International Journal of Law and Psychiatry 66 (2019) 101478

Contents lists available at ScienceDirect

International Journal of Law and Psychiatry

journal homepage: www.elsevier.com/locate/ijlawpsy

'#WontBeErased': The effects of (de)pathologisation and (de)medicalisation on the legal capacity of trans* persons

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ARTICLE INFO

Keywords:
Trans* persons
Pathologisation
Legal capacity
Gender identity
Gender self-determination

ABSTRACT

Over the last decade, trans* issues have increasingly gained attention all around the globe. While this increased social recognition has mostly resulted in higher acceptance rates of gender non-conformity, world-wide data show that trans* persons still remain among the most vulnerable groups in society. One of the most pressing issues facing trans* persons, is their inherent psycho-pathologisation and medicalisation in society and law. Indeed, in modern history, trans* issues have been predominantly addressed through the lens of medicine and psychiatry, which has had a clear impact on the legal capacity of gender non-conforming persons. Although this contribution shows that a human rights movement towards depathologisation and demedicalisation of gender non-conformity is rapidly getting up steam in several parts of the world, it needs to be questioned whether the current human rights approach is getting it 'right'. In this regard, it is argued that the present focus on trans* depathologisation and demedicalisation should only be the first step towards the full inclusion of all trans* persons in law and society.

1. Introduction

Over the last decade, trans* issues have increasingly gained attention all around the globe. While this increased social recognition has mostly resulted in higher acceptance rates of gender non-conformity, world-wide data show that trans* persons still remain among the most vulnerable groups in society (Uppalapati et al., 2017). Indeed, not only are trans* persons often subjected to verbal, physical and material violence, their legal status is often inferior to that of cisgender persons. Although many national, European and international human rights bodies have addressed the misfortunes of trans* persons over the last decade, diverging trends are also occurring. For instance, and by way of mere illustration, in October 2018, both the Hungarian Orbán government and the US Trump administration announced their intention to (in)directly roll back trans* rights. In Hungary, all gender studies were banned at university level and in the US, the Department of Health and Human Services declared its intention to define the legal notion of 'sex' as 'a person's status as male or female based on immutable biological traits identifiable by or before birth'.[1]

One of the most pressing issues facing trans* persons, is their inherent psycho-pathologisation and medicalisation in society and law. Indeed, in modern history, trans* issues have been predominantly addressed through the lens of medicine and psychiatry, which has had a clear impact on the legal capacity of gender non-conforming persons. Although this contribution will show that a movement towards depathologisation and demedicalisation of gender non-conformity is rapidly getting up steam in several parts of the world, it needs to be questioned whether the current human rights approach, which generally focusses on the abolition of abusive medical requirements for legal gender recognition, is getting it 'right'. Indeed, it will be argued that the present focus on trans* depathologisation and demedicalisation should only be the first step towards the full inclusion of all trans* persons in law and society.

This paper will first elaborate on the concepts of gender identity and gender non-conformity, especially from a legal perspective (Section 2). Afterwards, it will be explained how trans* persons became pathologised and medicalised in society and how this pathologising and medicalised narrative was adopted by law, and more specifically in procedures of legal gender recognition (Section 3). Section 4 will then demonstrate how various human rights actors and States have abolished psycho-medical conditions for legal gender recognition, predominantly on the basis of a human rights discourse. Before concluding, Section 5 will question whether this international movement towards trans* depathologisation and demedicalisation is actually sufficient to ensure the full and equal legal capacity of gender non-conforming persons.

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[1] See https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.

https://doi.org/10.1016/j.ijlp.2019.101478
Received 23 April 2019; Received in revised form 18 July 2019; Accepted 22 July 2019
Available online 14 August 2019

2. Gender identity and gender non-conformity: what's in a name?

2.1. (Legal) definitions of 'sex', 'gender identity' and 'trans*'

In modern legal practice, the leading definition of 'gender identity' stems from the Yogyakarta Principles (+10). In 2006–2007, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity (O'Flaherty & Fisher, 2008).[2] The result was a universal guide to human rights which applies binding general international legal standards to the situation of LGBTIQ+ persons.[3] Besides promoting an LGBTIQ+ inclusive reading of existing and universally applicable international human rights law standards, the Yogyakarta Principles also provide definitions of the concepts 'sexual orientation' and 'gender identity', which are used throughout the international literature. In 2017, the Principles were updated through the addition of ten new provisions (hence the '+10'). The new provisions further elaborated on the obligations flowing from the original Principles, taking into account new developments in international human rights law, as well as an increased focus on the situation of persons with variations of sex characteristics ('intersex persons'). Since that update, the Yogyakarta Principles also provide a definition of the concepts 'gender expression' and 'sex characteristics'. According to the preamble to the Principles, gender identity can be defined as "*each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms*".[4] On the other hand, 'sex characteristics' are defined 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*".

The concepts 'transgender', 'trans' or 'trans*' are umbrella terms for persons who are to some extent confronted with the same issue: their gender identity and/or gender expression differs from the cultural norms prescribed for people of a particular sex. In other words, trans* persons are non-conforming individuals, since they fail to live up to society's expectations (or even demands) of what it means to have certain biological sex characteristics. However, in reality, multidisciplinary research has extensively shown that a person's sex characteristics and gender identity are different elements of their sexual identity, that are not necessarily congruent or that don't necessarily define each other. Moreover, both 'sex' and 'gender identity' are social constructions, and therefore more complex than the persistent binary notions of 'male' and 'female' would suggest. Indeed, both persons with variations of sex characteristics ('intersex persons')[5] and trans* persons prove that any binary conceptualisation of a person's sexual identity works oppressively and excludes many variations of human reality. Because of the social constructionism that essentially breeds what we refer to as 'trans* identity', it is also appropriate to refer to the concept as 'gender non-conformity'. The concept of 'trans* (identity)' actually presupposes a natural continuum of persons who (sometimes or always) live, or desire to live, in the role of a gender which is not the one designated to that person at birth (Pfäfflin, 2016), but who show incredible variation in identities, expressions and practices (Currah, 2006). For the clarity of the argument, this contribution will make use of the following terminology:

- Transsexual persons: persons who mentally, socially and sexually identify with the (binary) sex (male-female) opposite to their sex registered at birth and who desire sex reassignment. Some, but not all, transsexual persons also experience severe mental distress because of the incongruence between their biological sex and their actual gender identity, i.e. gender dysphoria (Motmans, 2009).
- Transgender persons (s.s.): individuals who live, or desire to live, (a part of) their life performing a (binary) gender role (male-female) that does not follow the socially expected one that is allegedly correlative to the (binary) sex assigned to them at birth (Gonzalez-Salzberg, 2014). Transgender persons may have a wish to undergo medical treatment on their sex characteristics in order to better express their gender identity, without going as far as sex reassignment;
- Non-binary persons: umbrella term for persons whose gender identity is neither male, nor female, or persons who may identify as both male and female at one time, as different genders at different times, as no gender at all, or dispute the very idea of only two genders (Richards et al., 2016). Non-binary persons may have a wish to undergo medical treatment on their sex characteristics in order to better express their gender identity, without going as far as sex reassignment.

