 [3.2.1].

[637] For example, Sweden and Germany have abolished such requirements. Review of legislation is ongoing. See ILGA-Europe, Rainbow Europe, 'What is it Like to Be Lesbian, Gay, Bisexual, Trans & Intersex in Europe' (23 October 2014) 161; ILGA-Europe, 'Rainbow Europe 2021' (*Rainbow Europe 2021*) <https://www.ilga-europe.org/rainboweurope/2021> accessed 18 April 2022.

[638] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights A Queer Reading of Human Rights Law* (Bloomsbury 2019).

[639] Iina Sofia Korkiamäki, 'Legal Gender Recognition and (Lack of) Equality in the European Court of Human Right' (2014) 13 The Equal Rights Review 20, 28.

[640] John Money, Joan G Hampson and John L Hampson, 'Imprinting and the Establishment of Gender Role' (1957) 77(3) American Medical Association Archives Neurology and Psychiatry 333; Kyle Kirkup, 'The origins of gender identity and gender expression in Anglo-American legal discourse' (2018) 68(1) University of Toronto Law Journal 80, 108.

[641] Kyle Kirkup, 'The origins of gender identity and gender expression in Anglo-American legal discourse' (2018) 68(1) University of Toronto Law Journal 80, 108.

'gender expression' gained new momentum in Anglo-American discourse.[642] There is no gender identity behind gender expressions; that identity is performatively produced by the very 'expressions' that are purported to be gender expressions.[643] Drawing on Chapter III, however, I would argue that there is both gender identity and gender expression, with some gender expressions being linked to foundational identitarian claims, in which the transgender person narrates themselves, and other gender expression beyond such claims but as an extension of foundational traits of personality, conscience and expression. As Transgender Studies argue, there is no need to find an explanatory theory on gender nonconformity; the need is to offer institutional protection to those discriminated against or persecuted for gender nonconforming identities/expressions which should be regarded by the law as *prima facie* and *de facto* foundational for the development of personality and is also linked to freedom of expression, conscience and political belief against cisheteronormativity.

5. Conclusion

Finally, I turn to what the above extensive analysis may mean for a transgender or a gender nonconforming asylum claimant in CoE state. Firstly, as I argued in the first subchapter, sexuality claims and, as I will argue, gender identity and expression claims as well, transgress the public/private divide. This can also be seen in the jurisprudence of the ECtHR, first on the right to respect for privacy and family life for homosexual (not yet bisexual) individuals and then on the jurisprudence of the Court on the right of expression and assembly for the same group of people and the ideology legitimizing their rights and existence. If one would extend this, it would be easier to see that sexual orientation is not just a private affair, but an identity, or an experience, or a practice that expresses itself and socializes the one who bears it in several ways. Also, sexually and gender diverse people may have an ideology which delegitimizes political, social and institutionally amalgamated homophobia and transphobia, which brings us to the right of

[642] Idem; See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge,1990; Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge 1993). For a more recent discussion of their gender theoretical work, see Judith Butler, *Undoing Gender* (Routledge, 2004).
[643] For another example of the use of the term 'gender expression' from the period, see for instance: Urvashi Vaid, 'Linking Arms and Movements' *The Advocate* (8 June 1999) 88 where Vaid states: 'Homophobia maintains gender inequality. Labels like 'fag' or 'dyke' are deployed to police the boundaries of sexual and gender expression' drawing connections between the women's movement and queer and trans liberation.

conscience and expression as per subchapter 3 of this Chapter. That goes for claimants with nonconforming gender identity and expression.

Unfortunately, the ECtHR has protected only under the right of privacy (Art 8) of transgender applicants, and maybe it would be more appropriate to say post-operative transexual applicants and mainly on the matter of legal gender recognition, the criteria for which have been left to the states' discretion. This, on the one hand, opens the door for self-determination procedures on legal gender change, but on the other hand it does not delegitimize medicalizing and pathologizing approaches to trans identity, by not mandating a clearly depathologizing and inclusive approach to gender identity/expression. The implication of that for transgender asylum claimants is that their gender identity may be assessed in medicalizing ways, of whether they feel gender dysphoria or not, of whether they intend to undergo gender affirming medical procedures. That leaves many transgender asylum applicants in lack of protection, since what puts them at risk of persecution, namely their identity which does not conform to the sex assigned at birth, is addressed with disbelief, since they do not fulfil certain criteria. This group of claimants is often not acknowledged as a Particular Social Group, since their gender identity does not 'pass the test' of being innate and unchangeable, instead of just fundamental to the exercise of their human rights (See Chapter III). Most importantly, what does not change here through the authoritative interpretation of the ECtHR is the gender binarism and the fixity of gender, whether that corresponds to the sex assigned at birth or not, and must be attributed to some innate characteristic, as with the narrative of 'being born in the wrong body'. On the other hand, not all transgender peoples' experience corresponds to this narrative, and one must have in mind that this is largely a western narrative, that is projected to asylum claimants beyond the North-West. The decolonization of human rights narratives within European asylum law is essential, as is the intersectional approach of gender identity, sex assumed at birth, race, migrant and refugee status. Also, being transgender is not just a private issue, it has public and political manifestations.

Gender expression as a fundamental right unfortunately is far beyond the jurisprudence of the ECtHR. For so long as the Court holds on to binarism and fixity of gender, it would be very difficult to include a right to gender expression, either as the right to perform one's gender, or the right to express one's conscience in contesting cultural, political and

social gender norms. On the other hand, decolonizing and de-essentializing gender would lead to the direction of accepting gender expression as a protected category and judicially clarifying that it is fundamental for personality development and socialization. If one accepts that people are not autonomous beings, as western meta-narratives of law define them, but instead consist of relationships, and are foundationally part of the society,[644] one would be able to understand that gender expression is rightly being included in recent legislation,[645] since the personal realm is not possible to experience in a fulfilling way while ignoring its social and relational aspect. On the other hand, judicial bodies and legislatures must consider that gender nonconformity, either in identity or expression, can put someone at risk of serious harm, hate crimes, and persecution.

Transgender and gender nonconforming people must be free to experience and express their (a)gendered existence both if they are CoE citizens or if they reach CoE states as a receiving country fleeing from the risk of persecution. Standards are indeed double, since the extraterritorial application of the ECHR is different for each Article, especially based on whether it is derogable or not. Derogability is a criterion of whether a human rights violation is severe enough to surpass the threshold of persecution for refugee status determination (the threshold for protection of citizens is instead discrimination), but it is not the only criterion. If the violation of nonderogable rights is systematic, as it most commonly is for transgender and gender nonconforming people in political, judicial, administrative, social, economic, educational and healthcare settings or if the violation can indeed activate a breach constituting arbitrary potential risk to life and freedom, or inhumane and degrading treatment, then the asylum applicants in question must be granted asylum. That is the case even if the right to gender identification/expression relates to Art. 8 ECHR if indeed the law is clear that concealment is not an option, equating Art 8 ECHR with the freedom of conscience and expression (See the analysis on Chapter III).

[644] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011); Jennifer Nedelsky, 'Reconceiving autonomy: sources, thoughts and possibilities' (1989) 1(1) Yale Journal of Law and Feminism 7.
[645] Gender Identity, Gender Expression and Sex Characteristics Act 2015; Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L. 315/57-315/73.

Finally, when it comes to the assessment of persecution, gender nonconformity should not reproduce the gender ideology outlined in subchapter 4 of this Chapter. One should be able to conceptualize gender nonconformity in an inclusive way, encompassing different experiences of intertwinement of sexuality, gender, and expression, and mainly locating them in the social and political realm of the country of origin. What is the most important issue at stake is understanding the implications of not conforming to gender roles as they are prescribed politically or socially, the risk of harm of state or civil actors, the systemic marginalization or the state's transphobia that may lead an asylum applicant to seek protection.

Having analysed the jurisprudence of the ECtHR on sexuality and asylum, I now turn to the CJEU that has dealt with cases within the EU Law scope, noting that ECtHR jurisprudence and the European Convention of Human Rights are considered general principles of EU law, thus EU primary law.

CHAPTER VII: A doctrinal and transnormative analysis of CJEU jurisprudence on gender identity/asylum law

This chapter will examine the CJEU case law on sexual orientation, gender identity, and asylum. In the first doctrinal section, I will examine sex and sexual orientation discrimination in LGBTQI+ cases, in order to infer how illegitimate discrimination is conceptualized in EU law. This can be helpful as it can help interpret occasions of sex and sexual orientation discrimination that rises to the level of persecution for LGBTQI+ asylum claimants in the EU. In the second subchapter of the doctrinal analysis, I will examine the jurisprudence of the CJEU on transexual identities, focusing primarily on legal gender recognition protection especially with regards to benefits that fall within the scope of EU law. In the third subchapter of doctrinal analysis, I will delve into the LGBTQI+ asylum jurisprudence of the CJEU, where it has examined sexuality cases so far, but can be used to infer the protection of transgender asylum claimants as well. In this process I will also attempt to demarcate the concept of persecution and particular social group for claims of conscience and sexual orientation in the CJEU jurisprudence, since it provides an authoritative interpretation on the Qualification Directives and EU asylum law.

In the following section, I will attempt to perform a critical transnormative analysis, as defined in the Chapter v. on Methodology, on LGBTQI+ CJEU case law. This will be examined first in terms of sexuality and then in terms of gender identity, as these two concepts interconnect to form the cis-heterosexual matrix (See Chapter II-Queer Theory). The latter is reflected in legal jurisprudence through sex, sexuality, and gender assumptions that represent the dominant gender ideology, which legitimizes gender/sex congruence and validates particular types of bodies and relationships between them. By re-examining the CJEU jurisprudence on sexuality/gender identity through the lens of Transgender Studies (See Chapter II-Transgender Studies), which does not treat gender congruence and conformity as the normalized default, but as one of the possibilities of (a)gendered living with equal status as gender incongruence, and gender nonconformity, I hope to make these assumptions visible. In this process, I must reiterate, as I did in Chapter I (epistemology), that I take an anti-essentialist view of gender and an

intersectional feminist approach that recognizes trans experience and narrative as knowledge. I problematize gender ideological assumptions in ECtHR jurisprudence through transnormative analysis, utilizing knowledge consolidated as a 'Transgender Studies Framework' (See Chapter III). By contextualizing CJEU judgments containing gendered assumptions in text, critical textual analysis is performed to reveal cisheteronormative ideological and legal choices and erased gender subjectivities.

In conclusion, finally, I will bring together the doctrinal and critical textual portions of the analysis in order to delineate how the EU could move forward in protecting gender identity and expression in the scope of EU law and draw on the notion of human dignity to include the protection of all (a)gendered experiences and expressions, both for citizens and non-citizens in the territory of the EU.

1. Doctrinal analysis

1.1. Sex and sexual orientation discrimination in the CJEU

In this section, I will delve into how the CJEU has dealt with the equality principle in aspects of private life (Article 7 CFREU), such as sexual orientation and gender identity. Since the CJEU has dealt with several cases of sexual orientation discrimination, one will try to determine how a breach of the principle of non-discrimination is considered to be a breach of EU law for LGBTQI+ cases. This does not have extraterritorial effect, (equality principles are reserved for people in the Member States' territories) but the discussion will shed light on how anti-discrimination norms work in the EU. If the threshold for severity is reached by the form of discrimination against LGBTQ+ people so that it constitutes persecution, the applicant may have right to asylum under 18 CFREU (right to asylum).

Less favourable treatment of homosexuals has historically been justified on the grounds that their orientation distinguishes them as 'different', 'lesser', and even 'deformed' in

comparison to the heterosexual majority - a distinction that has been used to deny LGBTQI+ people the right to participate equally in many facets of public and private life.[646]

Attitudes are shifting, and EU equality legislation has reflected that and arguably has played a key role in this. The CJEU's case law demonstrates a clear commitment to ending discrimination on the basis of sexual orientation, as required by the principle of equality enshrined in Article 21 of the Charter[647] and the Framework Equality Directive's[648] prohibition on discrimination on the basis of sexual orientation in employment and occupation.[649] One might also mention changes made by the Amsterdam Treaty, inserting a new Art. 6A into the TEC: 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.[650] In cases that plainly fall within the scope of the Framework Equality Directive and where the intrinsic logic of the Court's established case law leads to a clear result, the Court has applied these principles rigorously.[651]

However, in the context of the Court's sexual orientation case law, questions regarding competency, legitimacy, and the uncertain normative substance of the equality principle have loomed large, imposing substantive constraints on the reach of EU equality law - as evidenced by numerous significant CJEU judgments.[652]

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[646] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370; See in general Luca Trappolin, Gasparini Alessandro and Wintemute Robert (eds.), *Confronting Homophobia in Europe: Social and Legal Perspectives* (Hart 2011).
[647] Charter of Fundamental Rights of the European Union [2012] 2012/C, 326/02.
[648] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303.
[649] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[650] Treaty establishing the European Community (Nice consolidated version) - Part One: Principles - Article 13,
Official Journal C 340, 10/11/1997 P. 0185 - Consolidated version.
[651] See for example the analysis of the Maruko judgment.
[652] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.

P v. S and Cornwall County Council[653] was the first case involving LGBTQ+ rights to reach the Luxembourg Court, and the court determined that discrimination on the basis of transsexuality was covered by the Equal Treatment Directive's general prohibition on sex discrimination. Tolerating such prejudice, the Court reasoned, would be equivalent to disregarding the dignity and freedom to which such a person is entitled and which the Court is obligated to protect.[654] In other words, the Court applied a broad interpretation to the Equal Treatment Directive because it safeguarded people's fundamental rights in accordance with the criteria of the general principle of equal treatment.[655]

This decision exemplifies the constitutionalization of equal treatment by the EU legal order, which serves to justify a broad interpretation of the scope of the equality directives. It does, however, contrast sharply with the Court's subsequent decision in *Grant v. South-West Trains Ltd.*[656] South-West Trains had offered travel discounts to employees' spouses and unmarried opposite-sex companions who had been in a 'meaningful relationship' for more than two years.[657] Ms Grant argued that this benefit should have been available to her long-term same-sex partner as well. When this was denied, she filed a lawsuit alleging that she had been treated unfairly on the basis of her sexual orientation, arguing that the Equal Treatment Directive's scope should be expanded to include discrimination on this basis. The Court determined that the prohibition against sex discrimination did not protect from differential treatment based on sexual orientation, and did that sex did not include diverse sexual orientation of plaintiffs.[658]

The Court recognized the essential status of equitable treatment in reaching this conclusion, but concluded that the principle could not be used to extend Community competence.[659] While respect for fundamental rights, which are an integral part of the general principles of law, is a necessary condition for the legality of Community acts,

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[653] Case C-13/94 *P v. S and Cornwall County Council*. [1996] ECR I-02143.
[654] Idem [22].
[655] Idem; Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[656] Case C-249/96 *Grant v. South-West Trains Ltd.* [1998] ECR I-00621.
[657] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[658] Idem.
[659] Case C-249/96 *Grant v. South-West Trains Ltd.* [1998] ECR I-00621.

those rights cannot be invoked to extend the scope of Treaty provisions beyond the Community's competences.[660]

In other words, despite the expansion of protection in P and S to include discrimination based on gender reassignment, the Court determined that the equity principle could not be used to extend Community competence to sexual orientation discrimination.[661] The Court was criticized for being excessively circumspect in reaching this conclusion, which drew considerable academic criticism.[662] It does, however, demonstrate how the application of the equality principle is constrained by considerations of legitimacy and expertise. If the Court had reached a different conclusion, it would have exposed itself to charges of judicial lawmaking, which it may have struggled to refute in this case.[663]

Grant's claim of sex discrimination was also dismissed because a male coworker with a female partner would have been entitled to the concession: the Court determined that the appropriate comparator was a male coworker in a same-sex relationship who would not have been treated differently than Ms Grant – and thus there was no difference in treatment.[664] The Court justified its conclusion that same-sex partners were not in the same situation as opposite-sex partners by stating that 'in the current state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex'.[665] The Court's decision in this case to use a comparator that maintained the status quo exemplifies the normative uncertainty surrounding the equality principle at the time. Even if the precise legal situation in *Grant* has been altered by the

[660] Idem. [45]; Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[661] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[662] For a thorough analysis of these arguments, see Bell Mark, 'Identity and Sexual Orientation : Alternative Pathways in EU Equality Law'(2012) 60(1) American Journal of Comparative Law Gender 127.
[663] Case C-13/94 *P v. S and Cornwall County Council*. [1996] ECR I-02143.
[664] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[665] Case C-249/96 *Grant v. South-West Trains Ltd.* [1998] ECR I-00621 [35]. See also Joined Cases C-122/99 P and C-125/99 *P D. and Kingdom of Sweden v. Council of the European Union* [2001] ECR I-04319.

Framework Equality Directive's prohibition of discrimination on the basis of sexual orientation in employment and profession, this uncertainty persists.[666]

Maruko was the first case to reach the Court following the Framework Equality Directive's implementation, involving this specific ground of non-discrimination.[667] In this case, the complainant and his same-sex partner entered into a legally recognized life partnership (eingetragene Lebenspartnerschaftsgesetz).[668] According to the collective bargaining agreement that governs the compulsory occupational pension scheme to which Mr Maruko's partner belonged, a widower's pension can be paid only to the deceased's married spouse, not to life partners. Mr Maruko contended that this was discrimination based on sexual orientation in violation of Directive 2000/78/EC,[669] as same-sex life partners were not eligible for these benefits, whereas opposite-sex married couples were.[670]

The Court affirmed that states retain complete authority to determine marital status, citing Recital 22 of the Directive,[671] which states that its requirements are 'without prejudice to national laws on marital status and the benefits dependent thereon'. However, the Court ruled that Member States must exercise this authority in accordance with their commitment to refrain from discrimination. As a result, the Court determined that the survivor's benefit was subject to the Framework Equality Directive's provisions.[672] It continued by stating that because the Framework Equality Directive prohibits direct discrimination on the basis of sexual orientation, national laws cannot prohibit same-sex life partners from receiving a benefit that was available to spouses if (i) surviving life

[666] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370; The Court in Grant, for example, noted that the Treaty of Amsterdam, which had only recently been signed at the time the judgment was handed down, gave the Council authority to act against discrimination based on sexual orientation: see Case C-249/96 *Grant v. South-West Trains Ltd.* [1998] ECR I-00621 [48].
[667] Case C-267/06 *Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-01757.
[668] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[669] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303.
[670] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[671] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303.
[672] Idem.

partners were in a comparable position to spouses in terms of the benefit's purpose and function, and (ii) marriage was reserved for opposite sex couples. In such cases, same-sex life partners received less favourable treatment directly related to their sexual orientation, as homosexuals.[673]

The Court followed a similar logic in the subsequent case of Römer.[674] In this judgment, the Court reaffirmed that Member States retained jurisdiction over the definition of marriage. Additionally, as in Maruko, the Court concluded that paying employment-related benefits to married couples but not to a registered same-sex life partner of an employee who was in a legal and factual situation comparable to that of a married person for the purpose and function of that specific benefit would constitute direct discrimination on the basis of sexual orientation. However, the Court went further than Maruko in providing guidance on when same-sex life partners should be treated similarly to opposite-sex married couples.[675] Subsequently, in Hay,[676] the CJEU bit the bullet and concluded that it would constitute direct discrimination against the Framework Equality Directive's provisions for same-sex life partners who had entered into a civil partnership to be denied employed-related benefits afforded to newly married couples.[677]

These decisions are significant because they establish unequivocally that, in an employment context, failing to provide family-related benefits (in the context of employment) to same-sex partners in a legally recognized relationship that is broadly equivalent to marriage constitutes direct discrimination when these benefits are provided

[673] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370; Case C-267/06 *Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-01757.
[674] Case C-147/80 *Römer v. Freie und Hansestadt Hamburg* [2011] ECR I-03591.
[675] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370; The Court highlighted, in particular, that it was vital to engage in in a 'specific and concrete' analysis when determining whether same-sex life partners were in a comparable situation to opposite-sex married partners of the 'rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions (…) taking account of the purpose and the conditions for granting the benefit at issue'. Case C-267/06 *Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-01757 [42]-[43].
[676] Case C-267/12 *Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2014] OJ C52.
[677] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.

to married couples in a situation where marriage is reserved for opposite sex partners.[678] This is true even when registered partners' rights and obligations are less extensive than those of married couples, as is the case with the Hay case's civil solidarity pacts. This conclusion is based on an expansive reading of the Framework Equality Directive – or, more precisely, on a refusal to adopt an overly restrictive reading of its provisions. In Römer, the Court specifically invoked the principle of equal treatment to support its conclusion,[679] emphasizing the critical role of constitutionalizing this principle in shaping the Court's expansive interpretation of the equality directives.[680]

These decisions have limited states' ability to discriminate against same-sex couples, thereby strengthening protection for what Kees Waaldijk has dubbed the 'right to relate' – that is, the right of everyone to form nurturing, loving relationships without fear of discrimination.[681] This right can extend to transgender applicants, in the context of the right to relate as the gender they are, giving a relational aspect to the right of gender identity and gender expression. These decisions also demonstrate the destabilizing effect of EU equality and antidiscrimination law and the manner in which it operates.[682]

However, it is necessary to acknowledge the limitations of these judgments. They provide protection against discrimination only for same-sex partners who have entered into a registered partnership that is broadly equivalent to marriage under national law. It is presumed that in states without such registered partnership schemes, same-sex life partners will not be considered to be in a comparable situation to opposite-sex married couples.[683] Thus, these couples may be denied benefits available to the latter group, despite the fact that their relationship of support and mutual reliance is de facto identical

[678] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[679] Case C-147/80 *Römer v. Freie und Hansestadt Hamburg* [2014] ECLI:EU:C:2014:350 [59]-[60].
[680] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[681] Kees Waaldijk, 'The Right To Relate: A Lecture on the Importance of 'Orientation' in Comparative Sexual Orientation Law' (2013) 24 Duke Journal of Comparative and International Law 161.
[682] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[683] Idem.

to that of opposite-sex married couples.[684] However, the uncertain and contested scope of the equality principle, that was just limited in the context of employment and occupation, puts a limit in the potential for the expansion of the right's scope; it would be difficult to attempt to define persecutory harm stemming from discrimination that reaches the threshold of severity of fundamental rights' violation extraterritorially as to qualify an asylum claimant that has reached the territory of a Member State for refugee status.

