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Legal challenges of transgender and
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in the case-law of the European Court
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Preface

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A. Introduction

The European Court of Human Rights (further — ECtHR) is the most important and longest standing human rights protection institution in Europe. This monitoring body is considered also as one of the most influential authority in the field of human rights law.[1] The Court has produced more than over 100 judgements since 1959 on topics related to gender, sexuality, queer marriage and parenthood.[2] In particular, since 1980, the ECtHR has delivered 38 judgements in the area of transgender and gender-diverse identity.[3] In the last decade, the evidence suggests that the Court paid even more attention to LGBTIQ* issues: the number of merits cases increased from 34% in the period from 1999 to 2009 to 88% in the period from 2010 to 2020.[4] The trends suggest that the Court will have to deal with the LGBTIQ* issues more in the future.

Many authors that write on the topic of transgender rights often refer to the ECtHR judgements. For example, Shon Faye writes, "[…] all [countries] were signatories to the European Convention on Human Rights when they enshrined [sterilisation —] this

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[1] *Slaughter*, Virginia Journal of International Law 40/2000, p. 1103, 1109.

[2] Inventory of relevant SOGIESC (sexual orientation, gender identity, gender expression and sex characteristics) case-law and pending cases before the ECtHR and CJEU, https://ilga-europe.org/sites/default/files/Inventory%20of%20relevant%20SOGIESC%20case-law%20and%20pending%20cases%20before%20the%20ECtHR%20and%20CJEU.pdf (last accessed on 31.05.2023).

[3] ECtHR, Van Oosterwijck v. Belgium, App.7654/76, 06 November 1980; Rees v. UK, App. no. 9532/81, 17 October 1986; Cossey v. UK, App. no. 10843/84, 27 September 1990; B v. France, App. no. 13343/87, 25 March 1992; XYZ v. UK, App. no. 21830/93, 22 April 1997; Sheffield and Horsham v. UK, App. no. 22985/93, 30 July 1998; I v. UK, App. no. 25680/94, 11 July 2002; Grant v. UK, App. no. 32570/03, 23 May 2006; Van Kück v. Germany, App. no. 35968/97, 12 June 2003; Goodwin v. UK App. no. 28957/95, 11 July 2002; Parry v. UK, App. no. 42971/05, 28 November 2006; R and F v. UK, App. no. 35748/05, 28 November 2006; L v. Lithuania, App. no. 27527/03, 11 September 2007; Guerrero Castillo v. Italy, App. no. 39432/06, 12 June 2007; Nunez v. France, App. no. 18367/06, 27 May 2008; P.V. v. Spain, App. no 35159/09, 30 November 2010; Schlumpf v. Switzerland, App. no. 29002/06, 8 January 2009; P v. Portugal, App. no. 56027/09, 06 September 2011; Halat v. Turkey, App. no. 23607/08, 08 November 2011, Cassar v. Malta, App. no. 36982/11, 09 July 2013, Hämäläinen v. Finland, App. no. 37359/09, 16 July 2014; YY v. Turkey, App. no. 14793/08, 10 March 2015; X v. Turkey, App. no. 24727/12, 04 April 2017; D.Ç. v. Turkey, App. no. 10684/13, 07 February 2017; A.P., Garcon & Nicot v. France, App. 79885/12, 52471/13 and 52596/13, 6 April 2017; S.V. v. Italy, App. no. 55216/08, 11 October 2018; X v. FYROM, App. no. 29683/16, 17 January 2019; PO v. Russia, App. no. 52516/13, 18 June 2019; P v. Ukraine, App. no. 40296/16, 11 June 2019; Solmaz v. Turkey, App. no. 49373/17, 24 September 2019; RL v. Russia, App. no. 36253/13, 11 June 2020; YT v. Bulgaria, App. no. 41701/16, 09 July 2020; Rana v. Hungary, App. no. 40888/17, 16/ July 2020, X v. Romania and Y v. Romania, App. nos. 2145/16 and 20607/16, 19 January 2021, A.M. and Others v. Russia, App. no. 47220/19, 6 July 2021; X. v. Russia, App. no. 60796/16, 15 December 2020; A.D. v. Georgia and A.K. v. Georgia, App. no. 57864/17 and 79087/17, 01 December 2022; M. v. France, App. no. 42821/18, 26 April 2022; Y v. France, App. 76888/17, 31 January 2023.

[4] *Helfer*, *Ryan*, L. & Contemp. Probs 85/2021, p. 59, 74.

coercive violation of trans people's bodies."[5] Does the fact that the country is a signatory to the European Convention on Human Rights (further — ECHR) prevent the State from violating transgender persons' rights? Where in the Convention can we exactly find the rights that are supposed to protect transgender and gender-diverse persons from discrimination based on their gender identity? Have transgender persons even been included in the conversation when the ECHR was drafted? All these questions we will tackle in this paper.

There is a plethora of issues facing transgender and gender-diverse people. Although transgender and gender-diverse people are indeed a minority — their prevalence in Europe and North America ranges from 0,4% to 10% according to different studies[6] — the amount of legal problems and discrimination they face is shocking. This paper will focus mainly on the issue of legal gender recognition. This includes many different requirements, some of which have been found to be human rights violations by the ECtHR, while others remain unchallenged: from the practice of forced sterilisation mentioned above to mental health diagnosis.

Many issues will not be discussed in detail. For example, we will not talk about legal gender recognition for trans children, issues related to sex work, same-sex marriage, sexual and other types of harassment that trans people face on a daily basis. This does not mean that these issues are less important — on the contrary, they are as important as legal gender recognition for adults and some other issues that we will discuss below. However, legal gender recognition is a starting point for trans people to be seen as a vulnerable group in need of special protection. It marks their legal existence, which brings with it certain rights to trans persons and obligations to the States.

We will look at how the case law of the ECtHR has developed over more than 30 years. In the global scheme of things, this is a short period of time. However, we will see tectonic shifts in the perception of the Court. The aim is to understand whether there

[5] *Faye*, p. 160.
[6] *Arcelus, Bouman*, in: Richards, Bouman, Barker (eds.), pp. 13-21.

is room for progress in terms of better protection of trans people's rights and what the ECtHR could do better to contribute even more to the protection of trans people.

B. Queer and feminist methodology

The methodology of this paper incorporates traditional approaches to legal writing, namely the methods of description, conceptual analysis, comparison and legal evaluation of conclusions, together with relatively new approaches: the queer legal theory and feminist approaches. Queer legal theory relies on the knowledge and methods of queer theory. The latter uses a deconstructive method. Deconstruction helps, in the words of *Damian A. Gonzalez-Salzberg*, "[…] to critically examine [social] constructions […], as well as to indulge [their] interest in those cases that depart from the dominant model of genders and sexualities."[7]

The deconstruction of gender and sexuality is an important part of queer legal method due to the fact that these concepts are often taken for granted as being neutral and objective. However, the deconstruction reveals that these constructs are anything but neutral. In fact, they are heavily pre-determined by our cultural and societal norms. This insight should help researchers understand how our world is structured to privilege certain identities over others,[8] and how this affects the way we interact with each other.[9] By understanding this, researchers can begin to challenge the status quo and influence the creation of a more equitable society.[10]

Human beings are indeed very biased creatures, and this has a great impact on the state of legal and social norms.[11] It is shocking that not only do we have no control over most circumstances of our life, such as what family we are born into, what nationality we have and many other important aspects, but we also have no control over what we do with our bodies. Social constructs,[12] particularly those embodied in

[7] *Gonzalez-Salzberg*, in: Gonzalez-Salzberg, Hodson (eds.), pp. 100-104.
[8] *Gonzalez-Salzberg,* Sexuality & Transsexuality, p. 18.
[9] *Traughber*, The social cycle of repression, https://news.harvard.edu/gazette/story/2017/08/why-do-some-groups-enjoy-privileged-status-in-a-society/ (last accessed on 31/05/2023).
[10] *Curtin, Stewart, Cole,* PWQ 39(4)/2015, p. 512, 523.
[11] *Steinhauser*, Everyone Is a Little Bit Biased, https://www.americanbar.org/groups/business_law/publications/blt/2020/04/everyone-is-biased/ (last accessed on 31/05/2023).
[12] *Foucault*, pp. 43, 139–46.

laws, define who we ‘actually' are — our bodies and legal identities are gendered from birth, with no room for people in between these categories.[13] When some people begin to question these assumptions and ‘deviate’, they are confronted with the reality of a whole range of societal norms in the broadest sense, but also in particular — legal norms with their claim to be just and fair when they, in fact, may be the problem itself.

Although the aim of legal analysis is primarily to question the assumptions mentioned above and, if necessary, to prove them wrong, it can remain very limited, strictly speaking, since there are many other norms that are often not questioned, such as the notion of ‘justice’. For this reason, legal critics are often accused of being ‘liberal’ and of not going further than just formally establishing de-jure equality of possibilities for all.[14] But one may also argue that it does not even go further than establishing de-jure equality. There are still so many questionable aspects of the law that we cannot even say that we have achieved this ‘liberal’ goal of equality. Therefore, the purpose of this paper is to question the logic, fairness and consistency of the ECHR and the judgments of the ECtHR on transgender issues from the queer and feminist point of view.

One of the ways in which we can identify gaps and inconsistencies in judgements is through the simple use of terms. Even though judging on the correct words might cause a backlash because of seemingly ‘radical’ political correctness,[15] it is still important to do so because our language reflects our perceptions and can influence the way we think about certain issues (so-called linguistic relativity).[16] It is particularly important in legal practice, where judges may be biased in many ways against women* and LGBTIQ* people, prone to stereotyping and therefore , “[…] penalize those who do not conform to those stereotypes”.[17] Previously, the word ‘transsexual’[18] was used by the ECtHR as the only way to define non-cisgender identity. Although the term is deemed

[13] *Gonzales-Salzberg,* (fn. 8), p. 28.
[14] *Heathcote and Zichi*, in: Deplano, Tsagourias, Cheltenham, p. 461.
[15] *Bannerman*, Trans movement has been hijacked by bullies and trolls Monday, https://www.thetimes.co.uk/article/trans-movement-has-been-hijacked-by-bullies-and-trolls-lwl3s73vj (last accessed on 31/05/2023).
[16] *Hoijer*, p. 92, 95.
[17] General recommendation No. 33 (2015) on women’s access to justice, para. 26-27; *Harris, Sen,* Bias and Judging Annu. Rev. Political Sci. 2018 pp. 1, 18-21.
[18] The term is also problematic because it sets the requirement of ongoing or completed gender reaffirming process to pass as a person whose gender identity is ‘truly’ different from what is stated in identity documents.

outdated and even derogatory by many trans persons in general and academics in particular,[19] judges continue to use it and its different variations, such as 'transsexualism', on a stable basis, demonstrating a lack of nuance and understanding. In the case X. v. The former Yugoslav Republic,[20] both terms are being used interchangeably, even though it was not once stated that the applicant is transgender. The ultimate conclusion from these observations is that the Court should move away from the word 'transsexual', which for many has medical and psychiatric connotations,[21] unless it is how the person identifies themselves*[22] or it is needed to cite the legislation or historical sources.

The reason why feminist legal lenses should be included in the analysis of the ECtHR judgements is quite simple — the author cannot analyse gender issues without considering the various intersections of different identities. Even though the identity of the transgender woman is definitely queer, the queerness is not all. It is also a woman's* identity with all discrimination it entails. Feminism is not just about cis-women, it is also about all persons that have certain features or biological characteristics that are used as grounds for discrimination, for example, the uterus. As *Shon Faye* correctly noted, "[…] as long as trans women […] around the world experience human rights violations and male violence as women, then it is right and just that we are able to access the support and solidarity of the feminist and women's community."[23] This means that intersectional feminism, and therefore feminist legal methodology, must also include non-binary, intersex and transgender men and women in the conversation.