A common misunderstanding about the trans* experience is that it is about choice (Levasseur, 2015). Indeed, as Weiss states: "Transgender identity is a choice only in the sense of 'Hobson's choice', the option of taking the one thing offered or nothing. Essentially, gender chooses us, and not the other way around" (Weiss, 2001b).

2.2. The complexity and prevalence of gender non-conformity

Although gender identity is generally considered to be one of the most intimate elements of private life, it is also all around us in public life. Whenever a person enters in interaction with other human beings or social institutions, gender ceases to be a purely private matter. The ways in which society deals with gender, especially when it does not conform to normative assumptions or stereotypes therefore has a strong impact on a person's life. In this regard, the (sociological) literature makes a distinction between internal and external gender processes, or in other words, between 'doing gender' and 'determining gender', respectively referring to a person's own definition of gender and the attribution of gender by society (including the legal system) on the basis of everyday interaction which serves to authenticate a person's own gender identity (Westbrook & Schilt, 2014). The way of attributing gender identity changes in light of the circumstances at hand (Westbrook & Schilt, 2014): in non-sexual gender-integrated spaces, self-determined gender expression can be easily used to determine gender identity, as long as the persons concerned express themselves as a man or a woman. In this context, our perception of gender is based on a conglomeration of numerous factors, including but not limited to visual cues such as gait, body and facial characteristics, body language, and dress; auditory cues such as voice and vocabulary; and cultural cues such as interpersonal style, profession, job title, social status, and economic status (Weiss, 2001a). By contrast, in gender-*segregated* spaces, a combination of self-defined identity expression and body-based criteria is often used, allowing someone to receive cultural and institutional support for a 'change' of gender identity only if they undergo (genital) surgery.[6] Finally, in sexual interactions, biology-based criteria

[2] See www.yogyakartaprinciples.org.

[3] Lesbian, Gay, Bisexual, Transgender, Intersex and Queer persons. The '+' refers to the open-endedness of the term.

[4] Although the definition of 'gender identity' put forward by the Yogyakarta Principles +10 is widespread in international literature and practice, it is also criticised. Authors like Otto (2017) and Dreyfus (2012) argue that, by stating that a gender identity must be 'deeply felt' and 'individual', persons become obliged to 'fix' their gender into a core identity, leading to an unintentional privileging of a clear, coherent and unitary identity over conceptions of blurred identifications.

[5] Since this contribution's focus lies on the legal status of trans* persons, it will not address the social and legal pathologisation of persons with variations of sex characteristics.

(particularly genitals) are used to determine gender. Gender determination also occurs at the legal level, which often demands the use of biological criteria, such as external genitals (Westbrook & Schilt, 2014). A person's attributed gender identity could therefore change depending on the type of interaction one has with other individuals. In other words, gender non-conformity leads to varying degrees of social 'emergency' depending on the concrete (individual and contextual) situation, making it a difficult issue to tackle through uniform measures.

Trans* persons represent a significant group in society, even though it is challenging to determine a concrete number given the difficulties to agree on shared and/or unbiased definitions of gender non-conformity (Müller, De Cuypere, & Sjoen, 2017). Indeed, depending on the field of research (e.g. medicine, social psychology or law) and the used methodology, figures clearly vary. However, it appears that most data until now are only a cautious display of human reality and that the number of gender non-conforming persons will grow together with the increasing attention for and openness to gender variance in society (Motmans, Ponnet, & De Cuypere, 2015; Müller et al., 2017). As will be discussed below, both society and the law have until very recently quasi uniquely focussed on the situation of transsexual persons who desired (and were able) to, legally and physically, belong to the (binary) sex opposite to the one assigned at birth (Gonzalez-Salzberg, 2014). Nevertheless, although transsexual persons are probably the best known members of the trans* community, they are only 'the tip of the iceberg' of gender variation (Hanssen, 2017). Recent Belgian research indicated that while the prevalence of transsexuality was estimated at 1:12,900 for male-to-female transsexuals and 1:33,800 for female-to-male transsexuals (De Cuypere et al., 2007),[7] the prevalence of gender incongruence[8] (0.7% of persons assigned male at birth and 0.6% of persons assigned female at birth) and gender ambivalence[9] (2.2% of persons assigned male at birth and 1.9% of persons assigned female at birth) was much higher (Van Caenegem et al., 2015). Dutch research indicated a prevalence of gender ambivalence with 4.6% of persons assigned male at birth and 3.2% of persons assigned female at birth (Kuyper, 2012). Gender incongruence was found with 1.1% of persons assigned male at birth and 0.8% of persons assigned female at birth (Kuyper, 2012).

3. The historical pathologisation and medicalisation of trans* persons in society and law

3.1. Transsexuality and gender incongruence as a medical condition/disorder

Since the twentieth century, the notion of gender identity, gender non-conformity and the existence of trans* persons have been studied from different disciplines (Cannoot, 2019a). Sexologist Magnus Hirschfeld was the first scholar to introduce the term 'transsexual' in his article *'Die Intersexuelle Konstitution'* in 1923. Although he addressed social phenomena such as cross-dressing and cross-gender identification, he mainly wanted to normalise homosexuality by clearly distinguishing it from cross-gender behaviour (Motmans, 2009). Widespread scientific and public interest for gender identity in general, and transsexuality in particular, significantly increased with two highly mediatised cases in the 1940's and 1950's (Pfäfflin, 2016). Christine Jorgensen was an American transwoman who travelled to Denmark to receive sex reassignment surgery and hormonal treatment, and who became an instant celebrity upon her return to New York. British transman Laurence Michael Dillon received sex reassignment surgery in the 1940's and wrote a book called 'Self: A Study in Ethics and Endocrinology', in which he argued that so-called 'masculine inverts' suffered from an innate condition for which the relief existed in bringing the body in conformity with the mind. However, the first sex reassignment surgery already dates back to 1912 (Pfäfflin, 2016).

Endocrinologist and sexologist Harry Benjamin's book 'The transsexual phenomenon' (1966) is commonly regarded as the foundation of the modern medical approach to transsexuality. Benjamin strongly believed that the body of transsexual persons should be adapted to their gender identity through medical treatment, consisting of hormonal replacement and sex reassignment surgery, instead of the until then preferred psychotherapy (Motmans, 2009). Importantly, in his vision, this medical treatment should be reserved for 'true' transsexuals, who are accordingly diagnosed by a psychiatrist. Since the 1960's, this medical approach has been the leading way in which society has dealt with issues relating to incongruence between a person's biological sex and gender identity, making a physical sex change between 'male' and 'female' possible for persons who have been diagnosed with the condition of transsexuality or gender dysphoria. However, by combining sex reassignment to a psycho-medical condition, transsexual persons became inherently pathologised. Indeed, medicine has been the dominant prism for looking at gender variance in society. Having a non-conforming gender identity thus has been considered a medical condition to be treated rather than a fundamental aspect of identity (Silver, 2014).

