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# Stereotyped Recognition

Trans identities and conceptions of gender in the European Court of  
Human Rights' jurisprudence

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## **Abstract**

In the past decades, international instruments and human rights courts have set out to eliminate gender stereotyping. The topic of elimination of gender stereotypes has been particularly present in the area of gender equality.

As trans people are increasingly gaining recognition, it must be ensured that legal gender recognition does not occur through reliance on gender stereotypes, which bears the risk of undermining the goal of eliminating gender stereotypes. However, gender stereotypes often appear in case-law related to the gender identity of trans persons.

This thesis aims to compare the European Court of Human Rights' (ECtHR) approach to gender stereotypes in the context of gender equality and gender identity cases, to analyse whether it avoids relying on gender stereotypes and condemns such reliance when it occurs. The thesis further analyses whether the ECtHR should be consistent in its approach to gender stereotypes in gender equality and gender identity cases, and how it could achieve such a goal.

This analysis reveals that both gender equality and gender identity cases contain a number of gender stereotypes despite the ECtHR's commitment to their elimination, with the gender stereotypes relied on in gender identity cases being disproportionately left unaddressed. Where gender stereotypes may aid in the recognition of certain trans persons, and hinder the recognition of others, this thesis questions the potential value of gender stereotypes and the risks associated with judicial reliance on them.

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# 1. Introduction

“The Court has already found that States may not impose traditional gender roles and gender stereotypes” - *Konstantin Markin v Russia* (2012)<sup>1</sup>

“He had always behaved like a girl and his physical appearance had always been very feminine” - *AP, Garçon and Nicot v France* (2017)<sup>2</sup>

## 1.1. Topic of research

In the case of *Konstantin Markin v Russia*, the European Court of Human Rights (ECtHR) set out its opposition to the perpetuation of gender stereotypes, in the context of a case dealing with gender equality. It appears that in cases brought by trans applicants, such as *AP, Garçon and Nicot v France*, references are often made to stereotyped ideas of gendered physical appearance and behaviour. The ECtHR’s advancements towards the elimination of gender stereotypes risk being undermined if the ECtHR accepts or even relies on gender stereotypes in certain cases, despite taking a firm stance towards the elimination of gender stereotypes in others. This research will explore how the ECtHR addresses gender stereotypes in its judgments, through comparisons between the approaches taken in cases of gender identity, brought by trans applicants, and approaches taken in cases relating to gender equality.

## 1.2. Background

Cook and Cusack have set out that “a stereotype is a generalized view or preconception of attributes or characteristics possessed by, or roles that are or should be performed by, members of a particular group”<sup>3</sup>, which has become a widely accepted definition of stereotypes, *inter alia* relied on by the Office of the High Commissioner for Human Rights of the United Nations

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<sup>1</sup> *Konstantin Markin v Russia* App no 30078/06 (ECtHR, 22 March 2012) para 142.

<sup>2</sup> *AP, Garçon and Nicot v France* App nos 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017) para 8.

<sup>3</sup> Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2011) 9.

(OHCHR)<sup>4</sup>. References to gender stereotypes in international instruments tend to focus on “harmful gender stereotypes”<sup>5</sup> or “wrongful gender stereotypes”<sup>6</sup>. However, it has been argued that gender stereotypes may be harmful even when they are not “negative”<sup>7</sup>, as seemingly positive stereotypes may impose undue expectations and burdens upon their recipients who may not conform to these stereotypes. These ‘positive’ stereotypes also serve to perpetuate unnecessary and undesirable categorisations. Nonetheless, some more restrictive approaches to the idea of harmful stereotypes persist, including the OHCHR’s view that harmful stereotypes are those that limit “women’s or men’s capacity to develop their personal abilities, pursue their professional careers and make choices about their lives and life plans”<sup>8</sup>, or Cook and Cusack’s idea that “[g]ender stereotyping is not necessarily problematic” but only becomes so where it denies “individuals their human rights and fundamental freedoms, and when it creates gender hierarchies”<sup>9</sup>, thus setting an arguably high bar for harmfulness to be established. A distinction can also be drawn between “statistically sound” generalisations and “statistically unsound” generalisations<sup>10</sup>, as the former may for example be necessary in decision-making<sup>11</sup>. Nonetheless, even where generalisations - or stereotypes - are statistically accurate, reliance on them may still be harmful and morally wrong, where it risks exacerbating “profiling” or marginalisation of certain communities or groups of people<sup>12</sup>. Throughout this research, gender stereotypes, specifically as applied to trans individuals, will be examined through the lens of these notions, to assess the harmfulness or justifiability of relying on them.

As it has been argued that one of the obstructions to gender equality is that “the frame of reference is still masculine”<sup>13</sup>, it may similarly be argued that full equality between cisgender, transgender and non-binary persons is currently stunted by the fact that the frame of reference is still cisnormative<sup>14</sup> and binary. Timmer contends that “[i]f the Court wants to go to the roots

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<sup>4</sup> UN Office of the High Commissioner for Human Rights, ‘Gender stereotypes and Stereotyping and women’s rights’ (September 2014) 1.

<sup>5</sup> *SVP v Bulgaria* (24 November 2012) Communication No 31/2011, CEDAW/C/53/D/31/2011, para 9.6.

<sup>6</sup> *RKB v Turkey* (13 April 2012) Communication No 28/2010, CEDAW/C/51/D/28/2010, para 8.8.

<sup>7</sup> UN Office of the High Commissioner for Human Rights, Commissioned Report on ‘Gender stereotyping as a human rights violation’ (October 2013) 18-19.

<sup>8</sup> UN OHCHR ‘Gender stereotypes and Stereotyping and women’s rights’ (n 4) 1.

<sup>9</sup> Cook and Cusack (n 3) 20.

<sup>10</sup> Frederick Schauer, *Profiles Probabilities and Stereotypes* (Harvard University Press 2003) 16-17.

<sup>11</sup> Schauer (n 10) 23-24.

<sup>12</sup> *ibid* 187-198.

<sup>13</sup> Alexandra Timmer, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’, 11(4) *Human Rights Law Review* (2011) 711.

<sup>14</sup> ILGA-Europe, ‘ILGA-Europe Glossary’ (July 2014) 3 <[https://ilga-europe.org/sites/default/files/ilga-europe\\_glossary\\_final\\_170714\\_www.pdf](https://ilga-europe.org/sites/default/files/ilga-europe_glossary_final_170714_www.pdf)> accessed 28 April 2021: “Cisnormativity: refers to the practices and



of structural gender discrimination it should dismantle gender stereotypes”<sup>15</sup>, and this research will use this argument as a starting point to argue for the deconstruction of gender stereotypes and general conceptions of gender to effectively work towards gender equality for all gender identities and expressions.

In 2002, the ECtHR recognised a right to gender identity under the right to private life<sup>16</sup>, which was reiterated in 2017<sup>17</sup>, in a landmark judgment for the advancement of transgender rights, and more recently in 2021<sup>18</sup>, clearly recognising the importance of the right to gender identity. So far, the ECtHR’s jurisprudence has remained within the confines of binary gender identities, having not yet been confronted with cases relating to non-binary gender or gender non-conforming individuals, though this may change soon as a case on the matter is pending before the Court<sup>19</sup>. Within Council of Europe (CoE) Member States, legal gender recognition takes several different forms, imposing requirements varying in intrusiveness and ease of fulfilment to their citizens. As of yet, there is no generalised model of self-determination of gender in CoE Member States, meaning that States will most often require individuals to fulfil certain requirements for their gender identity to be legally recognised. Gendered expectations and stereotypes will often shine through these requirements of proof, imposing certain visions of gender on transgender persons. As such, transgender persons may for example be required to prove that they have “presented publicly” as their lived gender for some years<sup>20</sup>, leaving judges to determine what ‘masculine’ and ‘feminine’ appearances and behaviours should look like<sup>21</sup>, an exercise that is difficult - or perhaps impossible - to accomplish without relying on stereotypes. Applicants themselves may also at times rely on heavily stereotyped notions of gender when petitioning for their identity to be legally recognised<sup>22</sup>.

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institutions that legitimise and privilege those who are comfortable in the gender belonging to the sex assigned to them at birth. On the other hand, this norm systematically disadvantages and marginalises all persons whose gender identity and expression do not meet social expectations.”

<sup>15</sup> Timmer (n 13) 713.

<sup>16</sup> *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002).

<sup>17</sup> *AP, Garçon & Nicot* (n 2) para 123.

<sup>18</sup> *X and Y v Romania* App nos 2145/16 and 20607/16 (ECtHR, 19 January 2021) paras 164-165.

<sup>19</sup> *Y v France* App no 76888/17 (ECtHR, forthcoming).

<sup>20</sup> Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI<sup>e</sup> siècle, Article 56 (France).

<sup>21</sup> Marie-Xavière Catto, ‘Changer de sexe à l’état civil depuis la loi du 18 novembre 2016 de modernisation de la justice du XXI<sup>e</sup> siècle’, 9 *Cahiers Droit, Sciences et Technologies* (2019), para 45.

<sup>22</sup> *YY v Turkey* App no 14793/08 (ECtHR, 10 March 2015) paras 7, 9.

### 1.3. Societal relevance

As touched upon previously, there exists significant research on the topic of (gender) stereotyping, including (gender) stereotyping within the European Court of Human Rights' jurisprudence. To date, research on gender stereotypes has mainly focused on the experiences of cisgender persons. This research will aim to examine gender stereotyping in the context of trans persons, through an analysis of ECtHR case law, to understand the limitations of current case-law for transgender and gender diverse individuals. This thesis will also examine potential alternatives to current conceptions of legal gender that may lessen the impact of gender stereotypes on marginalised communities, while highlighting the need to counter stereotypes at all levels for the goal of eliminating gender stereotypes to be reached. While gender stereotypes are increasingly being countered in the context of gender equality, they must not be implicitly accepted in the context of gender identity.

### 1.4. Research question and methodology

This research, therefore, aims to answer the following question:

*Does the ECtHR adopt a consistent approach to avoid and condemn reliance on gender stereotypes in gender equality and gender identity cases, and if not, should and could it do so?*

To answer this central question, this research will be guided by the following three questions, which will serve to structure the thesis.

*1. How does the ECtHR understand gender, and is this understanding inclusive of queer identities?*

To answer the research question, the first goal of this thesis will be to set out the ECtHR's understanding of gender, and explore the potential harms of an understanding lacking inclusivity, with a specific focus on marginalised groups (Chapter 2). The thesis will therefore first review how the ECtHR understands gender, by exploring the European Convention on Human Rights (ECHR) and the ECtHR's jurisprudence relating to gender. This understanding of gender will be contextualised through an exploration of other conceptions and definitions of

gender, in international human rights instruments and academia. These understandings of gender will be analysed through the lens of queer theory, which Gonzalez-Salzberg defines as “a deconstructive strategy that aims at denaturalising heteronormative<sup>23</sup> understandings of genders and sexualities”<sup>24</sup>. Queer theory will therefore serve to question underlying norms and stereotypes in broadly accepted ideas of gender, and will also serve to explore the place of queer identities in these conceptions of gender.

The research will then focus on an analysis of efforts to eliminate gender stereotypes in international human rights instruments (Chapter 3), to give context to the efforts undertaken within the CoE. Approaches to gender stereotypes will first be analysed in selected human rights instruments from the United Nations, the African Union, the Organisation of American States, the European Union (EU), and international human rights experts. With this context in mind, two human rights instruments of the CoE pertaining to gender stereotypes will be analysed: the Istanbul Convention and the Gender Equality Strategy 2018-2023.

*2. Is the ECtHR consistent in its approach to gender stereotypes between gender equality and gender identity cases? Are gender stereotypes condemned in the same manner when the applicants are explicitly trans, as in general cases relating to gender equality?*

The thesis will thereafter aim to establish whether the ECtHR addresses gender stereotypes in the same manner in cases of gender equality and in cases of gender identity, which is a concept that the ECtHR has so far understood to apply only to trans persons<sup>25</sup>. As for gender equality, the ECtHR has interpreted it as applicable only to cases relating to discrimination between women and men<sup>26</sup>, reflecting a binary conception of gender. An analysis of ten cases of the ECtHR in which gender stereotypes appear will be conducted. The criteria for selection will be

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<sup>23</sup> ILGA-Europe (n 14) 13: “Heteronormativity: Reference to cultural and social practices where men and women are being led into believing and behaving as if heterosexuality were the only conceivable sexuality. It also implies the positioning of heterosexuality as the only way of being “normal” and as the key source of social reward.”; European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation* (2009) 25: “Heteronormativity is what makes heterosexuality seem coherent, natural and privileged. It involves the assumption that everyone is “naturally” heterosexual, and that heterosexuality is an ideal, superior to homosexuality or bisexuality.”

<sup>24</sup> Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (Hart Publishing 2018) 22.

<sup>25</sup> European Court of Human Rights, ‘Factsheet - Gender Identity Issues’ (July 2021).

<sup>26</sup> European Court of Human Rights, ‘Factsheet - Gender Equality’ (July 2021).

discussed in depth in chapter 4. Through the analysis of these ten cases, a comparison will be drawn between the ECtHR's approach to gender stereotypes when they appear in cases of gender equality (Chapter 4) and cases of gender identity (Chapter 5). Five gender equality cases and five gender identity cases have therefore been selected. They will serve as the basis for comparing the origin of gender stereotypes in these cases, the types of gender stereotypes that are most prevalent for each category, as well as any patterns in the origin of each type of stereotype (Chapter 6). This analysis will allow for the comparison of the ECtHR's response to gender stereotypes in cases relating to gender equality and gender identity, and will serve to highlight how gender stereotypes are approached in cases relating to trans persons.

*3. Are there alternative approaches through which gender stereotypes may be lessened, or eliminated from conceptions of gender? Which role can the ECtHR play in the elimination of gender stereotypes for all?*

The case analysis will serve as the basis to understanding where issues may lie in the ECtHR's current approach(es) to gender and gender stereotypes, and therefore, the research will then explore alternative approaches that can be or have been taken to defining gender in manners that lessen the perpetuation of gender stereotypes. Lastly, this research will analyse cases pending before the ECtHR, which may enable it to challenge its current perceptions of gender (Chapter 7).

## 1.5. Definitions

'Gender stereotypes' will be understood as a broad notion in the context of this research, based on Cook and Cusack's previously mentioned definition of stereotypes being "a generalized view or preconception of attributes or characteristics possessed by, or roles that are or should be performed by, members of a particular group"<sup>27</sup>. This definition will allow for several components of such stereotypes to be examined in legislation and case-law. These will include gender roles, gender expression, social behaviour, sex characteristics, and heteronormativity. These components will be discussed in further detail and defined in chapter 4. This approach to

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<sup>27</sup> Cook and Cusack (n 3) 9.

gender stereotypes will allow cisnormative and heteronormative approaches to be highlighted where they are perpetuated in case-law and human rights instruments.

‘Trans’ will be understood as an umbrella term, encompassing persons of all gender identities, who do not correspond to their sex assigned at birth<sup>28</sup>. This may include transgender women, transgender men, non-binary persons, genderqueer persons, gender fluid persons, agender persons, bigender persons, or any other person identifying with gender diversity.

‘Queer’ will also be used as an umbrella term, encompassing persons whose gender identities and/or sexual orientations exist outside of cisgender and heterosexual norms. Queer will also be used in the context of queer theory, defined in section 1.4., which allows for questioning and deconstruction of heteronormativity in all areas where it appears.

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<sup>28</sup> *Gender identity, and equality and non-discrimination of same-sex couple*, Advisory Opinion OC-24/17, Inter-American Court of Human Rights (24 November 2017) para 32(h).

## 2. Outside stereotypes

This chapter will review understandings of gender, to examine whether gender can be defined in a manner that includes queer identities. This analysis will first focus on the ECtHR's understanding of gender or sex, before including definitions of gender and sex taken from international human rights instruments and jurisprudence, as well as academia, which will be read through a queer theory lens (2.1.). The research will then explore the relationship between gender stereotypes and queer identities (2.2.). Lastly, this chapter will explore the notions of 'positive' and 'negative' stereotypes, and the effects of gender stereotypes on marginalised groups (2.3.).

### 2.1. Stereotypes and definitions of gender

#### *2.1.1. Definitions of (cis) gender*

'Gender' and 'sex' are widely and frequently used terms, both socially and legally. However, for such common words, they surprisingly resist clear definition. The ECHR seeks to counter discrimination based on sex in its Article 14, though it does not define the term 'sex'. Gonzalez-Salzberg argues that by setting out a right to marry for "men and women" in Article 12, "it is only logical to infer from the Article the belief that every individual must fit, or be made to fit, the binary classification of either man or woman"<sup>29</sup>, thus perpetuating the gender binary. As the ECHR does not offer more definition of 'sex' than the mention of "men and women", the ECtHR has had to develop on the meaning of 'sex', and its understanding can be inferred from the judgments of the ECtHR<sup>30</sup>. The ECtHR first defined sex in a supposedly 'biological' manner, determined at birth, and thus as an immutable truth<sup>31</sup>. In later years, the ECtHR started recognising that 'sex' may include trans persons who had been assigned a different sex at birth, on the condition that they 'assimilate' to cisgender norms by undergoing gender-affirming surgery<sup>32</sup>. In 2017, the ECtHR removed the need for the "traditionally expected congruence

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<sup>29</sup> Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights* (n 24) 32.

<sup>30</sup> *ibid* 32.

<sup>31</sup> *ibid* 34-35.

<sup>32</sup> *ibid* 42-43.

between gender and genitalia”<sup>33</sup>, thus moving away from a definition of sex or gender based on cisgender norms of physical appearance. Nonetheless, though the ECtHR has broadened its understanding of sex and gender over the years, it has kept a binary approach to these concepts. Thus, it has reinforced the idea that gender and sex exist in terms of “men and women” as set out in Article 12 of the ECHR, despite expanding on the meaning of these terms. Neuman Wipfler describes this approach as “definitional expansionism”, which entails “revis[ing] [the] definitional criteria for sex determination to allow more people to fit into the existing sex categories”<sup>34</sup>. This approach is beneficial to trans persons who identify with binary gender, but it is not conducive to the recognition of non-binary identities<sup>35</sup>.

Even the United Nations (UN), who have long referred to ‘gender’, did not define it for over a decade<sup>36</sup>. Thus, the UN Convention on the Elimination of All Discrimination Against Women (CEDAW)<sup>37</sup>, signed in 1979, did not define ‘sex’ or ‘women’<sup>38</sup>. Rosenblum argues that this omission can be explained by the fact that the term women “is so clearly universal that it needs no definition”<sup>39</sup>, though this universality of ‘women’ can be questioned in light of differing definitions between countries, different experiences of womanhood, and different biologies<sup>40</sup>. By centring women in sex equality, Rosenblum argues that the CEDAW fails to highlight that gender roles and gender stereotypes also affect men negatively<sup>41</sup>, but also that the CEDAW thus reinforces the female/male binary, thereby erasing “the diversity of gender identity”<sup>42</sup>. Furthermore, by focusing this convention on women, the CEDAW reinforces a distinction between women and men. Aiming for sex equality while upholding a difference between women and men, even in the title, risks undermining the very purpose of the convention.

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<sup>33</sup> *ibid* 55.

<sup>34</sup> Anna James Neuman Wipfler, ‘Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents’ (2016) 39 *Harvard Journal of Law and Gender*, 500.

<sup>35</sup> *ibid* 501.

<sup>36</sup> Valerie Oosterveld, ‘The Definition of ‘Gender’ in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 *Harvard Human Rights Journal*, 66.

<sup>37</sup> UN General Assembly, International Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>38</sup> Darren Rosenblum, ‘Unsex CEDAW, or What’s Wrong with Women’s Rights’ (2011) 20(2) *Columbia Journal of Gender and Law*, 100.

<sup>39</sup> *ibid* 127-128.

<sup>40</sup> *ibid* 128-129.

<sup>41</sup> *ibid* 184-190.

<sup>42</sup> *ibid* 135.

The term ‘gender’ was defined in Article 7(3) of the Rome Statute of the International Criminal Court in 1998, amidst great controversy<sup>43</sup>, as a reference “to the two sexes, male and female, within the context of society”<sup>44</sup>. This definition of gender contained the conservative allusion to two sexes, reinforcing a binary conception of sex and gender. However, the Rome Statute also offered a more progressive approach, through its reference to gender as a concept existing “within the context of society”<sup>45</sup>, thus highlighting the understanding of gender as a social construct<sup>46</sup>. As a result, the Rome Statute established a definition of gender that relied on a binary and supposedly biological approach to sex<sup>47</sup>, while still recognising the learned and socially influenced nature of gender<sup>48</sup>. This reliance on a biological approach to sex and gender is however problematic, as it presupposes that sex is biologically divided into two categories, which has been proven to be incorrect<sup>49</sup>. This biological determination of sex to determine one’s gender also seems to imply the traditional approach that sex may be determined at birth, thus viewing sex as immutable<sup>50</sup>, and failing to adequately recognise the identities of trans persons under the CEDAW.

The Yogyakarta Principles set out a definition of gender identity in 2007, which is intended to be applicable to everyone, rather than just trans persons<sup>51</sup>. However, the Yogyakarta Principles also rely on a “deeply felt, internal and individual experience of gender”<sup>52</sup>, which Otto argues represents gender as “innate and unitary”, and therefore fails to represent the persons “who experience their gender as shifting or multiple”<sup>53</sup>. Otto holds that by excluding genders outside of the binary, the Yogyakarta Principles are effectively “reinstat[ing] (bio)logic which, in turn, re-naturalises the gender binary”<sup>54</sup>. Such a definition, beyond ignoring the fluidity of gender,

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<sup>43</sup> Oosterveld (n 36), 63.

<sup>44</sup> UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), Treaty Series, vol 2187, No 38544, Article 7(3).

<sup>45</sup> *ibid.*

<sup>46</sup> Oosterveld (n 36), 64.

<sup>47</sup> *ibid.* 72.

<sup>48</sup> *ibid.* 67.

<sup>49</sup> Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (2nd edn, New York: Basic Books 2020) 49, 54.

<sup>50</sup> Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights* (n 24) 34-35.

<sup>51</sup> Dianne Otto, ‘Queering Gender [Identity] in International Law’ (2015) 33(4) *Nordic Journal of Human Rights*, 312.

<sup>52</sup> International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) Introduction. (Yogyakarta Principles)

<sup>53</sup> Otto (n 51), 313.

<sup>54</sup> *ibid.*



therefore also serves to reinforce the gender binary, and only offers a limited understanding of gender. The Yogyakarta Principles Plus 10, adopted in 2017, kept this same definition of gender identity<sup>55</sup>, though they did specify that gender identity should be understood to include gender expression<sup>56</sup>.

The Council of Europe's Istanbul Convention of 2011 defines gender as "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men"<sup>57</sup>. Thereby, it recognises the socially constructed nature of gender and the role of culture in shaping it. Nonetheless, the Istanbul Convention merely constructs gender in relation to "women and men", and therefore restricts it to a binary understanding.

