

**The right to personal autonomy regarding sex (characteristics),
gender (identity and/or expression) and sexual orientation:
towards an inclusive legal system**

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Dissertation submitted to obtain the degree of Doctor of Laws

Academic year: 2018-2019

'Cogito ergo sum'

René Descartes

Acknowledgements

As this thrilling PhD adventure comes to an end, many acknowledgements are necessary. Although it might seem that academic research – and writing a doctoral dissertation in particular – is an inherently lonesome activity, many people played a crucial part over the last years. I would therefore like to express a few thank you's.

First and foremost, I want to express my gratitude to my supervisors, Prof. Dr. Toon Moonen and Prof. Dr. Eva Brems. Both truly took on the role of invested and supportive coaches throughout my PhD trajectory, and have been generous with their time, expertise and feedback. I cannot thank them enough for believing in me, inspiring me, and creating a relaxed working environment with their great sense of humour. Discussing my work and opinions with them has been nothing but sheer intellectual joy.

In addition, I want to sincerely thank Prof. Dr. Gerd Verschelden and Dr. Marjolein van den Brink, who, as members of my guidance committee, reviewed the progress of my work, provided many valuable insights and opened doors for me. I am especially grateful to Prof. Dr. Johan Vande Lanotte, who gave me the opportunity to start working at Ghent University and to follow my dream. It has been a pleasure to learn from his vast experience as a constitutional scholar, a politician and a statesman.

Although they still might profoundly challenge me with questions and critiques, I want to already thank the members of my examination commission. I would also like to especially thank the commission's chairman, Prof. Dr. Michel Tison, for being an ally in the endeavour to constantly improve the faculty's diversity policy.

I am thankful to my colleagues and friends at the Constitutional Law Research Group, and the Faculty of Law & Criminology, which houses some of the most talented and friendly people I know. There are of course many people who deserve to be included here, but a special thank you goes to Sien Devriendt, for taking over some of my tasks in the last weeks leading up to my PhD deadline and for sharing many laughs over the absurdities of university life. Thank you to Tom Wijnant, for those many lunch breaks in which we could

vent and share the latest faculty gossip. I wish to thank Martine Dewulf, Kristien Van Ingelgem, Yvan De Maeseneire and Luc De Bie for always guiding me through the maze of university bureaucracy. And of course a big thank you to my colleagues at the FDO for their support in my activities as an assistant. My genuine gratitude goes to Mieke Mestdag, whose presence brightens up our buildings. The faculty is a better place for having her here.

I consider it one of the absolute privileges of my life so far to be able to spend my days with my colleagues at the Human Rights Centre, who dedicate their professional careers to researching and fighting social injustice. They provide a voice to persons who are often left unheard, such as children, sexual minorities, indigenous peoples, migrants, sexually harassed individuals, religious minorities and victims of systemic human rights violations, to name only a few. I am in awe of their work and they continue to inspire me.

Two women were of vital importance for the realisation of this dissertation. Although it sounds like a cliché, I would truly not have been able to reach the finish line without them. They are two of the most generous persons I know, and I am proud to call them my friends. I would therefore like to express my eternal gratitude to Evelyn Merckx and Eline Kindt, for their friendship, advice and patience.

Last, but certainly not least, I want to thank my entire family and my friends. I am forever grateful to my parents, who taught their children the value of empathy and perseverance. In a small, yet important way, they make the world a better place to live. Thank you to my sister whose love and support I feel every day, and to Laura and Jana for their never-ending enthusiasm. A special thank you goes to Helena Payne, who is one of the very few people who have the capacity to make me feel completely relaxed. Thank you for all those fantastic weekends. Finally, I want to thank my husband Timothy, who has rocked my world for the last eight years with his great humour, eternal patience and unconditional support. Here's to many more years to come.

I dedicate this work to the people whose legal struggles are analysed in this thesis. Meeting you, listening to your stories and reading about your lives has been the biggest blessing of these last few years.

Summary

In recent years, the legal rights of LGBTIQ+ persons (lesbian, gay, bisexual, transgender, intersex and queer/questioning persons) have received increased attention at the international and national level. Considerable legal progress has been made in a short period of time, even though a divergent trend is occurring in several countries, mainly in Africa, Eastern Europe and parts of the Americas. Still, when looking at the national level, a study of 2016 showed that constitutional provisions that explicitly address rights based on gender identity and/or sexual orientation are rare, particularly in comparison to provisions concerning sex, race or ethnicity, religion and disability. Besides, constitutional provisions that do mention sexual orientation or gender identity are often confined to prohibiting discrimination or guaranteeing equal rights and do not confer the autonomy to each individual person to determine their sexual identity, and to live free from normative stereotypes in the first place. Indeed, despite the progress over the last decades, the law has remained largely blind to the subtleties of sexual identity, and persists in trying to assign individuals legal and social identities that are not their own, based on criteria which themselves are uninformed assumptions and stereotypes.

Nevertheless, stereotypes are inherently part of humanity. Indeed, via stereotypes, all dimensions of personality or identity that make an individual person unique are consequently filtered through the lens of generalised assumptions of the group with which the individual is identified. In this regard, the question arises whether the law is capable of effectively respecting, protecting and fulfilling human rights if it reinforces or facilitates the continuation of stereotypes in law and society. This question is especially relevant for socially marginalised groups, such as persons who have suffered structural and institutionalised discrimination on the basis of their sexual identity, i.e. sexual minorities. Even though sex characteristics, gender identity, gender expression and sexual orientation are part of an individual's most intimate and fundamental characteristics, the State seems eager to regulate those concepts on the basis of normative assumptions, for instance through the registration of a person's sex at birth, legislation regarding marriage and adoption rights, or conditions for the legal recognition of a

person's gender identity. Since not all forms of stereotyping in law and society are necessarily detrimental and in need of elimination, the legal system and its actors are faced with the difficult task of distinguishing between harmful and acceptable stereotyping. In any case, from a human rights perspective, stereotypes become harmful when they operate to deny individuals the full enjoyment of their fundamental rights by being an inherent human rights violation or a contributing factor to such violation.

This thesis studies whether a legal framework based on (the recognition of a right to) personal autonomy regarding sex (characteristics), gender (identity/expression) and sexual orientation would enhance the legal status of LGBTIQ+ persons. In this regard, it not only addresses the question to what extent the present legal framework recognises, protects and fulfils the rights of sexual minorities and how potential gaps in legal protection could be tackled. Specific attention is also given to the possible role and value of constitutional law in this debate. The thesis makes use of the Belgian legal order as an illustration of a stereotyped Western national legal system.

The dissertation is divided into six chapters. The first chapter introduces the reader to the research and elaborates on its objectives, and underlying research questions. Furthermore, the methodology is clarified. The second chapter elaborates on the concepts of 'sex', 'gender identity', 'gender expression' and 'sexual orientation'. Although the chapter mainly refers to non-legal, sociological, psychological and medical literature, its ambition is not to provide a comprehensive scientific overview, but insights that anticipate the specific human rights analysis. The third chapter provides an analysis of the legal status of persons with variations of sex characteristics in the Belgian legal order from the perspective of their right to personal autonomy. Chapter four presents a comparable analysis of the legal status of transgender persons, taking into account their right to personal autonomy. Chapter five discusses how a constitutional rights provision could be formulated in order to enhance the legal status of LGBTIQ+ persons. Lastly, chapter six provides a general conclusion and aims to answer the research questions. Moreover, suggestions for further research are put forward.

The thesis concludes that, although there are differences in the extent to which the Belgian legal framework respects, protects and fulfills the right to personal autonomy of persons with variations of sex characteristics, transgender persons and non-heterosexual persons, it is clear that the legal status of all three groups shows gaps due to an incorrect conceptual understanding of the true scope and variety of the human sexual identity. Abolishing stereotypes and normative assumptions concerning the sexual identity of a person in law is therefore crucial to improve the legal status of persons who are socially non-conforming with regard to their sex (characteristics), gender (identity/expression) and/or sexual orientation. Indeed, this thesis proves that, by failing to correctly conceptually address the situation of sexual minorities, the law fails to respect and protect their right to personal autonomy. Moreover, this violation of the human rights of sexual minorities also leads to a failure to fully include them within the law's expressive scope. In this regard, the thesis points out that the introduction of a fundamental right to personal autonomy regarding a person's sexual identity by the Constituent power would provide a mandate to – or even compel – the legislature to adopt measures that improve the legal and social status of sexual minorities. Moreover, the provision would also create the negative obligation for the State to refrain from expressing or acting on stereotypes and other normative assumptions about a person's sex (characteristics), gender (identity/expression) and/or sexual orientation. Important positive obligations would also be generated. Indeed, a substantive and sustainable realisation of a fundamental right to autonomy regarding sexual identity would rely on the implementation of the State's positive obligation to bring about cultural change regarding the conceptualisation of sex, sexual orientation and gender (identity/expression) in law and society.

Samenvatting

In recente jaren hebben de grondrechten van zogenaamde LHBTIQ+ personen (lesbische, homoseksuele, biseksuele, transgender, intersekse en queer / questioning personen) veel aandacht gekregen op internationaal en nationaal niveau. Op korte tijd is dan ook aanzienlijke juridische vooruitgang geboekt, hoewel zich in verschillende landen een andere trend voordoet, met name in Afrika, Oost-Europa en delen van Amerika. Wanneer we naar het nationale niveau kijken, heeft een studie van 2016 aangetoond dat grondwettelijke bepalingen die expliciet betrekking hebben op genderidentiteit en/of seksuele geaardheid zeldzaam zijn, zeker in vergelijking met bepalingen betreffende geslacht, ras of etniciteit, religie en handicap. Bovendien zijn constitutionele bepalingen die seksuele geaardheid of genderidentiteit vermelden vaak beperkt tot het verbieden van discriminatie of het garanderen van gelijke rechten en verlenen ze niet de autonomie aan elke individuele persoon om hun seksuele identiteit te bepalen, en om vrij van normatieve stereotypen te leven. Ondanks de aanzienlijke vooruitgang in de afgelopen decennia is het recht grotendeels blind gebleven voor de subtiliteit van seksuele identiteit en wijst het nog steeds juridische en sociale identiteiten toe aan individuen op basis van normatieve assumpties en stereotypen.

Stereotypen zijn een inherent onderdeel van het mens-zijn. Via stereotypen worden alle dimensies van persoonlijkheid of identiteit die een individu uniek maken, consequent gefilterd aan de hand van assumpties over de groep waarmee het individu wordt geïdentificeerd. In dit verband rijst de vraag of het recht in staat is om mensenrechten effectief te respecteren, te beschermen en te vervullen als het de voortzetting van stereotypen in de samenleving versterkt of faciliteert. Deze vraag is vooral relevant voor maatschappelijk gemarginaliseerde groepen, zoals personen die geconfronteerd worden met structurele en geïnstitutionaliseerde discriminatie op basis van hun seksuele identiteit, i.e. seksuele minderheden. Hoewel geslacht(skenmerken), genderidentiteit, genderexpressie en seksuele oriëntatie deel uitmaken van de meest intieme en fundamentele kenmerken van een persoon, lijkt het rechtssysteem erop gericht om die concepten te reguleren op basis van normatieve assumpties, bijvoorbeeld door de

registratie van iemands geslacht bij de geboorte, wetgeving met betrekking tot het huwelijk en adoptierechten, of voorwaarden voor de wettelijke erkenning van iemands genderidentiteit. Omdat niet alle vormen van stereotypering in recht en maatschappij noodzakelijkerwijs schadelijk zijn en geëlimineerd moeten worden, worden het rechtssysteem en zijn actoren geconfronteerd met de moeilijke taak onderscheid te maken tussen schadelijke en aanvaardbare stereotypen. Vanuit een mensenrechtenperspectief worden stereotypen in elk geval schadelijk wanneer ze ertoe leiden dat aan individuen het volledige genot van hun fundamentele rechten ontzegd wordt, wanneer ze een inherente schending van de mensenrechten zijn of wanneer ze bijdragen aan dergelijke schending.

Dit proefschrift onderzoekt of een wettelijk kader gebaseerd op (de grondwettelijke erkenning van een recht op) persoonlijke autonomie met betrekking tot geslacht(skenmerken), gender(identiteit/expressie) en seksuele geaardheid de rechtspositie van LHBTIQ+ personen zou verbeteren. Het gaat daarbij in eerste instantie in op de vraag in hoeverre het huidige rechtskader de rechten van seksuele minderheden erkent, beschermt en vervult en hoe mogelijke lacunes in de rechtsbescherming kunnen worden aangepakt. Specifieke aandacht wordt daarnaast ook besteed aan de mogelijke rol en waarde van het grondwettelijk recht in dit debat. Het onderzoek hanteert België als illustratie van een gestereotypeerd Westers nationaal rechtstelsel.

Het proefschrift is verdeeld in zes hoofdstukken. Het eerste hoofdstuk introduceert de lezer tot het onderzoek en gaat in op de doelstellingen en onderliggende onderzoeksvragen. Voorts wordt de methodiek opgehelderd. Het tweede hoofdstuk gaat in op de begrippen 'geslacht', 'genderidentiteit', 'genderexpressie' en 'seksuele oriëntatie'. Hoewel het hoofdstuk vooral verwijst naar niet-juridische, sociologische, psychologische en medische literatuur, heeft het niet de ambitie om een uitgebreid interdisciplinair wetenschappelijk overzicht te bieden, maar wel inzichten die anticiperen op de specifieke mensenrechtenanalyse. Het derde hoofdstuk geeft een analyse van de rechtspositie van personen met variaties in geslachtskenmerken in de Belgische rechtsorde vanuit het perspectief van hun recht op persoonlijke autonomie. Hoofdstuk vier biedt een vergelijkbare analyse van de

rechtspositie van transgender personen, rekening houdend met hun recht op persoonlijke autonomie. Hoofdstuk vijf analyseert hoe een nieuw grondrecht in de Belgische grondwet kan worden geformuleerd om de rechtspositie van LHBTIQ+ personen te verbeteren. Ten slotte geeft hoofdstuk zes een algemene conclusie en worden de onderzoeksvragen beantwoord. Bovendien worden suggesties voor verder onderzoek naar voren gebracht.

Het proefschrift besluit dat, hoewel er verschillen zijn in de mate waarin het Belgische recht het recht op persoonlijke autonomie van personen met variaties in geslachtskenmerken, transgender personen en niet-heteroseksuele personen erkent, beschermt en vervult, het duidelijk is dat hun rechtspositie lacunes vertoont als gevolg van een onjuist conceptueel begrip van de werkelijke omvang en diversiteit van de menselijke seksuele identiteit. Het bestrijden van juridische stereotypen en normatieve assumpties met betrekking tot de seksuele identiteit van een persoon is daarom cruciaal om de rechtspositie te verbeteren van personen die niet beantwoorden aan de maatschappelijke verwachtingen wat betreft hun geslacht(skenmerken), gender(identiteit/expressie) en/of seksuele oriëntatie. Dit proefschrift bewijst dat het recht nalaat het recht op persoonlijke autonomie te respecteren en te beschermen door de persoonlijke situatie van seksuele minderheden niet correct te conceptualiseren. Het proefschrift toont in dit verband aan dat de invoering van een fundamenteel recht op persoonlijke autonomie met betrekking tot de seksuele identiteit van een persoon door de constituanten een mandaat zou bieden aan de wetgever – of de wetgever zelfs zou dwingen – om maatregelen te nemen om de rechtspositie en sociale positie van seksuele minderheden te versterken. Bovendien zou de bepaling ook de negatieve verplichting creëren voor de Staat om zich te onthouden van het uiten van of handelen naar stereotypen en andere normatieve aannames over het geslacht, de gender(identiteit/expressie) en/of de seksuele geaardheid van een individueel persoon. Belangrijke positieve verplichtingen zouden ook worden gegenereerd. Zo gaat een substantiële en duurzame realisatie van een fundamenteel recht op autonomie met betrekking tot seksuele identiteit gepaard met de implementatie van de positieve verplichting van de Staat om culturele verandering teweeg te brengen met betrekking tot de

conceptualisering van geslacht, seksuele oriëntatie en
gender(identiteit/expressie) in recht en samenleving.

List of abbreviations

CAT	Convention Against Torture
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
CoM	Council of Europe Committee of Ministers
CJEU	Court of Justice of the European Union
CRPD	Convention on the Rights of Persons with Disabilities
DSD	Differences/Disorders of Sex Development
DSM	Diagnostic and Statistical Manual of Mental Disorders
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union

FRA	European Union Fundamental Rights Agency
GIGESC Act	Gender Identity, Gender Expression and Sex Characteristics Act (Malta)
GRA	Gender Recognition Act
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICD	International Classification of Diseases
ICRC	International Convention on the Rights of the Child
LGB+	Lesbian, Gay, Bisexual +
LGBTIQ+	Lesbian, Gay, Bisexual, Transgender, Intersex, Questioning/Queer +
LGBTIQA+	Lesbian, Gay, Bisexual, Transgender, Intersex, Questioning/Queer, Asexual/Allied+
NNID	Nederlandse Organisatie voor Seksediversiteit
OHCHR	Office of the High Commissioner for Human Rights

PACE	Council of Europe Parliamentary Assembly
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organisation

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Chapter I. Introduction

1. Setting the stage: researching the legal status of LGBTIQ+ persons in Belgium

The legal rights of LGBTIQ+ persons¹ have recently received increased attention at the international and national level, especially with regard to the protection against homophobic and transphobic violence and the prohibition of discrimination on grounds of sexual orientation and gender identity.² Considerable legal progress has been made in a short period of time, even though a divergent trend is occurring in several countries, mainly in Africa, Eastern Europe and parts of the Americas.³ Still, when looking at the national level, a study of 2016 showed that constitutional provisions that explicitly address rights based on gender identity and/or sexual orientation are rare,

¹ Lesbian, gay, bisexual, transgender, intersex and queer/questioning persons. The '+' refers to the open-endedness of this categorisation, meaning that the acronym also includes all other forms of socially non-conforming sexualities, variations of sex characteristics and/or gender identities/expressions. Chapter II will provide definitions and an extensive contextualisation of all relevant terminology used throughout this thesis, such as, *inter alia*, sexual identity, sex, sex characteristics, gender identity, gender expression, and sexual orientation, and the social normativities connected to them. See *infra* p. 63.

² See M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 8.

³ A. RAUB, A. CASSOLA, I. LATZ and J. HEYMANN, "Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions", *Yale Journal of Law and Feminism* 2016, p. 152. See also A. UPPALAPATI et al., "International Regulation of Sexual Orientation, Gender Identity, and Sexual Anatomy", *The Georgetown Journal of Gender and the Law* 2017, Vol. 18, p. 641-655. See also M. HADLER and J. SYMONS, "World Society Divided: Divergent Trends in State Responses to Sexual Minorities and Their Reflection in Public Attitudes", *Social Forces* 2018, Vol. 96(4), p. 1724. See also P. LIOLA TONAKATTO, "A critical comparative law analysis on challenging anti-homosexual legislation in Uganda", *UCL Journal of Law and Jurisprudence* 2018, Vol. 7, p. 82-113. 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 transgender rights. In Hungary, all gender studies were banned at university level and in the US, the Department of Health and Human Services defined the legal notion of 'sex' as 'a person's status as male or female based on immutable biological traits identifiable by or before birth'. See A. FAUSTO-STERLING, "Why Sex is Not Binary. The complexity is more than cultural. It's biological, too", <<https://www.nytimes.com/2018/10/25/opinion/sex-biology-binary.html>> (last visited 26 October 2018).

however, particularly in comparison to provisions concerning sex,⁴ race or ethnicity, religion and disability.⁵ Constitutional provisions that do mention sexual orientation or gender identity are often confined to prohibiting discrimination or guaranteeing equal rights and do not confer the autonomy to each individual person to determine their sexual identity, and to live free from normative expectations in the first place. Despite the considerable progress over the last decades, the law has remained largely blind to the subtleties of sexual identity, and persists in trying to assign individuals legal and social identities that are not their own, based on criteria which themselves are uninformed assumptions and stereotypes.⁶ This situation not only denies the individual identity of a considerable group of human beings, but arguably also affects the legitimacy, pertinence and proportionality of government performance that is connected to sexual identity.⁷

Nevertheless, stereotypes are inherently part of humanity.⁸ According to COOK and CUSACK, through stereotyping, all humans produce generalisations or preconceptions concerning attributes, characteristics, roles or

⁴ The prohibition of discrimination on the basis of 'sex' in this context has to be interpreted as the prohibition of discrimination between men and women. See C. A. MACKINNON, "Gender in Constitutions" in M. ROSENFELD & A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 405.

⁵ Only ten countries constitutionally prohibit discrimination or guarantee equal rights on the basis of sexual orientation: Bolivia, Ecuador, Fiji, Mexico, Malta, New Zealand, Portugal, South Africa, Sweden, and the United Kingdom. Only five constitutions additionally prohibit discrimination on the basis of gender identity: Bolivia, Ecuador, Fiji, Malta and the United Kingdom. See A. RAUB, A. CASSOLA, I. LATZ and J. HEYMANN, "Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions", *Yale Journal of Law and Feminism* 2016, p. 150-151.

⁶ B. VANDERHORST, "Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex", *Harvard Law & Policy Review* 2015, Vol. 9, p. 242.

⁷ *Ibid.*, p. 244.

⁸ Although this thesis mainly makes use of the term 'stereotypes', authors like LAU refer to 'scripts'. According to LAU, the notion of 'gender scripts' suggests connectivity among stereotypes that are related to sexual identity. For instance, the 'femininity script' is constituted by the stereotypes that women have 'typical' female genitalia, carry themselves softly, possess nurturing qualities, partner with men and prioritise family over their career. See H. LAU, "Gender scripting and deliberative democracy" in M. FINEMAN (ed.), *Transcending the boundaries of law. Generations of feminism and legal theory*, Abingdon, Routledge, 2010, p. 327.

appearances of members of a particular social group, which renders unnecessary the consideration of any particular individual's abilities, needs, wishes and circumstances.⁹ Indeed, via stereotypes, all dimensions of personality or identity that make an individual person unique are consequently filtered through the lens of generalised assumptions of the group with which the individual is identified,¹⁰ which may be descriptive and/or normative in content.¹¹ In this regard, the question arises whether the law is capable of effectively respecting, protecting and fulfilling human rights if it reinforces or facilitates the continuation of stereotypes in law and society.¹² This question is especially relevant for socially marginalised groups, such as persons who have suffered structural and institutionalised discrimination on the basis of their sexual identity, i.e. sexual minorities. Even though sex characteristics, gender identity, gender expression and sexual orientation are part of an individual's most intimate characteristics,¹³ the State seems eager to regulate sexual identity on the basis of normative assumptions, for instance through the registration of a person's sex at birth,¹⁴

⁹ R. J. COOK and S. CUSACK, *Gender Stereotyping. Transnational Legal Perspectives*, Philadelphia, University of Pennsylvania Press, 2010, p. 1. See on the existence, role and harm of stereotypes also L. PERONI and A. TIMMER, "Gender Stereotyping in Domestic Violence Cases. An Analysis of the European Court of Human Rights' Jurisprudence" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 40-42.

¹⁰ R. J. COOK and S. CUSACK, *Gender Stereotyping. Transnational Legal Perspectives*, Philadelphia, University of Pennsylvania Press, 2010, p. 9.

¹¹ See also E. BREMS and A. TIMMER, "Introduction" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 2.

¹² R. J. COOK and S. CUSACK, *Gender Stereotyping. Transnational Legal Perspectives*, Philadelphia, University of Pennsylvania Press, 2010, p. 36-37.

¹³ See for instance J. MARSHALL, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 100.

¹⁴ Koninklijk Besluit 16 juli 1992 tot vaststelling van de informatie die wordt opgenomen in de bevolkingsregisters en het vreemdelingenregister [Royal Decree 16 July 1992 determining the information included in the civil register and the register of foreigners], *Belgian Gazette* 15 August 1992, p. 18038.

legislation regarding marriage and adoption rights,¹⁵ or conditions for the legal recognition of a person's gender identity.¹⁶

Since not all forms of stereotyping in law and society are necessarily detrimental and in need of elimination, the legal system and its actors are faced with the difficult task of distinguishing between harmful and acceptable stereotyping.¹⁷ From a human rights perspective, stereotypes encroach upon the individual's personal autonomy.¹⁸ They become harmful, even when they appear to be benevolent,¹⁹ when they operate to deny individuals the full enjoyment of their fundamental rights, either by constituting a human rights

¹⁵ Wet 13 februari 2003 tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen in het Burgerlijk Wetboek [Act 13 February 2003 opening marriage to persons of the same sex and amending several provisions of the Civil Code], *Belgian Gazette* 28 February 2003, p. 9880; Wet 18 mei 2006 tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek, teneinde de adoptie door personen van hetzelfde geslacht mogelijk te maken [Act 18 May 2006 amending several provisions of the Civil Code to enable adoption by persons of the same sex], *Belgian Gazette* 20 June 2006, p. 31128.

¹⁶ Wet 25 juni 2017 tot hervorming van regelingen inzake transgenders wat de vermelding van een aanpassing van de registratie van het geslacht in de akten van de burgerlijke stand en de gevolgen hiervan betreft [Act 25 June 2017 reforming the regulations concerning transgender persons regarding the mention and amendment of the registration of sex in civil certificates and the consequences thereof], *Belgian Gazette* 10 July 2017, p. 71456.

¹⁷ E. BREMS and A. TIMMER, "Introduction" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 3.

¹⁸ V. UNDURRAGA, "Gender Stereotyping in the Case Law of the Inter-American Court of Human Rights" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 84. According to FREDMAN, stigmatising stereotypes can also be addressed from a human rights perspective through a reconceptualised right to substantive equality. According to FREDMAN's model, substantive equality is a four dimensional framework of aims and objectives: "Firstly, the right to substantive equality should aim to redress disadvantage. Second, it should counter prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic. Third, it should enhance voice and participation, countering both political and social exclusion. Finally, it should accommodate difference and achieve structural change". In her view, substantive equality is capable of addressing gender as a social construct, and therefore of tackling harmful normative assumptions of gender identity that limit the human rights of socially non-conforming persons. See S. FREDMAN, "Substantive equality revisited", *International Journal of Constitutional Law* 2016, Vol. 14(3), p. 712-738.