Transsexuality was first included in the third edition of the Diagnostic Statistical Manual of Mental Disorders (DSM-3) of the American Psychiatric Association in 1980, before being changed to 'gender identity disorder' in DSM-4. The fifth and current Diagnostic Statistical Manual of Mental Disorders (DSM-5) still pathologises situations where a person's gender identity does not match their sex assigned at birth (Gonzalez-Salzberg, 2018). However, it revised the DSM-4 diagnosis of 'gender identity disorder' to 'gender dysphoria', in order to emphasise that gender non-conformity in itself does not constitute a mental disorder. The diagnosis of 'gender dysphoria' refers to the clinically significant distress associated with the condition of gender incongruence (transsexuality). For a person to be diagnosed with gender dysphoria in accordance with DSM-5, there must be a marked difference between the individual's expressed/experienced gender and the gender others would assign to that person, and it must continue for at least six months. According to the DSM, this condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. Gender dysphoria is manifested in a variety of ways, including strong desires to be treated as the 'other' gender or to be rid of one's sex characteristics, or a strong conviction that one has feelings and reactions typical to the 'other' gender (or some alternative gender different from one's assigned gender).

The tenth edition of the World Health Organisation's International Classification of Mental and Behavioural Disorders (ICD) placed 'transsexualism', 'dual-role transvestism', 'gender identity disorder of childhood', 'other gender identity disorders' and 'gender identity disorder, unspecified' under the separate chapter of 'gender identity disorders'. Transsexuality for instance, was defined as the desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make one's body as congruent as possible with one's preferred sex through surgery and hormonal treatment, during at least two years persistently, which was not a symptom of another mental disorder, such as schizophrenia, or associated with chromosome abnormality. However, the WHO's latest revision of the ICD (ICD-11) removed the diagnostic category of 'gender identity disorders' and replaced it with a diagnosis of 'gender incongruence' as a medical

[6] This requirement of harmonisation between body and gender identity in order to have access to gender-segregated spaces is informed by heteronormative expectations regarding female weakness and male predatory sexual behaviour.

[7] These estimations only take into account transsexuals who seek access to medical and/or surgical treatment.

[8] Gender incongruence (within the binary sex/gender model (m/f)) refers to the situation where a person identifies stronger with the other sex than with the sex assigned at birth.

[9] Gender ambivalence refers to the situation where a person identifies equally with the other sex as with the sex assigned at birth.

condition related to sexual health, which does not include the assumption of a mental disorder (Richards et al., 2016). Gender incongruence is defined as a marked and persistent incongruence between an individual's experienced gender and the assigned sex, as manifested by at least two of the following elements: 1) a strong dislike or discomfort with the one's primary or secondary sex characteristics due to their incongruity with the experienced gender; 2) a strong desire to be rid of some or all of one's primary and/or secondary sex characteristics due to their incongruity with the experienced gender; 3) a strong desire to have the primary and/or secondary sex characteristics of the experienced gender. The individual experiences a strong desire to be treated (to live and be accepted) as a person of the experienced gender. The experienced gender incongruence must have been continuously present for at least several months and gender variant behaviour and preferences alone are not a basis for assigning the diagnosis.

Depsychopathologising trans* identities has been one of the major goals of the World Professional Association for Transgender Health (WPATH) (Müller et al., 2017). In this regard, version seven of the WPATH's Standards of Care (SOC) for the Health of Transsexual, Transgender and Gender Nonconforming People distinguishes between gender non-conformity and gender dysphoria, the latter referring to discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics). The SOC suggest changes in gender expression and role, hormone therapy, surgery and psychotherapy as the main medical treatment options for gender dysphoria, next to social support and non-medical changes in gender expression. Even though the SOC thus acknowledge that gender non-conforming individuals may not necessarily experience gender dysphoria because of the incongruence between their biological sex assigned at birth and their gender identity, a formal diagnosis of gender dysphoria via one or more psychiatric assessments remains necessary in many countries to have access to trans*-specific health care and support (Müller et al., 2017).

The evolution in terminology of the diagnoses connected to experiences of gender non-conformity has clearly identified one of the biggest problems related to the historical focus on the medical condition of 'transsexuality', i.e. its exclusionary effects towards non-transsexual trans* persons. Indeed, not all trans* persons fit the diagnostic criteria for gender dysphoria or gender incongruence. Moreover, non-transsexual trans* persons do not necessarily wish to undergo full sex reassignment treatment to express their experienced incongruence between their self-defined gender identity and their biological sex. Other trans* persons who do seek access to health care face a vast amount of different (medical, socio-economic, religious…) reasons which prevent treatment (Bribosia & Rorive, 2018). Although access to trans*-specific medical treatment is very important for (some) trans* persons, one may question the persistent dominance of the medical perspective. Indeed, despite its increasingly broadened application, the medical model still forces individuals to fit their gender identities into a pathological framework, and conform to a set diagnostic definition irrespective of their actual experience or desires, making medical authorities gatekeepers with the power to regulate gender identity and bodily gender expression (Silver, 2014). Nevertheless, despite calls by trans* activists to fully depathologise medical transition pathways, diagnoses concerning gender non-conformity have often been retained predominantly for the purely pragmatic reason that some people wish for medical interventions such that they have a more holistically congruent self (Richards et al., 2016), and therefore should have access to diagnosis-based publicly-funded health care and social security (Kraus, 2015). According to former Council of Europe Commissioner for Human Rights Hammarberg, from a human rights and health care perspective, no diagnosis is needed in order to give access – on the basis of informed consent – to treatment for a situation in need of medical care (Hammarberg, 2009). Fully depathologising medical transition pathways does not necessarily contradict the legitimate wish of some trans* persons to have access to trans*-specific forms of health care. As Theilen (2014) holds, the coverage of several expenses regarding pregnancy shows that having a disease or diagnosis is not a necessary condition for being afforded health care.

3.2. The pathologisation and medicalisation of trans* persons in law

The pathologisation of gender non-conformity, and the quasi unique focus on post-operative transsexual persons was also adopted by many legal systems around the globe. The strong entanglement between the medical and legal approaches towards gender variance should not be surprising, since it was precisely the performance of sex reassignment surgeries, following psychiatric diagnoses of transsexuality, during the course of the twentieth century that forced the law to address the matter of the legal recognition of trans(sexual) persons (Pfäfflin, 2016). Despite the fact that Switzerland already provided the possibility for post-operative transsexual persons to change their registered sex as early as the 1930's, many States only started adopting legislation on legal gender recognition at the end of the 20th or the beginning of the 21st century (Pfäfflin, 2016).

Although comparative legal analysis of national frameworks of legal gender recognition might lead to the conclusion that the legal accommodation of trans* persons is deeply embedded in the respective national legal tradition, closer study reveals many similarities (Scherpe & Dunne, 2016). Indeed, in many cases, the first question legislatures and courts needed to answer was whether and how a transsexual person who had undergone sex reassignment treatment, could be legally recognised in their 'new' identity. This conflation of the medical relief for transsexual persons with their legal interests essentially led to a dominance of a legal framework where prerequisites in standards of care – such as a psychiatric diagnosis of gender dysphoria, sex reassignment therapy and sterilisation – were adopted as mandatory conditions for legal gender recognition (Scherpe & Dunne, 2016). After all, in times where knowledge about the full scope of gender variance was limited, a legal system that reaffirmed the medical solution to the unfortunate situation of the suffering transsexual was regarded as benevolent and well-meaning (Scherpe & Dunne, 2016). This legal pathologisation of gender non-conforming persons has persisted until today. For instance, a comparative study by 'Transgender Europe' from 2019 pointed out that no less than 36 countries in Europe and Central Asia require a mental health diagnosis/assessment in the course of the procedure of legal gender recognition. Sixteen countries require compulsory sterility and 21 countries require forced medical intervention (Transgender Europe, 2019). In this regard, the notion of trans* pathologisation in the context of legal gender recognition has to be interpreted broadly, i.e. encompassing both psycho-medical diagnoses or assessments, and compulsory medical intervention in the form of sterilisation, forced hormonal treatment or sex reassigning surgery (pathologisation and medicalisation).