To conclude, the main goal of queer legal theory and feminist approach is therefore the critical analysis of the legal aspects of gender and sexuality embedded in law. In this paper, we will use these methods together with traditional approaches to assess the case law of the ECtHR.

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[19] *Vidal-Ortiz*, Sociology Compass 2(2)/2008, pp. 433, 435-436.
[20] ECtHR, X. v. The Former Yugoslav Republic, App. no. 29683/16, 17 January 2019, para. 69-70.
[21] *Vidal-Ortiz*, (fn. 19) pp. 435-436.
[22] In this paper, the author intentionally uses gender-neutral 'they*', 'them*' or 'themselves*' pronounces (in single form) when talking about one abstract person whose gender is unknown.
[23] *Faye*, p. 227.

C. Legal gender recognition

I. General aspects

1. Legal gender recognition is a human right

Legal gender recognition is extremely important for transpersons.[24] Lack of proper identity documents[25] leads to social isolation, unemployment, inability to travel safely, mental and physical health problems and other issues.[26] This is because these documents act not only legally but also socially as "an entrance ticket for participation in society".[27] Legal gender recognition allows people, who believe that their* gender assigned at birth, is inappropriate to "have a more holistically congruent self".[28] Or, to put it simply, to live their* lives in accordance with their perception who they* are. It is certainly a matter of fundamental human rights. And it is finally time for international law, and law in general, to question what has long been unquestioned — namely, the belief that gender assigned at birth is a biological truth, rather than a legal and social construction that can be changed throughout life.

It is necessary to mention that we do not know the full set of reasons why gender divisions have occurred historically in the first place and why people hold on to these definitions so strongly. Regardless of the reason, the direct consequence is the whole set of norms in all national legal systems that are linked to the gender binary. For instance, compulsory military service or different social security norms for women* and men*.[29] And most, if not all, states are interested in preserving these rigid systems, even though many are striving for gender equality (e.g. introducing quotas for women*

[24] The term "trans person" is an umbrella term for all persons that believe that their gender identity is different from that assigned at birth. In some circumstances, it is important to distinguish non-binary persons, transgender persons, intersex and other gender identities/variations since the need to be legally recognised may differ in content in different situations. In this paper, the author mostly talks about transgender persons and legal gender recognition for transgender persons, which is just one aspect of the legal gender recognition in general.
[25] The author means that the documents should include a suitable name/surname (in case they are gendered), gender marker, in certain cases also right digits in the ID number and other aspects that can show the gender indirectly.
[26] *European Commission*, Legal Gender Recognition in the EU. The Journeys of Trans People towards Full Equality, Publications Office of the European Union 2020, p. 10.
[27] *Holzer*, ERA Forum 23/2022, p. 165, 165.
[28] *Cannoot*, NQHR 37(1)/2019, p. 14, 17.
[29] *Holzer*, (fn. 27), p. 167.

in public positions).[30] However, the goal of gender equality does not imply the abolition of the gender binary. On the contrary, it can be even used to justify the perpetuation of existing structures by not allowing or making it extremely difficult for individuals to change their gender categories they* were assigned at birth.[31] This is why the issue of legal gender recognition is more than just setting the rules for crossing the boundaries of being legally a man* or a woman*. As *Gonzalez-Salzberg* rightly pointed out, "the rigid separation of sex categories is nothing but an illusory rule".[32] Ultimately, accepting the illusory nature of the gender binary could undermine this system and make it possible to exist outside of these two gender boxes.[33]

It is also important to note that legal gender recognition is only one tool in the struggle for human rights in the area of gender. It will not eradicate the root causes of discrimination against trans persons.[34] Rigid legal standards are just one symptom of transphobia, cisnormativity[35] and other systems of oppression deeply woven into the fabric of our society. Much more needs to be done than simply allowing documents to be changed.

2. International law framework

Before delving into the analysis of the ECtHR judgements, it is useful to consider the state of international law in relation to legal gender recognition. There is some disagreement as to whether trans rights are protected at all by the existing international legal framework. One of the most common views is that "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".[36] As we shall see further, it is not that simple.

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[30] Ibid.
[31] *Otto*, Nord. J. Hum. Rights 33/2015, p. 299, 302.
[32] *Gonzalez-Salzberg*, (fn. 8), p. 30.
[33] van der Vleuten, Politics and Governance Vol.8(3)/2020, p. 278, 289.
[34] Ibid, p. 169.
[35] Cisnormativity is the assumption that "all people [are] cissexual, [which problematises] and [renders] invisible trans individuals" in: *Gonzalez-Salzberg*, (fn.8), p. 21.
[36] *Brems, Cannoot et al.*, Third Party Intervention by the Human Rights centre of Ghent University ECtHR, A.M. and Others v. Russia (Application no. 47220/19), http://hdl.handle.net/1854/LU-8720402 (last accessed on 31/05/2023).

Indeed, there are some issues that are not unique to trans people, such as torture or inhuman or degrading treatment. So if we can qualify some acts as torture, for example, we could use the Universal Declaration of Human Rights (UDHR),[37] the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment. For violations of children's rights, there is the Convention on the Rights of the Child. We can also find some standards of legal recognition. For example, Article 6 of the UDHR and Article 16 of the ICCPR state that “everyone has the right to recognition everywhere as a person before the law”. But what remains unclear is that: do these norms also include people who do not agree with their* assigned gender? Do Conventions protect people who do not identify as women* or men*? All of these documents were written in the last century. This fact alone could play a big role in limiting the interpretation of the articles to traditional definitions that might not include transgender persons and other gender-diverse people. Sadly, this is what actually happens, as we shall see.

Returning back to the ECHR, we may also come to a disappointing conclusion about the subject matter of its protection. Some scholars argue that the subject of the rights enshrined in the Convention is a priori a binary gendered person.[38] However, there is no legal definition of gender (or sex) and what it means to be a man* or a woman*. This means that the final answer to the question is not an ultimate truth but a matter of interpretation.[39] Therefore, it is partly true that every instrument of the protection can already be found in existing international law, and in particular, as we shall see, in the ECHR. However, as we discussed earlier, we do not live in an impartial world, we are still very much dependent on the decisions who may be transphobic, mysoginistic, racist, homophobic and in general xenophobic. Most conventions, including the ECHR, were drafted at a time when there was no acceptance of trans identity and homosexuality in international law.[40] This means that most of the time we have to rely

[37] Even though the UDHR is not legally binding, it plays an important role in the field of Human Rights.
[38] *Gonzalez-Salzberg*, (fn. 8), p. 32, *van der Vleuten*, (fn. 33), p. 278, 285.
[39] *Gonzalez-Salzberg*, (fn. 8), p. 32.
[40] The first law that allowed legal gender recognition was introduced in Sweden in 1972, more than 20 years after the Convention was opened for signature.

on the interpretations of judges, who are not so infrequently biased. In this context, it makes a lot of sense to have norms that are literal and transparent and do not require any additional complex interpretations, such as, unfortunately, the norms of the Convention.

In this regard, there has been a major development in the area of defining the responsibilities of states in protecting the rights of the LGBTIQ*-community — the Yogyakarta Principles. In the words of *Dr. Lucie Cviklová*, "[…] the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity can be characterized as a set of principles that aim at the application of international human rights law standards to address the abuse of the human rights of LGBT people as well as issues of intersexuality."[41] As such, the Yogyakarta Principles are not legally binding, although they do contain state obligations under existing international law. Nevertheless, this soft law[42] instrument is a very valuable point of view and could be seen as a a source of inspiration and even guidance for the judgements of the ECtHR. Indeed, the judges of the ECtHR are, of course, aware of its existence[43] which gives us a hope that the clear wording of the Principles will be even more incorporated into the interpretations of the Convention.

One great example for this part of the paper is the Principle 31: "Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them." This principle will be the point from which we will start in the following analysis.

[41] *Cviklová*, in: SGEM 3rd Int. Multidiscip. Sci. Conf. Soc. Sci. Arts 16/2016, p. 526.
[42] *European Commission, (*fn. 26), p. 112.
[43] For instance, ECtHR, Case Hämäläinen v. Finland [GC], App. no. 37359/09, 16 July 2014, para. 16.

3. Legal gender recognition: earlier judgements

Article 8 of the European Convention states that everyone has the right to respect for their* private and family life, home and correspondence. Does this article also cover the right to change one's legal gender? Are the States, signatories to the Convention, obliged to introduce an accessible and quick procedure that allows suitable identity documents to be issued?

These questions have come before the Court on many occasions. The interpretation of the Article 8 has oscillated between two extremes. Looking ahead: we will see that the Court will eventually recognise the gender identity as an aspect of personal identity and therefore a part of the right enshrined in Article 8 of the Convention. It will also be accepted that it is one of the most intimate aspects of private life, meaning that governments have to provide very convincing justifications for any restrictions. However, the decisions so far will reverberate for years to come. It is important to see how drastically the interpretation of the Article 8 changes over the years, because we need to understand what the reasons for such changes are and what instruments of interpretation have been used and could be used in the future to extend the scope of protection.

One of the earliest cases on this issue is Rees v. UK.[44] In this case, the applicant, a transgender man, wanted to change the gender marker on his birth certificate. All other legal documents identified him as male. However, for some legal purposes, such as marriage, priority was given to the gender indicated on the birth certificate. This essentially means that the legal gender recognition was incomplete because it was not valid for all legal purposes. The Court found no violation of Article 8. The Court's reasoning is as follows: the applicant's demands could not be met "without first modifying fundamentally the present system for keeping the register of births",[45] which was seen as an unreasonable burden on the State and entire administrative system. Interestingly, UK's arguments were based on laws that discriminate against cis-women in the area of property rights.[46] This conclusion is reminiscent of the popular argument

[44] ECtHR, Rees v. United Kingdom, App. no. 9532/81, 17 October 1986.
[45] ECtHR, Judgement Rees v. United Kingdom, App. no. 9532/81, 17 October 1986, para. 43.
[46] *Holzer*, (fn. 27), p. 172.

for restrictions: LGBTIQ* persons disrupt the rigid systems and are therefore a burden and even danger.[47]

In the next similar case, Cossey v. UK, the Court confirmed the conclusions of the previous judgement.[48] Moreover, the wording of the latter judgement highlighted the deeper issue of the gender construction in the Court's perception: "gender reassignment surgery [does not] result in the acquisition of all the biological characteristics of the other sex"[49]. This is an example of pure biological essentialism and binary thinking in the Court's judgement: there are only two sex options and they are defined by the whole set of biological characteristics that cannot be completely changed and that are absolutely necessary for a human being to be identified as a woman or a man. However, some Judges question this 'biological truth'[50]. In their dissenting opinion, Judges Palm, Foighel and Pekkanen state that the applicant is "somewhere between the sexes"[51]. In other words, they say that although Ms Cossey may still have some biological characteristics of a cis-male, such as XY chromosomes, she is no longer a man because her body and psychological reality have changed. This means that she is neither a cis-man nor a cis-woman, she is a trans-woman. Transgender people do indeed transcend the binary options. But for legal purposes she should have been recognised simply as a woman, because there are only two categories. The binary is questioned, but at the same time, she is not legally allowed to cross it.[52] Who or what does not allow her to do that? It is the law. And it is the Court that has put her in this limbo of being between two genders, whereas for the applicant it is already clear that she is a woman.