These definitions seem to highlight a consistent approach to gender and sex, which is a binary approach, and the lack of inclusion of trans persons unless they are explicitly mentioned. Concerning this lack of inclusion of trans people, Howansky et al. concluded that studies on gender stereotypes "almost exclusively considered gender stereotypes that cisgender people [...] attach to other cisgender people"<sup>58</sup>, thus implicitly understanding 'gender' as merely 'cisgender'. This is further highlighted by Oosterveld, noting the Christian Rights' fear that including 'gender' in the Rome Statute may entail the creation of five genders, namely "male, female, homosexual, lesbian, or transgendered"<sup>59</sup>. This highlights that gender or sex is understood not only as cisgender, but also heterosexual. Oosterveld thus questions whether "maleness" and "femaleness" merely include heterosexuality<sup>60</sup>, whereas Wittig more explicitly states that "lesbians are not women", for the category of women only makes sense within a heterosexual system<sup>61</sup>. This existence of sex/gender within a heteronormative culture is highlighted by the fact that intersex babies are subjected to 'normalising' surgery, with their

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<sup>55</sup> International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (10 November 2017), Preamble para 3. (Yogyakarta Principles Plus 10)

<sup>56</sup> *ibid*, Preamble para 5.

<sup>57</sup> Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence* (2011) Treaty Series - No. 210, Article 3. (Istanbul Convention)

<sup>58</sup> Kristina Howansky, Leigh S. Wilton, Danielle M. Young, Samantha Abrams and Rebekah Clapham, '(Trans)gender stereotypes and the self: Content and consequences of gender identity stereotypes' (2019) *Self and Identity*, 2.

<sup>59</sup> Oosterveld (n 36) 64-65.

<sup>60</sup> *ibid* 79.

<sup>61</sup> Monique Wittig, 'La Pensée Straight' (1980) 7 *Questions Féministes*, 53.

sex being assigned by doctors to ensure that they can “have normal sexual relations”<sup>62</sup>, with ‘normal’ referring to “deeply held beliefs about male and female sexuality”<sup>63</sup> in this context, i.e. heterosexual<sup>64</sup>.

Thus, in a system that generally views gender and sex as implicitly cisgender and heteronormative, can other definitions of sex and gender include those who are not cisgender and/or heterosexual?

### *2.1.2. Towards more inclusive definitions of sex/gender*

When legislation relies on undefined terms such as ‘sex’ and ‘gender’, courts will hold great power to interpret these terms, in a manner that reflects the current understanding of these terms and better suits the evolution of society. For example, the Equal Employment Opportunity Commission of the United States of America held that discrimination against a person for being transgender fell under the ban on sex discrimination<sup>65</sup>. Indeed, Cruz explains that where a person is discriminated against for being transgender, this implies that the person committing the discriminatory act - in this case, the employer - is relying on a real or assumed belief of a “mismatch between [the sex assigned at birth] and the employee’s gender identity or expression”, thus clearly basing this discrimination on sex characteristics<sup>66</sup>. As mentioned previously, the ECtHR has also attempted to take a broader approach to the definitions of sex and gender, thus demonstrating the power of courts in redefining these supposedly universal terms to ensure more inclusivity.

Sex and gender escape clear legal and judicial definition, and academics have generally not been able to define these terms much more precisely. However, more inclusive understandings of sex and gender and sex have been proposed. On the relation between sex and gender, Butler notes that by presuming that gender functions as a binary, gender continues to be implicitly linked to sex and cannot exist without it<sup>67</sup>. Butler defines gender as a “performative”

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<sup>62</sup> Fausto-Sterling (n 49) 51.

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.* 60.

<sup>65</sup> David B Cruz, 'Acknowledging the Gender in Anti-Transgender Discrimination' (2014) 32(2) *Law & Inequality: A Journal of Theory and Practice*, 257.

<sup>66</sup> *ibid.* 265.

<sup>67</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (2nd edn, Routledge 2007) 9.

construction, which exists within a “regularized and constrained repetition of norms”<sup>68</sup>. Butler’s point is reflected in the Rome Statute, which explicitly links gender to “the two sexes”, leaving gender to be constructed “within the context of society” but largely limited by the confines of sex. Franke, similarly to Butler, advocates for an end to “reliance upon a biological definition of sexual identity and sexual discrimination”, and proposes instead “a more behavioral or performative conception of sex”<sup>69</sup>. She argues instead for a “fundamental right to determine one’s gender independent of one’s biological sex”<sup>70</sup>.

Indeed, even this often mentioned ‘biology’ of sex must be questioned. Fausto-Sterling has written extensively about the biological falsehood of the notion of binary sexes. In *Sexing the Body*, she highlights the prevalence of babies born with intersex variations, many of whom are subjected to medically unnecessary ‘normalising’ surgeries. Fausto-Sterling estimates that intersex babies make up approximately 1.7 per cent of all births<sup>71</sup>, a statistic commonly compared to the proportion of persons with red hair<sup>72</sup>. Sex, therefore, exists in many variations beyond the two traditional categories of ‘male’ and ‘female’. Butler also notes that as sex is not immutable, it may be “as culturally constructed as gender”<sup>73</sup>. Thus, the “biological foundation” invoked by Oosterveld in the context of the Rome Statute<sup>74</sup> may not be so biological after all, and may simply be the product of social construction. Butler concludes on the matter that “the distinction between sex and gender turns out to be no distinction at all”<sup>75</sup>, with both concepts being mere social constructs.

If gender and sex are not defined by genitals, behaviour, roles, expression, how are they then defined? Can they even be defined? Beauvoir has said that “one is not born, but rather becomes, a woman”<sup>76</sup> - but how exactly does one do that, when the word itself cannot be defined? Hines proposes to expand the category of ‘woman’ to an understanding rooted in “the cultural and the

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<sup>68</sup> Judith Butler, *Bodies That Matter: On the discursive limits of “sex”* (2nd edn, Routledge 2011) 59-60.

<sup>69</sup> Katherine M Franke, ‘The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender’ (1995) 144(1) *University of Pennsylvania Law Review*, 8.

<sup>70</sup> *ibid.*

<sup>71</sup> Fausto-Sterling (n 49) 54-56.

<sup>72</sup> Amnesty International, ‘It’s Intersex Awareness Day - here are 5 myths we need to shatter’ (28 October 2018) <[<sup>73</sup> Butler, \*Gender Trouble\* \(n 67\) 9.](https://www.amnesty.org/en/latest/news/2018/10/its-intersex-awareness-day-here-are-5-myths-we-need-to-shatter/#:~:text=Myth%20%3A%20Being%20intersex%20is,intersex%20people%20are%20massively%20underrepresented.> (last accessed 9 June 2021).</a></p></div><div data-bbox=)

<sup>74</sup> Oosterveld (n 36) 72.

<sup>75</sup> Butler, *Gender Trouble* (n 67) 10.

<sup>76</sup> Simone de Beauvoir, *The Second Sex* (New York: Vintage Books 1973) 301.

political”, and argues that it “becomes a productive category when it is freed from sex”, noting the political power of such a category of ‘woman’ “when it is opened out to account for differently gendered bodies”<sup>77</sup>.

As such, it may be said that categories of “sex”, “gender” or “women”, “men”, “female”, “male”, overlap and interlink with each other. Gender and sex may not be terms that can be defined clearly, and their attempted definitions may vary depending on the context in which the terms are being used. The difficulty in defining these terms becomes especially relevant when it comes to queer identities and bodies, where gendered norms and expectations may be entirely inapplicable.

## 2.2. Queer identities and stereotypes

Queer identities often demonstrate the subversion of gender norms, through identities perceived as “deviant”<sup>78</sup> and shaped outside of the moulds of heteronormativity and cisnormativity. Queer culture can be said to subvert gender stereotypes, for instance through the importance of drag culture in queer communities. Drag culture, while sometimes relying heavily on certain stereotypes of femininity for drag queens, is also a space for gender exploration and freedom, with gay trans men being able to perform as drag queens and being celebrated across the world<sup>79</sup>, breaking boundaries of gender norms and stereotypes. The presence of butch and femme identities within lesbian communities also highlights this subversion of gender stereotypes, with butch identities existing separate to stereotypes associated with womanhood, and butch lesbians sometimes being considered a gender of their own<sup>80</sup>, and femme identities representing a form of femininity existing outside of heterosexual norms.

Though LGBTQI+<sup>81</sup> people can often be considered as a group, it is an incredibly diverse one. Fredman, citing Young, notes that a group is “better described in terms of a sense of affinity

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<sup>77</sup> Sally Hines, ‘Sex wars and (trans) gender panics: Identity and body politics in contemporary UK feminism’ (2020) Vol 68(4) *The Sociological Review Monographs*, 713.

<sup>78</sup> Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights* (n 24) 19.

<sup>79</sup> Sam Damshenas, ‘Gottmik opens up for the first time about being a trans male drag queen’ (Gay Times, 2021) < <https://www.gaytimes.co.uk/amplify/gottmik-opens-up-for-the-first-time-about-being-a-trans-male-drag-queen-amplify-by-gay-times/> > accessed 14 July 2021.

<sup>80</sup> Otto (n 51) 303.

<sup>81</sup> Lesbian, Gay, Bisexual, Trans, Queer, Intersex, and other non-heterosexual and/or non-cisgender persons.

between individuals, and a social process of interaction” than through “apparently fixed attributes”<sup>82</sup>. As such, LGBTQI+ people may constitute a socially created group united by non-conformity to heteronormativity and/or cisnormativity, but despite not conforming to cisgender-heterosexual stereotypes, they will also not conform to the same attributes or stereotypes within the group either. As Hines highlights, there is for instance an “increasing recognition of different ways of being gender diverse within trans communities”<sup>83</sup>.

Cook and Cusack argue that gender stereotypes are degrading when they interfere with women’s ability “to shape, or carve out, their own identities”<sup>84</sup>. Similarly, gender stereotypes based on cisnormativity and heteronormativity can be degrading to LGBTQI+ people when they limit their ability to shape their own identities and express them fully. This is highlighted by Yoshino, who discusses the “covering” of gay identities, understood as assimilation to fit into heterosexual norms. Yoshino describes a shift from gay conversion towards gay covering, with gay acceptance being conditional on assimilation to heterosexual norms, or “acting straight”<sup>85</sup>.

However, the imposition of gender stereotypes on queer persons does not only come from outside the community. Yoshino refers to a divide within the gay community, between two groups he labels as “normals” and “queers”, with the former assimilating to heterosexual norms and rejecting those who refuse to or cannot, and the latter refusing to abide by these norms, while rejecting those who shame them for it<sup>86</sup>. Even without aiming for heterosexual acceptance, gender stereotypes can be perpetuated in the queer community. Yoshino highlights how in his experience, “the impetus to ‘act straight’ came from gays”<sup>87</sup>, with an incentive to conform to stereotypes of hyper-masculinity to be considered attractive. Hoskin also describes the higher value placed on “gender conformity or ‘masculinity’” among gay men<sup>88</sup>. However, this valuing of masculinity is not limited to men, as Hoskin notes that lesbians tend to “value gender non-conformity or masculinity”<sup>89</sup>. The lower value placed on the feminine and

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<sup>82</sup> Sandra Fredman, *Discrimination Law* (Oxford University Press 2011) 111.

<sup>83</sup> Hines (n 77), 712.

<sup>84</sup> Cook and Cusack (n 3), 64.

<sup>85</sup> Kenji Yoshino, *Covering - The hidden assault on our civil rights* (Random House Trade Paperbacks New York 2007) 76-77.

<sup>86</sup> *ibid* 77-78.

<sup>87</sup> *ibid* 81.

<sup>88</sup> Rhea Ashley Hoskin, ‘Femme Theory : Refocusing the Intersectional Lens’ (2017) 38(1) *Atlantis*, 97.

<sup>89</sup> *ibid*.

femininity, or the “general aversion to femininity”<sup>90</sup>, is therefore not specific to heterosexual groups, but has also seeped into queer communities despite attempts to subvert gender norms.

Queer and LGBTQI+ identities can be considered to subvert gender stereotypes on several levels, by their mere existence. However, gender stereotypes are not absent from queer culture, and their pervasiveness can be observed in efforts to assimilate to heterosexual or cisgender norms or in the perceived superiority of masculinity.

### 2.3. Stereotypes and the notion of harmfulness

As highlighted in the introductory chapter, generalisations are a necessity in many circumstances, though there are limits to the generalisations that can be accepted. Cook and Cusack argue that a “stereotypical categorization is not necessarily negative”<sup>91</sup>, and create a distinction based on whether stereotypes carry “negative connotations”<sup>92</sup>. They further distinguish between “statistical/descriptive stereotyping” and “normative/prescriptive stereotyping”<sup>93</sup>. The former - statistical stereotyping - resembles Schauer’s model of statistically sound or unsound stereotyping<sup>94</sup>. Schauer however notes that certain generalisations, though statistically correct, would cause too great a harm if they were relied on for legislative purposes for instance, and as such would not be morally defensible<sup>95</sup>. Hellum and Aasen question whether when the state relies on statistically sound gender stereotypes, it “entrenches the stereotype and stigmatises or excludes nonconforming individuals”<sup>96</sup>. The second category set out by Cook and Cusack - normative stereotyping - represents stereotyping which aims at dictating roles to be played in society based on a person’s characteristics<sup>97</sup>.

A distinction has sometimes been drawn between “negative” and “positive” stereotypes<sup>98</sup>. However, it is debated whether gender stereotypes can really be positive. Hellum and Aasen

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<sup>90</sup> *ibid* 98.

<sup>91</sup> Cook and Cusack (n 3), 12.

<sup>92</sup> *ibid*.

<sup>93</sup> *ibid* 14.

<sup>94</sup> Schauer (n 10) 16-17.

<sup>95</sup> *ibid* 187-198.

<sup>96</sup> Anne Hellum and Henriette Sinding Aasen, *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press 2013) 155.

<sup>97</sup> Cook and Cusack (n 3) 14.

<sup>98</sup> Timmer (n 13) 714.

argue that “[s]eemingly benign, protective or benevolent stereotypes can also be harmful”<sup>99</sup>, which was reiterated by the OHCHR<sup>100</sup>. Fenton similarly underscores the potential negative consequences of so-called positive stereotypes<sup>101</sup>, which may still “force that individual in a particular role or position, either ideologically or in reality”<sup>102</sup>.

Timmer argues that stereotypes “often serve to maintain existing power relationships”, and labels them “control mechanisms”<sup>103</sup>. Cook and Cusack similarly argue that stereotypes “can exacerbate the subordination of the social group to which the stereotyped individual belongs”<sup>104</sup> and that “stereotyping is more likely to intrude when [...] the target or the subject of the stereotype is isolated”<sup>105</sup>. As a result, stereotypes can serve as tools of oppression over already marginalised persons, and gender stereotypes can therefore be used to further subordinate women and gender minorities.

Consequently, where conceptions of gender convey notions of cisnormativity and heteronormativity, and force persons into a binary, they become inherently exclusionary of queer persons. Queer persons may thus conform to gender stereotypes for acceptance by cisgender and heterosexual people, or they may be unable or unwilling to, further marginalising them. Gender stereotypes which may therefore seem benign can be disproportionately harmful to queer persons, which can make the elimination of gender stereotypes particularly relevant for queer liberation.

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<sup>99</sup> Hellum and Aasen (n 96) 153.

<sup>100</sup> UN OHCHR ‘Gender stereotypes and Stereotyping and women’s rights’ (n 4) 1.

<sup>101</sup> Zanita E Fenton, ‘Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence’ (1998) 8(1) *Columbia Journal of Gender and Law*, 13.

<sup>102</sup> Timmer (n 13) 714.

<sup>103</sup> Timmer (n 13) 715.

<sup>104</sup> Cook and Cusack (n 3) 16.

<sup>105</sup> *ibid* 33.

## 3. Dismantling stereotypes

The goal of eliminating gender stereotypes has been expressed in a number of international instruments. This chapter will include an analysis of efforts undertaken to dismantle gender stereotypes at the international level (3.1.) and the CoE level (3.2.), to examine whether such efforts have attained the standards of inclusivity studied in the previous chapter. The analysis will be focused on selected human rights instruments, which have been developed by or relied on by international institutions or regional human rights systems, including the CoE.

### 3.1. Efforts to dismantle stereotypes in international human rights instruments

#### *3.1.1. The CEDAW*

Article 5(a) of the CEDAW places an obligation upon State Parties to take measures to eliminate prejudices and practices based on “stereotyped roles for men and women”<sup>106</sup>. Cook and Cusack define this obligation on States more broadly as one to “dismantle, eliminate, and remedy wrongful gender stereotypes”<sup>107</sup>. This obligation was elaborated upon by the Committee on the Elimination of Discrimination against Women (the Committee) in 2010, which stated that gender equality entails a right to be free from “stereotypes, rigid gender roles and prejudices”<sup>108</sup>. As the text of the CEDAW only mentions “stereotyped *roles*” [emphasis added], the Committee’s mention of “stereotypes”, followed by a separate mention of “gender roles” could arguably be understood to broaden the scope of the CEDAW concerning the elimination of stereotypes, which could thus be interpreted in a broader sense than simply the “roles” that follow from stereotypes, and include various forms of stereotypes. Gender stereotypes, while they can be conveyed through gender roles, can for example also arise in gender expression, social behaviour, sex characteristics or sexual orientation, as will be discussed in chapters 4 through 6.

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<sup>106</sup> CEDAW (n 37) Article 5(a).

<sup>107</sup> Cook and Cusack (n 3) 74.

<sup>108</sup> UN Committee for the Elimination of All Forms of Discrimination Against Women, ‘General Recommendation No 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) UN Doc CEDAW/C/GC/28, para 22.



The Committee has interestingly referred to stereotypes in the context of their application to trans persons<sup>109</sup>. While it had previously noted the exposure to gender stereotypes and the multiple forms of discrimination suffered by some women because of their gender identity<sup>110</sup>, it explicitly addressed the application of gender stereotypes to trans persons in 2014. In its Concluding Observations on the periodic report of Finland in 2014, the Committee recommended that Finnish legislation be amended “to ensure that gender recognition is carried out without requiring transgender persons to conform to *stereotypical ideas of masculine or feminine appearance or behaviour*”<sup>111</sup> [emphasis added]. Thereby, the Committee explicitly recognised that stereotypes, as understood in the CEDAW, include those related to “appearance or behaviour”, widening the scope of action of the CEDAW in relation to gender stereotypes.

Though the Committee itself has not seemed to go beyond a binary interpretation of gender/sex yet, Otto argues that the language of Article 5(a) of the CEDAW is open to a much broader interpretation. Indeed, Article 5(a) recognises the “social and cultural patterns of conduct of men and women”<sup>112</sup> which play a role in stereotypes. Otto argues that this recognition of social and cultural influence “lead[s] inexorably to the conclusion that gender [identity] can be experienced and/or perceived as fluid and potentially multiplicitous, constrained only by its historical and cultural context”<sup>113</sup>. Thus, this broad definition of gender, taking into account its complexities which go much further than the traditionally recognised binary sexes, leads Otto to argue that all forms of sex discrimination can be included under the CEDAW<sup>114</sup>. Otto thus concludes that the categories protected from sex discrimination (and stereotyping) under Article 5(a) can be broadened to men, trans people, intersex people, and all other gender-diverse people<sup>115</sup>. Otto discusses these stereotypes through the lens of sex discrimination, and while sex

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<sup>109</sup> Rikki Holtmaat and Paul Post, ‘Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?’ (2015) 33(4) *Nordic Journal of Human Rights*, 329-330.

<sup>110</sup> UN Committee for the Elimination of All Forms of Discrimination Against Women, ‘Concluding observations on the fourth to seventh periodic report of Panama’ (5 February 2010) CEDAW/C/PAN/7, paras 22-23.

<sup>111</sup> UN Committee for the Elimination of All Forms of Discrimination Against Women, ‘Concluding observations on the seventh periodic report of Finland’ (10 March 2014) CEDAW/C/FIN/CO/7, para 29.

<sup>112</sup> CEDAW (n 37) Article 5(a).

<sup>113</sup> Otto (n 51) 303.

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.*

discrimination is included under Article 5(a), Cook and Cusack note that discrimination need not be proven for the stereotypes to warrant measures of elimination<sup>116</sup>.

### *3.1.2. The Yogyakarta Principles Plus 10*

The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity are non-binding principles set out by the International Commission of Jurists to clarify States' human rights obligations related to gender identity and sexual orientation<sup>117</sup>.

The Yogyakarta Principles (2006), as well as the Yogyakarta Principles Plus 10 (2017), address stereotypes in several principles, on a number of topics. In the Preamble, the Yogyakarta Principles reiterate the obligation of Article 5(a) of the CEDAW, “to eliminate prejudices and customs based on the idea of the inferiority or the superiority of one sex or on stereotyped roles for men and women”<sup>118</sup>. Principle 18 on protection from medical abuses states that individuals must be protected from harmful medical practices based on “stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms”<sup>119</sup>, which offers a broad definition of what can be considered a stereotype. Principle 25 on the right to participate in public life enjoins States to take “measures to eliminate stereotypes and prejudices regarding sexual orientation and gender identity that prevent or restrict participation in public life”<sup>120</sup>, thereby highlighting the prevalence and harmfulness of stereotypes in the public sphere. In their Additional Recommendations, the Yogyakarta Principles also encourage the mass media to “avoid the use of stereotypes in relation to sexual orientation and gender identity”<sup>121</sup>, drawing attention to the media's power in perpetuating stereotypes, but also in countering them. Principle 32, from the Yogyakarta Principles Plus 10, sets out a right to bodily and mental integrity, which includes an obligation on States to “address stigma, discrimination and stereotypes based on sex and gender, and combat the use of such stereotypes [...] to justify modifications to sex characteristics, including of children”<sup>122</sup>. This principle aims to protect

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<sup>116</sup> Cook and Cusack (n 3) 72.

<sup>117</sup> Yogyakarta Principles (n 52) Introduction.

<sup>118</sup> *ibid*, Preamble para 7.

<sup>119</sup> *ibid*, Principle 18(A).

<sup>120</sup> *ibid*, Principle 25(B).

<sup>121</sup> *ibid*, Additional Recommendations (O).

<sup>122</sup> Yogyakarta Principles Plus 10 (n 55) Principle 32(C).

intersex children who are regularly subjected to ‘normalisation’ surgeries to reveal their “‘true’ sex” rather than accepting their existence outside of a binary conception of sex<sup>123</sup>. The Yogyakarta Principles Plus 10 elaborated on Principle 23 on the right to seek asylum, stating that “guidelines on assessing credibility in relation to establishing a person’s sexual orientation, gender identity, gender expression and sex characteristics when seeking asylum” must be “unhindered by stereotyping and cultural bias”<sup>124</sup>. This is a particularly relevant addition when such assessments can constitute an important part of asylum decisions, and such decisions can be made arbitrarily or based on stereotypes surrounding sexual orientation or gender identity<sup>125</sup>.

### *3.1.3. The Convention of Belém do Pará*

In 1994, the Organization of American States (OAS) adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, better known as the Convention of Belém do Pará. This Convention makes explicit references to the need to eliminate practices and behaviours based on gender stereotypes. In its Article 6(b), the Convention of Belém do Pará states that women’s right to be free from violence entails “[t]he right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination”<sup>126</sup>. Article 8(b) states that Member States of the OAS should take steps to modify behaviours and practices “which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women”<sup>127</sup>. Thus, the OAS has sought to highlight the harmfulness of stereotyped gender roles and of practices in which perpetuations of gender stereotypes go unquestioned.

