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## Abstract

The European Court of Human Rights is the human rights monitoring body that has dealt with the largest number of cases related to gender identity and trans\* persons. In this regard, it has recognised under Article 8 ECHR both a right to gender self-determination and a positive obligation for the State to adopt a procedure for legal gender recognition. However, Contracting States were given a wide margin of appreciation to set conditions for the legal recognition of a person's actual gender identity, leading to the acceptance by the Strasbourg Court of pathologising requirements such as a diagnosis of gender dysphoria and compulsory sex reassignment surgery. This contribution analyses and conceptually explains this message of trans\* pathologisation in the ECtHR's case law. Subsequently, on a normative level, it argues that this case law cannot be upheld taking into account the international trend towards full trans\* depathologisation, and the scope of the margin of appreciation that States (ought to) have in cases concerning gender identity.

## Keywords

European Court of Human Rights, trans\* persons, gender nonconformity, pathologisation, gender self-determination

## 1. Introduction

In recent years, trans\*<sup>1</sup> issues have made their way into mainstream media, with positive representations of trans\* persons increasingly appearing in popular culture.<sup>2</sup> Indeed, cultural awareness and

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1. The term 'trans\*' will be used throughout this contribution to denote all forms of gender nonconformity. Gender nonconformity refers to the situation where a person's gender identity or gender expression does not match their registered sex or the gender identity/expression that society attaches to it.
  2. E. Bribosia and I. Rorive, 'Human rights integration in action: making equality law work for trans people in Belgium' in E. Brems and S. Ouald-Chaib (eds), *Fragmentation and Integration in Human Rights Law: Users' Perspectives* (Edward Elgar Publishers 2018) 111.

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societal recognition of many forms of gender identity, gender expression and gender roles have continued to progress around the globe.<sup>3</sup> Over the last decade, trans\* rights and gender nonconformity as a legal and human rights issue have also been high on the agenda, both at the international and national level.<sup>4</sup> However, until very recently the law has quasi uniquely focussed on providing legal accommodation for transsexual persons who desired to, legally and physically, belong to the sex opposite to the one assigned to them at birth.<sup>5</sup> In many countries worldwide, those persons have been able to have their registered sex changed in the light of their actual gender identity.<sup>6</sup> In this regard, most procedures require the compliance with some psycho-medical conditions, ranging from an expert assessment/diagnosis confirming gender dysphoria or transsexuality, to sex reassignment treatment or compulsory sterility.<sup>7</sup> This is also referred to as the legal pathologisation of gender nonconformity and trans\* identities.

Although this use of pathologising conditions in law has been continuously criticised from a human rights perspective, its inherent exclusionary effect is often overlooked.<sup>8</sup> Indeed, over the last decade it has become increasingly clear that compulsory compliance with psycho-medical requirements, such as a psychiatric assessment/diagnosis and forced medical treatment in order to obtain legal gender recognition, violate the individual's right to personal autonomy and/or physical integrity.<sup>9</sup> However, these requirements also effectively reserve legal gender recognition for trans\* persons who are able and willing to comply with those medical conditions, that is transsexual persons.<sup>10</sup>

Although transsexual persons are probably the best-known members of the trans\* community, they only form 'the tip of the iceberg' of gender variation. Recent Belgian research indicated that while the prevalence of transsexualism was estimated at 1:12,900 for male-to-female transsexuals and at 1:33,800 for female-to-male transsexuals,<sup>11</sup> the prevalence of gender incongruence<sup>12</sup> (0.7%

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3. A. J. Neuman Wipfler, 'Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents' (2016) 39 *Harvard Journal of Law & Gender* 491, 494.
  4. M. van den Brink, 'The Legitimate Aim of Harmonising Body and Soul. Changing Legal Gender: Family Life and Human Rights' in K. Boele-Woelki and A. Fuchs (eds), *Same-Sex Relationships and Beyond. Gender Matters in the EU* (Intersentia 2017) 247. See in this regard also K. Franklin and S. E. Chinn, 'Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases' (2017) 32 *Berkeley Journal of Gender, Law & Justice* 1, 3.
  5. See in this regard for instance D. A. Gonzalez-Salzburg, 'The Accepted Transsexual and the Absent Transgender: a Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2014) 29 *American University International Law Review* 797, 828.
  6. This procedure is often referred to as 'legal gender recognition'.
  7. Although other conditions, such as compulsory divorce, may also be problematic from a human rights perspective, this contribution will only focus on conditions of a psycho-medical nature.
  8. See below.
  9. Z. Davy, A. Sørliie and A. Suess Schwend, 'Democratising diagnoses? The Role of the Depathologisation Perspective in Constructing Corporeal Trans Citizenship' (2018) 38 *Critical Social Policy* 13, 27.
  10. In this contribution, a distinction is made between transsexual trans\* persons and non-transsexual trans\* persons. While the former are willing to undergo sex reassignment therapy in order to align their bodily appearance with their experienced gender identity, the latter are not. Although non-transsexual trans\* persons might want to undergo some trans\*-specific forms of health care, such as for instance a breast reduction or removal, they do not necessarily seek full congruence between their sex characteristics and experienced gender identity. In other words, while all transsexual persons are trans\*, not all trans\* persons are transsexual.
  11. G. De Cuyper and others, 'Prevalence and Demography of Transsexualism in Belgium' (2007) 22 *Eur. Psychiatry* 137. These estimations only take into account transsexuals who seek access to medical and/or surgical treatment.
  12. 'Gender incongruence' refers to the situation where a person more strongly identifies with the gender identity that society attaches to the opposed sex than with the gender identity aligned with their own sex.

of persons assigned male at birth and 0.6% of persons assigned female at birth) and gender ambivalence<sup>13</sup> (2.2% of persons assigned male at birth and 1.9% of persons assigned female at birth) was much higher.<sup>14</sup>

This contribution will first elaborate on the pathologisation of trans\* persons in law and society (Section 2.). Second, it will analyse and conceptually explain the acceptance of the aforementioned pathologisation of trans\* persons in the case law of the European Court of Human Rights (ECtHR).<sup>15</sup> Not only is the ECtHR's case law authoritative within the Council of Europe and around the globe, the Court has also been the human rights monitoring body that has dealt with the largest number of cases that are related to gender identity and (the conditions for) the legal recognition thereof.<sup>16</sup> It will be argued that – despite the existence of a right to gender self-determination under Article 8 ECHR (Section 3.1.) – a message of trans\* depathologisation cannot be deduced from the Court's rulings (Section 3.2.1.). *A fortiori*, it may even be argued that throughout the last decades the Court has facilitated the perseverance of the legal pathologisation of trans\* persons (Section 3.2.2.). Subsequently, on a normative level, it will be argued that the Court's acceptance of trans\* pathologisation cannot be upheld taking into account the international trend towards full depathologisation of trans\* persons (Section 4.1.), and the scope of the State's margin of appreciation in cases concerning gender identity (Section 4.2.).

## 2. Making the argument: (De)pathologisation of trans\* persons in medicine, society and law

The term 'transsexual' was first introduced by sexologist Magnus Hirschfeld in 1923, who wrote about the differences between cross-dressing, cross-gender identification and homosexuality, and mainly aspired to normalise the latter. General interest for issues relating to gender identity really grew with the highly mediatised cases of Christine Jorgensen, an American transwoman who received hormonal treatment and sex reassignment surgery in 1952 and was initially treated for homosexuality, and Laurence Michael Dillon, a British transman who underwent surgery in the 1940's. However, the first sex reassignment operation dates back to 1912.<sup>17</sup>

Harry Benjamin's book 'The Transsexual phenomenon' (1966) is commonly regarded as the foundation of today's approach to issues regarding gender nonconformity.<sup>18</sup> Benjamin strongly believed that transsexual persons' bodies should be adapted according to their gender identity through medical treatment, consisting of hormonal replacement and sex reassignment surgery, instead of the until then preferred psychotherapy. In his vision, this medical treatment should be reserved for 'true' transsexuals, who are accordingly diagnosed by a psychiatrist, leading to the pathologisation of transsexuality. Since the 1960's, this medical approach has been the leading

13. 'Gender ambivalence' refers to the situation where a person identifies equally with the gender identity assigned at birth as with the other gender identity. Gender ambivalent persons are sometimes also called 'non-binary persons'.