This, once again, emphasizes the limitations of equality in a purely comparative sense, as well as the equality principle's limited scope. As with *Grant*, some commentators have criticized the Court for being overly deferential to states that maintain a cis heteronormative view of marriage and partnership rights and for being too slow to recognize the denial of equality of status inherent in a refusal to open marriage or an equivalent legal status to same-sex partners and has been conservative in this sense.[685]

The recent CJEU decision in Léger demonstrates both the strength and limitations of how equality has been constitutionalized in EU law.[686] This case is particularly noteworthy because it concerns the interpretation of provisions of a 2004 Directive[687] regulating the collection and storage of donated blood with reference to the legal principle of equal treatment.[688] The Court's decision establishes that national laws implementing this

[684] Idem; Jule Mulder, 'Some More Equal Than Others? Matrimonial Benefits and the CJEU's Case Law on Discrimination on the Grounds of Sexual Orientation' (2012) 19 (4) Maastricht Journal of European and Comparative Law 505.
[685] Mark Bell, 'Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law' (2012) 60(1) American Journal of Comparative Law 127; Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[686] Case C-528/13 *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Établissement français du sang* [2014] ECLI:EU:C:2014:2112 ; Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[687] Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells [2004] OJ L102.
[688] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.

Directive must conform to Article 21 of the Charter,[689] demonstrating both the feasibility of the equality principle and its relevance across the entire spectrum of EU regulation.[690]

Léger[691] was troubled by a French law prohibiting men from donating blood if they had previously engaged in sexual relations with another man. Numerous countries enacted such absolute bans in the late 1970s and early 1980s in response to the HIV epidemic, with the goal of preventing the spread of infectious diseases via contaminated blood.[692] Certain jurisdictions have recently lifted such blanket prohibitions on homosexual men donating blood, with the United Kingdom (except Northern Ireland) allowing donation following sex in 2013 after a 12-month waiting period.[693] Furthermore, the existence of such restrictions is highly contentious: many LGBTQI+ advocacy organizations argue that such restrictions are unnecessary and based on demeaning stereotyping, given that it is now possible to rigorously test donated blood for infection and screen out high-risk donor categories.[694] 80 Medical associations have also advocated for their removal.[695]

The CJEU first had to decide whether France could permanently prohibit gay men from donating blood under the provisions of Annex III, point 2.1 of the 2004 directive,[696] which allows Member States to prohibit donations from persons whose behaviour or activity places them at risk of acquiring infectious diseases that may be transmitted by

[689] Charter of Fundamental Rights of the European Union [2012] 2012/C 326/02.
[690] For another example of that, relating to the disability ground of non-discrimination, see *Case C-356/12 Glatzel v. Freistaat Bayern* [2014] EU:C:2014:350.
[691] Case C-528/13 *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Établissement français du sang* [2014] ECLI:EU:C:2014:2112.
[692] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[693] Idem.
[694] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370; See Caplan Arthur, 'Blood Stains - Why an Absurd Policy Banning Gay Men as Blood Donors has Not Been Changed' (2010) 10(2) American Journal of Bioethics 1, 1-2; Fabricant Michael, 'Equalising the Right To Donate Blood is the Next Frontier for UK Gay Rights' (*The Guardian*, 14 August 2014). <http://www.theguardian.com/commentisfree/2014/aug/14/right-to-donate-blood-uk-gay-rights-safe-sex> accessed 9 April 2022.
[695]Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370; See the report's data overview published by the UK Advisory Committee on the Safety of Blood, Tissue and Organs (SaBTO), *Donor Selection Criteria Review* (April 2011).<https://www.gov.uk/government/publications/donor-selection-criteria-review> accessed 9 April 2022.
[696] Case C-528/13 *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Établissement français du sang* [2014] ECLI:EU:C:2014:2112.

blood.[697] Second, the Court considered whether determining that men who had sexual relations with other men were a 'high risk' group conflicted with the concept of non-discrimination based on sexual orientation, as enshrined in Article 21 of the Charter.

The Court determined that the absolute prohibition violated this right because it treated men who had sexual relations with other men differently than other men - which required that it be objectively justified.[698] The Court agreed that the absolute prohibition was necessary for a legitimate purpose, namely public health protection.[699] However, it continued, 'a permanent ban on blood donation for all men who have had sexual relations with other men is proportionate only if there are no less onerous methods of ensuring a high level of health protection for recipients'.[700] It also stated that laboratory techniques existed that could effectively screen any donated blood. As a result, it concluded that the national court should consider whether the absolute prohibition was proportionate and necessary in light of the availability of alternative screening methods and whether using such alternative methods in lieu of the absolute prohibition would effectively ensure a high level of health protection.[701]

Thus, the Court considered whether France's absolute prohibition was objectively justified and identified potential grounds for concern that the prohibition was not proportionate – though it delegated to national courts the detailed assessment of the sufficiency of alternative screening methods required in this context.[702]

Finally, in recent cases the CJEU has found that sexual orientation cannot be a reason that an employer can refuse or conclude a contract with a self-employed worker,[703] since that is unlawful discrimination within the scope of the Equality Directive 2000/78. In addition, the Court will decide on the case of a trans man, whose gender identity

[697] Idem.
[698] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[699] Idem.
[700] Case C-528/13 *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Établissement français du sang* [2014] ECLI:EU:C:2014:2112 [65].
[701] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[702] Idem.
[703] Case C-356/21 *JK v TP* [2023] ECLI:EU:C:2023:9.

(recognized in the UK) Romania refuses to acknowledge.[704] This will clarify the scope of the right to dignity and the freedom of movement for trans persons which is unjustifiably restricted for transgender people whose travel and state documents do not correspond to their gender.

1.2. Transsexual identities in the judgments of CJEU

The first transgender case decided by the CJEU involved what appeared to be an open and obvious instance of discrimination. In *P v. S and Cornwall County Council*,[705] the applicant's employment was terminated due to her decision to undergo a medical transition. The Court of Justice held that the concept of sex discrimination (as defined in Directive 76/207) 'cannot be limited solely to discrimination based on a person's sex'.[706] Rather, the directive (and the principle of non-discrimination between men and women) must 'apply to discrimination based on a person's sex'.[707] Because trans-related cases are based on sex discrimination, the scope of protection is wider than in the case of sexual orientation, as sex discrimination is prohibited not only in the context of employment but also in relation to the provision of goods and services.

In three subsequent cases, the Court was not confronted with direct discrimination in the same manner as in *P v. S*. Rather, the Luxembourg judges were required to consider instances in which transgender people were denied certain pension and survivor benefits due to the United Kingdom's refusal to legally recognize their preferred gender.[708]

For instance, in *KB v. National Health Service Pensions Agency and Others*,[709] the NHS stated that it would not pay the applicant's male partner a widower's pension. The benefit

[704] TGEU, *LGR case requesting Romania to recognise trans man's UK documents referred to the CJEU* (3 March 2023) < https://tgeu.org/trans-mans-lgr-case-in-romania-is-referred-to-cjeu/ > accessed 8 March 2023.
[705] Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-02143.
[706] Idem.
[707] Idem.
[708] Peter Dunne, 'Transgender rights in Europe: EU and Council of Europe movements towards gender identity equality' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Edward Edgar Publishing Limited 2020).
[709] Case C117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-00541.

was available only to married individuals. He was unable to marry his female partner, however, because the United Kingdom refused to recognize the man's gender for the purposes of English and Welsh marriage law. While acknowledging that the UK was within its rights to reserve certain benefits for married couples,[710] the Court of Justice suggested that the situation is different when, as in KB,[711] a member state prohibits an individual who has socially and medically transitioned from marrying due to his birth gender assignment. The United Kingdom could establish rules regarding recognition of the applicant's partner's preferred gender. However, it could not refuse to affirm him as a man – at least not under EU law. This constituted a violation of Article 157 TFEU's sex equality provisions (gender reassignment).[712]

Richards v. Secretary of State for Work and Pensions[713] involved an applicant (a trans woman) who was denied an earlier pension, as was provided by UK law at the time for (cis) women, due to the UK's continued refusal to legally recognize her self-identified gender. The Court of Justice confirmed once again that the United Kingdom has the authority to: (a) maintain advantageous pension benefits for women on a temporary basis; and (b) determine the conditions under which trans people will be recognized (both generally and for the purposes of EU law). However, in Richards, the applicant was not contesting the legality of women's earlier pensionable ages. Rather than that, the Court of Justice accepted her complaint that the UK was refusing to recognize her as a woman in violation of the ECHR.[714] As a result, the member state prevented the applicant from claiming an earlier pension. Richards is notable also in that it seemed to signal a different approach to identifying comparators for the purpose of establishing that there has been discrimination. As the decision states, 'Unlike women whose gender is not the result of gender reassignment surgery and who may receive a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of eligibility for that pension, in this case that relating to retirement age. The Court stated, that as it arises from her gender

[710] Idem.
[711] Idem [28].
[712] Idem [33]–[34].
[713] Case C423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585.
[714] Idem.

reassignment, the unequal treatment to which Ms Richards was subject must be regarded as discrimination which is precluded by Article 4(1) of Directive 79/7.[715]

The Secretary of State for Work and Pensions had the authority to establish criteria for gender affirmation in Richards. However, under Directive 79/9,[716] completely excluding such a possibility constituted unlawful discrimination on the basis of gender, though it is not certain what gender reassignment and affirmation means in the jurisprudence of the CJEU and what is the scope and nature of this right. The conditions for gender recognition are left to the discretionary power of the Member States and it seems their consensus has not converged enough for more CJEU judicial activism.

Finally, in *MB v. Secretary of State for Work and Pensions*[717], the CJEU was asked to consider a condition imposed by the UK on access to gender recognition. As previously stated, the Court viewed state preconditions for gender recognition with deference in the two preceding cases (suggesting that such conditions were a national prerogative).[718] However, in MB, where the applicant was denied an earlier retirement pension due to her refusal to annul her marriage (and thus was unable to obtain a Gender Recognition Certificate), it was argued that at least some of the preconditions for affirming preferred gender are incompatible with EU law.[719] In its decision, the ECJ reaffirmed that member states retain the authority to establish criteria for marriage and gender recognition. However, as stated in KB, the UK was required to exercise that competence in accordance with Union law, specifically the non-discrimination principle. Directive 79/7,[720] which prohibits discrimination on the basis of gender in access to pensions that protect against the risk of old age, is an example of this principle in action.

The ECtHR and the CJEU have demonstrated deference to member states in recognizing preferred gender, which is a final issue with existing case law. Throughout their case law,

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[715] Case C423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585, [29]-[30].
[716] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1978] OJ L6.
[717] Case C-451/16 *MB v Secretary of State for Work and Pensions* [2016] ECLI:EU:C:2018:492.
[718] Idem.
[719] Peter Dunne, 'Transgender rights in Europe: EU and Council of Europe movements towards gender identity equality' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Edward Edgar Publishing Limited 2020) 340.
[720] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1978] OJ L6.

the Strasbourg and Luxembourg judges have demonstrated a strong aversion to dictating a particular affirmation model. This is understandable (at least on the surface) in the case of the CJEU, as gender recognition is not strictly a matter of EU concern except where it intersects with EU law.[721] Nonetheless, by deferring to EU member states (in KB and Richards[722]), the Court encouraged (indeed, reinforced) the imposition of gender recognition criteria that are incompatible with EU fundamental rights. This is demonstrated by the Court of Justice of the European Union's ruling in the MB case, which stated that the UK could not condition access to earlier pension benefits on involuntary marital annulment. Many of these cases stem from the former ban on marriage between couples of the same-sex, illustrating how anti-trans and anti-gay measures often share the same roots.

While MB implies that member states may adopt affirmation standards, it also demonstrates that the level of respect will be limited. Will the CJEU be able to move beyond the inflexible nomenclature of 'gender reassignment' in an era of expanding gender concepts, or will additional protection for trans people require legislative (or even treaty) reform? Is it possible to expand and modify existing jurisprudence – such as asylum law – that has been successfully marshalled to protect lesbian, homosexual, and bisexual claimants to include trans and nonbinary populations entirely?[723] The CJEU has not defined what 'gender reassignment' means and whether it is confined to medical interventions or extends also to social transitions. In this context, there is still debate about the scope of the protection. Notably, the grounds in *P v. S*[724] speaks of an operation but the principle set out in the body of the text speaks only of gender reassignment. There are, however, references to operations elsewhere in the body of text, with the implication

[721] See Peter Dunne, 'Transgender rights in Europe: EU and Council of Europe movements towards gender identity equality' in Chris Ashford and Alexander Maine (eds), Research Handbook on Gender, Sexuality and the Law (Edward Edgar Publishing Limited 2020).
[722] Case C117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-00541; Case C423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585.
[722] Case C117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-00541.
[722] Idem [28].
[722] Idem.
[723] Peter Dunne, 'Transgender rights in Europe: EU and Council of Europe movements towards gender identity equality' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Edward Edgar Publishing Limited 2020) 347.
[724] C-13/94 *P v S and Cornwall County Council* [1996] ECLI:EU:C:1996:170 [summary].

that the fact that the operation occurred was part of the reasoning. In *Richards*,[725] there is one reference to the applicant having undergone an operation. In light of that, gender reassignment is a term that needs to be clarified in a theoretically informed and depathologizing way.

1.3 The impact of soft-law of the EU

Soft law is one of the sources of EU law, although it is not legally binding. It has had a significant impact, however, on the development of EU jurisprudence and practice, providing a point of reference for interpretation and context of the letter of law, the content of principles and EU institutions' intent. The European Parliament has actively issued resolutions on sexual orientation and gender identity, that constitute EU soft law.[726] In 2014, the Commission, Member States, and relevant agencies were asked to collaborate on a Roadmap to achieving equality, devoted to sexual orientation and gender identity. It was originally drafted by the Committee on Civil Liberties, Justice, and Home Affairs (LIBE)[727] and adopted by the European Parliament[728], the Commission, Member States, and relevant agencies.[729] It requested, among other things, that the Commission pay special attention to gender identity when monitoring the implementation of the Recast Directive,[730] the Gender Goods and Services Directive[731], the Common

[725] Case C423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585, para 28.
[726] The European Parliament's Intergroup on LGBT Rights collects all relevant acts from 2009, see European Parliament's Intergroup on LGBT Rights News < http://www.lgbt-ep.eu/news/> accessed on 9 April 2022.
[727] Committee on Civil Liberties, Justice and Home Affairs, 'Report of 8 January 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity' (2013/2183(INI)).
[728] Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (European Parliament, 2013/2183(INI)).
[729] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[730] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337.
[731] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373.

Procedures for International Protection Directive,[732] the Qualification Directive,[733] and the Victims' Rights Directive.[734]

Surprisingly, the European Parliament made no mention of the Gender Statutory Social Security Schemes Directive, which, according to the CJEU's interpretation in Richards, includes (limited) protection for gender identity.[735] On the contrary, the Parliament presumptively addressed the protection of such a ground by referencing the Gender Goods and Services Directive, despite the fact that neither the Directive nor the Court expressly mentions gender identity.[736] Additionally, it requested that the Commission issue guidelines clarifying that transgender and intersex people are protected under the term 'sex' for the purposes of the Recast Directive,[737] explicitly including 'gender identity' as a ground for discrimination in future equality legislation, and addressing the lack of legislation and research on intersex people in collaboration with Member States.[738] Given that CJEU jurisprudence speaks of gender reassignment rather than gender identity, including 'gender identity' would help delineate the protection of persons outside the narrow context of transition and could further include nonbinary gender and nonoperative transgender persons.

In a September 2016 resolution on the Employment Equality Directive,[739] the European Parliament called for national measures to improve legal definitions under the Recast Directive, including the inclusion of transgender people who do not undergo gender

[732] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180.
[733] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304.
[734] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315.
[735] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[736] Idem 45.
[737] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)[2006] OJ L204.
[738] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[739] Resolution of 15 September 2016 on application of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive') (European Parliament, 2015/2116(INI)).

confirmation surgery,[740] and urged the Commission and Member States to consider, combat, and prevent discrimination against intersex people.[741]

In one of its most recent resolutions (March 2018),[742] the European Parliament focused on the general state of human rights in the Union in 2016, and specifically addressed the situation of transgender and intersex individuals.[743] It recognized and condemned all forms of discrimination against LGBTI people and urged the Commission to monitor the transposition and implementation of EU legislation affecting their rights, as well as to promote and protect equal rights and opportunities in collaboration with civil society and with due regard for Member States' competences.[744]

Additionally, it condemned Member States' practices and regulations that stigmatized transgender people and imposed restrictions on gender marker change and gender confirmation surgery (such as medical interventions, forced sterilization and psychiatric consent). It requested that Member States conduct a review of their processes and that the Commission provide guidance in this area.[745]

In the case of intersex individuals, the European Parliament rejected neonatal medical procedures and requested that the Commission collect data on human rights violations suffered by intersex individuals and assist national authorities in protecting them.[746] In May 2016, the Commission published a report on the implementation of Directive 2004/113/EC on goods and services.[747] It recognized that Directive 2004/113/EC codified the concept of equal treatment for men and women in the access to and provision

[740] Idem [66].
[741] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[742] Resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (European Parliament, 2017/2125(INI)).
[743] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[744] Idem; Resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (European Parliament, 2017/2125(INI)) [61]-[63].
[745] Idem; Resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (European Parliament, 2017/2125(INI)) [66].
[746] Idem; Resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (European Parliament, 2017/2125(INI)) [68].
[747] European Commission, Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (17 February 2017, 2016/2012(INI)).

of goods and services[748] and that the prohibition of sex discrimination included gender identity.[749]

While the CJEU had not yet decided on a case involving a transgender person that does not intend or has not undergone gender affirming medical procedures, but psychosocially defines as another gender then the one assumed at birth, the Commission acknowledged that a broad definition of gender identity, as well as gender reassignment, should be covered by the prohibition on sex discrimination.[750] This assessment is based on the assumption that gender reassignment is also protected under the current Directive, as discussed above in relation to the prohibition of sex discrimination.[751] This could also extend to gendered discrimination against gender expression that does not conform with sex assigned at birth, as Franke has argued.[752] In response to the European Parliament's request for a Roadmap on LGBTI issues, the European Commission, through its Directorate-General for Justice and Consumers (DG JUST), headed by Commissioner for Justice, Consumers, and Gender Equality Vra Jourová, issued a List of Actions to Advance LGBTI Equality in December 2015.[753]

In these following reports of the Commission,[754] it addressed the issues or requests raised by the Roadmap Resolution.[755] It emphasized its efforts in monitoring the implementation of the aforementioned Directives, with a particular emphasis on gender identity, raising

[748] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004) OJ L373.
[749] European Commission, Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2015] COM/2015/0190 [3.3].
[750] Idem.
[751] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 47.
[752] Katherine Franke, 'The Central Mistake of Antidiscrimination Law: The Disaggregation of Sex from Gender'(1995) 144 (1) University of Pennsylvania Law Review 1, 4.
[753] European Commission, *List of Actions by the Commission to Advance LGBTI Equality 2015-2019* <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025/list-actions-advance-lgbti-equality-2015-2019_en> accessed 9 April 2022; See also Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[754] European Commission, *Annual Report 2016 on the List of Actions to Advance LGBTI Equality* (23 February 2017); European Commission, *Annual Report 2017 on the List of Actions to Advance LGBTI equality* (1 March 2018).
[755] Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (European Parliament, 2013/2183(INI)).

awareness among European citizens, assisting Member States, civil society, businesses, and foreign countries, as well as advancing LGBTI rights. Recognizing certain human rights standards enshrined in significant international legal documents[756] and drawing on its own legislation on equality and non-discrimination, the Council issued guidelines in June 2013 to promote and protect the rights of LGBTI people in external relations.[757] Three years later, the Council adopted conclusions on LGBTI equality.[758] It made general requests regarding the protection and promotion of this group's rights, such as requesting the Commission to publish annual reports.[759] However, it made no specific reference to the situation of transgender and intersex people.[760]

2. From sexuality to gender identity in asylum law

The Qualification Directive ('initial QD')[761] and its recast ('recast QD')[762] define the criteria for refugee and subsidiary protection status under EU law. The Qualification Directive acknowledges the 1951 Refugee Convention[763] as the 'cornerstone of the international legal regime for the protection of refugees'[764] and elaborates on the criteria for refugee status based on that understanding. Subsidiary protection is intended to

[756] Council of the European Union, *Guidelines To Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, (24 June 2013) for instance [1],[5], [9] – [12].
[757] Idem.
[758] According to European Commission, Justice and Consumers, *LGBTI Equality* (17 May 2018). <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=605456> accessed on 9 April 2022.
[759] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[760] Council of the European Union, *Conclusions on LGBTI equality*, Press Release 338/16 (16 June 2016) [9].
[761] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304.
[762] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337.
[763] Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, 137.
[764] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted[2004] OJ L304.

complement refugee protection,[765] and is thus limited to individuals who do not meet the criteria for refugee status.[766] Subsidiary protection eligibility criteria are derived from 'international obligations under human rights instruments and national practices'.[767]

By the end of 2013, the CJEU had issued preliminary rulings on the following issues: (i) the test for well-founded fear, including whether the applicant can be expected to act in order to avoid persecution; (ii) the definition of the term 'act of persecution'; and (iii) the relationship between 'acts of persecution' and 'reasons'.[768] Although all these rulings concerned the interpretation and application of the initial QD, they will apply equally to the recast QD, the relevant provisions of which remain essentially unchanged.[769]

Until now, the CJEU has issued these two preliminary rulings on the definition of 'act of persecution': one in *Y and Z,*[770] concerning violations of the right to religious freedom, and another in *X, Y, and Z,*[771] concerning criminalization of 'homosexual activities'.[772] The CJEU's rulings in both cases focused on acts of persecution in the sense of Article 9(1)(a) QD, which states that an act is an act of persecution if it is 'sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) [ECHR]'.[773] In *X, Y and Z* the CJEU linked persecution due to homosexuality to religious freedom as in *X and Y*.