National authorities naturally do not act in a legal vacuum. For instance, since its judgment in the case of Christine Goodwin v. United Kingdom (2002), the European Court of Human Rights requires from Council of Europe Member States to adopt a domestic procedure for legal gender recognition.[10] Although the Court recently considered the condition of compulsory sterility for legal gender recognition a violation of Article 8 of the European Convention on Human Rights,[11] States are still granted a wide margin of appreciation to decide on the (psycho-

[10] ECtHR 11 July 2002, App no 28957/95, Christine Goodwin v. United Kingdom. Despite the positive obligation under Article 8 of the European Convention on Human Rights to foresee a domestic procedure for legal gender recognition, legal gender recognition is still impossible in six Council of Europe Member States.

[11] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13 and 52,596/13, A.P., Garçon, Nicot v. France.

medical) conditions – such as a diagnosis of gender dysphoria/transsexuality and compulsory sex reassignment surgery – that gender non-conforming persons have to fulfil to have their registered sex changed in the light of their actual gender identity. However, in recent years, the narrow focus on providing legal accommodation for transsexual persons has opened up in order to take into account (a larger part of) the trans* spectrum (Pfäfflin, 2016). Interestingly, these legal developments have been predominantly based on a human rights approach in which pathologising and medicalising conditions for legal gender recognition have been considered a violation of fundamental rights. Indeed, over the last decade, trans* rights and gender non-conformity as a human rights issue have been high on the agenda, both at the international and national level (Cannoot, 2019a). The next Section will therefore address this international move towards the full legal depathologisation and demedicalisation of trans* persons.

4. A human rights movement towards full legal depathologisation and demedicalisation of trans* persons

4.1. The 'emerging right' to (self-determination) of gender identity

Human rights standards concerning the (legal) position of trans* persons in general, and concerning the amendment of registered sex in particular,[12] are a recent – and predominantly Western – phenomenon. Indeed, the fundamental right to (self-determination of) gender identity is often qualified as an 'emerging right' within international human rights law (Lau, forthcoming; Baisley, 2016). Although the number of legislative reforms and judicial procedures in national and international courts is rapidly increasing, so-called soft law instruments are currently the predominant source for gender related human rights standards. While it has been argued in legal literature that the development of human rights provisions through soft law instruments could potentially lead to a devaluation or implosion of international human rights law (Alston, 1984), attention should be given to the specific context of LGBTIQ+ rights at the international stage. Rights related to sexual orientation and gender identity are still one of the most contentious issues across the globe (Chase, 2016), which is reflected by the fact that sexual minorities, together with elderly persons, remain one of the last global 'groups' vulnerable to structural discrimination not to have their 'own' human rights treaty. Although the legal status of LGBTIQ+ persons has significantly improved since the 1990's on the basis of human rights claims (Raub et al., 2016), a diverging trend is also occurring in several States, especially in parts of Africa, Asia, Eastern Europe and, notably, the United States. The contentious nature of gender identity as a human rights issue at the international level was recently evidenced by the discussions in the Human Rights Council concerning the renewal of the mandate of the UN Independent Expert on Sexual Orientation and Gender Identity. While 27 countries voted in favour, 12 voted against and 7 abstained, with clear geographical differences in voting patterns.[13]

Because of the lack of specific human rights norms relating to LGBTIQ+ persons, several institutional human rights actors, such as UN treaty bodies, the UN High Commissioner for Human Rights, the UN Independent Expert on Sexual Orientation and Gender Identity, the Council of Europe Parliamentary Assembly, the European Court of Human Rights and the Inter-American Court of Human Rights, have 'read in' the human rights of LGBTIQ+ persons in existing provisions of for instance the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights. In this regard, the right to respect for private life and the right to personal autonomy have been of particular importance.

4.2. The legal depathologisation and demedicalisation of trans* persons in law

4.2.1. Soft law instruments

Over the last decade, several soft law instruments have addressed the abovementioned psycho-medical conditions with which trans (sexual) persons often have to comply in order to obtain a change of their registered sex in light of their gender identity. In 2015, the Council of Europe Parliamentary Assembly (2015), which not only welcomed the emergence of a right to gender identity that gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity, but also called on States to develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of trans* people on birth certificates, identity cards, passports, educational certificates and other similar documents. More specifically, the Assembly called on States to abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as necessary legal requirements to recognise a person's gender identity in law. The same message regarding legal gender recognition and gender self-determination was repeated in Resolution 2191 (2017), which had a focus on the human rights protection of persons with variations of sex characteristics (Council of Europe Parliamentary Assembly, 2017). A recommendation of the Committee of Ministers of 2010 urged States to regularly review prior requirements – including changes of a physical nature – for legal gender recognition, in order to remove abusive requirements (Council of Europe Committee of Ministers, 2010).

In November 2017, the Inter-American Court of Human Rights (IACtHR) adopted a much anticipated advisory opinion on request by Costa Rica on gender identity, and equality and non-discrimination of same-sex couples (Inter-American Court of Human Rights, 2017). According to the Court, recognition of gender identity as a manifestation of personal autonomy is both an integral and a determining component of the individual's personal identity which is protected by Articles 7 (protection of personal liberty) and 11 (protection of private life) of the American Convention on Human Rights. Moreover, States have the positive obligation to adopt domestic legal procedures for the legal recognition of a person's self-perceived gender identity in public records and identity documents. In this regard, the Court specified that all procedures must be based solely on the free and informed consent of the person concerned without involving any pathologising and medicalising requirements such as a psycho-medical assessment, surgery and/or hormonal therapy. The Court thus clearly considered all medical requirements for legal gender recognition a violation of the right to gender identity under the American Convention on Human Rights.

United Nations human rights treaty bodies, such as the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) have started to

[12] This contribution focusses on the legal recognition of a trans* person's self-defined gender identity, since, arguably, procedures of legal gender recognition are the first and necessary step towards guaranteeing the full legal capacity of trans* persons and their right to substantive equality However, this does not mean that legal gender recognition is or should be the only point of attention with regard to the protection of the rights of trans¨* persons. Moreover, it is important not to forget that legal human rights protections of trans* persons without broader societal acceptance constitute only a partial solution to transphobia at large.

[13] Voted in favour: Argentina, Australia, Austria, Bahamas, Brazil, Bulgaria, Chile, Croatia, Cuba, Czech Republic, Denmark, Fiji, Iceland, Italy, Japan, Mexico, Nepal, Peru, Philippines, Rwanda, Slovakia, South Africa, Spain, Tunisia, Ukraine, United Kingdom, Uruguay. Voted against: Afghanistan, Bahrain, Bangladesh, China, Egypt, Eritrea, Iraq, Nigeria, Pakistan, Qatar, Somalia. Abstained: Angola, Burkina Faso, Democratic Republic of Congo, Hungary, India, Senegal, Togo.

bring attention to the situation of trans* persons in their General Comments and country-specific concluding observations (van den Brink, 2017a). In 2018, the UN Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity has also recommended to States to 'enact gender recognition laws concerning the rights of trans persons to change their name and gender markers on identification documents. Such procedures should be quick, transparent and accessible, without abusive conditions, and respectful of the principle of free and informed choice, and of personal integrity' (Madrigal-Borloz, 2018).