¹⁹ V. UNDURRAGA, "Gender Stereotyping in the Case Law of the Inter-American Court of Human Rights" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 84.

violation in itself or by contributing to such violation.²⁰ This thesis aims to study how law expresses stereotypes and assumptions concerning sex (characteristics), gender (identity/expression) and/or sexual orientation that determine a stereotyped conception of the legal subject, and how they could be tackled in order to improve the legal status and protection of LGBTIQ+ persons, taking into account their autonomy needs. Although – as explained below – it will make use of the Belgian legal order as an illustration of a stereotyped national legal system, its findings are applicable to most Western legal systems.

Research concerning the legal and social position of LGBTIQ+ persons has been in full expansion since the beginning of the 21st century. From a human rights perspective, a catalyst effect stemmed from the adoption of the Yogyakarta Principles. 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.²¹ The result was a universal guide to human rights which applies binding general international legal standards to the situation of LGBTIQ+ persons. Besides promoting a 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, and are also presented and used in this thesis from Chapter II onwards.²² In 2017, the Principles were updated through the addition of ten new provisions (Yogyakarta Principles +10). These 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

²⁰ E. BREMS and A. TIMMER, “Introduction” in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 4.

²¹ See <www.yogyakartaprinciples.org> (last visited 17 December 2018). See also M. O’FLAHERTY and J. FISHER, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta principles”, *Human Rights Law Review* 2008, p. 207-248.

²² See *infra* Chapter II, p. 63.

of persons with variations of sex characteristics. Since that update, the Yogyakarta Principles also provide a definition of the concepts 'gender expression' and 'sex characteristics'.

Researching how the legal status of LGBTIQ+ persons can be improved has clear social relevance, since data from all over the world shows that – despite positive evolutions since the 1990's – sexual minorities continue to experience high levels of discrimination and verbal, physical and material violence. Interestingly, research has shown that these discriminatory attitudes and instances of violence are especially reserved for persons who show 'non-conformist' behaviour. In other words, especially those LGBTIQ+ persons who fail to act according to the expectations of how 'good' LGBTIQ+ persons are supposed to behave become the object of stigma and violence.²³ By way of introduction, the following sections will briefly point out some of the most pressing issues that sexual minorities face in Belgium, and how the Belgian legal system has responded or failed to do so. Most of these issues are extensively and critically addressed in Chapters III, IV and V of this thesis.

A. The social and legal position of LGB+ persons in Belgium

The available data on the social status of LGB+ persons (lesbian, gay, bisexual and all other non-heterosexual variants of sexual orientation) in Belgium shows that almost all members of this group are regularly confronted with discrimination, prejudice and different forms of verbal and physical violence.²⁴ These data are comparable to figures stemming from world-wide research.²⁵ Whereas a recent survey by iVox and the Belgian Interfederal Centre for Equal Opportunities (Unia) showed that Belgians are increasingly tolerant towards non-heterosexual persons *in abstracto*, full acceptance remains a point of concern with regard to concrete themes, such as

²³ M. DIERCKX, P. MEIER and J. MOTMANS, "'Beyond the Box': A Comprehensive Study of Sexist, Homophobic, and Transphobic Attitudes Among the Belgian Population", *DiGeSt. Journal of Diversity and Gender Studies* 2017, Vol. 4(1), p. 7-8.

²⁴ *Ibid.*, p. 5-34.

²⁵ See A. UPPALAPATI et al., "International Regulation of Sexual Orientation, Gender Identity, and Sexual Anatomy", *The Georgetown Journal of Gender and the Law* 2017, Vol. 18, p. 635-709.

education, employment and sports.²⁶ Moreover, nine out of ten non-heterosexual persons have been confronted with verbal or psychological violence, three out of ten with physical violence and one in five with material violence, leading to lower self-esteem, negative and even suicidal thoughts.²⁷ This discrepancy between the general feelings towards LGB+ persons and the behaviour expected of them is rooted in societal heteronormativity, i.e. the institutions, structure of understanding and practical orientations that make heterosexuality and the heterosexual lifestyle in the nuclear family seem not only coherent, but also privileged.²⁸ Considering that the Belgian legal system – specifically civil law – was conceived when legal recognition of homosexuality was unthinkable, it was untenably permeated with heteronormativity.²⁹ However, since then, significant legal progress has been made, resulting in almost full formal equality between all persons on the basis of their sexual orientation. Nevertheless, it has also been argued that granting rights to LGB+ persons on the basis of non-discrimination – although commendable – pressures them to come and speak out on the basis of clear-cut categories such as ‘homosexual’ or ‘bisexual’, which reduces the complexity and ambiguity of sexual orientation and conduct.³⁰

²⁶ UNIA, “Onderzoeksrapport iVox – Homofobie in België anno 2016 [Research report iVox – Homophobia in Belgium anno 2016]” <https://www.unia.be/files/Documenten/Publicaties_docs/Onderzoeksrapport_Unia_-_iVOX.pdf> (last visited 14 August 2018).

²⁷ M. VAN HOUTTE, A. DEWAELE, L. D’HAESE, “Geweld tegenover holebi’s. Verkennende studie over de beleving, de omstandigheden en de uitkomsten van holebigeweld in Vlaanderen [Violence against LGB persons. Explorative study on the experience, circumstances and results of LGB related violence in Flanders]”, <<http://www.steunpuntgelijkekansen.be/wp-content/uploads/Geweld-tegenover-Holebis-I-tussentijdsrapport-2013-Lies-dHaese-130514-bvl.pdf>> (last visited 14 August 2018).

²⁸ A DEWAELE, N. COX, W. VAN DEN BERGHE and J. VINCKE, *De maatschappelijke positie van holebi’s en hun sociale netwerken: over vriendschap en andere bloedbanden* [The social position of LGB persons and their social networks: on friendship and other blood bonds], Antwerp/Hasselt, Policy Research Centre on Equality Policies, 2006. The concept of heteronormativity is further explained below. See *infra* p. 95.

²⁹ E. BREMS and L. STEVENS, “Inleiding [Introduction]” in E. BREMS and L. STEVENS (eds.), *Recht en gender in België* [Law and Gender in Belgium], Bruges, die Keure, 2011, p. 21.

³⁰ S. KATYAL, “Exporting identity”, *Yale Journal of Law and Feminism* 2002, Vol. 14, p. 171.

B. The social and legal position of transgender persons in Belgium

Recent population-based research in Flanders³¹ showed that gender incongruence³² was found with 0.7% of persons registered male at birth and with 0.6% of persons registered female at birth.³³ Moreover, 2.2% of persons registered male at birth and 1.9% of persons registered female at birth indicated experiences of gender ambivalence.³⁴ These prevalence rates represented much higher figures than prior studies had indicated. Moreover, the so-called ‘transgender taboo’ seems to be diminishing, as more people find their way to care programmes³⁵ and transgender persons are increasingly positively represented in popular media across the globe.³⁶ The improved registration of and attention for the prevalence of gender non-conformity (especially among minors) is accompanied by the international legal attention for the often far-reaching requirements for transgender persons to obtain legal recognition of their actual gender identity. Indeed, in many countries worldwide, transgender persons have to comply with invasive medical requirements, such as gender affirming surgery, sterility and/or hormonal treatment, in order to have their official (birth) sex registration amended in

³¹ E. VAN CAENEGEM, K. WIERCKX, E. ELAUT, A. BUYSSE, A. DEWAELE, F. VAN NIEUWERBURGH, G. DE CUYPERE and G. T’SJOEN, “Prevalence of gender nonconformity in Flanders, Belgium”, *Archives of Sexual Behavior*, 2015, p. 1292.

³² Gender incongruence (within the binary sex/gender model (male/female)) refers to the situation where a person identifies stronger with the other sex than with the sex assigned at birth.

³³ This concerns 17,150-17,665 and 14,743-15,221 persons respectively.

³⁴ Gender ambivalence refers to the situation where a person identifies equally with another sex as with the sex assigned at birth. This concerns 54,256-55,168 and 47,020-47,865 persons respectively.

³⁵ See J. MOTMANS, E. WYVERKENS, J. DEFREYNE, “Being Transgender in Belgium. Ten Years Later”, <https://igvm-iefh.belgium.be/sites/default/files/118_-_being_transgender_in_belgium.pdf> (last visited 6 December 2018), p. 17.

³⁶ E. BRIBOSIA and I. RORIVE, “Human rights integration in action: making equality law work for trans people in Belgium” in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 111. See also J. MOTMANS, E. WYVERKENS, J. DEFREYNE, “Being Transgender in Belgium. Ten Years Later”, <https://igvm-iefh.belgium.be/sites/default/files/118_-_being_transgender_in_belgium.pdf> (last visited 6 December 2018), p. 16.

the light of their self-experienced gender identity.³⁷ However, a small, but rapidly growing number of (mostly European and South-American) States have recently reformed their legal framework of legal gender recognition, by allowing transgender persons to change their official sex registration on the basis of gender self-determination. In 2017-2018, Belgium joined this group by replacing the 2007 Act on Transsexuality, which the federal government considered to be no longer in conformity with the State's obligations under international and European human rights law, with a new legal framework of gender recognition based on self-determination.³⁸ In June 2019, the Belgian Constitutional Court delivered a true landmark ruling in which it found the absence of any form of recognition of non-binary gender identities in the 2017 Gender Recognition Act discriminatory, in light of the right to gender self-determination of non-binary persons.³⁹ The legal status of transgender persons will therefore be again improved in the near future.

However, it may be argued that the focus in law on the possibility of changing one's registered sex, and anti-discrimination legislation as the instrument for dealing with transgender people is too simplistic and under-inclusive. Indeed, a person's subjectivity, or sense of self, may differ from the outward gender identity which one may adopt or is allowed to adopt by the legal system.⁴⁰ Moreover, this internally experienced gender identity may be expressed in ways that are inconsistent with social expectations associated with that gender identity. This (potential) dissonance between internally experienced gender, externalised gender identity, gender expression and conduct is not fully served by legislation predominantly focussing on the protection of the externalised and standardised gender identity through non-discrimination or legal recognition, as it – again – requires placing oneself in a certain predefined category. Moreover, it may be questioned whether reforming procedures for legal gender recognition by introducing self-determination,

³⁷ J.M. SCHERPE and P. DUNNE, "Comparative analysis and recommendations" in J.M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, p. 622.

³⁸ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 4.

³⁹ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019.

⁴⁰ S. KATYAL, "Exporting identity", *Yale Journal of Law and Feminism* 2002, p. 168.

without addressing normative legal stereotypes concerning gender identity and expression, sufficiently takes into account and protects the interests and human rights of all gender non-conforming persons. In any case, instances of discrimination and transphobia are frequently reported by transgender persons, and these experiences have a strong impact on their mental health: depression, suicidal thoughts, low self-esteem and a fatalistic attitude are common among members of this group.⁴¹

C. The social and legal position of persons with variations of sex characteristics in Belgium

In early 2017, Belgian international model Hanne Gaby Odiele ‘came out’ as a person with variations of sex characteristics, which stirred debate worldwide.⁴² In various interviews, Hanne talked about the non-consensual sex ‘normalising’ medical treatment she underwent when she was still a child and the secrecy that surrounded it. Indeed, since the mid-20th century the dominant medical standards of care regarding variations of sex characteristics have been based on the performance of so-called assigning/normalising treatment on the sex characteristics of the person concerned during infancy or early childhood, even though there was no medical necessity at hand. Although the beginning of the 21st century marked the adoption of a new medical paradigm based on transparency and attention for the opinion and participation of the person concerned (especially minors), data shows that non-consensual and medically deferrable treatment on persons with variations of sex characteristics still occurs all across the world, including Belgium.⁴³ Since the late 1990’s and early 2000’s, activists and international human rights actors have addressed this medicalisation of persons with variations of sex characteristics from a human rights approach and have called for the legal prohibition of unnecessary invasive treatment on a

⁴¹ J. MOTMANS, E. WYVERKENS, J. DEFREYNE, “Being Transgender in Belgium. Ten Years Later”, https://igvm-iefh.belgium.be/sites/default/files/118_-_being_transgender_in_belgium.pdf (last visited 6 December 2018), p. 16-17.

⁴² See <https://www.theguardian.com/fashion/2017/apr/23/intersex-and-proud-hanne-gaby-odiele-the-model-finally-celebrating-her-body> (last visited 17 August 2018).

⁴³ See *infra* Chapter III, p. 132.

person's sex characteristics.⁴⁴ Nevertheless, stereotypes regarding the assumed necessary congruence between a person's sex and gender identity and the importance of 'normal' aesthetics of genitalia for mental well-being, as well as concerning the binary conceptualisation of sex (male/female) continue to persist and inform medical treatment. Except for a handful of examples worldwide, most States do not address the situation of persons with variations of sex characteristics in their domestic legal order.

2. Objectives, research questions and limits

A. Objectives, design and research questions

Given all considerations mentioned above, it is necessary to study whether a legal framework based on (the recognition of a right to) personal autonomy regarding sex (characteristics), sexual orientation and gender identity/expression would enhance the legal status of LGBTIQ+ persons. In this regard, this thesis not only addresses the question to what extent the present legal framework recognises, protects and fulfils the rights of sexual minorities and how potential gaps in legal protection could be tackled. Specific attention is also given to the possible role and value of constitutional law in this debate. Although legal systems may use a variety of legislative, judicial and policy channels to address the rights of LGBTIQ+ persons, constitutions are important tools, because of their symbolic and legal weight, resistance to reversal in case of changes in the government, and burdensome amendment procedure.⁴⁵ Moreover, constitutional provisions could have a catalysing effect for advancing protection in practice through litigation in court.

⁴⁴ M. SUDAI, "Revisiting the limits of professional autonomy: the intersex rights movement's path to de-medicalization", *Harvard Journal of Law & Gender* 2018, Vol. 41, p. 3.

⁴⁵ A. RAUB, A. CASSOLA, I. LATZ and J. HEYMANN, "Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions", *Yale Journal of Law and Feminism* 2016, p. 153.

This thesis is designed in two tracks, which in combination lead to a renewed insight in the protection of the rights of LGBTIQ+ persons. Its aims are analytical, critical and normative.

- 1) The first objective of this thesis is to *critically analyse* the extent to which and how the legal status of LGBTIQ+ persons under Belgian law respects, protects and fulfils their autonomy needs. In this regard, it is examined in particular whether their legal status shows any gaps and which reasons lie at the basis thereof. The research focus on the autonomy of individuals also leads to questioning the appropriateness of the current (legal) terminology.⁴⁶ The first research question is therefore:

- **RQ 1:** To what extent are the autonomy needs of LGBTIQ+ persons currently respected, protected and fulfilled in the Belgian legal order (including directly applicable treaties)?

The first research question is answered through the following sub-questions:

- **RQ 1.1:** What are the most appropriate terms/concepts in which to express the protected values relating to the autonomous experience of sex (characteristics), gender (identity/expression), and sexual orientation?
- **RQ 1.2:** What are the limits to/gaps in the protection of the rights of LGBTIQ+ persons in the current Belgian legal order?
- **RQ 1.3:** To what extent are these limits/gaps related to an expression of heteronormativity, binary sex normativity and cisgender normativity and what are their implications for LGBTIQ+ persons?

⁴⁶ Moreover, one could question the use of the common abbreviation 'LGBTIQ+' as a means of categorising individuals. As will be explained in Chapter II, although the acronym has increased the visibility of sexual minorities and their claims regarding the law and policy, it has also been criticised for not working inclusively, since the designation of separate categories serves to highlight the differences between and among individuals based on their sexual identities and/or experiences. See *infra* p. 128.

2) The second track of this thesis has a *normative* objective and aims to study how a constitutional right to personal autonomy regarding a person's sex (characteristics), sexual orientation and gender (identity/expression) can be formulated in order to enhance the legal status of LGBTIQ+ persons in Belgium. The second research question therefore reads:

- **RQ 2:** (How) can a constitutional law provision be formulated to enhance the legal status of LGBTIQ+ persons with an emphasis on their personal autonomy?

It will be answered through various sub-questions:

- **RQ 2.1:** What is the added value of provisions of a constitutional nature in this field?
- **RQ 2.2:** What is the added value of the protection of the personal autonomy regarding sex (characteristics), sexual orientation and gender (identity/expression) in comparison to the current focus on anti-discrimination law and protection of private life?
- **RQ 2.3:** How can a suitable constitutional rights provision for the above-mentioned purpose be formulated, taking into account both the scope and the limits of the envisaged right?

B. Focus on sexual minorities

The study of the relationship between law and gender (*sensu lato*) has long been focussed on the research into the implication of law for women's disadvantages and its creation, maintaining and change of patterns and stereotypes of femininity and masculinity.⁴⁷ However, the emergence of other concerns with a gender dimension – sexuality, gender identity/expression and variations of sex characteristics – along with an

⁴⁷ J. CONAGHAN, *Law and gender*, Oxford, Oxford University Press, 2013, p. 74; E. BREMS and L. STEVENS, "Inleiding [Introduction]" in E. BREMS and L. STEVENS (eds.), *Recht en gender in België* [Law and gender in Belgium], Bruges, die Keure, 2011, p. 18.

increasing tendency to view gender as part of a much more complex matrix of intersectional inequalities encompassing race, class, disability, religion and so on, has widened the cast of gender as an analytical frame well beyond a focus on women's disadvantage or gender injustice per se.⁴⁸ This thesis fully embraces this direction within the study of law and gender and will therefore not focus on the position of women in the legal order. However, this new direction in law and gender studies does not necessarily have to be disadvantageous to women. Indeed, O'BRIEN argues that "if gender (and sex) remain the preserve of feminists, then women's struggle will always be marginalised. If sex/gender is not understood as culturally constitutive of *all* identities, then the prevailing assumptions will continue: to be 'gendered' is to be female, and sexed and gendered oppression are thus 'women's issues'. Scholars of gender and sex need to encourage a mainstream understanding that the sex/gender category of male is no less constructed than that of female."⁴⁹

3. Methodology

As mentioned above, this thesis studies how law expresses stereotypes and assumptions concerning sex (characteristics), gender (identity/expression) and/or sexual orientation that determine a stereotyped conception of the legal subject, and how they could be tackled in order to improve the legal status and protection of LGBTIQ+ persons, taking into account their autonomy needs. The Belgian legal order is used as an illustration of a stereotyped national legal system.

The next sections will elaborate on the methodological decisions that were made throughout the research. It will be explained why the Belgian legal order can be seen as a logical choice for researching the legal status of LGBTIQ+ persons (A), which sources were consulted in the qualitative literature study and how they were used (B), why personal autonomy and inclusiveness constitute the natural analytic framework for a study of

⁴⁸ J. CONAGHAN, *Law and gender*, Oxford, Oxford University Press, 2013, p. 74.

⁴⁹ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 8.

LGBTIQ+ rights (C), which methodological challenges occurred (D), and how the preliminary research results were tested in the context of an expert seminar (E).

A. Belgium as illustration of a stereotyped legal system

The research made use of Belgium as an illustration of a European State with a constitutional tradition, that is a member of both the Council of Europe (CoE) and the European Union (EU). Belgium is one of the founding members of both the CoE and the EU and has a strong tradition of constitutionalism. Indeed, the exercise of legal authority in Belgium is based on the constitution which materialises the principles of the rule of law and the separation of powers and holds a set of substantive fundamental rights.⁵⁰ Since 1988, the Belgian Constitutional Court has been competent to review all legislative acts – stemming from the federal level and the federated entities – on their compliance with constitutional fundamental rights. As will be explained in Chapter V, this procedure of constitutional review provides agency to individual citizens to have their fundamental rights respected, protected and fulfilled by the State.

Belgium is internationally known for its (ambition to adopt) progressive legislation regarding ethical matters, including LGBTIQ+ issues.⁵¹ The country was for instance one of the first States worldwide to introduce marriage equality (2003), adoption rights for same-sex couples (2006) and legal gender recognition based on self-determination of gender identity (2017).⁵² Since in

⁵⁰ P. POPELIER and K. LEMMENS, *The Constitution of Belgium. A contextual analysis*, Oxford, Hart Publishing, 2015, p. 37.

⁵¹ According to interest group ILGA Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), Belgium is ranked second in Europe regarding equality for LGBTIQ+ persons (as of 2019).

⁵² In 2016, the federal Chamber of representatives adopted an act that introduced an obligation for all foreigners who apply for a residence permit, to sign a so-called ‘statement for newcomers’ (*‘nieuwwokomersverklaring’*) (Wet van 18 december 2016 tot invoering van een algemene verblijfsvoorwaarde in de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen [Act of 18 December 2016 introducing a general residence condition in the Act of 15 December 1980 concerning the access to the territory, residence, establishment and removal of foreign nationals], *Belgian Gazette* 16 January 2017, p. 2054). The statement will reflect the

June 2019, the Constitutional Court found the absence of any legal recognition of non-binary persons a violation of the constitutional right to equality, the federal legislature is obliged to end the binary conceptualisation of sex/gender in law in the near future. It is even suggested in the literature that progressiveness concerning (the legal status of) sexual minorities is constitutive to Belgium's national identity.⁵³ Moreover, both official (yet independent) government bodies such as the Institute for the Equality of Women and Men and the Interfederal Centre for Equal Opportunities (Unia), and interest groups such as Çavaria, Rainbowhouse Brussels and Genres Pluriels, regularly publish reports with ample data on the prevalence of homo-, trans- and interphobia and the social status of LGBTIQ+ persons in Belgium. The country is therefore a fertile ground for (studying) LGBTIQ+ rights.

As will be thoroughly explained in Chapter V of this thesis, Belgium's constitutional order is well suited for researching the relevance of (the introduction of) constitutional fundamental rights, both from a symbolic and pragmatic perspective. In recent years, there has been much debate on the relevance of the Belgian constitution – which dates back to 1831 – in the 21st century legal order, taking into account, *inter alia*, the ever-increasing internationalisation of human rights protection, the dynamics of social change and the complexity of the Belgian state structure.⁵⁴ Moreover, since

fundamental values of Belgian society. In this regard, it is noteworthy that the draft statement, proposed by the Secretary of State for Migration, includes 'the free experience of sexual orientation', and the equality between same-sex and heterosexual relations. See also <https://www.vrt.be/vrtnws/nl/2016/03/31/letterlijk_de_nieuwkomersverklaring-1-2616190/> (last visited 27 August 2018).

⁵³ E. CLOOTS, "Het mysterie van de Belgische nationale en constitutionele identiteit [The mystery of the Belgian national and constitutional identity]", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2017, p. 320. See in this regard also P. POPELIER and K. LEMMENS, *The Constitution of Belgium. A Contextual Analysis*, Oxford, Hart Publishing, 2015, p. 227.

⁵⁴ For instance, in 2019 a large number of Belgian constitutional law and political science scholars participated in a series of seminars that thoroughly discussed the current state of the Belgian Constitution. The seminars resulted in a broad collection of proposals for amendments of current provisions, or new provisions in order to align the constitution with social and political realities. See <<https://cdn.uclouvain.be/groups/cms-editors->

the Belgian constitutional tradition is not opposed to periodical constitutional amendment, it is not illusory that the Belgian Constitution could be updated in order to include a new provision guaranteeing every person's right to autonomy regarding their sex (characteristics), gender (identity/expression) and sexual orientation. The thesis' territorial focus on Belgium therefore matches the country's legal tradition, its responsiveness to LGBTIQ+ human rights claims, and its historical commitment to dynamic constitutionalism.

Although the thesis has a territorial focus on Belgium, it is written in English, primarily because this language can be perceived as the *lingua franca* of (international) human rights law. Moreover, LGBTIQ+ persons throughout the world are directly affected by the (national) legal system and face many similar difficulties because of the lack of sufficient legal protection. Other countries can therefore benefit from research performed in one country regarding this matter, making a partial legal transplant possible. Given the widespread knowledge of the language across the globe, the likelihood of legal transplants is increased if research results are presented in English.

As outlined above, this thesis addresses multiple research questions, for which different forms of methodology were applied. Broadly speaking, a combination of literature review and case law analysis was used.

B. Qualitative literature study

A theoretical qualitative analysis of the main domestic and foreign literature was used for both research questions **RQ 1** and **RQ 2**. Given the cutting-edge character of the research and its strong connection to disciplines such as psychology, anthropology, sociology and medicine, a combination of legal scholarship, non-legal scholarship, policy documents and documents from civil society organisations was used. During the first stage of the research, the focus was laid on non-legal literature and reports originating from civil society actors. The research then moved to the legal analysis, which forms the core of the thesis.

creco/Syntheseverslag_Welke%20Grondwet%20na%202019.pdf> (last visited 25 March 2019).

I. Cross-disciplinary literature review

In first instance, general (cross-disciplinary, non-legal) literature regarding the topics of variations of sex characteristics, gender (identity and/or expression), sexual orientation and sexual identity was analysed. This multidisciplinary literature proved to be of paramount importance to the research, since it facilitated the understanding of and familiarity with the terminology and concepts that are central to legal questions. Since the legal system attaches a certain meaning and value to sex, gender (identity and/or expression) and sexual orientation, research questions **RQ 1** and **RQ 2** could only be correctly answered if the true scope of these concepts was first established and analysed. Gathering information was not difficult, since extensive multidisciplinary literature exists regarding gender and sexual orientation studies *sensu lato*. The review of this non-legal literature resulted in Chapter II, which provides a broad overview of the concepts that are most relevant to this thesis. Next to providing definitions, sociological, anthropological, psychological, and medical literature was also instrumental in order to gain insight in the psycho-medicalisation of (variations of) sex characteristics, gender non-conformity and non-heterosexual sexual orientation that has dominated a significant part of history.

II. Legal literature review

Since the object of the research was to study how the potential gaps in the legal status of LGBTIQ+ persons could be addressed through a constitutional law framework, the second focus of the literature study was laid on the legal status of LGBTIQ+ persons and the problems and challenges they face from a legal perspective. As explained below, the main perspective in this regard has been (the right to) personal autonomy, which is central to most (regional) human rights systems.