The first departure from a clear, to put it mildly, unfavourable jurisprudence for transgender people was the case of B. v. France. [53] For the first time, the Court found that there had indeed been a violation of Article 8. However, the conclusions were

[47] ECtHR, Dudgeon v United Kingdom, App. No. 7525/76, 22 October 1981 Series A no 45, 22.10.1981, dissenting opinion of Judge Matscher, para. 30; ECtHR, Bayev and others v Russia, App. no. 67667/09, 44092/12 and 56717/12 20.06.2007, 20 June 2017, dissenting opinion of Judge Dedov, para. 44.
[48] ECtHR, Cossey v. United Kingdom, App. no. 10843/84, 27 September 1990.
[49] ECtHR, Cossey v. United Kingdom, App. no. 10843/84, 27 September 1990, para. 40.
[50] *Cannoot,* (fn. 28), p. 25.
[51] ECtHR, Cossey v United Kingdom App. no. 10843/84, 27 September 1990, Joint Dissenting Opinion of Judges Palm, Foighel, and Pakkanen, para. 5.
[52] *Gonzalez-Salzberg*, (fn.8), p. 37.
[53] ECtHR, B. v. France, App. no. 13343/87, 25 March 1992.

specific to France: “The Court had found, in connection with the English civil status system, that the purpose of the registers was not to define the present identity of an individual but to record a historic fact […]. This was not the case in France. Birth certificates were intended to be updated throughout the life of the person concerned.”[54] While this was certainly a victory for the applicant, the reasoning should be taken with a pinch of salt. The obvious problem with such reasoning is that, according to the Court, rights that are supposed to be universal and inalienable depend on how the objectives of administrative systems are formulated. At the very least, whether or not the right to update one's birth certificate was part of Article 8 was held to depend per se on the national context.[55]

In the latter case, however, six judges[56] expressed concern about the outcome, fearing that the applicant was not a “true transexual”[57] but an imposter, as Judge Pettiti claimed, a person with "double personality and schizophrenia”.[58] In his opinion, the Court — importantly, not a psychiatric institution, failed to distinguish between these two situations. Another Judge, Judge Valticos, not only misgendered the applicant but also claimed that she was still actually a man because “he […] performed his military service”.[59] Unsurprisingly, researcher *Gonzales-Salzberg* also found that all of these six judges opposed trans rights in all cases they sat on.[60] This is just one example of how biased judges can be. It is also an example of how twisted the logic of the binary gender system is, and how difficult it is to fight for trans rights when legal systems and the interpretation of legal norms are within this way of thinking.

[54] Ibid, para. 52.
[55] *Nicosia*, C.E.S.I. 2/2022, p. 31, 33.
[56] Namely, Matscher, Pinheiro Farinha, Pettiti, Valticos, Loizou, Morenilla. See infra Note 57 and 59, ECtHR, B. v. France, App. no. 13343/87, 25 March 1992, dissenting opinion of Judge Pinheiro Farinha; dissenting opinion of Judge Morenilla.
[57] “[…] 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” in ECtHR, B. v. France, App. no. 13343/87, 25 March 1992, dissenting opinion of Judge Pettiti.
[58] Ibid.
[59] ECtHR, B. v. France, App. no. 13343/87, 25 March 1992, dissenting opinion of Judge Valticos, joined by Judge Loizou.
[60] *Gonzales-Salzberg*, (fn. 8), p. 39.

4. The ultimate answer of the Court

The following series of judgements marked a dramatic departure from the earlier interpretation of Article 8 of the Convention. The first landmark case was Christine Goodwin v. UK.[61] The applicant, like other applicants before them, argued that UK was violating her human rights by not allowing full legal gender recognition. This time, the Court confirmed that Article 8 includes a positive obligation on the State to recognise the gender identity of transgender persons who have undergone medical gender reassignment process and met other requirements. In doing so, the Court abandoned its previous case-law on this issue, despite the fact that such a step could indeed potentially jeopardise "the interests of legal certainty, foreseeability and equality before the law".[62] What has changed in the 10 years that passed since B. v. France?

The initial purpose of Article 8 is to protect against arbitrary interference with private and family life. Where there is interference, especially with the most intimate aspects of life, the Court has to consider whether that interference is lawful (prescribed by law), and, if so, whether there is legitimate aim for this and whether this aim is necessary.[63] Since most of the cases in this paper are about lawful interference, there is always a question of balancing the above mentioned interests of the state concerned and the rights of trans people.

In the landmark case Goodwin v. UK, the Court found that the British government had failed to demonstrate "[any] concrete or substantial hardship or detriment to the public interest",[64] despite the conclusions of previous ECtHR's jurisprudence. However, the balance of interests contributed to the final outcome. It was also, surprisingly, "a continuing international trend towards increased social acceptance of transsexuals [and] towards legal recognition of the new sexual identity of post-operative transsexuals."[65] One of the strongest influences was, for example, the European Court

[61] ECtHR, Christine Goodwin v. the United Kingdom, App. no. 28957/95, 11 July 2002.
[62] ECtHR, Christine Goodwin v. the United Kingdom, App. no. 28957/95, 11 July 2002, para. 74.
[63] *Gonzalez-Salzberg*, JICL-2(1)-07 6/2015, p. 173, 175.
[64] ECtHR, Christine Goodwin v. the United Kingdom, App. no. 28957/95, 11 July 2002, para. 91.
[65] Ibid, para. 85.

of Justice,[66] an EU-institution, and its judgement of 30 April 1996,[67] in which the ECJ has found that "discrimination based on a change of gender was equivalent to discrimination on grounds of sex".[68] However, the Court notes that there is a lack of European and international consensus on trans issues.[69] The ECtHR decided not to use the argument of the lack of consensus, despite the tensions such a decision could cause.[70] This judgement is a clear example of dynamic interpretation,[71] where the ECtHR bravely embraces the change when it had every reason to do the opposite.

On the other hand, the dynamic interpretation only concerns the notion of emerging consensus and its link to trends and does not extend to a deeper understanding of trans issues. The ECtHR still heavily relies on the medical discourse in this judgement.[72] The basis for the argument in favour of legal gender recognition was the lack of any evidence in natural science not to give it.[73] Recognition is offered to alleviate the suffering of 'mentally-ill' people and give them* the opportunity to assimilate to the 'preferred' gender. Thus it was again established that there is a 'true' sex,[74] but that gender is a legal characteristic that can be changed.

Ultimately, it was no longer possible to maintain the binary gender system without gradually allowing transgender people to cross boundaries. While this does indeed alleviate the suffering and isolation of transgender persons, it does so only under very strict conditions such as mental health diagnosis and completed reassignment surgery, a requirement discussed further below.

Given the history of cases over the last 15 years, such a change of position required an appealing rationale. First of all, it must be noted that although this judgement can still be criticised in many aspects discussed above, it was a very important change for

[66] *Groussot, Gill-Pedro*, in: Gerards, Brems (eds.), p. 236.
[67] ECJ, Judgement of 30 April 1996, Case C-13/94, P. v S. and Cornwall County Council, ECLI:EU:C:1996:170, para. 20-21.
[68] Ibid; ECtHR, Christine Goodwin v. the United Kingdom, App. no. 28957/95, 11 July 2002, para. 92.
[69] ECtHR, Christine Goodwin v. the United Kingdom, App. no. 28957/95, 11 July 2002, para. 85.
[70] *Polgari*, ICL Journal 12(1)/2018, pp. 59, 76-77.
[71] Ibid, p. 60.
[72] *Gonzales-Salzberg*, (fn. 8), p. 43.
[73] ECtHR, Christine Goodwin v. the United Kingdom, App. no. 28957/95, 11 July 2002, para. 63.
[74] Ibid, para. 62.

thousands of transgender people across Europe. We have to recognise the pressure which the ECtHR is under constantly, even though it is an independent institution.[75]

a) An endless waiting period

Now, with this outcome, we have got the opportunity for further developments. And logically, the next step would be to ask how exactly the legal recognition should work and how we can achieve the ideal of the self-determination? Given the wide margin of appreciation that is given to States under Article 8 of the ECHR, we could assume that States would use this to make the legal recognition as difficult as possible to prevent as many persons as possible from crossing boundaries.[76]

One of the possible ways to hinder the legal gender recognition is to demoralise transpersons by imposing eternal waiting periods for fulfilling the requirements to change documents. As it was mentioned above, quick legal gender recognition is not only preferable but absolutely necessary for transgender persons, especially if their* appearance differs significantly from their* legal gender. The longer the waiting period is, the more vulnerable, isolated and even unhealthier and poorer in an economic context a person can become.[77] It jeopardises every aspect of their* life.

In AP, Schlumpf v. Switzerland, the Court has ruled that 'mechanically applied waiting periods 'could violate Article 8 depending on their length and individual circumstances. In this case, the applicant sought the reimbursement from her health insurance company for gender reassignment surgery.[78] At the time, she had to wait two years from the time she applied for the operation. She did not comply with the law because she was already over 65 in 2004 and could not wait any longer, therefore she had to finance her transition out of her resources. Despite her age, the failure to comply with the waiting period was the reason for the denial of reimbursement by the insurance

[75] "Under these circumstances, the political argument pertaining to the sustainability of the ECHR framework is straightforward: if there is a clear and present danger that States will not comply with a judgment, especially when non-compliance as a response strategy seems to be endorsed by a considerable number of States, then there is a powerful reason to provide a morally suboptimal decision, such as the one that the Court opted for in Lautsi II." *Tsarapatsanis*, in: Gonzales-Salzberg, Hodson (eds.), p. 215.
[76] *van der Vleuten*, (fn. 33), p. 284.
[77] *European Commission, (*fn. 26), pp. 200-201.
[78] ECtHR, AP, Schlumpf v. Switzerland, App. no. 29002/06, 8 January 2009, para. 10-14.

company and later by the domestic courts. As we can see, in some cases, the waiting period is crucial. However, it should be noted that, in general, extra length prevents people from realising their* right to legal gender recognition, no matter how old they* are or regarding any other individual circumstances. Transgender persons do not have to justify why they need quick procedures. This problem is still common in many States, one of the most notorious examples being the United Kingdom.[79] For this reason, the Committee of Ministers has issued recommendations to States where their authors stress the need for "making possible the change of name and gender in official documents in a quick, transparent and accessible way".[80]

Another important issue that is not so obvious is the use of the deadname[81] while legal transitioning is still going on. Many trans persons start hormone therapy and generally present themselves as their* preferred gender before legal gender recognition takes place. However, until a person transitions legally, they* have to use the documents with the deadname which in itself can cause distress. As mentioned above, names and surnames indicate the gender identity in many languages, which creates problems (such as suspicion of identity fraud) for many people whose appearance does not match the gender of their* name. In the case S.V. v Italy,[82] the applicant wanted to change her male name given to her at birth while she was still in the transition process. She was refused to do so because in Italy names must correspond to the legal gender of the person. The ECtHR sided with the plaintiff, ruling that such interference with her private life was disproportionate, given that she has been living fully as a woman, met all the requirements for legal gender recognition and that the process itself had begun many years earlier.[83]

[79] *Bailey, McNeil,* Monitoring and Promoting Trans Health across the North West, https://www.researchgate.net/publication/281452992_Monitoring_and_Promoting_Trans_Health_across_the_North_West (last accessed on 31/05/2023).
[80] *Council of Europe*, 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, 31 March 2010, para. 21.
[81] The name that was assigned at birth, which is usually male or female, that the trans person wishes not to use.
[82] ECtHR, S.V. v. Italy, App. no. 55216/08, 11 October 2018.
[83] Ibid, para. 70-71.

For all the reasons described above, legal gender recognition needs to happen as quickly as possible so that the person can enjoy all their* rights freely and without discrimination.

b) Trans healthcare and suffering

Another way of obstructing a person's legal gender recognition is of economic nature. In the case AP, Schlumpf v. Switzerland,[84] we saw that insurance companies did in fact reimburse the costs for the operations but only under certain conditions imposed by the State. However, this is not a common practice in every Member State of Council of Europe and there may be a situation where laws do not regulate such issues which would allow States and insurance companies to refuse funding or reimbursement in all cases. In general, not everyone can simply afford to pay for medical gender reassignment at all. The question of gender reassignment surgery will be discussed in more detail below, now it is only important to understand whether States are obliged to finance surgeries and all necessary medical procedures.