The most elaborate recommendations can be found in the Yogyakarta Principles +10. Although the Principles cannot be considered as legally binding standards of international human rights law, they have great moral authority and have been cited by State governments, institutional human rights actors and courts, such as the Court of Justice of the European Union and the Inter-American Court of Human Rights. In this regard, Principles 3 and 31 of the aforementioned Yogyakarta Principles +10 call for the instalment of procedures of legal gender recognition, solely on the basis of the self-determination of one's gender identity. Indeed, Principle 3 holds that States have to:

> *'[…] Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;*
>
> *Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity […]'.*

Principle 3 was further elaborated in Principle 31. On the basis of the latter provision, States should:

A) Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;
B) Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;
C) While sex or gender continues to be registered:
   i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
   ii. Make available a multiplicity of gender marker options;
   iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;
   iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.'

4.2.2. The ECtHR's case law

4.2.2.1. The positive obligation of legal gender recognition. Interesting developments regarding the rights of trans* persons, and especially their right to legal gender recognition have also been occurring at the level of national and international courts. In this regard, the case law of the European Court of Human Rights is of particular importance. Indeed, judgements of the ECtHR are authoritative not only within the Council of Europe, but also around the globe. Moreover, the ECtHR is the human rights monitoring body that has dealt with the largest number of cases that are related to trans(sexual) persons (Gonzalez-Salzberg, 2014). Although the ECHR does not mention the matter of gender identity nor the registration thereof, the ECtHR has held that a person's right to gender identity and to personal development is a fundamental aspect of the right to private life (Article 8 ECHR),[14] of which the guarantees are interpreted based on the underlying principle of personal autonomy. Indeed, it considers the freedom to define one's gender identity as one of the most basic essentials of self-determination.[15] It may therefore be stated that the right for all individuals to define their own gender identity is firmly founded on the right to personal autonomy under Article 8 of the Convention (Cannoot, 2019a).

The case of Christine Goodwin v. United Kingdom (2002) was arguably the landmark case for the right of trans(sexual) persons to the legal recognition of their gender identity through the amendment of their officially registered sex. Although post-operative transsexual persons had started bringing cases to Strasbourg since the early 1980's, the Court had been unwilling to oblige States to legally recognise them in their actual gender identity. However, the Court had been aware of the increasingly unsustainable legal limbo in which trans(sexual) persons were stuck. Indeed, it held in Rees v. United Kingdom (1986) that it was "conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and social developments".[16] In Christine Goodwin, the Court referred to international evolutions in science, medicine, society and law to find that the matter of legal gender recognition could no longer fall within the State's margin of appreciation under Article 8 ECHR, with the exception of the 'appropriate means' for achieving this recognition. In other words, while individuals have the right to define their own gender identity based on their personal autonomy under Article 8 ECHR, the legal recognition thereof may be made conditional by the State (Theilen, 2016).

As mentioned above, in many countries in Europe and around the globe, these conditions amounted to invasive requirements of a psycho-medical nature, such as a diagnosis of transsexuality/gender dysphoria, sex reassignment surgery and compulsory sterility. However, this legal pathologisation of trans(sexual) persons has only scarcely reached the ECtHR's attention (Cannoot, 2019a). Indeed, while it has had the opportunity to decide on the conformity of pathologising conditions for legal gender recognition since 2008,[17] the Court has only considered an explicit or implicit condition of compulsory sterility a violation of human rights in A.P., Garçon, Nicot v. France (2017).

4.2.2.2. A.P., Garçon, Nicot v. France and beyond. In A.P., Garçon, Nicot, the Court had to decide whether the then applicable requirements for legal gender recognition in France were compatible with Article 8 ECHR. At the time of the relevant facts, French law required that the trans* person concerned presented proof of the real existence and persistence of the 'syndrome of transsexuality' and the 'irreversibility of the transformation of the bodily appearance' to the 'opposite sex'. In this regard, the domestic courts were usually satisfied with evidence based on medical and psychological certificates,[18] but sometimes also ordered a medical expert examination in case of doubt.

[14] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 93; 10 March 2015, App no 14793/08, Y.Y. v. Turkey, para. 66.

[15] ECtHR 11 October 2018, App no 55216/08, S.V. v. Italy, para. 54–55; 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 93; 12 June 2003, App no 35968/97, Van Kück v. Germany, para. 73.

[16] ECtHR 17 October 1986, App no 9532/81, Rees v. United Kingdom, para. 47.

[17] ECtHR 27 May 2008, App no 18367/06, Nuñez v. France.

[18] In France, the procedure of legal gender recognition is of a judicial nature.

While the French Government argued in Strasbourg that the condition of the 'irreversibility of the transformation of the bodily appearance' did not necessarily have to entail a surgical intervention or treatment leading to sterility, the ECtHR nonetheless interpreted this requirement as a condition of surgical or hormonal sterilisation.[19] In other words, it appeared that the Court did not want to address the conformity of other pathologising conditions for legal gender recognition than the requirement of sterility (Cannoot, 2019a). Since the applicants renounced the conditions to which they had to comply for the recognition of their gender identity, the Court verified whether the State had struck a fair balance between the general interest and the individual interests, taking into account its margin of appreciation. In this regard, it pointed out that the State's margin was restrained, despite the absence of a European consensus on the condition of sterility for legal gender recognition, and the fact that the matter concerned the civil status and delicate moral and ethical questions.[20] Indeed, the Court noted that not only the right to sexual identity and personal development are fundamental aspects of the right to respect for private life under Article 8,[21] but also a person's physical integrity is directly at stake in case of a sterilisation.[22] It then pointed out the international tendency to abandon the condition of sterility in the context of legal gender recognition, which France nota bene joined in October 2016, and was shared by numerous international and European institutional human rights actors.[23] Since conditioning legal gender recognition on sterilising surgery or treatment, which the person concerned does not wish to undergo, comes down to conditioning the exercise of the right to respect for one's private life under Article 8 on the renunciation of one's right to physical integrity, protected by Articles 8 and 3 ECHR, trans(sexual) persons were effectively placed before an impossible dilemma.[24] Even though the Court acknowledged the importance of the general interests of the non-disposability, truthfulness and coherence of the civil status, it found that the State had failed to strike a fair balance between those interests and the applicants' rights and therefore violated Article 8 ECHR.[25]

The second applicant had submitted that making legal recognition of gender identity conditional of proof that one suffered from a gender identity disorder, amounted to labelling trans* persons as mentally ill, and hence to an infringement of their dignity. Nevertheless, the Court upheld the condition of providing evidence of the existence of the 'syndrome of transsexuality', considering the classification of 'transsexuality' as a form of gender identity disorder in ICD-10,[26] the absence of a comparable international trend towards the abolition of a mental health assessment for gender recognition, and the smaller consequences for the person's physical integrity. The Court also endorsed the French Government's position that the diagnosis requirement 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. In this regard, the condition met the general interest in safeguarding the principle of the inalienability of civil status, the reliability and consistency of civil-status records, and legal certainty, given that this requirement also promotes stability in changes of gender in civil-status documents.[27] The case thus had for direct effect the illegality of a condition of sterility for legal gender recognition under Article 8 ECHR, while upholding the trans* pathologisation in general (Cannoot, 2019a).