§1. Selection of topics

In order to structure the research, topics for analysis were selected on the basis of a preliminary screening of various legal sources. Sources used include legislation, national and international case law, the so-called grey literature

(reports by institutional and non-institutional human rights actors and policy advisors), and international and European soft law instruments. Particular attention was given to documents of UN treaty and monitoring bodies, case law of the European Court of Human Rights and the Inter-American Court of Human Rights concerning LGBTIQ+ issues, and national legislation that impacted on the legal status of LGBTIQ+ persons since the start of the 21st century. The selection of relevant jurisdictions and documents was greatly informed by international scholarship. Priority was given to literature that was recent, and/or written by established experts, and/or widely cited.

All sources were initially read with the purpose of identifying core issues in the legal status of LGBTIQ+ persons from a human rights perspective. In this regard, the following topics were selected for further research:⁵⁵

- With regard to persons with variations of sex characteristics:
 - Medicalisation through non-consensual, medically unnecessary sex assigning/normalising treatment;
 - Official registration of sex;
 - Discrimination based on sex characteristics;
- With regard to transgender persons:
 - Legal gender recognition;
 - Official registration of gender identity.

Although the material scope of this thesis also includes the legal status of LGB+ persons and the question of how the legal system deals with the concept of sexual orientation, no separate chapter was dedicated to this analysis. Indeed, given the progressive leadership of consecutive Belgian governments, formal equality on the basis of sexual orientation is already almost completely achieved in the Belgian legal system.⁵⁶ However, as is

⁵⁵ Another recurring theme in the studied sources is the need to include 'gender identity' and 'gender expression' among the prohibited grounds for discrimination in anti-discrimination legislation, in order to fight against discrimination of transgender persons. However, as will be explained below, Belgian anti-discrimination legislation already includes these grounds. See *infra* p. 294 and further.

⁵⁶ One of the remaining inequalities is the ban on blood donations for men who had sex with men in the year prior to the moment of blood donation.

established in the course of this thesis, a situation of formal equality does not necessarily lead to a comprehensive protection against harmful stereotypes that limit personal autonomy. ‘Sexual orientation’ was therefore also included in the research of the second track **(RQ 2)**, which deals with the study of how a constitutional provision to personal autonomy regarding a person’s sexual identity could enhance the legal status of LGBTIQ+ persons, as compared to the legal approach based on guaranteeing equality.

§2. Legal analysis

The abovementioned topics lie at the heart of the legal – and societal – problems that LGBTIQ+ persons face. The Belgian legal system was analysed in order to identify how these topics are and should be implemented in law. In order to establish the true scope of present relevant Belgian law, an integrated combination of legislation, national case law, preparatory policy documents, grey literature, recommendations and observations from international (UN) and European institutional human rights actors, and scholarship was applied. In a second phase, this framework was then compared to the ‘best practice legal system’ for LGBTIQ+ persons, from the perspective of the protection of their right to personal autonomy. This ‘best practice’ framework was established through an integrated method,⁵⁷ i.e. through the use of a combination of international and European legislation, international and European soft law instruments, recommendations and observations from international (UN) and European institutional human rights actors, national and international case law, national preparatory policy documents, grey literature and international scholarship. The European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) were given particular attention, considering the

⁵⁷ See with regard to the integrated approach concerning human rights, E. BREMS, “Should pluriform human rights become one? Exploring the benefits of human rights integration”, *European Journal of Human Rights* 2014, p. 447-470. See also E. BREMS, “Smart human rights integration” in E. BREMS and S. OUALD-CHAIB, *Fragmentation and Integration in Human Rights Law. Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 165-193. See also M. LANGFORD, “Same-sex marriage in polarized times: revisiting *Joslin v New Zealand*” in E. BREMS and E. DESMET (eds.), *Integrated human rights in practice: rewriting human rights decisions*, Cheltenham, Edward Elgar Publishing, 2017, p. 124-125.

authority of the ECHR in the legal order of all CoE Member States and around the globe, and the fact that the ECtHR has had to address issues concerning sexual identity already on numerous occasions. The label of ‘best practice’ was assigned to all sources that strongly took into account the autonomy needs of LGBTIQ+ persons, hence leading to maximum empowerment of those who do not conform to normative conceptions of anatomical form, gender performance and/or sexual desire.⁵⁸ As explained in Section C, the respect for and protection of personal autonomy is a natural benchmark in order to constitute a ‘best practice’ legal system for dealing with LGBTIQ+ issues.

The legal analysis was informed by (post-structuralist) feminist scholarship, and – especially – queer theory.⁵⁹ Both perspectives share post-structuralist viewpoints which proved to be instrumental to the analysis of how the Belgian legal system deals with the autonomy needs of sexual minorities, especially with regard to its adherence to stereotypes regarding sexual identity. By challenging laws which oppress (sexual) minorities, they call into question stereotypes and the alleged value-neutrality of the law and examine assumptions embedded in modern legal theory, using a multitude of disciplines.⁶⁰ They reveal how law “tends to approximate, implement, and reinforce dominant societal norms, rules, ideologies, and aspirations”.⁶¹ Although the insights of these theoretic perspectives are especially analysed and presented in the thesis’ terminological chapter (Chapter II), post-structuralist queer frames of analysis have been particularly helpful to identify the core issues concerning the legal status of LGBTIQ+ persons which

⁵⁸ A. P. ROMERO, “Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories”, *Yale Journal of Law and Feminism* 2007, Vol. 19, p. 248.

⁵⁹ See in this sense also J. MARSHALL, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 8.

⁶⁰ J. T. WEISS, “The Gender Caste System: Identity, Privacy, and Heteronormativity”, *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 135. See in this sense also A. P. ROMERO, “Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories”, *Yale Journal of Law and Feminism* 2007, Vol. 19, p. 241.

⁶¹ A. P. ROMERO, “Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories”, *Yale Journal of Law and Feminism* 2007, Vol. 19, p. 248.

could be addressed through a fundamental rights approach. Indeed, they demonstrate the need to examine law and society to find invisible and unacknowledged workings of prejudice in their individual and institutional forms.⁶² In this regard, queer theory scholar GONZALEZ-SALZBERG points out that “queer theory works within a post-structural understanding of identities that contests their stability, challenging not only the fixity of categories such as sex, gender and sexuality, but also the traditional construction of these characteristics as opposed to binaries.”⁶³ Indeed, as ZANGHELLINI holds, queer theory contributes to “[changing] laws that contribute to consolidating the construction of identity [...] along some definite lines [...] so as to remove the law’s authoritative support for that construction”.⁶⁴

C. Analytic tools: personal autonomy and inclusiveness

I. Personal autonomy

§1. Sexual identity and personal autonomy

As mentioned above, the leading theoretical point of reference for this research – which is already reflected in the title – is the individual’s right to personal autonomy or self-determination. Personal autonomy and human rights are strongly intertwined. As MARSHALL holds, “it is often claimed that we have human rights (morally and legally) because we are autonomous [...]”.⁶⁵ On the other hand, “it is possible to argue that we are autonomous [...], because we have [...] legal human rights [...]. That is, human rights law can be interpreted as part of the social conditions which can enable people to be free to live lives of meaning [...]”.⁶⁶ Human rights law can be used as an

⁶² J. T. WEISS, “The Gender Caste System: Identity, Privacy, and Heteronormativity”, *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 134.

⁶³ D.A. GONZALEZ-SALZBERG, “The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights”, *American University International Law Review* 2014, Vol. 29(4), p. 799.

⁶⁴ A. ZANGHELLINI, “Queer, Antinormativity, Counter-Normativity and Abjection”, *Griffith Law Review* 2009, Vol. 18(1), p. 2.

⁶⁵ *Ibid.*, p. 6.

⁶⁶ *Ibid.*, p. 6-7.

enabling tool, by changing the social conditions to enable people to make their own choices”.

The right to personal autonomy is well-established under international human rights law, even though an explicit provision of personal autonomy is not included in any of the leading international fundamental rights catalogues.⁶⁷ However, the right has been deduced from other provisions, such as the right to respect for private life *ex* Article 8 ECHR and Article 17 ICCPR.⁶⁸ Moreover, the ECtHR considers personal autonomy to be an integral part of human dignity, which lays at the very essence of the European Convention on Human Rights.⁶⁹

Next to a standard of modern international human rights law, personal autonomy is also a foundational principle in philosophy of law. The legal concept ‘autonomy’ does not have one single unitary meaning but has its roots in the idea that provided others are not harmed, each individual should be entitled to follow their own life plan in the light of their beliefs and convictions.⁷⁰ As DONNELLY holds, modern (legal) autonomy theorists predominantly rely on the work of philosophers Immanuel Kant and John Stuart Mill.⁷¹ On the basis of the Kantian conception of autonomy, individual freedom of choice is central to a person’s life and their relation to the law (‘choice autonomy’).⁷² In this view, autonomy refers to the rational capacity to subject oneself to objective moral principles on the basis of free choice.⁷³ MILL’s conceptualisation of personal freedom is based on his utilitarian liberal

⁶⁷ See M. DONNELLY, *Healthcare Decision-Making and the Law. Autonomy, Capacity and the Limits of Liberalism*, Cambridge, Cambridge University Press, 2010, p. 49.

⁶⁸ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 30-31.

⁶⁹ See for instance ECtHR 10 March 2015, 14793/08, *Y.Y. v. Turkey*, §58.

⁷⁰ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 57.

⁷¹ M. DONNELLY, *Healthcare, Decision-Making and the Law. Autonomy, Capacity and the Limits of Liberalism*. Cambridge, Cambridge University Press, 2010, p. 16.

⁷² *Ibid.*, p. 17.

⁷³ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Nijhoff Publishers, 2009, p. 58.

vision.⁷⁴ As he puts it, personal freedom consists of “liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong”.⁷⁵ Following the work of KANT and MILL, personal autonomy has been described in philosophy as “‘acting and living according to one’s own choices, values and identity within the constraints of what one regards as morally permissible’, as a ‘capacity [...] to reflect critically upon [...] preferences, desires, wishes’, involving ‘self-discovery, self-definition, and self-direction’, and ‘living life from the inside’”.⁷⁶

Private life and personal identity, of which sexual identity is a constituent aspect, are intricately related to personal autonomy.⁷⁷ The ability to freely define and experience one’s gender identity, sex and sexual desires is indeed a key aspect of an individual’s personal life. From a legal perspective, the struggle to improve the social and legal situation of LGBTIQ+ persons – who have faced structural discrimination because of their non-conforming sexual identity – has often been closely connected to right to respect for private life, of which personal autonomy is an integral part. A *prima facie* study of the case law of the ECtHR on issues related to sexual identity for instance shows a strong reliance by LGBTIQ+ applicants on the right to respect for private life *ex* Article 8 ECHR to bring their case before the Strasbourg Court.

However, in relation to personal and/or sexual identity, the conceptualisation of personal autonomy as a matter of rational individual choice has also been criticised. Indeed, according to RUOCCO, “defining one’s own identity is one of the most personal and individual practices one can engage in; it is central

⁷⁴ M. DONNELLY, *Healthcare, Decision-Making and the Law. Autonomy, Capacity and the Limits of Liberalism*. Cambridge, Cambridge University Press, 2010, p. 17.

⁷⁵ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Nijhoff Publishers, 2009, p. 57-58.

⁷⁶ *Ibid.*, p. 57.

⁷⁷ *Ibid.*, p. 90.

to autonomy”.⁷⁸ In this regard, ‘personal autonomy’ should not be confused with ‘choice’, implying that it concerns volitional behaviour: ‘autonomy’ refers to independent self-governance, whereas ‘choice’ refers to preference.⁷⁹ Moreover, the concept of personal autonomy does not necessarily mean that the individual completely disregards the web of social connections that have moulded their identity.⁸⁰ It is not concerned with isolation but depends upon the existence of relationships that provide support and guidance: relatedness is not the antithesis of autonomy but its precondition.⁸¹ Neither does it necessarily lead to immorality. Indeed, morality attempts to reconcile one person’s autonomous pursuit with others’ such pursuits and is therefore equally indispensable to the individual being.⁸² The individual acts in a moral framework which enables people to discern what is right to choose and what choices will in fact promote human flourishing, both of oneself and of others.⁸³ However, extensive feminist literature has also shown that, although an individual is seemingly free to decide on their own lives and therefore appears to be autonomous, the subtle processes of social constructionism may limit the genuine alternatives from which the individual may ‘choose’.⁸⁴ Moreover, autonomy may be reduced through relational dynamics in the social context that not only construct normative choices, but also produce personal identities. In this view, social conditions and social environment thus influence the *exercise* of autonomy, as well as the *formation* of autonomy.⁸⁵

⁷⁸ B. T. RUOCCO, “Our Antitotalitarian Constitution and the Right to Identity”, *University of Pennsylvania Law Review* 2016, Vol. 165, p. 204.

⁷⁹ J.T. WEISS, “Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for *Lawrence v. Texas*”, *Journal of Race, Gender and Ethnicity* 2010, Vol. 5, p. 7.

⁸⁰ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 63.

⁸¹ *Ibid.*, p. 65.

⁸² *Ibid.*, p. 58.

⁸³ *Ibid.*, p. 105.

⁸⁴ *Ibid.*, p. 60.

⁸⁵ *Ibid.*, p. 61.

This relational component of autonomy is central to its uses in (post-structuralist) feminist and queer theory.⁸⁶ As mentioned above, the legal analysis performed in this thesis was informed by the insights developed in especially queer theory, which critically addresses the construction of normative and oppressive sexual and gender identities in society. In these theories of social constructionism, the idea that autonomy is defined based on the assumption of a stable and transparent self that is guided by objective moral principles leading to rational choices, is heavily criticised.⁸⁷ Nevertheless, as will be explained in the next section, despite their criticism of the predominant individualistic conceptualisation of personal autonomy, social constructionist theories still appear to aspire personal autonomy as a normative value in the experience of personhood.

§2. Personal autonomy and queer theory

Queer theory is defined in the literature as “a deconstructive strategy that aims at denaturalising heteronormative understandings of genders and sexualities. [...] Central to queer thinking is the continuous interrogation of discourses that reinforce the system of two mandatory genders and one normal sexuality”.⁸⁸ Based on this definition, there are two foundational aspects to a queer theoretic framework:

- An element of *discourse production*: the awareness that the concepts and language used to discuss (human) reality are not merely descriptive tools, but sites where normative truths are constructed;

⁸⁶ See for instance A. P. ROMERO, “Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories”, *Yale Journal of Law and Feminism* 2007, Vol. 19, p. 254. See in this sense also M. DONNELLY, *Healthcare Decision-Making and the Law. Autonomy, Capacity and the Limits of Liberalism*, Cambridge, Cambridge University Press, 2010, p. 31.

⁸⁷ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 61.

⁸⁸ D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 22.

Chapter I. Introduction

- An element of *deconstruction*: a critical analysis to highlight in an apparent neutral context certain (normative) meanings that, while present in that context, do not appear to be the focus of attention.⁸⁹

Building on the work of feminist scholar Judith BUTLER, queer theory understands sex, gender and sexuality as cultural conceptions and performative constructions.⁹⁰ According to BUTLER, neither sex nor gender are pre-discursive notions that are fixed on individuals, and therefore do not necessarily have to be conceptualised as innate, binary and mutually dependent categories.⁹¹ She laid the foundations of the idea of gender as a performative construction, i.e. not an intrinsic essence of the individual person or a fixed core, but a construct that takes place through the continuous repetition of gendered acts in the context of a body.⁹² With regard to sexuality, queer theory is indebted to the writings of Michel FOUCAULT, who argued that the construction of homosexuality as the non-normative sexual identity served to transform the criminally prohibited sin of sodomy into a deviant way of life.⁹³ Connected to the construction of the deviant homosexuality, was the constitution of the normality of heterosexuality.⁹⁴

Given its rejection of objective, absolute, essentialist and naturalised views on sexual identities, queer theory is essentially radically counter-normative.⁹⁵ In this regard, the interest of queer theory seems to lie in offering a methodology for critiquing existing regimes of sex, gender and sexuality,

⁸⁹ Ibid., p. 4, 13. See in this sense also A. ZANGHELLINI, "Queer, Antinormativity, Counter-Normativity and Abjection", *Griffith Law Review* 2009, Vol. 18(1), p. 3-4.

⁹⁰ Ibid., p. 16.

⁹¹ See J. BUTLER, *Gender Trouble: Feminism and the Subversion of Identity*, London, Routledge, 1990, p. 10-11.

⁹² D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 33.

⁹³ Ibid., p. 16.

⁹⁴ Ibid., p. 16-17.

⁹⁵ A. ZANGHELLINI, "Queer, Antinormativity, Counter-Normativity and Abjection", *Griffith Law Review* 2009, Vol. 18(1), p. 7; A. P. ROMERO, "Methodological Descriptions: 'Feminist' and 'Queer' Legal Theories", *Yale Journal of Law and Feminism* 2007, Vol. 19, p. 228; D. M. HALPERIN, *Saint Foucault: Towards a Gay Hagiography*, Oxford, Oxford University Press, 1997, p. 62.

unveiling their hidden normative and oppressive constructions, but not in the normative articulation of queer ideals.⁹⁶ Moreover, - and interestingly for this thesis -, queer theory has had a troubled relationship with international human rights law. Indeed, according to STEIN and PLUMMER, queer theory is known for “a rejection of civil rights strategies in favour of a politics of carnival, transgression, and parody which leads to deconstruction, decentering, revisionist readings, and an antiassimilationist politics”.⁹⁷ The engagement of queer activists and stakeholders with human rights has, in the opinion of some authors, “taken the radicality out of queer rather than result[ed] in the queering of international human rights”.⁹⁸ While the inclusion of LGBTIQ+ persons in the protective scope of international human rights is seen as an important endeavour that is not without its merits, it has arguably not resulted in a fundamental destabilisation of assumptions connected to a normative framework that ignores the constructive nature of sex, gender and sexuality categories.⁹⁹

Nevertheless, ZANGHELLINI and GONZALEZ-SALZBERG have pointed out that queer theory *does* appear to have a normative commitment to liberal values, such as personal autonomy, which it shares with human rights.¹⁰⁰ Indeed, queer theory – based on a normative ideal of personal autonomy – “can help us imagine a normative system in which the subject would not need to fit within strict sexed and sexual binaries, since the humanity of individuals

⁹⁶ D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 21-22. See also A. P. ROMERO, “Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories”, *Yale Journal of Law and Feminism* 2007, Vol. 19, p. 229.

⁹⁷ A. STEIN and K. PLUMMER, “‘I Can’t Even Think Straight’. ‘Queer’ Theory and the Missing Sexual Revolution in Sociology”, *Sociological Theory* 1994, Vol. 12, p. 182.

⁹⁸ R. KAPUR, “The (Im)possibility of Queering International Human Rights Law” in D. OTTO (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks*, London, Routledge, 2018, <https://www.academia.edu/35253999/The_Im_possibility_of_Queering_International_Human_Rights_Law> (last visited 14 March 2019), p. 1.

⁹⁹ *Ibid.*, p. 4.

¹⁰⁰ D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 24; A. ZANGHELLINI, “Queer, Antinormativity, Counter-Normativity and Abjection”, *Griffith Law Review* 2009, Vol. 18(1), p. 8.

would not depend on their ability to conform to rigid categories”.¹⁰¹ In other words, queer theory, like other social constructionist theories, challenges the encroachment on personal autonomy because of social constructions which constitute what persons are allowed to be, to do, how they are able to think and conceive of themselves, what they can and should desire and what their preferences are.¹⁰² The use of queer theory insights, such as the necessity of a deconstructive counter-normative reading of concepts as sex, gender and sexual orientation, could eventually inform both the reading of the fundamental right to personal autonomy and the underlying legal regulations evaluated in the perspective thereof. Queer legal theory may therefore lead to “queering the law”.¹⁰³ Or as GONALEZ-SALZBERG holds, “human rights law can take advantage of queer’s technique of continuous interrogation in order to test and improve the actual scope of the purported universality of rights”.¹⁰⁴

Personal autonomy is thus not only the human right most intrinsically related to issues concerning sex, gender identity/expression and sexual orientation, it is also essentially the central normative value that informs queer theory’s deconstructionist engagement with normative constructions of sexual identity.¹⁰⁵ It therefore appeared the natural perspective and analytic tool for the legal analysis performed in this thesis. As a human right, personal autonomy has been extensively developed in the case law of the European Court of Human Rights. Since the ECtHR has been the human rights monitoring body that has dealt with the most cases related to LGBTIQ+ issues,

¹⁰¹ D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 25.

¹⁰² J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 60.

¹⁰³ A. P. ROMERO, “Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories”, *Yale Journal of Law and Feminism* 2007, Vol. 19, p. 249.

¹⁰⁴ D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 25.

¹⁰⁵ A. ZANGHELLINI, “Queer, Antinormativity, Counter-Normativity and Abjection”, *Griffith Law Review* 2009, Vol. 18(1), p. 8.

its case law is of particular importance for this thesis.¹⁰⁶ The next section will therefore present the ECtHR's key considerations concerning personal autonomy, and especially in relation to personal and sexual identity.

§3. Personal autonomy under the ECHR

The European Court of Human Rights has not yet explored the philosophical foundations of personal autonomy.¹⁰⁷ As mentioned above, it sees personal autonomy as an element of personal freedom and human dignity, which are “the very essence of the European Convention on Human Rights”¹⁰⁸, even though it is not explicitly included therein. It is from this connection with human dignity that the concept of personal autonomy derives its significance.¹⁰⁹ The ECtHR has stated that “the notion of personal autonomy is an important principle underlying the interpretation of the Convention guarantees”.¹¹⁰ One can therefore see personal autonomy as a general principle of law within the framework of the European Convention on Human Rights.¹¹¹ More specifically, the Court has often held that “the notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8 of the ECHR”,¹¹² which holds the right

¹⁰⁶ D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 5.

¹⁰⁷ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 2.

¹⁰⁸ ECtHR 10 March 2015, 14793/08, Y.Y. v. Turkey, §58; B. RUDOLF, “European Court of Human Rights: Legal status of postoperative transsexuals”, *International Journal of Constitutional Law* 2003, Vol. 1(4), p. 719.

¹⁰⁹ *Ibid.*, p. 719.

¹¹⁰ ECtHR 11 January 2006, 52562/99 and 52620/99, Sørensen and Rasmussen v. Denmark, §54.

¹¹¹ N.R. KOFFEMAN, “(The right to) personal autonomy in the case law of the European Court of Human Rights”, <https://openaccess.leidenuniv.nl/bitstream/handle/1887/15890/N.R.+Koffeman+-+%28The+right%29+to+personal+autonomy+in+the+case+law+of+the+ECtHR+%282010%29.pdf;jsessionid=B61A5297472C85DB373DD0943F3B6AC8?sequence=3> (last visited 17 November 2016).

¹¹² See for instance ECtHR 12 April 2016, 64602/12, R.B. v. Hungary, §78; 10 March 2015, 14793/08, Y.Y. v. Turkey, §57; 28 October 2014, 49327/11, Gough v. the United Kingdom, §183; 12 June 2014, 56030/07, Fernández Martínez v. Spain, §126. In these cases the Court

to respect for private and family life. In recent cases, the Court has even gone further by finding that “Article 8 encompasses, *inter alia*, [...] the right to personal autonomy and the personal development”.¹¹³ According to the ECtHR, the right to personal autonomy is therefore a part of the broader right to private life under the Convention.

In the landmark case on personal autonomy and self-determination, *Pretty v. the United Kingdom*, the Court described the right to personal autonomy as “the ability to conduct one’s life in a manner of one’s own choosing, [which may include] the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned”.¹¹⁴ The Court also held that personal autonomy “can embrace multiple aspects of a person’s physical and social identity”.¹¹⁵ The right to develop one’s personality also includes our relationships with others and the outside world.¹¹⁶ With the exception of gender identity,¹¹⁷ the Court has not yet explicitly placed individual decisions regarding one’s sexual identity – which consists of a person’s sex characteristics, gender identity/expression and sexual orientation – under the scope of ‘personal autonomy’. However, it considers that “elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article

often refers to the case *Pretty v. the United Kingdom* as the leading judgment of this settled case law (ECtHR 29 April 2002, 2346/02, *Pretty v. the United Kingdom*, §61). As mentioned above, issues regarding sex, sexual orientation and gender identity are mostly dealt with under Article 8 ECHR.

¹¹³ See for instance ECtHR 14 June 2016, 49304/09, *Birzietis v. Lithuania*, §32; 3 September 2015, 10161/13, *M. and M. v. Croatia*, §169; 11 December 2014, 28859/11 and 28473/12, *Dubská and Krejzová v. the Czech Republic*, §73; 24 June 2014, 33011/08, *A.K. v. Latvia*, §63; 20 May 2014, 4241/12, *McDonald v. the United Kingdom*, §46; 14 May 2013, 67810/10, *Gross v. Switzerland*, §58; 8 November 2011, 18968/07, *V.C. v. Slovakia*, §138. The first case in which the Court mentioned the “right to autonomy” was *Evans v. the United Kingdom* (ECtHR 7 March 2006, 6339/05, *Evans v. the United Kingdom*, §57).

¹¹⁴ ECtHR 29 April 2002, 2346/02, *Pretty v. the United Kingdom*, §61. In the *Pretty* case, ‘personal autonomy’ was still regarded as a ‘notion’, rather than as a ‘right’.

¹¹⁵ ECtHR 12 April 2016, 64602/12, *R.B. v. Hungary*, §78.

¹¹⁶ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 3.

¹¹⁷ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P., Garçon and Nicot v. France*, §93.

8 of the Convention”,¹¹⁸ of which the guarantees are interpreted based on the underlying principle of personal autonomy.¹¹⁹ It has in that sense also stated that “protection is given to the personal sphere of each individual, including their right to establish details of their identity as human beings”¹²⁰, which arguably encompasses the harmonisation of one’s sex and self-perceived gender identity.¹²¹ One can therefore state that the right to establish one’s personal identity is founded on the right to personal autonomy under Article 8 of the Convention, which has in the past tipped the balance in favour of LGBTIQ+ applicants.¹²²

In its case law, the Court has assigned to certain private life elements a more intimate nature and thereby allegedly also a more fundamental nature than to others.¹²³ It has referred to sexual orientation as “one of the most intimate aspects of private life”.¹²⁴ The same characterisation was used for gender identity.¹²⁵ Indeed, the freedom to define one’s gender identity is one of the most basic essentials of self-determination.¹²⁶ This labelling of sexual orientation and gender identity as part of the most intimate aspects of private life, is important when it comes to the balancing of competing interests,¹²⁷ which can be both of a general and individual nature. However, the Court

¹¹⁸ ECtHR 10 March 2015, 14793/08, *Y.Y. v. Turkey*, §56; 22 October 1981 *Dudgeon v. the United Kingdom*, Series A no. 45, p. 18-19, §41.