The Court answered this question in the affirmative in the case L v. Lithuania.[85] The applicant could not continue with the gender reassignment process due to the lack of legislation in this area.[86] He underwent a partial transition (mastectomy and hormone treatment) and because his transition was only partial, he could not be recognised as a man. The applicant was thus caught in a vicious circle, unable to obtain both treatment and legal recognition. The ECtHR found a violation of Article 8 of the Convention. Lithuania had tried to justify the delay in implementing the necessary legislation on the grounds of budgetary constraints in the healthcare sector. However, the Court did not see why transgender persons, given their small number, were as such a burden on the State's budget.[87] Therefore, Lithuania failed to strike a fair balance between its financial interests and the rights of transgender persons who could not be legally recognised.

[84] ECtHR, AP, Schlumpf v. Switzerland, App. no. 29002/06, 8 January 2009.
[85] ECtHR, L. v. Lithuania, App. no. 27527/03, 11 September 2007.
[86] Ibid, para. 2.
[87] Ibid, para. 59.

Interestingly, the Court rejected the applicant's argument that such a violation could amount to inhuman and degrading treatment. There is no strict definition of these terms in the Convention. However, the Court has provided a definition from which to interpret the norm. In Pretty v. UK, the ECtHR says, "[the treatment can be characterised as degrading] where it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance".[88] In its assessment, the ECtHR has to take into account "all the circumstances of the case, such as the duration and manner of the treatment, its physical and mental effects as well as the sex, age and state of health of the victim."[89] Hence, the ECtHR has to pay attention to the specifics of transpersons' position in the society. In L v. Lithuania, however, as the Court claims, that "the circumstances were not of such an intense degree, involving exceptional, life-threatening conditions, as to fall within the scope of this provision."[90] Given that, to the best of our knowledge, there have never been transgender judges, and given that our society is transphobic, including all its institutions such as the courts, how can we ignore the suffering of transgender people in situations like this? Is the social isolation and humiliation,[91] the deterioration of mental and physical health, which leads to a higher risk of death,[92] not intense and fearful enough?

More scholars argue for a broader interpretation and application of Article 3 in cases concerning transgender persons. For example, *Bassetti* argues that "[n]ot having a matching ID may also arouse feelings of anguish, fear and inferiority. It exposes trans people to a high risk of discrimination and violence on a daily basis when they are forced to reveal their trans status to strangers such as post officers, bank employees, librarians, waiters, ticket controllers, club bouncers and public administrators."[93] The author explains in interpretation whether there has been a violation of Article 3, the subjective experience of the claimant must be taken into account, as well as all the components mentioned above. Moreover, we see that historically this is not the first

[88] ECtHR, Pretty v. UK, App. no. 2346/02, para. 52.
[89] *Bassetti*, EJLS 12(2)/2020, p. 292, 301.
[90] ECtHR, L. v. Lithuania, App. no. 27527/03, 11 September 2007, para. 47.
[91] Ibid, para. 50.
[92] *de Blok et al.*, Lancet Diabetes Endocrinol. Vol. 9/2021, pp. 663, 669.
[93] *Bassetti*, (fn. 89), p. 303.

time that some people have been denied recognition of the degree of their suffering due to their gender identity and its position in society: cisgender women have long awaited recognition of the denial or obstruction of abortion as a form of torture.[94] Therefore, it is no wonder, then, that the Court has never found any violation of Article 3 of the Convention in any cases in its case-law concerning trans individuals — it has not yet abandoned its attachment to the cisnormative gender binary system.

c) Birth certificates, again. The issue of discrimination

One of the examples of the Court's strong attachment to the cisnormativity can be found in the case of Y. v. Poland.[95] The case is notable for the fact that the Court did not see a violation of Article 8 in the fact that the original birth certificate indicated that the gender marker had been changed in the form of an annotation to the gender assigned at birth.[96] Another noteworthy aspect is that the decision was delivered in 2022, twenty years after Goodwin v. UK. Twenty years after obtaining the guarantee of the ability to change the gender marker on the birth certificate, we can see again a similar struggle.

On the one hand, the Court has accepted that "the marginal annotation to [the applicant's] birth certificate is demeaning and causes him mental suffering".[97] On the other hand, since the full birth certificate is needed only in rare cases, the degree of suffering was not considered "sufficiently serious".[98] In addition, the Court mentions that such a reference "might be necessary to prove certain facts".[99] What vague facts might need to be proved in the specific case of Poland is not explained and cannot be accepted as a valid argument. Moreover, the requirement to prove an extremely high degree of suffering and everyday abuse[100] in order to obtain a new birth certificate without an annotation is incomprehensible in the light of previous case-law. The ECtHR has already recognised gender identity as one of the most intimate parts of identity which includes various aspects discussed above and not just the gender marker. Thus,

[94] Zurieck, Fordham Int. Law J. .38(99)/2015, pp. 100, 102-103.
[95] ECtHR, Y. v. Poland, App. no. 74131/14, 17 February 2022.
[96] Ibid, para. 5-8.
[97] ECtHR, Y. v. Poland, App. no. 74131/14, 17 February 2022, para. 78.
[98] Ibid, para. 78-79.
[99] Ibid, para. 79.
[100] Ibid, para. 78.

it is difficult to agree that a fair balance has been struck between the interests of Poland which are, in the words of a human rights lawyer *Stephanos Stavros*, "in keeping the gender unchanged in the full version of the birth certificate",[101] and the interests of the transgender applicant.

Furthermore, even this argument does not seem to carry much weight, as there is an exception to this rule. In this case, in Poland it is only possible to add an annotation to the birth certificate stating that the gender marker has been changed. The only case where the birth certificate can be changed (and not just annotated) is in the case of full adoption. So, we can see a parallel issue: the application of Article 14 in relation to the right not to be discriminated against on the ground of gender identity. Looking ahead: the ECtHR has previously extended the protection of the Article 14 to the grounds that are not explicitly mentioned in this article, such as gender identity and sexual orientation.[102] The applicant therefore argued that he had been discriminated against on the basis of his transgender identity.

In order to assess whether there has been a violation of Article 14, the Court must determine whether the situation falls within the scope of the Convention's protection. Next, the ECtHR must determine whether there is an analogous situation in which others are treated more favourably. The final steps are to assess whether there is a legitimate aim for such differential treatment and whether it is necessary in a democratic society.[103]

The Court did not found a violation of the Article 14 in the case discussed above either, as it considered that the situation was "not sufficiently similar to be compared to each other."[104] So, if Poland has already decided to change the system to protect certain individuals, what is then the problem with protecting others who actually need it? In this respect, if we consider transgender persons and adopted children to be worthy of protection as vulnerable social categories who have experienced some major changes

[101] *Stavros*, Y v. Poland: Trans Rights and Strasbourg's Search for a Proper Discrimination Theory, https://ohrh.law.ox.ac.uk/y-v-poland-trans-rights-and-strasbourgs-search-for-a-proper-discrimination-theory/ (last accessed on 31/05/2023).
[102] ECtHR, Identoba and Others v. Georgia, App. no. Application no. 73235/12, 12 May 2015, para. 96.
[103] Gonzales-Salzberg, JICL 2(1)/2015, p. 173, 180.
[104] ECtHR, Y. v. Poland, App. no. 74131/14, 17 February 2022, para. 88.

in their* lives — then we might agree that their situations are analogous to the extent because that other groups of individuals do not usually need any changes to their birth certificates at all. Therefore, it is impossible to compare trans individuals exclusively to cisgender adult people since the latter would never need to change their gender on the birth certificate in the first place.

As disappointing as this judgement was, it is important to note that the protection of trans people has gradually increased over the last twenty years. One more example of this is the recent case A.D v Georgia,[105] in which the Court held that the existence of a legal framework in theory is not in itself sufficient to fulfil a positive obligation to provide legal gender recognition. Since the introduction of the legal framework allowing gender transition in Georgia, there has not been a single successful case of legal gender recognition. The Court reiterated again that the legislation must be precise, decrease the level of arbitrariness of the legal gender recognition procedure to the possible minimum and make it accessible in practice.[106] In addition, as we have seen, it is not enough that the procedure itself be provided for in national legislation; it must also be accessible, quick and transparent. The fact that a person can change their legal gender but only if all the requirements are met does not mean that the obligation under ECHR is fulfilled. This is because the requirements taken alone could be a violation of human rights.

The ultimate goal is a procedure that is free of both costs and unnecessary requirements, that is accessible, transparent, quick — all in all, self-determination that includes the complete change of all necessary markers on identity documents and in civil registries. Such an objective usually requires not only the legislation but also the high degree of social acceptance and gender equality in general. But it should not be postponed because the latter has not yet been achieved. On the contrary, free self-determination will only support these goals of gender equality and freedom and create a fairer and more just society. Now, self-determination is possible in at least 8 European jurisdictions: Portugal, Belgium, Switzerland, Norway, Iceland, Ireland,

[105] ECtHR, A.D. and Others v. Georgia, App. no. no. 57864/17, 79087/17 and 55353/19, 1 December 2022.
[106] ECtHR, A.D. and Others v. Georgia, App. no. no. 57864/17, 79087/17 and 55353/19, 1 December 2022, para. 73.

Malta and Denmark.[107] However, most states still have additional requirements for the legal gender recognition, some of which are still approved by the ECtHR. It means that the goal of self-determination is not reached until transpersons are pathologised and required to go through divorce and obtaining mental health diagnosis, if not worse. Each requirement, its evolution and the reasons why it is contrary to the Convention will be examined below.

II. Sterilisation (non-procreation) requirement

Just 6 years ago, there were many more European countries that required sterilisation for the trans people's access to legal transition, such as France and Norway.[108] At the moment, the countries that still require, what the Commissioner for Human Rights defined as, "legally prescribed, state-enforced sterilisation"[109] are: Finland, Latvia, Czech Republic, Romania, Serbia, Montenegro, Bosnia and Herzegovina.[110]

The non-procreation requirement has caused much debate in various members of Council of Europe. The issue has been brought up before the ECtHR more than once. In this part we will look at these judgements and try to understand what are the final conclusions and arguments of the Court. We will try to understand if there is any room to develop the arguments, and what the future of this requirement, where it still exists, might be.

First of all, it is important to understand that until recently this requirement was not even questioned.[111] Legal scholars argue that countries that still require sterilisation undermine reproductive rights, namely the right to respect bodily integrity, the right to found a family, and even the right to be free from torture, ill-treatment and inhuman

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[107] TGEU, Trans Rights Maps Europe & Central Asia 2022, LGR Cluster https://transrightsmap.tgeu.org/home/legal-gender-recognition/cluster-map (last accessed on 31/05/2023).
[108] *Morgan*, Lancet Diabetes Endocrinol. 4/2016, pp. 207, 207-208.
[109] *Commissioner for Human Rights*, Human Rights and Gender Identity, CommDH/IssuePaper 2/2009, p. 8.
[110] TGEU, Trans Rights Map, Europe & Central Asia 2022, Sterilisation https://transrightsmap.tgeu.org/home/legal-gender-recognition/sterilisation (last accessed on 31/05/2023).
[111] *Dunne,* Med. Law Rev, Vol. 23, No. 4/2015, p. 646, 650.

and degrading treatment.[112] The main point of defending reproductive rights of trans persons here is not to propagate reproduction itself, it is above it. Sterilisation seeks to eradicate families with trans parents who would be trans from the conception to child rearing.[113] Moreover, it inflicts immense suffering upon trans people, whether they plan to have children in the future or not, because sterilisation procedures are very intrusive and require the removal of a whole set of organs.