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<sup>123</sup> Fausto-Sterling (n 49) 53-54.

<sup>124</sup> Yogyakarta Principles Plus 10 (n 55), Principle 23.

<sup>125</sup> Devyany Nighoskar, ‘Sexualisation, stereotypes, statistics: LGBTQI+ asylum seekers in the UK’ (SOAS University of London, 28 January 2020) <<https://study.soas.ac.uk/lgbtqi-asylum-seekers-uk/>> accessed 26 June 2021.

<sup>126</sup> Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women “Convention of Belém do Pará” (Adopted at the Twenty-fourth Regular Session of the General Assembly of the Organization of American States, Belém do Pará, Brazil, 9 June 1994), Article 6(b). (Convention of Belém do Pará)

<sup>127</sup> *ibid*, Article 8(b).

The Inter-American Commission of Women has provided further context around these gender stereotypes, highlighting for instance the harmfulness of stereotyping of women based on religion, noting its prevalence in the discourse around reproductive rights<sup>128</sup>.

The Inter-American Court of Human Rights (IACtHR) has also taken steps to name gender stereotypes where they appear, and to work towards their elimination. In the case of *González et al. v Mexico*<sup>129</sup>, also known as the “Cotton Field” case, the IACtHR relied on the Convention of Belém do Pará in its judgment, and strongly condemned reliance on gender stereotypes. The IACtHR thus noted stereotyping which had been targeted at disappeared victims, with officials questioning their sexual preferences, or inferring “that they led a disreputable life”<sup>130</sup>, thus perpetuating negative stereotypes of women and preventing effective investigations. In *Cotton Field*, the IACtHR defined gender stereotyping more clearly than in the Convention of Belém do Pará, and put the concept in context, stating that:

gender stereotyping refers to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women. [...] the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.<sup>131</sup>

Thus, the IACtHR highlighted the pervasiveness of gender stereotypes, with an interesting mention of the role that language used by the judiciary may play, which will be further discussed in later chapters. Ultimately, the IACtHR ordered Mexico to “continue implementing

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<sup>128</sup> Inter-American Commission of Women, *Inter-American Guidelines on Gender Equality for the Good of Humanity* (2017) 18.

<sup>129</sup> *Case of González et al. (“Cotton Field”) v Mexico*, Inter-American Court of Human Rights (16 November 2009).

<sup>130</sup> *ibid*, para 208.

<sup>131</sup> *ibid*, para 401.

permanent education and training programs and courses in [...] elimination of stereotypes of women's role in society"<sup>132</sup>.

However, the IACtHR's goal of eliminating gender stereotypes is not limited to those stereotypes which regard women. In the case of *Fornerón and daughter v Argentina*, though the IACtHR did not reference the Convention of Belém do Par , several references were made to the requirement not to rely on gender stereotypes as judicial justifications. The case related to a father's role in the guardianship of his child. In this case, the IACtHR for instance noted that "stereotypes [...] regarding traditional concepts of the family are inadmissible"<sup>133</sup>, and condemned reliance on stereotypes regarding the ability of a man to be a single parent<sup>134</sup>. Consequently, without explicitly relying on the Convention of Bel m do Par  - likely because this case was not related to violence against women - the IACtHR still named gender stereotypes as they appeared, and recognised the harmfulness of imposing gender roles on individuals.

#### *3.1.4. The Maputo Protocol*

The African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol, in 2003. The Maputo Protocol contains several mentions of stereotypes. Stereotypes are for instance referred to in the context of Article II on the elimination of discrimination against women, where the Maputo Protocol imposes an obligation on States to take measures to "modify the social and cultural patterns of conduct of women and men through public education" to eliminate harmful practices, including those "based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men"<sup>135</sup>. While it does convey a binary conception of gender, this Article highlights the importance of awareness-raising in eliminating gender stereotyping, as the IACtHR did in the case of *Gonz lez et al. v Mexico*. By noting that this relates to "patterns of conduct of women and men", the Maputo Protocol also recognises that

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<sup>132</sup> *ibid*, para 541.

<sup>133</sup> *Case of Forner n and daughter v Argentina*, Inter-American Court of Human Rights (27 April 2012) para 50.

<sup>134</sup> *ibid*, para 96.

<sup>135</sup> African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (adopted 11 July 2003 entered into force November 2005), Article II(2). (Maputo Protocol)

gender stereotypes could be perpetuated by all, which implies that gender stereotypes are deeply rooted ideas in all individuals, which need to be collectively challenged.

In Article IV.2.d., the Maputo Protocol states that the rights to life, integrity and security of the person entail an obligation on States to take awareness-raising measures to “eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women”<sup>136</sup>, once again drawing attention to the importance of information about gender stereotyping. Hellum and Aasen have noted that this commitment to the eradication of such stereotypes may be especially useful in the context of “non-consensual (often under-age) marriages justified as part of culture”<sup>137</sup>. The elimination of such stereotypes may therefore instead permit a focus on women’s autonomy. Article IV.2.d. also serves to highlight the role played by gender stereotypes in violence against women, demonstrating the critical necessity of countering such stereotypes.

Lastly, the Maputo Protocol enjoins States to take measures to “[e]liminate all stereotypes in textbooks, syllabuses and the media, that perpetuate” discrimination against women as part of the right to education and training in Article XII.1.b. This further highlights the importance of education, information, and awareness-raising in countering gender stereotypes and in becoming aware of their harmfulness.

### *3.1.5. The European Union’s efforts to eliminate gender stereotyping*

#### 3.1.5.1. The European Parliament

In 2012, the European Parliament’s Committee on Women’s Rights and Gender Equality published its Report on eliminating gender stereotypes in the EU<sup>138</sup>, which included a motion for a European Parliament Resolution. The motion was successful, and in 2013, the European Parliament resolution of 12 March 2013 on eliminating gender stereotypes in the EU was

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<sup>136</sup> *ibid*, article IV.2.d.

<sup>137</sup> Hellum and Aasen (n 96) 195.

<sup>138</sup> European Union, Committee on Women’s Rights and Gender Equality, *Report on eliminating gender stereotypes in the EU* (6 December 2012) 2012/2116(INI).

adopted<sup>139</sup>. This resolution highlighted that “stereotypes still exist at all levels of society and in all age groups”<sup>140</sup>, and noted their “strong influence”<sup>141</sup> in all areas of life. The resolution further highlighted that gender stereotypes may have influence and be perpetuated in the media, education, the labour market, as well as decision-making. It further highlighted that “gender stereotypes are often combined with other stereotypes”<sup>142</sup>, which Cook and Cusack refer to as “compounded stereotypes”, arising when “gender intersects with other traits”<sup>143</sup> which may also be sources of discrimination. The Resolution thus notes that gender stereotypes “affect women with multiple identities to a greater extent”<sup>144</sup>, which follows Crenshaw’s theory of intersectional discrimination<sup>145</sup>, referring to the possession of several marginalised identities as a source of a specific form of discrimination based on the intersection of these identities, which highlights the “interconnection between different systems of oppression”<sup>146</sup>.

### 3.1.5.2. The European Union Fundamental Rights Agency

The European Union Agency for Fundamental Rights (FRA) is an EU body that provides EU institutions and national governments with independent and evidence-based advice on fundamental rights protected by the EU. In 2012, the FRA conducted its first LGBT survey, which was “the first EU-wide survey on the rights of LGBT persons”<sup>147</sup> and included 93,000 respondents. It has since conducted another survey, the LGBTI II survey, in 2019. This newer survey gathered 140,000 responses, and included intersex people for the first time.

Following the 2012 LGBT survey, the FRA published a report on ‘Being Trans in the European Union’, presenting the findings of the survey. The FRA concluded from its survey that “discrimination and violence may often happen due to a person’s nonconforming gender

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<sup>139</sup> European Union, European Parliament, *Resolution on eliminating gender stereotypes in the EU* (12 March 2013) 2012/2116(INI).

<sup>140</sup> *ibid*, C.

<sup>141</sup> *ibid*, E.

<sup>142</sup> *ibid*, H.

<sup>143</sup> Cook and Cusack (n 3) 29.

<sup>144</sup> European Parliament, *Resolution on eliminating gender stereotypes in the EU* (n 139) H.

<sup>145</sup> Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) *University of Chicago Legal Forum*, 166.

<sup>146</sup> Lorena PA Sosa, ‘Inter-American case-law on femicide: Obscuring intersections?’ (2017) 35(2) *Netherlands Quarterly of Human Rights*, 87.

<sup>147</sup> European Union Agency for Fundamental Rights, *Being Trans in the European Union: Comparative analysis of EU LGBT survey data* (Publications Office of the European Union, Luxembourg, 2014) 3.

expression” and therefore suggested that “the EU Strategy for equality between women and men should be enhanced to include actions combating gender stereotypes and discrimination on grounds of gender identity, gender expression and transphobia”<sup>148</sup>. Thus, the FRA highlighted that dismantling gender stereotypes is critical to attaining equality between women and men in a general manner, but also to ensure the safety and adequate livelihood of trans persons who may be disproportionately affected by such gender stereotypes.

## 3.2. Efforts to dismantle stereotypes in Council of Europe instruments

### *3.2.1. The Istanbul Convention*

In 2011, the CoE adopted the Convention on preventing and combating violence against women and domestic violence, better known as the Istanbul Convention. In its Chapter III, relating to the prevention of violence against women and domestic violence, the Istanbul Convention imposes an obligation on State Parties to take measures aimed at “eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men”<sup>149</sup>. It also enjoined State Parties to take steps, in the field of education, to “include teaching material on issues such as equality between women and men, non-stereotyped gender roles”<sup>150</sup>, etc. The focus of the Istanbul Convention is aimed at stereotypes relating to gender roles, though it is possible that the text may be interpreted more broadly. The measures included in Articles 12 and 14 highlight the Istanbul Convention’s focus on awareness-raising, as stated in Article 13, to ensure adequate understanding of the issue of violence against women and domestic violence, and to ensure that the importance of preventing such violence in any way it arises is conveyed to all members of society.

However, while the Istanbul Convention focuses on eliminating “stereotyped gender roles”, it may to a certain extent perpetuate them itself. It can first be noted that the Convention relies

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<sup>148</sup> *ibid* 19.

<sup>149</sup> Istanbul Convention (n 57) Article 12(1).

<sup>150</sup> *ibid*, Article 14(1).



only on a binary understanding of gender, understood as “women and men”<sup>151</sup>. Moreover, when the Convention discusses gender-based violence, it conflates it with violence against women<sup>152</sup>, and does not recognise the violence that men may face because of their gender, in the context of “violence against homosexuals, transmen or men who do not conform to the masculine standard as gender-based violence”<sup>153</sup>. Furthermore, the Istanbul Convention portrays women only as victims of violence, noting for instance that they are disproportionately affected by domestic violence. However, the Convention does not give this same attention to the sex of the perpetrators of violence, and “does not address violence as predominantly male or masculine behaviour”<sup>154</sup>, whether it is targeted at women or men<sup>155</sup>. Niemi and Sanmartin therefore argue that:

there is a real risk that the view on stereotypes that the Convention offers is a narrow one, focused on stereotypes of women, and one that does not really challenge the most fundamental problem, that is, men’s role in violence.<sup>156</sup>

Consequently, it can be said that the Istanbul Convention highlights the importance of eliminating gender stereotypes to prevent gender-based violence. However, it also conveys gender stereotypes of its own, stereotyping women as the sole victims of gender-based violence, and failing to include the men and non-binary persons who do not conform to heteronormative standards as the potential victims of gender-based violence.

### *3.2.2. The Council of Europe Gender Equality Strategy 2018-2023*

In 2018, the Committee of the Ministers of the CoE adopted the Gender Equality Strategy 2018-2023. One of the six “strategic objectives” of the Strategy is to “[p]revent and combat gender stereotypes and sexism”<sup>157</sup>. The CoE notes that though women have historically been

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<sup>151</sup> Johanna Niemi and Amalia Verdu Sanmartin, ‘4. The concepts of gender and violence in the Istanbul Convention’ in Johanna Niemi, Lourdes Peroni and Vladislava Stoyanova (eds), *International Law and Violence Against Women - Europe and the Istanbul Convention* (Routledge 2011) 82.

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.* 93.

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.* 83.

<sup>156</sup> *ibid.*

<sup>157</sup> Council of Europe Gender Equality Strategy 2018-2023 (adopted by the Committee of Minister of the Council of Europe in March 2018) 3.

discriminated against by men, “both women and men are victims of stereotypes restricting their full capabilities”<sup>158</sup>, emphasising that all individuals have an interest in dismantling stereotypes, as they are limiting to all. Indeed, the CoE holds that “[m]ale gender stereotypes need to be overcome in order to free men and boys from the pressures of stereotyped expectations they face”<sup>159</sup>, such as “hegemonic masculinities”<sup>160</sup>, serving to legitimise the dominant position of men in society who abide by an ‘ideal’ form of masculinity, relying on traits such as aggressiveness, strength, confidence, etc.

The CoE further emphasises the limiting nature of stereotypes, which may prevent individuals from reaching their full potential<sup>161</sup>. This limiting nature is also conveyed through ideas of “what both women and men should look like”<sup>162</sup>, which may refer to gender expression, through expectations related to behaviour, or to gender roles in the home<sup>163</sup>. The CoE, like the European Parliament (see section 3.1.5.1.), emphasises the specific challenges faced by women who belong to one or more other marginalised groups<sup>164</sup>.

The CoE thus concludes that it will seek to ensure the implementation of measures aimed at eradicating stereotyped gender roles, and of the Istanbul Convention<sup>165</sup>. It will also aim to address intersectional gender discrimination<sup>166</sup>. Lastly, emphasis is placed on the role of education and the media<sup>167</sup>, which conveys the idea also contained in the Istanbul Convention that awareness-raising is crucial to attain widespread change.

The CoE has therefore taken steps towards ensuring the elimination of gender stereotypes, inspired by and at times consistent with other international human rights instruments. It becomes relevant to see, then, whether the ECtHR includes these commitments to the elimination of gender stereotypes in its jurisprudence, and which role it plays or can play in the elimination of gender stereotypes.

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<sup>158</sup> *ibid* 6.

<sup>159</sup> *ibid* 12.

<sup>160</sup> *ibid* 16.

<sup>161</sup> *ibid*.

<sup>162</sup> *ibid* 17.

<sup>163</sup> *ibid*.

<sup>164</sup> *ibid* 17-18.

<sup>165</sup> *ibid* 18.

<sup>166</sup> *ibid* 19.

<sup>167</sup> *ibid*.

## 4. Gender stereotyping in gender equality cases of the ECtHR

The research will now focus on the ECtHR's consistency, or lack thereof, in its approach to gender stereotypes between gender equality and gender identity cases. Chapters 4, 5 and 6 focus on an analysis of cases relating to gender equality and gender identity. Chapter 4 contains an analysis of gender stereotypes in selected gender equality cases. Chapter 5 then contains an analysis of gender stereotypes in selected gender identity cases. Chapter 6 ultimately contains the comparative analysis of the findings of chapters 4 and 5 and a discussion of these findings. These three chapters aim to establish how the ECtHR approaches gender stereotypes in these two types of cases. Gender equality cases may refer to trans or cisgender applicants, as the ECtHR does not explicitly specify this in its cases on the issue<sup>168</sup>. Gender equality has however only been used in the context of discrimination between men and women, reflecting a binary system of gender. By contrast, when the ECtHR discusses gender identity, it implicitly understands it as a concept related to trans persons. As such, the ECtHR's factsheet on 'gender identity issues' refers only to cases brought by trans applicants<sup>169</sup>.

This section will contain an analysis of the ECtHR's approach to gender stereotypes in ten selected cases of the ECtHR. These ten cases were chosen for their references to gender stereotypes, whether these were named and recognised by the ECtHR or not. As this analysis will aim to compare the occurrence of gender stereotypes and how they are (or are not) addressed by the ECtHR between cases relating to gender equality and cases relating to gender identity, the selected cases consist of five cases relating to gender equality, and five relating to gender identity. The decision to limit this analysis to ten cases was made to ensure that each case could be sufficiently analysed, while ensuring that enough cases could be covered so that the ECtHR's jurisprudence was not misrepresented through the selection being too small.

The cases selected for this analysis are all cases of the ECtHR, with all but one having been decided in the last ten years, to ensure that the analysis reflects the ECtHR's current attitude

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<sup>168</sup> European Court of Human Rights, 'Factsheet - Gender Equality' (n 26).

<sup>169</sup> European Court of Human Rights, 'Factsheet - Gender Identity Issues' (n 25).

towards gender stereotypes as accurately as possible. After an analysis of relevant literature regarding gender stereotypes and transgender rights under the ECtHR's jurisprudence, the following ten cases were considered the most relevant based on the following criteria:

- (1) Reference to gender or sex.
- (2) Reference to gender stereotypes, whether explicitly named or not.
- (3) Date of the judgment, to ensure that the cases were not outdated and represented the ECtHR's current stance, as far as possible.
- (4) Equal number of cases relating to gender equality and gender identity.

In the context of this research, gender stereotypes will be identified through reference to the following types of gender stereotypes:

- Gender roles: Gender roles will be understood as “[s]ocial and behavioural norms which, within a specific culture, are widely considered to be socially appropriate for individuals of a specific sex”<sup>170</sup>.
- Gender expression: Gender expression will be understood as “people's manifestation of their gender identity, and the one that is perceived by others”<sup>171</sup>.
- Social behaviour: Social behaviour will be understood as the manner in which people act, or are expected to act, in society, based on their sex or gender identity.
- Sex characteristics: Sex characteristics will be understood as “each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty”<sup>172</sup>.
- Heteronormativity: Heteronormativity will be understood as a “[r]eference to cultural and social practices where men and women are being led into believing and behaving as if heterosexuality were the only conceivable sexuality”<sup>173</sup>.

These terms will be interpreted broadly, and the categories may at times overlap, with certain gender stereotypes belonging to more than one category. Nonetheless, these subcategories of gender stereotypes will be helpful in better identifying gender stereotypes when they appear, and in conducting the comparative analysis in chapter 6.

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<sup>170</sup> European Institute for Gender Equality, Glossary and Thesaurus: ‘gender roles’, <<https://eige.europa.eu/thesaurus/terms/1209>> accessed 27 June 2021.

<sup>171</sup> ILGA-Europe, ‘ILGA-Europe Glossary’ (n 14) 11.

<sup>172</sup> Yogyakarta Principles Plus 10 (n 55) Preamble para 6.

<sup>173</sup> ILGA-Europe, ‘ILGA-Europe Glossary’ (n 14) 13.

The five selected cases relating to gender equality are the following:

- *Ünal Tekeli v Turkey* (2004), which is the only selected case dating back more than ten years. The reason for this judgment being included in the selected cases is that it did not appear to misrepresent the ECtHR's current attitudes towards stereotypes in the approach it took in this judgment;
- *Konstantin Markin v Russia* (2012);
- *Khamtokhu and Aksenchik v Russia* (2017);
- *Carvalho Pinto De Sousa Morais v Portugal* (2017);
- *Jurčić v Croatia* (2021).

This chapter contains an analysis of these five cases relating to gender equality. Each case is examined individually, assessing the gender stereotypes arising in the case, their type, their origin, as well as the ECtHR's approach to these gender stereotypes. Chapter 6 includes a comparative analysis of these findings, as well as those of chapter 5.

## 4.1. Analysis of gender stereotypes in gender equality cases of the ECtHR

### *4.1.1. Ünal Tekeli v Turkey*

In the case of *Ünal Tekeli v Turkey*<sup>174</sup>, the applicant had been refused the right to keep her maiden name after her marriage, and argued that this constituted discrimination on the basis of sex as married men kept their name. The Government attributed this difference in treatment to the aim of “reflecting family unity through a joint family name”<sup>175</sup>. As such, in Turkey, married women were under the obligation to take their husband's surname, though they had - in the time before the case was heard by the ECtHR - become able to keep their maiden name in front of their husband's name. This perpetuates the gender stereotype founded in the gender role of a husband as the head of the family, with the role of uniting the family. It also perpetuates heteronormativity, by presenting family unity as achievable only through a husband at the head

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<sup>174</sup> *Ünal Tekeli v Turkey* App no 29865/96 (ECtHR, 16 November 2004).

<sup>175</sup> *ibid*, para 68.

of the family, ignoring the situations of families with no male figures or two male figures, who are not less united as a result.

The ECtHR recognised this gender stereotyping, noting that the tradition of a married couple taking the husband's surname "derives from the man's primordial role and the woman's secondary role in the family"<sup>176</sup>, thus referring to traditional gender roles being perpetuated by this norm. Cook and Cusack point out the power of courts to "expose, dismantle, and eliminate stereotypes"<sup>177</sup>, which the ECtHR demonstrates in the present case by pointing out the discrepancies in the Turkish Government's statements concerning family unity. The ECtHR thus notes that family unity need not be reflected through a joint family name, and that family unity has not been demonstrated to suffer from married couples bearing different names<sup>178</sup>. The ECtHR also notes that if married couples were to use a joint family name, the aim of reflecting family unity through a joint name would be achieved just as well by choosing to bear the woman's surname or a jointly chosen name<sup>179</sup>.

#### 4.1.2. *Konstantin Markin v Russia*

In the case of *Konstantin Markin v Russia*, the applicant was a military man and the sole carer of his three children, who had been denied three years' parental leave to which military women were entitled. Gender stereotypes based on gender roles were apparent in the policy regarding parental leave for military women and men, as they perpetuated the idea of women having a bigger responsibility than men in their children's care. The applicant argued that such a policy "perpetuated gender stereotypes", and reinforced "women's traditional role of caring for the family in the home rather than earning money in the workplace"<sup>180</sup>. This policy therefore reinforced the gender stereotype based on gender roles of women as mothers and caretakers, and men as workers outside the home.

The ECtHR recognised that gender stereotypes arising out of traditional gender roles were being imposed on men and women, noting that they were "disadvantageous both to women's careers

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<sup>176</sup> *ibid*, para 63.

<sup>177</sup> Cook and Cusack (n 3) 78.

<sup>178</sup> *Ünal Tekeli* (n 174) para 66.

<sup>179</sup> *ibid*, para 64.

<sup>180</sup> *Konstantin Markin* (n 1) para 104.

and to men's family life"<sup>181</sup>, and finding that "States may not impose traditional gender roles and gender stereotypes"<sup>182</sup>. Thus, in this case, the gender roles of women as caretakers and mothers and men as breadwinners were named, both by the applicant and by the ECtHR. In this case, the ECtHR did what Cook and Cusack describe as "naming stereotypes"<sup>183</sup>, by pointing out and defining the harm of a certain stereotype.

#### 4.1.3. *Khamtokhu and Aksenchik v Russia*

In the case of *Khamtokhu and Aksenchik v Russia* (2017)<sup>184</sup>, the two applicants had been sentenced to life imprisonment in Russia, which was a sentence that could not be imposed on women, juveniles and elderly persons, but only on men between the ages of 18 and 65. The applicants argued that this constituted discrimination on grounds of sex and age. The Russian Government justified this distinction by reference to women's "special role in society which related, above all, to their reproductive function"<sup>185</sup>. The Government argued that such measures were not discriminatory, based on the CEDAW's mentions of "special measures aimed at protecting maternity"<sup>186</sup>, and argued that "international law provided for a more humane approach towards women"<sup>187</sup>. In so doing, the Russian Government relied on gender stereotypes rooted in the gender role of women as mothers, and perpetuated the stereotype of women being destined to motherhood, through women's "special role in society" being considered "above all" to be "their reproductive function"<sup>188</sup>, thus founding women's identity in their supposed future motherhood.