[765] Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden.
[766] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis'' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[767] Article 13(1) TEU, Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[768] UNHCR, *The Case Law of the European Regional Courts: the Court of Justice of the European Union and the European Court of Human Rights Refugees, asylum-seekers, and stateless persons* (1st edition, June 2015) 44 <https://www.refworld.org/docid/558803c44.html> accessed 9 April 2022.
[769] Idem.
[770] Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z (Germany*) [2012] ECLI:EU:C:2012:518 (Hereinafter Y and Z).
[771] Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* [2013]ECLI:EU:C:2013:720 (Hereinafter X, Y and Z).
[772] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[773] Idem; Y and Z [8]; X, Y and Z [8].

Under Article 15(2) ECHR there are certain acts constituting violations of fundamental human rights for which derogation is prohibited. As noted by the CJEU, Article 15(2) ECHR states that no derogation is permitted from the obligations arising under the following ECHR provisions: [774]

> Article 2 ('Right to life') except for deaths resulting from lawful acts of war,
>
> Article 3 (entitled 'Interdiction of Torture')
>
> Article 4(1) ('Abolish Slavery…')
>
> Article 7 ('There shall be no punishment without law')

Keeping in mind that the QD 'must be interpreted in a manner consistent with fundamental rights and principles recognized, in particular, by the European Union's Charter of Fundamental Rights, the CJEU identified the following provisions in the EU Charter as equivalent:

> Article 2 (entitled 'Right to life')
>
> Article 4 ('Torture and inhuman or degrading treatment or punishment are prohibited')
>
> Article 5(1) ('Abolish Slavery…')
>
> Article 49, paragraphs 1 and 2 ('Principles governing the legality and proportionality of criminal offenses and punishments') (UNHCR 49).

The CJEU stated in Y and Z that Article 9(1) QD refers to the aforementioned rights 'as a guide' in determining which acts 'must be regarded as constituting persecution in particular'.[775]

[774] Y and Z [7]; X, Y and Z [7].
[775] Y and Z [7].

In Y and Z, the CJEU was asked to determine whether an infringement of the right to religious freedom protected by Article 9 ECHR constitutes an act of persecution under Article 9(1)(a) QD.[776] Article 9 ('Freedom of Thought, Conscience, and Religion') of the European Convention on Human Rights provides that: 1. Everyone has the right to freedom of thought, conscience, and religion; this right includes the right to change one's religion or belief as well as the right to express one's religion or belief publicly or privately, through worship, teaching, practice, and observance. 2. The freedom to manifest one's religion or beliefs shall be subject to only those limitations prescribed by law and necessary in a democratic society for the public safety, order, health, or morals, or for the protection of others' rights and freedoms.[777]

The CJEU began by noting that religious freedom is a cornerstone of a democratic society and a 'fundamental human right' under Article 9(1)(a) QD and then reasoned that only certain interferences with that right constitute persecution.[778]

To begin, the Court noted that Article 10(1) of the EU Charter is identical to and corresponds to Article 9(1) of the ECHR, and that restrictions on the exercise of religious freedom in Article 10(1) of the Charter that are permissible under Article 52(1) of the Charter do not violate that right and thus cannot be considered acts of persecution: [779]

Article 52(1) of the EU Charter provides that: 'Any restriction on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and must respect the essence of those rights and freedoms. Limitations may be imposed, subject to the principle of proportionality, only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms

[776] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[777]European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[778] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023; See the similar point made by the CJEU in X, Y and Z [53]: 'It is clear from [Articles 9(1)(a) and 9(1)(b) of the QD] that, for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva Convention, it must be sufficiently serious. Therefore, not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness'.
[779] Y and Z [60]; European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016).
<https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.

of others'. The Court noted that the questions before it assumed that the applicant had not previously been persecuted or threatened with persecution for the reasons stated in the two cases: 'religion' in Y and Z and 'membership in a specific social group whose members share the same sexual orientation' in X, Y, and Z.[780]

The CJEU noted that it is apparent from the wording of Article 9(1) QD that 'there must be a 'severe violation' of religious freedom having a significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution'.[781] Hence, interferences with the exercise of the right to freedom of religion which infringe with that right can only be regarded as acts of persecution if their gravity is 'equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR'.[782] Such acts are to be identified by 'their intrinsic severity as well as the severity of their consequences for the person concerned'[783] and this can also hold true for the qualified right to privacy for LGBTQ+ asylum claimants.[784]

The CJEU referred to the concept of religion as defined in Article 10(1)(b) QD in determining when an infringement of the right to freedom of religion would constitute an act of persecution, as discussed above under 'acts of persecution'.[785] However, the Court's comments appear to be equally applicable to determining when an act of persecution is motivated by religion.[786] Additionally to the foregoing, the Court stated that Article 10(1)(b) of the QD contains a 'broad definition' of religion that encompasses 'all its constituent components, whether public or private, collective or individual'.[787]

According to the CJEU in Y and Z, Article 4(3)(c) QD requires that the evaluation of the applicant's claim 'take account of all the acts to which the applicant has been, or risks being, exposed, in order to determine whether, in light of the applicant's personal

[780] X, Y and Z [63].
[781] Y and Z [59].
[782] Idem [61].
[783] Idem [65].
[784] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[785] Idem.
[786] Idem.
[787] Idem; Y and Z [63].

circumstances, those acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive'.[788]

In light of this, the CJEU ruled that, in order to determine whether an interference with the right to freedom of religion that violates Article 10(1) of the Charter constitutes persecution within the meaning of Article 9(1)(a) QD, the competent authorities must ascertain:[789]

> 'in the light of the personal circumstances of the person concerned, whether that person, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors [of persecution] referred to in Article 6 of the [QD]'.[790]

Article 6 QD ('Actors of persecution or serious harm') provides that: 'Actors of persecution or serious harm include: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7'.[791]

Concerning the prohibition of public worship, the CJEU stated that prohibiting public participation in formal worship, whether alone or in community with others, may meet the above test,[792] and that the competent authorities must consider both a subjective and objective element when assessing the applicant's risk.:

> '… The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular

[788] Idem [63].
[789] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[790] Y and Z [72].
[791] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304.
[792] Y and Z [69].

> importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned… Indeed, it is apparent from the wording of Article 10(1)(b) of the [QD] that the scope of protection afforded on the basis of persecution on religious grounds extends both to forms of personal or communal conduct which the person concerned considers to be necessary to him – namely those 'based on … any religious belief' – and to those prescribed by religious doctrine – namely those 'mandated by any religious belief'.[793]

The Court then considered the Article 4 QD rules in their entirety in Y and Z To decide whether it is reasonable to expect an applicant to refrain from religious acts that would expose them to persecution.

> '... None of [the rules in Article 4 QD] states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take into account the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and thus relinquishing the protection provided by the Directive…'

In principle, it makes no difference whether he could avoid that risk by abstaining from certain religious practices. In light of the foregoing, the answer is 'that Article 2(c) of the Directive must be interpreted to mean that the applicant's fear of persecution is justified if the competent authorities believe that, in light of the applicant's personal circumstances, it is reasonable to expect him to engage in religious practices upon his return to his country of origin. When considering an individual refugee application, 'those authorities cannot reasonably expect the applicant to abstain from those religious practices'.[794]

[793] Idem [70]-[71].
[794] Idem [81.2].

The Court was later asked, in X, Y and Z, to determine the standards to be applied in deciding refugee claims made by third-country nationals who have a well-founded fear of persecution as a result of their sexual orientation. Both in X and Y, and X, Y and Z, the Court applied a contextual approach grounded in human dignity, taking into account the unique nature of the humiliating and unequal treatment frequently experienced by LGBTQ+ people, as well as their right to equal care and respect during national processes determining refugee status.[795] In X, Y and Z, the CJEU held that the 2004 Asylum Seekers Directive's[796] terms must be interpreted in accordance with the Geneva Convention and other applicable international treaties, as well as with the EU Charter's recognized rights.[797] This case began with a preliminary referral from the Dutch Council of State (Raad van State), which sought clarification from the CJEU on a number of issues.[798] To begin, the CJEU was asked whether homosexual third-country nationals from states that criminalized homosexual behaviour could be considered a social group for the purposes of Article 10(1)(d) of the Asylum Seekers Directive, entitling members of that group to collective protection under a 'umbrella' category of homosexuality.[799]

The Court concluded that homosexuals could be considered a distinct social group if they were targeted by criminal laws in the relevant countries:[800] they could be treated as having a distinct shared identity as a result of being 'perceived as being different by the surrounding society'.[801] Second, the Court determined that the criminalization of homosexual acts in general could be regarded as forming a distinct social group in the relevant country. However, incarcerating gays in the state in question would constitute a disproportionate and discriminatory punishment that would qualify as persecution.[802]

[795] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[796] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304.
[797] X, Y and Z [40].
[798] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[799] Idem.
[800] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[801] X, Y and Z [47].
[802] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.

Finally, the Court determined that national authorities could not reasonably expect a refugee applicant to conceal his homosexuality in his home country in order to avoid persecution or to exercise caution when expressing his sexual orientation during the refugee application process. The CJEU made it clear that homosexuals should not be expected to conceal or avoid expressing their sexual orientation in their home countries, and that an active policy of criminalizing and imprisoning homosexuals in their home countries will constitute grounds for a claim of refugee status.[803] The Court's conclusion placed a strong emphasis on homosexual people's rights to integrity, privacy, and equality of treatment, as required by the Charter's Articles 3, 7, and 21.[804] The Court affirmed that a 'person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it',[805] and that he should not be required to exercise 'greater restraint than a heterosexual in expressing his sexual orientation'.[806]

The Court observed that the questions before it presupposed that the question was whether the applicant could, in public, conceal traits or beliefs in order to avoid persecution for reasons of: a) 'religion' in Y and Z; and b) 'membership in a particular social group whose members share the same sexual orientation' in X, Y, and Z,[807] linking in this way the right to privacy (homosexual orientation) with freedom of conscience (freedom of religion) as fundamental aspects of human identity.[808]

The CJEU in X, Y, and Z took a similar approach to Y and Z commented above, ruling that homosexual applicants could not reasonably be expected to exercise restraint in their sexual orientation expression in order to avoid persecution and despite the existence or otherwise of previous persecution.[809] The Court reasoned that, like religion, the concept of sexual orientation encompasses both public and private behaviour.[810] The only acts

[803] Idem.
[804] Idem.
[805] X, Y and Z [46], [70].
[806] Idem [75].
[807] Idem.
[808] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[809] X, Y and Z [74]-[76].
[810] Idem [69].

that are not considered to be sexual orientation-related are those that are criminal under national law in EU Member States, as specified in Article 10(1)(d) QD.[811]

There are no restrictions on 'the attitude that members of a particular social group may adopt toward their identity or toward behaviour that may or may not be classified as sexual orientation' for the purpose of determining the basis for persecution[812]. To determine whether applicants can be expected to completely conceal their sexual orientation in order to avoid persecution, a more onerous requirement than exercising restraint in expressing it,[813] the CJEU examined the definition of a 'particular social group' in Article 10(1)(d) QD and concluded that:

> '[R]equiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it. Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution'.[814]

Article 4(3)(c) QD requires that the applicant's claim be assessed to 'take account of all the acts to which the applicant has been, or risks being, exposed, in order to determine whether, in light of the applicant's personal circumstances, those acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive'.[815]

When determining the reasons for persecution, there are no restrictions on 'the attitude that members of a particular social group may adopt with respect to their identity or to behaviour that may or may not fall within the definition of sexual orientation'.[816]

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[811] Idem [66]-[67].
[812] Idem [67]-[68].
[813] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[814] X, Y and Z [70]-[71].
[815] Idem [68].
[816] Idem [67]-[68]; European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.

The CJEU reasoned that if the laws of the country-of-origin sanction homosexual acts with a term of imprisonment, and that sanction is applied in practice, this would violate Article 8 ECHR, which corresponds to Article 7 of the Charter, and constitute punishment that is 'disproportionate or discriminatory' under Article 9(2)(c) QD. The Court ruled that such a sentence of imprisonment must be considered a form of persecution.[817]

The Dutch Council of State later asked the CJEU in the case of X, Y, and Z if a distinction could be made between forms of expression that relate to 'the core area of sexual orientation' and forms of expression that do not.[818] The CJEU considered the question analogous to that in Y and Z, and responded that for the purposes of determining whether acts may be regarded as persecution under Article 9(1) QD, 'it is unnecessary to distinguish acts that interfere with the core areas of sexual orientation expression, even assuming it were possible to identify them, from acts that do not affect them'.[819]

Article 10(1)(b) QD expressly states that the concept of religion encompasses both public and private participation in formal worship, which precludes the conclusion that the concept of sexual orientation – to which Article 10(1)(d) QD refers without making an equivalent express statement – must apply only to an individual's private actions and not to his public actions.[820]

As previously discussed, the CJEU applied the provisions of Article 10 QD both in Y and Z and in X, Y, and Z to assist in determining whether the acts at issue constituted acts of persecution within the meaning of Article 9(1) QD.[821] The question is whether the Court

[817] X, Y and Z [56]-[57], [61] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[818] Idem.
[819] X, Y and Z [78].
[820] Idem [69]; European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[821] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304.

viewed Article 10 QD as merely interpretative in those instances, or whether it viewed it as necessary for characterizing an act as an act of persecution.[822]

Certain CJEU statements in X and Z appear to imply that an act of persecution cannot occur unless it is committed for one of the reasons defined in Article 10 QD.[823] In this regard, it is worth noting that the Court explicitly referred to the provisions of Article 9(3) QD, which require a connection between the reasons for persecution as defined in Article 10 QD and the acts of persecution as defined in Article 9(1) QD.[824] Article 9(3) of the recast QD ('Acts of persecution') states: 'In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution defined in paragraph 1 of this Article, or the lack of protection against such acts'.[825]

The CJEU's reference to risk in the above test is ambiguous, as it is unclear whether the reference is to the determination of 'well-founded fear', the determination of a 'act of persecution', or both.[826] However, the later case of X, Y, and Z, in which the Court did not consider risk in determining whether criminalizing 'homosexual activities' constitutes persecution, may resolve this ambiguity. [827]

To determine whether such criminalization would constitute persecution, the CJEU first identified in X, Y, and Z what it considered to be fundamental rights 'specifically linked to the applicants' sexual orientation', such as 'the right to respect for private and family life, which is protected by Article 8 of the ECHR, to which Article 7 of the Charter corresponds, read together, where necessitated'.[828]

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[822] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[823] Y and Z; X, Y and Z; European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[824] Y and Z [55]; X, Y, and Z [60].
[825] Idem.
[826] Y and Z [50]-[51]; X, Y and Z [42]-[43].
[827] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[828] X, Y and Z [78].

Given that the identified rights are not among those from which no derogation is permissible, the Court concluded that: 'The mere existence of legislation criminalizing homosexual acts cannot be considered an act affecting the applicant in such a way that it reaches the level of seriousness required for a finding of persecution'.[829] As a result, more is required in order for the applicant to be recognized as a refugee:[830] the competent authorities must examine 'all relevant facts concerning [the] country-of-origin, including its laws and regulations and the manner in which they are applied', as required by Article 4(3)(a) QD.[831]

According to Article 4(3) QD ('Facts and circumstances assessment'): '3. An application for international protection must be assessed on an individual basis, taking into account: (a) all relevant facts as they relate to the country-of-origin at the time of making a decision on the application, including the country-of-origin's laws and regulations and how they are applied; (b) all relevant facts as they relate to the country-of-origin at the time of making a decision on the application; and (c) all relevant facts as they relate to the country-of-origin at the time of making a decision on the application'. [832]

The CJEU was asked in the cases of X, Y, and Z whether asylum seekers with a 'homosexual orientation' are members of a certain social group as defined by Article 10(1)(d) QD.[833] According to the CJEU in X, Y and Z:

> 'First, members of that group share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that no one should be forced to renounce it. Second, because it is perceived as different by the surrounding society, that group has a distinct identity in the relevant country'.[834]

[829] Idem [55].
[830] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[831] Idem; X, Y and Z [58].
[832] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304.
[833] Idem.
[834] Idem [45].

The CJEU held that a group whose members share the same sexual orientation must satisfy the first condition, because it was undisputed that sexual orientation is a feature of identity that one should not be forced to renounce.[835]

However, whether or not such a group meets the second condition will be determined by the situation in the country-of-origin.[836] The existence of 'criminal laws which... specifically target homosexuals', such as those at issue in the main proceedings in X, Y, and Z, according to the CJEU, is one example of how that second condition will be met,[837] because the existence of such laws 'supports a finding that those persons form a separate group which is perceived by the surrounding society as being different'.[838]

What is implied is that both conditions must be met in order for LGBTQI+ applicants to qualify for the particular social group ground, which is in opposition with the UNHCR Guidelines on Particular Social Group that indicates that protected characteristics and social perception tests must be applied alternatively.[839]

The Court's decision in A, *B, and C v. Staatssecretaris van Veiligheid en Justitie*[840] demonstrates a commitment to preserving individual autonomy and dignity. In this case, the CJEU determined that state procedures for verifying the sexual orientation of asylum seekers who sought protection from persecution in their home country as a result of their homosexuality had to comply with the EU Charter's requirements.[841] The Court specifically held that the detailed and intrusive questioning of an asylum seeker's sexual practices by national authorities was incompatible with the right to privacy guaranteed by Article 7 of the Charter and the right to human dignity guaranteed by Article 1 of the

[835] Idem [46], [70]. European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[836] European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (December 2016) <https://www.refworld.org/docid/5a65c4334.html> accessed 19 April 2023.
[837] Idem.
[838] X, Y and Z [47]-[48].
[839] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02.
[840] Joined cases C-148/13 to C-150/*13 A, B and C v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2406 (Hereinafter A, B and C).
[841] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.

Charter.[842] Additionally, the Court determined that, in light of these Charter rights, Article 4 of Directive 2004/83[843] prohibited national authorities from seeking and accepting evidence such as details of the applicant's homosexual acts or his submission to 'tests' to determine his sexual orientation. Additionally, the Court stated that national authorities could not rule that an asylum seeker lacked credibility solely because his initial claim for protection was not based on his declared sexual orientation.[844] The Court emphasized that national authorities cannot rely solely on stereotyped notions of 'typical' homosexual behaviour and must respect the sensitivity of information about a person's sexual orientation, as well as the critical nature of human dignity in this context.[845]

In *A, B and C*, three third-country nationals sought asylum, claiming persecution for their homosexuality. In each of the three cases, the Staatssecretaris and later the Rechtbank's Gravenhage rejected the applications, claiming that the applicants' claims of homosexuality were untrustworthy.[846] On appeal, the Dutch Raad van State (Council of State) questioned whether specific constraints on national authorities were imposed in light of the EU Charter when validating an applicant's sexual orientation.[847]

The Court of Justice was asked the following questions: what constraints do Article 4 of [Directive 2004/83] and [the EU Charter], in particular Articles 3 and 7, impose on the method of assessing the credibility of a declared sexual orientation, and are those constraints distinct from the constraints that apply to the method of assessing the credibility of a declared sexual orientation?[848] The court concentrated on the EU Charter's limitations on methods for determining credibility in cases involving declared sexual orientation. Additionally, the Court discussed the impact of late sexual orientation disclosure on an individual's credibility. Academics and practitioners have expressed

[842] A, B and C [75].
[843] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304.
[844] Colm O'Cinneide, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 (3) *Maastricht Journal of European and Comparative Law* 370.
[845] Idem.
[846] European Council on Refugees and Exiles (ECRE), 'Preliminary deference: The impact of judgments of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights', March 2017 <https://www.refworld.org/docid/58c8fd924.html> accessed 9 April 2022.
[847] Idem.
[848] Idem.

conflicting views about the decision. On the one hand, the decision has been lauded for concluding that sexually explicit questions and evidence/material cannot be used to determine a person's credibility and that decision-makers are expressly prohibited from doing so. Additionally, the Court's finding that no adverse credibility determinations should be made for late disclosure was well received. On the other hand, because of the Court's recognition that stereotypes can be useful in certain situations, the judgment has been criticized for not explicitly excluding questions based on stereotyped notions when evaluating an individual's statements.[849] Along with the lack of specificity regarding which stereotypes are permissible, critics assert that the judgment makes significant omissions regarding how Member States should question applicants and, more broadly, which approach to take when determining credibility.[850]

To begin, the Court notes that the Geneva Convention serves as the bedrock of the international legal regime for refugee protection and that Directive 2004/83 (the Qualification Directive) should be interpreted in light of its overall purpose, the EU Charter and other relevant treaties referred to in Article 78(1) TFEU. The CJEU rejects the applicants' argument that sexual orientation assessments should be solely based on their declarations, but notes that Article 4 of Directive 2004/83, when read in light of the EU Charter, imposes certain restrictions on authorities when assessing the facts and circumstances surrounding the applicants' declared sexual orientation.[851] The Court emphasizes, in particular, that, while Article 4 of the Qualification Directive applies to all claims for international protection, competent authorities must adapt their methods of evidence assessment to the particular category of asylum application in order to comply with the EU Charter.[852] When determining the facts of the case, an individualized assessment must be made, taking the applicant's personal circumstances into account. In the present case, the Court believes that assessing asylum applications 'solely on the basis of stereotyped notions' do not comply with the requirements for individualised

[849] Idem.
[850] Idem; For commentaries which examine these arguments see: S Chelvan, 'C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie: Stop Filming and Start Listening – a judicial black list for gay asylum claims' (*European Law Blog*, 12 December 2014) <https://europeanlawblog.eu/2014/12/12/c-14813-c-14913-and-c-15013-a-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-stop-filming-and-start-listening-a-judicial-black-list-for-gay-asylum-claims/> accessed 9 April 2022 and Steve Peers, 'LGBTI asylum-seekers: the CJEU sends mixed messages' (*EU Law Analysis*, 2 December 2014) <http://eulawanalysis.blogspot.com/2014/12/lgbti-asylum-seekers-cjeu-sends-mixed.html> accessed 9 April 2022.
[851] Idem.
[852] Idem.

assessment set out in Article 4(3) of the Qualification Directive and Article 13(3)(a) of the Procedures Directive.[853] The Court rejects decisions based solely on stereotyped notions, but recognizes the connection between acts of persecution and their causes: as previously stated, the CJEU relied on the provisions of Article 10 QD to assist in determining whether the acts in question were acts of persecution under Article 9(1) QD both in Y and Z and in X, Y, and Z.[854] However, it is unclear whether the Court regarded Article 10 QD as merely interpretive in such cases or as necessary for classifying an act as an act of persecution in some way.[855]