The landmark cases that recognised that sterilisation violates the human rights of transgender persons are Y.Y. v. Turkey[114] and A.P., Garçon and Nicot v. France.[115] In the first case, the applicant was denied legal gender recognition simply because he was still able to procreate. In order to obtain legal gender recognition, a person must prove that they* are unable to conceive a child or that they* have undergone a sterilisation operation. The applicant claimed that this situation was not incompatible with Article 8 of the Convention, and the ECtHR agreed. Once again, the Court noted that there was an emerging international trend towards abandoning such a requirement.[116] In addition, the ECtHR notes, "[the Court] considers that due respect for [the applicant's] physical integrity precluded any obligation for him to undergo this type of treatment."[117] There was no sufficient aim, such as a proven need to protect the transperson's health, which could even justify such a requirement.[118] Nevertheless, while this was a clear step towards the protection of trans rights, it could be argued that it was not enough, as we shall see.

In 2017, the issue of coerced sterilisation came before the Court again in the case A.P., Garçon and Nicot v. France.[119] The Court extended the protection of the rights of trans persons to include the prohibition of any treatment that involves "a high probability of sterility."[120] The ECtHR found that the requirement did not pass the proportionality test. This means that any irreversible changes to the body that will later

[112] *Bassetti*, EJLS 12(2)/2020, pp. 292, 311-316.
[113] *Dunne*, Med. Law Rev, 25(4)/2017, p. 554, 579.
[114] ECtHR, Y.Y. v. Turkey, App. 14793/08, 10 March 2015.
[115] ECtHR, A.P., Garçon and Nicot v. France, App. 79885/12, 52471/13 and 52596/13, 6 April 2017.
[116] ECtHR, Y.Y. v. Turkey, App. 14793/08, 10 March 2015, para. 108.
[117] Ibid, para. 119.
[118] *Dunne*, Med. Law Rev, 23, 4/2015, p. 646, 650.
[119] ECtHR, A.P., Garçon and Nicot v. France, App. 79885/12, 52471/13 and 52596/13, 6 April 2017.
[120] Ibid, para. 135.

result in the inability to conceive a child cannot be a requirement for legal gender recognition. This was a huge step forward because it allows trans people in countries that still require operations with irreversible changes that could lead to infertility to claim that this is contrary to the Convention.

In view of the fact that in some European countries coercive sterilisation is still a prerequisite for legal gender recognition, despite the two most recent judgements, it is useful to look more closely at this requirement and the reasons for it. Academics define the following sets of arguments used by states: legal certainty in family law, the best interests of the child and the preservation of natural means of reproduction.[121]

The first argument implies that only a person who gives birth can be a mother, and only a person whose reproductive organs produce sperm can be a father. Once again, we see a rigid binary that is presented as the ultimate truth. If a transgender man gives birth, then he is a 'mother' in the common sense of that word which might cause "political and cultural unease".[122] The problem with this argument is that prescribing parental roles creates legal uncertainty through false labelling.[123] In the case of transgender persons, the words 'mother' or 'father' should be used in a way that reflects the gender identity of the parent. Otherwise, the legislation still denies legal gender recognition for all purposes, including parenthood.[124]

There is also a fear that children will be confused about their genetic origins if parents stick to their gender identity rather than social definitions of motherhood or fatherhood. This argument does not make any sense in a modern world where we have various situations that allow cisgender people to have children in non-normative ways, such as IVF or adoption. The latter is legal in all countries that are members of the Council of Europe, and is not seen as confusing. On the other hand, the ECtHR has not once

[121] *Dunne*, (fn. 113), p. 560.
[122] *Dunne*, (fn. 113), p. 560.
[123] Ibid, pp. 560-562.
[124] The court is likely to deal with the designation of parents as a mother or a father and the violation of rights protected by Article 8 in the pending cases O.H. v. Germany, App. nos. 53568/18 and 54741/18 and A.H. and others v. Germany, App. no. 7246/20.

emphasised[125] the importance of maintaining "biological familial relationships"[126] between biological parents and their children, which is exactly the case when there is a biological trans parent who has a child. "Biological" in this sense could be interpreted as simply being a biological parent, regardless of the role in conception and child-rearing. And if the ECtHR places so much importance on biological relationships, it should protect the relationship between biological trans parents and their children as much as possible, not to make it more complicated for both parents and children.

Another argument is the best interest of a child or child welfare. Some point out that children of transgender persons suffer from discrimination because of their parents' gender identity, apart from the argument that transpersons cannot raise healthy children because they are mentally-ill by default (the mental health issue will be discussed below).[127] Some policymakers are concerned about bullying which does occur, but there are many ways how it could be prevented without imposing infertility on transpersons.[128] Furthermore, the issue of discrimination against children of transgender parents must be seen as a consequence of the general discrimination against transpersons, and not as a reason for the further discrimination in the area of family and reproductive rights.

Last but not least, one of the most important reasons why States require transpersons to be infertile is preservation of natural reproduction. This argument lies at the heart of the legal uncertainty argument that has been already discussed above, but it is useful to highlight it separately and openly. Unlike the last two justifications, this one is not rooted in any legal theory — it is simply a matter of our perceptions of what is normal and what is not. There is a social pre-context that queer parenting is dangerous, sick and abnormal, and therefore has to be erased.[129] However, there is no credible scientific evidence to support these fears.

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[125] ECtHR, Kruskovic v. Croatia, App. 46185/08, 21 June 2011; Mandet v. France, App. 30955/12, 14 January 2016; Keegan v Ireland, App. 16969/90, 26 May 1994.
[126] *Dunne*, (fn. 113), p. 565.
[127] *Kohler, Recher, Ehrt,* pp. 83-84.
[128] *Thompson*, A Time for Change: Removing Discrimination From Same-Sex Adoption, https://nzbora7.rssing.com/chan-33144831/article9.html (last accessed on 31/05/2023).
[129] *McCandless, Sheldon,* Modern Law Review 73(2)/2010, pp. 175, 200–202.

Unfortunately, the ECtHR has not properly addressed these justifications. The most dangerous aspect of this situation is that it creates "tangible disadvantages for Europe's transgender population, even where non-procreation requirements are ultimately considered to be disproportionate."[130] A proper response to these justifications is necessary not only for the sake of the proportionality test, but also to stop the legitimisation in national legislation that portrays trans people as "incapable child-carers"[131] (e.g. in the case of custody and employment). The initial argument for reproductive rights for trans people must be based on the common sense that these people are no worse parents by default because they* are trans. Using the argument of acceptance of non-normative family structures will unfortunately not change legal systems. If a country does not allow much freedom for cisgender people, it will not allow it for trans people.

The last major case concerning sterilisation is S.V. v. Slovakia.[132] Unlike the previous cases, the applicant is not a transgender person. The Court found that in this case the coerced sterilisation imposed on a cisgender woman violated of Article 3 of the Convention, namely that it amounted to cruel and inhuman or degrading treatment.[133] Can it be argued that transgender sterilisation is of a lesser gravity? This is a clear example of double standards. Sterilisation, where it is a requirement for legal gender recognition, cannot in any way be considered voluntary. While the UN has recognised the mandatory non-procreation requirement as a form of inhuman or degrading treatment,[134] the ECtHR is unwilling to face the truth about the suffering of transgender persons. Therefore, despite certain strong victories, there is still a long way to go.

III. Gender reassignment surgery requirement

Until recently, gender reassignment surgery was, not surprisingly, one of the least challenged claims. Most of the cases that have reached the ECtHR concern

[130] *Dunne*, (fn. 113), p. 557.
[131] Ibid.
[132] ECtHR, S.V. v. Slovakia, App. no. 18968/07, 8 November 2011.
[133] ECtHR, S.V. v. Slovakia, App. no. 18968/07, 8 November 2011, para. 119.
[134] An interagency statement OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO Eliminating forced, coercive and otherwise involuntary sterilization ISBN 978 92 4 150732 5 (NLM classification: WP 660) World Health Organization 2014.

transgender people who have already undergone surgery. This could be seen both as a reason for maintaining the requirement and as a consequence of the state of acceptance of transgender people. As we discussed earlier, no matter how hard we try to find reasons for its existence in biology and nature, legal gender is still a social and political concept. Medicine and natural science in general will never have the power to tell us exactly and objectively what gender is, how many genders there are, and whether or not it is 'normal' to be transgender or gender-diverse because these notions are social constructs. Therefore, until individuals achieve the freedom of self-determination free from state interference, there will always be a need to strike a balance between the interests of the state and the physical integrity of the individual.

In the landmark case of Goodwin v. UK,[135] the Court recognised the right of transgender persons to cross the gender line by gaining legal recognition for all legal purposes. Despite the apparent victory for trans rights, the reasoning deepened the pathologisation and genitocentrism even further.[136] The Court relied heavily on the fact that the operation, or many operations, had been carried out, and on the wide margin of appreciation of the state in setting such a requirement. So what exactly did this mean for transgender and gender-diverse persons who did not wish to undergo irreversible changes of their genitalia and other physical characteristics (such as mastectomy and many other)? The answer is that they were automatically excluded from the protection of Article 8 in the matters of legal gender recognition. This means that a person living in the countries, members of the Council of Europe, had to change their* body irreversibly, whether they* wanted it or not, if they* did not agree with a state-imposed gender label.[137] However, if a person wanted to live their life and function normally in the deeply gendered society, they* had to change their body in order to be legally recognised, because otherwise it is impossible to live their* life without suffering for many reasons.

In the case A.P., Garçon and Nicot v. France,[138] discussed above, the Court ruled that states violate Article 8 of the ECHR when they require transgender people to undergo

[135] ECtHR, Christine Goodwin v. the United Kingdom, App. no. 28957/95, 11 July 2002.
[136] *Holzer*, (fn. 27), p. 174.
[137] *Holzer*, (fn. 27), p. 165.
[138] ECtHR, A.P., Garçon and Nicot v. France, App. 79885/12, 52471/13 and 52596/13, 6 April 2017.

bodily modifications that are in themselves disguised sterilisation or could lead to infertility. This is the first time when the Court has taken a step towards greater protection of the physical integrity of trans persons.[139] It is important to note that the Court ruled only on genital surgery. However, States could still impose procedures that do not directly lead to sterilisation. Such conclusions make the ground shaky for trans people who are faced with a range of different medical procedures that are often highly detrimental to their* health and designed to "normalise" their* bodies regardless of their* wishes. While some trans people may wish to undergo gender reassignment surgery and procedures, this does not mean that this is what should be normal and required of every trans person. There was a clear need for a clear answer based on reasons other than infertility.

In 2021, in the case X and Y v. Romania, the Court made it clear that gender reassignment surgery violates Article 8 of the Convention.[140] In this case, the difference is that the applicants insisted that such a procedure is highly invasive, whether or not it has consequences for fertility.[141] The ECtHR found Romania's arguments made unconvincing, namely that there was no justification for the interference with bodily integrity. The doctrine of genitocentrism[142] has been completely abandoned, and not only that — medical intervention in the form of invasive surgery is no longer considered to be a legitimate requirement. Such a step is positive not only for those who do not want to undergo such an operation, but also for those who do. By significantly shortening the waiting period for legal gender recognition, it reduces the immense amount of stress that trans people experience while transitioning.