¹¹⁹ See ECtHR 11 January 2006, 52562/99 and 52620/99, *Sørensen and Rasmussen v. Denmark*, §54.

¹²⁰ ECtHR 11 July 2002, 28957/95, *Christine Goodwin v. the United Kingdom*, §90.

¹²¹ B. RUDOLF, “European Court of Human Rights: Legal status of postoperative transsexuals”, *International Journal of Constitutional Law* 2003, Vol. 1(4), p. 721.

¹²² *Ibid.*, p. 717-719.

¹²³ N.R. KOFFEMAN, “(The right to) personal autonomy in the case law of the European Court of Human Rights”, <https://openaccess.leidenuniv.nl/bitstream/handle/1887/15890/N.R.+Koffeman+-+%28The+right%29+to+personal+autonomy+in+the+case+law+of+the+ECtHR+%282010%29.pdf;jsessionid=B61A5297472C85DB373DD0943F3B6AC8?sequence=3> (last visited 17 November 2016), p. 58.

¹²⁴ ECtHR 22 October 1981, *Dudgeon v. the United Kingdom*, Series A no. 45, p. 21, §52.

¹²⁵ ECtHR 12 June 2003, 35968/97, *Van Kück v. Germany*, §56; 10 March 2015, 14793/08, *Y.Y. v. Turkey*, §60.

¹²⁶ ECtHR 12 June 2003, 35968/97, *Van Kück v. Germany*, §73.

¹²⁷ ECtHR 12 June 2003, 35968/97, *Van Kück v. Germany*, §72; 10 March 2015, 14793/08, *Y.Y. v. Turkey*, §60.

does not interpret ‘personal autonomy’ in an absolute manner. Limitations are possible, to the extent that they comply with the standards set by the ECHR.¹²⁸

II. Inclusiveness

Although (the right to) personal autonomy is the point of reference for the entire thesis, attention is also given to the need for inclusiveness of persons who are socially non-conforming with regard to their sex (characteristics), sexual orientation, and gender identity/expression, and the consequences thereof. Although human rights per definition claim universality and attempt to capture and express a common human nature and universal conditions for human dignity, they are human-made.¹²⁹ Indeed, the purported universality of human rights should be interpreted as an aspiration, not as a fact.¹³⁰ It is therefore obvious that there is no such thing as an objective viewpoint from which to picture an abstract, context-neutral human being, and that the human rights system was conceived by predominantly white, well-off, adult, heterosexual, cisgender, Western men.¹³¹ As GONZALEZ-SALZBERG holds, “the individual entitled to these universal rights has been conceived as gendered and sexual in specific ways, [...] some of which betray the very idea

¹²⁸ The interference should have a legal basis, pursue a legitimate aim, and be necessary in a democratic society because of a pressing social need and if it is proportionate to the legitimate aim pursued.

¹²⁹ E. BREMS, “Inclusive universality and the child-caretaker dynamic” in K. HANSON and O. NIEUWENHUYS (eds.), *Reconceptualizing children’s rights in international development: living rights, social justice, translations*, Cambridge, Cambridge University Press, 2013, p. 199.

¹³⁰ T. DREYFUS, “The ‘Half-Invention’ of Gender Identity in International Human Rights Law: from CEDAW to the Yogyakarta Principles”, *Australian Feminist Law Journal* 2012, Vol. 37, p. 35.

¹³¹ E. BREMS, “Inclusive universality and the child-caretaker dynamic” in K. HANSON and O. NIEUWENHUYS (eds.), *Reconceptualizing children’s rights in international development: living rights, social justice, translations*, Cambridge, Cambridge University Press, 2013, p. 199. See also F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 2. See also E. BREMS, “Accommodating Diversity in International Human Rights: Legal Techniques” in P. MEERTS (ed.), *Culture and International Law*, The Hague, Hague Academic Press 2008, p. 63-81.

of universality of human rights”.¹³² Given the binary, cis- and heteronormativity of society – especially in the twentieth century – the specific issues that LGBTIQ+ persons face were therefore not envisioned by the drafters of international human rights treaties, such as the ECHR.

The ‘inclusiveness’ concept that will be used throughout this research is based on the work of BREMS, i.e. ‘inclusive universality’.¹³³ Although the concept was first used in the debate between the universality and contextual, non-Western diversity of human rights, it is also very much applicable to the binary, cis- and heteronormativity of the legal system and hence, the subject of this thesis:

“‘Inclusive universality’ goes beyond general and worldwide applicability of human rights standards. Underlying it is the recognition that human rights are not context-neutral, and that for that reason people who do not correspond to the implicit point of reference of human rights experience a form of exclusion. The exclusion consists of the fact that when human rights standards are formulated or interpreted, and when human rights policies are determined, the needs, concerns and values of members of non-dominant groups are not taken into account to the same extent as those of the members of dominant groups. Inclusive universality proposes to remedy this situation by accommodating particularist claims from excluded people. [...] If human rights are to be universal in the sense that they apply in an equal manner to all

¹³² D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 2.

¹³³ See E. BREMS, *Human Rights: Universality and Diversity*, The Hague/Boston/London, Martinus Nijhoff Publishers, 2001, 574p.; E. BREMS, “Accommodating Diversity in International Human Rights: Legal Techniques” in P. MEERTS (ed.), *Culture and International Law*, The Hague, Hague Academic Press 2008, p. 63-81.

human beings, they must take into account specific circumstances relevant to the lives of these human beings."¹³⁴

LGBTIQ+ persons were not taken into account by society, of which the legal system is the reflection, due to its binary, cis- and heteronormative character. Inclusiveness, in the form of inclusive universality, is therefore an important point of reference to achieve the objective of this thesis, i.e. the study of how a constitutional rights provision can be developed in order to address the gaps in the legal status of LGBTIQ+ persons. Moreover, according to THEILEN, championing inclusivity within the legal system enables continuous contestation and criticism of views regarding sexual identity.¹³⁵ Inclusiveness is a key consideration in an effort to promote human rights of sexual minorities.¹³⁶

D. Methodological challenges

1. Shifting and 'emerging' human rights standards

A particular methodological challenge for this research has been the cutting-edge character of the topic. Not only is the scholarship, jurisprudence and grey literature concerning variations of sex characteristics, gender non-conformity and sexual orientation in full development and rapid expansion, also legal activity is in constant evolution. Moreover, the thesis' analytical point of reference – the right to personal autonomy regarding a person's

¹³⁴ E. BREMS, "Inclusive universality and the child-caretaker dynamic" in K. HANSON and O. NIEUWENHUYS (eds.), *Reconceptualizing children's rights in international development: living rights, social justice, translations*, Cambridge, Cambridge University Press, 2013, p. 203.

¹³⁵ J. T. THEILEN, "Between Novelty and Timelessness: The Right to Legal Gender Recognition. Comment on Holning Lau's "Gender Recognition as a Human Right"" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹³⁶ Ibid. By way of illustration, the importance of including persons with variations of sex characteristics and transgender persons within society and the legal system was also explicitly noted by the Portuguese government in its explanatory memorandum to the 2018 Act that introduced legal gender recognition based on gender self-determination and a legal ban on non-consensual, and medically unnecessary treatment on minor's sex characteristics. See

<<https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=40397>> (last visited 25 October 2018).

sexual identity – needs to be seen as an ‘emerging’ human right standard. While ‘new’ or ‘emerging’ human rights standards are arguably reflective of the inherent evolution of human rights law in order to continuously offer effective protection in changing social and legal circumstances, they often remain highly controversial in the absence of broad State support. Taking into account this highly evolutive situation,¹³⁷ Chapter III and Chapter IV consistently first establish the relevant international, European and (if appropriate) national human rights framework and its sources, before evaluating the legal position of LGBTIQ+ persons in the Belgian legal order.

This thesis not only uses the ‘emerging’ human right standards concerning a person’s sexual identity as analytic tools, but also aims to contribute to the development thereof. More specifically, Chapter V addresses the question concerning the legitimacy of ‘new’ and/or ‘emerging’ human rights standards, *in abstracto* and with regard to sexual identity, and investigates to what extent a new constitutional right to personal autonomy regarding sex (characteristics), gender and sexual orientation can be formulated.

II. Terminology

The choice of terminology with which to address the issues and persons that were central to the research, was also a particular methodological challenge. Indeed, on the one hand, the scientific understanding of concepts such as variations of sex characteristics, gender identity/expression and sexual orientation is in continuous evolution. On the other hand, it became quickly clear throughout the research that the terminology with which the law addresses the problems that sexual minorities face, is one of the main causes for gaps in their legal status. Given this central position of terminology for the clear understanding of the research results, Chapter II of this thesis provides a thorough explanation of the most important concepts. Nevertheless, it has appeared to be virtually impossible to choose terminology that all persons

¹³⁷ The last important evolution included in this thesis is the Belgian Constitutional Court’s ruling of 19 June 2019 on the 2017 Gender Recognition Act.

approve of, or find satisfactory to reflect their personal experience.¹³⁸ In any case, no offence or disrespect was intended with any of the terminological choices.

E. Expert seminar

On 6 February 2018, the expert seminar '*Protecting trans* rights after the new Belgian Gender Recognition Act: done deal or work in progress?*' was organised. During this seminar, preliminary research results – specifically with regard to the legal status of transgender persons – were shared and discussed with scholars and stakeholders, such as transgender persons, policymakers, academics, activists, and lawyers. Although essentially a forum for dissemination of research results, the expert seminar was also part of the thesis' methodological design. Indeed, critical comments and questions by experts and stakeholders from across Europe and different backgrounds contributed significantly to a fine-tuning of the research results, and to new insights. The papers which were presented during the seminar were bundled in the edited volume '*Protecting trans* rights in the age of gender self-determination*', which is currently forthcoming.¹³⁹

4. Structure of the thesis

Chapter I of this thesis introduced the reader to the research and elaborated on its objectives, and underlying research questions. Furthermore, the methodology was clarified.

Before it is possible to analyse the legal status of LGBTIQ+ persons in the Belgian legal order in the light of their right to personal autonomy, it is necessary to first develop a basic understanding of the concepts that are at the basis of the issues at stake. **Chapter II** therefore elaborates on the concepts of 'sex', 'gender identity', 'gender expression' and 'sexual

¹³⁸ See in this regard also J.M. SCHERPE, "The Legal Status of Intersex Persons: an Introduction" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 2.

¹³⁹ E. BREMS, P. CANNOOT and T. MOONEN (eds.), *Protecting Trans* Rights in the Age of Gender Self-Determination*, Cambridge, Intersentia (forthcoming).

orientation', and the social normativities connected to them. Although the chapter mainly refers to non-legal, sociological, psychological and medical literature, its ambition is not to provide a comprehensive scientific overview, but insights that anticipate the specific human rights analysis. Moreover, it explains which terminology is used throughout the thesis, for which reasons, and from which sources it is deduced.

Chapter III provides an analysis of the legal status of persons with variations of sex characteristics in the Belgian legal order from the perspective of their right to personal autonomy. The focus is on the legal framework regarding non-consensual, unnecessary medical treatment of persons (especially children) born with variations of sex characteristics. Since the way in which the law and society deal with variations of sex characteristics also influences the model of official sex registration, Chapter III also addresses the questions of whether, how and when a person's sex could or should be registered. Lastly, since both the treatment model and sex registration influence the visibility of persons with variations of sex characteristics in society, it is examined how discrimination based on sex characteristics is and should be tackled in the Belgian legal order.

A comparable analysis of the legal status of transgender persons, taking into account their right to personal autonomy, is presented by **Chapter IV**. Since the matter of legal gender recognition is arguably the biggest legal challenge for transgender persons, the chapter especially addresses whether, how and when a person's gender identity is and should be registered. In this regard, much attention is given to the 2017 Belgian Gender Recognition Act, which introduced a framework for legal gender recognition based on gender self-determination, and therefore undone of any psycho-medical requirements. The Act is evaluated taking into account the aforementioned 2019 judgment of the Constitutional Court, in which parts of the Act were found unconstitutional.

Chapter V discusses how a constitutional rights provision could be formulated in order to enhance the legal status of LGBTIQ+ persons, taking into account their right to personal autonomy. The chapter first addresses the relevance

Chapter I. Introduction

and role of (constitutional) fundamental rights, before elaborating on the value of a national constitution for the human rights protection of all persons and sexual minorities in particular. Moreover, it argues that a right to autonomy provides an added value to an approach based on (formal) equality.

Lastly, **Chapter VI** provides a general conclusion and aims to answer the research questions. Moreover, suggestions for further research are put forward.

Chapter II. Terminology and framework

This chapter discusses the terminology that is used throughout this thesis. Since the terminology with which the law, science and society in general address issues regarding sex, gender identity/expression and sexual orientation is varied, inconsistent and constantly evolving,¹⁴⁰ a clear demarcation is of paramount importance. However, the question arises whether such demarcation is possible, considering that many people find the habitual terminology unsatisfactory to reflect the versatility that they feel or aspire.¹⁴¹ Indeed, the precise wording and terms used in debates surrounding variations of sex characteristics, gender and sexuality often reflect the intensely personal views and feelings of the person concerned, and often are an area of very intense disagreement.¹⁴²

As mentioned in the previous chapter, the first objective of this thesis is to study the extent to which and how the legal status of LGBTIQ+ persons could be enhanced, taking into account the autonomy of the individual regarding their sex, gender identity/expression and sexual orientation. This framing of the research already generates several problems. Indeed, what do we mean with the commonly used acronym 'LGBTIQ+' and the concepts of 'sex', 'sexual orientation' and 'gender identity/expression'? Is this terminology even adequate?¹⁴³ To what extent are the (legal) issues regarding sex, sexual orientation and gender identity/expression even specific to (only) LGBTIQ+

¹⁴⁰ See also K. FRANKLIN and S. E. CHINN, "Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases", *Berkeley Journal of Gender, Law & Justice* 2017, Vol. 32, p. 3-4.

¹⁴¹ J. MOTMANS, *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht* [Living as transgender in Belgium. The social and legal situation of transgender persons mapped], Brussels, Instituut voor de Gelijkheid van Vrouwen en Mannen, 2009, p. 28.

¹⁴² J.M. SCHERPE, "The Legal Status of Transsexual and Transgender Persons – An Introduction" in J.M. SCHERPE (ed.), *The Legal Status of Transsexual and Transgender Persons*, Cambridge, Intersentia, 2016, p. 2; A.R. REEVES, "Sexual identity as a fundamental human right", *Buffalo Human Rights Law Review* 2009, Vol. 15, p. 218.

¹⁴³ The acronym 'LGBTIQ+' will be used until the thesis provides an answer to this question.

Chapter II. Terminology and framework

persons? After all, one could argue that every human being has a sex, a sexual orientation and a gender identity/expression. But is that really the case?

The concepts of 'sex', 'sexual orientation' and 'gender identity/expression' are often discussed together in the literature concerning LGBTIQ+ persons, who form sexual minorities within society. For instance, renowned feminist scholar Judith BUTLER has asserted that sex and gender exist in a mutually defining relationship.¹⁴⁴ VALDES refers to the trio as the central concepts in our society's sex/gender system.¹⁴⁵ Indeed, the composite of biological sex, gender identity/expression and sexual orientation could be seen as forming the sexual identity of a person.¹⁴⁶

'Sexual identity': A person's identity consisting of their sex (characteristics), gender identity/expression and sexual orientation.

Although lawyers tend to prefer to work with clear-cut definitions when tackling the problem they are faced with, definitions are a vexing problem when dealing with the issues discussed in this thesis.¹⁴⁷ It is important to differentiate from the start between 'sex', 'sexual orientation' and 'gender identity/expression', since they are independent constructs.¹⁴⁸ Although

¹⁴⁴ J. BUTLER, *Bodies that matter: on the discursive limits of "sex"*, Abingdon, Routledge, 1993, p. 2-16.

¹⁴⁵ F. VALDES, "Foreword. Notes on the 'Conflation'", *California Law Review* 1995, Vol. 83(1), p. 12. In his work, VALDES employs the term 'sex/gender system' to refer to the systematised sources of subordination of women and sexual minorities in our hetero-patriarchal culture.

¹⁴⁶ A.R. REEVES, "Sexual identity as a fundamental human right", *Buffalo Human Rights Law Review* 2009, Vol. 15, p. 218. A person's gender role in society and procreative identity/consciousness are sometimes also included in the description of sexual identity. In this dissertation, the concept will remain limited to a person's sex (characteristics), gender (identity/expression) and sexual orientation.

¹⁴⁷ See also J. DOLGIN, "Discriminating gender: legal, medical, and social presumptions about transgender and intersex people", *Southwestern Law Review* 2018, Vol. 47, p. 65. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 933.

¹⁴⁸ V. PASTERSKI, "Gender Identity and Intersex Conditions" in J.M. SCHERPE, A. DUTTA, T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 65; J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 925.

society and the law tend to conflate these concepts¹⁴⁹ – which in itself has led to further misconceptions regarding binary, cis- and heteronormative standards – distinguishing them from each other and analysing how they interrelate is essential.¹⁵⁰ There are many definitions and descriptions used in the literature, varying over time, place and scientific perspective. This chapter does not extensively address the legal aspects of the terms that are discussed, since it mainly serves to conceptualise them from a cross-disciplinary perspective.

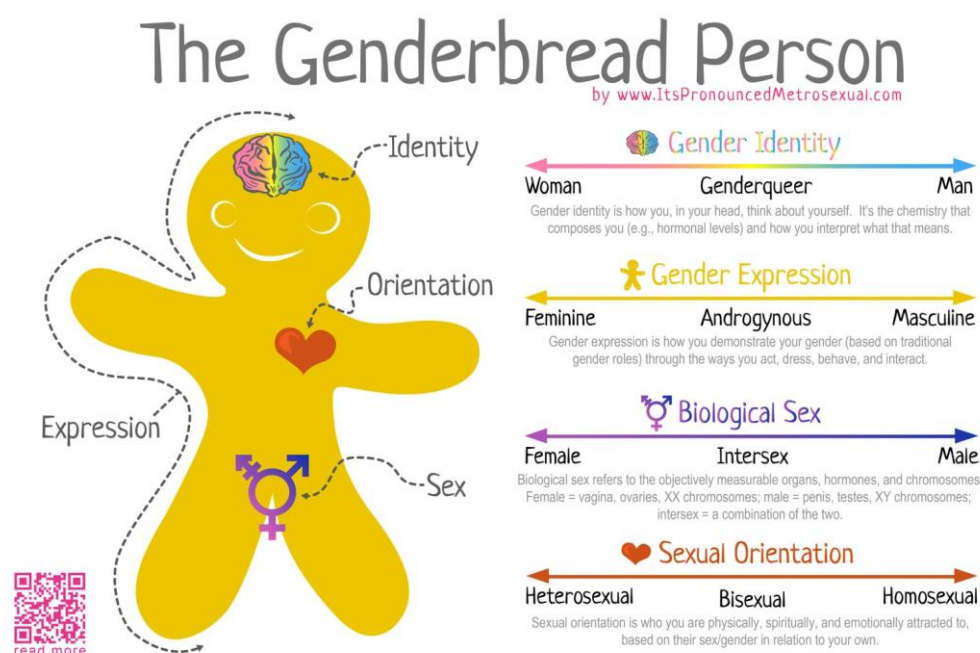


Figure 1: Popular presentation of a person's sexual identity

¹⁴⁹ H.G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 422. See also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 49. See also A. BOYD, "Back to the Binary: How the Olympics Struggle with Separation of Male and Female", *DePaul Journal of Sports Law* 2018, Vol. 14, p. 4.

¹⁵⁰ E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 508.

1. Sex (characteristics), sexual orientation and gender identity/expression

A. Sex – Intersex/DSD – Variations of sex characteristics

I. Sex

‘Sex’ is traditionally seen as a biological concept of a factual nature, (mostly) determined by the presence of a certain configuration of X and Y-chromosomes, hormones, gonads, internal morphology (seminal vesicles/prostate or vagina/uterus/fallopian tubes), external morphology (genitalia), and secondary characteristics in an individual.¹⁵¹ The complete process of sex determination and differentiation involves a series of sequential events and is considered to occur within four stages, that lead up to the development of secondary sex characteristics at puberty.¹⁵² Although (external) genitalia are only one of the constituting elements regarding one’s sex, they are usually decisive for determining a person’s sex at birth.¹⁵³ Thus, the existence of a penis or a vagina is deemed to settle the sex of the person

¹⁵¹ P.I. CHAU and J. HERRING, “Defining, Assigning and Designing Sex, *International Journal of Law, Policy and the Family* 2002, Vol. 16, p. 328-329; A. E. SILVER, “An Offer You Can’t Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity”, *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 490. However, some authors also include gender identity as a component of a person’s sex. See for instance M. D. LEVASSEUR, “Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights”, *Vermont Law Review* 2014-15, Vol. 39, p. 981-982; J.A. GREENBERG, “Defining Male and Female: Intersexuality and the Collision Between Law and Biology”, *Arizona Law Review* 1999, Vol. 41, p. 269, 278. This thesis uses ‘sex’ solely in the biological/physical sense, without referring to gender identity, unless expressly stated otherwise.

¹⁵² See more: N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 23-28.

¹⁵³ E. PICARRA and C. VISSER, “Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism”, *South African Journal on Human Rights* 2012, Vol. 28, p. 508; N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 239; A. E. SILVER, “An Offer You Can’t Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity”, *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 490; J.A. GREENBERG, “Defining Male and Female: Intersexuality and the Collision Between Law and Biology”, *Arizona Law Review* 1999, Vol. 41, p. 271. See also J. KNOUSE, “Intersexuality and the social construction of anatomical sex”, *Cardozo Journal of Law & Gender* 2005-06, Vol. 12, p. 138.

whose body is at issue.¹⁵⁴ According to the Preamble to the Yogyakarta Principles +10, ‘sex characteristics’ refer to “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”.¹⁵⁵

‘Sex’/‘Sex characteristics’: 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.

Some authors link the concept of ‘sex’ to a person’s “biological status as male or female”,¹⁵⁶ hence referring to ‘sex’ as a binary notion.¹⁵⁷ Indeed, Westerners¹⁵⁸ live in societies premised on the assumption that human beings are discretely sexed into two categories,¹⁵⁹ so that much of the world’s

¹⁵⁴ F. VALDES, “Foreword. Notes on the ‘Conflation’”, *California Law Review* 1995, Vol. 83(1), p. 20.

¹⁵⁵ Preamble Yogyakarta Principles +10, <<http://www.yogyakartaprinciples.org/preamble-yp10/>> (last visited 30 November 2017).

¹⁵⁶ A.R. REEVES, “Sexual identity as a fundamental human right”, *Buffalo Human Rights Law Review* 2009, Vol. 15, p. 218.

¹⁵⁷ See also J. KNOUSE, “Intersexuality and the social construction of anatomical sex”, *Cardozo Journal of Law & Gender* 2005-06, Vol. 12, p. 136.

¹⁵⁸ The literature places the roots of this Western binary normativity with the strong ties between society and Christianity. See B. VANDERHORST, “Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex”, *Harvard Law & Policy Review* 2015, Vol. 9, p. 250.

¹⁵⁹ N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 239. See also D. MACKENZIE, A. HUNTINGTON and J. A GILMOUR, “The experiences of people with an intersex condition: a journey from silence to voice”, *Journal of Clinical Nursing* 2009, p. 1780. See also C. LOWRY, “Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice”, *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 327-328. See also J. KNOUSE, “Intersexuality and the social construction of anatomical sex”, *Cardozo Journal of Law & Gender* 2005-06, Vol. 12, p. 146. See also J. DOLGIN, “Discriminating gender: legal, medical, and social presumptions about transgender and intersex people”, *Southwestern Law Review* 2018, Vol. 47, p. 62. See more

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structures categorise human beings according to the binary.¹⁶⁰ However, advances in science, as well as the experiences of individuals with variations of sex characteristics reveal that sex is much more nuanced than the binary categories would have us believe.¹⁶¹ Indeed, although in most individuals the aforementioned sex markers are all congruent, this is not the case for millions of individuals.¹⁶² Biological sex thus is fraught with indeterminacy, since there is no simple or singular test to decide on a person's 'correct' sex marker.¹⁶³ Careful considerations of all biological elements of 'sex' suggest that the idea of the concept as a binary is a socialised construct,¹⁶⁴ informed and defined

infra on the conflation between sex, sexual orientation and gender identity/expression, p. 123.

¹⁶⁰ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 104.

¹⁶¹ D.L. CLARK HOFMAN, "Male, Female, and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law", *Tulane Journal of Law & Sexuality* 2012, Vol. 21, p. 2; J.A. GREENBERG, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology", *Arizona Law Review* 1999, Vol. 41, p. 275.

¹⁶² J.A. GREENBERG, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology", *Arizona Law Review* 1999, Vol. 41, p. 269.

¹⁶³ P. CURRAH, "Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities", *Hastings Law Journal* 1996-97, Vol. 48, p. 1373; A. E. SILVER, "An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity", *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 491. See also C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice", *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 333. For instance in sports, external genitalia are less important than hormonal and chromosomal composition of the athlete concerned.