In 2019, the Court had again the opportunity to address other medicalised conditions for legal gender recognition than the sterility requirement. The case of *X v. the Former Yugoslav Republic of Macedonia* concerned a transman, whom the Court identified as a pre-operative transsexual.[28] Indeed, the applicant had been diagnosed by a psychologist and sexologist with 'transsexuality'. Over the years, X had started hormonal treatment to increase his testosterone levels and had undergone a double mastectomy. However, he had shown no intention of undergoing sex reassigning genital surgery. From 2011 onwards, the applicant had lodged several applicants with the Macedonian civil registry in order to have the sex/gender marker and the numerical personal code[29] on his birth certificate changed in the light of his actual gender identity. However, the registry dismissed the applications, stating that X had not obtained a medical certificate providing evidence of "an actual change of sex".[30] Although the Administrative Court had quashed one of the registry's dismissals, it eventually only ordered the registry to specify the evidence that needed to be adduced without stipulating whether legal gender recognition needed to be granted or not. The applicant not only complained to the ECtHR about the lacking Macedonian regulatory framework for legal gender recognition, he also considered the obligatory condition of sex reassigning surgery a violation of this right to bodily integrity under Article 8 ECHR. However, in a somewhat artificial manner, the Court only addressed the quality of the regulatory framework. Indeed, it focussed on the legal uncertainty for transgender persons regarding the required evidence they needed to present to the civil registry.[31] Since the government could not provide any information on the procedure for obtaining the relevant evidence or that it was regulated by law or judicial practice, the Court decided that the FYR of Macedonia had failed to implement its positive obligation under Article 8 to provide quick, transparent and accessible procedures for legal gender recognition.[32] Taking into account this uncertainty regarding the required evidence, the Court decided not to speculate whether a condition of compulsory sex reassigning surgery was indeed required or not.[33] Nevertheless, as the dissenting judges – who argued that the applicant's claim did not fall under the scope of Article 8 to

[19] ECtHR 6 April 2017, App no 79885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v France, para. 83, 116.

[20] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 123.

[21] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 123.

[22] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 123.

[23] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 124–125.

[24] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 131. On 15 May 2018, the European Committee of Social Rights adopted a decision in the case of *Transgender Europe and ILGA-Europe v. the Czech Republic* in which it considered the requirement of compulsory sex reassigning surgery a violation of Article 11 of the 1961 European Social Charter (right to protection of health). In its decision, the Committee mirrored the ECtHR's reasoning in *A.P., Garçon, Nicot v. France* and held that the condition for the recognition of a trans* person's gender identity vitiates free consent to medical treatment, and that therefore such a requirement violates physical integrity, operates contrary to the notion of human dignity and consequently cannot be considered as compatible with the right to protection of health as guaranteed by Article 11§1 of the Social Charter (para. 86).

[25] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 131.

[26] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 139.

(*footnote continued*)

[27] ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon, Nicot v. France, para. 142.

[28] ECtHR 17 January 2019, App no 29683/16, X v. the Former Yugoslav Republic of Macedonia, para. 65.

[29] This 10-digit administrative code indicated whether a person was of the male or female sex.

[30] ECtHR 17 January 2019, App no 29683/16, X v. the Former Yugoslav Republic of Macedonia, paras. 10–17.

[31] ECtHR 17 January 2019, App no 29683/16, X v. the Former Yugoslav Republic of Macedonia, para. 68.

[32] ECtHR 17 January 2019, App no 29683/16, X v. the Former Yugoslav Republic of Macedonia, para. 70.

[33] ECtHR 17 January 2019, App no 29683/16, X v. the Former Yugoslav Republic of Macedonia, para. 69.

begin with – rightly stated, there were numerous indications in the domestic procedures that the Macedonian authorities required full sex reassigning surgery and would continue to do so.[34] In other words, the Court had sufficient information to know that, ultimately, the core issue for the applicant would be his objection to undergoing full sex reassignment therapy, instead of the lack of an accessible and foreseeable regulatory framework for gender recognition.

4.2.2.3. The medicalised trans narrative in the ECtHR's case law.* The ECtHR's reluctance to legally depathologise and demedicalise trans* persons in cases concerning legal gender recognition is remarkable, especially considering its clear exclusionary effects. Indeed, these requirements effectively reserve legal gender recognition for trans* persons who are able and willing to comply with those medical conditions, i.e. (a part of) transsexual persons (Cannoot, 2019a). However, it may be argued that this caution should not be surprising. While the positive obligation to foresee a procedure of legal gender recognition, which was found in the Christine Goodwin case, was formulated in general terms, the Court's argumentation was tailored specifically to the applicant's status as a *post-operative transsexual* (Theilen, 2016). And although the Court granted the States a margin of appreciation to decide on the appropriate means for achieving legal gender recognition, its reasoning clearly reaffirmed the dominant medical vision that a medical trajectory of sex reassignment is the decisive factor to 'normalise' trans(sexual) persons within the clearly defined binary sex/gender system and society. Indeed, psycho-pathologisation of gender non-conformity is considered to be necessary to ascertain that individuals who are not 'truly' trans (sexual) do not erroneously pursue a social and legal gender transition process (Gonzalez-Salzberg, 2018). As Ammaturo holds, the ECtHR has "established clear boundaries between 'legitimate' and 'illegitimate' positions for trans* persons as human rights holders" (Ammaturo, 2017). In other words, the ECtHR's case law on legal gender recognition of gender non-conforming persons is still strongly founded on the narrative of the medicalised transsexual person, despite the clear human rights concerns concerning trans* pathologisation and medicalisation.

4.2.3. International state practice

The aforementioned international developments towards full depathologisation and demedicalisation of trans* persons in procedures of legal gender recognition is also clearly present in recent State practice. Indeed, since 2012, a small, yet rapidly increasing number of countries worldwide have profoundly reformed legislation by adopting the possibility for trans* persons to have their registered sex changed on the basis of a self-declaration of their actual (binary) gender identity in an administrative procedure.[35] Although these States represent only a limited group of progressive leaders at the national level, they are important not only because of the legal result that they achieved, but arguably also because of the more general change in attitude that they help bring about (Theilen, 2016). Moreover, national developments that realise a paradigm shift in human rights protection may lead to similar results in other States through legal transplants or on the basis of case law of an international court, such as the ECtHR, that takes notice of a rising international trend and/or consensus. In this regard, Baisley has argued that, next to high-ranking UN officials, States have been the most effective norm entrepreneurs concerning issues of gender identity (Baisley, 2016).