The Court may still have to deal with cases concerning gender reassignment and its funding in the future. Previous judgements, such as Van Kück v. Germany,[143] Schlumpf

[139] *Holzer*, (fn. 27), p. 175.
[140] ECtHR, X and Y. v. Romania, App. no. 2145/16 et 20607/16, 19 January 2021.
[141] *Schoentjes*, *Cannoot*, X AND Y V. ROMANIA: THE 'IMPOSSIBLE DILEMMA 'REASONING APPLIED TO GENDER AFFIRMING SURGERY AS A REQUIREMENT FOR GENDER RECOGNITION, https://strasbourgobservers.com/2021/02/25/x-and-y-v-romania-the-impossible-dilemma-reasoning-applied-to-gender-affirming-surgery-as-a-requirement-for-gender-recognition/ (last accessed on 31/05/2023).
[142] The doctrine, which was based on the fact that genital surgery was also necessary for transition.
[143] ECtHR, Van Kück v. Germany, App. no. 35968/97, 12 June 2003.

v. Switzerland,[144] L v. Lithuania,[145] were given in a specific context, namely when the Court saw gender reassignment surgery as a requirement for gender recognition. Now the situation is different, and the question might be asked: if it is no longer compulsory, should the desire to undergo such a procedure not be the responsibility of the State? The answer should still be that it is a positive obligation of the State, because for some trans persons it is a crucial aspect of their* well-being and a part of their* transition. The transgender person should have a right to transition in terms of bodily changes, if it is necessary. There should be no further explanation for this other than the person's willingness, based on informed consent. The new approach to gender reassignment surgery should not jeopardise the previous case-law where the Court found that "the burden imposed on the [transgender person] to prove the necessity of the medical treatment [to be] disproportionate."[146]

Gender reassignment should be a right, not an obligation. Moreover, any medical intervention that is coercive and has no therapeutic purpose has no place in a fair democratic society. Unfortunately, the rulings only touch on the issue of genital surgery. But this is not the only medical procedure that trans people have to go through. The Court may still have to deal with the issue of hormone replacement therapy and compulsory medical examinations, which are still imposed on trans people in many countries.[147]

IV. Mental health diagnosis

At the time of writing, 10 States, members of the Council of Europe, do not require a psychiatric diagnosis.[148] We need to understand that this requirement is not simply a quick appointment with a psychiatrist who gives the green light for further changes. The whole process can involve hospitalisation in a psychiatric facility for up to 45 days, during which the full panel of doctors conduct multiple interviews with very intrusive

[144] ECtHR, AP, Schlumpf v. Switzerland, App. no. 29002/06, 8 January 2009.
[145] ECtHR, L. v. Lithuania, App. no. 27527/03, 11 September 2007.
[146] *Gonzalez-Salzberg,* (fn.8), p. 51.
[147] *Bassetti*, (fn. 89), pp. 321-323.
[148] TGEU, Trans Rights Map, Europe & Central Asia 2022, Mental health diagnosis, https://transrightsmap.tgeu.org/home/legal-gender-recognition/mental-health-diagnosis (last accessed on 31/05/2023).

questions about all aspects of the person's private life.[149] After all of this, the person may be rejected to be recognised as a 'transexual' because they* are not feminine enough for a woman or masculine enough for a man. Not only is this stigmatising, but it also puts people in the position of having to defend social norms of femininity, masculinity and heterosexuality in order to be a 'proper transsexual' - rhetoric that we saw in the Goodwin v UK case.[150]

In several of the cases mentioned above, the Court was asked to examine whether the requirement was contrary to Article 8 of the Convention. In particular, the question of disproportionality was raised in the case of A.P., Garçon and Nicot v. France.[151] The ECtHR has not yet challenged this requirement, and still accepts it as a valid demand within the wide margin of appreciation of the State. In this part, we will look at recent developments in medical perception of 'transsexualism' and how they might change the Court's position on the issue.

Firstly, the diagnosis is needed to "safeguard against ill-considered"[152] and erroneously requested legal gender recognition.[153] As the endocrinologists *Leighton Seal* and *Donal O'Shea* put it, there is simply a need to distinguish persons that suffer from other psychiatric diagnosis, such as bipolar depression or psychosis.[154] This line of argument raises many questions. Allegedly, people with these diagnoses cannot consciously decide for themselves* whether their* gender identity is different from what is stated on their* birth certificate. Is another psychiatric diagnosis also an obstacle to legal gender recognition? Furthermore, there is no evidence of how often it actually happens that a person wants to change their* gender identity solely because they* are currently under the influence of, for example, a severe psychosis. It seems that the medical field is still very patronising and overprotective of people who seem to be the exception rather than the rule.

[149] *Bassetti,* (fn. 89), pp. 318-319.
[150] ECtHR, Christine Goodwin v. the United Kingdom, App. no. 28957/95, 11 July 2002.
[151] ECtHR, A.P., Garçon and Nicot v. France, App. 79885/12, 52471/13 and 52596/13, 6 April 2017.
[152] *Dunne*, J Soc Welf Fam Law Vol. 39/2017, p. 497, 498.
[153] ECtHR, A.P., Garçon and Nicot v. France, App. 79885/12, 52471/13 and 52596/13, 6 April 2017, para. 141.
[154] *Morgan*, Lancet Diabetes Endocrinol. 4/ 2016, pp. 207, 207-208.

In the above cases, the Court relied heavily on the medical view of 'transsexualism' as a mental disorder. This means that trans identity is by default not a choice, and that the core of a person's identity is a pathology. There is a point where some conditions are recognised as a diagnosis, although this may be controversial. This should, at least in theory, help people with these conditions to escape stigma, especially in the medical field. This is not the case for trans people. It only stigmatises their existence and puts them in a vulnerable position.

Interestingly, a similar situation had developed with homosexuality which was generally recognised as pathological until 1973 or 1990, depending on the context.[155] The 'pathological' presentation of trans identity derives in particular from the World Health Organisation's (further — WHO) International Classification of Diseases (further — ICD). ICD-11 is its latest version, which has re-evaluated the scientific basis for the diagnosis. Finally, the WHO has removed or declassified the diagnoses of 'transsexualism' and 'gender identity disorder of children'.[156] However, the ICD still has two conditions ('gender incongruence of adolescence and adulthood' and 'gender incongruence of childhood') which have been moved to the chapter on 'conditions related to sexual health'. The WHO's position on this issue is now clear: "This reflects current knowledge that trans-related and gender diverse identities are not conditions of mental ill-health, and that classifying them as such can cause enormous stigma."[157] These scientific and institutional developments could provide the perfect basis for the Court to change its position.

Nevertheless, the Court may be reluctant to move away from pathologisation. Mainly because the ECtHR has used this 'medical condition' argument to prove that other requirements are disproportionate, as in the case of gender reassignment surgery. The diagnosis again proves that a person is in fact 'mentally' transgender. Some scholars argue that the medical condition

[155] In 1973, homosexuality was removed from the international classification of diseases (DSM). However, the WHO did not remove it from ICD until 1990. *Murjan, Bouman*, in: *R*ichards, Bouman, Barker (eds.), p. 125.
[156] Ibid, p. 126.
[157] World Health Organization, Gender incongruence and transgender health in the ICD, https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd (last accessed on 31/05/2023).

requirement has even been strengthened in recent years in order to abandon other requirements — the lesser of two evils formula, so to speak.[158]

Secondly, the ECtHR correctly notes that most states consider this requirement to be desirable and valid, and therefore states have a wide margin of appreciation.[159] However, as we discussed earlier, the consensus argument is not so simple. Indeed, scholars argue that it is no longer an obstacle to abandoning previous case-law in favour of States.[160] A conservative consensus would most likely be less restrictive of the margin of appreciation and therefore less likely to be used as a legal argument against the requirement. It is mostly used in favour of governments and limits the Court's activism.[161] Nevertheless, we should not forget that there is also an instrument of dynamic interpretation that shows "the consensus arguments are not used any longer to uphold the state's justification, […] and the lack of consensus does not in itself necessarily prevent the finding of a violation".[162] The clear example is the case Dudgeon v. UK.[163]

There is also a rather dark side to the story of this requirement: pathologising further leads to restricting of other freedoms, such as the freedom of movement. The Court's lack of attention to the transphobic nature of the compulsory hospitalisation is worrying. For example, in the case X v. Russia, "[the applicant] has started contemplating the possibility of gender reassignment. During this period he has had mood swings, has been anxious, irritable, [and had] difficulties in focusing his attention. Given these circumstances he was hospitalised in [a psychiatric facility]."[164] Although the judgement does not deal with the first hospitalisation, it is surprising that the Court does not connect the nature of further arbitrary deprivation of liberty to the perception of 'transexualism' as a disorder (even though, the applicant received a

[158] *Schoentjes*, *Cannoot*, X AND Y V. ROMANIA: THE 'IMPOSSIBLE DILEMMA 'REASONING APPLIED TO GENDER AFFIRMING SURGERY AS A REQUIREMENT FOR GENDER RECOGNITION, https://strasbourgobservers.com/2021/02/25/x-and-y-v-romania-the-impossible-dilemma-reasoning-applied-to-gender-affirming-surgery-as-a-requirement-for-gender-recognition/ (last accessed on 31/05/2023).
[159] ECtHR, A.P., Garçon and Nicot v. France, App. 79885/12, 52471/13 and 52596/13, 6 April 2017, para. 139.
[160] *Polgari*, (fn. 70), p. 78.
[161] Ibid.
[162] Ibid.
[163] ECtHR, Dudgeon v. UK, App. no. 7525/76, 22 October 1981.
[164] ECtHR, X. v. Russia, App. 3150/15, 20 February 2018, para. 11.

different diagnosis). More generally, the judgement does not mention the possibility that the applicant's trans identity may have led to further unlawful forced hospitalisation since many trans persons are seen as a 'proven' danger to children, if not paedophiles at worst.[165]

In light of new circumstances, such as recent scientific developments and the fact that 10 countries have abandoned the requirement, the ECHR may reverse its position in the near future. As we have argued, the establishment of a diagnosis involves the pathologisation of a person's core identity and the outsourcing of the decision as to whether or not a person actually has that identity. The latter involves intrusive medical examinations and long waiting periods that directly interfere with the most intimate aspects of private life. This requirement should be abandoned and recognised as a violation of Article 8 of the Convention. Instead, it could be replaced with giving a person detailed information about the consequences of legal gender recognition.

V. Divorce requirement

Divorce is the other requirement that has not been affected. It involves the dissolution of the marriage for the purpose of further gender legal recognition. This can be done either by converting the marriage into a civil partnership, if the legislation so provides, or simply by divorce.

The question of queer marriage and trans issues have not once appeared before the Court. It all goes back to the earlier judgements on legal gender recognition. The illegality of same-sex marriage was a perfect argument for not allowing people to transition at first, because gender was considered to be immutable.[166] Therefore, the person will always be of the gender assigned to them at birth. Consequently, if they were 'homosexual', then legal gender recognition would allow them to enter into a marriage which would be also unchangeably homosexual because of the birth sex of one of the spouses. This was unacceptable.[167] Later, the state of acceptance of

[165] *Gonzalez-Salzberg,* (fn.8), pp. 160-161.
[166] *Gonzalez-Salzberg,* (fn.8), p. 49.
[167] *Holzer*, (fn. 27), p. 174.

'transexuals' has changed. However, the argument has mutated further to defend heteronormativity at all costs to the extent that it is now even considered that heteronormativity is even more important than rigid gender roles.[168]

In the landmark case Goodwin v. UK,[169] the Court argues that if Ms Goodwin is recognised as a woman for all legal purposes, her wish to marry her partner, a cis-man, will fall within the scope of Article 12's protection.[170] Moreover, her heterosexuality is also the reason for the Court's willingness to accept her arguments in favour of legal gender recognition.[171] The reason for the latter is heteronormativity, which can be found, for example, in Rees v. UK,[172] where the ECtHR defines what marriage actually is: "[M]arriage is defined as a voluntary union for life of one man and one woman to the exclusion of all others."[173] It gives us the perfect opportunity to see the hierarchy of social norms that the Court establishes in its judgements. Ultimately, when it comes to weighing up what is more important — the ECtHR places heteronormativity above rigid gender roles.[174]

It is important to note that transgender persons can have any type of sexuality which is existent — on the whole spectrum from the pole of heterosexuality to the pole of homosexuality.[175] Heterosexuality does not distinguish 'true' transgender persons because all people who identify as transgender are simply transgender. Being trans is a personal matter and is must be defined by the individual concerned.