¹⁶⁴ J.A. GREENBERG, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology", *Arizona Law Review* 1999, Vol. 41, p. 272; "Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience", *San Diego Law Review* 2002, Vol. 39, p. 922. See also D. GONZALEZ-SALZBERG, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights", *American University International Law Review* 2014, Vol. 29(4), p. 800. See also N. BEN-ASHER, "The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties", *Harvard Journal of Law & Gender* 2006, Vol. 29, p. 53. See also R. LEE, "Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States' Laws Regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans* People", *Berkeley Journal of International Law* 2015, Vol. 33, p. 122. See also M. VAN DEN BRINK, "'The Legitimate Aim of Harmonising Body and Soul'. Changing Legal Gender: Family Life and Human Rights" in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge,

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by ideas of gender identity (roles),¹⁶⁵ and therefore not a pre-discursive notion that is fixed on individuals.¹⁶⁶ After all, societal assumptions about gendered identities map onto our biological bodies, resulting in (external) genitalia becoming a crucial part of difference and identity.¹⁶⁷

An important group of persons whose biological appearance does not match the socially constructed normality of the male/female sex are the individuals with a condition that is defined as intersex, DSD (Disorders/Differences of Sex Development) or variation of sex characteristics, and who therefore do not necessarily have discretely 'sexed' sex characteristics.¹⁶⁸ Variations of sex characteristics refer to all congenital conditions in which there is a disagreement between a person's genetic (i.e. chromosomal) sex and the appearance of internal and external reproductive structures.¹⁶⁹ Nevertheless,

Intersentia, 2017, p. 232. See also L. J. MOORE and P. CURRAH, "Legally Sexed" in R. E. DUBROFSKY and S. A. MAGNET (eds.), *Feminist Surveillance Studies*, Durham, Duke University Press, 2015, p. 63.

¹⁶⁵ D.L. CLARK HOFMAN, "Male, Female, and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law", *Tulane Journal of Law & Sexuality* 2012, Vol. 21, p. 3. See also J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 162. See also J. KNOUSE, "Intersexuality and the social construction of anatomical sex", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12, p. 138. See more *infra* on the conflation between sex, sexual orientation and gender identity/expression, p. 123.

¹⁶⁶ J. BUTLER, *Gender Trouble: Feminism and the Subversion of Identity*, New York, Routledge, 1999 (10th ed.), p. 11. See in this sense also D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 15.

¹⁶⁷ N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 239. See more *infra* on gender identity and societal assumptions and stereotypes regarding gender, p. 101.

¹⁶⁸ *Ibid.*, p. 239. Transgender persons are also faced with the assumptions regarding sex and gender identity. However, they are generally not faced with a variation of sex characteristics, since their registered sex at birth matches the composition of their biological elements of 'sex' at birth. See *infra*, p. 107.

¹⁶⁹ I.A. HUGHES, C. HOUK, S.F. AHMED, P.A. LEE, "Consensus statement on management of intersex disorders", *Journal of Pediatric Urology* 2006, Vol. 2, p. 148-162.

the essentialist argument of the binary sex categories rests on the idea that, although 'sex' cannot be precisely defined, "we know it when we see it".¹⁷⁰

II. Intersex/DSD/Variations of sex characteristics – binary normativity

§1. Definition, prevalence and 'social emergency'

Diverging definitions and sources of identification of variations of sex characteristics compromise a clear-cut quantification of their prevalence.¹⁷¹ However, between at least 0.5 and four percent of the population is believed to have an intersex condition/DSD/variation of sex characteristics,¹⁷² which includes variants of the sex chromosomes (e.g. Klinefelter Syndrome and Turner Syndrome),¹⁷³ variants of the hormonal composition (e.g. Androgen Insensitivity Syndrome),¹⁷⁴ 'ambiguous' genitalia (e.g. micropenis, congenital

¹⁷⁰ J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 166.

¹⁷¹ B. M. DICKENS, "Management of Intersex Newborns: legal and ethical developments", *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 2; C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice", *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 325.

¹⁷² A. FAUSTO-STERLING, "The Five Sexes: Why Male and Female Are Not Enough", *Sciences* 1993, Vol. 33, p. 21; R. L. WHITE, "Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson", *Fordham International Law Journal* 2014, Vol. 37, p. 783; J. VAN LISDONK, "Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]", <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 2 February 2017), p. 28. See also N. CALLENS, J. MOTMANS, C. LONGMAN, "Redactionele inleiding themanummer intersekse/DSD [Editorial introduction themed issue intersex/DSD]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 1.

¹⁷³ According to the binary of sex, every person is born with either a 46 XX chromosomes karyotype (female) or a 46 XY chromosomes karyotype (male). However, individuals with Klinefelter Syndrome have a 47XXY karyotype, while individuals with Turner Syndrome have a 45 XO karyotype. Nevertheless these individuals develop genitalia that seem at birth either 'typically' male (Klinefelter) or female (Turner). See INTERSEX SOCIETY OF NORTH AMERICA, "Intersex conditions", <<http://www.isna.org/faq/conditions>> (last visited 3 November 2016).

¹⁷⁴ Individuals with Androgen Insensitivity Syndrome do not respond to androgen hormones, such as testosterone, leading to infertility with women, among other things. See INTERSEX

adrenal hyperplasia),¹⁷⁵ variants of the internal morphologic sex (e.g. Persistent Müllerian Duct Syndrome),¹⁷⁶ or gonadal variants (e.g. ovotestes).¹⁷⁷ For Belgium, this would be equivalent to the number of red-haired persons.¹⁷⁸ Variations of sex characteristics are thus not a rare human condition.¹⁷⁹ Although some conditions are easily identifiable at birth, for others the detection only occurs during puberty or sometimes even later (e.g. due to the absence of menstruation, during treatment for fertility problems, or due to physical development that is not in line with the assigned sex).¹⁸⁰ It is even possible that persons with variations of sex characteristics, or the people around them, never discover the condition.¹⁸¹ These variants in the

SOCIETY OF NORTH AMERICA, “Androgen Insensitivity Syndrome (AIS)”, <<http://www.isna.org/faq/conditions/ais>> (last visited 3 November 2016).

¹⁷⁵ INTERSEX SOCIETY OF NORTH AMERICA, “Micropenis”, <<http://www.isna.org/faq/conditions/micropenis>> (last visited 4 November 2016).

¹⁷⁶ Persistent Müllerian Duct Syndrome only affects males. Due to the syndrome, males not only have male reproductive organs, but also a uterus and fallopian tubes. See <<https://ghr.nlm.nih.gov/condition/persistent-mullerian-duct-syndrome>> (last visited 6 December 2016).

¹⁷⁷ Ovotestes are gonads containing both ovarian and testicular tissue. See INTERSEX SOCIETY OF NORTH AMERICA, “Ovotestes (formerly called “true hermaphroditism”)”, <<http://www.isna.org/faq/conditions/ovo-testes>> (last visited 4 November 2016).

¹⁷⁸ N. CALLENS, C. LONGMAN and J. MOTMANS, “Terminologie en zorgdiscours m.b.t. Differences of Sex Development (DSD)/Intersekse in België [Terminology and care discourse concerning Differences of Sex Development (DSD)/Intersex in Belgium]”, Staatssecretariaat voor Gelijke Kansen, 2016, p. 9.

¹⁷⁹ N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 30. See in this regard also H.G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 439.

¹⁸⁰ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 14 December 2016), p. 14. See in this regard also H.G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 433; B. M. DICKENS, “Management of Intersex Newborns: legal and ethical developments”, *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 3.

¹⁸¹ H.G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender*

constituting elements of 'sex' therefore clearly demonstrate that the idea that a person's sex is easily determined by a visual examination of external genitalia at birth is overly simplistic.¹⁸² Although variations of sex characteristics are part of the natural development of a person's body, similar experiences can also arise due to human interventions, such as a failed circumcision.¹⁸³

'Variations of sex characteristics'/'Intersex'/'DSD': All congenital conditions in which there is a disagreement between a person's genetic (i.e. chromosomal) sex and the appearance of internal and external reproductive structures.

Persons with variations of sex characteristics show that universal sex bipolarity does not exist in nature, even if it does exist in culture or cultural norms.¹⁸⁴ Indeed, society's culture promulgates a binary gender ideal which includes standards of normality for our bodies and how we think about

& *Society* 2014, Vol. 29(3), p. 433; D.C. GHATTAS, "Standing Up for the Human Rights of Intersex People" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 430.

¹⁸² D.L. CLARK HOFMAN, "Male, Female, and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law", *Tulane Journal of Law & Sexuality* 2012, Vol. 21, p. 5. See in this regard also S. HANSSEN, "Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law", *Oregon Law Review* 2017, Vol. 96, p. 286-287.

¹⁸³ J.A. GREENBERG, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology", *Arizona Law Review* 1999, Vol. 41, p. 290-292. See also N. CALLENS, J. MOTMANS, C. LONGMAN, "Redactionele inleiding themanummer intersekse/DSD [Editorial introduction themed issue intersex/DSD]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 1.

¹⁸⁴ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 307. See also P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 235. See also A. FAUSTO-STERLING, "Why Sex is Not Binary. The complexity is more than cultural. It's biological, too", <<https://www.nytimes.com/2018/10/25/opinion/sex-biology-binary.html>> (last visited 26 October 2018).

them.¹⁸⁵ However, it is important to state that while persons with variations of sex characteristics will have physical sex characteristics which fall outside of the male/female binary, the majority of people with this range of conditions still identify their gender within the binary, i.e. as male or female.¹⁸⁶ Within the group of persons with variations of sex characteristics, some will identify as *being* 'intersex', while others indicate *having* an atypical development of sex characteristics, referring to the medical term of 'DSD' or the more neutral 'variations of sex characteristics'.¹⁸⁷ Certain persons with variations of sex characteristics who experience incongruence between their (binary) gender identity and (non-binary) sex characteristics might therefore have the legitimate wish to align their bodily appearance with their self-defined gender identity.¹⁸⁸ Preliminary research on the living conditions of

¹⁸⁵ J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 161. See in this regard also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 929-930.

¹⁸⁶ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 95. There have been examples in case law where 'intersexuality' was conflated with 'transsexuality'. However, both phenomena are clearly distinct and involve other aspects of one's sexual identity. See M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 986. See also N. CALLENS, J. MOTMANS, C. LONGMAN, "Redactionele inleiding themanummer intersekse/DSD [Editorial introduction themed issue intersex/DSD]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 3. See also N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 11. See also P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 236.

¹⁸⁷ N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 16. See in this regard also M. CARPENTER, "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 486.

¹⁸⁸ See in this regard also M. BLONDIN and C. BOUCHOUX, "Rapport d'Information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la

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persons with variations of sex characteristics indeed indicates the presence of anxiety with certain persons concerned with regard to one's (often gendered) self-image as a 'full' woman or man.¹⁸⁹ Others do not support surgical intervention for variations of sex characteristics.¹⁹⁰ It is thus important not to lump *all* persons with variations of sex characteristics automatically into a new collective category, based on their perceived situation.¹⁹¹

The idea of 'sex' as a social construct based on biological elements, and therefore not necessarily limited to the binary categories 'male' and 'female', is fairly new and controversial.¹⁹² Historically, variations of sex characteristics have been regarded as situations where one is born with ambiguous genitalia,

stigmatisation et les exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 10.

¹⁸⁹ J. VAN LISDONK, "Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]", <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 25 April 2017), p. 44. See also N. CALLENS, T. VAN DER GRIFT, M. COOLS, "Een holistisch zorgbeleid voor Differences of Sex Development [Holistic health care for Differences of Sex Development]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 10. See in this regard also N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 18.

¹⁹⁰ D. MACKENZIE, A. HUNTINGTON and J. A. GILMOUR, "The experiences of people with an intersex condition: a journey from silence to voice", *Journal of Clinical Nursing* 2009, Vol. 18, p. 1780.

¹⁹¹ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people", <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 14 December 2016), p. 15.

¹⁹² See for instance W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 1-20. See also J. DOLGIN, "Discriminating gender: legal, medical, and social presumptions about transgender and intersex people", *Southwestern Law Review* 2018, Vol. 47, p. 63. See also C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice", *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 332. See also A. R. CHANG and S. M. WILDMAN, "Gender In/Sight: Examining Culture and Constructions of Gender", *The Georgetown Journal of Gender and the Law* 2017, Vol. 43, p. 59.

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sexual organs, or sex chromosomes that deviate from the (biological) 'norm'.¹⁹³ The perception of persons with variations of sex characteristics as supernatural or miraculous/monstrous in the early modern period gradually yielded to a biomedical approach which 'normalised' them in the sense of identifying biological processes which produced variations of sex development.¹⁹⁴ However, this normalisation was simultaneously pathologising.¹⁹⁵ Indeed, variations of sex characteristics cannot be explained satisfactorily under the essentialist binary theory of sex, revealing inner contradictions in the theoretical framework.¹⁹⁶ The medical approach therefore has consisted of surgically or hormonally modifying the 'abnormality' shortly after birth,¹⁹⁷ or sometimes during adolescence, to bring the individual concerned in accordance with the binary categories of 'male' or 'female', enforcing the bipolar duality of sex and gender.¹⁹⁸ In this regard,

¹⁹³ S. PREVES, *Intersex and identity: The contested self*, New Brunswick, Rutgers University Press, 2003, p. 2.

¹⁹⁴ See in this regard also H.G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 426.

¹⁹⁵ A. KENNEDY, "Fixed at Birth: Medical and Legal Erasures of Intersex Variations", *University of New South Wales Law Journal* 2016, Vol. 39, p. 817.

¹⁹⁶ J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 163.

¹⁹⁷ Other reports indicate that intersex fetuses are also within the reach of medical intervention. Some mothers are administered medication – despite proven negative side effects, such as risk of heart disease and diabetes –, while some fetuses are selectively aborted. See COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people", <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 14 December 2016), p. 20.

¹⁹⁸ See also J.L. NAGOSHI, C.T. NAGOSHI, S. BRZUZY, *Gender and Sexual Identity. Transcending Feminist and Queer Theory*, New York, Springer, 2014, p. 26; S. FARRELL, "Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights", *Law & Sexuality Review* 2004, Vol. 13, p. 614; E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 301. See in this regard also M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 3. See in this regard also J. DOLGIN, "Discriminating gender: legal, medical,

the dominant external characteristics of the new-born are taken to be the biological sex of the child.¹⁹⁹ Persons with variations of sex characteristics have thus routinely been subjected to medical and surgical treatments – while still being very young – to align their physical appearance with either of the binary sexes without their prior and fully informed consent, even though they do not usually face actual health problems due to their status.²⁰⁰ These surgical techniques for altering genitals have also contributed to a shift to genitals as *the* signifier of sex and the modern centrality of genital surgery in the demarcation of the sexes.²⁰¹

Conceptually one can distinguish sex assigning treatment, sex normalising treatment and treatment on sex characteristics:²⁰²

- Sex assigning treatment: Surgical and other forms of (hormonal) treatment that aim to assign a binary sex to a child born with ‘ambiguous’ sex characteristics. These forms of treatment are often based on a prediction of the child’s presumed gender identity, according to a cisnormative logic;

and social presumptions about transgender and intersex people”, *Southwestern Law Review* 2018, Vol. 47, p. 71.

¹⁹⁹ E. PICARRA and C. VISSER, “Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism”, *South African Journal on Human Rights* 2012, Vol. 28, p. 511.

²⁰⁰ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”,

<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 14 December 2016), p. 14. Variations in sex development are, with a few exceptions, not life-threatening and do not generally require immediate medical intervention. See N. CALLENS, J. MOTMANS, C. LONGMAN, “Redactionele inleiding themanummer intersekse/DSD [Editorial introduction themed issue intersex/DSD]”, *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 3. See also N. CALLENS, T. C. VAN DER GRIFT, M. COOLS, “Een holistisch zorgbeleid voor Differences of Sex Development [Holistic health care for Differences of Sex Development]”, *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 3.

²⁰¹ N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 239. Genital surgery has also been crucial within the medical and legal treatment of transsexual persons, and the legal recognition of transgender persons in general. See *infra*, p. 101.

²⁰² See in this regard also H.G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 441.

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- Sex normalising treatment: Surgical and other forms of (hormonal) treatment that aim to bring a person's sex characteristics in conformity with the societal normative expectations regarding (the appearance of) that person's binary sex;
- Treatment on sex characteristics: Surgical and other forms of (hormonal) treatment on a person's sex characteristics that serve a therapeutic cause, e.g. prevention of cancer or infections. According to the Council of Europe Committee on Bioethics, only three medical procedures have been identified as meeting criteria of medical necessity in some infants: (1) administration of endocrine treatment to prevent fatal salt-loss in some infants, (2) early removal of streak gonads in children with gonadal dysgenesis, and (3) surgery in rare cases to allow exstrophic conditions in which organs protrude from the abdominal wall or impair excretion.²⁰³

- **'Binary normativity'**: Essentialist principle according to which there are only two biological sexes, i.e. male and female.
- **'Sex assigning treatment'**: Surgical and other forms of (hormonal) treatment that aim to assign a binary sex to a child born with 'ambiguous' sex characteristics.
- **'Sex normalising treatment'**: Surgical and other forms of (hormonal) treatment that aim to bring a person's sex characteristics in conformity with the societal normative expectations regarding that person's binary sex.
- **'Medicalisation' of variations of sex characteristics**: The combination of sex assigning and sex normalising treatment.

²⁰³ COUNCIL of EUROPE COMMITTEE ON BIOETHICS, "The Rights of Children in Biomedicine", <<http://www.coe.int/en/web/bioethics/-/study-on-the-rights-of-children-in-biomedici-1>> (last visited 9 August 2017), p. 43. See in this regard also M. JONES, "Intersex Genital Mutilation – A Western Version of FGM", *International Journal of Children's Rights* 2017, Vol. 25, p. 406; M. CARPENTER, "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 468. See also C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice", *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 328.

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Sex assigning/normalising treatment of persons with variations of sex characteristics has also been embedded in societal heteronormativity²⁰⁴ and rigid gender stereotypes.²⁰⁵ For instance, the influential Committee on Genetics of the American Academy of Pediatrics issued guidelines for the treatment of children with variations of sex characteristics, containing a number of factors that should be considered when determining the sex of a new-born. Most notably, the guidelines refer to 'fertility potential' and 'capacity for normal sexual function', i.e. whether the genitals are capable of penetrative heterosexual acts,²⁰⁶ clearly reflecting the societal conflation between sex, gender identity and sexuality.²⁰⁷ For instance, a genetic male with an 'inadequate' penis (one that is incapable of penetrating a woman's vagina) is 'turned into' a female even if this means destroying his reproductive capacity, while a genetic female who may be capable of reproduction, is generally assigned the female sex to preserve this capacity regardless of the appearance of the external genitalia.²⁰⁸ In other words, men are defined

²⁰⁴ S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, "Intersex, Variations of Sex Characteristics, and DSD: The Need for Change", <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 17.

²⁰⁵ See *infra* p. 101. See in this regard HUMAN RIGHTS WATCH and INTERACT, "I want to be like nature made me. Medically Unnecessary Surgeries on Intersex Children in the US", <<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>> (last visited 9 August 2017), p. 9. See also B. VANDERHORST, "Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex", *Harvard Law & Policy Review* 2015, Vol. 9, p. 256.

²⁰⁶ A. E. SILVER, "An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity", *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 491. This focus on external genitals has led authors to speak of the second half of the 20th century of the 'Age of the Genitals' or the 'Age of the Penis' with regard to the decisive factor for assigning a person's 'true' sex. See A. KENNEDY, "Fixed at Birth: Medical and Legal Erasures of Intersex Variations", *University of New South Wales Law Journal* 2016, Vol. 39, p. 819. See also F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 85.

²⁰⁷ G. DAVIS, "The power in a name: diagnostic terminology and diverse experiences", *Psychology and Sexuality* 2014, Vol. 5, p. 17-18.

²⁰⁸ J.A. GREENBERG, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology", *Arizona Law Review* 1999, Vol. 41, p. 271-272. See in this regard also M. BLONDIN and C. BOUCHOUX, "Rapport d'Information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 34.

based on their ability to penetrate females and women are defined based on their ability to procreate.²⁰⁹ Other treatment goals include the reduction of anxiety by enabling children to conform to gender norms and expectations,²¹⁰ such as the ability and social need for boys to stand while urinating.²¹¹ The child is then to be raised in the gender identity that matches the assigned sex based on cisnormative expectations.

The medical model of sex assigning/normalising treatment is heavily inspired on the work of John MONEY, who believed that gender identity is learned, rather than innate (nurture versus nature).²¹² Indeed, MONEY's influential theory that gender identity is fluid or neutral until around eighteen months, along with the argument that parental uncertainty as to the maleness or femaleness of their child should be avoided through constructing genitals that match the assigned sex, shaped the medical management of children born with a variation of sex characteristics.²¹³ Especially during the twentieth century, parents were usually advised not to make a premature announcement about the infant's sex and to refrain from discussing the

²⁰⁹ J.A. GREENBERG, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology", *Arizona Law Review* 1999, Vol. 41, p. 269.

²¹⁰ COUNCIL OF EUROPE COMMITTEE ON BIOETHICS, "The Rights of Children in Biomedicine", <<http://www.coe.int/en/web/bioethics/-/study-on-the-rights-of-children-in-biomedici-1>> (last visited 9 August 2017), p. 42.

²¹¹ HUMAN RIGHTS WATCH and INTERACT, "I want to be like nature made me. Medically Unnecessary Surgeries on Intersex Children in the US", <<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>> (last visited 9 August 2017), p. 8.

²¹² N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 47. According to Money's 'optimal gender theory', gender identity is not fixed in human beings, but develops around the age of two. Up to that age, humans are largely gender neutral. A central determinate is how children are reared, as long as the rearing does not clash with the visible anatomy. See A. KENNEDY, "Fixed at Birth: Medical and Legal Erasures of Intersex Variations", *University of New South Wales Law Journal* 2016, Vol. 39, p. 818-819. See C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice", *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 326.

²¹³ D. MACKENZIE, A. HUNTINGTON and J. A. GILMOUR, "The experiences of people with an intersex condition: a journey from silence to voice", *Journal of Clinical Nursing* 2009, Vol. 18, p. 1776. See also N. CALLENS, J. MOTMANS, C. LONGMAN, "Redactionele inleiding themanummer intersekse/DSD [Editorial introduction themed issue intersex/DSD]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 1.

condition in order to avoid insistent questioning.²¹⁴ After the surgical treatment, parents were advised to remain silent (or lie) about the condition, in order to avoid negative consequences for the child's self-image, the development of a male or female gender identity and appropriate gender expression, and heterosexual orientation.²¹⁵ After all, physicians believed that variations of sex characteristics made people uncomfortable and that parents would not be able to accept or bond with their children unless their condition was 'erased'.²¹⁶ According to GARLAND and DIAMOND, on the basis of this medical policy, three interwoven ambitions were aspired: "(1) bring the genital appearance in line with the assigned gender in order to facilitate the acceptance of the child [...] in the social environment; (2) minimise the occurrence of later body image problems and gender doubts of the child through gender-appropriate-rearing; and (3) provide the capacity for penile-vaginal intercourse in adulthood".²¹⁷

Since the end of the 1990's, this medical approach to sex assigning/normalising treatment led to much criticism among people with variations of sex characteristics and scholars, especially regarding the timing and necessity of genital surgeries (calling them intersex genital mutilation), the presumption of heterosexuality in treatment guidelines and the authority of the medical science.²¹⁸ Activists and scholars see variations of sex

²¹⁴ H. G. BEH and M. DIAMOND, "David Reimer's Legacy: Limiting Parental Discretion", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 16.

²¹⁵ N. CALLENS, J. MOTMANS, C. LONGMAN, "Redactionele inleiding themanummer intersekse/DSD [Editorial introduction themed issue intersex/DSD]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 2.

²¹⁶ P. NEWCOMBE, "Blurred Lines – Intersexuality and the Law: An Annotated Bibliography", *Law Library Journal* 2017, Vol. 109(2), p. 223.

²¹⁷ J. GARLAND and M. DIAMOND, "Evidence-based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 86.

²¹⁸ G. DAVIS, "The power in a name: diagnostic terminology and diverse experiences", *Psychology and Sexuality* 2014, Vol. 5, p. 15-17; N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 239; N. CALLENS, J. MOTMANS, C. LONGMAN, "Redactionele inleiding themanummer intersekse/DSD [Editorial introduction themed issue intersex/DSD]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 2. For a comprehensive overview of intersex

characteristics and the problems that persons with variations of sex characteristics face as a social, rather than medical issue.²¹⁹ Their claims have been supported by documented stories of persons with variations of sex characteristics that reveal trauma and pain, sometimes leading to self-harming and suicidal behaviour.²²⁰ In this regard, results of qualitative interviews have indicated an awareness of ‘silence’ during childhood, but not understanding the reasons for the silence and the experience of uncertainty and a sense of being imperfect.²²¹ Pervasive dishonesty among parents, family and medical professionals about their condition, have left many persons with variations of sex characteristics with feelings of confusion, shame, guilt, and sometimes anger,²²² next to condition related challenges such as reduced fertility or reduced sexual pleasure.²²³ Medicalisation and pathologisation of variations of sex characteristics maintain the idea of a ‘medical’ emergency, substituting a rubric of ‘social’ emergency and

activism, as well as the different strategies that activists pursue, see M. SUDAI, “Revisiting the limits of professional autonomy: the intersex rights movement’s path to de-medicalization”, *Harvard Journal of Law & Gender* 2018, Vol. 41, p. 1-54.

²¹⁹ G. DAVIS, “‘DSD is a perfectly fine term’: Reasserting medical authority through a shift in intersex terminology” in P.J. McGann and D.J. Hutson (eds.), *Sociology of diagnosis*, Bingley, Emerald, 2011, p. 155-182.

²²⁰ See COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 14 December 2016), p. 20-21. See also C. LOWRY, “Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice”, *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 332.

²²¹ D. MACKENZIE, A. HUNTINGTON and J. A. GILMOUR, “The experiences of people with an intersex condition: a journey from silence to voice”, *Journal of Clinical Nursing* 2009, Vol. 18, p. 1778.