The majority of the ECtHR agreed with the Government's stance, holding that there existed a "public interest underlying the exemption of female offenders from life imprisonment by way of a general rule"<sup>189</sup> and found that there was no violation of the right to be free from discrimination on the basis of sex<sup>190</sup>. Thereby, the ECtHR accepted the differential treatment

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<sup>181</sup> *ibid*, para 141.

<sup>182</sup> *ibid*, para 142.

<sup>183</sup> Cook and Cusack (n 3) 39.

<sup>184</sup> *Khamtokhu and Aksenchik v Russia* App nos 60367/08 and 961/11 (ECtHR, 24 January 2017).

<sup>185</sup> *ibid*, para 47.

<sup>186</sup> *ibid*, para 45.

<sup>187</sup> *ibid*.

<sup>188</sup> *ibid*, para 47.

<sup>189</sup> *ibid*, para 82.

<sup>190</sup> *ibid*, para 88.

of women on the basis of their stereotyped gender role as mothers, with no regard for the fact that many women do not wish to become mothers, and many men wish to become fathers.

It must however be noted that while the ECtHR did condone this gender stereotype, this case was somewhat exceptional. Indeed, the Russian Government had made clear that a finding of a violation would lead to formal equality being applied through a levelling-down rather than an improvement, as it “would allow others, including women [...] to be given harsher sentences, while the applicants’ personal situation would remain the same”<sup>191</sup>. As a result, the judges of the ECtHR seemingly preferred to ensure that no favourable treatment would be taken away from vulnerable groups, which would have been an “absurd result”<sup>192</sup>. One of the concurring judges, Judge Nussberger, explains that in this “complicated case”, she chose to vote for a non-violation as “the risk [was] too great and too real”<sup>193</sup>. Consequently, the ECtHR chose, in this case, to allow some stereotypes to be perpetuated, where this was ultimately beneficial to the persons most affected by these stereotypes.

This judgment is interesting in that it contains six separate opinions, shining a light on the conflicting views on the issue within the Grand Chamber of the ECtHR. Judge Turković noted in a concurring opinion that by exempting women from life imprisonment, the Russian State “portrays women as a naturally vulnerable group”<sup>194</sup>, reinforcing the image of women as being weaker than men, and thus constitutes a form of “judicial paternalism”<sup>195</sup> that is not welcome in achieving gender equality. As highlighted in the joint partly dissenting opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Stadlmayer, the special measures envisaged by the CEDAW and other international instruments only aim to protect “women in certain *specific situations* (pregnancy, maternity)”<sup>196</sup>, and as a result they are not aimed at “all women, purely on account of their sex”<sup>197</sup>, which merely serves to reinforce the idea of differences between the sexes and gender stereotypes. The partly dissenting judges further point

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<sup>191</sup> *ibid*, para 42.

<sup>192</sup> *Khamtokhu and Aksenchik v Russia* App nos 60367/08 and 961/11 (ECtHR, 24 January 2017) Concurring opinion of Judge Mits, para 2.

<sup>193</sup> *Khamtokhu and Aksenchik v Russia* App nos 60367/08 and 961/11 (ECtHR, 24 January 2017) Concurring opinion of Judge Nussberger, para 7.

<sup>194</sup> *Khamtokhu and Aksenchik v Russia* App nos 60367/08 and 961/11 (ECtHR, 24 January 2017) Concurring opinion of Judge Turković, para 3.

<sup>195</sup> *ibid*, para 3.

<sup>196</sup> *Khamtokhu and Aksenchik v Russia* App nos 60367/08 and 961/11 (ECtHR, 24 January 2017) Joint partly dissenting opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström, and Kucsko-Stadlmayer, para 7.

<sup>197</sup> *ibid*.



out that the maternity argument on which the Government relies cannot be accurate, as women can still be sentenced to twenty years in prison, thus effectively preventing most of them from exercising this supposedly quintessential role as mothers<sup>198</sup>, leading to the conclusion that these measures may simply be based on women’s diminished “power of endurance” compared to men<sup>199</sup>, rather than a real desire to allow them to exercise a meaningful parental role.

In relation to this supposed power of endurance, the ECtHR condemned the stereotype of “male toughness”<sup>200</sup>, which was perpetuated by only sentencing men of a certain age group to life imprisonment, implying that women - as well as juveniles and elderly persons - did not have this same toughness. In his dissenting opinion, Judge Pinto de Albuquerque notes that this difference in sentencing between men and women conveys the stereotype of women lacking endurance in comparison to men<sup>201</sup>. Thereby, the ECtHR addressed the stereotype linked to the social behaviour of men being expected to demonstrate toughness, and women lacking this same toughness, which was being perpetuated by this policy.

#### *4.1.4. Carvalho Pinto De Sousa Morais v Portugal*

In the case of *Carvalho Pinto De Sousa Morais v Portugal* (2017)<sup>202</sup>, the applicant had been the victim of a failed gynaecological surgery, which had left her physically disabled. She was awarded a reduced compensation for the non-pecuniary damage she had suffered, which she argued was decided based on sexism and ageism. Indeed, the Portuguese Court held that:

it should not be forgotten that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age.<sup>203</sup>

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<sup>198</sup> *ibid*, para 13.

<sup>199</sup> *Khamtokhu and Aksenchik v Russia* App nos 60367/08 and 961/11 (ECtHR, 24 January 2017) Dissenting opinion of Judge Pinto de Albuquerque, para 41.

<sup>200</sup> *Khamtokhu and Aksenchik* (n 184) para 35.

<sup>201</sup> *ibid*, para 41.

<sup>202</sup> *Carvalho Pinto De Sousa Morais v Portugal* App no 17484/15 (ECtHR, 25 July 2017).

<sup>203</sup> *ibid*, para 16.

By linking women's sexuality to reproduction, the Portuguese Court perpetuated the stereotype relating to social behaviour that women are not sexual beings, thus discrediting sexuality existing solely for pleasure. It also perpetuated the heteronormative stereotype that women's sexuality is linked to reproduction, discrediting sexuality that cannot result in reproduction, which includes a large proportion of same-sex sexualities. The ECtHR established that the approach taken by the Portuguese Court reduced women to a traditional role of motherhood, portraying "female sexuality as being essentially linked to child-bearing purposes"<sup>204</sup>, and failed to recognise women's sexuality as independent of reproductive function. Indeed, the ECtHR highlighted that in cases where men had been left unable to have sexual relations, the Portuguese courts considered that this had "affected their self-esteem and resulted in a 'tremendous blow' and 'severe mental trauma'"<sup>205</sup>, without paying attention to their parental status<sup>206</sup>. Thus, it was clear to the ECtHR that in this case, the applicant had been treated differently due to her age and sex<sup>207</sup>, resulting in a violation of the right to be free from discrimination<sup>208</sup>. The case of *Carvalho Pinto De Sousa Morais* also highlighted the issue of intersectional discrimination<sup>209</sup>, whereby the applicant was the subject of both sexism and ageism, resulting in a unique form of discrimination, reflected in this "compounded stereotype"<sup>210</sup> based on sex but also on age. The ECtHR thereby addressed the stereotypical gender role of women as mothers, as well as the stereotypes associated with social behaviour relating to sexuality.

Further stereotypes based on gender roles were reinforced in the judgment of the Portuguese Supreme Administrative Court, noting that:

Indeed, (1) it has not been established that the plaintiff had lost her capacity to take care of domestic tasks, (2) professional activity outside the home is one thing while domestic work is another, and (3) considering the age of her children, she [the plaintiff] probably only needed to take care of her

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<sup>204</sup> *ibid*, para 52.

<sup>205</sup> *ibid*, para 55.

<sup>206</sup> *ibid*.

<sup>207</sup> *ibid*, para 53.

<sup>208</sup> *ibid*, para 56.

<sup>209</sup> See section 3.1.5.1.; Crenshaw (n 145).

<sup>210</sup> Cook and Cusack (n 3) 29.

husband; this leads us to the conclusion that she did not need to hire a full-time maid<sup>211</sup>.

Thereby, the Portuguese Court implied that the applicant's role was to carry out domestic work, and care for her family, including her husband, thus strongly reinforcing traditional gender roles in the home. The ECtHR's judgment is however slightly unclear in its treatment of these stereotyped gender roles. Indeed, the ECtHR referred to this stereotypical view on several occasions in its judgment<sup>212</sup>. However, it did not condemn it explicitly, but merely implied that it conveyed that the Portuguese court had relied on the applicant's gender in its decision and was influenced by sexism within the judiciary<sup>213</sup>. As such, the ECtHR, though it condemned the sexism and ageism which the applicant was the victim of, did not take this opportunity to clearly name the stereotype at play in this instance. Cook and Cusack argue that "[t]he ability to eliminate a wrong is contingent on it first being 'named'"<sup>214</sup>, which would mean that in this situation, by failing to explicitly address and name the stereotype portraying women as responsible for domestic work, it also failed to take steps which could have worked towards the elimination of this stereotype.

#### 4.1.5. *Jurčić v Croatia*

In the case of *Jurčić v Croatia* (2021)<sup>215</sup>, the applicant had undergone in vitro fertilisation (IVF) treatment while seeking employment, and found out she was pregnant shortly after taking up her new position. She was denied salary compensation for the sick leave she had to take when she was prescribed rest due to pregnancy-related complications, on the basis that her employment had been fictitious and aimed only at obtaining these benefits. She argued that she had been discriminated against on grounds of sex. The Government contended that the applicant should not have taken up new employment when she had undergone IVF treatment and was likely to become pregnant as a result<sup>216</sup>, thus perpetuating the stereotype rooted in gender roles

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<sup>211</sup> *Carvalho Pinto De Sousa Morais* (n 202) para 16.

<sup>212</sup> *ibid*, paras 50, 53.

<sup>213</sup> *ibid*, paras 53-54.

<sup>214</sup> Cook and Cusack (n 3) 39.

<sup>215</sup> *Jurčić v Croatia* App no 54711/15 (ECtHR, 4 February 2021).

<sup>216</sup> *ibid*, para 60.

and social behaviour that women could not be both mothers and workers, or work while pregnant, which reinforced the idea that women were mothers first and workers second.

The ECtHR explicitly addressed the gender stereotype perpetuated by the Government, by stating that the decision “implied that women should not work or seek employment during pregnancy or mere possibility thereof”<sup>217</sup>. Thereby, it highlighted the stereotype linked to the social behaviour of women refraining from working during pregnancy and being unable to take up work during that time. The ECtHR thus named the stereotype in this case, by clearly outlining its implications and the harm it may cause, stating that it served to “discourag[e] the applicant from seeking employment due to her possible prospective pregnancy”<sup>218</sup>. As a result, it not only risked affecting pregnant persons, but all persons who were planning to become pregnant. The ECtHR concluded with a strong statement, by holding that “gender stereotyping of this sort presents a serious obstacle to the achievement of real substantive gender equality”<sup>219</sup>.

Nonetheless, the ECtHR itself stated in this judgment that “such a decision could only be adopted in respect of women, since *only women could become pregnant*”<sup>220</sup> [emphasis added]. By portraying women as the only persons able to get pregnant, the ECtHR is perpetuating stereotypes of sex characteristics, portraying women as the only persons with a uterus, and the ability to bear children. However, trans men, non-binary persons and other gender-diverse individuals born with a uterus may also have the ability to become pregnant, whereas all women may not have a uterus, or may no longer have one. The ECtHR may soon be faced with this reality, as the case of a trans man who gave birth is currently pending before the ECtHR, as he is seeking to be recognised as his child’s father rather than the mother in the birth register<sup>221</sup>. As will be discussed in section 5.1., the ECtHR itself recognised in *AP, Garçon and Nicot v France* - four years before *Jurčić* - that trans people have a right to have their gender legally recognised without being compelled to fulfil any sterilisation requirements. With this judgment, the ECtHR thus implicitly recognised that trans men may obtain legal gender recognition while having fully functioning uteruses and reproductive systems giving them the ability to bear children. It is therefore surprising that in 2021, in *Jurčić*, the ECtHR would link womanhood

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<sup>217</sup> *ibid*, para 83.

<sup>218</sup> *ibid*, para 77.

<sup>219</sup> *ibid*, para 83.

<sup>220</sup> *ibid*, para 70.

<sup>221</sup> *OH and GH v Germany* App nos 53568/18 and 54741/18 (ECtHR, *forthcoming*).

to a biological foundation in this manner. Furthermore, Article 14 ECHR includes “other status”, which would have allowed the ECtHR to define the facts of *Jurčić* as discrimination on the basis of pregnancy or recourse to IVF, without gendering pregnancy or limiting it to women.

Therefore, the ECtHR itself also perpetuated stereotypes relating to sex characteristics in the judgment of *Jurčić v Croatia*, despite its commendable approach to gender stereotypes relating to pregnant women in employment. As the ECtHR itself conflated women with the ability to bear children, it did not address the fact that this implied an understanding of gender that was not inclusive of trans persons, and defined womanhood in biological terms.

## 4.2. Conclusion

In conclusion, it may be noted that the ECtHR addressed gender stereotypes in all five selected cases. However, though stereotypes were addressed to some extent in each case, several stereotypes arising in the selected cases were not addressed by the ECtHR in its main judgment. The ECtHR, despite holding that “States may not impose traditional gender roles and gender stereotypes”<sup>222</sup>, did therefore not appear to always rise to its own standard. The ECtHR thus implicitly accepted that reliance on gender stereotypes could be legitimate in the case of *Khamtokhu*. The ECtHR also did not always succeed in accurately naming and outlining all gender stereotypes, as seen in *Carvalho*. In fact, at times, it perpetuated stereotypes itself, as was the case in *Jurčić*. Nonetheless, it can be noted that the ECtHR did pay special attention to gender stereotypes in all selected cases relating to gender equality, and attempted to address them to some extent, though its methods may require improvement for future cases.

The findings of this chapter have been set out in two tables, which can be consulted in Annex 1 and Annex 2. The data set out in these annexes will aid in drawing comparisons in chapter 6.

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<sup>222</sup> *Konstantin Markin* (n 1) para 142.

## 5. Gender stereotyping in gender identity cases of the ECtHR

Following the analysis of the ECtHR's approach to gender stereotypes in cases relating to gender equality, this chapter includes a similar analysis for cases relating to gender identity. First and foremost, gender identity will be put into context, to better situate the ECtHR's stance on recognition of gender identity (5.1.). Therefore, this chapter includes a brief timeframe of the evolution of legal gender recognition in the ECtHR's jurisprudence, to highlight the ECtHR's changing attitude on the matter and the advancements achieved through the years, while noting remaining issues in the ECtHR's jurisprudence. This section will also allow for a clearer understanding of the ECtHR's current criteria for legal gender recognition. Following this contextualisation of gender identity in the ECtHR's jurisprudence, five cases relating to gender identity will be analysed to highlight any gender stereotypes which may arise, determine their origin and their type, and observe the ECtHR's approach to gender stereotypes in these cases (5.2.).

As noted in Chapter 4, the ECtHR has interpreted gender identity to refer solely to trans persons, and as a result, all five selected cases were brought by trans applicants. The cases were selected following the list of criteria developed in Chapter 4, namely:

- (1) Reference to gender or sex;
- (2) Reference to gender stereotypes, whether explicitly named or not;
- (3) Date of the judgment, with the aim of focusing on recent cases;
- (4) Equal number of cases relating to gender equality and gender identity.

The five selected cases relating to gender identity are the following:

- *Hämäläinen v Finland* (2014);
- *YY v Turkey* (2015);
- *AP, Garçon and Nicot v France* (2017);
- *X v The Former Yugoslav Republic of Macedonia* (2019);
- *X and Y v Romania* (2021).

## 5.1. Gender identity in context: ECtHR jurisprudence on legal gender recognition

As an introduction to the topic of gender identity in cases of the ECtHR, it must be noted that the ECtHR's jurisprudence concerning gender identity has greatly evolved over the years. As noted in chapter 4, the ECtHR has considered 'gender identity issues' to be those related to trans persons<sup>223</sup>. As a result, this section will provide an overview of the case-law of the ECtHR as it relates to trans persons, and their gender identity, in cases often centring around legal gender recognition and its implications.

The ECHR was first faced with the issue of legal gender recognition of a trans person in the case of *Rees v UK*, in 1986, in which it did not find a violation in the refusal to legally recognise a trans man's gender identity, noting the administrative consequences which would be borne by the rest of the population<sup>224</sup>, and further noting that in any case "the change so recorded could not mean the acquisition of all the biological characteristics of the other sex"<sup>225</sup>. This reliance on a biological foundation to consider sex immutable was confirmed in *Cossey v UK* in 1990, where the ECtHR again held that "gender reassignment surgery did not result in the acquisition of all the biological characteristics of the other sex"<sup>226</sup>.

The ECtHR shortly after started to question the immutability of sex, with the case of *B v France*. In that case, the ECtHR noted for trans people "the discrepancy between their legal sex and their apparent sex"<sup>227</sup>. Highlighting that contrary to English birth certificates, French ones "were intended to be updated throughout the life of the person concerned"<sup>228</sup>, the ECtHR concluded that France had violated the right to private life of the applicant. Finally, in 2002, the ECtHR recognised in the case of *Goodwin v UK* what has since been considered a general 'right to gender identity', based on "clear and uncontested evidence of a continuing international trend" towards the legal recognition of the gender identity of "post-operative transsexuals"<sup>229</sup>.

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<sup>223</sup> European Court of Human Rights, 'Factsheet - Gender Identity Issues' (n 25).

<sup>224</sup> *Rees v UK* App no 9532/81 (ECtHR, 17 October 1986), paras 43-44.

<sup>225</sup> *ibid*, para 42(b).

<sup>226</sup> *Cossey v UK* (1990) Series A no 184, para 40.

<sup>227</sup> *B v France* App no 13343/87 (ECtHR, 25 March 1992) para 59(a).

<sup>228</sup> *ibid*, para 52.

<sup>229</sup> *Goodwin* (n 16) para 85.

The ECtHR further stated that this international trend bore a higher weight than the lack of a European consensus on legal gender recognition of trans persons<sup>230</sup>. This concept of a continuing international trend would become particularly relevant in the ECtHR's jurisprudence, setting the stage for further advancements in the rights of trans persons.

As the right to gender identity developed over the years, it remained a conditional right. In *Hämäläinen v Finland*, the applicant sought to challenge what is known as the 'divorce requirement', which made it impossible for married trans persons to have their gender identity legally recognised without divorcing their spouse or, where possible, converting their marriage into a civil partnership. Such a requirement aimed to prevent persons from finding themselves in a same-sex marriage where those were still illegal. The ECtHR held that forcing a person into a civil partnership or a divorce to have their gender legally recognised was "not disproportionate" when balancing the interests of the State and the right of the applicant to private and family life, seeing as the civil partnership conveyed "almost identical" legal protections as marriage<sup>231</sup>.

Nonetheless, the requirements which were allowed to be imposed on trans applicants seeking legal gender recognition were lowered over time. In *AP, Garçon and Nicot v France*, in 2017, the ECtHR held that "sterilisation surgery or treatment" could not be used as requirements for legal gender recognition of trans persons<sup>232</sup>. Indeed, such a requirement placed trans persons in the situation of an "impossible dilemma" between undergoing sterilisation regardless of their desire to do so and thus forfeiting their right to physical integrity, or not undergoing such sterilisation, and thus forfeiting their right to gender identity<sup>233</sup>. The ECtHR recently reiterated this position in *X and Y v Romania*<sup>234</sup>.

However, as the ECtHR is recognising a broader right to gender identity, and holding certain requirements incompatible with the ECHR, it has not made this right absolute. For instance, the ECtHR has held that requiring a psychiatric diagnosis of a gender identity disorder does not violate applicants' right to private life<sup>235</sup>. As a result, legal gender recognition under the

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<sup>230</sup> *ibid*, para 85.

<sup>231</sup> *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014) paras 87-89.

<sup>232</sup> *AP, Garçon and Nicot* (n 2) paras 131-132.

<sup>233</sup> *ibid*, paras 132.

<sup>234</sup> *X and Y* (n 18) para 165.

<sup>235</sup> *AP, Garçon and Nicot* (n 2) para 141.



ECtHR’s jurisprudence has not yet been depathologised, as will be discussed in section 7.2.1. Furthermore, though the ECtHR relies on a “right to self-determination”<sup>236</sup>, it has not followed the common understanding associated with this term, which implies a model in which persons may legally change their gender upon a self-made declaration<sup>237</sup>. Lastly, where the ECtHR has made certain advancements in its understanding of the different ways in which one may express one’s gender identity, for example through acknowledging that all trans persons may not wish to undergo surgical interventions<sup>238</sup>, it has not yet considered legal gender recognition outside of a binary context. This may merely be due to the fact that it has not been faced with cases where such discussions would be relevant yet, which will be discussed in further detail in section 7.3.2.

## 5.2. Analysis of gender stereotypes in gender identity cases of the ECtHR

### *5.2.1. Hämäläinen v Finland*

In the case of *Hämäläinen v Finland* (2014), a trans woman sought to have her gender legally recognised. She had entered into what was at the time a heterosexual marriage with her wife. However, when she transitioned, the Finnish state would not legally recognise her gender unless she and her wife both consented to have their marriage transformed into a civil partnership, or divorced. If they did none of those things, their marriage would *de facto* become a same-sex marriage, which was still illegal in Finland. This case therefore highlighted the heteronormativity ingrained in legal systems, with only heterosexual marriages being an option, to the point of ending perfectly good marriages when they turned out not to fit into those heteronormative ideals anymore. The ECtHR stated that Article 12 ECHR “enshrines the traditional concept of marriage as being between a man and a woman”<sup>239</sup>. However, by insisting on this concept of heterosexual marriage, Gonzalez-Salzburg argues that the ECtHR is merely

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<sup>236</sup> *ibid*, para 93.

<sup>237</sup> Marjolein van den Brink and Peter Dunne, *Trans and Intersex Equality Rights in Europe - A Comparative Analysis* (Publications Office of the European Union, Luxembourg, 2018) 59.

<sup>238</sup> *AP, Garçon and Nicot* (n 2) para 132.

<sup>239</sup> *Hämäläinen* (n 231) para 96.

keeping up an illusion<sup>240</sup>. The ECtHR has indeed recognised “the heterosexuality of marriage in circumstances that appear as opposites”<sup>241</sup>, sometimes allowing a trans woman to marry a woman but sometimes also allowing a trans woman to marry a man, while considering both these situations heterosexual<sup>242</sup>. The ECtHR is thereby upholding heteronormativity, by not only limiting marriage to same-sex couples, but also by defining heterosexuality in different ways depending on the circumstances, irrespective of “sexuality and genitalia”<sup>243</sup>, to ensure that “the institution remains heterosexual”<sup>244</sup>.