The most important case in this respect is the case of Hämäläinen v. Finland.[176] At the time, Finland did not allow marriage for same-sex couples, only civil partnerships. Legal gender recognition was subject to several requirements, including the dissolution of the marriage. The applicant considered that this requirement violated her right to respect for private and family life (Article 8 of the Convention) and her right to marry

[168] *Gonzalez-Salzberg,* (fn. 8), pp. 49-59.
[169] ECtHR, Christine Goodwin v. the United Kingdom, App. no. 28957/95, 11 July 2002.
[170] Ibid, para. 101.
[171] *Gonzalez-Salzberg,* (fn. 8), pp. 49-50.
[172] ECtHR, Rees v. United Kingdom, App. no. 9532/81, 17 October 1986.
[173] Ibid, para. 26.
[174] *Gonzalez-Salzberg,* (fn. 8), pp. 49-50.
[175] *Vade*, Mich. J. Gender & L. 11(253)/2005, p. 253, 270.
[176] ECtHR, Case Hämäläinen v. Finland [GC], App. no. 37359/09, 16 July 2014.

(Article 12 of the Convention), as she had to choose between two of her fundamental rights: to be legally recognised as a woman and to remain married to her wife. In addition, her wife still considered herself heterosexual, had strong religious beliefs and did not wish to transform the marriage into civil partnership.[177] This meant that the only way to obtain legal gender recognition without her wife's consent was through divorce. The applicant also claimed that she was discriminated against on the basis of her gender identity, as cisgender people did not have to fight for their rights in the way that she did.

As wee can see, there are two interests at stake: the applicant's interest in obtaining legal recognition without further transformation of her marriage and Finland's interests in preserving traditional heterosexual marriage.[178] Finland and the ECtHR agreed that there was indeed an interference with the applicant's private life and the question was whether such an interference was proportionate. The ultimate answer of the Court was: yes, it was.[179] The Court rejected the applicant's complaints on several grounds. Firstly, it was crucial that Finland provided several options for resolving this issue, namely transformation of marriage or divorce. The Court did not find that civil partnership gave less rights in comparison with marriage, in particular parental. Secondly, the ECtHR applied the doctrine of conservative consensus, which allows states a wider margin of appreciation regarding the divorce requirement. Finally, it did not even consider whether there was a violation of the Article 12 of the Convention since "[it] enshrines the traditional concept of marriage as being between a man and a woman".[180] The Court also rejected the claim that the applicant had been discriminated against. There was no violation of Article 14 because, in the Court's view, her situation was not comparable to that of cisgender persons.[181]

Three judges disagreed with this conclusion and issued a dissenting opinion.[182] They insisted that the margin of appreciation in this case should be much more narrower,

[177] ECtHR, Case Hämäläinen v. Finland [GC], App. no. 37359/09, 16 July 2014, para. 44.
[178] *Gonzales-Salzberg*, (fn. 103), p. 176.
[179] ECtHR, Case Hämäläinen v. Finland [GC], App. no. 37359/09, 16 July 2014, para. 87.
[180] Ibid, para. 96.
[181] ECtHR, Case Hämäläinen v. Finland [GC], App. no. 37359/09, 16 July 2014, para. 112.
[182] ECtHR, Case Hämäläinen v. Finland [GC], App. no. 37359/09, 16 July 2014, joint dissenting opinion of Judges Sajó, Keller and Lemmens, para. 1.

given that the issue touches the applicant's gender identity. As we have seen in previous cases, the most intimate aspect of life argument has been considered a legitimate argument for narrowing the margin of appreciation. However, the consensus doctrine is not applied consistently and this was clearly demonstrated in this case.[183] In addition, the judges argued in their dissenting opinion that the aim of preserving heterosexuality, even though it is legitimate, did not justify such an interference in the applicant's personal life, particularly in the most intimate aspect such as gender identity.[184] They also reiterated the applicant's arguments that the wife's sexuality remained heterosexual, as she insisted, and therefore it could not be argued that this marriage would become homosexual.[185] It was also argued that the court ignored the religious background of the applicant's wife and her strong religious beliefs about marriage.[186] The judges were persuaded by this line of argument and concluded that there was indeed a violation of Article 8 in this case.

There are a number of major problems with Hämäläinen v. Finland and in particular, with the dissenting opinion. Firstly, the biggest problem is the belief that homosexual marriage is not a human right and that the Convention does not support it.[187] Homosexual marriage could be considered as any non-heterosexual marriage between cis-men and cis-women, so we could skip the discussion whether marriage between a heterosexual woman and a transgender woman with any type of sexuality is homosexual or not.

Both the judgement and the dissenting opinion convey the conviction that the Article 12 of the Convention only protects heterosexual marriage and does not oblige States to introduce homosexual marriage.[188] The judges thereby upheld the general status quo regarding gay marriage. Unfortunately, this is the main problem, as all judges see the preservation of heterosexual marriage as a legitimate aim worth to be protected by all means and not as discrimination of the LGBTIQ*-community. Secondly, the

[183] *Gonzales-Salzberg*, (fn. 103), p. 182.
[184] ECtHR, Case Hämäläinen v. Finland [GC], App. no. 37359/09, 16 July 2014, joint dissenting opinion of Judges Sajó, Keller and Lemmens, para. 5.
[185] Ibid, para. 20.
[186] Ibid, para. 6.
[187] ECtHR, Case Hämäläinen v. Finland [GC], App. no. 37359/09, 16 July 2014, para. 96.
[188] *Gonzales-Salzberg*, (fn. 103), p. 182.

arguments of the dissenting opinion were partly based on the religious beliefs of the applicant's wife. This means that if other spouses in this situation do not hold such beliefs, it is easier to justify the interference in their private and family life. While individual circumstances must certainly be taken into account, they should not become the main line of argument in such cases, which affect many other people.[189]

However, there was another interesting point that could be a source of inspiration for future judgements — negative obligations of the State. In the dissenting opinion, the Judges argued that this case touched not only positive obligations of the State but also negative ones[190] — that is, not to interfere in the applicant's personal and family life.[191] All previous judgments have focused heavily on the positive obligations of the state: to introduce legislation, to create transparent systems of legal gender recognition, to assist applicants with all necessary legal and practical measures. In many cases, however, States are also required to abolish requirements that prevent swift and transparent legal gender recognition. The negative obligation of the State not to interfere in the private life of trans persons in order to prevent legal gender recognition is enshrined in Yogyakarta Principle No.3 which states that "no status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity."

In 2023, we could also point out that the Council of Europe is almost evenly divided on the question of divorce. Iceland, Ireland, the United Kingdom, Portugal, Spain, Malta, France, Germany, Luxembourg, Belgium, the Netherlands, Switzerland, Austria, Slovenia, Ukraine, Estonia, Sweden, Norway and finally Finland — the country that defended the divorce requirement in the case of Hämäläinen — have abandoned it.[192] The Court could use the argument of the growing European consensus in its future judgement to strengthen its position on abandoning previous case-law in the light of the new circumstances. Since the ECtHR is a part of the Council of Europe and the

[189] *Gonzales-Salzberg*, (fn. 103), p. 183.
[190] ECtHR, Case Hämäläinen v. Finland [GC], App. no. 37359/09, 16 July 2014, joint dissenting opinion of Judges Sajó, Keller and Lemmens, para. 4.
[191] *Holzer*, (fn. 27), p. 180.
[192] TGEU, Trans Rights Map, Europe & Central Asia 2022, No-divorce requirement, https://transrightsmap.tgeu.org/home/legal-gender-recognition/no-divorce-requirement (last accessed on 31/05/2023).

latter is an intergovernmental organisation, it is important that more countries share the same position on banning certain requirements.[193] However, some argue that the European consensus cannot be regarded as the most progressive tool in defending transpersons rights. As *Lucrezia Nicosia* notes, this is because it simply reinstates something that is already in the legislation of many European countries.[194] Nevertheless, it is, both practically and symbolically, an important tool for extending protection through progressive legislation of members of the Council of Europe.

D. Family rights after legal gender recognition

Many trans people have children. The studies show that in most cases trans women become parents even before the moment of legal transition.[195] Given the fact that the requirement of a psychiatric diagnosis and spousal divorce is still in effect, we can assume that the problems discussed above are not exclusive to the process of obtaining legal recognition of gender.

Pathologisation can, of course, affect not only the right to liberty and security, but also the rights in relation to one's children. For example, in P.V. v. Spain,[196] the ECtHR "upheld a Spanish court's decision to limit a trans woman's contact with her son."[197] The Court ignored the fact that transpersons are routinely pathologised by the medical community and did not sufficiently analyse the extent to which negative attitudes might have affected this situation. In this case, the Court did not connect "the dots" between 'emotional instability', which was used as a ground for restricting contact arrangements, and the process of gender reassignment. However, the Spanish Court points to this link directly: "It has only been a few months since he began the process of [gender reassignment], which involves profound changes in all aspects of [her] life and personality, which, logically and understandably, involves the emotional instability detected by the psychologist in her report". The use of the words "logically" and "understandably" is not accidental; there are doubts as to how much of this association

[193] Nicosia, (fn. 55), p. 32.
[194] Nicosia, (fn. 55), p. 32.
[195] *Motmans, Dierckx, Mortelmans*, in *Bouman, Arcelus*, p. 82.
[196] ECtHR, P.V. v. Spain, App. no 35159/09, 30 November 2010.
[197] Dunne, (fn. 113), p. 571.

is natural and how much is due to pathologisation. We can only hope that in this case it was the best decision for the child and really corresponded to his best interests, but how often is this really the case? How often do trans parents lose custody of their children because they are trans? Can discrimination provoke emotional instability and anxiety about their* rights? These are the questions we want to see discussed in the European Court's judgements.

Fortunately, we see that there are indeed positive developments. In 2021, the ECtHR finally stood up for the trans parents and found violations of both Articles 8 and 14 of the Convention. In the case A.M. v. Russia, the Court found for the first time that trans people were indeed discriminated against in comparison to cisgender people.[198] The circumstances of the case are similar: the applicant was deprived of the contact with her children because, in the opinion of Russian Courts and psychiatrists, she was a danger to her child.[199] The ECtHR did not find these conclusions persuasive.[200] Moreover, it stated, "[…] the influence of the applicant's gender identity on the assessment of her claim has been established and was a decisive factor leading to the decision to restrict her contact with her children."[201] This judgement is definitely a huge victory for the entire LGBTIQ* community. It breaks new ground not only to better protect the rights of trans parents, but also to protect trans people from discrimination in general.

E. Gender-diverse and intersex persons

Gender is a social category based on biological characteristics. It is seen normal to divide people into two boxes: men and women. Both categories have very different characteristics, and it is assumed that there is nothing in between: a person is either a man or a woman. However, biology is not the most reliable argument for maintaining the gender binary. There are people who have 'mixed' or 'missing' bodily characteristics that makes them 'abnormal' in the eyes of society because they* do not

[198] ECtHR, A.M. and Others v. Russia, App. no. 47220/19, 6 July 2021, para. 81.
[199] Ibid, para. 19.
[200] Ibid, para. 57.
[201] Ibid, para. 75.

fit into these illusory rules, namely intersex people.[202] There are also people who may not physically differ from cis-men or cis-women but still identify as non-binary, agender, bi-gender, genderqueer, etc.[203] These are gender-diverse people in the terminology of this paper.[204] This category also includes some intersex people,[205] non-binary persons and trans persons that are not binary-oriented.[206]

This paper has focused on the problems faced by binary-oriented transgender people. This may seem unfair as they are not the only ones to suffer discrimination or inhuman and degrading treatment and other cruel practices. Nevertheless, it is difficult to analyse the legal problems of, for example, non-binary or intersex people, as there are rarely cases before the ECtHR concerning their* legal challenges. It is only now, in the 2010s and 2020s, that we see the first cases making their way into the Court's chambers, thanks to developments in the field of LGBTIQ* rights. If there is any success, we will see in this section.