14. E. Van Caenegem and others, 'Prevalence of Gender Nonconformity in Flanders, Belgium' (2015) 44 *Archives of Sexual Behaviour* 1281.

15. Due to a lack of space, this contribution only addresses the ECtHR's case law concerning legal gender recognition under Article 8 ECHR. Nevertheless, it is clear that the pathologisation of trans\* persons might also fall in the scope of Article 3 ECHR and Article 14 ECHR.

16. Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender' (n 5) 801.

17. F. Pfäfflin, 'Transgenderism and Transsexuality: Medical and Psychological Viewpoints' in J.M. Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2016) 12.

18. H. Benjamin, *The Transsexual Phenomenon* (The Julian Press Inc. Publishers 1966).

way in which society deals with issues relating to incongruence between a person's biological sex and gender identity, making a 'sex change' between 'male' and 'female' possible.

Transsexuality was first included in the third edition of the Diagnostic Statistical Manual of Mental Disorders (DSM-3) of the American Psychiatric Association in 1980, before being changed to 'gender identity disorder' in DSM-4. The fifth and current Diagnostic Statistical Manual of Mental Disorders (DSM-5) still pathologises situations where a person's gender identity does not match their biological sex.<sup>19</sup> However, it has revised the DSM-4 diagnosis of 'gender identity disorder' to 'gender dysphoria', to emphasise that gender nonconformity in itself does not constitute a mental disorder. The diagnosis of 'gender dysphoria' refers to the clinically significant distress associated with the condition of gender incongruence (transsexuality).

The currently in force ICD<sup>20</sup>-10 Classification of Mental and Behavioural Disorders of the World Health Organisation (WHO) places 'transsexualism', 'dual-role transvestism', 'gender identity disorder of childhood', 'other gender identity disorders' and 'gender identity disorder, unspecified' under the separate chapter 'gender identity disorders'.<sup>21</sup> Transsexuality for instance, is defined as the desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make one's body as congruent as possible with one's preferred sex through surgery and hormonal treatment, during at least two years persistently, which is not a symptom of another mental disorder, such as schizophrenia, or associated with chromosome abnormality. However, the WHO's forthcoming (2019) revision of the ICD (ICD-11) will remove the diagnostic category of 'gender identity disorders' and replace it with a diagnosis of 'gender incongruence' as a condition related to sexual health, which does not include the assumption of a mental disorder.<sup>22</sup>

The World Health Organisation and the American Psychiatric Association (still, although to a lesser extent than before) pathologise gender nonconformity by linking it to a medical diagnosis (gender dysphoria or gender identity disorder/gender incongruence), and foreseeing various forms of medical treatment. Having a nonconforming gender identity thus is a medical condition – although not necessarily a (mental) disorder – to be treated rather than being seen as a fundamental aspect of identity.<sup>23</sup>

Although medical treatment is very important for (some) trans\* persons, one may question the dominance of this medical perspective. Indeed, the medical model forces individuals to fit their gender identities into a pathological framework, and conform to a set definition irrespective of actual experience or desires, making medical authorities gatekeepers with the power to regulate gender identity.<sup>24</sup> Nonetheless, gender diagnoses have been retained predominantly for the purely pragmatic reason that some people wish for medical interventions such that they have a more holistically congruent self,<sup>25</sup> and therefore should have access to health care and social

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19. See in this regard also D. Gonzalez-Salzburg, 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*' (2018) 81 *The Modern Law Review* 526, 533.

20. 'ICD' stands for 'International Classification of Diseases'.

21. World Health Organisation, 'ICD-10 Classification of Mental and Behavioural Disorders', <[www.who.int/classifications/icd/en/GRNBOOK.pdf](http://www.who.int/classifications/icd/en/GRNBOOK.pdf)> accessed 31 August 2018.

22. C. Richards and others, 'Non-binary or Genderqueer Genders' (2016) 28 *International Review of Psychiatry* 95, 96.

23. A. E. Silver, 'An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity' (2013-2014) 26 *Columbia Journal of Gender and Law* 488, 506. See also Gonzalez-Salzburg, 'An Improved Protection for the (Mentally Ill) Trans Parent' (n 19) 533.

24. *ibid* 499; See also Gonzalez-Salzburg, 'An Improved Protection for the (Mentally Ill) Trans Parent' (n 19) 538.

25. Richards and others (n 22) 97; See also M. D. Levasseur, 'Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights' (2014-2015) 39 *Vermont Law Review* 943, 954.

security.<sup>26</sup> However, it needs to be questioned whether a purely legal and administrative procedure such as legal gender recognition should have any relation to standards of care for trans\* persons.

The medical model of gender nonconformity has been widely adopted by the legal system. For instance, a comparative study by 'Transgender Europe' from 2018 pointed out that 34 European countries require a mental health diagnosis/assessment in the course of the procedure of legal gender recognition. Fourteen countries require compulsory sterility and nineteen countries require forced medical intervention.<sup>27</sup>

As a last introductory note, it is important to point out that the depathologisation of gender nonconformity in medicine and in law should not have any influence on the importance, availability, options and funding of medical and/or psychological treatment, which should always be individualised according to the needs of the trans\* person concerned.<sup>28</sup> In this regard, empirical research performed by Dietz in Denmark shows that when gender self-determination in procedures for legal gender recognition is not complemented by depathologised access to trans\*-specific health, the inclusive intentions of legal reform might be undermined.<sup>29</sup>

### 3. Trans\* (de)pathologisation in the ECtHR's case law

#### 3.1. The right to (legal recognition of) gender identity under Article 8 ECHR

The European Convention on Human Rights (ECHR) does not explicitly mention the matter of gender identity, nor the registration thereof. However, the ECtHR has held in the past that the individual freedom to define one's gender identity is one of the most basic essentials of self-determination.<sup>30</sup> Indeed, according to the Court, one's right to gender identity and to personal development, is a fundamental aspect of the right to respect for private life.<sup>31</sup> Although it has only once explicitly placed individual decisions regarding gender identity under the scope of the right to personal autonomy *ex* Article 8 ECHR,<sup>32</sup> it has consistently considered that 'elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8',<sup>33</sup> of which the guarantees are interpreted based on the underlying principle of personal autonomy. It has in that sense also stated that 'protection is given to the personal sphere of each individual, including their right to establish details of their identity as human beings',<sup>34</sup>

26. C. Kraus, 'Classifying Intersex in DSM-5: Critical Reflections on Gender Dysphoria' (2015) 44 *Archives Sexual Behaviour* 1147, 1156; See also J. T. Theilen, 'Depathologisation of Transgenderism and International Human Rights Law' (2014) 14 *Human Rights Law Review* 327, 329.

27. Transgender Europe, 'Trans Rights Europe Map & Index 2018', <<https://tgeu.org/trans-rights-map-2018/>> accessed 31 August 2018.

28. Levasseur (n 25) 956.

29. C. Dietz, 'Governing Legal Embodiment: On the Limits of Self-Declaration' (2018) *Feminist Legal Studies*, <<https://doi.org/10.1007/s10691-018-9373-4>> accessed 31 August 2018.

30. *S.V. v Italy* App no 55216/08 (ECtHR 11 October 2018) para 54-55; *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 93. *Van Kück v Germany* App no 35968/97 (ECtHR, 12 June 2003), para 73.

31. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 93. *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015), para 66.

32. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 93.

33. See *inter alia* *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015), para 56; *Dudgeon v United Kingdom* (ECtHR, 22 October 1981) Series A no 45, para 41.

34. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 90.

which encompasses the harmonisation of one's sex and self-perceived gender identity.<sup>35</sup> It may therefore be stated that the right to define one's gender identity is firmly founded on the right to personal autonomy under Article 8 of the Convention.<sup>36</sup>

With regard then to the *legal recognition* of this self-defined gender identity, the true landmark case was *Christine Goodwin v. United Kingdom*,<sup>37</sup> in which trans(sexual) persons were arguably written into legal existence at the European level.<sup>38</sup> After acknowledging that gender identity is an important aspect of personal identity, the Court referred to international evolutions in science, medicine, society and the law to find that the matter of legal gender recognition could no longer fall within the State's margin of appreciation, save as regards the appropriate means of achieving this recognition (that is the conditions for legal gender recognition).<sup>39</sup> It affirmed this ruling in later case law,<sup>40</sup> in which it even held that the legal recognition of one's 'sexual identity' amounts to a right of the individual under Article 8 ECHR.<sup>41</sup> Nevertheless, States still maintain a margin of appreciation to set conditions to the exercise of the right to legal gender recognition. In other words, while individuals have the right to define their own gender identity based on their personal autonomy under Article 8,<sup>42</sup> the *legal recognition thereof* may be made conditional by the State.<sup>43</sup>

### 3.2. The ECtHR's position on pathologising conditions for legal gender recognition

**3.2.1. Developments in the case law.** As mentioned above, the conditions for legal gender recognition in many countries are of a psycho-medical nature, and therefore pathologise trans\* persons. However, this legal pathologisation of trans\* persons has only scarcely reached the Court's attention, even though there have been cases concerning access to and reimbursement of sex reassignment therapy.

In 2007, the Court found a violation of Article 8 ECHR in *L. v. Lithuania* because of the authorities' persistent failure to adopt legislation enabling sex reassignment surgery, even though the Civil Code provided for a right to legal gender recognition on the basis of sex reassignment.<sup>44</sup> It found that the limited legislative gap regarding sex reassignment therapy left the individual transsexual person in a situation of distressing uncertainty with regard to the private life and the

35. B. Rudolf, 'European Court of Human Rights: Legal Status of Postoperative Transsexuals' (2003) 1 *International Journal of Constitutional Law* 716, 721.

36. See in this regard also A. Sørli, 'Legal Gender Meets Reality: A Socio-Legal Children's Perspective' in A. Hellum (ed), *Human Rights, Sexual Orientation, and Gender Identity* (Routledge, 2017) 81.

37. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002). J. T. Theilen, 'The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe' in G. Schreiber (ed), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven* (De Gruyter 2016) 377; See in this regard also F. R. Ammaturo, *European Sexual Citizenship. Human Rights, Bodies and Identities* (Palgrave 2017) 22.

38. Theilen, 'The Long Road to Recognition' (n 37) 377.

39. See below.

40. See for instance *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015), para 110; *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 99-100.

41. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 132. Nevertheless, there are still a number of Council of Europe Member States that do not provide a possibility of legal gender recognition: Albania, Andorra, Cyprus, Kosovo, Liechtenstein, Macedonia, Monaco, and San Marino.

42. Theilen, 'The Long Road to Recognition' (n 37) 377.

43. *ibid* 378. See also Ammaturo (n 37) 22; van den Brink (n 4) 237; Theilen, 'Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition' (2018) *European Human Rights Law Review* 249, 250.

44. *L. v Lithuania* App no 27527/03 (ECtHR, 11 September 2007).

recognition of one's true identity.<sup>45</sup> Nevertheless, the Court did not address the conformity of the requirement of sex reassignment surgery for legal gender recognition with Article 8. Moreover, from this case, trans(sexual) persons also cannot deduce a right to sex reassignment surgery or trans\* specific health care *in abstracto*.<sup>46</sup>

One year later, in 2008, the Court had the chance to address the conformity of the compulsory requirement of sex reassignment therapy for legal gender recognition, yet declared the case manifestly ill-founded.<sup>47</sup> Taking into account the State's margin of appreciation, it found the conditioning of legal gender recognition on the completion of a hormonal-surgical process not unreasonable under Article 8 ECHR.<sup>48</sup>

In *Y.Y. v. Turkey* (2015), the Court held that the requirement of sterilisation to have access to sex reassignment therapy violated Article 8 of the Convention. However, interestingly, it made use of arguments that related more to legal gender recognition than to access to medical sex reassignment. The Court first held that, in accordance with the principle of subsidiarity, it was primarily for the Contracting States to decide on the measures necessary to resolve within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status. However, it attached less importance to the lack of evidence of a common European approach than to the existence of clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transgender persons but of legal recognition of the new gender identity of post-operative transgender persons.<sup>49</sup> In that connection it emphasised that:

in the Appendix to Recommendation CM/Rec (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers of the Council of Europe stated that prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements. Furthermore, in Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity, the Parliamentary Assembly of the Council of Europe has called on the Member States to address the specific discrimination and human rights violations faced by transgender persons and, in particular, to ensure in legislation and in practice their right to official documents that reflected the individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as gender reassignment surgery or hormone therapy.<sup>50</sup>

The Court then argued that 'the same is undoubtedly true in relation to the legal requirements governing access to medical or surgical procedures for transgender persons wishing to undergo the physical changes associated with gender reassignment.'<sup>51</sup> It therefore held that the respect for a person's physical integrity under Article 8 ECHR opposed the requirement of compulsory sterilisation.<sup>52</sup>

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45. *ibid*, para 59.

46. Gonzalez-Salzburg, 'The Accepted Transsexual and the Absent Transgender' (n 5) 824.

47. *Nuñez v France* App no 18367/06 (ECtHR, 27 May 2008).

48. *ibid*, para 1.

49. *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015), para 66.

50. *ibid*, para 110.

51. *ibid*, para 107.

52. *ibid*, para 119.



The matter of compulsory medical conditions as a prerequisite for legal gender recognition finally explicitly arose in the case of *A.P., Garçon and Nicot v. France*.<sup>53</sup> At the time of the relevant facts, French law required – on the basis of jurisprudence of the Court of Cassation – the fulfilment of two medical conditions in order to have one’s registered sex changed in the light of one’s gender identity through a judicial procedure: the applicant concerned needed to present proof of the real existence and persistence of the ‘syndrome of transsexuality’ and the ‘irreversibility of the transformation of the bodily appearance’ to the ‘opposite’ sex. The courts were usually satisfied with evidence on the basis of medical and psychological certificates, but sometimes ordered the applicant to be subjected to a medical expert examination in case of doubt.<sup>54</sup> The ECtHR first addressed the matter of the ‘irreversibility of the transformation of the bodily appearance’. While the French Government argued that this irreversibility did not necessarily entail a surgical intervention or treatment leading to the person’s sterility, the Court nevertheless aligned this condition with a *de facto* condition of surgical or hormonal sterilisation.<sup>55</sup> In other words, the Court did not (want to) address other medical conditions which could fall under ‘irreversibility of the transformation of the bodily appearance’, such as sex reassignment surgery or hormonal treatment.<sup>56</sup> It then proceeded by verifying whether the State, taking into account its margin of appreciation, struck a fair balance between the general interest and the rights of the applicants, who renounced the conditions to which they had to comply for the recognition of their gender identity. The Court pointed out that the margin of appreciation of the State was restrained. Indeed, even though there was no European consensus on the condition of sterility for legal gender recognition, and the matter concerned the civil status and delicate moral and ethical questions, the right to sexual identity and personal development are fundamental aspects of the right to respect for one’s private life under Article 8.<sup>57</sup> Moreover, a person’s physical integrity is directly at stake in case of a sterilisation.<sup>58</sup> The Court then noted the international tendency to abandon the condition of sterility in the context of legal gender recognition, which France *nota bene* joined in October 2016, and was shared by numerous international and European institutional human rights actors.<sup>59</sup> The Court then held that conditioning legal gender recognition on sterilising surgery or treatment, which the person concerned does not wish to undergo, comes down to conditioning the exercise of the right to respect for one’s private life under Article 8 on the renunciation of one’s right to physical integrity, protected by Articles 8 and 3 ECHR, which causes an impossible dilemma.<sup>60</sup> Even though it acknowledged the importance of the general interests of the non-disposability, truthfulness and coherence of the civil status,<sup>61</sup> it found that the State failed to strike a fair balance between those interests and the rights of the applicants and therefore violated Article

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53. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017).

54. The latter situation was the case for applicant A.P.

55. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 83, 116.

56. See Theilen, ‘Beyond the Gender Binary’ (n 43) 251; See in this regard also D. Gonzalez-Salzberg, who argues otherwise, Gonzalez-Salzberg, ‘An Improved Protection for the (Mentally Ill) Trans Parent’ (n 19) 527.

57. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 123.

58. *ibid*, para 123.

59. *ibid*, para 124-125.

60. *ibid*, para 131.

61. The Court affirmed this in the case of *S.V. v. Italy*, in which it found that the non-disposability, truthfulness and coherence of the civil status, and the requirement of legal certainty justify rigorous procedures in order to verify the “profound motivations” for legal gender recognition. See *S.V. v Italy* App no 55216/08 (ECtHR 11 October 2018), para 69.

8 ECHR.<sup>62</sup> Nevertheless, the Court upheld the condition of providing evidence of the existence of the ‘syndrome of transsexuality’ and the possibility for the State to order the performance of a medical expert research, considering the classification of ‘transsexuality’ as a form of gender identity disorder in ICD-10,<sup>63</sup> the margin of appreciation for the State and the smaller consequences for the persons concerned. The case thus had for direct effect the illegality of a condition of sterility for legal gender recognition under Article 8 ECHR, while upholding the trans\* pathologisation in general.<sup>64</sup> Nevertheless, one may at least deduce from the case law that the Court considers medical conditions for legal gender recognition to be an interference with the right to gender identity and personal development, and therefore with Article 8 ECHR.<sup>65</sup>

The Court’s caution to depathologise trans\* identities also became clear in the recent cases of *X v. Russia* (2018) and *S.V. v. Italy* (2018). The former case concerned a person who was registered as male at birth, yet who adopted a female gender expression later on in life. The applicant showed interests in a minor boy, which were interpreted as romantic/sexual feelings by the authorities, and was involuntarily institutionalised for showing ‘delusional’ behaviour. Although the Court found a violation of Article 5 ECHR due to the failure by the authorities to prove that the applicant’s condition actually warranted compulsory confinement, it did not thoroughly address the authorities’ transphobic motives. While the Court noted that the authorities ‘paid detailed attention and attached decisive importance to the applicant’s change of hair colour, his interest in women’s clothes, jewellery, and make-up’ in order to proceed with the compulsory hospitalisation, it chose not to ‘express an opinion on whether these aspects of the applicant’s life can be said to demonstrate the existence of any mental disorder’.<sup>66</sup> In other words, not only did the Court not conceptualise the applicant’s behaviour as nonconforming gender identity/expression, it also did not point out the inherent pathologisation of the applicant by the Russian authorities. While the Court did not go as far as declaring the applicant’s gender expression a medical condition in the same way it has done with transsexuality, it did not exclude this classification either. In *S.V. v. Italy*, the Court considered the situation in which a transwoman was forced to wait 2.5 years to have her first name changed in the light of her gender identity a violation of Article 8 ECHR. The applicant, who was born with male sex characteristics and had received judicial authorisation to undergo sex reassignment surgery, was unable to have her first name officially changed until she proved that sex reassignment was completed in a second judicial procedure. Given the fact that the applicant already was socially transitioned for several years and had adopted a feminine physical appearance,<sup>67</sup> the Court considered the waiting period in between both judicial procedures a violation of the right to respect for private life leading to feelings of vulnerability, humiliation and anxiety.<sup>68</sup>

62. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 132. The Court did not mention Article 3 ECHR in the operative part of its judgment.

63. *ibid*, para 139.

64. See in this regard also B. Moron-Puech, ‘L’arrêt *A.P., Garçon et Nicot c. France* ou la Protection Insuffisante par le Juge Européen des Droits Fondamentaux des Personnes Transsexuées’ <<http://revdh.revues.org/3049>> accessed 31 August 2018; and B. Moron-Puech, ‘Changement de Sexe: la Fin d’un Dilemma Insoluble, Mais Pas d’une Pathologisation outrangère’ <<https://sexandlaw.hypotheses.org/205>> accessed 31 August 2018.

65. *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015), para 66.

66. *X v Russia* App no 3150/15 (ECtHR, 20 February 2018), para 44.

67. *S.V. v Italy* App no 55216/08 (ECtHR 11 October 2018) para 70.

68. *ibid*, para 72.

However, since the applicant was a transsexual woman, who therefore personally did not object to undergoing sex reassignment therapy, the Court considered that physical integrity was not at stake and did not deem it necessary to consider the acceptability under the Convention of compulsory sex reassignment as a legal condition for amending the civil status.<sup>69</sup> The judgment is therefore confined to the issue of temporality in the legal recognition of the gender identity of transsexual persons, especially when they already have been in the process of social and physical transition for a number of years. For those persons, having to wait for a change of civil status until full sex reassignment is completed is now deemed to be disproportionate.

**3.2.2. Facilitation of Enduring Trans\* Pathologisation by the ECtHR?** The question then rises whether the ECtHR not only upholds, but also reinforces or even facilitates the legal pathologisation of trans\* persons by European States.<sup>70</sup> After all, it is striking that the Court continues to allow the requirement of providing evidence of the existence of the ‘syndrome of transsexuality’, sex reassignment therapy, and the possibility for the State to order the performance of a medical expert examination, considering its recognition that the psycho-pathologisation of gender identity reinforces stigmatisation of trans\* persons.<sup>71</sup> It may be argued that the continuing acceptance of the legal pathologisation of trans\* persons in the case law, although currently motivated on the State’s margin of appreciation in the absence of a European consensus, is essentially based on the Court’s insufficient conceptual understanding of gender nonconformity in all its varieties (3.2.2.1.), and more specifically its adherence to binary normativity regarding sex and gender identity (3.2.2.2.), which appears to be self-evident in law.

**3.2.2.1. The Court’s Insufficient Conceptualisation of Trans\* Identities.** The Court’s terminology regarding gender nonconformity has subtly changed over the years. Whereas early cases on legal gender recognition, such as *Rees v. United Kingdom* and *B. v. France* referred to ‘transsexuals’, more recent cases of *Y.Y. v. Turkey* and *A.P., Garçon and Nicot v. France* denoted the applicants as ‘transgender persons’. However, for a conceptual analysis, the most important case has been *Christine Goodwin v. United Kingdom*, in which the Court described ‘transsexualism’ as an internationally widely recognised *medical condition* for which treatment is provided in order to afford relief.<sup>72</sup> Indeed, ever since the *Goodwin* case, the Court has connected the right to legal gender recognition to a status of ‘post-operative transsexuality’,<sup>73</sup> seeing bodily transformation as the standard solution for the medical condition of the transsexual. This remains true up until today, since *A.P., Garçon and Nicot v. France* only limited the State’s margin of appreciation with regard to explicit or implicit conditions of sterility and/or sterilising treatments, and thus only with regard to the most extreme medical requirement for legal gender recognition. After all, it needs to be reminded that the Court not only deliberately chose to interpret the condition of the ‘irreversibility of the transformation of the bodily appearance’ in French law in the aforementioned narrow way – without any convincing stimuli in that direction –<sup>74</sup> but also upheld the condition of a diagnosis of the ‘syndrome of transsexuality’.

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69. *ibid.*, para 65.

70. See in this regard also Theilen, ‘The Long Road to Recognition’ (n 37) 385.

71. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 138.

72. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 81.