Amnesty International further pointed out in their third party intervention that “[m]any differences in treatment based on sexual orientation had their roots in stereotypes about gender roles”<sup>245</sup>, with the applicant reiterating this argument in her submission<sup>246</sup>.

### 5.2.2. *YY v Turkey*

In the case of *YY v Turkey* (2015), the applicant was a trans man who was being denied gender-affirming surgery on the basis that he was still able to procreate. In the facts of the case, it was reported by the applicant’s family that he was “behav[ing] like a boy”<sup>247</sup> from a young age. This refers to a stereotype of social behaviour of boys, who are expected to act a specific way, with different expectations put on girls. The facts of the case, with the testimonies put forward by the applicant’s family, also contain several mentions of his relationships with women<sup>248</sup>, supposedly to be used as evidence of his gender identity. This reveals a heteronormative stereotype, with the expectation that relationships should be between a man and a woman. In this scenario, the stereotype that men should be in relationships with women serves to justify that the applicant is indeed a man, since he was dating women. However, this perpetuates heteronormative understandings of relationships, and invisibilises trans persons who do not identify as heterosexual.

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<sup>240</sup> Damian A Gonzalez-Salzberg, ‘Confirming the (Illusion of) Heterosexual Marriage: *Hämäläinen v Finland*’ (2015) 2(1) *Journal of International Comparative Law*, 183.

<sup>241</sup> *ibid* 185.

<sup>242</sup> *ibid* 185-186.

<sup>243</sup> *ibid* 185.

<sup>244</sup> *ibid* 183.

<sup>245</sup> *Hämäläinen* (n 231) para 54.

<sup>246</sup> *ibid*, para 105.

<sup>247</sup> *YY* (n 22) para 9

<sup>248</sup> *ibid*, paras 7, 9.

In this case, the ECtHR also references “a change in social gender role”<sup>249</sup>. By using such language, the ECtHR perpetuates the idea that gender identity is linked to certain gender roles and certain expectations of social behaviour. Such an understanding implies that to be recognised as one’s gender, one needs to adapt one’s social behaviour and act in a manner expected of one’s gender.

### 5.2.3. *AP, Garçon and Nicot v France*

In the case of *AP, Garçon and Nicot v France* (2017), the three applicants had been denied legal gender recognition in France. The first applicant refused to undergo a medical examination to determine whether the gender-affirming surgery she had undergone was irreversible. The second applicant did not wish to undergo gender-affirming surgery, but was taking hormones. The French court held that she could not demonstrate an irreversible change in appearance or a gender identity disorder, and as such denied her request. The third applicant could not demonstrate an irreversible change in appearance either, and was denied her request on that ground.

In the facts of the case relating to the first applicant, it was noted that her “physical appearance has always been very feminine”<sup>250</sup>, and that the second applicant “dressed as a woman and was perceived by others as a woman”<sup>251</sup>. This perpetuates the idea that women and men should dress in a specific way, that gender expression is determined by gender identity, and that the way one dresses serves to ‘prove’ one’s gender. The first applicant was also referred to as having “always behaved like a girl”<sup>252</sup>, thus reiterating stereotypes of social behaviour, with a set of expectations imposed on girls’ behaviour, and a different set of expectations imposed on boys’ behaviour.

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<sup>249</sup> *ibid*, para 115.

<sup>250</sup> *AP, Garçon and Nicot* (n 2) para 8.

<sup>251</sup> *ibid*, para 35.

<sup>252</sup> *ibid*, para 8.

#### 5.2.4. *X v The Former Yugoslav Republic of Macedonia*

In the case of *X v The Former Yugoslav Republic of Macedonia* (2019)<sup>253</sup>, a trans man sought to have his gender legally recognised, but the State did not provide a regulatory framework for such recognition, and his request was denied on the basis that he had not undergone gender-affirming surgery.

In its considerations, the ECtHR refers to the applicant as a “pre-operative transsexual”<sup>254</sup>, seemingly implying that this is merely a temporary status, preceding a final state. However, this case was decided two years after *AP, Garçon and Nicot v France*, meaning that the ECtHR had previously clearly recognised that surgery could not be required for legal gender recognition, and that the ECtHR had been confronted with the cases of applicants who did not wish to undergo surgery. As a result, the ECtHR perpetuated stereotypes related to sex characteristics, by implying that all trans persons seek or should seek to acquire sex characteristics that match those of cisgender persons of their gender.

#### 5.2.5. *X and Y v Romania*

In the case of *X and Y v Romania* (2021), the two applicants had not undergone gender-affirming surgery and were refused legal gender recognition by the Romanian State on that basis. In the description of the facts of the case, it is highlighted that each of the applicants “began from adolescence to behave like a boy in his way of dressing and his social relations”<sup>255</sup>. This reference to the way in which applicants would dress implies that gender expression equals gender identity, and as such perpetuates stereotypes linked to gender expression, that men and boys should dress a certain way, and women and girls should dress a different way. Furthermore, the reference to “behaving like a boy in [...] [their] social relations” reiterates the same stereotypes observed in the case of *YY v Turkey*, that boys should act a specific way in society, perpetuating stereotypes of social behaviour and expecting certain ideas of masculinity from men and boys.

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<sup>253</sup> *X v the Former Yugoslav Republic of Macedonia* App no 29683/16 (ECtHR, 17 January 2019).

<sup>254</sup> *ibid*, para 69.

<sup>255</sup> *X and Y* (n 18) paras 4, 34.

In its arguments, the Government contended that a “sex/gender marker” could not be legally changed in the state if it was “contrary to decisive biological characteristics”<sup>256</sup>. The Government therefore perpetuates stereotypes linked to sex characteristics, implying that the “biological characteristics” in question necessarily determine a person’s sex or gender. This therefore roots gender identity in sex characteristics, which - as discussed in section 2.1. - is not accurate, and fails to recognise the reality of trans persons, but also of intersex persons, whose “biological characteristics” cannot place them in one of two categories of sex or gender.

### 5.3. Conclusion

In the five selected cases relating to gender identity, the ECtHR did not once mention gender stereotypes or address the gender stereotypes outlined in section 5.2. The ECtHR was consistent in its absence of attention paid to gender stereotypes raised in these cases, regardless of who raised the stereotypes in question. By not naming stereotypes, despite not explicitly endorsing them, the ECtHR did not highlight their harmfulness. As Cook and Cusack argue, naming gender stereotyping is essential to its dismantling<sup>257</sup>. The ECtHR on occasion implied gender stereotypes itself, as can be seen in *Hämäläinen v Finland*, *X v Macedonia* and *YY v Turkey*.

It must be noted that though the gender stereotypes that the applicants relied on were not addressed by the ECtHR, they were also often beneficial to the applicants, as the cases in which applicants relied on gender stereotypes led to a finding of a violation. Indeed, in *YY v Turkey* and *X and Y v Romania*, the ECtHR found a violation of the applicants’ right to private life, and in *AP, Garçon and Nicot v France*, the ECtHR found a violation of the right to private life of two of the applicants, though this finding concerned only the sterilisation requirement. Though it is not clear whether these stereotypes played into the ECtHR’s decision, they did not seem to do any harm to the applicants’ cases either. The usefulness of this reliance on gender stereotypes will be further discussed in section 6.4., where a comparison will be drawn with the gender equality cases.

It could therefore be concluded that in gender identity cases, gender stereotypes did not seem to harm the applicants’ cases, and potentially may have helped them. However, by implicitly

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<sup>256</sup> *X* (n 253) para 57.

<sup>257</sup> Cook and Cusack (n 3) 39, 54.

accepting this reliance on gender stereotypes, the ECtHR may also have undermined the efforts undertaken in its gender equality cases for the elimination of gender stereotypes.

The findings of this chapter have also been set out in two tables, which can be consulted in Annex 1 and Annex 2. The data set out in these annexes will aid in drawing comparisons in chapter 6.

## **6. (In)consistent gender stereotyping in ECtHR cases**

Chapters 4 and 5 have explored the gender stereotypes surfacing in judicial decisions relating to gender equality and gender identity. They have also analysed the ECtHR's approach to these gender stereotypes, examining whether the ECtHR addressed these gender stereotypes or condemned their use. This chapter confronts the findings of both chapters, to determine whether the ECtHR's approach to gender stereotypes is consistent (6.1.). This comparative analysis of the findings of chapters 4 and 5 is then relied on to highlight the areas which could be improved upon (6.2.). Lastly, this chapter interprets these results while comparing them with other findings in relevant research, to assess potential reasons underlying reliance on gender stereotypes (6.3.), and the effectiveness of such a course of action (6.4.). Attempts were made to conduct interviews with legal practitioners, professionals in human rights organisations specialised in issues relating to gender and academics. None of the nine persons and organisations contacted were available for an interview, but they recommended relevant literature on the issue which proved useful for this section.

### **6.1. Comparative analysis of gender stereotyping in gender equality and gender identity cases**

In analysing the findings of chapters 4 and 5, different factors and variables can be considered. This section focuses first on a comparison of the origin of stereotypes in cases relating to gender identity and gender equality. A comparison is then drawn between the types of stereotypes that surfaced most in these cases, as well as the origin of these different types of stereotypes. Finally, this section examines the stereotypes addressed, or not addressed, by the ECtHR.

To ensure more clarity in the discussion of these findings, the following sections include figures comparing the findings of chapters 4 and 5. The data which served to establish these figures can be found in Annexes 1 and 2.

### 6.1.1. Origin of gender stereotypes

From the analyses of chapters 4 and 5, the origins of gender stereotypes in the selected cases appeared to be the Government, the applicants, national policies, national legislation, national courts, and the ECtHR. For the purposes of this analysis, national legislation and policies will be considered analogous categories.

It can be noted that in the five selected cases relating to gender equality, the gender stereotypes could predominantly be found in the Government's arguments. Indeed, the Government referred to gender stereotypes in three of the five cases, namely *Jurčić v Croatia*, *Ünal Tekeli v Turkey* and *Khamtokhu and Aksenchik v Russia*. The remaining gender stereotypes appeared through a national policy (*Konstantin Markin v Russia*), a national court (*Carvalho Pinto De Sousa Morais v Portugal*) and finally the ECtHR (*Jurčić v Croatia*). The applicants themselves did not rely on gender stereotypes in the selected gender equality cases. Indeed, in gender equality cases, applicants aim to achieve equal rights and opportunities, which often entails the elimination of gender stereotypes, which create distinctions based on gender instead. The applicants would therefore not benefit from reliance on gender stereotypes to argue for gender equality.

By contrast, in the five cases relating to gender identity, the gender stereotypes were very present in the applicants' arguments, as seen in the three cases of *YY v Turkey*, *X and Y v Romania* and *AP, Garçon and Nicot v France*. The stereotypes were however just as often raised by the ECtHR, with three of the five selected cases containing references to gender stereotypes made by the ECtHR, namely the cases of *Hämäläinen v Finland*, *YY v Turkey* and *X v The Former Yugoslav Republic of Macedonia*. Stereotypes also surfaced through the Government's arguments once, in *X v The Former Yugoslav Republic of Macedonia*, and through national legislation once, in *Hämäläinen v Finland*. No gender stereotypes surfaced through the national courts' judgments in the cases relating to gender identity.



Looking to the number of instances gender stereotypes were referred to - as certain actors raised different types of gender stereotypes - it can be seen that the applicants in gender identity cases ultimately raised the highest number of gender stereotypes, with six occurrences (Figure 1, see Appendix 1 for detail on the corresponding data). They were however closely followed by the Governments in gender equality cases, who raised gender stereotypes on five occasions. Interestingly, the ECtHR was the third highest-ranking actor raising gender stereotypes, with four occurrences of raising gender stereotypes in gender identity cases, and one in a gender equality case.

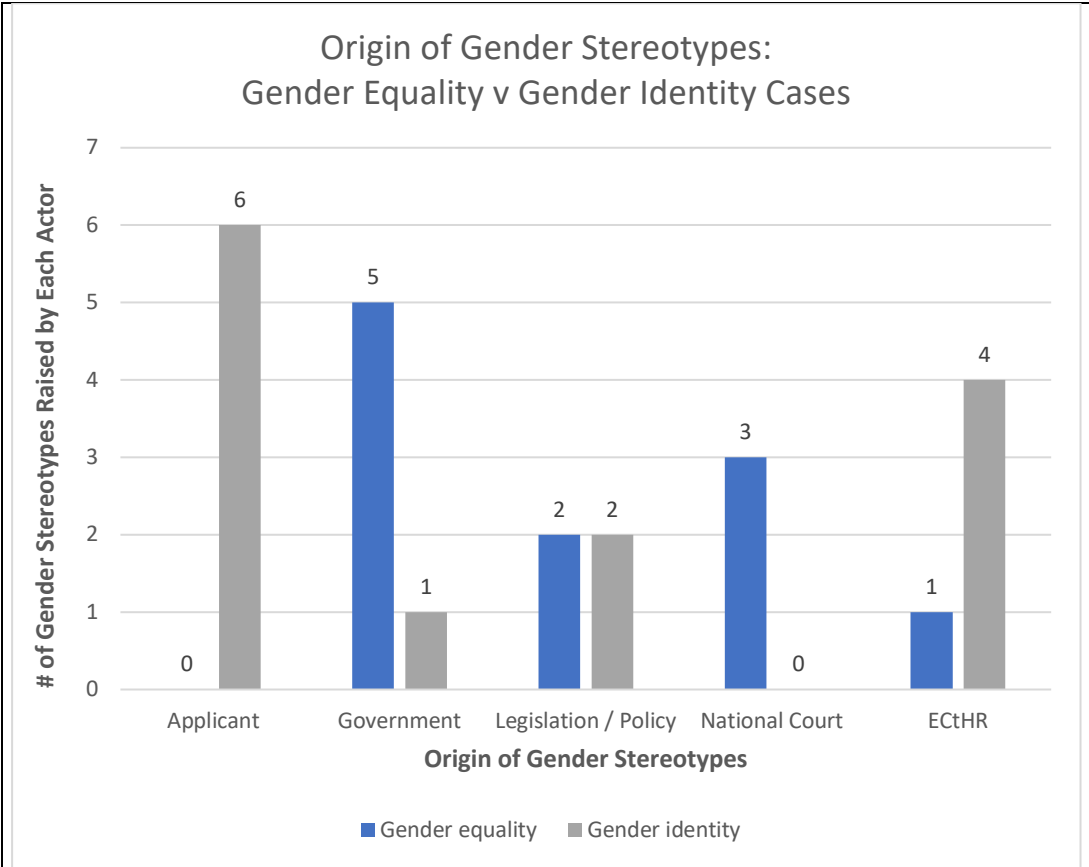


Figure 1  
 (See Appendix 1 for data corresponding to the bar graph)

There is therefore a disparity in the origin of gender stereotypes (Figure 1), depending on whether the cases relate to gender equality or gender identity. Gender equality cases are more likely to contain references to gender stereotypes in arguments made by the Government, whereas gender identity cases are more likely to see these gender stereotypes arise in arguments made by the applicants and the ECtHR.

6.1.2. Types of stereotypes invoked in gender equality and gender identity cases

The types of stereotypes were divided into five categories, as set out in chapter 4. These categories were: gender roles, gender expression, social behaviour, sex characteristics and heteronormativity.

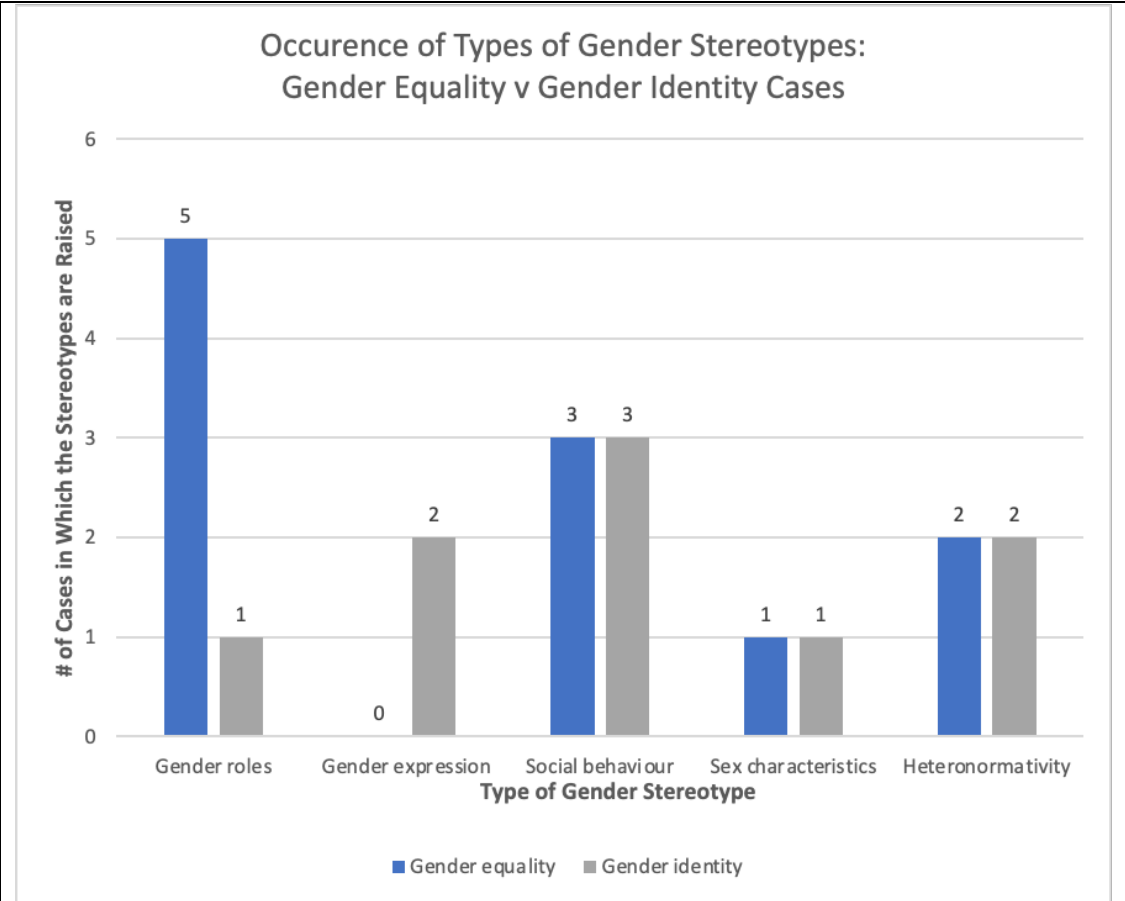


Figure 2  
(See Appendix 2 for data corresponding to the bar graph)

Several types of gender stereotypes could be found both in gender equality and gender identity cases. However, there were disparities between the most prevalent types of stereotypes for each category of selected cases (Figure 2). Indeed, all five cases related to gender equality contained references to gender roles, whereas only one gender identity case mentioned them (*Hämäläinen v Finland*). However, stereotypes linked to social behaviour were equally frequent in both categories, with three cases making mentions of such stereotypes in gender equality cases (*Khamtokhu and Aksenchik v Russia*, *Carvalho Pinto De Sousa Morais v Portugal* and *Jurčić*

*v Croatia*), and three cases making mentions of social behaviour stereotypes in gender identity cases (*YY v Turkey*, *AP, Garçon and Nicot v France* and *X and Y v Romania*). By contrast, stereotypes relating to gender expression could be found in two of the cases relating to gender identity (*AP, Garçon and Nicot v France* and *X and Y v Romania*), whereas that type of stereotype was absent from the selected cases relating to gender equality. Stereotypes based on heteronormativity were equally present in both types of cases, with such stereotypes surfacing in two gender equality cases (*Ünal Tekeli v Turkey* and *Carvalho Pinto De Sousa Morais v Portugal*) and two gender identity cases (*Hämäläinen v Finland* and *YY v Turkey*). Stereotypes based on sex characteristics were quite rare, and only appeared in one case of each category (*Jurčić v Croatia* and *X v The Former Yugoslav Republic of Macedonia*).

Gender equality cases could therefore be considered to centre largely around gender roles and their dismantling, with references to social behaviour and heteronormativity. By contrast, the stereotypes present in gender identity cases were largely centred around social behaviour, gender expression and heteronormativity. Heteronormativity and social behaviour can therefore be considered quite prevalent types of stereotypes ranging across both categories, whereas gender roles and gender expression seem to generally be specific respectively to gender equality and gender identity cases. It may be noted that gender equality cases tend to deal with norms attached to different genders, whereas gender identity cases tend to centre around individual recognition, which occurs through perception by others in these cases. As a result, the presence of stereotypes of gender roles in gender equality cases is reflective of those contested norms, whereas the presence of stereotypes of gender expression and social behaviour reflects the expectations placed on individuals as the basis for belonging to certain categories.

### *6.1.3. Types of stereotypes surfacing through the arguments of the different actors in the cases*

### Type and Origin of Gender Stereotypes in the Selected Gender Equality Cases

	Gender roles	Gender expression	Social behaviour	Sex characteristics	Heteronormativity
Ünal Tekeli v Turkey	Yellow				Yellow
Konstantin Markin v Russia	Green				
Khamtokhu and Aksenchik v Russia	Yellow		Green		
Carvalho Pinto de Sousa Morais v Portugal	Blue		Blue		Blue
Jurčić v Croatia	Yellow		Yellow	Purple	

Figure 3

### Type and Origin of Gender Stereotypes in the Selected Gender Identity Cases

	Gender roles	Gender expression	Social behaviour	Sex characteristics	Heteronormativity
Hämäläinen v Finland	Green				Green, Purple
YY v Turkey	Purple		Red, Purple		Red
AP, Garçon and Nicot v France		Red	Red		
X v The Former Yugoslav Republic of Macedonia				Purple	
X and Y v Romania		Red	Red	Yellow	

Figure 4

Key	
Red	Indicates that the Applicant(s) raise(s) the stereotype
Yellow	Indicates that the Government raises the stereotype
Green	Indicates that the stereotype appears through national Legislation or Policies
Blue	Indicates that the stereotype appears through the judgement of the National Court
Purple	Indicates that the ECtHR raises the stereotype
Green, Purple	Indicates that the stereotype appears through Legislation/Policy and the ECtHR
Red, Purple	Indicates that the stereotypes were raised both by the Applicant and the ECtHR

Figures 3 and 4 highlight the prevalence of gender stereotypes, depending on their type and origin, in cases relating to gender equality and gender identity.

As noted previously, the applicants' arguments did not contain gender stereotypes in the five selected cases relating to gender equality. Similarly, the cited parts of national judgments in the cases relating to gender identity did not contain mentions of gender stereotypes.

Unsurprisingly, in the gender equality cases, the most prevalent type of gender stereotypes which surfaced through the Government's arguments were those related to gender roles (Figure 3), with three cases making mentions of them (*Ünal Tekeli v Turkey*, *Khamtokhu and Aksenchik v Russia* and *Jurčić v Croatia*). Also unsurprisingly, the most prevalent types of gender stereotypes relied on by the applicants in gender identity cases were those relating to social behaviour and gender expression (Figure 4), the most prevalent types of stereotypes for those cases.

Interestingly, the mentions of stereotypes related to sex characteristics were rare, but in two out of the three instances they were mentioned, the ECtHR was the origin for their appearance (*Jurčić v Croatia* and *X v The Former Yugoslav Republic of Macedonia*). The third reference to sex characteristics was made by the Government, and also arose in the case of *X v The Former Yugoslav Republic of Macedonia*.