Finally, *F v. Hungary*[856] concerns a Nigerian national who sought asylum due to his fear of persecution in his home country as a result of his homosexuality. F was subjected to three different psychological tests by the Hungarian determining authorities in order to determine his overall credibility. On the other hand, psychological experts were unable to confirm or deny F's sexual orientation based on these tests. As a result, the deciding authorities determined that he lacked general credibility and denied his asylum application. Despite the fact that his statements were not fundamentally contradictory, a psychologist's report concluding that it was impossible to confirm F's sexual orientation led to the conclusion that he lacked credibility.[857] While the report concluded that determining F's sexual orientation was impossible, it did not rule out the possibility that the applicant was gay. Then the question arises as to whether such proof is even possible.[858]

Three distinct psychological tests were used to create the psychological report. To begin, the 'Draw-A-Person-In-The-Rain' test is a personality and cognitive assessment that requires the subject to draw a person in the rain.[859] Children and adolescents are frequently prescribed this test. Psychologists would be able to determine an individual's personal characteristics and IQ based on factors such as the umbrella's size and posture. Researchers use the Rorschach test to extract respondents' perceptions from inkblots. The

[853] Idem.
[854] Idem.
[855] Idem.
[856] Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36.
[857] Valérie Bruyckere, 'Somewhere Over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)' (2018) 14 (1) Croatian Yearbook of European Law and Policy 255.
[858] Idem.
[859] Idem.

third test, the Szondi test, would allow psychologists to ascertain the most fundamental human drives and personality traits by asking subjects to examine eight photographs and identify the person they would not want to meet after sundown. The applicant was not interrogated about his or her sexual habits or subjected to a physical examination. The Court concluded that determining an applicant's sexual orientation is not always necessary in these instances.[860] The CJEU emphasized that when an applicant has made a genuine effort to provide evidence and establish his general credibility, but his story remains unsubstantiated, the determining authority should grant him the benefit of the doubt.[861] This benefit is available if the applicant's story does not contain any fundamental contradictions.[862] Clearly, this principle was not followed in F's case. Although expert reports from medical, psychological, or sociological professionals may be beneficial during the asylum application process, they do not bind evaluating authorities. Each case should be thoroughly investigated, taking the facts of the case into account and with due regard for human dignity, the right to privacy and family life, and the right to an effective remedy, all of which are guaranteed by EU Charter Articles 1, 7, and 47. The Court emphasized that a person can be classified as a member of a particular social group if the characteristic is simply ascribed to the individual by the perpetrators of persecution as an imputed protected characteristic.[863] As a result, determining an applicant's sexual orientation is not always necessary, as non-heterosexual orientation may simply be attributed to or perceived by the applicant's surrounding society.[864]

On the other hand, expert reports should not be excluded from the process of determining an applicant's actual need for asylum or other forms of protection; in fact, they can be beneficial.[865] Nonetheless, the determining authorities' procedures should be consistent with EU law and should protect an applicant's fundamental rights and freedoms, particularly those guaranteed by Article 1, Article 7 (right to privacy and family life), and Article 47 (right to effective remedy) of the EU Charter.[866] Additionally, these adjudicating bodies are solely accountable for analyzing and adjudicating asylum

[860] Idem.
[861] Idem.
[862] Idem.
[863] Idem.
[864] Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36 [31]-[32].
[865] Valérie Bruyckere, 'Somewhere Over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)' (2018) 14 (1) Croatian Yearbook of European Law and Policy 255.
[866] Idem.

claims.[867] They are not bound de facto or de jure by the findings of expert reports on sexual orientation. National determining authorities, who are unable to delegate this task to (psychological) experts, must bear ultimate responsibility for an in-depth assessment of the problem on an individual basis.[868]

The CJEU found an infringement of the applicant's privacy and stated that such an infringement should be proportionate, meaning that the measures should not exceed what is reasonable and necessary to accomplish the law's legitimate goals.[869] Following an examination of the facts, the deciding authorities should determine whether psychological reports are appropriate and necessary.[870] The Court determined that the gravity of the interference in this case exceeded the threshold for determining the applicant's fear of persecution.[871] It went on to state that national authorities should prioritize providing asylum case workers with the training and skills necessary to assess all personal circumstances relevant to asylum applications, including sexual orientation.[872] Any interference with these rights should be proportionate.

The issue remains that the Court continues to provide no guidance on how national adjudicating authorities should handle evidence, and it ignores the significance of asylum seekers' self-declared sexual orientation. In May 2014, ILGA-Europe released a report in which they 'acknowledge that LGBTI asylum authorities must assess the general credibility of an applicant's story in relation to the well-foundedness of the fear of persecution'.[873] However, this examination is distinct from determining an applicant's sexual orientation or gender identity.[874] According to ILGA-Europe, the assessment should primarily take into account the individual's self-identification and place a

[867] Idem.
[868] Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36 [31]-[32]. [40]-[42].
[869] Valérie Bruyckere, 'Somewhere Over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)' (2018) 14 (1) Croatian Yearbook of European Law and Policy 255.
[870] Idem.
[871] Idem.
[872] Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36 [66]-[67].
[873] Sabine Jansen, 'Good Practices' (ILGA Europe, 2014) <www.refworld.org/pdfid/5433a8124.pdf> accessed 9 April 2022; Valérie Bruyckere, 'Somewhere Over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)' (2018) 14 (1) Croatian Yearbook of European Law and Policy 255.
[874] Valérie Bruyckere, 'Somewhere Over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)' (2018) 14 (1) Croatian Yearbook of European Law and Policy 255.

premium on the persecution he or she has faced or fears of future persecution, where credibility interrogation can be more grounded in the context, territory and environment where the claims of being targeted arose or can be realized.[875]

Although the CJEU has not dealt with gender identity and gender expression in asylum claims, one can infer that discrimination that would elevate to the level of persecution would be established by the same rationale for transgender asylum claimants as for transsexual citizens in the jurisprudence of the CJEU (based on discrimination because of sex/gender, 'including gender identity and sexual orientation' as article 30 Recast QD notes for the establishment of particular social group). From the case law on homosexual asylum claimants combined with the fact that gender recognition rights have been established for post-operative individuals and discrimination due to transsexual status has been deemed in breach of the non-discrimination principle when in process of transitioning, one can infer certain conclusions. Notably, if the threshold of severity of fundamental rights' violation is surpassed in qualified articles like 7 CFREU, then persecution due to gender nonconformity would qualify for asylum given that there are non-derogable rights at stake because of gender identity/expression. Nonetheless it is not certain whether same rationale would apply on Article 8 protection in the country of origin and the depathologization and legal recognition of transgender (also nonbinary) identities.

3. From the absolute right to dignity to the fundamental right to be and perform one's gender

It would be acceptable to make certain contrasts between several previously analyzed provisions in this context. Articles 2 (2nd sentence) and 3 of the TEU, as well as Articles 8 and 157 of the TFEU, all explicitly reference sex binary terminology ('women' and 'men') although Articles 10 and 19 of the TFEU provide a broader meaning by just

[875] Nuno Ferreira and Denise Venturi, 'Testing the untestable: The CJEUs decision in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal' (*European Database of Asylum Law*, 18 June 2018).

referencing 'sex' without drawing any further distinction.[876] As a result, the latter two provisions could be read as safeguarding nonbinary sexes, identities, and expressions.[877]

The fact that EU primary law openly proclaims the concept of equality between women and men does, in my judgment, undermine the EU legal order's unity of meaning and consistency from the aspect of systematic interpretation.[878] Given that equality and non-discrimination applies to all human beings in the territory, the Treaties and the EU Charter should include, on the one hand, more explicit gender equality rules and, on the other hand, broader gender equality provisions and an understanding of sex that does not necessarily rely on that binary definition. Gender binarism does not offer equal protections.

It is also clear from a teleological perspective [879] why the Union's basic statute specifies equal treatment for men and women. Despite the inclusion's primary economic aim, as previously stated, this idea evolved and became crucial in preventing genuine discrimination against women, as well as competitive advantages for states that allowed women to be paid less for the same work. However, when interpreted broadly, such a claim does not preclude the existence of other protected grounds, such as sex.[880]

In some ways, the CJEU pioneered this type of interpretation in its case law. As previously stated, the Court from *P v. S* onwards assumed that sex included 'gender reassignment'. While this approach relied on and reinforced binary normativity, it did

[876] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 61.
[877] Idem; Drawing on Mitchell Travis, 'Accommodating Intersexuality in European Union AntiDiscrimination Law' (2015) 21(2) European Law Journal 180.
[878] Bohumila Salachová and Bohumil Viték 'Interpretation of European Law – Selected Issues'(2013) LXI (7) Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis 2717, 2718; Koenraad Lenaerts and José Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice'(2014) 20(3) Columbia Journal of European Law 3, 16- 17.
[879] Koenraad Lenaerts and José Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice'(2014) 20(3) Columbia Journal of European Law 3, 31-37.
[880] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 67.

reject the conventional view that gender is inevitably assigned at birth, acknowledging that some individuals do not confirm their assigned birth-sex or gender.[881]

Additionally, the Court's willingness to depart from the traditional gender equality approach in favour of a more expansive and inclusive understanding of sex and gender may be reflected in the Court's progressive construction of the comparative element from *P v. S* to *MB*,[882] abandoning the comparison of the two sexes in favour of one between transsexual people and cispeople. This understanding encompasses the notion that 'sex' discrimination may imply concepts other than binary forces as adversarial and comparable.[883]

Furthermore, as enshrined in Article 2 of the TEU and Article 1 of the EU Charter, respect for human dignity and fundamental rights, including the rights of minorities, is a core value of the Union. The fact that the EU Charter is considered primary law reinforces the call for universal human rights respect.[884] Additionally, Article 21 (1) of the EU Charter's open clause protects against discrimination on grounds not specifically mentioned in the provision; as does Article 14 of the ECHR, which is a fundamental principle of EU law (Article 6(3) of the TEU) although the latter is activated only in conjunction with other Convention articles and to which Article 21 of the EU Charter appears to be inextricably linked.[885]

As demonstrated, the ECtHR has the authority to interpret Article 14 of the Convention in order to include new grounds, as it did with transsexuality and later gender identity.[886] In the same way as the Strasbourg Court, the CJEU appears to be able to expand the scope of protection under Article 21 of the EU Charter since the list of discrimination grounds

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[881] Idem.
[882] C-13/94 *P v S and Cornwall County Council* [1996] ECLI:EU:C:1996:170; MB v Secretary of State for Work and Pensions [2016] UKSC 53.
[883] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 61.
[884] Idem; Andrew Williams, 'Human Rights in the EU' in Anthony Arnull and Damian Chalmers (eds) *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 253.
[885] Claire Kilpatrick, 'Article 21 Non-Discrimination' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing 2014) 584; Mark Bell, 'Article 20 Equality before the Law' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds) *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing 2014) 566- 567.
[886] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 70.

is not exhaustive.[887] While Article 51 (1) of the EU Charter applies wherever Union entities act,[888] the Treaties specify a limited though not exhaustive set of grounds, and adding new ones would be interpreted as a legitimate expansion of TEU Article 6 (1) and EU Charter Article 51 (2) based on the interpretation of principles and EU provisions.[889] The EU Charter has two primary functions in the EU legal order: first, the interpretation of EU law and national implementing legislation must adhere to the EU legal order's fundamental rights and general principles.[890] Second, a violation of a fundamental right may be subject to judicial review by EU courts under Article 263 of the Treaty on the Functioning of the EU (herein TFEU). Alternatively, the validity of a legal act may be contested in a national court under Article 267 TFEU in most circumstances involving a potential violation of a fundamental right or principle, albeit only the CJEU has the jurisdiction to declare a Union act illegal.[891] EU institutions are expected to conduct a compatibility check with the Charter when developing legislation.[892] The proposal's compliance with the EU Charter must be checked during the original draft, the impact analysis and, lastly, the final text.[893]

As can be seen in the Victims' Rights Directive (gender identity and gender expression)[894] and the Recast Qualification Directive for refugee status determination

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[887] Idem.
[888] Iain Cameron, 'Competing Rights?', in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds) *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing, 2013) 187; Allan Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19(4) Jurisprudencija: Mokslo darbu žurnalas 1269, 1272. On the other hand, the part of the provision that involves Member States and 'implementing Union law' are highly disputed. Also see Silvan Agius and Christa Tobler, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression' (European Commission, June 2011). 52.
[889] Silvan Agius and Christa Tobler, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression' (European Commission, June 2011) 52.
[890] European Council on Refugees and Exiles (ECRE), 'Preliminary deference: The impact of judgments of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights', March 2017 <https://www.refworld.org/docid/58c8fd924.html> accessed 9 April 2022; See for instance Joined Cases C-402/05 P and C- 415/05 *Yassin Abdullah Kadi v Council of the European Union P, Al Barakaat International Foundation v Council of the European Union* [2008] ECR I-06351 [281]-[286] and [302]-[308].
[891] European Council on Refugees and Exiles (ECRE), 'Preliminary deference: The impact of judgments of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights', March 2017 <https://www.refworld.org/docid/58c8fd924.html> accessed 9 April 2022.
[892] Idem.
[893] Idem.
[894] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315.

(gender identity),[895] the Union took advantage of the opportunity to strengthen specific protections for 'gender related aspects', 'gender', 'gender identity', and 'gender expression' by enacting legislation in the areas of asylum and judicial cooperation in criminal cases.[896] This secondary legislation was enacted outside of the non-discrimination framework established by Article 19 of the TFEU, but within the scope of the competences set out in Article 78 (2) (a), (b), and (d) of the TFEU – measures for a common European asylum system – and Article 82 (2) of the TFEU – directives on minimum rules to facilitate mutual recognition of judgments and judicial decisions.[897]

Under Articles 10 and 19 of the TFEU, the EU's general equality and non-discrimination legal framework protects discrimination based on 'sex', but this does not expressly cover gender identity, gender expression, sex traits, or gender-related factors.[898] Additionally, the principle of equality is asserted as a Union value and fundamental right (Articles 2 (1st sentence) of the TEU and 20 of the EU Charter), without being elaborated.[899] In respect of religion or belief, disability, age, and sexual orientation, the Employment Equality Directive[900], which supplements the Race and Ethnic Origin Directive[901], establishes a comprehensive framework for equal employment and occupational treatment. The EU's gender equality legislative framework, on the other hand, defines gender as a binary divide that is protected on the basis of sex. The terms woman, man, female, and male are frequently used in this context's primary legislation (Articles 2, 2nd

[895] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337.
[896] Christa Tobler, 'Sex Equality Law under the Treaty of Amsterdam'(2000) 2 European Journal of Law Reform 135.
[897] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 71-72.
[898] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[899] Idem.
[900] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303.
[901] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180.

sentence and 3 of the TEU, Articles 8 and 157 of the TFEU, and Article 23 of the EU Charter).[902]

This divide between men and women is reflected in each of the Gender Directives. On the one hand, the Preamble of the Recast Directive[903] protects against discriminatory treatment as a result of gender reassignment by incorporating it into the concept of sex, as the CJEU determined in the *P v. S* case.[904] Nonetheless, in not explicitly including non-operative transsexual, nonbinary and transgender people, as well as excluding violations due to gender expression, the CJEU's case law has focused exclusively on post-operative transsexuals, arguably leaving the door potentially open for additional cases. Different treatment resulting directly or indirectly from gender reassignment (the definition of which, however, was left unclear) was included in the definition of sex discrimination when the latter has an impact to the entitlement of EU protected rights.[905] On a positive note, the Court's much debated comparative approach has gradually shifted away from the traditional sex equality approach, abandoning same assigned sex at birth sex comparisons; Namely, the Court has recently compared a transsexual woman to a cisperson in the MB case.[906]

Despite the fact that an individual may not identify with the gender assigned at birth, the Union's legal framework continues to be based on a binary view of gender. As a result, because trans people may face discrimination motivated by their gender identity or expression rather than their gender reassignment (as the CJEU developed), trans, nonbinary and gender nonconforming people who do not undergo gender confirmation procedures or do not experience bodily dysphoria are not guaranteed in the same way fundamental rights' protection and can easily be ignored also in the asylum process. If they lack binary female or male physical characteristics and instead exhibit a combination of gender expression and sex characteristics that contradict traditional gender stereotypes,

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[902] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 70.
[903] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities .and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204.
[904] Case C-13/94 *P v S and Cornwall County Council* [1996] ECLI:EU:C:1996:170.
[905] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 75.
[906] Case C-451/16 *MB v Secretary of State for Work and Pensions* [2016] ECLI:EU:C:2018:492.

this binary perspective makes it difficult to protect transgender asylum claimants in refugee status determination solely on the basis of sex and or/gender identity according to the Recast Qualification Directive and EU primary law.

Nonetheless, the Union's legal framework provides for future developments. One possibility is to amend the existing law to explicitly include nonbinary gender categories – such as 'sex characteristics', 'gender identity', 'gender expression', and 'gender-related aspects' – or to include an open clause to avoid the eventual marginalization of certain unforeseen situations.[907] This would necessitate a Treaty revision pursuant to the time-consuming ordinary revision procedure set out in Article 48 (1) (2-5) of the TEU, given that the Union is only authorized to act on the grounds specified in Article 19 of the TFEU. This option would entail considerable time and a genuine willingness on the part of the EU institutions and Member States, both of which appear improbable. [908]

The CJEU stated in a landmark judgment on human dignity in Omega that 'the [Union] legal order undeniably strives to ensure respect for human dignity as a general principle of law'.[909] This position built on the Court's earlier assertion of its authority to review acts of EU institutions for their compliance with human dignity: 'it is for the Court of Justice to ensure respect for human dignity as a general principle of law in its review of the compatibility of acts of EU institutions'.[910] In the area of refugee and asylum seeker protection 'during the entire asylum procedure', (that is, during the asylum application process, temporary detention, the return process, and upon return),[911] the Court adopted a dignity-conforming interpretation of EU asylum rules in order to strengthen certain

[907] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 70.
[908] Idem 76.
[909] Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2014] EU:C:2004:614 [34].
[910] Case C-377/98 *Netherlands v. Parliament and Council* [2001] EU:C:2001:523 [70]. See also Opinion of Advocate General Jacobs in Case C-377/*98 Netherlands v Parliament and Council* [2001] EU:C:2001:329 [197]; Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:162 [90]; Opinion of Advocate General Kokott in Case C-236/ 09 *Test-Achats* [2010] EU:C:2010:564 [49]-[51].
[911] Matej Avbelj and Gareth Davis, 'Íntroduction' in Gareth Davies and Matej Avbelj (eds) *Research Handbook on Legal Pluralism and EU law* (Edward Elgar 2018) 96; Case C-179/ 11 *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* [2012] EU:C:2012:594 [42] and [56].

requirements imposed on Member State authorities.[912] For instance, when it comes to the prohibition of returning asylum seekers to their country-of-origin if they face the risk of inhuman or degrading treatment upon eventual return, a dignity-conforming interpretation of secondary EU law precludes national legislation that fails to recognize the suspensive effect of an appeal against a return order or that fails to provide effective health care during the period of detention.[913] For example, the Court has ruled that national authorities' sexual orientation 'tests' or 'expert reports' 'by their very nature infringe human dignity'.[914]

Advocate General Stix-Hackl sketched an outline of the concept in her Opinion in Omega, acknowledging the difficulty of defining or expressing dignity as a legal concept.[915] She attempted to provide an all-encompassing account of human dignity: as ascribed to every human being solely on the basis of their human nature;[916] as inherent and inalienable to humans endowed with intelligence.[917]

Advocate General Stix-Hackl also recognized the various rationales (religious, philosophical, and ideological) that underpin this understanding of human dignity.[918] According to her, because it is essentially a generic concept, it lacks 'any traditional legal definition or interpretation (...)', and thus its substance must be expressed in more concrete terms in each individual case.[919]

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[912] Davor Petric, 'Different faces of dignity': A functionalist account of the institutional use of the concept of dignity in the European Union (2019) 26(6) Maastricht Journal of European and Comparative Law 792.
[913] Idem.
[914] Joined Cases C-148/13 to C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie* [2014] EU: C:2014:2406 [65]; Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] EU:C:2018:36 [35]-[36] and [71]. See further Opinion of Advocate General Bot in Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* [2012] EU:C:2012:224 [100], and the Court's judgment in Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* [2012] EU:C:2012:518 [80], regarding the asylum claimants' public demonstration of faith.
[915] Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega* [2004] EU:C:2004:162 [74].
[916] Idem [75].
[917] Davor Petric, 'Different faces of dignity': A functionalist account of the institutional use of the concept of dignity in the European Union' (2019) 26(6) Maastricht Journal of European and Comparative Law 792.
[918] Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega* [2004] EU:C:2004:162 [78].
[919] Idem [85]-[86]. Further: '[I]nstead of direct recourse to human dignity, the codification and application of individual concrete guarantees of fundamental rights would therefore seem appropriate from the point of view of justiciability and judicial methods in general'.