73. See in this regard also Ammaturo (n 37) 68.

74. See in this regard also Moron-Puech (n 63).

On the basis of this pathologising rhetoric, the ECtHR, like many other courts and legislators, thus has quasi-exclusively focused on *transsexuality* and mostly ignored the existence of a broader gender spectrum, despite its evolving terminology.<sup>75</sup> While it needs to be acknowledged that most cases that have reached Strasbourg concerned (post-operative) transsexual persons, the ECtHR already had the chance to broaden the scope of legal gender recognition from the ‘true transsexual’<sup>76</sup> to other gender nonconforming persons in 2008, with the case of *Nuñez v. France*. Although in the cases of *A.P., Garçon and Nicot v. France* and *S.V. v. Italy*, the Court (albeit implicitly) acknowledged that the fact that medical conditions are required for legal gender recognition leads to the exclusion of non-transsexual trans\* persons, it has refused to examine this difference of treatment between transsexual persons and non-transsexual trans\* persons under Articles 14 *jo.* 8 ECHR. The continuing pathologisation and selective exclusion of trans\* experiences are also tellingly proven by the Court’s refusal in *A.P., Garçon and Nicot v. France* to address the applicants – who could not be seen as ‘post-operative transsexuals’ – by their self-defined gender identity.<sup>77</sup> Indeed, the Court noted that the applicants were still officially registered as men and therefore needed to be addressed in the male form. Nevertheless, this lack of official gender recognition in domestic law did not stop the Court in previous cases from addressing the applicants – who were post-operative transsexuals – on the basis of their self-defined gender identity.<sup>78</sup> In other words, as Ammaturo stated, the ECtHR has demonstrated only a limited knowledge of the sociological data available on the different experiences, identities, and kinship and life arrangements of trans\* persons across Europe.<sup>79</sup>

This conclusion is striking, especially considering its clear inconsistency with other elements in the Court’s own broader trans\* case law.<sup>80</sup> Indeed, in the cases of *Van Kück v. Germany* and *Schlumpf v. Switzerland*,<sup>81</sup> which concerned access of transsexual persons to trans\* specific health care, the Court noted that determining the medical necessity of sex reassignment measures is not a matter of legal definition or appreciation.<sup>82</sup> It is therefore necessary to examine this commitment to medical discourse in legal gender recognition beyond the arguably messy conceptualisation of trans\* persons and gender nonconformity. It may be argued that the continuing pathologisation of trans\* persons in the case law is connected to the Court’s general adherence to strictly demarcated binary sex/gender normativity, which appears to be self-evident in law.

**3.2.2.2. The Court’s Adherence to Binary Sex/Gender Normativity.** Although it may be assumed that the Court is not fully aware of all forms of gender nonconformity and the existence and experiences of non-binary persons,<sup>83</sup> it is clear that the Court adheres to a clearly defined binary sex/gender normativity through its conceptualisation of trans\* identities which makes use of a pathologising

75. Note that, although the Court has made use of the term ‘transgender’ in its case law, it has mainly used this as a synonym for ‘transsexual’. See Theilen, ‘Depathologisation of Transgenderism’ (n 26), 334.

76. Ammaturo (n 37) 77.

77. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 6.

78. *ibid*, para 6.

79. Ammaturo (n 37) 71.

80. See in this regard also Theilen, ‘The Long Road to Recognition’ (n 37) 387.

81. See above.

82. *Van Kück v Germany* App no 35968/97 (ECtHR, 12 June 2003), para 54; *Schlumpf v Switzerland* App no 29002/06 (ECtHR, 8 January 2009), para 57.

83. Due to the insufficient conceptual understanding of trans\* identities.

lens.<sup>84</sup> In other words, since the Court uses the arguably self-evident hypothesis that there are only two clearly defined sexes/gender identities as a point of departure, it has made use of the medicalisation of trans\* persons to bring them within this binary framework and the scope of the Convention.

According to Gonzalez-Salzburg, the *Christine Goodwin v. United Kingdom* case, in which the Court notably relied more heavily on medical discourse than in previous cases, effectively changed the Court's vision of sex/gender.<sup>85</sup> Indeed, during the first twenty years of case law concerning gender nonconformity, the Court refused to accept that the applicant (in all cases a transsexual person) could *truly* abandon the sex assigned and registered by the law at birth.<sup>86</sup> In *Cossey v. United Kingdom* (1990) and *Sheffield and Horsham v. United Kingdom* (1998), for instance, it pointed out that 'gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex'.<sup>87</sup> In other words, the Court joined the conceptualisation of sex/gender as an innate, biological truth, which was at that point dominant in English law.<sup>88</sup> However, as some dissenting judges in *Cossey v. United Kingdom* noted, this strongly biological conceptualisation of sex/gender effectively meant that a trans(sexual) person could '[fall] somewhere between the sexes'.<sup>89</sup>

Since trans(sexual) persons continued to challenge this fixed biological categorisation of sex/gender, Gonzalez-Salzburg argues that the law needed to re-incorporate these bodies into the self-evident binary, through an operation of 'normalisation', that did not have to necessarily follow purely biological criteria.<sup>90</sup> In *Christine Goodwin v. United Kingdom*, the Court pointed out that 'the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable'.<sup>91</sup> Although the Court did not fully abandon the idea of an innate, 'true' biological sex,<sup>92</sup> it did acknowledge the need for legal gender recognition of transsexual persons under Article 8 on the basis of a reasoning that was strongly linked to the idea that the pathologisation of trans(sexual) experiences maintained clearly defined sex/gender categories as far as possible.<sup>93</sup>

84. Gonzalez-Salzburg, 'An Improved Protection for the (Mentally Ill) Trans Parent' (n 19) 535; See also Theilen, 'Beyond the gender binary' (n 43) 254.

85. Gonzalez-Salzburg, 'The Accepted Transsexual and the Absent Transgender' (n 5) 824.

86. *ibid* 807.

87. *Cossey v United Kingdom* App 10843/84 (ECtHR, 27 September 1990), para 40; *Sheffield and Horsham v United Kingdom* App nos 22985/93 and 23390/94 (ECtHR, 30 July 2007), para 56.

88. This purely biological definition of (legal) sex based was on the 1970 British case *Corbett v. Corbett*.

89. *Cossey v United Kingdom* App no 10843/84 (ECtHR, 27 September 1990) Joint Dissenting Opinion of Judges Palm, Foighel, and Pakkanen, para 5.

90. Gonzalez-Salzburg, 'The Accepted Transsexual and the Absent Transgender' (n 5) 811. A certain temporal motivation for the Court's move in the *Christine Goodwin* case is also seen by Theilen, who refers to the following paragraph: '*In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved*'. See *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 90; and J. T. Theilen, 'Between Novelty and Timelessness: The Right to Legal Gender Recognition. Comment on Holning Lau's "Gender Recognition as a Human Right"' in A. von Arnould, K. von der Decken, and M. Susi (eds), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

91. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 90.

92. *ibid*, para 62.

93. See in this regard also C. Hutton, 'Legal Sex, Self-Classification and Gender Self-Determination' (2017) 11 *Law and Humanities* 64, 70.

While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex[ . . . ], the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals.<sup>94</sup>

A test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the 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 in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender.<sup>95</sup>

While the right to legal gender recognition that was found in the *Goodwin* case was constructed in general terms, the Court's argument was tailored specifically to the applicant's status as a *post-operative* transsexual.<sup>96</sup> And although the Court granted the States a margin of appreciation to decide on the appropriate means for achieving legal gender recognition,<sup>97</sup> sex/gender re-assignment became the decisive factor to normalise trans\* persons within the clearly defined binary sex/gender legal system.<sup>98</sup> This conclusion is corroborated by the importance the Court attaches to the (commitment to) suffering of trans(sexual) persons:

Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment.<sup>99</sup>

However, it could be argued that the Court has changed its pathologising narrative towards trans\* persons since *A.P., Garçon, Nicot v. France*. Indeed, the statement in that judgment that there is no right under the Convention for trans\* persons to obtain legal gender recognition without being diagnosed as transsexual, could be seen as simply a consequence of the well-established consensus-reasoning in the Strasbourg case law, and therefore not necessarily an endorsement of the pathologisation of trans\* persons. Nevertheless, this Section has shown that some caution is required. Indeed, a mere interpretation technique cannot be regarded as the only reason for the absence of a full right to gender self-determination under the ECHR. After all, the (acceptance of) legal pathologisation of trans\* persons has strongly persisted in the Court's case law from the 1980s onwards. As Theilen states, 'there are many roads that the ECtHR has, so far, refused to walk'.<sup>100</sup> Lau therefore argues that the ECtHR has acknowledged only a partial

94. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 82.

95. *ibid.*, para 100.

96. Theilen, 'The Long Road to Recognition' (n 37) 383; See in this regard also Ammaturo (n 37) 74.

97. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 93.

98. See in this regard also Hutton (n 89) 71; See in this regard also Ammaturo (n 37) 75.

99. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 81; See in this regard also Ammaturo (n 37) 73-74.