The other types of stereotypes referenced by the ECtHR were those pertaining to gender roles and social behaviour, both in the case of *YY v Turkey*.

#### *6.1.4. Gender stereotypes addressed by the ECtHR*

In the cases relating to gender equality, the ECtHR only addressed stereotypes relating to gender roles and social behaviour. This is consistent with the findings of the previous sections, as these types of stereotypes are among the most prevalent in the cases relating to gender equality, and thus potentially more likely to be noticed by the ECtHR.

However, and possibly most importantly, the ECtHR addressed at least one type of gender stereotype in each case relating to gender equality. Nonetheless, even in cases relating to gender equality, the ECtHR failed to address a number of stereotypes. Those included stereotypes of gender roles, social behaviour and sex characteristics (*Khamtokhu and Aksenchik v Russia*, *Carvalho Pinto De Sousa Morais v Portugal* and *Jurčić v Croatia*).

By contrast, as noted in section 5.3., the ECtHR did not address any of the gender stereotypes which appeared in the cases relating to gender identity. As a result, the conclusions to be drawn from a comparative analysis of the ECtHR's approach to gender equality cases and gender identity cases are limited. It may be speculated that the ECtHR does not notice the gender stereotypes relating to gender identity to the same extent as it does those relating to gender equality. It may also be due to the fact that these stereotypes are often raised by the applicants in their own arguments, thus potentially making the ECtHR less 'suspicious' of any of those arguments, and less likely to point out the reliance on gender stereotypes. As the types of stereotypes appearing in both categories of cases are also somewhat different, it may also be due to the fact that the ECtHR is better prepared to notice stereotypes relating to gender roles, which are the most commonly discussed gender stereotypes, and generally the type which are named in international instruments pertaining to the elimination of gender stereotypes<sup>258</sup>.

It is therefore important to realise the power that courts hold in this regard. As stated by Cook and Cusack, "Court decisions and practices can be means of perpetuating or eliminating stereotypes of women"<sup>259</sup>. The ECtHR has in some regards been consistent in pointing out gender stereotypes in all cases relating to gender equality, though some stereotypes were missed. However, the ECtHR has also in some cases perpetuated gender stereotypes itself, as seen in *Jurčić v Croatia*, *Hämäläinen v Finland*, *YY v Turkey* and *X v The Former Yugoslav Republic of Macedonia*. In the Canadian case of *Ewanchuk*, Justice L'Heureux-Dubé noted the importance of not letting gender stereotypes resurface in the courts when they had been removed from legislation<sup>260</sup>. An analogous example of this is the ECtHR's own case-law prohibiting the sterilisation requirement for legal gender recognition, thus implicitly enabling men to become pregnant while being legally recognised as men, but then producing a new

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<sup>258</sup> CEDAW (n 37) Article 5(a); Istanbul Convention (n 51) Article 12(1).

<sup>259</sup> Cook and Cusack (n 3) 78.

<sup>260</sup> *ibid* 58.

judgment stating that pregnancy is unique to women<sup>261</sup>. It is therefore crucial that where efforts towards the elimination of stereotypes and discriminations are successful, these efforts should be reflected in all future judgments. Though the judgments in which stereotypes appear may not always pertain to the issues where the consequences of such stereotyping are the most visible, it is of utmost importance that stereotyping be noticed, named and contested every time it appears.

## 6.2. Residual stereotypes in the ECtHR's jurisprudence

Section 6.1. has demonstrated that there is clear room for improvement in terms of gender stereotyping. Indeed, the ECtHR has not yet taken sufficient steps to implement its own standards of elimination of gender stereotypes, particularly when it comes to gender identity cases, and thus trans applicants.

As the language of the ECtHR in its judgments has the power to perpetuate stereotypes, so do the standards it sets. Indeed, the ECtHR's acceptance of a medical diagnosis as a precondition for legal gender recognition - in *AP, Garçon and Nicot v France*<sup>262</sup> - has been subject to criticism. Degner and Nomanni have demonstrated that mandatory psychiatric assessments may rely on gender stereotypes due to the unreliability of external assessments<sup>263</sup>, highlighting flaws in the ECtHR's current jurisprudence on legal gender recognition.

While the ECtHR has worked towards ensuring respect for trans persons, by highlighting the need to ensure that trans people are not placed in a situation causing "vulnerability, humiliation and anxiety"<sup>264</sup>, it has not always ensured that such feelings are not caused by its own judgments. Cannoot has noted that the ECtHR does not consistently refer to trans persons by their correct pronouns in judgments, choosing occasionally to use the pronouns commonly associated with a person's contested legal gender, as was the case for the applicants in *AP, Garçon and Nicot v France*<sup>265</sup>. This invalidates the identity of trans applicants, and seeing

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<sup>261</sup> *Jurčić* (n 215) para 70.

<sup>262</sup> *AP, Garçon and Nicot* (n 2) para 141.

<sup>263</sup> Anne Degner and Miriam Nomanni, 'Psychiatry in legal gender recognition procedures in Europe - A comparative human rights analysis' (2017) *Humboldt Law Clinic*, 14, 33.

<sup>264</sup> *Goodwin* (n 16) para 77; *SV v Italy* App no 55216/08 (ECtHR, 11 October 2018) para 72.

<sup>265</sup> Pieter Cannoot, 'The pathologisation of trans\* persons in the ECtHR's case law on legal gender recognition' (2019) 37(1) *Netherlands Quarterly of Human Rights*, 24.

themselves misgendered by the ECtHR is likely to cause the feelings of humiliation which the ECtHR purports to avoid. Furthermore, such use of pronouns perpetuates the stereotype that pronouns are always linked to gender identity, which is not the case<sup>266</sup>, as persons of any gender may use any pronouns they feel most comfortable with<sup>267</sup>. A person may therefore use ‘she/her’ pronouns without identifying a woman, and another may use ‘they/them’ or ‘he/him’ pronouns while identifying as a woman<sup>268</sup>. Consequently, the ECtHR could dissociate its use of pronouns from the legal gender of an applicant without this having to be interpreted as the ECtHR taking a position regarding the applicant’s legal gender, but merely as respect for the applicant.

Thus, even though the ECtHR does not seem to voluntarily perpetuate stereotypes, gender stereotypes may still be perpetuated indirectly, through problematic requirements being permitted or through the use of stereotyped language.

### 6.3. (Un)conscious reliance on gender stereotypes

As section 6.1.1. has emphasised that a number of gender stereotypes appearing in judgments of the ECtHR take their origin in the applicants’ own submissions, it is relevant to attempt to understand the reason for this. Such reliance on stereotypes may be a conscious and strategic choice, it may be due to social conditioning reinforcing the idea that gender must be expressed in a certain way, or it may be based on entirely different reasons.

Howansky et al. demonstrated in their second study that gender congruent, or gender reinforcing, stereotypes are viewed more positively than gender incongruent stereotypes by their cis and trans persons alike<sup>269</sup>. A gender congruent stereotype that may be viewed positively would for instance be ‘caring’, for cis and trans women alike<sup>270</sup>. While this outcome was predicted by the authors<sup>271</sup> and does not seem surprising, it does highlight that where stereotypes fit one’s gender, they tend to be seen as less problematic. As a result, this reliance on stereotypes by applicants may be partly explained by the fact that, where gender stereotypes

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<sup>266</sup> ‘Gender Pronouns’ (Springfield College) <<https://springfield.edu/gender-pronouns>> accessed 27 June 2021.

<sup>267</sup> ‘Pronouns 101’ (Trans Student) <<https://transstudent.org/graphics/pronouns101/>> accessed 13 July 2021.

<sup>268</sup> ‘He/Him Lesbian’ (LGBTQA Wikia) <[https://lgbta.wikia.org/wiki/He/Him\\_Lesbian](https://lgbta.wikia.org/wiki/He/Him_Lesbian)> accessed 13 July 2021.

<sup>269</sup> Howansky et al. (n 58) 13.

<sup>270</sup> *ibid* 6.

<sup>271</sup> *ibid* 13.



congruent with a person's gender apply to a person, they are not perceived as highly problematic, and relying on them may be considered beneficial.

Another potential reason for this reliance on gender stereotypes by applicants is brought by Camminga. They highlight the “normalisation strategy”<sup>272</sup> which was applied in a legal gender recognition case in Botswana, where the applicant was portrayed by his lawyers as “an ordinary guy” and “a normal man”<sup>273</sup>, in a successful attempt to have the judge relate to him and empathise with his struggles. Camminga notes that through this strategy, “the image of ND as just a man with his girlfriend by his side, a very normal, wholesome and heteronormative image was created”<sup>274</sup>. Yoshino writes that such an approach is also typical in “progay litigation”, in which gay applicants will be presented as “identical to straights in all ways except orientation”<sup>275</sup>, meaning they can be perceived as “the understated, well-scrubbed boy next door”, rather than “a screaming queen”, as the New York Times writes<sup>276</sup>. Though Camminga highlights the downsides of the normalisation strategy, which include perpetuating a strict gender binary and heteronormativity<sup>277</sup>, this reliance on gender stereotypes can also be a highly effective strategic tool for persons who do fit these stereotypes. As a result, it would not be surprising if reliance on gender stereotypes before the ECtHR by trans applicants was based on strategic choices, by highlighting gender stereotypes to which they conform. This may help ensure that judges of the ECtHR perceive them as regular women or men, rather than focusing on them potentially pushing the boundaries of gender as it is perceived by the judges.

Seeking to understand the mentions of gender stereotypes by judges of the ECtHR is also relevant when these same judges have emphasised their support for the elimination of gender stereotypes. Timmer highlights that judges are not entirely neutral figures, since they “bring their own unacknowledged biases to bear on a case”<sup>278</sup>, which may result in the perpetuation of gender stereotypes, through language for example, where judges have not questioned their own conceptions of gender or have not realised the pervasiveness of gender stereotypes. As gender stereotypes can be observed in every part of our highly gendered society, it is not surprising

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<sup>272</sup> B Camminga, ‘One for one and one for all? Human rights and transgender access to legal gender recognition in Botswana’ (2020) 1 *International Journal of Gender, Sexuality and Law*, 255.

<sup>273</sup> *ibid* 253.

<sup>274</sup> *ibid* 255.

<sup>275</sup> Yoshino (n 85) 80.

<sup>276</sup> *ibid*.

<sup>277</sup> Camminga (n 272) 261, 263.

<sup>278</sup> Timmer (n 13) 720.

that gender stereotypes may go unquestioned and unaddressed. Furthermore, Timmer notes that “judges will often form part of the dominant group”<sup>279</sup>. Therefore, judges of the ECtHR would likely rarely belong to gender minorities or groups who have extensively questioned gender and paid particular attention to perpetual references to it.

#### 6.4. (Un)necessary reliance on gender stereotypes

While it has been established that applicants often rely on gender stereotypes in cases relating to gender identity before the ECtHR, it remains unclear whether this reliance on gender stereotypes is helpful, or necessary.

In the selected cases, it can be noted that the applicants relied on gender stereotypes about themselves in the cases of *YY v Turkey*, *X and Y v Romania* and *AP, Garçon and Nicot v France*. The ECtHR found violations in the three cases, though the violation in the latter case only pertained to the sterilisation requirement, and not the psychiatric diagnosis and medical examination. In the two cases where the applicants did not rely on gender stereotypes, *X v The Former Yugoslav Republic of Macedonia* and *Hämäläinen v Finland*, the ECtHR found a violation in the first and none in the second. However, though there does not appear to be a direct correlation between the reliance on gender stereotypes by the applicants and the success of the case, it cannot be excluded that these gender stereotypes still play a role in gaining the sympathy of judges, as highlighted by Camminga, though perhaps not to the extent of it being a determining factor for the case.

Gender stereotypes were also conveyed by domestic sources, including the Government, domestic policies and domestic legislation. Such stereotypes invoked by domestic sources occurred in the cases of *Jurčić v Croatia*, *Ünal Tekeli v Turkey*, *Konstantin Markin v Russia*, *Carvalho Pinto De Sousa Morais v Portugal* and *X v The Former Yugoslav Republic of Macedonia*, in which the ECtHR found a violation of the ECHR. However, gender stereotypes were also relied on by national sources in the cases of *Khamtokhu and Aksenchik v Russia* and *Hämäläinen v Finland*, in which the ECtHR did not find violations. This does therefore not

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<sup>279</sup> *ibid.*

demonstrate a clear link between the reliance on gender stereotypes by domestic sources and the outcome of the case either.

Lastly, where the ECtHR itself made mentions of gender stereotypes, in the cases of *Hämäläinen v Finland*, *YY v Turkey*, *X v The Former Yugoslav Republic of Macedonia* and *Jurčić v Croatia*, it found a violation in the three latter cases. Though this does not imply a direct correlation, it may indicate that the ECtHR does not necessarily view these gender stereotypes in a negative light. This may potentially incite applicants to rely on such stereotypes, when the ECtHR itself is doing so with a positive outcome.

Catto has studied the influence of reliance on gender stereotypes in French judicial decisions relating to legal gender recognition. In these cases, Catto notes that though gender stereotypes are relied on for evidentiary purposes by the applicants and the judges, they seem to play only in favour of the applicants, but not against them when the applicants do not fit into stereotyped norms<sup>280</sup>. Catto notes that applicants will often rely on gender stereotypes when they apply to their situations, by providing photographs or presenting evidence relating to their social behaviour<sup>281</sup>. However, the courts did not seem to hold it against applicants when they did not conform to stereotyped conceptions of gender, for example by accepting an applicant's choice to keep her "masculine" name despite applying for her gender to be legally recognised as female<sup>282</sup>. It may therefore be similarly relevant for trans applicants who fall within the binary to rely on gender stereotypes, as they may also play in their favour before the ECtHR, though they may not play a determining role in the outcome of the case.

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<sup>280</sup> Catto, 'Changer de sexe à l'état civil depuis la loi du 18 novembre 2016' (n 21) para 47.

<sup>281</sup> *ibid*, paras 46-47.

<sup>282</sup> *ibid*, para 48.

## 7. The future of gender

*“Who was I now — woman or man? That question could never be answered as long as those were the only choices; it could never be answered if it had to be asked.”*<sup>283</sup>

This chapter explores how gender may be legally recognised and defined in manners that do not perpetuate gender stereotypes, but also which steps the ECtHR may (or may not) be able to take to attain definitions of gender that are devoid of gender stereotypes. It thereby explores how the ECtHR may strengthen its role in the elimination of gender stereotypes for all. Therefore, this chapter examines the reasoning behind legal definitions of gender (7.1.), as well as alternatives to the ECtHR’s current jurisprudence which may help decentre stereotyped views of gender (7.2.). Ultimately, this chapter considers several cases pending before the ECtHR (7.3.), which may challenge certain current approaches of the ECtHR.

### 7.1. Purpose of a legal gender

It is argued that gender/sex was historically recorded to identify persons for evidentiary purposes<sup>284</sup>, but also to apply unequal laws which created distinctions based on sex<sup>285</sup>. Indeed, marriage<sup>286</sup>, military service<sup>287</sup>, parental authority<sup>288</sup>, and voting rights<sup>289</sup> were contingent upon sex, and certain offices could only be held by men or women. In France, for instance, the Code Civil of 1804 put in place a system under which spouses had unequal rights and duties, with wives requiring authorisation from their husbands to take up work and not being in control of their own finances<sup>290</sup>.

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<sup>283</sup> Leslie Feinberg, *Stone Butch Blues* (20<sup>th</sup> Anniversary Author Edition 2014) 241.

<sup>284</sup> Marie-Xavière Catto, ‘Le critère de l’apparence physique dans les décisions de changement de sexe’, in Catto M-X and Mazaleigue-Labaste J, *La Bicatégorisation de sexe - Entre droit, normes sociales et sciences biomédicales* (Mare et Martin 2021), 159.

<sup>285</sup> *ibid* 159.

<sup>286</sup> Marie-Xavière Catto, ‘Reconnaître un troisième sexe à l’état civil ?’ (2018) 2(4) *Délibérée*, 12.

<sup>287</sup> *ibid*.

<sup>288</sup> Catto, ‘Le critère de l’apparence physique dans les décisions de changement de sexe’ (n 284) 159.

<sup>289</sup> Stéphanie Arc, ‘Faut-il supprimer la mention « sexe » de l’état-civil ?’ (2019) *CNRS Le Journal*, accessible at < <https://lejournale.cnrs.fr/articles/faut-il-supprimer-la-mention-sexe-de-letat-civil> >

<sup>290</sup> *ibid*.

Relating to the purpose of identifying persons, Catto argues that registration of sex does not fulfil that aim. Indeed, registration of sex is based on a person's genitals, which the law requires remain hidden<sup>291</sup>. But even where a trans person had undergone gender-affirming surgery, amendment of legal sex remained impossible for many years<sup>292</sup>, thus creating an inconsistency which leads Catto to argue that the purpose of registration was never identification at all<sup>293</sup>, but that registration had a normative purpose instead of a descriptive one<sup>294</sup>, forcing individuals to ascribe to norms associated with the sex they were assigned at birth<sup>295</sup>. A person's genitalia may indeed not be guessed from their mere appearance, with intersex persons sometimes not matching cisgender expectations, and varied forms of gender expression existing for all genders. As such, someone's genitalia at birth does not do much for identification purposes. As Kessler notes, "what has primacy in everyday life is the gender that is performed, regardless of the flesh's configuration under the clothes"<sup>296</sup>, thus making gender expression the central identifier, which may be very fluid. Therefore, even where gender/sex markers may now be amended, there is no way of ensuring that a person's appearance will match the gender norms associated with their legal gender, thus arguably defeating the purpose of a legal gender marker for identification. Nonetheless, it must also be noted that though sex/gender markers may place certain trans persons in danger when their gender markers do not match their gender identity and expression, they can also serve as protection from violence and harassment when they do match the holder's gender identity<sup>297</sup>. Such proof of gender may for instance enable access to gender-segregated spaces or may ensure that the holder of the identity document is gendered correctly<sup>298</sup>.

As for the purpose of applying legal distinctions based on gender, it seems generally outdated. With the exception of marriage, which is reserved for different-gender couples in several CoE countries<sup>299</sup>, gender equality commitments should generally prevent legal gender from influencing the application of legislation.

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<sup>291</sup> Catto, 'Le critère de l'apparence physique dans les décisions de changement de sexe' (n 284) 157-158.

<sup>292</sup> *ibid* 161.

<sup>293</sup> *ibid* 181.

<sup>294</sup> *ibid* 163.

<sup>295</sup> *ibid* 164.

<sup>296</sup> Fausto-Sterling (n 49) 112.

<sup>297</sup> Neuman Wipfler (n 34) 540-541.

<sup>298</sup> *ibid* 541.

<sup>299</sup> *Oliari and others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015) para 53.

It has been argued that legal gender serves the purpose of ensuring that gender equality measures are undertaken, that non-discrimination measures are properly implemented, and that data on gender discrimination is collected to inform these measures. Gendered statistics are extremely important in highlighting gender-based violence, gendered patterns in sexual and domestic violence or gender discrimination in the workplace<sup>300</sup>. However, it has also been stressed that non-discrimination measures and state action are not contingent upon legal recognition of status<sup>301</sup>, as demonstrated by the prevalence of measures combatting racism, religious discrimination or homophobia, and the existence of statistics on discrimination and crimes motivated by racism, homophobia, antisemitism, islamophobia, etc. Neuman Wipfler thus contends that self-attestation of gender could solve this issue<sup>302</sup>. This would also enable statistics to include a wider range of categories as well, rather than limiting gender statistics to an under-inclusive binary system<sup>303</sup>. It has also been argued that gender constitutes personal data when it is combined with other identifying information, which entails that its collection must be founded on a legitimate aim, and it must be ensured first that the aim cannot be achieved in a less intrusive manner<sup>304</sup>. Some of the proposed less intrusive manners of legally defining and recording gender will be outlined in section 7.2.5.

## 7.2. Existing and proposed alternatives

### *7.2.1. Depathologisation*

Pathologisation of trans persons refers to “the question of whether transsexuality should be considered an illness”<sup>305</sup>, which entails that legal gender recognition is made conditional upon “a diagnosis of gender dysphoria, gender identity disorder or transsexualism”<sup>306</sup>. Pathologisation may also include a requirement of “sex reassignment treatment or compulsory

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<sup>300</sup> ‘Au-delà de « F » et de « M », repensons les catégories de sexe et de genre’, Equality Law Clinic - Université Libre de Bruxelles (22 April 2021) Presentation by Prof. Valérie Piette.

<sup>301</sup> Davina Cooper and Flora Renz, ‘If the State Decertified Gender, What Might Happen to its Meaning and Value?’ (2016) 43(4) *Journal of Law and Society*, 488.

<sup>302</sup> Neuman Wipfler (n 34) 340.

<sup>303</sup> *ibid* 339.

<sup>304</sup> ‘Au-delà de « F » et de « M », repensons les catégories de sexe et de genre’, Equality Law Clinic - Université Libre de Bruxelles (22 April 2021) Presentation by Prof. David Restrepo Amariles.

<sup>305</sup> Jens T Theilen, ‘Depathologisation of Transgenderism and International Human Rights Law’ (2014) 14 *Human Rights Law Review*, 328.

<sup>306</sup> van den Brink and Dunne (n 237) 63.

sterility” to authorise legal gender recognition<sup>307</sup>, though these requirements have been prohibited by the ECtHR<sup>308</sup>. Depathologisation therefore refers to the move away from such “psycho-medical requirements”<sup>309</sup> imposed on the legal recognition of trans persons’ gender.

As observed in section 5.1., the ECtHR still allows for legal gender recognition to be made conditional upon a psychiatric diagnosis, as demonstrated in *AP, Garçon and Nicot v France*<sup>310</sup>, due to a majority of CoE States still imposing such a requirement<sup>311</sup>. This is a contested stance, which does not seem to follow recommendations by soft-law instruments<sup>312</sup>. Cannoot argues that the ECtHR’s case-law fails to reflect a clear international trend towards the depathologisation of trans persons<sup>313</sup>. Cannoot also argues that the ECtHR misapplies a wide margin of appreciation in the case of *AP, Garçon and Nicot v France*. Indeed, the case revolves around gender identity, which should have led to the application of a narrow margin of appreciation, following the ECtHR’s own jurisprudence<sup>314</sup>. Furthermore, Cannoot notes that the ECtHR has held that the margin of appreciation of States should be “substantially narrower” where restrictions of fundamental rights are imposed on “a particularly vulnerable group in society”<sup>315</sup>, which is certainly the case of trans persons when considering the significant discrimination they face.

The pathologisation of trans persons also reinforces the belief that trans persons cannot be certain of their gender without external advice<sup>316</sup>. This belief is upheld by the ECtHR in *AP, Garçon and Nicot*, as it holds that the requirement of a psychiatric diagnosis “is aimed at safeguarding the interests of the persons concerned in that it is designed in any event to ensure that they do not embark unadvisedly on the process of legally changing their identity”<sup>317</sup>, implying that trans persons require validation of their identity as a prerequisite to making any

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<sup>307</sup> Cannoot, ‘The pathologisation of trans\* persons in the ECtHR’s case law on legal gender recognition’ (n 265) 15.