Other institutional entities from the EU and Member States are also involved. All of this led the Advocate General to conclude that, because human dignity is a fundamental value under EU law, it cannot be restricted or weighed against other values or interests.[920] Regardless, the reader is left with a conceptual jumble, wondering how the EU courts would define the substance of dignity in particular circumstances, as Advocate General Stix-Hackl proposes.[921]

She attempted to develop an all-inclusive definition of human dignity: as inherent and inalienable to humans endowed with a human nature.[922] This detailed opinion may provide insight into the direction of the EU's concept of dignity in terms of content.[923] Dignity, in general, encapsulates two core concepts: liberty and equality.[924] According to Advocate General Stix-Hackl, the EU's definition of dignity leans more toward liberty. This is evident in Advocate General Stix-Hackl's opinion, which places a premium on self-determination, independence, and autonomy, as well as an individualistic rather than communal interpretation of human nature.[925] Advocate General Maduro's Opinion in *S. Coleman v. Attridge Law and Steve Law* on the other hand establishes autonomy as the fundamental ideal from which 'dignity-as-equality' emerges.[926] One could argue that liberty outranks equality in the EU's 'Pantheon of Liberalism'.[927] However, and drawing from the above, advocate Maduro's Opinion, a critic of such a concept of dignity (or of the EU's conceptual underpinnings in general) would argue that true liberty flows from

[920] Davor Petric, 'Different faces of dignity': A functionalist account of the institutional use of the concept of dignity in the European Union' (2019) 26(6) Maastricht Journal of European and Comparative Law 792
[921] Idem 798.
[922] Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] EU:C:2004:162 [75].
[923] Davor Petric, 'Different faces of dignity': A functionalist account of the institutional use of the concept of dignity in the European Union' (2019) 26(6) Maastricht Journal of European and Comparative Law 792.
[924] Idem.
[925] Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] EU:C:2004:162 [75].
[926] Opinion of Advocate General Maduro in Case C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] EU:C:2008:61. See also Opinion of Advocate General Sharpston in Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA.* [2016] EU:C:2016:553 especially [71]-[72], which draws on Advocate General Maduro's conception of human dignity.
[927] Davor Petric, 'Different faces of dignity': A functionalist account of the institutional use of the concept of dignity in the European Union' (2019) 26(6) Maastricht Journal of European and Comparative Law 792, 799.

meaningful, substantive equality, whereas equality does not appear to flow from liberty.[928]

The CJEU stated in Omega that 'the [Union] legal order undeniably strives to ensure respect for human dignity as a general principle of law', [929] thus primary EU law to which all secondary law must conform. In some instances, the CJEU's interpretive role regarding human dignity aided it in broadening the scope of constitutional rights that it was establishing and developing. This exercise is well-known to the EU Member States' highest national (constitutional) courts, as well as the ECtHR.[930] For example, in *P. v. S.*, the Court held that '[t]o tolerate [discrimination arising (...) from the gender reassignment of the person concerned] would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard'.[931]

The ECHR makes no reference to human dignity. It has been incorporated implicitly through interpretation into the document, however. The European Court of Human Rights emphasizes the value of human dignity in light of Tyrer's judgment on Article 3,[932] which prohibits cruel and degrading treatment. Thus, even though the applicant suffered no severe or long-lasting physical consequences, his punishment - in which he was treated as a tool in the hands of the authorities - constituted an assault on precisely what Article

[928] Idem.
[929] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] EU:C:2004:614 [34].
[930] Paolo G. Carozza, 'Human Dignity in Constitutional Adjudication' in Tom Ginsburg, Leo Spitz and Rosalind Dixon (eds) *Research Handbook in Comparative Constitutional Law* (Edward Edgar Publishing 2011) 466: 'In many cases, courts appeal to the idea of human dignity to expand the scope of fundamental rights, either by finding that human dignity requires a substantially extended understanding of a recognized right or by justifying the recognition of a new constitutional right by reference to the requirements of dignity. Such uses of dignity range across a broad spectrum of constitutional rights'.
[931] Case C-13/94 *P v S and Cornwall County Council* [1996] ECLI:EU:C:1996:170; Davor Petric, 'Different faces of dignity': A functionalist account of the institutional use of the concept of dignity in the European Union'(2019) 26(6) Maastricht Journal of European and Comparative Law 792.
[932] *Tyrer v United Kingdom* [1978] ECHR 2 [32]- [33]. See also *X v France* App. No. 18020/91 (ECHR, 31 March 1992), *SW v United Kingdom* App No 20166/92 (ECHR, 22 November 1995); *CR v United Kingdom* (1995) 21 EHRR 363; *East African Asians v United Kingdom* (1973) 3 EHHR 76. In the last one, the Court stated in para. 207 that 'publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity', a decision applied in Moldovan v Romania (App nos 41138/98; 64320/01), where the ECtHR accepted the claim of a number of Roma individuals that their rights had been breached under Article 14.

3 is intended to protect, namely a person's dignity and physical integrity, as the ECtHR declared in 1978.[933]

Despite the absence of an explicit reference to human dignity in the ECHR, the ECtHR has read it into specific instances and violations of several ECHR provisions. This is not the same as including an entire chapter on human dignity in this new human rights document, with the first article requiring the EU and member states to respect and protect dignity and enshrining the obligation to respect and protect dignity in a variety of fields in EU secondary law.[934]

The term 'dignity' appears several times in the EU Charter's first chapter.[935] According to Article 1, 'human dignity must be respected at all times. It must be cherished and safeguarded'.[936] It was inspired by the Preamble to the 1948 Universal Declaration of Human Rights,[937] which states: 'Whereas the recognition of the inherent dignity and equal and inalienable rights of all members of the human family is the bedrock of liberty'.[938] As a result, one could argue that Article 1 CFREU serves as a generic provision preserving and safeguarding human dignity, with impact on future Union law and policy.[939] Due to the fact that the Article does not specify which areas of Community law or policy it applies to, it may be one of the most effective ways of enhancing people's rights across all spheres of EU activity.[940]

Article 3 of the European Convention on Human Rights can be linked to Art 1 CFREU, in order to conceptualize dignity, since it too seems to assume its significance, in that it implicitly prescribes dignity for all human beings by prohibiting degrading and inhumane treatment in an absolute way. As a result, any case law referencing human dignity under this article, which already exists in significant quantities, also applies to EU law. The

[933] Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 Liverpool Law Review 281, 286.
[934] Idem.
[935] It should be noted that the EU Charter is not only a list of fundamental rights for the citizens of the EU, it applies equally to all those found to be inside the EU territory, regardless of citizenship.
[936] Charter of Fundamental Rights of the European Union [2012] OJ 326/02, art 1.
[937] Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 Liverpool Law Review 281.
[938] Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble.
[939] Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 Liverpool Law Review 281.
[940] Idem 286.

European Court of Human Rights recently defined 'inhuman' treatment as 'premeditated, applied over a long period of time, and causing either actual bodily injury or intense physical or mental suffering'. Additionally, 'treatment' is deemed 'degrading' if it humiliates or debases an individual, indicating a lack of respect.[941] which could be incorporated in the protection of gender identity and expression as a fundamental part of one's personality, which is essential for a dignified life free from discrimination (for EU nationals) and persecution (for asylum claimants).

As additional Directives are adopted in this area to differentiate non-EU nationals' rights from those of EU nationals, the use of dignity will become more prevalent.[942] Its effectiveness will be determined by the minimum content of a dignified life and the governmental mechanisms in place to ensure that these minimum standards are met. This can possibly expand the scope of the prohibition of inhumane and degrading treatment. It can subsequently lower the threshold of severity of violation for qualified articles/EU provisions so that the risk of serious harm, if LGBTQ+ and gender nonconforming applicants choose (or are deprived under that risk from even the right to choose) to live freely in the gender identity/expression and sexual orientation they have, amounts to persecution under EU law.

4. Critical transnormative textual analysis

4.1. Sexuality in CJEU law

When it comes to marriage and family formation, the EU Charter's Article 9 differs from the ECHR's Article 12. The nature of the Charter and scope of its obligations is also important in this context, as per Article 51: 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'[943] Notably, the

[941] Idem 289.
[942] Idem.
[943] Charter of Fundamental Rights of the European Union [2012] 2012/C, 326/02.

Charter does not expand EU competences. Article 9 CFREU is based on Article 12 of the ECHR. However, the language of the Article has been updated: Article 9 of the EU Charter states that '[t]he right to marry and the right to establish a family shall be guaranteed in accordance with national laws governing the exercise of these rights'.[944] In comparison, Article 12 of the European Convention on Human Rights[945] states that '[m]en and women of marriageable age have the right to marry'. This is especially significant in light of the fact that case law interpreting Articles 8 and 12 of the ECHR has created confusion, as evidenced by the number of cases brought to clarify, for example, who may legally marry, most notably transsexuals.[946] The Guidance continues by stating that the modernisation will apply to cases where national legislation recognizes family formation arrangements other than marriage. This Article neither prohibits nor requires the recognition of unions between people of the same sex as marriage. Thus, the right is comparable to the ECHR's,[947] but its scope may be expanded if national legislation so provides. Indeed, the ECtHR stated in 2002 in Goodwin: 'The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt intentionally, from the wording of Article 12 of the Convention by removing the reference to men and women'. (...)[948] It must be noted though, that under EU Law, marriage formation *per se* is a matter of competence for the Member States if not in scope of EU law.

The exercise of the right to marry has ramifications on a social, personal, and legal level. It is subject to the Contracting States' national laws, but any limitations imposed must not restrict or diminish the right in such a way or to such an extent that the right's very nature is jeopardized. (...)[949]

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[944] Steve Peers. 'Taking rights away? Limitations and derogations' in Steve Peers, Tamara Hervey and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2004).
[945] *Rees v UK* (1986) Series A, 106 EHRR 9; *Cossey v UK* (1990) Series A, 184 EHRR 13; *Sheffield and Horsham v. UK* (1997) 27 EHRR 163*; Goodwin v UK* and *I v UK* (2002) 35 EHRR 18; *Karner v. Austria* (2004) 38 EHRR 24.
[946] Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 Liverpool Law Review 281; See also Charter of Fundamental Rights of the European Union, Explanatory Notes [2007] OJ C303/1.
[947] Idem.
[948] *Goodwin v United Kingdom* App No 28957/95 (ECHR, 11 July 2002).
[949] Idem, [100]-[101]. See also Advocate Generals in Case C-13/94 *P v S and Cornwall County Council* [1996] ECLI:EU:C:1996:170 and Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541.

Once a case involving same-sex marriage is brought before the CJEU (as opposed to the rights associated with marriage or partnership), the meaning of the phrase 'no doubt intentionally' will become critical. Denying same-sex couples access to marriage strips the right of its very essence, and with many member states now permitting same-sex marriage, the 'margin of appreciation' is dwindling. On the other hand, by focusing exclusively on achieving this goal and relegating marriage, a highly gendered legal institution, to the end of the path toward equality, the LGBTQI+ community has overlooked other advocacy options and avenues for equality. According to Adler, marriage advocacy has embraced a neoliberal politics, ignoring other battles that could have benefited LGBTQ+ people who are not part of the mainstream movement. For instance, the movement could have advocated for decoupling marriage from its associated benefits or for universal rights – regardless of marital status – such as universal health care for all. Rather than that, the LGBTQ+ community has elevated marriage to the pinnacle of equality, establishing a homonormative ideal.[950]

The CJEU has had three opportunities to hear sexual orientation asylum claims thus far. The first opportunity presented itself in the combined cases C-199/12 to C-201/12, *X, Y, and Z v. Minister voor Immigratie en Asiel*,[951] in which the possibility of returning asylum seekers to their home countries based on their being discreet with regards to their sexual orientation has been examined. On the other hand, the Court determined that in order for a particular social group to qualify for asylum under the 1951 Refugee Convention,[952] sexual orientation applicants must meet two criteria: membership in a group that is socially recognized in the country of origin (social recognition test) and recognition of sexual identity as a fundamental characteristic of a person (fundamental characteristic test). Additionally, the Court determined that criminalizing same-sex behaviour is not a form of persecution if criminalizing laws are not applied. Both of these points reflect a

[950] Idem.
[951] Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720.
[952] Idem.

strict reading of EU law that runs counter to UNHCR guidelines[953] and commentators' opinions.[954]

The Court addresses evidentiary standards more explicitly in the second sexual orientation asylum case heard by the CJEU: the CJEU stated in Joined Cases C-148/13 to C-150/13, *A, B, and C v. Staatssecretaris van Veiligheid en Justitie*,[955] that the sexual orientation declared by asylum applicant constitutes the starting point in the process of assessing the facts and circumstances, in light of the particular context in which asylum applications are made. Some European Union Member States, such as Hungary in the F case,[956] are eager to carefully examine applicants' self-declared sexual orientation, disbelieve it whenever possible, and thus find an easy way to deny the asylum claim.[957] In A, B, and C, the Court correctly refused to use sexualized evidence or solely stereotyped assessments in sexual orientation asylum claims, effectively precluding medical tests such as phallometric testing and explanations of sexual practices on the grounds that such evidence violates the dignity and privacy of the claimants (Articles 1 and 7 of the EU Charter). However, no positive guidance regarding the types of questions that are appropriate in these circumstances was provided.[958] Additionally, stereotype-based questions may be asked as part of a more balanced line of questioning, leaving a great deal of room for ambiguity and allowing for inappropriate interviewing and decision-making.

Indeed, in her opinion, Advocate General Sharpston, states that:

> […] the Court thereby recognised that the competent authorities should not examine applications for refugee status on the basis of a homosexual

[953] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01.
[954] International Commission of Jurists, *X, Y and Z: a glass half full for 'rainbow refugees'?*, 2014.
[955] Joined cases C-148/13 to C-150/*13 A, B and C v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2406.
[956] Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36.
[957] Nuno Ferreira, 'Portuguese Refugee Law in the European Context: The Case of Sexuality-Based Claims', (2015) 27(3) International Journal of Refugee Law 411.
[958] Steve Peers, 'LGBTI asylum-seekers: the CJEU sends mixed messages' (*EU Law Analysis*, 2 December 2014) <http://eulawanalysis.blogspot.com/2014/12/lgbti-asylum-seekers-cjeu-sends-mixed.html> accessed 9 April 2022.

> archetype. Unfortunately, an examination based upon questions concerning an applicant's sexual activities would indeed suggest that those authorities are basing their assessment upon stereotypical assumptions about homosexual behaviour. Such questions are unlikely to be able to distinguish genuine applicants from bogus claimants who have schooled themselves in preparing their application, and are therefore inappropriate and disproportionate within the meaning of Article 52(1) of the Charter.[959]

The F case reintroduced sexual orientation asylum claims to the European Union, allowing the Court to correct some of the flaws in its two previous decisions on the subject. It was unknown whether the Court would take advantage of this opportunity appropriately. Despite the fact that personality tests cannot determine an applicant's sexual orientation, AG Wahl argued in this case that they should be permitted if consent is obtained and the tests are conducted in accordance with the applicant's right to dignity and respect for private and family life (Articles 1 and 7 of the EU Charter). AG Wahl effectively granted EU Member States an unnecessarily large margin of appreciation and an alarming amount of leeway to discredit asylum seekers' claims.[960]

4.2. Gender identity in CJEU law

In *P v. S and Cornwall County Council (P v. S)*, the CJEU had to decide whether the principle of equal treatment in terms of working conditions, including dismissal – which was enshrined at the time in Article 5 (1) of Directive 76/207/EEC[961] and is now included in the Recast Directive – precluded the dismissal of a transsexual person based on gender reassignment.[962] Hereinafter in this subchapter, I will use the term 'transsexual' as the

[959] Opinion of Advocate General Sharpston delivered on 17 July 2014, *(C-148/13), B (C-149/13) and C (C-150/13) v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2111, [65].
[960] Nuno Ferreira and Denise Venturi, 'Tell me what you see and I'll tell you if you're gay: Analysing the Advocate General's Opinion in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal' (Odysseus Blog – EU Immigration and Asylum Law and Policy, 24 November 2017).
[961] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39.
[962]Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration

CJEU has used it. Using the term 'transgender' instead, as a broad concept, according to Stryker, Valdes and Roen, would have been more inclusive, particularly in opposing binary distinctions.[963] Transgender theorists regard the term 'transgender' as inclusive of those identifying as transsexual, and that both can relate to queer identities.[964] Nevertheless, I will use the term 'gender reassignment' and 'transexual' since these were the legal terms used by the CJEU.

P, the applicant, assigned male at birth, was a manager at Cornwall County Council when she informed S, the Director of Studies, Chief Executive, and Financial Director, of her intention to undergo gender transition. P received notification of contract termination a few months later, following minor surgery.[965]

Contrary to the United Kingdom's and Commission's interpretations,[966] the Court held that such dismissal was contrary to the directive's stated purpose.[967] It based its decision on the European Court of Human Rights' (ECtHR) case *Rees v. United Kingdom,*[968] which defined transsexuals as 'those who, whilst belonging physically to one sex, feel convinced that they belong to the other' often seeking to undergo 'medical treatment and surgical operations to adapt their physical characteristics to their psychological nature'[969] Additionally, it recalled prior case law that regarded equality as a fundamental right.[970]

It is debatable whether individuals who wish to transition but are unable to do so due to financial constraints or because their request is denied by national authorities are considered to have 'intent to undergo gender reassignment'. Additionally, it is debatable whether this phrase reflects a more limited concept of those in the pre-operation phase,

2019); Case C-13/94 *P v S and Cornwall County Council* [1996] ECLI:EU:C:1996:170 [13] (Hereinafter P v S).
[963] Susan Stryker, *Transgender History* (Seal Press 2008) 19; Francisco Valdes, Afterword & Prologue: Queer Legal Theory (1995) 83 California Law Review 344; Katrina Roen ' Either/Or' and 'Both/Neither': Discursive Tensions in Transgender Politics – TEST'(2002) 27(2) Signs 501, 521.
[964] Idem; Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[965] P v S [3]- [6].
[966] Idem [14]-[15].
[967] Idem [24].
[968] *Rees v The United Kingdom* App No. 9532/81 (ECHR, 17 October 1986).
[969] P v S [16].
[970] Idem [18]- [19].

i.e., when gender confirmation surgery is imminent.[971] This may be an overly cautious judgment, and both perspectives are debatable: 1) on the one hand, the Court requires only purpose, not concretization; 2) on the other hand, it appears to imply a progressive scale from the past to the future (phrased in the chronological reverse order).[972]

However, problematic categorization and subsequent legal considerations can exacerbate social insecurity. As previously stated, the distinction between transsexuality and transgenderism raises some concerns about the inclusion (or exclusion) of specific individuals in one category or the other. Additionally, these two categories coexist in fundamental tension, with transsexuality strengthening the binary system in that it has been linked in theory and practice with transitioning from one gender to the other, often with body affirmative medical interventions.[973] Transgenderism on the other hand, includes by definition nonoperative and nonbinary trans experiences. As a result, one might conclude that this Court's decision reflects that tension or has chosen not to put it on the Court's agenda, since it considered it premature.[974]

Another factor to consider is the comparison component of the decision. In *P v. S*, the CJEU compared the treatment of an individual contemplating, undergoing, or having undergone gender reassignment to that of 'persons of the sex to which he or she was deemed to belong prior to undergoing gender reassignment'.[975]

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[971] See also along the same lines, Silvan Agius and Christa Tobler, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression (European Commission, June 2011) 43, although acknowledging some confusion regarding what 'gender reassignment' entails and conceptualizing space for elaboration. One can find a narrow interpretation at the Commissioner for Human Rights of the CoE, 'Issue Paper: Human Rights and Gender Identity' (2009) CommDH/IssuePaper (2009) 2, 5. The issue was also referred to but unresolved by AG Jacobs (Opinion of Advocate General Jacobs, delivered on 15 December 2005, Case C-423/04 *Sarah Margaret Richards v Secretary of State of Work and Pensions* [2006] ECR I-03585, and AG Bobek (Opinion of Advocate General Bobek, delivered on 5 September 2017, in Case C-451/16 *MB v Secretary of State for Work and Pensions* [2017] ECLI:EU:C:2017:937 [73] –[74].

[972] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).

[973] Idem.

[974] Idem; Carl F. Stychin, 'Troubling Genders: A comment on P. v. S. and Cornwall County Council' (1997) 2(3) International Journal of Discrimination and the Law 217, 222.

[975] P v S [21.1]; Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).

Some interpreted the decision as relying on a comparison between (transsexual) female and (non-transsexual male, thereby accepting P's self-identified sex.[976] Others interpreted it as relying on a comparison between people of the same sex (specifically male-to-male) once P was, in fact, always considered a man under British law, thereby denying P's self-identified sex.[977]

According to some authors, the Court rejected a 'symmetrical comparison', a 'traditional comparison analysis',[978] or the 'equal misery argument'[979] – as argued by the UK –[980] that is, a comparison of a transgender male and a transsexual woman, because both would have been fired in the same circumstances if the discrimination had resulted from the employee's gender reassignment rather than the employee's sex.[981]

Skeptics, on the other hand, questioned 1) whether it was truly possible to assert that P was not fired due to her gender, 2) whether the CJEU considered the possibility of female-to-male transsexuals in its categorization, and 3) how (and why) the Court arrived at its conclusion without using the traditional comparison.[982]

However, and strangely, the debate above does not address this point – why did the Court compare P's (a transsexual person) treatment to that of a non-transsexual person, regardless of whether the transition was male-to-female or female-to-male.[983] If discrimination is found to be motivated by gender reassignment, it appears that

[976] For instance, Mark Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT' (1999) 5 European Law Journal 63, 66; Heather Lardy and Angus Campbell, 'Discrimination against transsexuals in employment' (1996) 21 European Law Review 412, 415 – instead of 'sex' the authors employ the term 'sexual status'.
[977] For instance, Leo Flynn, 'Case Law: A. Court of Justice Case C-13/94, P. v. S. and Cornwall County Council, Judgment of the Full Court of 30 April 1996, [1996] ECR I-2143' (1997) 34 (2) Common Market Law Review 367, 377.
[978] Heather Lardy and Angus Campbell, 'Discrimination against transsexuals in employment' (1996) 21 European Law Review 412, 415.
[979] Mark Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT' (1999) 5 European Law Journal 63, 66.
[980] P v S [15].
[981] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[982] Idem; See also Silvan Agius and Christa Tobler, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression (European Commission, June 2011) 40, concluding that the Court was mobilized by the 'obviousness of the sex discrimination'.
[983] The position closest the one to the above is in Robert Wintemute, 'Recognizing New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes' (1997) 60 The Modern Law Review 334, 341 where the author claims that the comparison should have been done between P and cisgender female, nevertheless still enhancing the gender of the compared person.

determining whether a transsexual person received less favourable treatment than a non-transsexual person is required, as the CJEU determined in the Richards case.

In some ways, it is clear that the Court eschewed strict 'formulas' in favour of focusing on the heart of the patent discrimination matter,[984] which was not a novel approach in the Court's jurisprudence.[985] On the one hand, this approach threatens legal certainty, but on the other, it overcomes the dangerous limitations of such narrow and 'mathematical' assessment by ensuring the rigour of the assessment.[986]

In the case of *P v. S*, the strong opinion of Advocate-General (AG) Tesauro[987] is worth exploring, not only because it influenced the Court's conclusion,[988] but also because it indicated an audacious move that the Court did not make.

It is true that Mr. Tesauro's vision was consistent with a medical discourse that pathologizes transsexuals, a discourse that the Court did not appear to follow.[989] Mr. Tesauro was inspired by a definition proposed at the time by the Council of Europe Parliamentary Assembly (PACE), which defined transsexualism as a 'dual personality syndrome, one physical, the other psychological'.[990] However, he furthered his rationale in the manner below.