100. Theilen, 'The Long Road to Recognition' (n 37) 387.

right to gender identity recognition.<sup>101</sup> Or, in the words of Ammaturo, the ECtHR ‘established clear boundaries between ‘legitimate’ and ‘illegitimate’ positions for transgender persons as human rights holders’.<sup>102</sup>

#### 4. Reforming the ECtHR’s case law

The under-inclusiveness of the ECtHR’s case law on gender recognition that is caused by the acceptance of the pathologisation of trans\* identities cannot be upheld. After all, like post-operative transsexuals, other trans\* persons are confronted with ‘[a] conflict between social reality and law’ which similarly places them in ‘an anomalous position, in which [they] may experience feelings of vulnerability, humiliation and anxiety’.<sup>103</sup> The question then rises how the Court could move towards outlawing all pathologising conditions for legal gender recognition. In this regard, it may be argued that the instrument for a move towards recognising the full scope of the right to gender self-determination is already present in current case law, that is the State’s margin of appreciation which has been granted since *Christine Goodwin v. United Kingdom* for the implementation of the positive obligation for legal gender recognition under Article 8 ECHR.<sup>104</sup> In the next Sections, it will be argued that this pathologising, under-inclusive case law is at odds with a clear international trend towards the full depathologisation of trans\* identities (Section 4.1). Moreover, this continuing pathologisation goes beyond the narrow margin of appreciation that States (ought to) have in cases related to gender identity (Section 4.2). Last, since trans\* persons should be considered as a particularly vulnerable group in society, only a narrow margin of appreciation should apply (Section 4.3).

##### 4.1 International trend towards full legal depathologisation of trans\* persons

Trans\* persons, unlike people who are socially discriminated against on grounds like sex, race, ethnicity or disability, lack a particular international convention which obliges States to ensure that their human rights, and more specifically their right to equality and non-discrimination, are respected, protected and fulfilled.<sup>105</sup> However, according to the Office of the UN High Commissioner for Human Rights:

protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards; the legal obligations of States to safeguard the human rights of LGBT people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights standards.<sup>106</sup>

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101. H. Lau, ‘Gender Recognition as a Human Right’ in A. von Arnald, K. von der Decken, and M. Susi (eds), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

102. Ammaturo (n 37) 75.

103. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 77.

104. *ibid*, para 93.

105. A. Hellum, ‘Human Rights, Sexual Orientation, and Gender identity’ in A. Hellum (ed), *Human Rights, Sexual Orientation and Gender Identity* (Routledge 2017) 1; See also van den Brink (n 4) 234.

106. Office of the United Nations High Commissioner for Human Rights, ‘Combating Discrimination Based on Sexual Orientation and Gender Identity’, <[www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx](http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx)> accessed 31 August 2018.

In recent years, several influential international human rights actors have clarified the scope of these existing human rights standards in the context of gender identity. Although it may be argued that these soft law instruments (only) reflect the *emerging* existence of a right to the legal recognition of every individual's gender identity solely on the basis of gender self-determination, their importance for the ECtHR's case law cannot be overlooked. Indeed, the Court has explicitly made use of a proven emerging international trend in its earlier case law concerning gender nonconformity. Already in *Rees v. United Kingdom* (1986), it held that:

the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and social developments.<sup>107</sup>

A reliance on the soft law instruments mentioned below would therefore not only take into account the only available sources of international human rights law that specifically deal with the fundamental rights of trans\* persons, but would also be in line with the Court's own case law.

Although the ECtHR referred to various international instruments in its recent *A.P., Garçon, Nicot* judgment, it surprisingly – and mistakenly – only deduced from these instruments that there is an agreement among human rights actors on the unacceptability of a(n) (implicit) condition of compulsory sterility for legal gender recognition.<sup>108</sup> However, these instruments actually call for a total abolishment of *all forms of pathologisation* – including a condition of expert assessment/diagnosis –<sup>109</sup> in the context of legal gender recognition, in order to include all trans\* persons.

This international trend toward the full depathologisation of trans\* persons in the law is evidenced by various soft law instruments, such as the Yogyakarta Principles +10, Resolutions by the Parliamentary Assembly of the Council of Europe and the European Parliament, observations, recommendations by various UN (treaty) bodies and an advisory opinion by the Inter-American Court of Human Rights. Moreover, the trend is also reflected in the rapidly increasing number of (mostly European) States that have reformed their legislation concerning legal gender recognition.

**4.1.1. Yogyakarta Principles +10.** The Yogyakarta Principles +10 have been a very influential source of inspiration in the field of LGBTIQ+ rights. The Principles were adopted by international human rights experts in 2006 and updated in 2017 (hence the '+10') and apply international human rights law standards in the context of sex, sexual orientation and gender identity. Despite not being legally binding, the Principles have been cited by various international and European human rights actors, States legislatures and courts<sup>110</sup> as a leading source of inspiration for the human rights protection of trans\* persons. Although the ECtHR is yet to refer to the Principles, Judges Sajó, Keller and Lemmens already pointed out their relevance in their dissenting opinion in the case

107. *Rees v United Kingdom* App no 9532/81 (ECtHR, 17 October 1986), para 47.

108. *A.P., Garçon, Nicot v France* App nos 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 125.

109. Gonzalez-Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent' (n 19) 534.

110. See for instance Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018], para 62.



*Hämäläinen v. Finland*.<sup>111</sup> For the purpose of this contribution, Principles 3 and 31 are of particular importance.

On the basis of these principles, everyone has the right to recognition everywhere as a person before the law. Each person's self-defined gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one may be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity (Principle 3). States must ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender (Principle 31).

The Yogyakarta Principles +10 thus denounce all forms of psycho-medical requirements in relation to the legal recognition of a person's self-defined gender identity.

**4.1.2. Council of Europe and European Union.** As the Court noted in its judgment in *A.P., Garçon, Nicot v. France*,<sup>112</sup> the Committee of Ministers,<sup>113</sup> the Parliamentary Assembly (PACE)<sup>114</sup> and the Human Rights Commissioner of the Council of Europe<sup>115</sup> have consistently adopted guidelines with regard to conditions for legal gender recognition. For instance, the Human Rights Commissioner considered that the pathologisation of trans\* persons 'may become an obstacle to the full enjoyment of human rights by transgender people especially when it is applied in a way to restrict the legal capacity'.<sup>116</sup> He also called on Member States to abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in law.

PACE Resolution 2048 (2015) not only qualified *all* medical requirements for legal gender recognition as violations of fundamental rights, notably the right to private life and physical integrity under Article 8 ECHR, but also actively called on Member States to develop a procedure for legal gender recognition solely based on self-determination. According to the Assembly, this effectively means that all medical requirements, such as sterilisation, compulsory medical treatment and a mental health diagnosis should be abolished. The Parliamentary Assembly affirmed this call in its recent Resolution 2191 (2017) in which it again requested Member States to adopt

111. *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014) Joint Dissenting Opinion of Judges Sajó, Keller, and Lemmens, para 16.

112. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 74-77.

113. Council of Europe Committee of Ministers, 'Recommendation CM/REC(2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity', <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cf40a](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a)> accessed 15 October 2018.

114. Council of Europe Parliamentary Assembly, 'Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity', <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17853&>> accessed 15 October 2018; 'Resolution 2048 (2015) on discrimination against transgender people in Europe', <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>> accessed 15 October 2018; Resolution 2191 (2017) promoting the human rights of and eliminating discrimination against intersex people', <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&>> accessed 15 October 2018.

115. Council of Europe Commissioner for Human Rights, 'Human Rights and Gender Identity' (2009), <<https://rm.coe.int/16806da753>> accessed 15 October 2018.

116. *ibid*, 3.

procedures for legal gender recognition that are solely based on gender self-determination, and therefore without any form of medical requirement.

The European Parliament has also condemned the ‘deplorable’ pathologisation of trans\* persons in its recent Resolution on promoting gender equality in mental health and clinical research.<sup>117</sup> Moreover, the Parliament criticised that although research has shown that a diagnosis of ‘gender identity disorder’ is a source of significant distress for trans\* persons, EU Member States still request such diagnoses for access to legal gender recognition.

**4.1.3. UN (Treaty) bodies.** United Nations human rights treaty bodies, such as the Committee on Economic, Social and Cultural Rights (CESCR),<sup>118</sup> and the CEDAW Committee<sup>119</sup> have also started to bring attention to the legal pathologisation of trans\* persons in their country-specific concluding observations, raising concerns about the compulsory requirement for trans\* persons to undergo surgical and/or hormonal treatment before legal gender recognition can be granted.