²²² D. L. CLARK HOFMAN, “Male, Female and Other: How Science, Medicine and the Law Treat the Intersexed, and the Implications for Sex-Dependent Law”, *Tulane Journal of Law & Sexuality* 2012, Vol. 21, p. 7. See also NEDERLANDSE ORGANISATIE VOOR SEKSE DIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 35

²²³ N. CALLENS, T. VAN DER GRIFT, M. COOLS, “Een holistisch zorgbeleid voor Differences of Sex Development [Holistic health care for Differences of Sex Development]”, *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 10.

psychological health to justify physical intervention as close to birth as possible.²²⁴ Nevertheless, studies of non-treated persons with variations of sex characteristics provide evidence that they do not necessarily suffer from the psychological harms assumed to follow from the lack of medical intervention.²²⁵ On the other hand, there is no conclusive research showing that early, deferrable surgery is helpful to the child with variations of sex characteristics.²²⁶ Recent qualitative research based on interviews with persons with variations of sex characteristics indicated that cosmetic genital surgeries on children have no real certifiable benefit and instead often contribute to long-term mental and physical health problems.²²⁷

§2. Chicago Consensus and further evolutions

In 2005-06, the criticism of the medical model based on Money's theory prompted an international symposium in Chicago involving clinicians, researchers and advocacy groups, which resulted in a consensus statement

²²⁴ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 303; D. MACKENZIE, A. HUNTINGTON and J. A. GILMOUR, "The experiences of people with an intersex condition: a journey from silence to voice", *Journal of Clinical Nursing* 2009, Vol. 18, p. 1776. See in this regard also C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 459-511.

²²⁵ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 304; M. TRAVIS, "Accommodating Intersexuality in European Union Anti-Discrimination Law", *European Law Journal* 2015, Vol. 21, p. 182; S. KATYAL, "The *Numerus Clausus* of Sex", *The University of Chicago Law Review* 2017, Vol. 84, p. 408.

²²⁶ HUMAN RIGHTS WATCH and INTERACT, "I want to be like nature made me. Medically Unnecessary Surgeries on Intersex Children in the US", <<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>> (last visited 9 August 2017), p. 13. See also COUNCIL OF EUROPE COMMITTEE FOR BIOETHICS, "The Rights of Children in Biomedicine", <<http://www.coe.int/en/web/bioethics/-/study-on-the-rights-of-children-in-biomedici-1>> (last visited 9 August 2017), p. 40. See also J.M. SCHERPE, "The Legal Status of Intersex Persons: An Introduction" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 1.

²²⁷ M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 9.

holding new guidelines ('the Chicago Consensus'), that has remained the benchmark for the medical management of variations of sex characteristics until today.²²⁸ The recommendations and guidelines show a paradigm shift from a medicalised to a multidisciplinary approach that includes non-medical professionals, such as psychologists, social workers, and support groups.²²⁹ Although the statement calls for more caution with regard to early genital surgeries on children and represents the medical community's retreat from the belief that a child's psychosexual development is determined by the child's genitalia and gender assigned by the child's doctor and parents,²³⁰ it is not clear how the recommendations are implemented in practice,²³¹ given

²²⁸ A. KENNEDY, "Fixed at Birth: Medical and Legal Erasures of Intersex Variations", *University of New South Wales Law Journal* 2016, Vol. 39, p. 820.

²²⁹ C. STREULI e.a., "Shaping Parents: Impact of Contrasting Professional Counseling on Parents' Decision Making for Children with Disorders of Sex Development", *Journal of Sexual Medicine* 2013, Vol. 10, p. 1957.

²³⁰ R. L. WHITE, "Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson", *Fordham International Law Journal* 2014, Vol. 37, p. 789. See also AMNESTY INTERNATIONAL, "First, do no harm. Ensuring the rights of children with variations of sex characteristics in Denmark and Germany", <<https://www.amnesty.org/en/documents/eur01/6086/2017/en/>> (last visited 11 May 2017), p. 18. See also M. BLONDIN and C. BOUCHOUX, "Rapport d'Information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 44.

²³¹ See M. BLONDIN and C. BOUCHOUX, "Rapport d'information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 22 June 2017), p. 48. See also COUNCIL OF EUROPE COMMITTEE ON BIOETHICS, "The Rights of Children in Biomedicine", <<http://www.coe.int/en/web/bioethics/-/study-on-the-rights-of-children-in-biomedici-1>> (last visited 9 August 2017), p. 42. See also N. CALLENS, C. LONGMAN and J. MOTMANS, "Terminologie en zorgdiscours m.b.t. Differences of Sex Development (DSD)/Intersekse in België [Terminology and care discourse concerning Differences of Sex Development (DSD)/Intersex in Belgium]", Staatssecretariaat voor Gelijke Kansen, 2016, p. 20. See also J. GARLAND and M. DIAMOND, "Evidence-based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 87.

the lack of comprehensive and adequate data.²³² The consensus also did not problematise the assumed necessity of assigning a binary sex/gender to every child after birth.²³³ In this regard, after the coming out of Hanne Gaby Odiele, reactions from the Belgian medical world concerning the prevalence of sex assigning/normalising treatment indicated that invasive operations of young children presently occur less than before.²³⁴ The same reactions also indicated that *parents*, and therefore not medical professionals or the children concerned, often request early treatment, given the social pressure to have children that comply with the sex/gender binary.²³⁵ Given the lack of official data, it is assumed that sex assigning/normalising treatment still occurs all around the world, despite positive developments in care programmes.²³⁶ Indeed, a 2017 qualitative study by Human Rights Watch and

²³² S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, "Intersex, Variations of Sex Characteristics, and DSD: The Need for Change", <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 26.

²³³ C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice", *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 329-330.

²³⁴ See <<http://deredactie.be/cm/vrtnieuws/wetenschap/1.2873456>> (last visited 25 January 2017). This finding can also be deduced from recent research (2017) of N. CALLENS et al., even though it is also not conclusive about the prevalence of sex assigning/normalising treatment during the early childhood of children with variations of sex characteristics. It predominantly points out the necessity of an interdisciplinary approach regarding the information provided to (parents of) persons with variations of sex characteristics and the gaps in current policy regarding psychological support. See N. CALLENS, T. C. VAN DER GRIFT, M. COOLS, "Een holistisch zorgbeleid voor Differences of Sex Development [Holistic health care for Differences of Sex Development]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2). The same conclusion can be found in the recent information report of the French Senate, which highlights the increased prenatal diagnostics, information supply, support and preparation of persons with variations of sex characteristics and their families. However, the report does not necessarily indicate a significant move towards deferral of medical treatment until the person concerned can provide personal informed consent.

²³⁵ See in this regard also M. BLONDIN and C. BOUCHOUX, "Rapport d'Information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 22 June 2017), p. 51.

²³⁶ M. COOLS, M. SIMMONDS, S. ELFORD, J. GORTER, S. FAISAL AHMED, F. D'ALBERTON, A. SPRINGER, O. HIORT, "Response to the Council of Europe Human Rights Commissioner's Issue Paper on Human Rights and Intersex People", *Journal of European Urology* 2016, p. 408. See in this regard also P. NEWCOMBE, "Blurred Lines – Intersexuality and the Law: An Annotated

InterAct concerning the treatment of persons with variations of sex characteristics in the US, indicates that, despite a positive trend, too many medical practitioners still advise surgery or conduct surgeries on infants and young children, citing lack of data on the outcomes for children who do not undergo surgery.²³⁷

The consensus statement also introduced new medical terminology to deal with variations of sex characteristics, i.e. Disorders of Sex Development (DSD).²³⁸ By referring to variations of sex development as 'disorders', the medical world again pathologised the individuals concerned and affirmed the binary approach to the concept of 'sex'.²³⁹ Accordingly, the new terminology was met with criticism and doubt among scholars in different scientific fields.²⁴⁰ Empirical research has also shown that the DSD terminology is not uniformly accepted by those whose bodies the terminology describes, even though it has become very familiar and sometimes even unavoidable.²⁴¹ Moreover, the diagnosis of 'gender dysphoria' in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) defined DSD

Bibliography", *Law Library Journal* 2017, Vol. 109(2), p. 225. See in this regard also HUMAN RIGHTS WATCH and INTERACT, "I want to be like nature made me. Medically Unnecessary Surgeries on Intersex Children in the US", <<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>> (last visited 9 August 2017), p. 8. See in this regard also S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, "Intersex, Variations of Sex Characteristics, and DSD: The Need for Change", <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 10-15 and M. CARPENTER, "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 469.

²³⁷ HUMAN RIGHTS WATCH and INTERACT, "I want to be like nature made me. Medically Unnecessary Surgeries on Intersex Children in the US", <<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>> (last visited 9 August 2017), p. 13.

²³⁸ The umbrella term 'Disorders of Sex Development' was introduced by the Lawson Wilkins Pediatric Endocrine Society (LWPES) and the European Society for Paediatric Endocrinology (ESPE).

²³⁹ See J.M. SCHERPE, "The Legal Status of Intersex Persons: An Introduction" in J.M. SCHERPE, A. DUTTA, T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 2-3.

²⁴⁰ See G. DAVIS, "The power in a name: diagnostic terminology and diverse experiences", *Psychology and Sexuality* 2014, Vol. 5, p. 16.

²⁴¹ *Ibid.*, p. 24.

as a specifier of gender dysphoria.²⁴² However, this diagnosis does not take into account that the criteria for gender dysphoria do not apply to individuals with variations of sex characteristics, because they fail to take into account the irreducible difference between medically and non-medically assigned sex, and between non-consensual and consensual medical treatments respectively.²⁴³ KRAUS referred to this conflation as “the transsexualising of the gender ‘problems’ in individuals with variations of sex characteristics, regardless of their distinctive medical histories”,²⁴⁴ suggesting that something is ‘wrong’ with the person concerned. While persons with variations of sex characteristics and transgender persons can face common issues concerning their gender and sex,²⁴⁵ the terms ‘variations of sex characteristics and

²⁴² C. KRAUS, “Classifying Intersex in DSM-5: Critical Reflections on Gender Dysphoria”, *Archives Sexual Behaviour* 2015, Vol. 44, p. 1147.

²⁴³ Ibid., p. 1161. See in this regard also NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 46. See in this regard also P. DUNNE, “Towards Trans and Intersex Equality: Conflict or Complementarity?” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 222.

²⁴⁴ C. KRAUS, “Classifying Intersex in DSM-5: Critical Reflections on Gender Dysphoria”, *Archives Sexual Behaviour* 2015, Vol. 44, p. 1157. In other words: “Transsexual people seek the help of a doctor to have their body changed. Intersex people seek help to get rid of the doctor who changed their body”. See NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 46. See in this sense also D.C. GHATTAS, “Standing Up for the Human Rights of Intersex People” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 436.

²⁴⁵ In this regard, it is important to point out that gender dysphoria with persons with variations of sex characteristics can take other forms than with transgender persons. Indeed, even when they do not reject the sex/gender assigned to them at birth, persons with variations of sex characteristics whose bodies, expression, or interests do not comply with society’s rigid gender stereotypes might experience psychological problems (often due to a feeling of being not male or female ‘enough’). See N. CALLENS, C. LONGMAN and J. MOTMANS, “Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]”, <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 23.

‘transgender’ are not interchangeable.²⁴⁶ Moreover, by suggesting a mental disorder when people with variations of sex characteristics reject, at an older age, their sex assignment at birth or during childhood, the diagnosis leads to the formal pathologisation of bodily diversity and the increased risk of stigma.²⁴⁷

The introduction of the DSD terminology did not appease the tension between the different approaches to variations of sex characteristics, even within the group concerned.²⁴⁸ Indeed, many of the persons with variations of sex characteristics do not identify with the term ‘intersex’, or do not consider that they have a condition which impacts on their sexuality or gender identity.²⁴⁹ After all, as mentioned above, persons with variations of sex characteristics who develop a gender identity that conforms with the binary ‘m/f’, might have the legitimate wish of alignment between their body and gender identity along the line of social expectations. On the other hand, activists continue to criticise the emphasis in society on the medical approach to and the pathologisation of variations of sex characteristics,²⁵⁰ which is

²⁴⁶ R. L. WHITE, “Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson”, *Fordham International Law Journal* 2014, Vol. 37, p. 779. See in this regard also NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 45.

²⁴⁷ W. O'BRIEN, “Can International Human Rights Law Accommodate Bodily Diversity?”, *Human Rights Law Review* 2015, Vol. 15, p. 16; C. KRAUS, “Classifying Intersex in DSM-5: Critical Reflections on Gender Dysphoria”, *Archives Sexual Behaviour* 2015, Vol. 44, p. 1156.

²⁴⁸ See also NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 9 May 2017), p. 17.

²⁴⁹ E. MCDONALD, “Intersex People in Aotearoa New Zealand: The Challenges for Law and Social Policy. Part I: Critiquing Gender Normalising Surgery”, *Victoria University Wellington Law Review* 2015, Vol. 46, p. 709.

²⁵⁰ Even supporters of the term ‘DSD’ acknowledge that it holds a connotation of medicalisation. See NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 9 May 2017), p. 17.

reflected in the term ‘Disorders of Sex Development’, and the desirability of sex assignment at birth through medical treatment.²⁵¹ They claim that the shift to ‘DSD’ reinstitutionalised medical power to delineate and silence those marked by the diagnosis.²⁵² The terms ‘intersex’, ‘Divergence of Sex Development’ or ‘Differences of Sex Development’ have been proposed by activists instead, underlying one of their central tenets: unusual anatomy does not inevitably require surgical or hormonal correction.²⁵³ While results between studies differ, it can be noted that persons who prefer ‘intersex’ often use the term to express a social identity that challenges society’s binary cisnormativity.²⁵⁴ People who make use of the term ‘DSD’ or the condition-specific diagnostic term, are more likely to question their gendered self, which may lead to problems of self-acceptance and self-confidence.²⁵⁵ In essence, intersex activists form a human rights movement that is founded on the assumption that people with variations of sex characteristics should not be oppressed because their bodies do not fit social norms regarding the

2014-V1_0.pdf> (last visited 10 May 2017), p. 71. See also AMNESTY INTERNATIONAL, “First, do no harm. Ensuring the rights of children with variations of sex characteristics in Denmark and Germany”, <<https://www.amnesty.org/en/documents/eur01/6086/2017/en/>> (last visited 11 May 2017), p. 18; and N. CALLENS, J. MOTMANS, C. LONGMAN, “Redactionele inleiding themanummer intersekse/DSD [Editorial introduction themed issue intersex/DSD]”, *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 2.

²⁵¹ N. CALLENS, C. LONGMAN and J. MOTMANS, “Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]”, <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 8.

²⁵² COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 14 December 2016), p. 22.

²⁵³ N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 29.

²⁵⁴ N. CALLENS, C. LONGMAN and J. MOTMANS, “Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]”, <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 18.

²⁵⁵ *Ibid.*, p. 18.

‘male’/‘female’ binary.²⁵⁶ They point out that persons with variations of sex characteristics face interphobia, both at an institutional and social level.²⁵⁷ In this regard, thirty intersex activist organisations from multiple regions worldwide came together in Valetta in 2013 to draft the so-called ‘Malta Declaration’, which demands to end discrimination against intersex people and to ensure the right of bodily integrity, physical autonomy and self-determination.²⁵⁸ This urge was repeated by European intersex activists in the ‘Vienna Statement’ of 2017, which noted that more than fifty human rights bodies worldwide have called on governments, policy makers and stakeholders to end human rights violations suffered by persons with variations of sex characteristics, such as sex assigning/normalising treatment.²⁵⁹

In conclusion, it is important to point out that to date there is no scientifically correct overall picture of whether and how aspects of variations of sex characteristics (medical condition specific aspects, gender assignment, sex assigning/normalising treatment, and reactions from the social environment) affect the health and well-being of persons with variations of sex characteristics.²⁶⁰ Indeed, a 2016 interdisciplinary update to the Chicago

²⁵⁶ N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 240.

²⁵⁷ S. AGIUS and C. TOBLER, “Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression”, <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 23 March 2017), p. 13.

²⁵⁸ The full Malta Declaration can be found here: <<https://oiieurope.org/malta-declaration/>> (last visited 11 May 2017).

²⁵⁹ See <<https://oiieurope.org/statement-1st-european-intersex-community-event-vienna-30st-31st-march-2017/>> (last visited 9 August 2017).

²⁶⁰ J. VAN LISDONK, “Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]”, <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 25 January 2017), p. 44. See also M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 25. See also P. NEWCOMBE, “Blurred Lines – Intersexuality and the Law: An Annotated Bibliography”, *Law Library Journal* 2017, Vol. 109(2), p. 224. See also COUNCIL OF EUROPE COMMITTEE ON BIOETHICS, “The Rights of

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Consensus affirmed that “timing, choice of the individual and irreversibility of surgical procedures are sources of concerns. There is no evidence regarding the impact of surgically treated or non-treated DSDs during childhood for the individual, the parents, society or the risk of stigmatization”.²⁶¹ On the other hand, a 2017 French study on the psychological health of children with variations in genitalia who did not (have to) undergo sex assigning/normalising surgery indicated highly positive outcomes.²⁶² Although the 2016 Chicago Consensus noted that physicians should be aware that there has been a movement in recent years among legal and human rights bodies to increasingly emphasise the importance of maintaining the patient autonomy,²⁶³ it did not recommend a cessation of sex assigning/normalising treatment on children with variations of sex characteristics.²⁶⁴ Moreover, expert statements have neither sufficiently addressed the scientific uncertainty concerning the criteria for sex/gender assignment – and their respective weight –, nor the legal implications of

Children in Biomedicine”, <<http://www.coe.int/en/web/bioethics/-/study-on-the-rights-of-children-in-biomedici-1>> (last visited 9 August 2017), p. 43.

²⁶¹ P. A. LEE e.a., “Global Disorders of Sex Development, Update since 2006: Perceptions, Approach and Care”, *Hormone Research in Paediatrics* 2016, Vol. 85, p. 176. See in this regard also J. GARLAND and M. DIAMOND, “Evidence-based Reviews of Medical Interventions to the Gender Status of Children with Intersex Conditions and Differences of Sex Development” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 82-84; M. CARPENTER, “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 458. See also C. LOWRY, “Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice”, *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 339-340.

²⁶² P. BOUGNERES, C. BOUVATTIER, M. CARTIGNY and L. MICHALA, “Deferring surgical of ambiguous genitalia into adolescence in girls with 21-hydroxylase deficiency: a feasibility study”, *International Journal of Pediatric Endocrinology* 2017, p. 7.

²⁶³ P. A. LEE e.a., “Global Disorders of Sex Development, Update since 2006: Perceptions, Approach and Care”, *Hormone Research in Paediatrics* 2016, Vol. 85, p. 169-170. See also P. NEWCOMBE, “Blurred Lines – Intersexuality and the Law: An Annotated Bibliography”, *Law Library Journal* 2017, Vol. 109(2), p. 224.

²⁶⁴ In 2017, three former US Surgeons-General issued a statement calling for a moratorium on non-consensual, deferrable surgeries on children with variations of sex characteristics, based on the simple fact that research does not support the practice of cosmetic infant genitoplasty. See <<http://www.palmcenter.org/publication/re-thinking-genital-surgeries-intersex-infants/>> (last visited 9 August 2017).

wrongful assignment or the non-consensual medical interventions to reinforce such assignment.²⁶⁵ Nevertheless, even if medical professionals would become able to accurately predict the gender identity of all new-born children, one would still have to question whether irreparably transforming a person's body without their meaningful knowledge or consent could be legally acceptable.²⁶⁶

B. Sexual orientation – Heteronormativity

I. Sexual orientation

Sexual orientation is integral to a person's most intimate characteristics and – for most people – personal identity.²⁶⁷ It does not necessarily bear any relation to the biological sex or the gender identity of an individual, but rather to a person's sexuality.²⁶⁸ The Preamble to the Yogyakarta Principles defines 'sexual orientation' as "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender".²⁶⁹

²⁶⁵ J. GARLAND and M. DIAMOND, "Evidence-based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 84.

²⁶⁶ P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 223.

²⁶⁷ OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, "Fact sheet. LGBT Rights: Frequently Asked Questions", <https://www.unfe.org/system/unfe-7-UN_Fact_Sheets_v6_-_FAQ.pdf> (last visited 7 November 2016).

²⁶⁸ E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 510.

²⁶⁹ Preamble Yogyakarta Principles, <<http://www.yogyakartaprinciples.org/preamble/>> (last visited 7 November 2016).

‘Sexual orientation’: Each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

The Yogyakarta Principles describe sexual orientation in a broad manner. They refer to both internal feelings and external conduct, and make abstraction of terms such as ‘heterosexual’, ‘homosexual’, ‘bisexual’, ‘pansexual’ or ‘asexual’. According to these categories, which are clearly founded on a normative binary conceptualisation of sex/gender, people are either:

- Heterosexual: sexual attraction to members of the opposite of one’s own sex/gender;
- Homosexual: sexual attraction to members of one’s own sex/gender;
- Bisexual: sexual attraction to both members of one’s own sex or members of the opposite of one’s own biological sex/gender;
- Pansexual: sexual attraction to persons regardless of their biological sex or gender identity;
- Asexual: no sexual attraction.²⁷⁰

Whereas in today’s society, ‘sexual orientation’ is measured chiefly by the sex/gender of the object(s) of one’s sexual desires, in much of Western history an important axis of sexual orientation was instead that of being sexually active/passive or penetrative/receptive: (only) passivity in a male

²⁷⁰ It is still questioned in the literature whether ‘asexuality’ could be seen as a category of sexual orientation, considering the definition of ‘sexual orientation’ as the capacity for sexual attraction to other persons. An argument in favour of asexuality as a distinct category of sexual orientation is the finding that there appears to be a group of individuals who describe themselves as asexual or who report no subjective, psychological attraction to others. However, some scholars see the experience of genital sexual arousal in individuals, regardless of their subjective feelings, as a measure of sexual orientation. See E. VAN HOUDENHOVE, L. GIJS, G. T’SJOEN, P. ENZLIN, “Asexuality: A Multidimensional Approach”, *Journal of Sex Research* 2015, Vol. 52(6), p. 671.

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was seen as effeminate and led to one being considered homosexual.²⁷¹ This conceptualisation of homosexuality can be attributed to the conflation in society between gender identity, gender roles and sexual orientation.²⁷²

Research has shown that human sexuality and sexual preferences are as varied and numerous as there are individual personalities.²⁷³ Sexual attractions can therefore fall within one or more 'traditional' sexual orientation categories,²⁷⁴ or could not be categorical at all. Sexual orientation thus exists along a continuum.²⁷⁵ Moreover, considering that recent scientific understandings have shown that the social constructs of 'sex' and 'gender identity' cannot be understood in terms of a binary of 'male' and 'female',²⁷⁶ it can be questioned whether these categories could be used at all.²⁷⁷ Indeed, in the case of gay and lesbian persons, one desires a person of the same sex/gender; but what exactly is the same?²⁷⁸ For instance, 'sex' is the combination of genitals, chromosomes, gonads and hormones, which could vary between sexual partners.²⁷⁹

As mentioned above, according to the Yogyakarta Principles 'sexual orientation' not only refers to one's (capacity for) sexual attraction and conduct, but also to one's (capacity for) profound emotional attraction and

²⁷¹ M. A. CASE, "Disaggregating Gender from Sex and Sexual Orientation: the Effeminate Man in the Law and Feminist Jurisprudence", *The Yale Law Journal* 1995, Vol. 105(1), p. 14.

²⁷² See *infra* p. 123.

²⁷³ E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 510. See also I. Y. NUGRAHA, "The compatibility of sexual orientation change efforts with international human rights law", *Netherlands Quarterly of Human Rights* 2017, <<https://doi.org/10.1177%2F0924015917724654>> (last visited 18 January 2019), p. 5.

²⁷⁴ E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 512.

²⁷⁵ R.C. SAVIN-WILLIAMS and Z. VRANGALOVA, "Mostly heterosexual as a distinct sexual orientation group: A systematic review of the empirical evidence", *Developmental Review* 2013, Vol. 33, p. 58-88.

²⁷⁶ See *supra* p. 66

²⁷⁷ See also *infra* p. 128.

²⁷⁸ P. CURRAH, "Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities", *Hastings Law Journal* 1996-97, Vol. 48, p. 1381.

²⁷⁹ *Ibid.*, p. 1381.

intimate relations.²⁸⁰ This description is shared with the influential American Psychological Association and the American Psychiatric Association:

*“Sexual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment and intimacy. In addition to sexual behaviour, these bonds encompass nonsexual physical affection between partners, shared goals and values, mutual support and ongoing commitment. Consequently, sexual orientation is not merely a personal characteristic that can be defined in isolation. Rather, one’s sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, compromise an essential component of personal identity.”*²⁸¹

For queer legal theorist VALDES, ‘sexual orientation’ denotes the apparent or actual inclination(s) of sexual or affectional interests or desires among humans, and is part of the broader term of ‘sexuality’ which also encompasses sexual conduct.²⁸² Other authors from social sciences have also put a strong emphasis on sexual attraction – rather than on overt sexual behavior – in their conceptualisation of sexual orientation.²⁸³ However, sexual self-identification is the most widely used method to assess sexual orientation.²⁸⁴ Given its focus on personal autonomy, this thesis also makes use of self-identification as the decisive indicator for a person’s sexual orientation.

²⁸⁰ See also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 59-60.

²⁸¹ N. LEVIT, “Theorizing and litigating the rights of sexual minorities”, *Columbia Journal of Gender and Law* 2010, Vol. 19, p. 37.

²⁸² F. VALDES, “Foreword. Notes on the ‘Conflation’”, *California Law Review* 1995, Vol. 83:1, p. 23.

²⁸³ E. VAN HOUDENHOVE, L. GIJS, G. T’SJOEN, P. ENZLIN, “Asexuality: A Multidimensional Approach”, *Journal of Sex Research* 2015, Vol. 52(6), p. 670.

²⁸⁴ *Ibid.* p. 670.

II. Heteronormativity

Negative feelings towards non-heterosexual persons and their expected behaviour are rooted in societal heteronormativity, i.e. the institutions, structure of understanding and practical orientations that make heterosexuality seem not only coherent, but also privileged.²⁸⁵ Heteronormativity (or normative heterosexuality)²⁸⁶ refers to the naturalness of heterosexuality in society.²⁸⁷ Homosexuality, bisexuality and other forms of sexuality are regarded as unnatural and abnormal expressions of one's sexual identity. Indeed, heterosexuality is all around us, yet often invisible: from depictions of straight couples in movies, advertisements, songs, novels, textbooks, on television, to rites of adult passage, like dances and first dates.²⁸⁸ Its naturalness is enforced by punitive rules (social, familial and legal) that force us to conform to hegemonic, heterosexual standards for identity.²⁸⁹ The heteronormative standard thus acts as a sort of 'natural law' of sexuality.²⁹⁰ From birth, children are inundated with implicit and explicit messages that reinforce heterosexuality as both natural and good.²⁹¹ In that regard, it is important to recognise that 'sexual orientation' is a relational

²⁸⁵ A DEWAELE, N. COX, W. VAN DEN BERGHE and J. VINCKE, *De maatschappelijke positie van holebi's en hun sociale netwerken: over vriendschap en andere bloedbanden* [The societal status of LGB persons and their social networks: on friendship and other bloodbands], Antwerp/Hasselt, Policy Research Centre on Equality Policies, 2006.