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[984] Silvan Agius and Christa Tobler, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression (European Commission, June 2011) 41.
[985] The lack of male comparator in the judgment in Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV- Centrum)* (1990) ECR I 03941, ECLI:EU:C:1990:383, as noted in, for instance, John McInnes, 'Case C-249/96, Lisa Jacqueline Grant v. South West Trains Ltd, Judgment of the Full Court of 17 February 1998, [1998] ECR I-636' (1999) 36 (5) Common Market Law Review 1017, fn 33 and Mark Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT' (1999) 5 European Law Journal 63, 66-67; Leo Flynn, 'Case Law: A Court of Justice Case C-13/94, P. v. S. and Cornwall County Council, Judgment of the Full Court of 30 April 1996, [1996] ECR I-2143' (1997) 34 (2) Common Market Law Review 367, 376-377.
[986] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[987] Opinion of Advocate General Tesauro, delivered on 14 September 1995, Case C-13/94 *P v S and Cornwall County Council* [1995] ECR I-02143, ECLI:EU:C:1995:444.
[988] Catherine Barnard 'P v S: Kite flying or a new constitutional approach?' in Alan Dashwood and Siofra O'Leary (eds) The Principle of Equal Treatment in EC Law (Sweet and Maxwell 1997) 62.
[989] Carl F. Stychin, 'Troubling Genders: A comment on P. v. S. and Cornwall County Council' (1997) 2(3) International Journal of Discrimination and the Law 217, 222.
[990] Recommendation 1117 on the Condition of Transsexuals Parliamentary Assembly of the CoE (29 September 1989) [1]; Opinion of Advocate General Tesauro, delivered on 14 September 1995, Case C-13/94 *P v S and Cornwall County Council* [1995] ECR I-02143, ECLI:EU:C:1995:444 [8].

The AG initially acknowledged a dynamic view of the legal system, stating that the law cannot 'separate itself from society as it is', and thus must be 'capable of regulating new situations revealed by social change'.[991] He continued by criticizing the Directive's undeniably embedded 'traditional man/woman dichotomy' claiming that it overlooked 'all unfavourable treatment related to sex',[992] as well as the 'possible range of characteristics, behavior, and roles shared by men and women, so that sex itself ought to be thought of as a continuum'.[993] Surprisingly, it also implied that a 'third gender' individual should be excluded from the Directive.[994]

With numerous references to the 'fundamental', 'inalienable', 'universal' principle of equality[995] and a somewhat suggestive and lengthy argumentation – from an ironic reference to Adam and Eve[996] to discussions of social justice and European integration[997]– the Opinion concluded by urging the Court to make the 'courageous', 'bold but fair and legally correct'[998] decision. The Court adopted a similar position.[999]

In K.*B. v. National Health Service Pensions Agency and Secretary of State for Health*[1000], the CJEU had to decide whether a law prohibiting a transsexual man from receiving a widower's pension violated Article 141 EC (now Article 157 TFEU) and Directive 75/117[1001] (now enshrined in the Recast Directive).[1002]

K. B. was a member of the NHS Pension Scheme and a National Health Service (NHS) employee. R, her partner and a transgender man, was unable to obtain the widower's

[991] Opinion of Advocate General Tesauro, delivered on 14 September 1995, Case C-13/94 *P v S and Cornwall County Council* [1995] ECR I-02143, ECLI:EU:C:1995:444 [9].
[992] Idem [16]
[993] Idem [17].
[994] Idem [22].
[995] Idem [19], [20], [22], [24].
[996] Idem [17].
[997] Idem, referring to words once articulated by the AG Trabbuchi.
[998] Idem [24].
[999] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1000] Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541.
[1001] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45.
[1002] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)[2006] OJ L204.

pension because it was previously only available to spouses. Despite their wishes, the couple were unable to marry. R was unable to change his gender marker following the gender confirmation operation, resulting in a female birth certificate, and British law did not (at that time) recognize same-sex marriage as valid.[1003]

The Court recognized that limiting such benefits to married couples and excluding others was a matter for national competence and could not be considered 'per se discriminatory on the basis of sex' because the claimant's gender was irrelevant.[1004] Nonetheless, the Court believed that unequal treatment resulted from the precondition – the 'capacity to marry' – that had to be met in order to obtain the benefits.[1005] The Luxemburg Court upheld the European Court of Human Rights' decision in *Christine Goodwin v. the United Kingdom,* holding that because they are of the same sex according to their civil status, a transsexual whose gender identity is not recognized by national law is unable 'to marry a person of the sex to which he or she belonged prior to gender reassignment surgery'.[1006]

To begin, the K.B. ruling makes no reference to the *P v. S* judgment, either to follow it or to set it aside, despite the fact that the latter's outcome reinforced the former's.[1007] For example, the Commission did refer to the previous judgment in order to dismiss P's application, once it determined that the two situations were distinct: P faced direct discrimination due to her gender.[1008]

The Court's decision to take a complicated approach – directed at 1) unmarried couples, 2) same-sex couples, and 3) transsexual people – prompted some to question how much of the decision was about family law and how much was about gender identity.[1009]

[1003] Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541 [11]- [13] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1004] Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541 [28]- [29].
[1005] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1006] *Goodwin v United Kingdom* App No 28957/95 (ECHR, 11 July 2002).
[1007] Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541.
[1008] Idem [22]- [23].
[1009] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration

Perhaps as a result of this complexity, the Court emerged with hazy reasoning and a lack of precision.[1010] In some ways, the Court was willing to recognize the rights of transsexual people while avoiding interfering with Member States' competences on marriage, despite being trapped in the binary dichotomy of sex, as it had been in *P v. S.*[1011]

In *Sarah Margaret Richards v. Secretary of State for Work and Pensions*,[1012] the CJEU considered whether Article 4 (1) of the Gender Statutory Social Security Schemes Directive[1013] precludes national legislation that denies a transsexual woman the right to a pension at the retirement age set out in law for women (Richards). Ms Richards, a transsexual woman, applied to the Secretary of State for Work and Pensions for a retirement pension to be paid when she turned 60, the British law retirement age for women born before 6 April 1950.[1014] Her request was denied because Ms Richards' retirement age was, the State maintained, 65,[1015] the male retirement age.

The Court answered affirmatively,[1016] emphasizing that the claimant's inability to meet one of the pension's eligibility requirements, in contrast to 'women whose gender is not the result of gender reassignment surgery', resulted in unequal treatment. Drawing on

2019); For instance, Iris Canor, 'Case 117/01, K. B. v National Health Service Pensions Agency and Secretary of State for Health, judgment of the full court of 7 January 2004' (2004) 41(4) Common Market Law Review 1113, 1117- 1121, also elaborating on the case in relation to the judgments in Case -249/96 *Grant v South-West Trains Ltd* (1998) ERC I-00621, ECLI:EU:C:1998:63 and in Joined cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden v Council of the European Union* (2001) ECR I-04319, ECLI:EU:C:2001:304; see also Mark Bell, 'A Hazy Concept of Equality - Case C-117/01 K.B. v. N.H.S. Pensions Agency and Secretary of State for Health, European Court of Justice, 7 January 2004' (2004) 12(2) Feminist Legal Studies 223, 228.

[1010] Mark Bell, 'A Hazy Concept of Equality - Case C-117/01 K.B. v. N.H.S. Pensions Agency and Secretary of State for Health, European Court of Justice, 7 January 2004' (2004) 12(2) Feminist Legal Studies 223, 225-227.

[1011] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).

[1012] Case C-423/04 *Sarah Margaret Richards v Secretary of State of Work and Pensions* [2006] ECR I-03585.

[1013] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1978] OJ L6.

[1014] Case C-423/04 *Sarah Margaret Richards v Secretary of State of Work and Pensions* [2006] ECR I-03585 [14]-[16].

[1015] Idem [38].

[1016] Idem [29].

K.B., such a criterion was to be deemed 'incompatible with Community law requirements'.[1017]

As a result of the foregoing, and while reaching the same conclusion, the Court relied on a new comparison this time, namely Ms Richard's treatment in comparison to that of non-transsexual women. The Court clearly departs from the comparator between sexes, as it did in *P v. S* and previously in *K.B.*[1018]

Skeptics argue that this complicates understanding how such cases could be classified as sex discrimination under the traditional sex equality framework.[1019] However, it is precisely because the Court departs from this traditional framework that such comprehension becomes possible and necessary.[1020] If, as previously stated in the analysis of the *P v. S* decision, gender reassignment was the true source of discrimination in such situations, it was unclear how the Court could continue to rely on a comparison of the sexes female/male and transsexual (transgender) people/cispeople.[1021]

Regardless, one aspect of the comparison factor deserves to be mentioned. Once women are granted the pension at a younger age, regardless of the rationale of the provision, it is tempting to draw comparisons between Ms Richards' treatment and that of ciswomen. However, it appears critical to distinguish between two scenarios: 1) when Ms Richards' gender identity is not legally recognized in the same way as it is for cispeople because certain conditions are unmet; and 2) Ms Richards is denied the same pension rights as ciswomen regardless of her legal gender recognition, because of her trans background.

When the Court determined that Ms Richards' 'inability to have the new gender'[1022] rendered her ineligible for the pension at the age of 60 'unlike women whose gender is

[1017] Idem [31].
[1018] And according to AG Jacobs, Opinion of the Advocate General Jacobs, delivered on 15 December 2005, in Case C-423/04 *Sarah Margaret Richards v Secretary of State of Work and Pensions* [2006] ECR I-03585, ECLI:EU:C:2005:787 [41]- [45].
[1019] Silvan Agius and Christa Tobler, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression (European Commission, June 2011) 43.
[1020] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1021] Idem 38-39.
[1022] Case C-423/04 *Sarah Margaret Richards v Secretary of State of Work and Pensions* [2006] ECR I-03585 [28].

not the result of gender reassignment surgery',[1023] it recognized this mutual dependence. Its decision, however, was predicated on the second step of prejudice, emphasizing the obvious parallel to ciswomen.

If this had not been the case, the CJEU could have been chastised for undermining national standards governing gender identity and legal gender recognition, thereby exceeding its competences and/or jeopardizing its legitimacy.[1024] Perhaps for this reason, the Court avoided this route, beginning the current judgment by restating its previous ruling in K.B., emphasizing that the standards governing legal gender recognition were a matter for Member States to determine.[1025] As a result, it was left to national authorities to determine whether Ms Richards was 'deserving of gender recognition', [1026] while the Court decided that she was indeed entitled to be treated as a woman, for the purpose in question at least. This decision affirms the role that gender identity plays in the determination of the gender of transgender people for the ECtHR, according to which they will be treated for the purposes of EU law by the Court, under the condition that they have undergone or intend to undergo gender reassignment.

In *MB v. Secretary of State for Work and Pensions (MB)*, the CJEU considered whether Article 4(1) of the Gender Statutory Social Security Schemes Directive, taken together with Articles 3(1)(a) and 7(1)(a) of the Directive, precluded national legislation requiring a transsexual person willing to qualify for a statutory retirement pension to qualify for one.[1027]

Similar to some of the facts in the K.B. and Richards cases, MB,[1028] a transsexual woman, was unable to receive the same retirement pension as ciswomen at the age of 60 due to

[1023] Idem [29].
[1024] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1025] Idem.
[1026] Case C-423/04 *Sarah Margaret Richards v Secretary of State of Work and Pensions* [2006] ECR I-03585 [28]. [21]. Also, according to AG Jacobs, Opinion of Advocate-General Jacobs, ECLI:EU:C:2005:787 [51].
[1027] Case C-423/04 *Sarah Margaret Richards v Secretary of State of Work and Pensions* [2006] ECR I-03585 [21]. Also, according to AG Jacobs, Opinion of Advocate-General Jacobs, ECLI:EU:C:2005:787, point 51; Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1028] Case C-451/16 *MB v Secretary of State for Work and Pensions* [2016] ECLI:EU:C:2018:492 [26].

the presence of a male legal marker on her birth certificate. To obtain legal recognition of her female sex, MB's marriage to her female companion had to be annulled under British law (along with other physical, social and psychological criteria that she did fulfil).[1029]

The CJEU sided with MB, concluding that the UK legislation constituted direct sex discrimination and rejecting the UK's argument. It was determined that under national law, a person who had gender confirmation surgery after marrying was treated less favourably than a person who had not had such operations but was married, once the marriage annulment condition applied to the former but not to the latter for the purpose of statutory retirement pension entitlement.[1030]

The Court began to legitimize its intervention in the same way it did in *Richards*, albeit more comprehensively. It emphasized that it was asked to rule only on the eligibility requirements for the statutory retirement pension, not on whether the gender legal recognition procedure could rely on the marital annulment condition.[1031] It did emphasize, however, that while civil status and gender legal recognition are matters of national competence, Member States may not disregard Union law, specifically the principle of non-discrimination, when enacting legislation on these subjects.[1032] It affirmed the K.B. decision, holding that national legislation establishing civil status requirements for retirement pensions fell within the scope of the principle of non-discrimination based on gender.[1033] As a result, under the contested Directive, the Member State was compelled to apply that principle when exercising that competence, that is, when legislating civil status issues.[1034]

With such a detailed explanation – more so than in previous cases – the Court appeared more committed than ever to demonstrating that it was intervening in a sector of Union

[1029] Idem [16]- [19].
[1030] Idem [29].
[1031] Idem [30]- [31].
[1032] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1033] Idem.
[1034] Case C-451/16 *MB v Secretary of State for Work and Pensions* [2016] ECLI:EU:C:2018:492 [34]- [48].

competence distinct from national competence.[1035] Additionally, it demonstrated how, even if indirectly, national legislation must comply with EU law, particularly in relation to the concept of gender equality or non-discrimination.[1036] Nonetheless, the decision's uniqueness was contingent upon the examination of the comparison factor, which lengthened the time required to reach a decision. [1037]

By contrasting the position of a married person who 'changed' sex with the position of a married person who 'remains'[1038] with the sex assigned at birth, the Court effectively compared the treatment of a (married) transsexual person to that of a (married) cisperson.[1039] This comparison extends beyond Richards and, as stated previously, is pertinent to this work.[1040] The Court emphasized the distinction between this case and the ECtHR's decision in *Hämäläinen v. Finland* in light of AG Bobek's Opinion.[1041] Because the latter case involved the legal recognition of gender in civil status rather than the right to a statutory retirement pension, the Luxemburg Court determined that the two cases were incomparable.[1042]

As a result, the CJEU in MB, as argued in this study, went further than the CJEU in Richards. Due to the fact that MB was the first (and most recent) decision requiring such awareness, it is unclear whether the Court will continue to apply the same comparative

[1035] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1036] Idem.
[1037] Idem.
[1038] Case C-451/16 *MB v Secretary of State for Work and Pensions* [2016] ECLI:EU:C:2018:492 [34]-[48].
[37].
[1039] The Court did not use these the term 'cispeople', but AG Bobek referred to 'cisgender person', even defining the term. See Opinion of Advocate General Bobek, delivered on 5 September 2017, Case C-451/16 *MB v Secretary of State for Work and Pensions* [2016] ECLI:EU:C:2017:937 [39].
[1040] [1040] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1041] Opinion of Advocate General Bobek, delivered on 5 September 2017, Case C-451/16 *MB v Secretary of State for Work and Pensions* [2016] ECLI:EU:C:2017:937 [44].
[1042] Case C-451/16 *MB v Secretary of State for Work and Pensions* [2016] ECLI:EU:C:2018:492 [47]; *Hämäläinen v. Finland* App No 37359/09 (ECHR, 16 July 2014) [112].

element in future cases – though it will always be considered in a 'specific and concrete manner'[1043] – or whether this approach will change.[1044]

In light of the foregoing, it is reasonable to conclude that the CJEU has thus far only addressed cases involving transgender people who have undergone or want to undergo gender affirmation surgery. The Court was willing to protect this group in that case by including gender reassignment discrimination within the prohibition on sex discrimination. It did so not only in instances where discrimination was directly related to gender reassignment, but also in instances where discrimination resulted from an inability to meet specific prerequisites and thus enjoy certain Union-protected rights.[1045]

To protect its and the Union's role and legitimacy, the Court drew a clear distinction between its and the Member States' competence, delegating to them the responsibility for establishing the rules governing legal gender recognition and civil status, while emphasizing that the Union would always intervene if its principles were jeopardized.[1046] To arrive at these conclusions, the Court compared the claimant's (transsexual person's) treatment to that of non-transsexual people of the opposite sex, then to that of non-transsexual people of the (now) same sex, and finally to that of a non-transsexual, regardless of sex.[1047]

Additionally, these decisions do not provide a viable solution for future instances involving nonbinary gender types. They do not even appear to leave an open door in that sense, because the Court examined the concept of sex and its boundaries in the manner in which it was presented, perhaps to avoid certain complications, or to adhere to the verdicts' *thema decidendum.* It has also failed to address the issue of transgender people who do not wish to undergo gender affirmation surgery or the ones that do not experience bodily gender dysphoria,[1048] thus extending the meaning of reassignment to social

[1043] Also mentioned by Silvan Agius and Christa Tobler, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression (European Commission, June 2011) 43.
[1044] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1045] Idem.
[1046] Idem.
[1047] Idem.
[1048] Jack Drescher, Peggy Cohen-Kettenis and Sam Winter, 'Minding the body: Situating gender diagnoses in the ICD-11' (2012) 24(6) International Review of Psychiatry 568.

transition (name, mannerism, dress) or nonconforming gender expression beyond identitarian claims. The protection offered to the rights of individuals of the above groups in the jurisdiction of the Member State could serve to draw inferences on the scope of the right to gender identification/expression also extraterritorially, so that persecution for this reason would qualify for international protection status.

4.3. EU and the CJEU: Gender expression and the cisnormative medicalization of gender identities

At this point, deficiencies in EU legislation relating to the preservation of gender variations can be identified. One might wonder if the lack of proper legal protections and the ambiguity around certain existing and developed notions were intentional or the product of irresponsible or unintentional methods. Furthermore, one can wonder whether the Union is capable of acting at all, and if so, how far.[1049] Is the Union anticipated to act in any case?

To begin, keep in mind that the EU's (non-discrimination) legal framework has a limited field of application and an even more limited scope of human rights protection. Despite its noble intentions, one could argue that the Union is technically and constitutionally incapable of acting in all legal areas where intervention is required.[1050] What is the reason for this?

First, Articles 3–6 and 352 of the TFEU[1051] outline the Union's powers, within which and only within which the Union is entitled to operate on the basis of the conferral principle. Furthermore, according to Article 19 of the TFEU,[1052] the Union is expected to combat discrimination 'within the limits of the powers conferred by the Treaties', that is, the

[1049] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1050] Idem.
[1051] Article 3 – exclusive competence; Article 4 – shared competences; Article 5 – coordinating competences; Article 6 – complementary competences; Article 352 – flexibility clause; See Robert Schütze, 'EU Competences – Existence and Exercise' in Anthony Anrull and Damian Chalmers (eds) The Oxford handbook of European Union law (Oxford University Press 2015) 84- 89; Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases, and Materials* (6th edition, Oxford University Press 2015) 75- 94.
[1052] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326.

principle of non-discrimination can only be applied if the subject comes within the scope of EU legislation.[1053]

The CFREU Art. 52,[1054] which refers to the Charter's scope of application, contains a similar restriction. When implementing EU law and within the bounds of the Treaties' powers, paragraph (1) states that the Union and Member States must respect and promote the rights and principles enshrined therein, while paragraph (2) clarifies that the EU Charter cannot be used to expand the scope of EU law or to create or modify the Union's powers and tasks (as also stated in the second sentence of Article 6 (1) TEU).[1055]

This may explain why the CJEU was so concerned with establishing that it was dealing with a Union matter in the judgments cited above, or why it was not needed to examine the types of questions before the ECtHR.[1056] Despite its limited scope of action, the EU has the potential to be truly progressive in the areas where it may intervene — a good example is the breadth of EU equality or non-discrimination rules, particularly in the area of gender equality.[1057] Furthermore, through soft law documents, the EU institutions have the capacity to express concern and raise Member States' understanding.[1058]

In the absence of specific legal protection, sporadic attempts to fill the gap and the use of imprecise notions created an unsettled scenario. On the one hand, the CJEU incorporated protection for 'gender reassignment' under the category of 'sex' discrimination, reinforcing EU law's binary approach to sex and gender and establishing that there was

[1053] See also [1053] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1054] Paul Craig and Gráinne de Búrca*, EU Law, Text, Cases, and Materials* (6th edition, Oxford University Press 2015) 933.
[1055] For a comment, see Angela Ward 'Article 51 Field of Application' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing 2014).
[1056] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1057] Idem; For the development of the judicial framework and the several concepts it entails by the CJEU see Susanne Burri and Sacha Prechal, *EU gender equality law: update 2013* (European Commission Directorate-General for Justice, Publications Office 2014); Paul Craig and Gráinne de Búrca*, EU Law, Text, Cases, and Materials* (6th edition, Oxford University Press 2015) 914 -931.
[1058] Resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (European Parliament, 2017/2125(INI)).

no room for further argument.[1059] The Commission[1060] and the European Parliament,[1061] on the other hand, were of the opinion that a broader definition of gender identity should be included. I argue that gender expression is a missing ground for protection as well.

Despite this, the legal structure of the European Union remained unaltered. Even when the issue of gender identity was being debated, the Council and the CJEU in *P v. S* abstained from incorporating such an explicit reference to gender identity in the Goods and Services Directive.[1062] The Court's recent decision in MB established that, rather than accommodating the Commission, its goal was to advance the comparative elements (comparators) and explain its (and the Union's) sphere of competence.[1063]

As a result, determining whether such emptiness, confusion, and lack of concretization were intentional or unintended is challenging. There is no shortage of awareness or sensitivity; on the contrary, both are plentiful.[1064] However, it appears that the Union is waiting for new litigation, specifically claims brought by trans people who have not undergone gender confirmation surgery, other gender nonconforming individuals, or intersex people, to emerge through judicial interpretation, potentially leading to legislative changes, as happened after *P v. S.*[1065]

This avoids predicting problems and complexities, but it forces the legal system to operate in a reactive rather than proactive approach.[1066] The legislation, according to

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[1059] See also Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1060] European Commission, Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2015] COM/2015/0190.
[1061] Resolution of 15 September 2016 on application of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive') (European Parliament, 2015/2116(INI)).
[1062] See The Gender Directives and also Council of the European Union, Draft Minute of the 2606th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs) Document Number ST 13369 2004 INIT, held in Luxembourg on 4 October 2004, 7.
[1063] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1064] Idem.
[1065] Idem 58.
[1066] [1066] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).