<sup>308</sup> *AP, Garçon and Nicot* (n 2) paras 131-132; *X and Y* (n 18) para 167.

<sup>309</sup> Cannoot, ‘The pathologisation of trans\* persons in the ECtHR’s case law on legal gender recognition’ (n 265) 15.

<sup>310</sup> *AP, Garçon and Nicot* (n 2) paras 139-144.

<sup>311</sup> *ibid*, para 139.

<sup>312</sup> Cannoot, ‘The pathologisation of trans\* persons in the ECtHR’s case law on legal gender recognition’ (n 265) 28.

<sup>313</sup> *ibid* 27-28.

<sup>314</sup> *ibid* 32-33.

<sup>315</sup> *ibid* 33-34.

<sup>316</sup> van den Brink and Dunne (n 237) 64.

<sup>317</sup> *AP, Garçon and Nicot* (n 2) para 141.

decisions relating to it. The ECtHR therefore takes a paternalistic approach to trans persons' rights, implying that they cannot make important life decisions independently. This pathologisation further stigmatises trans persons, as making important life decisions is not typically subjected to a requirement of seeking professional advice, as can be seen with the lack of such a requirement for the purchase of a house or for having children.

Furthermore, the requirement of a psychiatric diagnosis is problematic as it is based on an erroneous medical foundation. Indeed, the World Health Organization's ICD-11, published in 2019, which classifies mental and behavioural disorders has removed its category of "gender identity disorders", and now merely contains a mention of "gender incongruence" in the context of sexual health, thus removing gender identity from the scope of mental disorders<sup>318</sup>. It must also be noted that there are no "reliable external tests" to be used for these psychiatric evaluations, and that they as a result "rely on gender stereotypes"<sup>319</sup>.

Depathologisation therefore offers a solution to the issues highlighted above, by diminishing the stigma surrounding trans persons and enabling easier access to legal gender recognition. However, though pathologisation may rely on gender stereotypes, depathologisation may not be entirely sufficient to prevent reliance on gender stereotypes either. This can be seen through the example of France, which has adopted a model through which legal gender recognition no longer requires any psycho-medical elements, but still requires applicants to demonstrate before a judge that they present publicly as the claimed sex, are known socially as the claimed sex, or have had their first name legally changed to match the claimed sex<sup>320</sup>. Catto notes that in applying these requirements, judges in practice tend to expect the applicants to have a stereotyped appearance or behaviour<sup>321</sup>, with a focus on dressing to fit stereotypes of the claimed sex or wearing makeup in the case of trans women<sup>322</sup>. Judges have focused on the "social status" of applicants, noting that some worked in "essentially masculine" jobs or played football<sup>323</sup>, thus clearly applying very stereotyped approaches to gender. Although noting that

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<sup>318</sup> Cannoot, 'The pathologisation of trans\* persons in the ECtHR's case law on legal gender recognition' (n 265) 17.

<sup>319</sup> Transgender Europe, Trans Network Balkan, ILGA Europe, Subversive Front, '*X v The Former Yugoslav Republic of Macedonia* (App no 29683/16) Written comments' (28 July 2017) para 21.

<sup>320</sup> Code civil, Article 61-5 (France) [translation by the author].

<sup>321</sup> Catto, 'Le critère de l'apparence physique dans les décisions de changement de sexe' (n 284) 169.

<sup>322</sup> *ibid* 179.

<sup>323</sup> *ibid* 169.



stereotypes around social behaviour are less present in judgments today, Catto states that these stereotypes still regularly appear in evidentiary documents and other pre-trial documents<sup>324</sup>.

### 7.2.2. *Self-determination*

In the context of legal gender recognition, self-determination refers to a system that requires individuals to submit “a statutory declaration affirming that they have a stable connection with the gender in which they wish to be recognized”<sup>325</sup> to legally change their gender. The self-determination model has been adopted in eight countries of the CoE: Belgium, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway and Portugal<sup>326</sup>.

Self-determination enables individuals to have their gender legally recognised without external validation or verification. As a result, legal gender recognition is freed from psycho-medical requirements<sup>327</sup>, but also from the scrutiny by judges of requirements that can be influenced by stereotypes.

The Parliamentary Assembly of the Council of Europe (PACE), recommended in 2015 in its Resolution 2048 that Member States adopt procedures based on self-determination<sup>328</sup>, specifying that this would entail for Member States to “abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement”<sup>329</sup>. In its Resolution 2191, adopted in 2017, PACE stressed the relevance of this right to self-determination for intersex persons<sup>330</sup>.

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<sup>324</sup> *ibid.*

<sup>325</sup> van den Brink & Dunne (n 237) 59.

<sup>326</sup> ILGA-Europe - Rainbow Europe, *Rainbow Map 2021*, <<https://rainbow-europe.org/#0/8701/9978>> accessed 25 June 2021.

<sup>327</sup> Pieter Cannoot and Mattias Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis’ (2020) 1 *International Journal of Gender, Sexuality and Law*, 35.

<sup>328</sup> Parliamentary Assembly of the Council of Europe (PACE), *Discrimination of transgender people in Europe*, Resolution 2048 (2015) para 6.2.1.

<sup>329</sup> *ibid.*, para 6.2.2.

<sup>330</sup> Parliamentary Assembly of the Council of Europe (PACE), *Promoting the human rights of and eliminating discrimination against intersex people*, Resolution 2191 (2017) para 5.

The Yogyakarta Principles Plus 10, referred to in section 3.1.2., recommend that States enforce legal gender recognition procedures based on self-determination<sup>331</sup>. They further recommend that legal gender recognition should not be subjected to any criteria, and provide a non-exhaustive list of criteria that should not be allowed. This list includes “medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion”<sup>332</sup>. Therefore, the Yogyakarta Principles Plus 10 support a self-determination model, and clearly state that such a model includes depathologisation. The mention of third party opinions as criteria that should not be allowed is for example relevant for the Netherlands, which do not require a medical diagnosis, but still impose a requirement on trans persons to have medical professionals “confirm that applicants experience their preferred (requested) gender and that they understand the consequences of obtaining gender recognition”<sup>333</sup>, thus nearing procedures based on self-determination, but not entirely removing third-party validation.

The IACtHR has also recommended in an Advisory Opinion on Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples from 2017, that legal gender recognition be based on self-determination, and free from any requirements of psycho-medical diagnoses<sup>334</sup>. The IACtHR emphasised that there should be no “requirements that undermine the principle according to which gender identity is not to be proven”, but should instead “be based on the mere expression of the applicant’s intention”<sup>335</sup>. Thereby, the IACtHR strongly advised that self-determination be adopted, by highlighting that gender identity is personal and cannot be subjected to external validation.

Though PACE resolutions are not binding, Cannoot remarks that the ECtHR refers to international instruments, including soft law. The IACtHR’s advisory opinion and the Yogyakarta Principles Plus 10 may therefore also be included in the ECtHR’s considerations as international soft law. Cannoot notes that these soft-law instruments are so far “the only available sources of international human rights law that specifically deal with the fundamental

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<sup>331</sup> Yogyakarta Principles Plus 10 (n 55) Principle 31.B.

<sup>332</sup> *ibid*, Principle 31.C.iii.

<sup>333</sup> van den Brink and Dunne (n 237) 64.

<sup>334</sup> IACtHR, *Gender identity, and equality and non-discrimination of same-sex couple* (n 28) paras 127, 129-131.

<sup>335</sup> *ibid*, para 129.

rights of trans\* persons”<sup>336</sup>. Therefore, it becomes especially relevant for the ECtHR to rely on them to better inform its interpretation of the ECHR as a living instrument.

It must however be noted that, though self-determination is often the goal that organisations and international institutions strive towards, it may not solve all the current issues with legal gender recognition. Indeed, while self-determination enables all individuals to regain control over their legal gender, it does so in a limited way, as self-determination functions within the framework of a certain number of categories to choose between. These categories may be limited to the binary ‘woman’ and ‘man’ options, but they may also include more categories as will be explored below. However, as will be outlined in section 7.2.3., categories tend to remain limiting even if their number is increased. Furthermore, self-determination tends to exclude minors, or make their legal gender recognition conditional upon parental consent<sup>337</sup>. Iceland is currently the only CoE State allowing minors of all ages to have their gender legally recognised, with an option enabling minors with unsupportive guardians to still have their gender recognised<sup>338</sup>. Procedures based on self-determination may also still be conditional upon a waiting period, as is the case in Denmark, which imposes a reflection period of 6 months<sup>339</sup>.

### *7.2.3. Categorical expansion*

As noted in the previous section, available gender markers may extend beyond the binary options of ‘female’ and ‘male’. In 2015, PACE suggested that a third gender option be made available, in the context of transgender people<sup>340</sup>. In 2017, it broadened its stance on the issue,

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<sup>336</sup> Cannoot, ‘The pathologisation of trans\* persons in the ECtHR’s case law on legal gender recognition’ (n 265) 28.

<sup>337</sup> In Denmark, minors are entirely prevented from legally changing their gender (LBK nr 646 af 02/06/2017, ‘Bekendtgørelse af lov om Det Centrale Personregister’, para 3 stk. 6). In Ireland, Portugal, Belgium and Norway, minors over 16 may have their gender legally recognised, with parental consent being required in the first three countries (van den Brink and Dunne (2018), 66). In Luxembourg, minors over the age of 5 may have their gender legally amended with parental consent (Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l’état civil et portant modification du Code civil, N° 797 du 12 septembre 2018, Article 3(1)). In Malta, minors - meaning persons under the age of 16 - may legally amend their gender with parental consent (Gender Identity, Gender Expression and Sex Characteristics Act, Act XI of 2015 (as amended in 2015, 2016 and 2018), 2, 7(1)). Iceland is so far the only country in the CoE which does not impose an age limit on self-determined legal gender recognition, and where an expert committee may decide on the request even without the support of the child’s guardians (Act on Gender Autonomy, Article 5).

<sup>338</sup> Act on Gender Autonomy, Article 5 (Iceland).

<sup>339</sup> LBK nr 646 af 02/06/2017, ‘Bekendtgørelse af lov om Det Centrale Personregister’, para 3 stk. 6 (Denmark).

<sup>340</sup> PACE, Resolution 2048 (n 328) para 6.2.4.

recommending that “a range of options” be made available “for all people”<sup>341</sup>, thus suggesting that more than three options should be made available where states still rely on a categorisation of gender<sup>342</sup>. The Yogyakarta Principles Plus 10 also suggested that States “[m]ake available a multiplicity of gender marker options”<sup>343</sup> as a temporary solution while awaiting deregistration<sup>344</sup>, which will be examined in further detail in section 7.2.4.

However, this categorical expansion may exist in a variety of forms. Some countries have accepted that intersex persons may have an ‘X’ or ‘diverse’ gender marker, based on the presence of an intersex variation. In Germany, persons with variations in sex/gender development may apply for a “diverse” or blank gender marker, though such a change can only be made by presenting “a medical certificate attesting to a variation of sex characteristics”, therefore preventing non-binary persons without intersex variations from availing of this possibility<sup>345</sup>. This method also seeks to enable intersex persons to be registered as such from birth, and prevents them from being forced into either a ‘female’ or ‘male’ category, that they do not fit into. However, Neuman Wipfler has noted that where such gender markers are made available for intersex newborns, intersex organisations have expressed worry that parents would seek to have their children fit into either the ‘female’ or ‘male’ category, to avoid the stigma associated with a different gender marker<sup>346</sup>.

In other instances, the availability of gender markers outside of the binary has extended to non-binary persons who do not present intersex variations. This has in certain cases been done by enabling anyone to freely adopt such gender markers, which was the method chosen in California<sup>347</sup>. In other cases, these additional gender markers have been made available to non-binary persons through judicial interpretation, as seen in Nepal<sup>348</sup>, but also in the Netherlands,

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<sup>341</sup> PACE, Resolution 2191 (n 330) para 7.3.3.

<sup>342</sup> Cannoot and Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination’ (n 327) 33.

<sup>343</sup> Yogyakarta Principles Plus 10 (n 55) Principle 31.C.ii.

<sup>344</sup> *ibid*, Principle 31.C.

<sup>345</sup> Cannoot and Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination’ (n 327) 39.

<sup>346</sup> Neuman Wipfler (n 34) 535.

<sup>347</sup> Lena Holzer, ‘Non-Binary Gender Registration Models in Europe - Report on third gender marker or no gender marker options’ (ILGA-Europe 2018) 24.

<sup>348</sup> Cannoot and Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination’ (n 327) 36.

where judges have applied legislation enabling intersex newborns to have an ‘X’ gender marker to non-binary persons, in cases where the applicants presented no intersex variations<sup>349</sup>.

However, the introduction of a third gender, or a larger number of additional categories, bears risks of its own. Though it opens options beyond the binary, it risks reinforcing the idea that categorisation of sex or gender is necessary, and perpetuating the binary as a norm that only some may not fit into<sup>350</sup>. In this regard, Fausto-Sterling notes that “[t]he problem with gender, as we now have it, is the violence - both real and metaphorical - we do by generalizing”, and argues that “[n]o woman or man fits the universal gender stereotype”<sup>351</sup>. If these binary categories are not right for anyone, it may arguably not be helpful to continue to rely upon them. Fausto-Sterling further notes that “recognizing a third category does not assure a flexible gender system”<sup>352</sup>. Rather, a third category merely portrays those who identify with it as outsiders or as abnormal persons, further reinforcing a strict binary as the norm<sup>353</sup>.

As a result, categorical expansion may not be the preferable option to eliminate gender stereotypes. On the contrary, it may ultimately perpetuate the ‘women’/‘men’ binary and reinforce the stereotypes associated with this binary, to distinguish those that do not fit into the binary gender stereotypes. Rather than creating the intended freedom, categorical expansion may result in a strengthened binary and the perpetuation of gender stereotypes.

#### 7.2.4. Deregistration

As the presence of categories - whether there are two or more of them - risks reinforcing the binary conception of gender and perpetuating gender stereotypes, the proposed alternative of deregistration of gender may serve to counter this. Deregistration, also referred to as the abolitionist model<sup>354</sup>, seeks the removal of sex or gender markers from identity documents. It

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<sup>349</sup> *ibid* 37-38.

<sup>350</sup> CL Quinan, Verena Molitor, Marjolein van den Brink and Tatiana Zimenkova, ‘Framing gender identity registration amidst national and international development: Introduction to ‘Bodies, identities and gender regimes: Human rights and legal aspects of gender identity registration’ (2020) 1 *International Journal of Gender, Sexuality and Law*, 2.

<sup>351</sup> Fausto-Sterling (n 49) 111.

<sup>352</sup> *ibid* 112.

<sup>353</sup> Geertje Mak, *Doubting Sex: Inscriptions, Bodies and Selves in Nineteenth-Century Hermaphrodite Case Histories* (Manchester University Press 2012) 14.

<sup>354</sup> Neuman Wipfler (n 34) 523.

is argued that since gender is not only socially constructed but also fluid, “the law will never be able to reliably document it”<sup>355</sup>. It is further argued that “as long as the state records gender identity, it will also police its boundaries”<sup>356</sup>, portraying the abolitionist model as the pathway to freer explorations of gender identity and expression. Though this model gathers widespread academic support, views vary as to the means of achieving abolition of legal gender. For instance, Feinberg argues that “sex categories should be removed from all basic identification papers”, including “driver’s licenses”, “passports”, but also “birth certificates”<sup>357</sup>. However, Neuman Wipfler argues that abolition, though it is desirable, must be done in stages, and cannot be fully achieved now. Neuman Wipfler contends that removal of gender markers from birth certificates is “a good starting place”<sup>358</sup>, as it is generally unnecessary for children and limiting for trans and intersex persons<sup>359</sup>, but that removal of gender markers from other identification documents is not currently achievable. As noted in section 7.1., Neuman Wipfler underscores the importance of gender-affirming identity documents for trans persons’ safety, especially for the most marginalised persons within that group<sup>360</sup>. However, whether deregistration should be achieved now or in the future, many scholars agree that it is a necessity, which explains the Yogyakarta Principles Plus 10’s recommendations for legal gender recognition being prefaced by “[w]hile sex or gender continues to be registered”<sup>361</sup>, presenting sex registration as a temporary system, to be done away with in the future.

Beyond academic support, the deregistration model has gathered institutional and judicial support. The CoE’s Commissioner for Human Rights recommended in 2015 that “Member states should consider the proportionality of requiring gender markers in official documents”<sup>362</sup>. This concept of proportionality is further discussed by Cannoot and Decoster, who hold that “sex/gender registration fails to pass the proportionality test”<sup>363</sup>, as registration is continued out of habit rather than necessity<sup>364</sup> and that registration is not suitable to the aims it seeks to

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<sup>355</sup> Cannoot and Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination’ (n 327) 47.

<sup>356</sup> Neuman Wipfler (n 34) 543.

<sup>357</sup> Fausto-Sterling (n 49) 113.

<sup>358</sup> Neuman Wipfler (n 34) 529.

<sup>359</sup> *ibid* 534-539.

<sup>360</sup> *ibid* 540-542.

<sup>361</sup> Yogyakarta Principles Plus 10 (n 55) Principle 31.C.

<sup>362</sup> Council of Europe Commissioner for Human Rights, Issue Paper on ‘Human rights and intersex people’ (2015) 9.

<sup>363</sup> Cannoot and Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination’ (n 327) 46.

<sup>364</sup> *ibid* 41.

achieve<sup>365</sup>. Supporting the argument that gender registration may not be necessary, PACE proposed that States “consider making the registration of sex on birth certificates and other identity documents optional for everyone”<sup>366</sup>. Recently, the Belgian Constitutional Court even proposed suppression of sex or gender registration as an alternative to the current registration system, in its judgment declaring parts of the Gender Recognition Act unconstitutional<sup>367</sup>. The Belgian Constitutional Court held that the lack of recognition of non-binary persons was unconstitutional<sup>368</sup>, and recognised the potential for gender to be fluid and held unconstitutional the definitive nature of legal gender recognition<sup>369</sup>. Non-binary persons and persons with a fluid gender would therefore both be accommodated under an abolitionist model.

Deregistration, or abolition of legal gender, may therefore enable individuals to experience and express their gender freely without the constraints of gendered identity documents. However, this abolition may not be achievable in the foreseeable future if it risks putting marginalised persons in unsafe situations. The move towards abolition has also been opposed by some elders in the trans community, whose gender markers reflect a hard-won fight, and who do not want to see their efforts undermined<sup>370</sup>.

### *7.2.5. Invisibilisation of gender markers on identity documents*

As the previous section noted that gender is often unnecessarily registered and documented, it may be relevant to make such gender markers accessible only where it serves a legitimate aim. Amariles therefore contends that gender markers may be invisibilised, and made accessible only in situations where it constitutes relevant information<sup>371</sup>. As such, gender markers may be removed from the visible information on identity documents, but may instead be found in a chip contained in identity cards, with the chip’s information being accessible only by certain entities for whom the gender marker contained therein is relevant<sup>372</sup>.

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<sup>365</sup> *ibid* 47.

<sup>366</sup> PACE, Resolution 2191 (n 330) para 7.3.4.

<sup>367</sup> C Const b, no 99/2019, 19 June 2019 (Belgium), B.7.3.

<sup>368</sup> C Const b, no 99/2019, 19 June 2019 (Belgium).

<sup>369</sup> *ibid*.

<sup>370</sup> Neuman Wipfler (n 34) 541.

<sup>371</sup> Amariles (n 304).

<sup>372</sup> *ibid*.

It must however be noted that gender markers' relevance can often be questioned, even in the medical field, as gender or sex is not so important as the “presence of a certain bodily characteristic”<sup>373</sup>. Cannoot and Decoster give the example of “an annual invitation for cancer screening”<sup>374</sup> in this context. For example, screenings for prostate cancer should target all those with a prostate, who may include cis men, trans women, non-binary persons or intersex persons, but should not include persons born without a prostate or persons whose prostate has been removed. Basing these invitations on gender markers would therefore not be the most effective criterion to include all the targets of such screening operations.

As a result, the invisibilisation of gender markers on identity documents may be relevant as it would enable persons to share their gender identity only when comfortable to do so, or when necessary. However, for invisibilisation to truly be considered, the relevance of gender registration must also be questioned. It should not serve to perpetuate stereotypes relating to the bodily characteristics associated with certain genders. It should also not be an overly intrusive manner of collecting data for statistical purposes where other manners of collecting such data exist, as examined in section 7.1.

#### *7.2.6. An anti-stereotyping approach, a first step in the right direction*

The alternatives described in sections 7.2.1. through 7.2.5. each present their own advantages and disadvantages. They also require legislative changes, and several of them would require an in-depth structural change to the current legal gender registration systems to be fully achieved. However, while the evolution towards some of these alternatives may take time, the ECtHR can take more immediate action to counter gender stereotypes in the approach it takes to cases.

Timmer argues that the ECtHR must adopt an anti-stereotyping approach. This approach entails for the ECtHR not to rely on “harmful (gender) stereotypes in its own reasoning” but also to “name gender stereotyping whenever it occurs on a national level and proceed against it as a particularly damaging form of discrimination”<sup>375</sup>. As noted in chapter 6, the ECtHR does still at times rely on harmful gender stereotypes in its reasoning, which it must stop doing to achieve

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<sup>373</sup> Cannoot and Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination’ (n 327) 47.

<sup>374</sup> *ibid.*

<sup>375</sup> Timmer (n 13) 717.



this anti-stereotyping approach. The findings of chapter 6 also highlight that the ECtHR does not always name gender stereotyping occurring at the national level, which is key to the success of this approach. Timmer underscores the importance of the ECtHR's role to "unmask the harmful stereotypes"<sup>376</sup>, meaning that stereotypes must be named following Cook and Cusack's approach, but their consequences must also be exposed<sup>377</sup>.

This anti-stereotyping approach entails analysing gender stereotypes and their potential harms comprehensively, with the goal of "exposing and contesting the patterns that lead to structural discrimination"<sup>378</sup>. Timmer therefore contends that this anti-stereotyping approach is essential to uncovering the roots of structural discrimination, and actively challenging such discrimination.

Therefore, the ECtHR may take on this anti-stereotyping approach in its future judgments as an immediate action towards the elimination of gender stereotyping, while working towards other legislative and structural solutions as well. Timmer calls for the ECtHR to be "continuously critical" and be "interrogative of the underlying social patterns and beliefs" in the cases before it, ensuring that it "problematise[s] the 'naturalness' of stereotypes"<sup>379</sup>. The ECtHR therefore needs to be highly vigilant of gender stereotypes, which can often be perpetuated unintentionally. It must ensure that conscious efforts are made to acknowledge gender stereotypes where they appear, and challenge them. As this can be a complicated goal to achieve, where stereotypes are so entrenched in society, Cook and Cusack suggest that "[t]raining programs could invite judges to analyze how wrongful gender stereotypes have become embedded in court decisions, and how such stereotypes have been or can be dismantled and remedied"<sup>380</sup>. An anti-stereotyping approach may therefore represent a necessary first step towards the elimination of gender stereotyping, by ensuring that gender stereotypes are noticed, named and challenged by the ECtHR in its judgments.

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<sup>376</sup> *ibid* 722.