²⁸⁶ E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 33.

²⁸⁷ L. WESTBROOK and K. SCHILT, "Doing gender, determining gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System", *Gender & Society* 2014, Vol. 28(1), p. 37. See also M. TRAVIS, "The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment", *Social & Legal Studies* 2018, p. 14.

²⁸⁸ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 614.

²⁸⁹ A. R. REEVES, "Sexual identity as a fundamental human right", *Buffalo Human Rights Law Review* 2009, Vol. 15, p. 223.

²⁹⁰ J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 124.

²⁹¹ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 614.

concept: 'gay' has little meaning independent of 'straight', and because of heterosexuality's dominance, 'gay' tends to be what 'straight' does not.²⁹²

'Heteronormativity': The institutions, structure of understanding and practical orientations that make heterosexuality seem not only coherent, but also privileged.

Societal heteronormativity in some cases leads to so-called minority stress among non-conforming individuals. MEYER distinguishes three stressors that non-heterosexual persons face:

- Internalised homonegativity: people grow up in a predominant heteronormative society that conveys negative attitudes towards 'deviant' sexual orientations and conduct. When non-conforming persons realise their sexual orientation and question their presumed heterosexuality, the possibility arises that they apply the homonegative feelings on themselves, leading to emotional stress;
- Stigma consciousness and expectation of homonegativity: Non-conforming persons expect to a certain extent to be stigmatised and treated in accordance with various stereotypes and homonegativity, leading to adjustments in their behaviour and appearance;
- Real experiences of negativity, hostility and aggression: these real experiences are – contrary to the first two concepts – external stressors. Experiences of aggression or hostility of course also negatively influence levels of internalised homonegativity and stigma consciousness.²⁹³

²⁹² Ibid., p. 617.

²⁹³ I. H. MEYER, "Prejudice, social stress, and mental health in lesbian, gay and bisexual populations: Conceptual issues and research evidence", *Psychological Bulletin* 2003, Vol. 129(5), p. 674-697.

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Heteronormativity *sensu lato* defines not only a normative sexuality, but also a normative way of life.²⁹⁴ It stems from binary normativity and cisnormativity, i.e. the essentialist belief that there are only two sexes – male and female – and that a certain gendered set of behaviours and expectations follow from one's sex.²⁹⁵ Indeed, heteronormativity also complements normative expressions of gender – what is required or imposed on individuals in order for them to be perceived or accepted as 'a real man' or 'a real woman' as the only available categories – and the privileging of those who are comfortable in the gender traditionally belonging to the sex assigned to them at birth through various practices and institutions.²⁹⁶ In this sense, sexual orientation is conflated with sex, gender identity and gender roles,²⁹⁷ legitimating specific forms of relationships. Indeed, the heteronormative norm is the idea that people are, by virtue of heredity and biology, exclusively and aggressively heterosexual: males are 'masculine' men, and are attracted only to 'feminine' women and *vice versa*.²⁹⁸ Societal heteronormativity therefore also encompasses social norms regarding gender identity, with stereotypes concerning sexual orientation forming its sexual component.

Institutionalised heterosexuality served – and to a certain extent still serves – to guarantee gender (role) hierarchy within society, particularly disadvantaging women.²⁹⁹ Indeed, gendered assumptions seem to be

²⁹⁴ S. JACKSON, "Gender, sexuality and heterosexuality. The complexity (and limits) of heteronormativity", *Feminist Theory* 2006, Vol. 7(1), p. 107.

²⁹⁵ A.R. REEVES, "Sexual identity as a fundamental human right", *Buffalo Human Rights Law Review* 2009, Vol. 15, p. 223.

²⁹⁶ T. HAMMARBERG, "Discrimination on grounds of sexual orientation and gender identity in Europe", <https://www.coe.int/t/commissioner/Source/LGBT/LGBTStudy2011_en.pdf> (last visited 21 November 2016), p. 131. See S. AGIUS and C. TOBLER, "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression", <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 23 March 2017), p. 13.

²⁹⁷ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 631.

²⁹⁸ J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 123-124.

²⁹⁹ S. JACKSON, "Gender, sexuality and heterosexuality. The complexity (and limits) of heteronormativity", *Feminist Theory* 2006, Vol. 7(1), p. 111.

informed by heterosexual ones. While womanliness is almost always equated with (hetero)sexual attractiveness and (hetero)sexual domesticity, manliness can be validated not only through (hetero)sex, but also through physical or mental prowess, courage or leadership abilities.³⁰⁰ When either men or women breach heteronormative conventions, they are equally susceptible to being defined by, or reduced to their (potentially deviant) sexuality.³⁰¹ Moreover, the reality of the 'feminine' being considered to be of an inferior status to the 'masculine' has had an impact on societies' and cultures' treatment of non-heterosexual persons who defy the traditional stereotypes attached to their sex: prejudice arises against gay males who adopt 'feminine' characteristics and contempt is reserved for lesbian women who display 'masculine' characteristics and who are not only 'less than women' but also 'less than men'.³⁰² Since male masculinity is enforced and policed in society more strictly than female femininity because of its connection to heterosexuality, gender non-conforming gay men are more likely targets for discrimination than gender conforming gay men.³⁰³ Heteronormativity thus is often combined with patriarchy, yielding perhaps the most formidable and exclusive of societal structures.³⁰⁴

³⁰⁰ R. W. CONNELL, *The Men and the Boys*, Cambridge, Polity, 2000.

³⁰¹ S. JACKSON, "Gender, sexuality and heterosexuality. The complexity (and limits) of heteronormativity", *Feminist Theory* 2006, Vol. 7(1), p. 115.

³⁰² E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 509.

³⁰³ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 632.

³⁰⁴ A. R. REEVES, "Sexual identity as a fundamental human right", *Buffalo Human Rights Law Review* 2009, Vol. 15, p. 224; D. OTTO, "International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry", *Melbourne Legal Studies Research Papers*, No. 620, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178769> (last visited 29 November 2016). This hierarchy regarding gender (roles) between men and women has often led to a so-called asymmetric human rights approach, which assumes that 'gender' problems are 'women's' problems, needing specific rights and action plans for women. However, this asymmetric approach could be seen as conforming the 'male'/'female' dichotomy, by not taking into account the conflation between 'sex' and 'gender identity' and its ignorance towards non-conforming gender identities.

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Heteronormativity can also be seen as the underlying reason for the creation of sex/gender-segregated spaces.³⁰⁵ Indeed, within the heteronormative logic, all bodies with male biological anatomies, regardless of gender identity, desire female bodies, and many of them are willing to use force to get access to those bodies.³⁰⁶ Women are considered to be weaker than men, and as a result, women are always at (hetero)sexual risk.³⁰⁷ Since all persons are presumed to be heterosexual, sex/gender-segregated spaces seem safe because they are then 'sexuality-free zones'.³⁰⁸ Persons whose biological sex does not match their gender identity do not fit in this heteronormative and cisnormative rhetoric and face different kinds of phobia, corroborating a treatment focus on gender affirming surgery, to realign them with the binary sex/gender categories and complementary segregation.

Society's heteronormativity/patriarchy has been heavily criticised by feminist and queer theory. Feminism challenges male social dominance, based on the sex/gender binary, by questioning the supposed naturalness of the subordination of women in social relationships, due to the purported physical superiority of the male body over the female's supposedly more fragile and vulnerable body, and the accompanying gender roles.³⁰⁹ However, whether the description of gender identity in terms of a male versus female identity binary, should also be questioned has been very controversial within feminist theory.³¹⁰ Indeed, many feminist theorists are afraid that fully dismantling sex/gender by questioning the binary 'male'/'female' will mean the loss of the precarious spaces that have been carved out for attention to be paid to

³⁰⁵ J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 975-976. See also J. GABILONDO, "Holy Gender! Promoting Free Exercise of Gender by Discernment Without Establishing Binary Sex or Compulsory Fluidity", *Seattle Journal for Social Justice* 2018, p. 673.

³⁰⁶ L. WESTBROOK and K. SCHILT, "Doing gender, determining gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System", *Gender & Society* 2014, Vol. 28(1), p. 48.

³⁰⁷ *Ibid.*, p. 46.

³⁰⁸ *Ibid.*, p. 49.

³⁰⁹ J.L. NAGOSHI, C.T. NAGOSHI, S. BRZUZY, *Gender and Sexual Identity. Transcending Feminist and Queer Theory*, New York, Springer, 2014, p. 17.

³¹⁰ *Ibid.*, p. 18.

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women's human rights issues.³¹¹ Queer theory has essentially filled this gap and has challenged the dominant binary, cis- and heteronormative structures, by proposing that gender roles, gender identity and sexual orientation are social constructs, and therefore open to questioning, subversion and self-construction.³¹² Queer theory thus challenges the feminist efforts to achieve recognition through category affirmation.³¹³

Over the years, there has been room for change and sexual diversity, especially in Western societies, at the social and legal level. However, several authors in the literature suggest that this movement did not fundamentally upset the heteronormative ideals, such as the traditional family values, separating the 'good homosexual' or 'normal gay' from the 'dangerous queer' or the bad citizen.³¹⁴ Indeed, in modern cases of discrimination, a straight or gay-identified person accepts gay identity as valid but does not accept how the person concerned expresses that identity.³¹⁵ BOSO distinguishes so-called 'assimilative' and 'non-assimilative' gays, i.e. persons who comply with modern conceptions of 'normal' gay sexuality based on traditional heteronormative ideals, and persons who do not.³¹⁶ Normalising deviant sexuality therefore goes hand in hand with accepting heteronormative conventions in society.³¹⁷ Gay or lesbian identified people are in many ways now a part of mainstream conservative life: they can legally get married and

³¹¹ D. OTTO, "International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry", *Melbourne Legal Studies Research Papers*, No. 620, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178769> (last visited 29 November 2016).

³¹² J.L. NAGOSHI, C.T. NAGOSHI, S. BRZUZY, *Gender and Sexual Identity. Transcending Feminist and Queer Theory*, New York, Springer, 2014, p. 25.

³¹³ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 6.

³¹⁴ S. JACKSON, "Gender, sexuality and heterosexuality. The complexity (and limits) of heteronormativity", *Feminist Theory* 2006, Vol. 7(1), p. 112.

³¹⁵ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 613. This notion is often called 'straight acting' by non-heterosexual persons.

³¹⁶ *Ibid.*, p. 624-631.

³¹⁷ Interestingly, over the last decades LGB+ activists have indeed made marriage equality their most important claim.

adopt children.³¹⁸ Non-heterosexual identity thus has steadily transformed from hated outsider status to tolerated – and sometimes accepted – insider status.³¹⁹

Although exceptions to societal heteronormativity are becoming more common, non-heterosexual persons often still encounter hostility, as proven by the figures of violence mentioned in Chapter I. This is especially true for individuals who fail to conform to stereotypical expectations of the straight-acting homosexual person. These non-conformities vividly demonstrate sexual orientation's diverse expressive meanings.³²⁰

C. Gender (identity) – Gender expression – cisnormativity

The last concept in the aforementioned trio of society's sex/gender system, is 'gender identity' or sometimes simply called 'gender'. The Preamble to the Yogyakarta Principles +10 defines 'gender identity' 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."³²¹

'Gender' usually refers to social rules and assumptions regarding gender roles and gender identities,³²² patterns and stereotypes, and the construction of 'manliness' and 'femininity';³²³ the culturally determined behavioural, social

³¹⁸ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 620.

³¹⁹ *Ibid.*, p. 620.

³²⁰ *Ibid.* p. 620. Divisions over how to express homosexual identity also exist among people identifying as homosexual. The many negative reactions to so-called pride events are illustrative of this internal division.

³²¹ Preamble Yogyakarta Principles, <<http://www.yogyakartaprinciples.org/preamble/>> (last visited 8 November 2016).

³²² S. HANSSEN, "Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law", *Oregon Law Review* 2017, Vol. 96, p. 285.

³²³ E. BREMS and L. STEVENS, "Inleiding [Introduction]" in E. BREMS and L. STEVENS (eds.), *Recht en gender in België* [Law and gender in Belgium], Bruges, die Keure, 2011, p. 18; F. VALDES, "Foreword. Notes on the 'Conflation'", *California Law Review* 1995, Vol. 83(1), p. 21.

and psychological traits that are typically associated with being male or female.³²⁴ However, it might also refer to other, more diverse experiences of gender that cannot be confined to the male/female dichotomy. Since gender is understood as an amorphous social construct, there are as many ways to experience and express gender as there are human beings on the planet.³²⁵ According to the Yogyakarta Principles +10, 'gender identity' contains both a personal, *internal* sense of one's gender, and an *external* expression of that gender through dress, speech and mannerism.³²⁶ Although the definition of gender identity and gender expression put forward by the Yogyakarta Principles +10 is widespread in international literature and practice, it is also criticised. Indeed, OTTO argues that although "the definition sets out to be inclusive by acknowledging that *everyone* has a gender identity, those who do not experience gender as an 'identity' or feel they have no gender or are gender neutral are excluded".³²⁷ DREYFUS joins BUTLER by stating that "there is no gender identity behind the expressions of gender; identity is performatively constituted by the very expressions that are said to be its results."³²⁸ In other words, by stating that a gender identity must be 'deeply felt' and 'individual', persons must fix their gender identity, leading to an unintentional privileging of a clear, coherent and unitary identity over conceptions of blurred identifications.³²⁹ In order to acknowledge these

³²⁴ M. L. BROWN and C. A. ROUNSLEY, *True Selves: Understanding Transsexualism*, San Francisco, Jossey-Bass, 1996, p.19.

³²⁵ K. REINECK, "Running from the gender police: reconceptualizing gender to ensure protection for non-binary people", *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 289.

³²⁶ The Belgian anti-discrimination legislation uses 'gender identity' and 'gender expression', i.e. the expression of one's gender identity, as distinct concepts. See Article 4, §3 of the Act of 10 May 2007 Combatting discrimination between women and men, *Belgian Gazette* 30 May 2007.

³²⁷ D. OTTO, "Queering Gender [Identity] in International Law" in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 36.

³²⁸ T. DREYFUS, "The Half-Invention of Gender Identity in International Human Rights Law: From Cedaw to the Yogyakarta Principles", *Australian Feminist Law Journal* 2012, Vol. 37, p. 45. See in this regard also S. K. KATYAL, "The *Numerus Clausus* of Sex", *The University of Chicago Law Review* 2017, Vol. 84, p. 437.

³²⁹ T. DREYFUS, "The Half-Invention of Gender Identity in International Human Rights Law: From Cedaw to the Yogyakarta Principles", *Australian Feminist Law Journal* 2012, Vol. 37, p. 45. See in this regard also L. J. MOORE and P. CURRAH, "Legally Sexed" in R. E. DUBROFSKY

critiques and to recognise that a vast diversity of genders exists beyond the male/female binary, this thesis will from here forward make use of the concept of '**gender (identity)**'.³³⁰

- '**Gender**': Societal rules and assumptions regarding roles and identities, patterns and stereotypes, and the construction of masculinity and femininity; the culturally determined behavioural, social and psychological traits that are typically associated with being male or female;
- '**Gender (identity)**': 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;
- '**Gender expression**': External expression of a person's gender (identity) through, *inter alia*, dress, speech and mannerism.

The Principles immediately refer to the biggest issue concerning gender (identity) in present society, i.e. the situation where one's gender (identity) is not congruent with one's biological sex assigned at birth. Although this thesis already stated that 'sex' is a social concept that does not necessarily have to be confined to the binary 'male' and 'female', incongruence between one's

and S. A. MAGNET (eds.), *Feminist Surveillance Studies*, Durham, Duke University Press, 2015, p. 69.

³³⁰ However, note that sometimes 'gender identity' will still be used, for instance in quotations or in the light of the specific context at hand.

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(binary) sex and gender (identity) is considered to be a ‘problem’ regarding a person’s gender (identity).³³¹

‘Sex’ and ‘gender (identity)’ are different concepts, that do not necessarily define each other. However, it is clear that they interrelate in current society. Indeed, in part, gender (identity) is constructed from the consequences attached by society to the physical differences between the (binary) sexes. There are particular dress codes, speech patterns, gaits etc. assigned to the sexes, which are usually either ‘male’ or ‘female’, resulting in gender stereotypes based on the naturalness and sanctity of the binary system, i.e. cisnormativity.³³² However, ‘gender’ does not necessarily equate to genitals.³³³ Although some authors claim that gender (identity) could be developed and cultivated,³³⁴ it is not manipulable: the idea that individuals can choose or change their gender fails to take into account that it is gender which determines the nature of human experience and not *vice versa*.³³⁵

‘Cisnormativity’: Essentialist principle according to which all persons born with male sex characteristics are assumed to have a male gender (identity) and all persons born with female sex characteristics are assumed to have a female gender (identity).

In the (sociological) literature, one can distinguish between ‘doing gender’ and ‘determining gender’, respectively referring to a person’s own gender

³³¹ The dominant vision since the 1960’s has been that, in case of gender incongruence or transsexuality, one’s physical appearance should be altered to match one’s gender (identity) and not *vice versa*. See *infra* p. 116.

³³² E. PICARRA and C. VISSER, “Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism”, *South African Journal on Human Rights* 2012, Vol. 28, p. 508.

³³³ J. T. WEISS, “The Gender Caste System: Identity, Privacy, and Heteronormativity”, *Law & Sexuality: Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 158.

³³⁴ D. COOPER and F. RENZ, “If the State Decertified Gender, What Might Happen to its Meaning and Value?”, *Journal of Law and Society* 2016, Vol. 43, p. 500.

³³⁵ J. T. WEISS, “The Gender Caste System: Identity, Privacy, and Heteronormativity”, *Law & Sexuality: Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 159.

expression and the attribution of gender (identity) by society (including the legal system) on the basis of everyday interaction which serves to authenticate a person's own gender (identity).³³⁶ The way of attributing gender (identity) changes in the light of the circumstances at hand:³³⁷ 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.³³⁸ By contrast, in gender-*segregated* spaces, a combination of self-defined identity expression and body-based criteria is used, allowing someone to receive cultural and institutional support for a 'change' of gender (identity) only if they undergo gender affirming therapy.³³⁹ Finally, in sexual interactions, biology-based criteria (particularly genitals) are used to determine gender.³⁴⁰ Gender determination also occurs at the legal level,

³³⁶ L. WESTBROOK and K. SCHILT, "Doing gender, determining gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System", *Gender & Society* 2014, Vol. 28(1), p. 33, 35. See in this sense also A. R. CHANG and S. M. WILDMAN, "Gender In/Sight: Examining Culture and Constructions of Gender", *The Georgetown Journal of Gender and the Law* 2017, Vol. 43, p. 46. See also S. GARRISON, "On the Limits of 'Trans Enough': Authenticating Trans Identity Narratives", *Gender & Society* 2018, Vol. 32(5), p. 615-617.

³³⁷ *Ibid.*, p. 50.

³³⁸ J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 179.

³³⁹ 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 behaviour. See *supra* p. 95. See in this regard also L. FINLAYSON, K. JENKINS, R. WORSDALE, "'I'm not transphobic but...': A feminist case against the feminist case against trans inclusivity", <<https://www.versobooks.com/blogs/4090-i-m-not-transphobic-but-a-feminist-case-against-the-feminist-case-against-trans-inclusivity>> (last visited 19 October 2018).

³⁴⁰ The central role of external genitals for determining one's sex/gender was also discussed above. See *supra* p. 66.

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which often demands explicit criteria, such as external genitals.³⁴¹ A person's attributed gender (identity) could therefore change depending on the type of interaction one has with other individuals.³⁴²

Situations where people disrupt gender norms often lead to so-called 'gender panics', and accompanying reactions to reassert the naturalness of the male/female binary.³⁴³ Society's focus on medical treatment consisting of hormone replacement and gender affirming surgery, enabling gender identity policing on the basis of external genitalia and the binary, usually ends the panic.³⁴⁴

Even though (almost) *all* human beings experience gender, this thesis will focus on persons whose gender (identity) or expression are socially non-conforming, i.e. differ from the cultural norms prescribed for people of a particular sex.³⁴⁵ It will not discuss the content of the concept 'gender' as such, i.e. which gender roles or social constructions (of masculinity and femininity) there are or ought to be. Many cultures and societies around the world attach stigma to gender non-conformity. Such stigma can lead to prejudice and discrimination, leading to minority stress, and mental health concerns such as anxiety and depression.³⁴⁶ Within the overarching concept of gender non-conformity, two terms are of particular importance for this thesis, i.e. 'transgender' and 'transsexual'.

³⁴¹ L. WESTBROOK and K. SCHILT, "Doing gender, determining gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System", *Gender & Society* 2014, Vol. 28(1), p. 36.

³⁴² *Ibid.*, p. 50.

³⁴³ *Ibid.*, p. 34.

³⁴⁴ *Ibid.*, p. 34.

³⁴⁵ INSTITUTE OF MEDICINE COMMITTEE ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH ISSUES AND RESEARCH GAPS AND OPPORTUNITIES, "The Health of Lesbian, Gay, Bisexual and Transgender People", <<https://www.ncbi.nlm.nih.gov/books/NBK64806/>> (last visited 10 November 2016).

³⁴⁶ WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, "Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People. 7th Version", <https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20%282%29%281%29.pdf> (last visited 10 November 2016). The concept of 'minority stress' was already discussed in the context of sexual orientation. See *supra* p. 95.

I. Transgender/trans/trans*

The concepts ‘transgender’, ‘trans’ or ‘trans*’³⁴⁷ are umbrella terms³⁴⁸ for all gender non-confirming persons: all persons whose gender (identity) or gender expression (at some point) does not match their registered sex at birth and/or the gender (identity) society attaches to it. Transgender persons therefore have a gender (identity) or a gender expression that does not (always) (completely) conform to their biological sex markers (mostly external genitals).³⁴⁹ The concept presupposes a 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,³⁵⁰ but who show incredible

³⁴⁷ The term ‘trans*’ is increasingly used in scientific literature. The ‘*’ refers to the open-end character of the term; highlighting the fact that there is a wide range of different identity labels possible. See M. VAN DEN BRINK and J. TIGCHELAAR, *M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders* [M/F and further. Sex registration by the government and the legal status of transgender persons], Utrecht, Utrecht Centre for European Research into Family Law, 2014, p. 3; S. WINTER, “Identity Recognition Without the Knife: Towards a Gender Recognition Ordinance for Hong Kong’s Transsexual People”, *Hong Kong Law Journal* 2014, Vol. 44, p. 11; K. FRANKLIN and S. E. CHINN, “Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases”, *Berkeley Journal of Gender, Law & Justice* 2017, Vol. 32, p. 10; S. HINES, Z. DAVY, S. MONRO, J. MOTMANS, A.C. SANTOS, J. VAN DER ROS, “Introduction to the themed issue: Trans* policy, practice and lived experience within a European context”, *Critical Social Policy* 2018, Vol. 38(1), p. 6.

³⁴⁸ See in this regard P. CURRAH, “Gender Pluralisms under the Transgender Umbrella” in P. CURRAH, R. M. JUANG, S. PRICE MINTER (eds.), *Transgender Rights*, Minneapolis, University of Minnesota Press, 2006, p. 4. See also K. FRANKLIN and S. E. CHINN, “Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases”, *Berkeley Journal of Gender, Law & Justice* 2017, Vol. 32, p. 9-10. See also M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publication Office of the European Union, 2018, p. 34.

³⁴⁹ A. E. SILVER, “An Offer You Can’t Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity”, *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 491.

³⁵⁰ S. WHITTLE, *Respect and Equality: Transsexual and Transgender Rights*, Abingdon, Routledge, 2002, p. xxii. The term ‘transgender’ was popularised in the 1970’s by the works and activism of Virginia Prince, who strongly distinguished the term from ‘transsexual’, and focused on the rights of transvestites, whom she considered to be male heterosexual cross-dressers. See F. PFÄFFLIN, “Transgenderism and Transsexuality: Medical and Psychological Viewpoints” in J.M. SCHERPE (ed.), *The Legal Status of Transsexual and Transgender Persons*, Cambridge, Intersentia, 2016, p. 14. See also S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 392. Sometimes, the gender continuum is also believed to be insufficient to conceptualise all forms of gender diversity. In this regard,

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variation in identities, expressions and practices.³⁵¹ This continuum includes:³⁵²

- Transvestites: any individuals who dress themselves in clothes that are associated with the gender (identity) that society attaches to the biological sex opposite to that of the transvestite. Transvestites wear clothing of the opposite gender primarily for erotic arousal or sexual gratification, although some do for emotional or psychological reasons as well. Transvestites usually do not experience incongruence between their biological sex and their gender (identity).³⁵³
- Drag queens/kings: mostly homosexual cross-dressers who don female/male clothing for their own erotic and sexual pleasure or for that of partners who are attracted to female/male presentation in a male/female. Drag queens/kings do not aspire to be females/males, and their partners do not want anatomical females/males. Both partners value their own and their partner's maleness/femaleness;³⁵⁴

VADE refers to the 'gender galaxy'. See D. VADE, "Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People", *Michigan Journal of Gender and Law* 2005, Vol. 11(3), p. 273.

³⁵¹ P. CURRAH, "Gender Pluralisms under the Transgender Umbrella" in P. CURRAH, R. M. JUANG, S. PRICE MINTER (eds.), *Transgender Rights*, Minneapolis, University of Minnesota Press, 2006, p. 4-5.

³⁵² See also WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, "Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People. 7th Version", https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20%282%29%281%29.pdf (last visited 10 November 2016). This list is not exhaustive, considering the conceptualisation of gender (identity) as a continuum.