Attorney General Tesauro, must 'keep pace with social changes'.[1067] This, in my opinion, necessitates the legal system to evolve not merely to accept new societal notions and advancements, but also to be capable of influencing societal change by offering new perceptions.

To put it another way, law must be capable of not only providing legal answers to discrimination claims brought by people who do not conform to binary and cis norms, but also of raising societal awareness of these people and their issues, thereby contributing to the debate and deconstruction of dichotomies.[1068] Indeed, Article 21 (1) of the EU Charter mandates that the Union actively promote basic rights.[1069] It is my view that EU law is merely one tool among others at our disposal towards inclusion.[1070]

It is debatable whether the lack of appropriate legal provisions and the ambiguity of some existing and manufactured notions were intentional or unintentional. Furthermore, one can wonder if the Union has the power to intervene at all, and if so, how far. The Union's legal framework establishes a reciprocal interaction with national legal systems, in addition to the osmotic relationship between law and society.[1071] The impact of EU law on national laws is evident, but the contrary is also true. For instance, Ireland prohibited sexual orientation discrimination in the workplace before the EU required it to do so. So, discrimination in the provision of goods and services is prohibited in Ireland, but not by the EU. It is also worth reflecting that some states are already pressing ahead of the CJEU

[1067] Opinion of Advocate General Tesauro, delivered on 14 September 1995, Case C-13/94 *P v S and Cornwall County Council* [1995] ECR I-02143, ECLI:EU:C:1995:444 [9].
[1068] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019); Similarly, Carl F. Stychin, 'Troubling Genders: A comment on P. v. S. and Cornwall County Council' (1997) 2(3) International Journal of Discrimination and the Law 217, 218- 219. Sceptical in this regard is Wayne Morgan, 'Queer Law: Identity, Culture, Diversity, Law' (1995) 5 Gay and Lesbian Law Journal 1, 41. The relationship between law and social change is controversial for Martha Minow, 'Law and Social Change'(1993) 62 (1) UMKC Law Review 171.
[1069] Paul Craig and Gráinne de Búrca*, EU Law, Text, Cases, and Materials* (6th edition, Oxford University Press 2015) 397; Andrew Williams, 'Human Rights in the EU' in Anthony Arnull and Damian Chalmers (eds) *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 252.
[1070] Wayne Morgan, 'Queer Law: Identity, Culture, Diversity, Law'(1995) 5 Gay and Lesbian Law Journal 1, 41 and 44, arguing for the need for 'more direct strategies'. Along the same lines, Dean Spade, 'Trans Survival and the Limits of Law Reform' in Laura Erickson-Schroth (ed) Trans bodies, Trans selves: A Resource for the Transgender Community (Oxford Univ. Press 2014) 187, claiming the ineffectiveness of (US) anti-discrimination law and hate-crime legislation, and proposing new strategies.
[1071] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).

in relation to a more expansive and inclusive approach - e.g., the O'Byrne case[1072] that doesn't seem to turn on medical intervention; various states with self-determination approaches; recognition of nonbinary people in Austria, Belgium, Denmark, Malta and of intersex people in Germany (analyzed in Chapter I).

The CJEU's 'general principles of Community law' are primary law and the European Convention on Human Rights and its elaboration by the European Court of Human rights are included therein. On the other hand, general principles of EU law were inspired not only by international human rights instruments, but also by national constitutions, before an express protection of human rights was established in the Treaties and the EU Charter came into force and became primary legislation.[1073]

Similarly, in terms of the subject at hand, the EU Member States' national legal systems are evolving new and more progressive characteristics. The German Federal Court, for example, declared in October 2017[1074] that the civil status law, which mandated gender registration but did not give a gender marker other than male or female, was unconstitutional. As a result, it asked that German legislators establish Basic Law-compliant provisions by December 31, 2018.[1075]

Apart from the notable remarks on 'binary gender patterns'[1076] and assumptions[1077], and thus the recognition of diverse identities beyond dichotomies,[1078] the recognition of 'gender identity' and 'gender expression' as protected grounds against discrimination[1079] would open the door to more inclusive readings of transgender phenomena and violations of human rights that are linked to gender nonconforming phenomena that are not linked

[1072] *Deirdre O'Byrne v Allied Irish Banks* [1974] DEC-S2013-015.
[1073] FRA and CoE, *Handbook on European non-discrimination law* (Publications Office of the European Union, 2018) 20-21; Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1074] Bundesverfassungsgericht (Germany), *Headnotes to the Order of the First Senate of 10 October 2017* (1 BvR 2019/16) [1]-[69]. For an English version, see <http://www.bverfg.de/e/rs20171010_1bvr201916en.html> accessed on 10 April 2022.
[1075] Idem 3.
[1076] Bundesverfassungsgericht (Germany), *Headnotes to the Order of the First Senate of 10 October 2017* (1 BvR 2019/16) for instance [59].
[1077] Idem, for instance [54].
[1078] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019).
[1079] Bundesverfassungsgericht (Germany), *Headnotes to the Order of the First Senate of 10 October 2017* (1 BvR 2019/16) [56].

to binary medicalized identity claims and are embodied versions of (a)gendered self-narratives. This is already the case with the Victims' Rights Directive.[1080]

It's unclear how the Gender Directives would be interpreted in this context if at all differently, and how would Union law respond to claims brought by someone who was discriminated against because of their gender nonconforming expression or nonbinary gender?[1081] Could the person rely on the Gender Directives, which ban discrimination in employment, occupation, and access to goods and services on the basis of 'sex'? How would the binary understanding of 'sex' under Union laws be understood when confronted with a nonbinary/medicalized view of sex and gender under national law?[1082]

Those questions, of course, are in addition to the Court's potential difficulties in dealing with claims brought by transgender and gender nonconforming people, if their sex or gender is not legally recognized: is gender identity (and arguably gender nonconforming expression or social gender transition) included in 'sex', as 'gender reassignment' is under the EU Gender Directives?[1083] Is it feasible to protect intersex and transgender persons while simultaneously gatekeeping understandings of gender equality? Is 'gender-related issues' included in the word 'sex-characteristics'? Is it possible for pregnant transgender man to rely on the Pregnancy Directive while identifying legally as male? [1084]

The German decision and the accompanying legislative solution may act as a stimulus for other Member States' legislatures and judicial authorities to re-examine their gender structures as well. Increased awareness and visibility of nonbinary sex and identities may also lead to more legal claims under national systems and more questions addressed to

[1080] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (2012) OJ L 315, Recital 17.
[1081] The *Taylor v Jaguar Land Rover* case in the UK suggests there is space for nonbinary and genderfluid persons in anti-discrimination law, even before gender recognition for nonbinary identities is realised. See *Taylor v Jaguar Land Rover Ltd* [2020] ET/1304471/2018 (15 September 2020).
[1082] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 61.
[1083] Irish law applied the EU non-discrimination principle before the introduction of gender recognition legislation. Claiming discrimination was not contingent on having a Gender Recognition Certificate.
[1084] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 61.

the Court under Article 267 of the TFEU.[1085] As a result, it is apparent that the Union must be prepared to face future challenges regarding these issues.[1086]

5. Conclusion

Gomes asks how should the EU intervene if it is expected to provide solutions to future claims and contribute to the (de)construction of gender concepts beyond binary and cisnormativity, despite its limited scope of action? [1087]

Gender essentialist classifications stifle the endless geometry of sex/gender and denaturalize sex/gender incongruence, resulting in the marginalization of certain groups and individuals through gender cisnormativity. Indeed, there is arguably a unifying feature that typifies the entire LGBTIQ+ spectrum, namely that (while diverse) its members cannot or refuse to conform to social norms around the gender binary, and confront the social expectation (the implicit programming) that how they identify, express themselves, behave, and love should flow rigidly from the 'fact' of being designated male or female at birth. The spectrum broadly rejects the concept of biology as destiny – namely, that because a person has certain sex characteristics at birth, a series of rigid expectations flow from that, to which we must all adhere. As a result, gender should be viewed as a continuum with numerous possible outcomes and trajectories. Trans, genderqueer, gender variation, gender fluid, and gender nonconforming are all terms that must be included in the legal categorizations of (a)gendered realities that need protection.

Individuals who do not conform to binary and cis norms face discrimination and violence in a wide variety of areas of life, including work, sports, health and social systems, family,

[1085] Idem.
[1086] As pointed out by Nora Markard, the German Court left that decision to the legislator, see Nora Markard, 'Structure and Participation: On the Significance of the 'Third Option' for the Equality Guarantee' (*The 'Third Option': Not Man, Not Woman, Not Nothing*' at IACL-AIDC blog, 3 March 2018) <https://www.bundesverfassungsgericht.de/e/rs20171010_1bvr201916en.html> accessed on 10 April 2022.
[1087] Inês Espinhaço Gomes, *Study Paper No 04/19 Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity* (Europa-Kolleg Hamburg, Institute for European Integration 2019) 61.

and social environments, because binary and cis norms define individuals, society, and institutions. Frequently, the legal system fails to protect them and, paradoxically, makes their lives more difficult. Transnormativity, which is the position that this thesis takes when analytically and textually deconstructing legal doctrine, normalizes all versions of gender/sex in/congruence as valid and true, reflecting and acknowledging each person's (a)gendered agency, narrative, identity, and expression.

This has been sufficiently addressed only by EU soft law up to now, which has addressed the need for a broad definition of gender reassignment and gender identity. Gender expression has also been addressed in good practices of stakeholders' organizations, such as WPATH,[1088] by human rights and legal experts, as with the Yogyakarta Principles[1089] and EU and domestic law, such as the Maltese Gender Identity, Gender Expression and Sex Characteristics Act 2015 and the EU Victims' Rights' Directive, showing that there is an emerging evolution of a norm in the EU not yet consolidated in EU binding law and CJEU jurisprudence, for depathologizing and inclusive gender diversity protection, as seen in the growing number of EU states with gender self-identifying laws outlined in Chapter I.

This emerging evolution must be reflected in CJEU jurisprudence in transgender and gender nonconforming plaintiffs' cases, both in employment, goods, family life and benefits within the scope of the EU's competence, as well as in asylum adjudication for non-citizens. The fact that gender reassignment has been an unclear concept, as to whether it includes nonbinary gender and non-operative transgender individuals and the fact that the EU Charter does not offer more explicit gender diversity protection clauses, leaves it to the CJEU to elaborate on whether the doctrine will include gender identity and expression in the open clause of prohibition of discrimination of the EU Charter, and will adopt a more inclusive, less binary and linear conceptualization of transgender identity and expression as protected grounds, also in asylum.

[1088] WPATH, 'World Professional Association for Transgender Health' (2022) <https://www.wpath.org/> accessed on 16 April 2022; WPATH, 'Standards of Care Version 7' (2012) <https://www.wpath.org/publications/soc> accessed on 16 April 2022.
[1089] International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007).

An approach based on self-determination, psychosocial experiences and personal narratives in the examination of cases of transgender and gender nonconforming cases by the CJEU, would lead to more coherent and clearer jurisprudence that would take a firm side in the pathologization/depathologization debate, instead of increasing the insecurity around the human rights and asylum jurisprudence at the EU level. Instead, it could firmly state that human dignity sides with the demedicalization approach.

The CJEU should follow the Commission and Parliament's suggestions as outlined in subchapter VII.1.3, and the EU should legislate within its scope also in the context of the Common European Asylum System in the context of current good practices and gender-inclusive theoretical and scientific knowledge. The transnormative analysis performed here shows that Transgender Studies tools, as elaborated in Chapter II, can help broaden the concept of dignity and the protection afforded to transgender and gender nonconforming citizens and asylum claimants alike by challenging legal cisheteronormativity at the EU level. This would have implications both for the assessment of credibility of transgender and gender nonconforming asylum applicants on their inclusion within a Particular Social Group for the purposes of refugee status determination, as well as for the assessment of persecution based on the non-adherence to gender norms beyond medicalized, westernized and binary norms and the risk of harm this may entail. The concept of gender nonconformity, as elaborated in Chapter III, could be employed by the CJEU in its jurisprudence rationale in order to broaden the scope of protection from sex discrimination and gender reassignment. This would refine asylum law also in a way that persecution and PSG are assessed by Member States in an inclusive way, doing justice and centring the narratives and experience of transgender and gender nonconforming asylum claimants. With this chapter, my analysis of the European Courts' jurisprudence on sexual orientation, transgender and asylum cases comes to an end, and I turn to the conclusions of this theoretical and legal endeavour.

Conclusion: A Transgender Studies framework to Gender Identity/Expression in Refugee Status Determination

In this concluding chapter of the thesis, I will bring together the various strands of my research in this thesis and present a coherent and comprehensive picture of my work, as presented. This chapter will demonstrate a thorough understanding of the research area and issues. It will highlight their implications and the contribution made to the field of study. The conclusion will summarize the key findings and offer insights into the broader implications of the research. This chapter is therefore critical in demonstrating the potential impact of the research on both theory and practice, as well as its limitations. In this chapter, I will provide a summary of the key findings of the research, draw conclusions, and suggest avenues for future research.

Summary and Research Objectives

In the previous chapters, I endeavoured to identify the developing human rights norms in an international and European context that can help us demarcate the fundamentality of gender identity/expression as an integral part of one's personality and identify the core content of the right to gender-identification. Through the doctrinal analysis of CJEU and ECtHR, I attempted to delineate the implicit or explicit definition of transness provided by the judicial review of the European Courts, EU Law and International Human Rights law. Through the transnormative textual analysis informed by Transgender Studies, I attempted to provide a critique of the dominant conceptualization of sex/gender incongruence both as identity and expression.

My purpose was to demarcate the scope of fundamental rights protected by EU Law and ECHR drawing on the Case Law of the ECtHR and CJEU regarding gender identity/identification/ expression in particular, and to envisage how this scope is configured in the context of EU Asylum Law especially regarding the severity of violation assessment. I sought to contextualize what are the positive and negative limits

of gender identity protection that can be derived from the related Case Law of the European Courts. I particularly focused on the insights that can be derived from the jurisprudence on sexuality and family life as deriving from the right to privacy (Art. 8 ECHR and Art. 7 CFREU)[1090] as well as from case law concerning religious freedom and freedom of conscience (Art. 9 ECHR and Art. 10 (1) CFREU),[1091] which in my view can be extended to gender identity/expression as traits and practices that permeate the private sphere. The right to relate[1092] and the right to moral integrity (Art 8 ECHR) can be envisioned when it comes to gender identity and expression as the right to identify and present as one's gender.

In Chapter III, I tried to envisage a Transgender Studies approach on gender identity/expression in asylum law, under the concept of gender nonconformity informed by relevant human rights norms to provide a more articulate legal framework for establishing membership of a 'Particular Social Group'[1093]. I did this so as to limit the ambiguity and stereotyping that arises in the context of credibility assessment by RSD bodies in relation to the gender-identity/expression of the claimant. I also tried to provide a decolonial critique of transness and gender nonconformity in asylum law, in order to open up the space for gender diverse narratives based on intersectionality and anti-essentialism beyond westernized identitarian notions of human rights.

I sought to adopt gender nonconformity as a framework for assessing trans asylum claims as claims of stigmatized gendered identities and performances, drawing on the work of Millbank and Berg and providing a critique of the work of Hathaway and Pobjoy.[1094] I concluded that claims based on gender identity/expression should assessed based on a socio-political treatment (official and civil) and not in a subjective (psychological impact) manner in relation to 'well-founded fear of persecution' so as not to *ad hoc* burden the

[1090] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 8; European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 7.
[1091] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 9; European Union, European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 10 (1).
[1092] Kees Waaldijk, 'The Right to Relate: A Lecture on the Importance of 'Orientation' in Comparative Sexual Orientation Law' (2013) 24 *Duke Journal of Comparative & International Law* 161.
[1093] Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group.' in Thomas Spijkerboer *Fleeing* (UTS: Legal Studies Research Paper Series No. 2013/1, 2013) <http://ssrn.com/abstract=2312887> accessed 25 July 2020.
[1094] James Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York Journal of International Law and Politics 315.

applicant and medicalize the asylum adjudication. I argue that the violation of the right to live and express freely as trans should be considered *a priori* a fundamental violation of human rights, an analysis which I support in later chapters engaging with the extraterritorial application of the right to privacy and the invocation of the rights of conscience, expression, dignity and relational autonomy in cases of trans and gender nonconforming asylum claimants. I also addressed the legal reasoning behind the prohibition of the discretion requirement by LGBTQ+ asylum claimants, critically analysing relevant domestic case law (Chapter III) as well as CJEU jurisprudence (Chapter VII).

Main Findings

This study has analysed doctrinally and textually the jurisprudence of CJEU and ECtHR on sexual orientation, gender identity and asylum, in order to make inferences on the space that gender identity and arguably gender expression take up in European asylum law. The CJEU and the ECtHR have not yet decided on any case involving a transgender or gender nonconforming asylum claimant but have done so on homosexual asylum claimants. First, when it comes the European Convention of Human Rights, it does not include a right to asylum, but there has been jurisprudence on the extraterritorial application of ECHR provisions, especially nonderogable rights, such as article 2 (right to life) and article 3 (prohibition of degrading and inhumane treatment). What I have tried to show through my doctrinal analysis of ECtHR jurisprudence is that the breach of the right to privacy from which a right to moral integrity derives can be very relevant for transgender and gender nonconforming asylum claimants. This breach can also result in an infringement of Article 2 and Article 3, which entail the risk of persecutory harm that claimants may suffer if they identify as the gender they are, or have an expression that does not conform to the gender norms that derive from the sex assigned at birth. Furthermore, legal gender recognition and the right to gender identity have been acknowledged to be protected under the right to private life (see Goodwin and I), but the jurisprudence has been reserved mainly for post-operative transexuals, and always in a binary way, although sterilization requirements have been banned for legal gender recognition. The Court has not offered a definition of transgender people that can be

nonbinary, have fluid or genderqueer identities or even have no identitarian claims but are treated inhumanely and degradingly due to their gender nonconforming expression. In that way, the Court has not clarified what is the scope of fundamental gender rights that are protected by the Convention. On the other hand, when it comes to sexuality claims, the Court has delivered judgments both on the right for privacy, but also on the freedom of expression and assembly, especially relating to speech and political belief. It can be said though, that the rejection of the cisheteronormative gender ideology by transgender and gender nonconforming, as well as queer people, through their gender performance and beliefs that do not conform to gender norms, may arise in future cases if viewed expansively in regard to the freedom of expression, and the freedom of conscience. That would be seminal in the context of asylum, since it would mean that transgender and gender nonconforming people would not have to prove their membership in a particular social group with more private questions and disbelief, than those persecuted because of politics or religion.

Proceeding to the doctrinal analysis of the CJEU jurisprudence, I attempted to understand the scope of what discrimination because of sex and sexual orientation means for the Court when it is within the scope of EU law, since such clarification would help demarcate whether discrimination (and in asylum law discrimination that amounts to persecution) because of sex, entails also gendered identities that do not conform to the expectations that derive from the sex assumed at birth. Although this is indeed the case, the court has not clarified what it means by gender reassignment, and it implicitly only validates binary trans identities of those who have undergone or intend to undergo medical transition. The Court does not talk about transgender, nonbinary or gender nonconforming people, but people who undergo gender reassignment and it remains unclear whether that transition may only be social, although such a case has not yet been considered.

It must be noted that asylum law is within the scope of EU law, that the CJEU delivers judgments on, and it has already determined some cases of gay asylum claimants. I examined these cases in order to be able to make inferences as to how claims by other identities within the LGBTQ+ umbrella would be examined in the context of asylum law. Certainly, the discretion requirement has been prohibited also in relation to its prohibition

in religious freedom (see Chapter VII, *X and Y*[1095]; *X, Y and Z*[1096]). I am quite sure that this would also entail a transgender person who is binary and according to the previous analysis in the chapter is considered to have undergone or wishes to undergo gender reassignment. But what about a nonbinary or nonoperative transgender person or one with gender nonconforming expression that is still at the risk of persecution? Also, in the decision of *A, B and C*,[1097] as well as F,[1098] intrusive questions were seen to breach the right to privacy. On the other hand, the use of stereotypes when assessing the credibility of the LGBTQ+ asylum claimants have not been completely prohibited, but were determined to have just a complementary role in credibility assessment. That is indeed dangerous, since gender norms are changing constantly, they have been westernized and colonized (see Chapter III), and some of the applicants do not even identify as being under the LGBTQ+ umbrella but just narrate such experiences, tendencies and practices deriving from their personality and the fact that these factors put them at risk. Narratives of (a)gendered experiences in opposition to identitarian statements are more inclusive of gender practices, conscience and performance, including the ones that do not result in identity claims. A narrative approach to refugee status determination for transgender asylum claimants is more in tune with intersectionality and anti-essentialism, as well as the decolonization of transness (see Chapters I and II). It also is the basis for bringing Transgender Studies into refugee law.

For the latter reason, I have proposed gender nonconformity as a unifying lens through which membership in a particular social group as ground for asylum, as well as risk of persecution can be examined. This is a relational concept that focuses on the social location of the applicant in the country of origin and can assess the risk of serious harm due to not adhering to gender norms, something that must be deemed as a priori fundamental for the exercise of human rights. This last statement related also to the right to dignity, as a founding stone of EU law (See Chapter VII) and personal autonomy as a key concept for the individual protections that the European Convention of Human Rights affords to all people in its territory (see Chapter VI). As Nedelsky has put it in her ground-

[1095] Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z (Germany*) [2012] ECLI:EU:C:2012:518.
[1096] Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* [2013]ECLI:EU:C:2013:720.
[1097] Joined cases C-148/13 to C-150/*13 A, B and C v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2406.
[1098] Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36.

breaking work on autonomy and the law, this concept must be seen relationally since relationships are what enable us to be autonomous.[1099] This gains even more significance in the case of transgender and gender nonconforming persons, whose gender identity/expression is not only a private issue but must be validated socially in order to be experience in a full and liberating way. This kind of autonomy is intrinsically related to dignity, the right to one's personality in a material, social, political, spiritual and relational way. For this reason, my view is that gender nonconformity entails all essential aspects of EU and ECHR individual protection in a way that corresponds to the purpose of refugee law.