In almost all cases, physically-diverse intersex persons suffer from violations of their* physical integrity through corrective surgery (sometimes including genital mutilation), medical treatment without their consent or knowledge, and sometimes the lack of legal recognition of their non-binary identity.[207] There were only 2 cases on intersex issues in the case-law of the ECtHR, despite the fact that these practices have existed for as long as the Court itself.

The first of them, M. v. France[208] was declared inadmissible. It concerned medical practices that are constantly carried out on intersex children in order to 'normalise' their bodies without their consent and with serious health complications. This is what made *Anne Fausto-Sterling* argue that "the existence of intersex bodies is usually only a matter of hours".[209] However, in some cases, the treatment takes years. These

[202] *Gonzalez-Salzberg*, (fn. 8), p. 30.
[203] *Vade*, Mich. J. Gender & L. 11(253)/2005, pp. 253, 273-275.
[204] Terms gender-diverse and non-binary are interchangeable in this paper.
[205] It should be noted that the identity of some intersex people may be the same as their* sex assigned at birth. Not all intersex people wish to be considered as a third gender.
[206] *Clucas, Whittle*, in: Richards, Bouman, Barker (eds.), p. 74.
[207] *Mestre*, Soc. Sci. 11, 317/2022, p. 1, 2.
[208] ECtHR, M v. France, App. no. 42821/18, 26 April 2022.
[209] *Fausto-Sterling*, p. 257.

operations have no proven therapeutic function (or in other words, they are non-vital) and are generally unnecessary, if not harmful.[210] In this case, the operations caused the applicant's disability, infertility and much mental and physical suffering for the applicant. The applicant argued that the treatment they* underwent violated their* right to physical integrity and to be free from inhuman or degrading treatment.

Unfortunately, the applicant did not exhaust domestic remedies, and the case M. v. France did not reach the substantive review. Some academics were disappointed that the ECtHR found the application inadmissible, despite the great opportunity it presented.[211] However, intersex activists were hopeful that this case would open the door for intersex persons to find the ECHR protection later.[212] The Court pointed out the following, "An act of a medical nature performed without therapeutic necessity and without the informed consent of the person who is the subject of the act is likely to constitute inhuman and degrading treatment within the meaning of Article 3",[213] which is the case in the most corrective surgeries.[214] The ECtHR found that all the circumstances described in the case were likely to fall within the scope of Article 3 of the Convention[215] — although there was no review on the merits, the Court's willingness to highlight this was ground-breaking. There was a clear message to the States in this decision. The only aspect that remained unresolved was the issue of Article 14 of the Convention. Scholars also argued that the Court should have at least addressed the discrimination suffered by intersex persons in the comparison to dyadic persons (those who conform to physical norms), even thought the applicant did not raise this issue.[216]

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[210] *Carpenter*, Reproductive Health Matters 24(47)/2016, p. 74, 77.
[211] *Derave, Ouhnaoui*, Medical" normalisation" of intersex persons: third-party intervention to the ECtHR in the case of M. v. France, https://strasbourgobservers.com/2023/02/14/m-v-france-recognising-the-existence-of-intersex-persons-but-not-yet-their-bodily-integrity/ (last accessed on 31/05/2023).
[212] oii Europe, The European Court of Human Rights finds the complaint inadmissible, but sets the basis for the qualification of IGM as torture, https://www.oiieurope.org/m-v-france-decision/ (last accessed on 31/05/2023).
[213] Translation from French: "Un acte de nature médicale réalisé sans nécessité thérapeutique et sans le consentement éclairé de la personne qui en est l'objet est susceptible de constituer un mauvais traitement au sens de l'article 3." ECtHR, M v. France, App. n. 42821/18, 26 April 2022, para. 61.
[214] *Carpenter*, Reproductive Health Matters 24(47)/2016, p. 74, 75.
[215] ECtHR, M v. France, App. n. 42821/18, 26 April 2022, para. 63.
[216] *Derave, Ouhnaoui,* (fn. 213).

In January 2023, the ECtHR delivered its first judgement concerning intersex persons and the issue of the gender-neutral markers. The individual claimed that they* would be recognised as an intersex person on their* birth certificate and only on their* birth certificate, and that the absence of such a marker on that document was in fact a violation of Article 8 of the Convention. Unfortunately, the Court rejected the complaint. The reasoning for the rejection is, unsurprisingly, reminiscent of the arguments used in earlier judgements on gender recognition for transgender persons. The judges accepted that there was an interference with the applicant's private life.[217] The Court also showed an understanding that intersex persons may not always be female or male, and that the forced gender assignment that they* receive is not a matter of choice.[218] It also recognised that the applicant did not ask for the third gender marker, but simply wanted to amend their* birth certificate. However, the Court was more concerned that the applicant's demands would lead to numerous changes in the law. Therefore, the aim of preserving "the principle of the inalienability of civil status" was considered legitimate and, moreover, not a matter on which the Court had any authority to rule. The ECtHR removed itself from reflection on the extent to which such changes were justified and necessary for the protection of rights: "[T]he applicant's request would have been tantamount to recognising the existence of another gender category in addition to "male" and "female", which was a matter for the legislature's assessment rather than for the courts, given that such recognition raised sensitive biological, moral and ethical questions."[219] It used the political argument of the separation of powers. This only leads us to doubt whether the Court properly weighed the interests of the state against the rights of the applicant.

It appears that the Court is prepared to use Article 3 of the Convention to protect gender-diverse people from violations of their physical integrity. However, it has clearly shown that it is not yet willing to extend the right to gain legal gender recognition to gender-diverse persons who fall between two genders and do not define themselves* as women or men. This means that many people do not have the right to exist legally between two recognised genders, unless the State decides to introduce a 'third' gender or to allow people to exist without an assigned gender. However, there is a huge

[217] ECtHR, Y. v. France, App. 76888/17, 31 January 2023, para. 83.
[218] Ibid, para. 85-86.
[219] Ibid, para. 86, 89.

problem of stigmatisation of gender diverse people, and this is sometimes exacerbated when they are assigned no gender or the third option at birth.[220] It should not preclude the introduction of the right to define oneself as a non-binary person. This only argues in favour of giving people the right to define themselves* as non-binary if they wish so, when they are able to give their* consent. In the meantime, States must take all necessary measures to combat the discrimination of this vulnerable category of people. Examples of European countries that have already changed the gender paradigm include: Austria,[221] Belgium,[222] Denmark,[223] Germany,[224] Iceland,[225] Spain[226] and Malta.[227] We can only hope that more countries will follow.

F. Conclusion

Only 51 years ago, there was no legal gender recognition anywhere in the world. Only 11 years ago, no country in the world allowed self-determination.[228] Until the second half of the 2010s, we could not imagine the first victories for non-binary legal recognition. There are huge advances in the rights of non-cisgender people happening before our eyes. And the ECtHR has played a huge role in this: in just over 20 years we have seen recognition of the right to legal recognition of gender and a huge turnaround in the understanding of the necessity and proportionality of requirements imposed by states to implement gender recognition. The court has definitely set out to protect the rights of transgender people as much as possible and one can only hope

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[220] *Mestre*, Soc. Sci.11(317)/2022, p. 1, 9.
[221] Intersexuelle Personen haben Recht auf adäquate Bezeichnung im Personenstandsregister, https://www.vfgh.gv.at/medien/Personenstandsgesetz_-_intersexuelle_Personen.php (last accessed on 31/05/2023).
[222] *Desloovere*, Transgender Laws in Transition: European Courts on Non-Binary Gender Recognition, https://www.leuvenpubliclaw.com/transgender-laws-in-transition-european-courts-on-non-binary-gender-recognition/ (last accessed on 31/05/2023).
[223] TGEU, Denmark: X in Passports and New Trans Law Works, https://tgeu.org/denmark-x-in-passports-and-new-trans-law-work/ (last accessed on 31/05/2023).
[224] *Muller*, Third Sex, https://www.dw.com/en/third-sex-option-on-birth-certificates/a-17193869 (last accessed on 31/05/2023).
[225] *Elliot*, New law to help trans and intersex people, https://www.ruv.is/english/new-law-to-help-trans-and-intersex-people (last accessed on 31/05/2023).
[226] *Mestre*, (fn. 220), p.1, 9.
[227] TGEU, Trans Rights Map, Europe & Central Asia 2022, Non-binary recognition, https://transrightsmap.tgeu.org/home/legal-gender-recognition/non-binary-recognition (last accessed on 31/05/2023).
[228] Argentina was the first country to introduce gender self-determination. *Hollar*, Comparative Politics 46(1)/2013, p. 103,105.

that this trend will increase and expand in relation to other gender non-conforming people.

There has been a lot of progress, and just as much backlash and regression. The most notorious examples of this are several Eastern European countries, all members of the Council of Europe. One of the them is now even an ex-member. In 2022, Russia was expelled from the Council of Europe.[229] As a member of the Council of Europe, it was one of the biggest violators of human rights, including LGBTIQ* rights.[230] Other major examples of deterioration of the rule of law and human rights protection are Poland and Hungary, both members of the Council of Europe and the European Union. Since around 2019, Poland has seen the emergence of 'LGBT free zones' or anti-LGBTIQ* zones, which represent a minimum level of direct discrimination against queer people.[231] In 2020, Hungarian lawmakers introduced a bill that essentially makes gender legal recognition impossible, as the birth sex /gender cannot be changed on the birth certificate anymore.[232] The deterioration of human rights in these countries has a strong impact on the state of LGBTIQ* rights in other countries, showing that even one of the most progressive regions of the world is not immune to such events.

In addition, ILGA-Europe's annual report,[233] which tracks key positive and negative trends in LGBTIQ* equality and human rights in Europe and Central Asia, shows that 2022 was the most violent year for LGBTIQ* people in 10 years. It shows that violence has become more planned and that hate speech against LGBTIQ* people has become a political tool. This indicates that now more than ever, the queer community needs to enlist the support of the European Court of Human Rights.

In relation to trans people, the following issues are of particular relevance: the mental health diagnosis and divorce requirements must be found to be in breach of Article 8

[229] ECtHR, Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, 22 March 2022.
[230] *The Guardian*, European court of human rights: which countries get the most judgments? https://www.theguardian.com/news/datablog/2012/jan/27/european-court-human-rights-judgments (last accessed on 31/05/2023).
[231] *Grabowska-Moroz, Wójcik,* EEJSP 7(4)/2022, p. 85, 95.
[232] Faye, p. 160.
[233] ILGA-Europe, Annual Review 2023, https://www.ilga-europe.org/report/annual-review-2023/ (last accessed on 31/05/2023).

of the ECHR. This means that the right to legal gender recognition must be transformed into the right to self-determination. The Court should consider extending the application of Article 3 of the Convention to states that continue to require sterilisation and gender reassignment surgery of transgender people who wish to transition. The ECtHR should refer more often to Article 14 of the Convention in situations where there is clear structural discrimination against trans people. We also hope that in the future the Court will address issues that very rarely reach the courts in principle, such as violence against trans sex workers.[234] The Court may also have to consider the issue of legal gender recognition for children, including the issue of gender reassignment surgery and puberty blockers for minors.

With regard to gender-diverse people, our hope is to see the same evolution that has taken place in legal gender recognition for transgender people. In relation to specific problems of intersex people, we hope to see cases where the Court finds violations of Article 3 of the Convention in relation to corrective surgery for intersex people. In addition, States should recognise the right of non-binary and intersex people to define themselves in this way, even if this means changing the binary thinking of the law.

It seems that these changes are already underway. However, it may take another 20 years to introduce them. In the meantime, we must accept the fact that, unfortunately, many trans people will suffer from oppression. And it is our job as lawyers to do all we can to bring about change.

[234] Such as the case Electra Leda Koutra and Anastasia Katzaki v. Greece, App. no. 459/16, communicated in 2017.

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