Moreover, in its 2015 ‘Free and Equal’ campaign, the Office of the High Commissioner for Human Rights released a factsheet on the human rights protection of transgender persons, calling on States to legally recognise the gender identity of trans\* people in official documents through a simple administrative process based on self-identification without abusive requirements such as forced medical diagnosis, sterilisation, treatment or divorce.<sup>120</sup>

**4.1.4. The IACtHR’s advisory opinion.** In November 2017, the Inter-American Court of Human Rights (IACtHR) adopted an advisory opinion on request by Costa Rica on gender identity, and equality and non-discrimination of same-sex couples.<sup>121</sup> According to the Court, recognition of gender identity as a manifestation of personal autonomy is both an integral and a determining component of the individual’s personal identity which is protected by Articles 7 (protection of personal liberty) and 11 (protection of private life) of the American Convention on Human Rights. Moreover, States have – similarly as under the ECHR – the positive obligation to adopt domestic legal procedures for the legal recognition of a person’s self-perceived gender identity in public records and identity documents.

Although the Court granted all States appreciation to decide on the most appropriate procedure for legal gender recognition – a judicial or administrative procedure –, it specified that all

117. European Parliament, ‘Resolution of 14 February 2017 on Promoting Gender Equality in Mental Health and Clinical Research’, <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0028+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0028+0+DOC+XML+V0//EN)> Accessed 15 October 2018.

118. E.g. Committee on Economic, Social and Cultural Rights, ‘Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant. Concluding observations of the Committee on Economic, Social and Cultural Rights. Germany’ (12 July 2011) UN Doc E/C.12/DEU/CO/5.

119. E.g. Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Switzerland’ (25 November 2016) UN Doc CEDAW/C/CHE/CO/4-5; ‘Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Slovakia’ (12 November 2015) UN Doc CEDAW/C/SVK/CO/5-6, 12 and ‘Concluding Observations on the Second Periodic Report of Montenegro’ (24 July 2017) UN Doc CEDAW/C/MNE/CO/2, 14.

120. Office of the United Nations High Commissioner for Human Rights, ‘Transgender’ <[www.unfe.org/wp-content/uploads/2017/05/UNFE-Transgender.pdf](http://www.unfe.org/wp-content/uploads/2017/05/UNFE-Transgender.pdf)> accessed 31 August 2018.

121. Inter-American Court of Human Rights, ‘Advisory Opinion OC-24/17 on gender identity, and equality and non-discrimination of same-sex couples’, <[www.corteidh.or.cr/docs/opinion/es/seriea\\_24\\_eng.pdf](http://www.corteidh.or.cr/docs/opinion/es/seriea_24_eng.pdf)> accessed 31 August 2018.

procedures must be based solely on the free and informed consent of the applicant without involving requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologising, or surgery and/or hormonal therapy. The Court thus clearly considered all medical requirements for legal gender recognition a violation of the right to gender identity under the American Convention on Human Rights. Moreover, the Court considered it a violation of the principles of equality and non-discrimination that trans\* persons encounter obstacles in achieving gender recognition that cisgender persons do not have to face. Importantly for this section's argument, the Court also referred to the aforementioned reports by the UN High Commissioner and other UN treaty bodies, as well as to the Yogyakarta Principles to substantiate its opinion. Last, it also criticised the stereotyped assumption that having an identity that differs from the sex assigned at birth is a pathology, which is reflected in the pathologising conditions for legal gender recognition.

The ECtHR's case law thus does not appear to be in line with all of the aforementioned (emerging) standards regarding legal gender recognition in international (soft) human rights law.<sup>122</sup>

**4.1.5. State practice in the Council of Europe.** In recent years, an increasing number of States worldwide have reformed their legal framework concerning gender recognition by abolishing medical requirements. Although the number of countries that allow for legal gender recognition solely on the basis of self-determination, is still limited, it may be argued that there is a clear trend towards abolishing not only compulsory sterility but also compulsory sex reassignment treatment and a psychiatric diagnosis/assessment. Although most States have focussed on the respect for the trans\* person's physical integrity, the most recent legal reforms abided by the requirements set in the abovementioned international soft law instruments and have also abolished criteria related to psychiatric assessments and diagnosis.

Within the Council of Europe,<sup>123</sup> this amounts to 20 countries:

1. Full self-determination (*administrative* procedure, no medical requirements, such as diagnosis/assessment): Belgium (2017), Denmark (2014), Ireland (2015), Luxembourg (2018), Malta (2015), Norway (2016), Portugal (2018);
2. Self-determination (*judicial* procedure, no medical requirements, such as diagnosis/assessment): France (2016), Greece (2017);
3. No compulsory medical intervention required:<sup>124</sup> Germany (2011), the Netherlands (2013), Russia (2018), United Kingdom (2004); and
4. No compulsory surgical intervention required:<sup>125</sup> Croatia (2013), Estonia, Finland,<sup>126</sup> Iceland (2012), Italy (2015), Spain (2007), Sweden (2013).

122. See also Ammaturo (n 37) 73-75. See below.

123. This territorial demarcation is important for the ECtHR's case law, which measures the scope of the State's margin of appreciation based, *inter alia*, on the presence or absence of a 'common European approach'.

124. These countries require some form of psycho-medical assessment/diagnosis during the procedure of legal gender recognition.

125. The remaining required medical intervention can be compulsory hormonal treatment.

126. However, Finnish law still requires sterility.

In *Christine Goodwin v. United Kingdom*<sup>127</sup> and *A.P., Garçon, Nicot v. France*,<sup>128</sup> the Court specifically referred to respectively the international trend in State practice towards legal gender recognition and the abolishment of the condition of sterility to find a need for a strengthened protection of trans\* persons under Article 8 ECHR. Moreover, the fact that an *increasing* number – yet not a majority –<sup>129</sup> of Contracting States reformed their legislation in a short period of time (*in casu* seven years) was of particular importance.<sup>130</sup> The Court should thus similarly recognise the abovementioned clear international trend towards the *full* depathologisation of trans\* persons in the law, and the clear move towards self-determination in the most recent reforms of the national legal gender recognition frameworks by several Contracting States, such as Belgium (2017), Denmark (2014), France (2016), Greece (2017), Ireland (2015), Luxembourg (2018), Malta (2015), Norway (2016) and Portugal (2018).

#### 4.2. The State's narrow margin of appreciation under Article 8 ECHR

Next to being problematic from an international point of view, the Court's stance regarding pathologising conditions for legal gender recognition is also at odds with the (narrow) margin of appreciation that States (ought to) have in cases relating to gender identity. It may be argued that this finding naturally results from the Court's existing case law.

The Court has already addressed the extent of the States' margin of appreciation in several cases relating to legal gender recognition. As mentioned above, it has continuously held that a person's gender identity belongs to the personal sphere protected by Article 8 ECHR. Moreover, it regards gender identity as one of the most basic essentials of self-determination.<sup>131</sup> In its recent judgment in *A.P., Garçon, Nicot v. France*, the Court even held that Article 8 ECHR holds a right to self-determination, of which the freedom to define one's gender identity is one of the most essential elements.<sup>132</sup>

However, as mentioned above, while the Court held in *Christine Goodwin v. United Kingdom* that Article 8 ECHR generates the positive obligation to foresee a procedure of legal gender recognition, it has given the Contracting States a wide margin of appreciation with regard to the measures and conditions to secure this Convention right.<sup>133</sup> Conversely, in *A.P., Garçon, Nicot v. France*, the Court pointed out that medical requirements directly involving the individual's (right to) physical integrity require special consideration and thus a narrow margin of appreciation.<sup>134</sup> In this regard, the Court pointed out the impossible dilemma for trans\* persons and held that conditioning the recognition of the gender identity of trans\* persons on the realisation of a sterilising operation or treatment that they do not want to undergo, comes down to conditioning the full exercise of their right to respect for their private life under Article 8 of the Convention on the

127. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 85.

128. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 124.

129. *ibid*, para 71. At the time of the judgment, 22 Contracting States required sterilisation for legal gender recognition, while 18 States did not.