<sup>377</sup> *ibid*.

<sup>378</sup> *ibid* 725.

<sup>379</sup> *ibid* 737.

<sup>380</sup> Cook and Cusack (n 3) 83.

### 7.3. Pending cases before the ECtHR - Potential for new approaches?

Several applications relating to gender identity, sex characteristics and legal gender recognition are currently pending before the ECtHR. These cases bring novel issues to the ECtHR, which are the subject of polarised debates in the public opinion. Though there are several more cases pending relating to these issues, three of the pending cases will be outlined in this section. The three cases were chosen as they highlight different issues within the scope of rights related to gender. If the ECtHR finds these applications admissible, they could lead the ECtHR to take a stance on new issues, which will be explored in this section.

#### 7.3.1. *M v France*

An application has been made to the ECtHR in the case of *M v France*<sup>381</sup>. The applicant was born with an intersex variation which did not imply any health risks. Throughout childhood and adolescence, the applicant went through several surgical interventions and medical treatments to create a feminine physical appearance<sup>382</sup>. The applicant was not made aware of their<sup>383</sup> intersex variation until the age of 23, and only acquired this knowledge by accidentally intercepting a medical letter<sup>384</sup>. The applicant only truly understood the implications of this discovery 14 years later, upon consulting a clinical psychologist, and chose to file a criminal complaint alleging voluntary and habitual violence against a minor of 15 years or a vulnerable person, and violence which caused mutilation or permanent infirmity of a minor of 15 years or a vulnerable person<sup>385</sup>. Their case was rejected as it had exceeded the statute of limitation, and this was upheld in the Court of Appeal and the Court of Cassation<sup>386</sup>. The applicant brought a complaint to the ECtHR, arguing that the aforementioned facts constituted violations of Articles 3 and 6§1 ECHR.

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<sup>381</sup> *M v France* App. no. 42821/18 (ECtHR, *forthcoming*).

<sup>382</sup> *ibid* A.1.

<sup>383</sup> While the application to the ECtHR refers to the applicant by she/her pronouns, the applicant is referred to by the French equivalent of they/them pronouns in a video telling their story, published more recently than the application. The pronouns last published will therefore be considered the most appropriate. francetv slash / causes, 'Mô, maltraité·e par le corps médical - Océan S2' (17 June 2021) <<https://www.youtube.com/watch?v=391-HM3lcmU&list=WL&index=90>> accessed 29 June 2021.

<sup>384</sup> *ibid* A.2.b.

<sup>385</sup> *ibid* A.2.

<sup>386</sup> *ibid* A.2.a., A.2.b., A.2.c.

If the ECtHR would hold the application admissible, this would be the first case before the ECtHR to deal with “normalising” surgeries and treatments of intersex persons<sup>387</sup>. This case questions the very foundations of binary sex systems, by highlighting how unnatural the categories of “female” and “male” are, when an estimated 1.7% of babies are born with intersex variations<sup>388</sup>, of which only very few pose a threat to intersex persons’ lives<sup>389</sup>. Derave and Ouhnaoui note that this binary model has become a social norm, which has “pervaded the medical community for the past seven decades”<sup>390</sup>. As a result, this social norm has become considered a medical norm, engendering the pathologisation of intersex persons who did not fit this binary norm and were considered “abnormal”<sup>391</sup>. Consequently, stereotypes relating to sex characteristics and their existence within a binary system has led to the genital mutilation of children, as defined by the applicant’s clinical psychologist<sup>392</sup>.

The case further demonstrates the extremes to which society’s injunctions of heteronormativity and cisnormativity can be taken. Indeed, the third party written observations submitted by the Equality Law Clinic of the Université Libre de Bruxelles and the Human Rights Centre of Ghent University denote how the creation of “normal” sex characteristics are intended to ensure “normal” gender expression - which they construe as cisgender - and “normal” sexual orientation - which they argue entails heterosexuality<sup>393</sup>. This is visible in the paediatrician’s letter submitted by the applicant, which includes mentions of the “extremely rudimentary appearance of the peno-clitoral organ, certainly unfit for valid functional activity”<sup>394</sup>. Though it is not explicitly stated in this instance, it is highly likely that the “functional activity” referred to in this instance is penetrative intercourse. Indeed, in medical literature dating from 2012 and 2016, the listed reasons for performing “normalising” surgeries still include allowing “vaginal-

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<sup>387</sup> Charly Derave and Hania Ouhnaoui, ‘Medical “normalisation” of intersex persons: third-party intervention to the ECtHR in the case of *M v France*’ (2021) *Strasbourg Observers*, accessible at <<https://strasbourgobservers.com/2021/04/07/medical-normalisation-of-intersex-persons-third-party-intervention-to-the-ecthr-in-the-case-of-m-v-france/>>

<sup>388</sup> Fausto-Sterling (n 49) 54-56.

<sup>389</sup> Equality Law Clinic of Université Libre de Bruxelles and Human Rights Centre of Ghent University, ‘Affaire *M c France* (Req no 42.821/18) Observations écrites’ (24 February 2021) 2.

<sup>390</sup> Derave and Ouhnaoui (n 387).

<sup>391</sup> *ibid.*

<sup>392</sup> *M* (n 381) A.1.

<sup>393</sup> Equality Law Clinic of Université Libre de Bruxelles and Human Rights Centre of Ghent University (n 389) 2.

<sup>394</sup> *M* (n 381) A.1. [Translation by the author, original text in French: “l’apparence extrêmement rudimentaire de l’organe péno-clitoridien, certainement incapable d’une activité fonctionnelle valable”.]

penile intercourse”<sup>395</sup> and “allowing future penetrative sexual intercourse (as male or female)”<sup>396</sup>. Not only is it assumed that a newborn baby will eventually wish to have a sexuality - entirely ignoring the possibility of asexuality - but also that this sexuality will be centred around heteronormative definitions of what sexuality entails, to the point where babies and children are subjected to surgeries and other medical treatments presumably aimed at facilitating their future sexuality. It can also be noted that these attempts are not always successful, as was the case with the applicant, whose surgeries caused further pain during penetrative intercourse<sup>397</sup>. Intersex persons are also forced into cisnormative stereotypes through the injunctions placed on parents to raise their intersex child in the forcibly assigned sex<sup>398</sup>, without providing them with knowledge of their identity, as was the case with the applicant, who would never have known they were intersex, had it not been for the interception of the aforementioned letter. Cisnormative standards are also enforced using surgery to “improve the cosmetic appearance of the genitals”<sup>399</sup>, medicalising children’s healthy bodies to fit stereotypes relating to sex characteristics and physical appearance, that will make their bodies acceptable by cisgender standards. Thereby, it can be concluded that this forced categorisation of individuals into two distinct sexes, to the point of relying on medically unnecessary surgical interventions to do so, further perpetuates stereotypes based on heteronormativity and cisnormativity.

The third party written intervention of the Equality Law Centre of Université Libre de Bruxelles and the Human Rights Centre of Ghent University argues that “these stereotypes have been institutionalised by law” and even “encouraged by national authorities”<sup>400</sup>. Indeed, they note that with most legal systems imposing an obligation to register the sex of children in a binary model, and social security systems covering the costs of certain “normalising” surgeries<sup>401</sup>, the idea that sex/gender exists only in a binary form is perpetuated.

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<sup>395</sup> Sarah Creighton, Steven D. Chernausk, Rodrigo Romao, Philip Ransley and Joao Pippi Salle, ‘Timing and nature of reconstructive surgery for disorders of sex development - Introduction’ (2012) 8(6) *Journal of Pediatric Urology*, 603.

<sup>396</sup> Equality Law Clinic of Université Libre de Bruxelles and Human Rights Centre of Ghent University (n 389) 6.

<sup>397</sup> *M* (n 381) A.1.

<sup>398</sup> *ibid.*

<sup>399</sup> Creighton et al. (n 395) 603.

<sup>400</sup> Equality Law Clinic of Université Libre de Bruxelles and Human Rights Centre of Ghent University (n 389)

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<sup>401</sup> *ibid.*

### 7.3.2. *Y. v France*

*Y v France*<sup>402</sup> is another application relating to intersex persons' rights that has been made to the ECtHR. This application however relates to the legal recognition of intersex persons' gender, with the claim being brought under Article 8 ECHR. The applicant is intersex, and applied to have their gender marker changed to "neutral sex" or "intersex". Their request was granted by the lower court, which held that the applicant's biological and psychological sex did not match their registered sex, nor the other sex marker available, and that there existed a legal void for such a situation, thus leading to the recognition of their "neutral sex". This decision was overturned on appeal, based on the legitimate aim of the duality of the sexes overriding the right to gender identity protected under Article 8 ECHR, and on the masculine appearance and social behaviour of the applicant. The Court of Cassation upheld the Court of Appeal's decision.

If the ECtHR finds this case admissible, it will be faced with the issue of binary gender, which has been considered a given in its previous judgments, as remarked in section 2.1.1. As noted in section 7.2.2., PACE has recommended that intersex persons be able to rectify their gender markers to match their self-identified gender, with the option to have their gender identity recognised outside of the binary<sup>403</sup>. The ECtHR is therefore presented with an opportunity to expand its conception of gender, to include intersex persons, but potentially also gender-diverse persons who do not have intersex variations, depending on the chosen approach.

The Court of Cassation judgment hinged on two main factors. The first factor was the legitimacy of a binary sex system, based on the necessity to preserve the social and judicial order, which Moron-Puech notes is not a permitted ground for interference with the right to respect for private and family life under Article 8 ECHR<sup>404</sup>. The second factor was the masculine physical appearance and behaviour of the applicant. These factors would therefore have to be examined by the ECtHR. The national judgments' focus on the appearance and social behaviour of the applicant are reflective of stereotypical attitudes towards gender expression

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<sup>402</sup> *Y* (n 19).

<sup>403</sup> PACE, Resolution 2191 (n 330) para 5.

<sup>404</sup> Benjamin Moron-Puech, 'Remarques langagières et méthodologiques sur le contrôle de conventionnalité à venir dans l'affaire du sexe neutre (CEDH, *Y c. France*, n°76888/17)' (2021) 2 *Revue des Droits et Libertés Fondamentaux*, para 22.

and social behaviour. The courts of appeal and cassation indeed focus on the applicant's physical appearance, though the applicant submits evidence that their beard is due to hormonal treatment for osteoporosis<sup>405</sup>. The Court of Appeal relies in its judgment on the applicant's marriage to a woman, and their joint adoption of a child<sup>406</sup>, thus perpetuating heteronormative stereotypes by implying that their marriage to a woman can serve to infer the gender identity of the applicant. The Court of Cassation does not refute this heteronormative stereotype, and merely states that the applicant appears, "to third parties", to have "the appearance and social behaviour of a person of the masculine sex"<sup>407</sup>, thus perpetuating stereotypes surrounding the social behaviour associated with various genders, and seemingly implying that intersex persons should fulfil standards of androgyny and gender non-conforming behaviour to be recognised legally. The focus on "third parties'" perception of the applicant also perpetuates the stereotype that gender identity must be externally corroborated to be valid - as discussed in section 7.1. - conditioning the recognition of gender-diverse persons on the stereotypes and norms placed on them by others rather than their own personal identities.

The ECtHR may therefore take this opportunity to review its position on gender, since it will be faced with the limits of a binary system of gender. The ECtHR will also be able to apply the principle it set out in *Konstantin Markin v Russia*, namely that "States may not impose traditional gender roles and gender stereotypes"<sup>408</sup>. Indeed, the French national courts have in this case blatantly and explicitly relied on gender stereotypes to infer that the applicant should retain a male gender marker. If the ECtHR were to follow its own jurisprudence, it would be a major step forward to see it name and recognise gender stereotypes when they occur in the case of an intersex person. In the case of such a decision, it may arguably serve as a reference to combat gender stereotyping in judgments relating to other gender-diverse individuals.

### 7.3.3. *AH and others v Germany*

A third pending case before the ECtHR, this time relating to parental rights of trans persons, is *AH and others v Germany*<sup>409</sup>. In this case, a trans woman had a child with her partner, who gave

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<sup>405</sup> CA Orléans 22 March 2016, 15/03281 (France).

<sup>406</sup> *ibid.*

<sup>407</sup> Cass civ (1) 4 May 2017, 16-17.189, no 531 (France).

<sup>408</sup> *Konstantin Markin* (n 1) para 142.

<sup>409</sup> *AH and others v Germany* App no 7246/20 (ECtHR, *forthcoming*).

birth to the child. The German authorities refused to recognise AH as the second mother of the child, and would only allow her to be registered as the father, using her former name. This was confirmed by the German national courts.

This case portrays the implications of *AP, Garçon and Nicot v France* when other parts of legal systems have not yet been adapted. Indeed, by enabling trans persons to have their gender legally recognised without requiring sterilisation, situations arise where trans persons who are legally registered as their own gender can become biological parents of their children. However, legislation surrounding parenthood has not always followed the advancements achieved in legal gender recognition. German case-law currently requires trans women to be registered as the child's father with their pre-transition name, and trans men who give birth to be registered as the child's mother, with their pre-transition name<sup>410</sup>. In their third party written comments, Transgender Europe, ILGA Europe and Bundesverband Trans\* note that this has alarming implications for trans parents, as they cannot prove that they are their child's parent without disclosing that they are trans<sup>411</sup>.

*AH and others v Germany* shows the reality of trans parenthood, by shining light on an issue many trans parents face, being legally recognised only in certain areas of the law. Though “[a]pproximately 25-50% of trans people are parents”<sup>412</sup>, the realities of these parents and their children have only rarely been legally recognised<sup>413</sup>. As noted in section 4.1.5., the ECtHR itself has perpetuated ideas that deny the reality of trans parenthood by stating in *Jurčić v Croatia* that “only women could become pregnant”<sup>414</sup>. Many trans men and non-binary persons can become pregnant. That is for instance the case of Freddy McConnell, a trans man who gave birth to his child and who the UK authorities and national courts have refused to recognise as the child's father, and who has stated that he is taking his case to the ECtHR<sup>415</sup>. Transgender Europe, ILGA Europe and Bundesverband Trans\* argue that the current system entails that the “state de facto dictates a single possible parenting structure” and “enforces gender norms (a

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<sup>410</sup> Transgender Europe, ILGA Europe, Bundesverband Trans\*, ‘*AH and others v Germany* (App no 7246/20) Written comments’ (11 November 2020) para 13.

<sup>411</sup> *ibid*, para 17.

<sup>412</sup> *ibid*, para 16.

<sup>413</sup> *ibid*, paras 10-11.

<sup>414</sup> *Jurčić* (n 215) para 70.

<sup>415</sup> Freddy McConnell, ‘Going to the European Court of Human Rights’ (2020) <<https://freddymcconnell.com/blog-everything/going-to-the-european-court-of-human-rights?rq=european>> accessed 26 June 2021.

person begetting a child is always the father)”<sup>416</sup>. By denying the realities of trans parents, stereotypes of sex characteristics in relation to gender roles are being perpetuated, through a lack of recognition of the fact that one’s role in procreation is not contingent upon one’s gender. If the ECtHR were to consider the case of *AH and others v Germany*, it would be faced with the reality that parenthood does not always fit into cisnormative and heteronormative moulds.

#### 7.3.4. Change through the ECtHR

Throughout this section, it has been noted that the ECtHR may soon be faced with novel issues relating to rights associated with gender. The ECtHR will be presented with opportunities to review its current jurisprudence on its definition of gender, potentially expanding it beyond a binary conception. The ECtHR will also have the opportunity to highlight the stereotyping which is prevalent in trans and intersex persons’ legal gender recognition, and uphold the standard set out in *Konstantin Markin v Russia*, reminding States that they may not impose gender stereotypes on individuals.

However, though the ECtHR will be presented with cases with high potentials for change in case-law and judicial understandings of gender, it may not be so likely that it will take up these opportunities to the fullest. Indeed, Quinan, Molitor, van den Brink and Zimenkova note that “[c]ourts are generally reluctant to overthrow entire systems and prefer incremental change”<sup>417</sup>, which in the case of the ECtHR is due to States’ entitlement to organise their national systems freely, so long as they “do not disproportionately interfere with people’s right to respect for their private lives”, in the case of gender<sup>418</sup>. It therefore seems unlikely that the ECtHR will take a radical approach by suggesting that States may cease registration of gender in the manner the Belgian Constitutional Court did in 2019<sup>419</sup>. However, even if the ECtHR chooses an approach that leaves a certain margin of appreciation to States, it may name the gender stereotyping occurring in relation to the recognition of trans and intersex persons’ rights and identities.

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<sup>416</sup> Transgender Europe, ILGA Europe, Bundesverband Trans\* (n 410) para 20.

<sup>417</sup> Quinan et al. (n 350) 7.

<sup>418</sup> *ibid.*

<sup>419</sup> C Const b, no 99/2019 (n 367) para B.7.3.



## 8. Conclusion

*“Ultimately, perhaps, concepts of masculinity and femininity might overlap so completely as to render the very notion of gender difference irrelevant.”<sup>420</sup>*

Over recent decades, the ECtHR has gradually broadened its understanding of gender, making it more inclusive of trans persons. This more open approach to the concept of gender does not however appear to directly translate to the ECtHR’s approach to gender stereotypes.

This research has analysed how the ECtHR approaches gender stereotypes in cases of gender equality and gender identity, with the latter pertaining solely to trans applicants. The findings were more nuanced than expected, and show that the ECtHR has not always successfully named and acknowledged gender stereotyping, even in cases relating to gender equality. The ECtHR has even at times perpetuated stereotypes through its own language in judgments, or in the requirements it allows. The research established that gender stereotypes were occasionally left unaddressed in cases concerning gender equality. However, this proved to be consistently true for cases relating to gender identity, with all gender stereotypes surfacing in these cases left unaddressed. The ECtHR, in addressing trans applicants, has not yet taken sufficient steps towards highlighting the gender stereotypes surfacing through their legal gender recognition.

Furthermore, the ECtHR’s lack of attention to gender stereotypes when they arise in cases of gender identity may undermine its commitment to the elimination of gender stereotypes. Indeed, the ECtHR creates an inconsistency, by condemning certain gender stereotypes but accepting others, and conveys the idea that reliance on gender stereotypes is acceptable in certain situations. If gender stereotypes are to be entirely dismantled, they must be addressed at all levels, and for all persons.

When legal gender recognition procedures let gender stereotypes surface, whether through limited (and limiting) categorisations of individuals or requirements that prompt reliance on gender stereotypes for evidentiary purposes, it raises the question of whether gender can exist legally without being influenced by gender stereotypes. Through the analysis of existing and

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<sup>420</sup> Fausto-Sterling (n 49) 101.

proposed conceptions of gender and the consistent surfacing of gender stereotypes, this research has led me to believe that it cannot. Cook and Cusack note that “where ‘laws, regulations, customs and practices’ are based on discriminatory forms of gender stereotypes, States Parties are obligated to ‘modify or abolish’ them”<sup>421</sup>. If current procedures of legal gender recognition consistently allow for gender stereotypes to surface, disproportionately allowing marginalised communities such as trans, queer and intersex persons, to be confronted with gender stereotypes, it may be time to ‘modify or abolish’ the systems in place.

Gender has been recorded for centuries, and has existed as a social concept for much longer. It is unlikely to disappear entirely as a concept in the foreseeable future. Cooper and Renz however reflect on gender as a concept that may change from being assigned by the State, to being “grown and cultivated by individuals within particular social contexts”<sup>422</sup>. Removing gender from the legal sphere would therefore not make it disappear as a concept, but it may instead make it more expansive, and allow for broader understandings of its meaning and implications within society.

This research has focused on the perpetuation of gender stereotypes within the legal and judicial spheres. Further research on gender stereotyping concerning trans identities may benefit in looking at the effects of newer approaches to gender registration - or deregistration - on the prevalence of gender stereotyping in public and private spheres. Though a number of these alternatives are praised in academia and activist circles, and considered to have strong potential, it will be crucial to evaluate their effectiveness in the long term, and establish whether they may provide solutions to eliminate gender stereotyping and gender discrimination.

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<sup>421</sup> Cook and Cusack (n 3) 104.

<sup>422</sup> Cooper and Renz (n 301) 500.

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Transgender Europe, ILGA Europe, Bundesverband Trans\*, '*AH and others v Germany* (App no 7246/20) Written comments' (11 November 2020).

Transgender Europe, Trans Network Balkan, ILGA Europe, Subversive Front, '*X v The Former Yugoslav Republic of Macedonia* (App no 29683/16) Written comments' (28 July 2017).

## ANNEX 1

### Origin and Type of Gender Stereotypes Occurring in Gender Equality Cases

	Applicant	Government	Legislation / Policy	National court	ECtHR
Gender roles		<p>1. <i>Ünal Tekeli v Turkey</i></p> <p>2. <i>Khamtokhu and Aksenchik v Russia</i></p> <p>3. <i>Jurčić v Croatia</i></p>	<i>Konstantin Markin v Russia</i>	<i>Carvalho Pinto de Sousa Morais v Portugal</i>	
Gender expression					
Social behaviour		<i>Jurčić v Croatia</i>	<i>Khamtokhu and Aksenchik v Russia</i>	<i>Carvalho Pinto de Sousa Morais v Portugal</i>	
Sex characteristics					<i>Jurčić v Croatia</i>
Heteronormativity		<i>Ünal Tekeli v Turkey</i>		<i>Carvalho Pinto de Sousa Morais v Portugal</i>	

### Origin and Type of Gender Stereotypes Occurring in Gender Identity Cases

	Applicant	Government	Legislation / Policy	National court	ECtHR
Gender roles			<i>Hämäläinen v Finland</i>		<i>YY v Turkey</i>
Gender expression	<p>1. <i>AP, Garçon and Nicot v France</i></p> <p>2. <i>X and Y v Romania</i></p>				
Social behaviour	<p>1. <i>YY v Turkey</i></p> <p>2. <i>AP, Garçon and Nicot v France</i></p> <p>3. <i>X and Y v Romania</i></p>				<i>YY v Turkey</i>
Sex characteristics		<i>X and Y v Romania</i>			<i>X v The Former Yugoslav Republic of Macedonia</i>
Heteronormativity	<i>YY v Turkey</i>		<i>Hämäläinen v Finland</i>		<i>Hämäläinen v Finland</i>

## ANNEX 2

### Occurrence of Types of Gender Stereotypes in Gender Equality Cases

	<i>Ünal Tekeli v Turkey</i>	<i>Konstantin Markin v Russia</i>	<i>Khamtokhu and Aksenchik v Russia</i>	<i>Carvalho Pinto de Sousa Morais v Portugal</i>	<i>Jurčić v Croatia</i>
Gender roles	✓	✓	✓	✓	✓
Gender expression					
Social behaviour			✓	✓	✓
Sex characteristics					✓
Heteronormativity	✓			✓	

### Occurrence of Types of Gender Stereotypes in Gender Identity Cases

	<i>Hämäläinen v Finland</i>	<i>YY v Turkey</i>	<i>AP, Garçon and Nicot v France</i>	<i>X v The Former Yugoslav Republic of Macedonia</i>	<i>X and Y v Romania</i>
Gender roles	✓				
Gender expression			✓		✓
Social behaviour		✓	✓		✓
Sex characteristics				✓	
Heteronormativity	✓	✓			