5. Is legally depathologising and demedicalising trans* persons sufficient to protect their human rights?

Nevertheless, the question arises whether depathologising and demedicalising gender non-conformity in law and society is sufficient to protect, respect and fulfil the human rights of trans* persons, and to recognise their full and equal legal capacity. Indeed, abolishing pathologising and other medical conditions for legal gender recognition does not necessarily lead to a paradigm shift in the legal conceptualisation of the trans* person (5.1). Besides, legal reforms that merely remove psycho-medical conditions for legal gender recognition fail to recognise the legal interests of the entire trans* spectrum (5.2). Moreover, it is increasingly questioned whether any system of sex/gender registration could ever be capable of respecting the autonomy of trans* persons, while guaranteeing effective and efficient government performance at the same time. However, due to a lack of space, this contribution will not address this question of the continued legitimacy, pertinence and/or proportionality of official sex/gender registration.

5.1. The continued stereotyped conceptualisation of gender non-conformity

5.1.1. The persistent trans narrative*

The previous Sections demonstrated how the law adopted a narrative of the gender non-conforming person as someone who is suffering from a medical condition/disorder and for whom the relief consists of a social and physical transition on the basis of sex reassignment treatment. The adoption of psycho-medical requirements for gender recognition in many legal systems across the globe, served to reserve the procedure of legal gender recognition for 'true' transsexual persons, who could be 'normalised' through physical and legal transition in law and society (Ammaturo, 2017). However, it appears that the currently developing international move towards legal depathologisation and demedicalisation of trans* identities does not necessarily lead to a profound challenge of the narrative in which (potential) gender non-conforming persons have to be protected against themselves and the legal system has to be protected against insincere or 'light-hearted' applications for legal gender recognition. In other words, depathologising and demedicalising trans* persons is not always complemented by positive measures to reduce the stereotypical assumption that there is something 'abnormal' or flawed with gender non-conforming identities and behaviour (Katyal, 2017).

5.1.2. Illustration: the Belgian Gender Recognition Act

The Belgian Gender Recognition Act (GRA) of 2017 is illustrative of this development. It is indisputable that the Belgian legislator's primary aim for introducing the GRA consisted of depathologising and demedicalising trans* persons within the legal procedure of gender recognition (Cannoot, forthcoming). Indeed, before the adoption of the 2017 GRA, legal gender recognition was limited to transsexual persons who were diagnosed with gender dysphoria by a psychiatrist, underwent sex reassignment therapy as far as medically possible, and were sterilised. The GRA is therefore embedded in the recognition of the aforementioned emerging right to gender self-determination. However, despite this obvious and laudable progress in the protection of the human rights of trans* persons, the Belgian legislator failed to fully take the principle of gender self-determination to its logical consequences: the legal psycho-*pathologisation* of trans* persons was replaced by legal *paternalisation* (Cannoot, forthcoming). This failure is arguably essentially linked to persistent lingering stereotypes concerning gender non-conformity. In other words, while the Belgian GRA effectively depathologised and demedicalised adult trans* persons who apply for legal gender recognition, it has failed to truly install a framework of gender recognition based on gender self-determination.

[34] ECtHR 17 January 2019, App no 29683/16, X v. the Former Yugoslav Republic of Macedonia, Dissenting Opinion of Judges Pejchal and Wojtyczek, para. 10.

[35] At the time of writing, this group consisted of Argentina, Belgium, Chile, Colombia, Costa Rica, Denmark, Ireland, Luxembourg, Malta, Norway, Pakistan, Portugal and Uruguay. Other States that have abolished all pathologising conditions, yet have maintained a judicial procedure, include France and Greece.

On the basis of the GRA, persons who have the conviction that their registered sex is not in conformity with their inner experienced gender identity can apply for legal gender recognition with the civil registrar, who has to hand over an official brochure containing information on the legal and administrative consequences of a change of registered sex. Minimum three and maximum six months after this first declaration, the person concerned has to return to the civil registry and repeat their declaration, after which the registrar drafts a certificate to amend the registered sex. During the waiting period of three months, the Public Prosecutor may give positive or negative advice for reasons of public order. If the Prosecutor gives negative advice, the registrar is obliged to refuse the application. On the basis of the original GRA, any trans* person could only once apply for legal gender recognition through this administrative procedure. If a person could provide evidence of exceptional circumstances, legal gender recognition could be reversed by the family court. However, the Constitutional Court annulled this principled irreversibility of legal gender recognition in June 2019.[36]

Although the new procedure effectively respects trans* persons' right to bodily integrity and autonomy regarding decisions about medical treatment, it has upheld the irrational 'fear' and discomfort towards trans* experiences, that was reflected by the compulsory medical requirements under the previous legal framework (Cannoot, forthcoming). Indeed, according to the government's explanatory memorandum, a procedure of gender recognition based on a self-declaration of gender identity is inherently vulnerable to not only (identity) fraud, but also to 'light-hearted' applications for gender recognition. Throughout the procedure, several measures ('guarantees') were therefore introduced to discourage unfounded applications for amendment of the registered sex and to protect public order. These measures together amount to a considerable attempt by the government of paternalising the trans* person concerned, even though it explicitly recognised that 'all individuals need to have maximal chances to develop into who they truly are'.[37] In this regard, the two most problematic measures were the intervention by the Public Prosecutor (a) and the principled irreversibility of the change of registered sex (b):

(a) As mentioned above, the Public Prosecutor's interference is essentially aimed at preventing the commitment of identity fraud, e.g. by persons who are the object of an arrest warrant,[38] or by potential terrorists.[39] However, it is unclear to what extent the Public Prosecutor can accurately detect an application with a fraudulent intention, given the fact that – in a procedure based on self-determination – applicants do not have to substantiate their declaration with evidence from the personal sphere to support their conviction of incongruence between the registered sex and their gender identity (Cannoot, forthcoming). Moreover, the government failed to substantiate their presumption that a procedure of legal gender recognition based on self-determination would become inherently vulnerable to fraud (Bribosia, Gallus, & Rorive, 2018). After all, persons who are allegedly fleeing from justice arguably attract more attention when taking on some form of gender non-conforming behaviour (Mottet, 2013), given societal marginalisation of trans* persons. Further, the risk of exploitation of rights is minor, considering that few rights or duties in the Belgian legal order are actually gender specific, and that going against the social expectations or stigma is probably more difficult than what is involved in amending legal gender (Sørlie, 2017). Besides, governments are arguably able to link previous personal information to current personal information in their software, so that criminal records are automatically transferred in case of legal gender recognition (Lau, forthcoming). In any case, by explicitly linking legal gender recognition based on self-determination to fraud, the legislature sent a message that there is something inherently flawed about a trans* person's existence (Levasseur, 2015).