130. *ibid*, para 124.

131. *Van Kück v Germany* App no 35968/97 (ECtHR, 12 June 2003) para 73 (own translation).

132. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 93.

133. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 85.

134. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 123.

renouncement of the full exercise of their right to integrity under Article 8 and Article 3 of the Convention.<sup>135</sup>

Arguably, the same reasoning would necessarily need to apply to other forms of medical requirements, and especially compulsory sex reassignment treatment, as these also involve – as with a condition of compulsory sterility for legal gender recognition – pitting the right to respect for one’s gender identity against the right to respect for one’s physical integrity and personal autonomy, especially when persons are unwilling to undergo such requirements. Moreover, although it may be argued that in *A.P., Garçon Nicot v. France* the Court predominantly relied on the protection of physical integrity under Article 8 ECHR, this does not mean that the continued acceptance of medical conditions that do not involve an interference with physical integrity, such as an expert assessment/diagnosis, are not problematic in the light of the Court’s existing case law. Indeed, the fact that a certain condition does not involve a person’s physical integrity is by itself no sufficient justification for the Court to overrule its own finding that States only have a narrow margin of appreciation in cases related to the right to gender identity, which is one of the most fundamental aspects of the right to respect for private life.<sup>136</sup> In other words, it is difficult to understand how a more general narrow margin of appreciation can suddenly become wider again in the context of a condition of which the Court recognises that it reinforces the stigmatisation of trans\* persons in society.<sup>137</sup> Moreover, as proven above, a correct understanding of the international trend towards trans\* depathologisation also does not substantiate the finding of a wider margin of appreciation in relation to a diagnostic condition.

#### 4.3. *Trans\* persons as a particularly vulnerable group in society*

A last element that should influence the Court in cases regarding gender identity, is related to the status of trans\* persons in society. According to the Court’s case law, ‘if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, [. . .], then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.’<sup>138</sup> Arguably, trans\* persons form a particularly vulnerable group in society, since they have been suffering considerable transphobia, that is discrimination, stigmatisation and stereotyping on the basis of their gender identity.

According to the seminal report by the Council of Europe Human Rights Commissioner on the human rights of trans\* persons:

many transgender people live in fear and face violence in the course of their lives. This violence ranges from harassment, bullying, verbal abuse, physical violence and sexual assault, to hate crimes resulting in murder. Transphobia – understood as the irrational fear of, and/or hostility towards, people who are transgender or who otherwise transgress traditional gender norms – can be considered as one of the main causes of violence and intolerance that many transgender persons face.<sup>139</sup>

135. *ibid.*, para 137.

136. *ibid.*, para 123, 140.

137. *ibid.*, para 138.

138. *Alajos Kiss v Hungary* App no 38832/06 (ECtHR, 20 May 2010), para 42.

139. Council of Europe Commissioner for Human Rights, ‘Human Rights and Gender Identity’ (2009), <<https://rm.coe.int/16806da753>> accessed 15 October 2018, 14.

These findings were corroborated by the Council of Europe Parliamentary Assembly which held that trans\* persons face a cycle of discrimination and deprivation of their rights in many Council of Europe Member States due to discriminatory attitudes and to obstacles in obtaining gender reassignment treatment and legal recognition of the new gender.<sup>140</sup>

Since prejudice and stigma towards a particular group in society have been indicators that have crucially informed the Court's assessment of group vulnerability,<sup>141</sup> the Court should apply the concept of vulnerable groups, which it already used in relation to Roma,<sup>142</sup> people with disabilities,<sup>143</sup> people living with HIV<sup>144</sup>, people suffering from a mental illness<sup>145</sup> and asylum seekers,<sup>146</sup> to trans\* persons.

The recognition of trans\* persons as a particularly vulnerable group in society naturally follows from existing case law. Indeed, the Court has already recognised the personal suffering and social stigmatisation of trans\* persons in its case law. In *Christine Goodwin v. United Kingdom*, it held that:

the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law [...] cannot be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of *vulnerability*, humiliation and anxiety.<sup>147</sup>

Moreover, it needs to be reminded that in *A.P., Garçon, Nicot v. France*, the Court already pointed out that the psycho-pathologisation of trans\* persons reinforces the stigmatisation of which they are victims.<sup>148</sup>

According to the ECtHR, the right of a particularly vulnerable group in society may only be restricted on the basis of 'very weighty reasons'.<sup>149</sup> Since the pathologisation of trans\* identities is essentially based on pervasive stereotypes of sex, gender identity and gender nonconformity in law and society, it may be concluded that no 'very weighty reasons' can be proven by the State to uphold psycho-medical conditions for legal gender recognition.

## 5. Conclusion

Although the ECtHR recognises a positive obligation for States under Article 8 ECHR to foresee a procedure for legal gender recognition, its case law is inherently (accepting of trans\*) pathologising and conceptually inconsistent. By adopting a medical discourse that considers sex

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140. Council of Europe Parliamentary Assembly, 'Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity', <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17853&>> accessed 15 October 2018.

141. L. Peroni and A. Timmer, 'Vulnerable Groups: the Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056, 1065.

142. *D.H. and others v Czech Republic* App no 57325/00 (ECtHR, 13 November 2007).

143. *Alajos Kiss v Hungary* App no 38832/06 (ECtHR, 20 May 2010).

144. *Kiyutin v Russia* App no 2700/10 (ECtHR, 10 March 2011).

145. *X v Russia* App no 3150/15 (ECtHR, 20 February 2018), para 32.

146. *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

147. *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 77.

148. *A.P., Garçon, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017), para 138.

149. *Horváth and Kiss v Hungary* App no 11146/11 (ECtHR, 29 January 2013), para 128.

reassignment therapy to be the appropriate relief for the medical condition of transsexuality, the Court has 'normalised' trans(sexual) persons and brought them within the scope of the Convention. However, even after the ground-breaking case of *A.P., Garçon and Nicot v. France*, a human right to depathologisation of gender nonconformity cannot be deduced from the ECHR. This restriction of legal gender recognition to a certain carefully constructed class of trans\* persons excludes those persons who cannot or do not wish to submit to medical interventions but nevertheless seek legal gender recognition.<sup>150</sup> For the Court, self-determination regarding gender identity thus only applies to decisions falling within the boundaries of the binary norm.<sup>151</sup>

In any case, this importance of medical conditions for legal gender recognition should not be surprising, since it was precisely the existence and increasing prevalence of medical sex reassignment treatment, on the basis of which transsexual persons could transition from one sex to the other, that brought the Court to adopting a conceptual framing of sex/gender in the first place.<sup>152</sup> Individuals who do not strictly fit in either category of sex/gender are left legally unrecognised, unless and until they undergo surgical treatment.<sup>153</sup> As Ammaturo aptly concludes, 'the case law of the ECtHR regarding issues of gender identity confines [transgender] persons within the logic of the gender binary, without granting the possibility of rethinking human rights [...] beyond the discrete category of male/female.'<sup>154</sup>

Nevertheless, while the legal pathologisation of trans\* identities is explainable from a conceptual point of view, this contribution has shown that the ECtHR's continuing acceptance of medical conditions for legal gender recognition is at odds with the current stance of international human rights law and especially its own case law. The Court should therefore find all medical conditions for legal gender recognition a violation of the ECHR and write all trans\* persons into legal existence.<sup>155</sup>

### Author's note

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150. Theilen, 'The Long Road to Recognition' (n 37) 383; See in this regard also L. J. Moore and P. Currah, 'Legally Sexed' in R. E. Dubrofsky and S. A. Magnet (eds), *Feminist Surveillance Studies* (Duke University Press 2015) 68-70; See also Gonzalez-Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent' (n 19) 529-530.

151. Ammaturo (n 37) 78; See in this regard also van den Brink (n 4) 239.

152. Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender' (n 5) 803. See in this regard also Hutton (n 89) 67.

153. S. Katyal, 'The Numerus Clausus of Sex' (2017) 84 *The University of Chicago Law Review* 389, 405.

154. Ammaturo (n 37) 65.

155. This evolution would also open the debate concerning the recognition of non-binary persons, e.g. through the addition of a category 'X'.