Finally, through the transnormative textual analysis that I performed in respect of sexuality and gender identity case law of CJEU and ECtHR, I have revealed the cisheterocentrism, binarism and medicalization that is prevalent in the European Courts' jurisprudence. Through the application of Transgender Studies (see Chapter II) that consider the myriad of geometries of sex characteristics/gender identity/gender expression valid and in need of institutional and social acknowledgement through the narration of trans experiences, I expose the complementary function of ciscentrism and heteronormativity in the Courts' jurisprudence. In fact, transgender experience is assumed as an exception by the Courts, as an example of gender incongruence that, on the one hand, needs to be legally regulated and, on the other hand, reflects the way the judiciary perpetuates the binary, medical and institutional cisheteronormativity.

Interrelationship with the existing body of knowledge and key concluding statements

According to Camminga, the phrase 'transgender' is now widely used.[1100] It was historically developed in the Northern Hemisphere and is based on motion. As an analytical concept, it includes ideas like, imaginaries, borders and 'home/s.' It addresses the social body's theoretical problems of interpellation and classification as well as the

[1099] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011); Jennifer Nedelsky, 'Reconceiving autonomy: sources, thoughts and possibilities' (1989) 1(1) Yale Journal of Law and Feminism 7.
[1100] B Camminga, *Transgender Refugees and the Imagined South Africa* (Palgrave Macmillan 2019) 2.

physical body's lived experience of the everyday. Though it is fundamentally presented as infinitely malleable, it also serves, paradoxically, as a term that connotes a particular kind of analytical and ideological rigidity.[1101]

This rigidity is frequently most apparent when the category is applied to mechanisms, such as human rights, whose functions frequently rely on questionable conceptual stability. As a term, it also travels, accumulating baggage and meaning as it traverses countries, cultures, and diverse institutional contexts.[1102] It is mobilized through legislative use, textual incorporation, popular culture, bodies that may feel a kinship to it or as a means to explain a felt sense of self, and organizations where it flags a specific political allegiance or alignment while simultaneously laying the groundwork for further access to various types of material support.[1103]

According to Duffy, it is possible to imagine a cisgender matrix in terms of theorizing gender variance and the law: a system of intelligibility in which identities that perform a binary, stable, mono-identity are given preference.[1104] The creation of human rights standards reflects this preference for bounded, discrete identity categories: the Yogyakarta Principles consider gender identity to be 'deeply felt,' implying a unitary, non-fluid component of the individual's personality, while the United Nations human rights treaties to date only include two gendered subjects (binary male/female).[1105] The cisgender matrix frames its subjects through the lens of congruence with observable sexual characteristics. People who violate the binary, transition from one gender to another (especially without medical assistance) or switch between fluid identities are rendered less or unintelligible.[1106]

According to Aizura, we frequently assume that trans people want hormones or surgery, for example, which reflects the assumption that gender reassignment is the same for most people.[1107] However, these accounts are also socially, geographically, and historically

[1101] Idem 2.
[1102] Idem.
[1103] Idem.
[1104] Sandra Duffy, 'Contested Subjects of Human Rights: Trans- and Gender-variant Subjects of International Human Rights Law' (2021) 84 The Modern Law Review, 1041, 1043-1044.
[1105] Idem.
[1106] Idem.
[1107] Aren Aizura, *Mobile Subjects: Transnational Imaginaries of Gender Reassignment* (Duke University Press, 2018) 3.

particular; they arise from colonial-era cultures in Europe and North America and are found in narratives that frequently view gender as a binary construct from the outset.[1108] Particularly in English-language trans historical narratives, autobiographies, novels, and films, representations of transnational mobility serve as metaphors for gender transformation.[1109] For example, trans migrants may self-identify differently (with local vocabulary) in the country of origin and transition to another (a)gendered experience and language during their travel and in the countries of receipt with their particular gender discourse.[1110] If we accept that accounts of transness as border-crossing movement both dominate the landscape of trans culture and emerge from particular cultural locations, we must also take seriously the fact that travel and mobility are concepts laden with the history of global and transnational travel and its representation: colonial and imperial exploration and settlement, as well as migration by sea, land, and air. We must also look into how migration and travel have changed some people's abilities while limiting them in other ways.[1111]

Human rights are based on 'the recognition of the inherent dignity and equal and inalienable rights of all members of the human family.'[1112] Yet, as Paul Johnson, Martha Nussbaum, and Robert Wintemute demonstrate,[1113] inherent dignity is not always a guarantee of equal rights when SOGIE (Sexual Orientation, Gender Identity and Expression) minorities are the subject. When these minorities claim 'to have rights', 'inclusivity' remains the ideal culmination of an evolutionary process for International Human Rights Law, not a category of interpretation. Using the lens of Arendt's work, SOGIE minorities should be protected as 'political communities' of their respective nations. In contrast, along with stateless and refugee people – that is, the outsiders of political communities – SOGIE minorities may be recognized as humans but 'without

[1108] Idem.
[1109] Idem.
[1110] Mariza Avgeri, 'Trans*it: Narratives of trans and nonbinary asylum applicants in the broader West' (2021) Here vs There Sexualities Special Issue (April 2021) https://doi.org/10.1177/13634607211013278 accessed 23 April 2023.
[1111] Aren Aizura, *Mobile Subjects: Transnational Imaginaries of Gender Reassignment* (Duke University Press, 2018) 3.
[1112] UN General Assembly, *Universal Declaration of Human Rights*, Resolution 217(III), 10 December 1948.
[1113] Paul Johnson, *Homosexuality and the European court of human rights* (Routledge 2013, 1st edn); Martha Nussbaum, *From disgust to humanity* (Oxford University Press 2010); Robert Wintemute, *Sexual orientation and human rights* (Clarendon Press 1996).

effective citizenship and no place in the world'.[1114] As a result, individuals who are members of both SOGIE minorities and asylum seekers may have extreme difficulty gaining access to international legal protection.[1115]

The dialectic of sexual normalisation and deregulation in cases of sexual and gender asylum is exacerbated by legal reading protocols that require a linear narrative of sexual identity from asylum seekers.[1116] An exposition of sexual identity assumes an essential and stable form of gender identity and sexual desire, whose gradual realization is narrativized teleologically, such that at the time of requesting sexual asylum, a clear, non-contradictory, and fully-formed sexual and gender identity has been formed.[1117] Many court decisions are based on the presumption that this type of narrative exposition is the appropriate 'evidence' of sexual identity.[1118] By requiring asylum seekers to provide such narrative evidence of their sexual identity, the law is unable or unwilling to recognize the complex, ambivalent, and contradictory ways in which sexual desire is experienced.[1119] When the representations of sexual desire in asylum seekers' speech and the reading strategies by the law that attempt to convert them into clear narratives of sexual identity intersect, the stability of sexual identity is queered.[1120]

It would contribute to the development of a field of judicial grammar that is epistemically inclusive. It would necessitate the active participation of judges in order to demonstrate a certain 'reflexive awareness' of the difficulty transgender individuals face in making their lives legible.[1121] Therefore, it would exceed the limited scope of a 'protected category' or the use of heuristics such as 'sex stereotyping.' Instead, a sharp focus would be placed on the discursive and material practices that comprise transgender

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[1114] Hannah Arendt, *The origins of totalitarianism* (Harcourt Brace Jovanovich 1973).
[1115] Carmelo Danisi, Moira Dustin, Nuno Ferreira, Nina Held, 'A Theoretical Framework: A Human Rights Reading of SOGI Asylum Based on Feminist and Queer Studies' in Carmelo Danisi, Moira Dustin, Nuno Ferreira, Nina Held (eds), *Queering Asylum in Europe* (Springer, IMISCOE Research Series 2021).
[1116] SM (Sudeep) Dasgupta, 'Sexual and Gender-based Asylum and the Queering of Global Space: Reading Desire, Writing Identity and the Unconventionality of the Law' in Emma Cox, Sam Durrant, David Farrier, Lyndsey Stonebridge, Agnes Woolley (eds), *Refugee Imaginaries: Research Across the Humanities* (Edinburgh University Press 2020) 87.
[1117] Idem.
[1118] Idem.
[1119] Idem
[1120] Idem.
[1121] B. Lee Aultman, 'Epistemic Injustice and the Construction of Transgender Legal Subjects' (2016) 15 Wagadu: A Journal of Transnational Women's and Gender Studies 11, 30.

discrimination experiences.[1122] In this manner, the process of judicial reasoning must intertwine with life itself. A commitment to the ordinary should assume that our legal institutions adequately reflect our collective life, grasping the roots of lived and situated moments in order to comprehend the diverse individuals who comprise transgender experiences.[1123] As gender and sex are integral components of human experience, the institutions that, at least in theory, we consent to govern us must comprehend gender and sex as they are lived in a world of bodily diversity.[1124]

Given the Refugee Convention provisions, the element of PSG that requires consideration of a claimant's 'true' or perceived identity remains regrettably unavoidable. In addition to encouraging more frequent use of the other four Convention groups in SOGIE cases, there is potential for establishing PSG membership through acceptance of self-identification as the default position and more consistent recognition of the benefit of the doubt principle.[1125] What is required is good faith on the part of decision-makers in believing that people do not want to leave their homes and families unless they have an extremely compelling reason to do so, something that the principle of the benefit of the doubt – a key principle in international refugee law – requires them to do regardless.[1126] The authorities, tribunals and courts should instead focus on persecution due to gender nonconformity, which is a concept that socially locates the applicant in terms of risk of harm due gender norms. Gender nonconformity may include theoretically non heterosexual sexual orientation, but since the protection of the latter has been established in emerging human rights norm, gender nonconformity can encompass all the expressions and experiences under the transgender identity and non cisheteronormative expression, also those that include lie in the intersecting area of diverse sexuality and gender.

In the words of Diane Otto, '[t]he critical insights of queer theory can offer new insights into how international law works to reinforce unequal relations of power, resources and knowledge, and how this might be resisted'.[1127] According to Manganini, queer curiosity

[1122] Idem.
[1123] Idem.
[1124] Idem.
[1125] Carmelo Danisi, Moira Dustin, Nuno Ferreira, Nina Held (eds), Queering Asylum in Europe (Springer, IMISCOE Research Series 2021) chapter 7, section 2.1.
[1126] Moira Dustin and Nuno Ferreira, 'Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity' (2021) 40 Refugee Survey Quarterly 315, 341.
[1127] Diane Otto, 'Introduction: Embracing Queer Curiosity' in Diane Otto (ed), *Queering International Law* (Routledge 2017).

aims to critically and thoughtfully analyze gender and sexuality norms and the role they play in symbolizing hierarchical power relations, not just in terms of their attachment to physical bodies but also in respect of the conceptual frameworks that make up the standards and practices of international law. In order to try to uncover the hierarchical relations of power present behind this interaction, her work has applied queer theory to the analysis of how a branch of international law, that of international refugee law, treats in theory and in practice the transgender refugee.[1128]

In *Undoing Gender*, Butler emphasizes the importance of seeking autonomy as a means of framing demands for rights, such as sanctuary for individuals who fear persecution.[1129] Butler discusses the 'political predicament' in which rights are granted to individuals, groups, and classes of people, which assumes 'bounded beings, distinct, recognizable, delineated, subjects before the law,' while rejecting on theoretical grounds the notion that 'autonomy' can be usefully supplemented by 'relationality.'[1130] Despite the fact that '[b]odily autonomy' is a paradox in practice, the assertion of these liberties 'cannot be made without recourse to autonomy,' and these claims must be made.[1131] This thesis's view is that it is vital to assert these autonomous claims based on rights and that relationality, opposite to what Butler contends, is a fruitful way to conceptualize autonomy as resulting from and enabling fostering relationships. I depart from common ground between queer theory and transgender studies focusing on the latter, since my purpose is rather reforming and democratizing the law, than deconstructing it.

Trent Olsen contends that the concept of relational autonomy is an appropriate ethical and practical standard for determining whether there has been persecution based on norm deviance, even though the place of rights in refugee law may be debated.[1132] I side with that view. Rights are not things that people 'have,' like identity, but rather relationships that are deeply ingrained in social practice.[1133] Young stated that 'rights are not fruitfully

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[1128] Irene Manganini, 'The Refugee Status Determination of Transgender Asylum-Seekers: a Queer Critique'
(The Global Migration Research Paper Series – N° 978-2-8399-2956-1, 2020) 60.
[1129] Judith Butler, *Undoing Gender* (Routledge 2004) 20.
[1130] Idem 20.
[1131] Idem 21.
[1132] P. Trent Olsen, 'The inclusive guise of 'gay' asylum: A sociolegal analysis of sexual minority asylum recognition in the UK' (PhD Thesis at the University of Edinburgh 2016) 215.
[1133] See also Thomas D. Perry, 'A Paradigm of Philosophy: Hohfeld on Legal Rights' (1977) 14 (1) American Philosophical Quarterly 41 where it is argued that rights imply duties and that liberties restrain others' rights.

conceived as possessions,'[1134] and that they can only be meaningfully realized with and through others, just like acts and identities.[1135]

The notion that a person is born with a predetermined place in society, on the other hand, is directly at odds with the principles of freedom and autonomy. Self-determined gender is a crucial component of one's ability to make free and autonomous decisions regarding their identities, roles, emotions, and modes of expression. As a result, States have a responsibility to ensure that gender recognition is accessible in a way that respects people's rights to freedom from discrimination, equal protection under the law, privacy, identity, and freedom of expression.[1136]

Another fundamental tenet of all other rights and freedoms is the right to equal recognition before the law. It has a practical connection to entitlements related to health, education, housing, social security, and employment insofar as the State bureaucracy's ability to actualize all of these entitlements is dependent on the person's identification.[1137]

In fact, the absence of legal recognition undermines the identity of the affected individuals to such a degree that it causes what can be described as a fundamental breach of state obligations. When states deny legal access to trans identities, they are actually sending a message about what constitutes an ideal citizen. Trans and gender-diverse individuals whose identities are not adequately recognized face denial of the right to health; discrimination, exclusion, and bullying in educational contexts; discrimination in employment, housing, and access to social services; violations of the rights of the child; and arbitrary restrictions on the rights to freedom of expression, peaceful assembly, and association, the right to freedom of movement and residence, and the right to leave any country.[1138]

Equal recognition before the law is also a crucial element of an effective system for safeguarding citizens from arbitrary detention and arrest, torture, and other cruel treatment, as it is well known that the individual's accurate identification serves as the

[1134] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 25.
[1135] Jennifer Nedelsky, 'Reconceiving Rights as Relationship' in Jonathan Locke Hart and Richard W. Bauman (eds), *Explorations in Difference: Law, Culture, and Politics* (University of Toronto Press 1996).
[1136] Idem [23].
[1137] Idem [24].
[1138] Idem [25].

first assurance of State accountability in all circumstances involving the deprivation of liberty.[1139] The fact that lack of trans healthcare and gender recognition renders claimants vulnerable to discrimination that due transphobic unwillingness of the state to protect amounts to persecution, should be given much more attention in the future. This would help establish whether being recognized by the law as a falsely gendered subject or being deprived of affirmative healthcare amounts to persecution regarding its durable and severe nature and triggers a violation of fundamental human rights.

By using gender nonconformity as an inclusive relational framework to appreciate the breach of rights of transgender and gender nonconforming asylum claimants, and by including gender expression as an essential element complementary to identitarian gender claims as grounds for asylum, the space of refugeehood opens up to different marginalized (a)gendered subjectivities that are under the risk of persecution. One does not need identify as LGBTQ+, two-spirited, gender nonconforming or genderqueer, in order to be able to access their fundamental right to dignity and autonomy through asylum. Gender nonconformity provides a way to assess asylum claims of people who flee from persecution due to nonconforming sex/gender/expression configuration according to mainstream gender norms. It also encompasses the complex interrelationship of gender, expression, and sexuality, where the framework of gender identity and sexual orientation is not adequate, because it is either fixed, binary, homonormative, or cisgendered. By giving the space to narratives of gender identity/identifications, gender expression and their interplay with performance, practice and desire, gender nonconformity proves an inclusive framework that can socially locate gendered protected characteristics that result in risk or serious harm. For gender identity and expression claims, it is also very much in accordance with Transgender Studies, which is critical but does not negate the fundamental impact that the attachment to gendered and other norms have for individuals in order to develop a sense of personhood. All configurations of sex/gender/expression are valid even though marginalized by mainstream gender ideology, whose problem is rather dominance than a specific normativity. A polymorphous and pluralist coexistence of gender normativities that would be protected in principle by law, open to challenge and constant reconstruction would not render institutional demands inconsistent with radical critical projects that

[1139] Idem [26].

socio-legally deconstruct gender, border and asylum as institutional power, but would perhaps make the former sensitive to subjectivities that are othered due to race, ethnicity, political belief, religion or gender/gender identity/gender expression/sexual orientation. This in policy would mean more cultural and gender diverse competence and more decolonising tools in order to make gendered persecution of any kind more intelligible by case workers in the Northwest. This can never succeed if migration management control prevails over justice, rights and care.

Limitations and future research

This project has been critical but reformist in its nature, opening the door for more critical legal studies that deconstruct the legal gendered status quo. On the other hand, it is the conviction of the author that asylum law has high everyday stakes for all people seeking protection from it, including transgender and gender nonconforming people who are often marginalized through more ideologically dominant westernized stereotypes of what an LGBTQ+ refugee really must be. Under this rationale, I decided to advocate through grounded research for a more inclusive refugee status determination process that is in tune with the spirit of refugee law, granting protection to those who need it due to persecution. Asylum law has been under pressure due to migration management regimes,[1140] but has been also inaugurating new categories of people that can benefit from it, such as LGBTQ+ people and climate refugees, despite the difficulties, disbelief and lack of specific guidelines and manuals on how to apply the law. In this landscape, it is my view that reforming asylum law while understanding that it creates exclusion through inclusion since defining categories always entails a certain portion of negation of otherness that does not fit, would make it essentially and in the present more inclusive to the needs of those it is supposed to protect. Democracy has had the same trajectory: expanding the group of people that it represents while being at the risk of dominating interests.

[1140] Calogero Giametta, 'New asylum protection categories and elusive filtering devices: the case of 'Queer asylum' in France and the UK' (2020) 46 (1) Journal of Ethnic and Migration Studies 142.

Future studies could take the form of a critical legal studies project on LGBTQ+ asylum both by supranational and domestic institutions, and comparative or crucial case studies on how transgender asylum is being assessed by asylum case workers or refugee appeals authorities. Doctrinal and comparative research would provide insights on how asylum adjudication in relation to people who are LGBTQ+ or transgender and gender nonconforming takes place in practice and how much it diverges from human rights norms and authoritative judicial and institutional points of reference. On the other hand, critical legal studies could expose not just the cisheteronormative assumptions of asylum adjudication but also connect them with the wider moment of bourgeoning and whitewashing LGBTQ+ rights, as well as pinkwashing through exclusion of certain types of deprived and marginalized subjectivities through migration management regimes. This can be linked to the rise of the western homonationalist western state,[1141] that perpetuates violence within, at and beyond borders while exerting normative human rights ideology. This would bring to the surface the contradiction of asylum as border control and the appropriation of LGBTQ+ rights for the reproduction of the liberal capitalist nation state.

Vulnerability as a concept should also be examined, not in procedural or accommodation needs, but in refugee status determination of LGBTQ+ individuals, which would elevate the harm in order to lower the threshold of risk of persecution in order for the asylum claimants to be granted asylum.[1142] Transgender and gender nonconforming asylum claimants, in particular, are very vulnerable to violations of human rights that otherwise would not constitute persecution, especially systematic deprivation of socio-economic rights due to lack of gender recognition.

Finally, subsidiary protection should be given attention in the future since it is an alternative international protection status for EU member states, from which LGBTQ+ claimants can benefit. This thesis, however, has focussed on international refugee and EU asylum law, and on transgender and gender nonconforming applicants in particular in order to refine theoretically the framework in which determination of refugeehood takes place and provide a critique of the authoritative interpretation of the European Courts on

[1141] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007).
[1142] Moira Dustin, 'Designating 'Vulnerability': The asylum claims of women and sexual minorities' (Refugee Law Initiative, 19 June 2017) <https://rli.blogs.sas.ac.uk/2017/06/19/designating-vulnerability-the-asylum-claims-of-women-and-sexual-minorities-2/> accessed 31 March 2023.

that matter, so that an expansive view of sex/gender/expression configurations can be legally protected for all individuals in the territory.

Intersex identities and sex characteristics have also been excluded from the focus of this thesis, since they demonstrate particular challenges for the binary, medicalized and interventionist legal framework that regulates sex/gender. Intersex identities are crucial for casting doubt in the binary categorization of sex characteristics, and conceptualizing sex characteristics not as purely dimorphic but on a spectrum, just as gender identity (see Chapter I). Due to the particular violations of human rights that intersex people, regardless of how they identify, face, it is the view of the author that this group has been particularly marginalized and its distinct demands have been ignored under the LGBTQI+ umbrella. That is the reason why I have chosen not to include sex characteristics in this thesis on gender identity and gender expression. My view is that focused research on intersex human rights (especially relating to non-consensual medical interventions and self-determination) would better serve the purpose of advocacy for justice, dignity, and moral integrity both in the context of human rights and refugee law.

I hope to have contributed to existing scholarship, by providing an analysis of the current state on transgender and gender nonconforming asylum claims in Europe and the EU and ways of addressing current discrepancies in asylum practice based on each individual's gender experience. As Leslie Feinberg said, 'gender is the poetry each of us makes out of the language we are taught',[1143] and the law must evolve in way that guarantees that we have space to blossom in our unique yet relational way and protects those who do not enjoy this safety and freedom. A Transgender Studies Framework is my suggestion for a judicial and legal way forward, one that treats sex/gender/identity/expression marginalized configurations not as an exemption that needs to be regulated, but as a valid possibility that needs to be acknowledged and protected. Changing the legal default and standards to be more inclusive while conceptualizing reality, relationships and subjectivities in a more complex ways is what brings law closer to justice.

[1143] Leslie Feinberg, *Trans liberation: beyond pink or blue* (Beacon Press 1998).

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