(b) The government motivated the principled irreversibility of legal gender recognition on the basis of the need to avoid that a person 'regularly' applies for an amendment of their registered sex.[40] Indeed, according to the government, 'reversibility would lead to a missing sense of seriousness among potential applicants – who need to seriously reflect on the matter of legal gender recognition'.[41] This level of caution is remarkable, especially considering the total absence of any form of qualitative or quantitative evidence to support the claim of the harm that gender fluidity would pose to society or that gender fluidity would even regularly occur.[42] Moreover, the government failed to provide any legal and/or administrative motive that is specifically related to the necessity of the irreversible nature of sex/gender registration. This conclusion is corroborated by the examples of 'exceptional circumstances' given in the preparatory works, i.e. an experience of transphobia and error leading to a decline of well-being. Besides the cynical message that the solution to an experience of discrimination would consist of reversing one's 'coming out', it was not foreseen that a person may argue that their self-defined gender identity has naturally – i.e. without any error – evolved over time, despite the Act's underlying principle of self-determination. Moreover, the principled irreversibility of legal gender recognition also potentially affects the legitimacy of sex/gender registration. Indeed, by excluding the possibility of any natural fluidity in gender identity, the individual's right gender self-determination is not only compromised, but the usefulness of the sex/gender marker is also potentially strongly diminished by increasing the likelihood that it does not correspond to social reality (Lau, forthcoming). As mentioned above, the Belgian Constitutional Court annulled this principled irreversibility in June 2019. According to the Court, the provision discriminated gender fluid persons and therefore violated the constitutional right to equality (Articles 10 and 11 of the Constitution), read together with the right to respect for private life (Article 22 of the Constitution and Article 8 ECHR). Since both gender fluid persons and persons with a 'fixed' gender identity have the same interest in not being confronted with a wrong sex/gender marker, the Court considered the additional guarantees towards the former category unjustified in light of the right to gender self-determination.

5.2. The registration of non-binary trans* persons

Pathologising and medical conditions, and especially the requirement of full sex reassignment, have also resulted in the strict maintenance of the fixed and binary nature of legal sex/gender registration. Indeed, by requiring all applicants for legal gender recognition to undergo feminising or masculinising hormonal and/or surgical treatment, gender non-conforming persons remain literally confined to the sex binary. However, abolishing binary biological criteria for legal gender recognition has not necessarily led to a legal inclusion of all variations

[36] Constitutional Court (Belgium) 19 June 2019, 99/2019.

[37] *Parl.Doc.* Chamber of representatives, 54–2403/004, 9 (own translation). Note that, through this introduction of paternalising measures of a bureaucratic nature, the State has taken over the 'gate-keeping' role of psychiatrists in medicalised procedures of legal gender recognition.

[38] *Parl.Doc.* Chamber of representatives, 54–2403/001, 21.

[39] *Parl.Doc.* Chamber of representatives, 54–2403/004, 17.

[40] *Parl.Doc.* Chamber of representatives, 54–2403/001, 22. Note that the protection of the non-disposability, truthfulness and coherence of the civil status is accepted by the ECtHR as a legitimate aim to limit self-determination regarding legal gender recognition. See ECtHR 6 April 2017, App nos 79,885/12, 52,471/13, 52,596/13, A.P., Garçon and Nicot v. France, para. 142.

[41] *Parl.Doc.* Chamber of representatives, 54–2403/001, 22 (own translation)

[42] Research by van den Brink has shown that, even when legal gender recognition is easily reversible, the number of reversions remains low (van den Brink, 2017b).

of gender identity. Indeed, probably an even more radical challenge for the law than tackling its paternalism towards trans* persons, is the recognition and legal accommodation of non-binary persons (Cannoot, forthcoming).

As of 2018, only a few countries worldwide have cautiously introduced some form of non-binary gender recognition, next to the standard options of 'male' and 'female'. Indeed, non-binary 'third' gender options (mostly 'X', 'other' or 'diverse') have been introduced through legislation or case law in States like Australia, Austria, Bangladesh, Canada, Denmark, Germany, India, Malta, Nepal, the Netherlands, New Zealand, Pakistan and a number of US States (Clarke, 2019). While some of these innovations concern the official registration in civil (birth) registers,[43] others deal with the indication of the gender marker on official identity documents, such as the international passport, identity card or driver's license.[44] Moreover, when comparing these evolutions, it immediately strikes the attention that most legal systems show clear differences with regard to the personal scope of the non-binary option. Whereas in some countries non-binary markers are exclusively reserved for persons with variations of sex characteristics (e.g. Austria, Germany and the Netherlands), they are open to non-binary transgender persons and persons with variations of sex characteristics, or even all persons in other countries (e.g. New Zealand). In countries like India and Nepal, the 'third gender' is meant to legally accommodate a distinct historical cultural group known as *'hijra'*.

Ending the binary normativity of the official sex/gender registration framework is necessary to protect the human rights of non-binary persons and to ensure their inclusivity in law and society as long as sex/gender remains registered. Moreover, it is also necessary to ensure accurate and inclusive government performance. However, the introduction of non-binarity in the official sex/gender registration could not only take the form of a third category 'X'/'other' – or even more categories for that matter –, but also be based on complete ascriptive self-determination. Indeed, from a human rights approach, there seem to be some reservations regarding the 'othering' of non-binary persons from the binary 'm/f'. As Hutton holds, "a system with a male-female binary is not necessarily more repressive than a system with a third option for gender (identity)"; a third gender option, especially when holding a strong ascriptive element, has strong potential for marginalising particular sexual identities (Hutton, 2017). This could even be true when registration as 'X'/'other' would be based on the individual's personal choice, which in any case seems to be the basic requirement from a human rights perspective (Katyal, 2017). Indeed, the creation of such third category could actually reinforce the dichotomy of 'male' and 'female' as the dominant standards, since most non-conforming, 'dubious' cases would be removed (Katyal, 2017). Nevertheless, this argument in favour of 'categorical expansionism' does not question the assumed interests of the State in gender registration (Neuman Wipfler, 2016). Indeed, an alternative path to respect a person's right to personal autonomy regarding their gender identity and to ensure their inclusivity in the law could also consist of ending sex/gender registration altogether. After all, it may be argued that 'as long as the State records gender identity, it will also police its boundaries' (Neuman Wipfler, 2016). According to van den Brink, present State practice underlines not only the 'naturalness' of the binary conception of sex/gender, but also the idea that sex/gender matters, and always matters (van den Brink, 2017a).

6. Conclusion

Since the middle of the twentieth century, trans* persons have been strongly pathologised in law and society, leading to clear limitations on their legal capacity. Indeed, for a long time the dominant perspective has been that gender non-conforming persons are suffering from a medical condition – or even a disorder – for which the relief consists of psychiatric analysis and a social and physical transition. However, over the last decade, various human rights actors have considered this pathologisation of trans* identities a violation of human rights, increasingly resulting in profound reforms of frameworks for legal gender recognition in Europe and Latin-America in order to respect trans* persons' (emerging) right to gender self-determination.

Nevertheless, the aforementioned conceptualisation of trans* persons continues to limit their human rights and legal capacity, even in the era of the depathologisation and demedicalisation of gender non-conformity. Indeed, stereotypical narratives concerning the trans* experience, and the wishes and behaviour of gender non-conforming persons continue to persist. In this regard, the recent Belgian Gender Recognition Act has shown that precautionary measures that accompany a system of depathologisation actually pursue the same functions as the psycho-pathologising requirements did: reserving the procedure of legal gender recognition for the 'true' and deserving trans* persons, and maintaining the binarity of sex and gender. The law therefore continues to exclude a broad range of individuals on the basis of unchallenged normative assumptions.

It is thus clear that a mere movement towards trans* depathologisation and demedicalisation in law will not be sufficient to protect their human rights, ensure their legal inclusivity and guarantee a full and equal legal capacity. Respecting, protecting and fulfilling the rights of trans* persons will only be achieved by profoundly reconceptualising law.

[43] For instance in Canada, Australian Capital Territory, South Australia, California, Oregon and Washington.

[44] For instance in Australia, Denmark, Malta, New Zealand.

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