³⁵³ E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 513; M. L. BROWN and C. A. ROUNSLEY, *True Selves: Understanding Transsexualism*, San Francisco, Jossey-Bass, 1996, p.12.

³⁵⁴ E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 513; M. L. BROWN and C. A. ROUNSLEY, *True Selves: Understanding Transsexualism*, San Francisco, Jossey-Bass, 1996, p. 16.

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- Female/male impersonators: males/females who wear female/male apparel to entertain an audience, regardless of their gender (identity) or sexual orientation;³⁵⁵
- Non-binary/genderqueer/genderfuck/agender persons: umbrella term for persons whose gender (identity) is neither male, nor female, or 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 or the existence of gender (identity). Genderqueer persons therefore defy the binary system of 'male'/'female' gender (identities). These persons mostly do not have a variation of sex characteristics.³⁵⁶ Like binary transgender persons, non-binary persons may or may not require trans-specific medical treatment.³⁵⁷ Among these persons are:
 - Transgenderist persons: persons who sometimes identify as male, as female, as neither male nor female or both male and female. Some transgenderists wish certain medical treatments to align their gender (identity) and biological sex characteristics;³⁵⁸

³⁵⁵ E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 513; M. L. BROWN and C. A. ROUNSLEY, *True Selves: Understanding Transsexualism*, San Francisco, Jossey-Bass, 1996, p.16-17.

³⁵⁶ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 95. Next to the abovementioned terms, the literature also mentions several other options, based on qualitative research with genderqueer persons: shemale, two-spirit, ambiguous, intergendered, polygendered, omnigendered, dynamically gendered, nonbiological intersexed, in-between and beyond, gender terrorist, intersex by design, intentional mutation, hermaphrodite, queer transman etc.

³⁵⁷ J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 908-909. See also K. REINECK, "Running from the gender police: reconceptualizing gender to ensure protection for non-binary people", *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 266.

³⁵⁸ J. MOTMANS, *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht* [Living as transgender in Belgium. The social and legal situation of transgender persons mapped], Brussels, Instituut voor de Gelijkheid van Vrouwen en Mannen, 2009, p. 23.

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- Androgynous/mixed gender/pangender persons: persons who incorporate aspects of both male and female, but who have a fixed identity. This is also referred to as gender hybridity;³⁵⁹
- Bi-gendered/gender fluid/pangender persons: persons who move between genders in a fluid way. This is also referred to as gender dynamism;³⁶⁰
- Tri-gendered persons: persons who move between more than two genders in a fluid way. This is also referred to as gender dynamism;³⁶¹
- Third gender/other gender/pangender persons: persons who identify as a specific additional gender (either between female and male or otherwise additional to those genders);³⁶²
- Agender/genderneutral/nongendered/genderless/neuter/neutrois: persons who have no gender. This is also referred to as gender rejection;³⁶³
- Transcending/per/trans persons: persons who attempt to overcome the gender question altogether, wanting to escape

³⁵⁹ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 95-96. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 907.

³⁶⁰ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 96. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 906-907.

³⁶¹ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 96. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 906-907.

³⁶² C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 96. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 906-907.

³⁶³ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 96. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 906-907.

sex and gender categories. This is also referred to as subversive genders.³⁶⁴

It is important to note the difference between transgender persons who wish medical treatment within the binary system and non-binary persons who may wish to remove sex markers, to combine such markers or may be taking a more conventional trans masculine or feminine treatment path while maintaining a non-binary identity.³⁶⁵

Recent population-based quantitative research in Flanders (Belgium) has shown that the prevalence of 'gender ambivalence' or 'non-binary gender' was 1.8% in persons assigned male at birth and 4.1% in persons assigned female at birth.³⁶⁶

- Gender incongruent persons: persons who identify stronger with the (binary) sex opposite to the sex registered at birth. Recent population-based medical research in Flanders (Belgium) showed that 0.7% of men and 0.6% of women reported (self-declared) gender incongruence.³⁶⁷
- Transgender persons (*sensu stricto*):³⁶⁸ individuals who live, or desire to live, (a part of) their life performing a (binary) gender role that does not follow the socially expected one that is allegedly correlative to the (binary) sex assigned to them at birth;³⁶⁹
- Transsexual persons: persons who mentally, socially and sexually identify as the (binary) gender connected to the sex opposite to their

³⁶⁴ F. PFÄFFLIN, "Transgenderism and Transsexuality: Medical and Psychological Viewpoints" in J.M. SCHERPE (ed.), *The Legal Status of Transsexual and Transgender Persons*, Cambridge, Intersentia, 2016, p. 19-20. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 908.

³⁶⁵ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 99.

³⁶⁶ *Ibid.*, p. 96.

³⁶⁷ E. VAN CAENEGEM, K. WIERCKX, E. ELAUT, A. BUYSSE, A. DEWAELE, F. VAN NIEUWERBURGH, G. DE CUYPERE and G. T'SJOEN, "Prevalence of gender nonconformity in Flanders, Belgium", *Archives of Sexual Behavior*, 2015, p. 1292.

³⁶⁸ See in this regard also S. HANSSEN, "Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law", *Oregon Law Review* 2017, Vol. 96, p. 287-288.

³⁶⁹ D. GONZALEZ-SALZBERG, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights", *American University International Law Review* 2014, Vol. 29(4), p. 801.

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.³⁷⁰ There are two elements to gender dysphoria: the first element is social, stemming from the refusal or failure by significant individuals and broader society to recognise or accept a transsexual person's experienced gender (identity); the second element is physical, stemming from the distress one feels about one's physical sex markers (anatomic dysphoria).³⁷¹ The process of beginning to live according to one's gender (identity) is often called gender transition, which may also include a social and physical element.³⁷² Obstacles – social or physical – to the gender transition could also lead to gender dysphoria.³⁷³ The literature distinguishes between:³⁷⁴

- Transman (F2M): transsexual person who was biologically born female, but identifies as male;
- Transwoman (M2F): transsexual person who was biologically born male, but identifies as female;
- Pre-operative person: transsexual persons who have not yet undergone gender affirming surgery, but are willing to;
- Post-operative person: transsexual persons who have undergone gender affirming surgery.

³⁷⁰ J. MOTMANS, *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht* [Living as transgender in Belgium. The social and legal situation of transgender persons mapped], Brussels, Instituut voor de Gelijkheid van Vrouwen en Mannen, 2009, p. 22.

³⁷¹ S. WINTER, "Towards a Gender Recognition Ordinance for Hong Kong's Transsexual Persons", *Hong Kong Law Journal* 2014, Vol. 44, p. 120.

³⁷² *Ibid.*, p. 120.

³⁷³ *Ibid.*, p. 121.

³⁷⁴ J. MOTMANS, *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht* [Living as transgender in Belgium. The social and legal situation of transgender persons mapped], Brussels, Instituut voor de Gelijkheid van Vrouwen en Mannen, 2009, p. 30.

- **‘Transgender’/‘trans’/‘trans* persons’:** All gender non-confirming persons, i.e. all persons whose gender (identity) or gender expression at some point does not match their registered sex at birth or the gender (identity) society attaches to it;
- **‘Genderqueer’/‘Non-binary persons’:** Persons whose gender identity is neither male, nor female, or 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.

This overview of transgender persons shows the great variety regarding the human gender (identity). Being transgender is therefore a matter of natural diversity and part of a culturally-diverse human phenomenon that should not be judged as inherently pathological or negative.³⁷⁵ Some people have a gender (identity) which does not fall within the traditional male/female binary – claiming that there are three, four, and possibly many other genders – and other individuals do not even have a defined or definable gender (identity). One can therefore not simply state that *every* person has a (single) gender (identity), nor that this identity necessarily remains the same over time.³⁷⁶ Moreover, since genderqueer/non-binary/genderless persons seem to be a relatively under-researched phenomenon, it is likely that some people who previously would have identified as gender incongruent – that is within the gender binary, but moving across it – may have identified outside of the binary if that discourse had been available to them.³⁷⁷ Indeed, qualitative sociological research suggests that inclusion of non-binary identity options

³⁷⁵ M. D. LEVASSEUR, “Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights”, *Vermont Law Review* 2014-15, Vol. 39, p. 952.

³⁷⁶ See F. PFÄFFLIN, “Transgenderism and Transsexuality: Medical and Psychological Viewpoints” in J.M. SCHERPE (ed.), *The Legal Status of Transsexual and Transgender Persons*, Cambridge, Intersentia, 2016, p. 20.

³⁷⁷ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T’SJOEN, “Non-binary or genderqueer genders”, *International Review of Psychiatry* 2016, Vol. 28(1), p. 98.

broadens the possibilities of self-conceptualisation for individuals.³⁷⁸ Binary thinking and theorising thus have serious consequences, as they lead to a lack of recognition of anyone who does not adhere to accepted binary norms and transgender persons trying to adhere to gender and sexuality norms.³⁷⁹ This thesis will mostly make use of the umbrella terms ‘transgender’ or ‘trans’, i.e. encompassing *all* non-conforming persons with regard to gender (identity), unless specified otherwise.

A common misunderstanding about the transgender experience is that it is about choice.³⁸⁰ 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”.³⁸¹ Many of the issues that transgender persons face are concerned with the recognition of the self-realisation of their gender (identity) over time. It is also important to differentiate between the transgender person and the syndrome/diagnosis ‘gender dysphoria’: only *some* transgender persons experience gender dysphoria at *some* point in their life, and hormonal treatment and surgery are just two of many options available to assist people with achieving comfort with self and identity.³⁸² A large-scale social report in Europe (2013) showed that around fifty percent of transgender persons do

³⁷⁸ See T. SANGER, “Beyond Gender And Sexuality Binaries in Sociological Theory: The Case for Transgender Inclusion” in S. HINES and T. SANGER (eds.), *Transgender Identities. Towards a Social Analysis of Gender Diversity*, Abingdon, Routledge, 2010, p. 268.

³⁷⁹ *Ibid.*, p. 268.

³⁸⁰ M. D. LEVASSEUR, “Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights”, *Vermont Law Review* 2014-15, Vol. 39, p. 988.

³⁸¹ J. T. WEISS, “Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for *Lawrence v. Texas*”, *Journal of Race, Gender and Ethnicity* 2010, Vol. 5, p. 7-8.

³⁸² J. MOTMANS, K. PONNET, G. DE CUYPERE, “Sociodemographic Characteristics of Trans Persons in Belgium: A Secondary Data Analysis of Medical, State, and Social Data”, *Archives of Sexual Behavior* 2015, Vol. 44, p. 1289; WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, “Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People. 7th Version”, <https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20%282%29%281%29.pdf> (last visited 10 November 2016).

not wish or need medical and/or surgical treatment.³⁸³ This implies that someone's self-described gender (identity) cannot be defined based on the medical steps that person is willing or able to undertake nor does being gender variant automatically translate into a wish to undertake medical interventions to alter one's body.³⁸⁴ Over the years, research has tended to focus on the most easily counted subgroup of gender non-conforming individuals – transsexuals – who experience gender dysphoria and who present themselves for medical treatment at specialist gender clinics, leaving out many transgender persons who do not wish medical treatment, and transsexuals who do not experience gender dysphoria or who would prefer medical (hormonal/surgical) treatment, but face obstacles along the way.³⁸⁵ Very often, the legal system also only accommodates the issues facing transsexual persons with access to medical treatment, and not transgender persons in general, leading to under-inclusiveness.³⁸⁶

³⁸³ EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS, "European Union lesbian, gay, bisexual and transgender survey", <http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf> (last visited 10 November 2016). Belgian research among transgender persons in 2017 showed that an overwhelming majority of respondents (85%) wanted some form of medical treatment on their bodies to better match their gender (identity). See J. MOTMANS, E. WYVERKENS, J. DEFREYNE, "Being Transgender in Belgium. Ten Years Later", <https://igvm-iefh.belgium.be/sites/default/files/118_-_being_transgender_in_belgium.pdf> (last visited 6 December 2018), p. 60. The figures were significantly higher among transmen and transwomen than among non-binary transgender persons.

³⁸⁴ J. MOTMANS, K. PONNET, G. DE CUYPERE, "Sociodemographic Characteristics of Trans Persons in Belgium: A Secondary Data Analysis of Medical, State, and Social Data", *Archives of Sexual Behaviour* 2015, Vol. 44, p. 1297.

³⁸⁵ E. COLEMAN e.a., "Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming people, Version 7", *International Journal of Transgenderism* 2011, Vol. 13, p. 169; J. MOTMANS, K. PONNET, G. DE CUYPERE, "Sociodemographic Characteristics of Trans Persons in Belgium : A Secondary Data Analysis of Medical, State, and Social Data", *Archives of Sexual Behavior* 2015, Vol. 44, p. 1290. These obstacles could be not daring to, being afraid of prejudice from care providers, not knowing where to go, costs of treatment etc.

³⁸⁶ See *infra* p. 339.

II. Transsexual

As mentioned above, transsexual persons are individuals who mentally, socially and sexually identify as the (binary) gender opposite to the (binary) sex registered at birth and who generally wish to change their biological sex through gender affirming treatment.³⁸⁷ Transsexual persons usually do not question the binary system of 'male' and 'female' and therefore do not identify as 'transsexual', but simply as 'male' or 'female'.³⁸⁸ WHITTLE defines 'transsexual persons' as those transgender persons who desire or have undergone gender reassignment treatment/surgery.³⁸⁹ While all transsexual persons are transgender, not all transgender persons are transsexual.³⁹⁰ Most authors identify transsexuality as creating an incongruity between a person's physical sex and gender (identity). However, WEISS identifies society's normative standards as responsible for the incongruity, since they artificially and prediscursively define a set of behaviours, body images, and genitalia as gendered in a fixed way.³⁹¹

'Transsexual persons': Individuals who mentally, socially and sexually identify as the (binary) gender opposite to the (binary) sex registered at birth and who wish to change their biological sex through medical treatment.

³⁸⁷ See *supra* p. 107.

³⁸⁸ J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 178.

³⁸⁹ S. WHITTLE, *Respect and Equality: Transsexual and Transgender Rights*, Abingdon, Routledge, 2002, p. xxii.

³⁹⁰ G. VERSCHULDEN and K. DHONDT, "Juridische aspecten van transgenderzorg voor minderjarigen [Legal aspects of transgender treatment for minors]", *Tijdschrift voor Jeugd en Kinderrechten* 2016, Vol. 3, p. 233; P. CANNOOT, "Nieuwe Franse transgenderwetgeving: België kan beter [New French transgender legislation: Belgium can do better]", *De Juristenkrant* 2016, Vol. 337, p. 20.

³⁹¹ J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 127-128.

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As mentioned above, one usually distinguishes pre-operative and post-operative transsexuals. The propriety of the distinction could however be questioned: if the basic defining element of transsexuality is that physical sex and gender (identity) are not congruent, then distinguishing between the (same) pre-operative and post-operative transsexual person is irrational, because both are of the same gender.³⁹² Indeed, a person's gender (identity) does not change in the light of gender affirming surgery or hormone treatment.³⁹³

The term 'transsexual' was first introduced by sexologist Magnus HIRSCHFELD in 1923, who wrote about the differences between cross-dressing, cross-gender identification and homosexuality, and mainly aspired to normalise the latter.³⁹⁴ General interest for issues relating to gender (identity) really grew with the highly mediatised cases of Christine Jorgensen, an American transwoman who received hormonal treatment and gender affirming surgery in 1952 and was initially treated for homosexuality, and Laurence Michael Dillon, a British transman who underwent surgery in the 1940's. However, it is believed that the first gender affirming operation dates back to 1912.³⁹⁵

Harry BENJAMIN's book "The transsexual phenomenon" (1966) is commonly regarded as the foundation of today's approach to issues regarding gender

³⁹² J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 179.

³⁹³ Some authors therefore speak of gender *affirmation* treatment to stress that the treatment serves to bring harmony between a person's body and self-knowledge of gender. See M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 955-956.

³⁹⁴ J. MOTMANS, *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht* [Living as transgender in Belgium. The social and legal situation of transgender persons mapped], Brussels, Instituut voor de Gelijkheid van Vrouwen en Mannen, 2009, p. 18. See M. HIRSCHFELD, "Die intersexuelle Konstitution", *Jahrbuch für sexuelle Zwischenstufen* 1923, p. 14.

³⁹⁵ F. PFÄFFLIN, "Transgenderism and Transsexuality: Medical and Psychological Viewpoints" in J.M. SCHERPE (ed.), *The Legal Status of Transsexual and Transgender Persons*, Cambridge, Intersentia, 2016, p. 12.

(identity).³⁹⁶ BENJAMIN strongly believed that the body of transsexual persons should be adapted to their gender (identity) through medical treatment, consisting of hormonal replacement and gender affirming surgery, instead of the until then preferred psychotherapy.³⁹⁷ In his vision, this medical treatment should be reserved for 'true' transsexuals, who are accordingly diagnosed by a psychiatrist, leading to the psycho-pathologisation of transsexuality. Since the 1960's, the medical approach has been the leading way in which society deals with issues relating to incongruence between one's biological sex and gender (identity), making a sex 'change' between male and female possible.

Transsexuality was first included in the third edition of the Diagnostic Statistical Manual of Mental Disorders (DSM-3) of the American Psychiatric Association in 1980, before being changed to 'gender identity disorder' in DSM-4. The fifth and current Diagnostic Statistical Manual of Mental Disorders (DSM-5) still pathologises situations where a person's gender (identity) does not match their biological sex.³⁹⁸ 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. This condition causes clinically significant distress or impairment in social,

³⁹⁶ H. BENJAMIN, *The transsexual phenomenon*, New York, The Julian Press Inc. Publishers, 1966.

³⁹⁷ J. MOTMANS, *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht* [Living as transgender in Belgium. The social and legal situation of transgender persons mapped], Brussels, Instituut voor de Gelijkheid van Vrouwen en Mannen, 2009, p. 18. See M. HIRSCHFELD, "Die intersexuelle Konstitution", *Jahrbuch für sexuelle Zwischenstufen* 1923, p. 19.

³⁹⁸ See in this regard also D. GONZALEZ-SALZBERG, "An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*", *The Modern Law Review* 2018, Vol. 81(3), p. 533.

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).³⁹⁹

The ICD-10 Classification of Mental and Behavioural Disorders of the World Health Organisation places ‘transsexualism’, ‘dual-role transvestism’, ‘gender identity disorder of childhood’, ‘other gender identity disorders’ and ‘gender identity disorder, unspecified’ under the separate chapter ‘gender identity disorders’.⁴⁰⁰ Transsexuality for instance, is defined as the desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make one’s body as congruent as possible with one’s preferred sex through surgery and hormonal treatment, during at least two years persistently, which is not a symptom of another mental disorder, such as schizophrenia, or associated with chromosome abnormality. The WHO’s 2019 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 condition related to sexual health, which does not include the assumption of a mental disorder.⁴⁰¹

Version seven of the World Professional Association for Transgender Health (WPATH) Standards of Care (SOC) for the Health of Transsexual, Transgender and Gender Non-Conforming People distinguishes between gender non-conformity and gender dysphoria, which refers to discomfort or distress that is caused by a discrepancy between a person’s gender (identity) and that

³⁹⁹ AMERICAN PSYCHIATRIC ASSOCIATION, “Gender Dysphoria”, <<http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf>> (last visited 9 November 2016).

⁴⁰⁰ WORLD HEALTH ORGANISATION, “The ICD-10 Classification of Mental and Behavioural Disorders”, <<http://www.who.int/classifications/icd/en/GRNBOOK.pdf>> (last visited 9 November 2016).

⁴⁰¹ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T’SJOEN, “Non-binary or genderqueer genders”, *International Review of Psychiatry* 2016, Vol. 28(1), p. 96. See also J.M. SCHERPE, “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 210.

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person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics).⁴⁰² The SOC suggests 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.

The World Health Organisation, the American Psychiatric Association as well as the World Professional Association for Transgender Health (still, although to a lesser extent) medicalise transsexuality/gender incongruence by linking it to a medical diagnosis (gender dysphoria or gender identity disorder/gender incongruence) and lived experience, and foreseeing various forms of medical treatment.⁴⁰³ Having a non-conforming gender (identity) thus is a medical condition – although not a disorder – to be treated rather than a fundamental aspect of identity.⁴⁰⁴ This is also reflected in the most recent case law of the European Court of Human Rights concerning transgender persons. Indeed, the Court referred to transsexualism as “internationally recognised as a medical condition”.⁴⁰⁵ Although medical treatment is very important for (some) transgender persons, one can question the dominance of this medical perspective. Indeed, the medial model forces individuals to fit their gender (identities) into a pathological

⁴⁰² WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, “Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People. 7th Version”, <https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20%282%29%281%29.pdf> (last visited 10 November 2016).

⁴⁰³ Introducing ‘transsexuality’ to these classifications of mental disorders proved to be necessary for the wider acceptance of the phenomenon and protection of medical practitioners providing treatment, who were at risk of being sued for malpractice, especially when their treatment did not lead to satisfactory results. See F. PFÄFFLIN, “Transgenderism and Transsexuality: Medical and Psychological Viewpoints” in J.M. SCHERPE (ed.), *The Legal Status of Transsexual and Transgender Persons*, Cambridge, Intersentia, 2016, p. 16. See in this regard also J. T. THEILEN, “Depathologisation of Transgenderism and International Human Rights Law”, *Human Rights Law Review* 2014, Vol. 14, p. 328.

⁴⁰⁴ A. E. SILVER, “An Offer You Can’t Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity”, *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 506.

⁴⁰⁵ ECtHR 10 March 2015, 14793/08, *Y.Y. v. Turkey*, §65; 11 July 2002, 28957/95, *Christine Goodwin v. the United Kingdom*, §81.

framework, and conform to a set definition of gender dysphoria irrespective of actual experience or desires, making medical authorities gatekeepers with the power to regulate gender (identity).⁴⁰⁶ Moreover, the aforementioned organisations do not always take into account the possibilities and limitations of these diagnoses for non-binary persons.⁴⁰⁷ Nonetheless, gender diagnoses have been retained predominantly for the purely pragmatic reason that some people wish for medical interventions such that they have a more holistically congruent self,⁴⁰⁸ and therefore should have access to health care and social security.⁴⁰⁹ However, by using changeable bodily aspects to determine gender, the basic premises of the 'sex/gender/sexuality' system are maintained, as the systems repatriate those whose existence potentially calls it into question.⁴¹⁰ Indeed, this 'medicalisation' of transsexuality is dictated by the biologic essentialism of sex, which obscures the differences between 'sex' and 'gender (identity)'.⁴¹¹ The medicalisation of the recognition of

⁴⁰⁶ A. E. SILVER, "An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity", *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 499.

⁴⁰⁷ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 96.

⁴⁰⁸ C. RICHARDS, W.P. BOUMAN, L. SEAL, M.J. BARKER, T.O. NIEDER and G. T'SJOEN, "Non-binary or genderqueer genders", *International Review of Psychiatry* 2016, Vol. 28(1), p. 97; E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 514. See also F. PFÄFFLIN, "Transgenderism and Transsexuality: Medical and Psychological Viewpoints" in J.M. SCHERPE (ed.), *The Legal Status of Transsexual and Transgender Persons*, Cambridge, Intersentia, 2016, p. 22; M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 954.

⁴⁰⁹ C. KRAUS, "Classifying Intersex in DSM-5: Critical Reflections on Gender Dysphoria", *Archives of Sexual Behaviour* 2015, Vol. 44, p. 1156. See also J. T. THEILEN, "Depathologisation of Transgenderism and International Human Rights Law", *Human Rights Law Review* 2014, Vol. 14, p. 329.

⁴¹⁰ L. WESTBROOK and K. SCHILT, "Doing gender, determining gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System", *Gender & Society* 2014, Vol. 28(1), p. 35. See also D. GONZALEZ-SALZBERG, "An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*", *The Modern Law Review* 2018, Vol. 81(3), p. 535.

⁴¹¹ J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 180.

transsexual persons thus represents society's primary interest to enforce the binary sex/gender system; the individual person's well-being comes second.⁴¹² This thesis will not make use of this medical approach to transsexual (and transgender) persons, but will address them and the issues they face from the perspective of their right to individual autonomy.⁴¹³ However, the legal approach to issues regarding gender (identity) should not have any influence on the importance, availability, options and funding of medical and/or psychological treatment, which should always be individualised according to the needs of the person concerned.⁴¹⁴

III. Cisgender

The term 'cisgender' is used to denote persons who are not transgender, i.e. persons whose gender (identity) and/or gender expression is in congruence with the (binary) sex registered at birth.⁴¹⁵ The term was introduced to draw the attention away from transgender persons, by not only categorising the minority, but also the majority of the population.⁴¹⁶

⁴¹² S. AGIUS and C. TOBLER, "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression", <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 23 March 2017), p. 19. See also D. GONZALEZ-SALZBERG, "An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*", *The Modern Law Review* 2018, Vol. 81(3), p. 535.

⁴¹³ The link between the medical approach to issues transgender persons face and the legal system will be thoroughly discussed *infra* p. 339 and further.

⁴¹⁴ WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, "Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People. 7th Version", <https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20%282%29%281%29.pdf> (last visited 10 November 2016). See in that sense also M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 956.

⁴¹⁵ J. MOTMANS, *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht* [Living as transgender in Belgium. The social and legal situation of transgender persons mapped], Brussels, Instituut voor de Gelijkheid van Vrouwen en Mannen, 2009, p. 29.

⁴¹⁶ *Ibid.*, p. 29.

‘Cisgender persons’: Persons whose gender (identity) and/or expression is in congruence with the (binary) sex assigned to them at birth.

D. Conflation between sex, sexual orientation and gender (identity)

Much of the difficulty in society in developing an understanding of the issues that LGBTIQ+ persons face can be attributed to the conflation of the concepts ‘sex’, ‘sexual orientation’ and ‘gender (identity)’.⁴¹⁷ BUTLER refers to the conflation as the “heterosexual matrix”: societal compulsory heterosexuality often presumes that there is first a sex that is expressed through a gender and then through sexuality.⁴¹⁸ Queer scholar VALDES developed a model which presents the conflation between ‘sex’, ‘sexual orientation’ and ‘gender (identity)’ as a triangled web with three ‘legs’ interconnecting these three social constructs.⁴¹⁹ According to his theory, ‘sex’ is at the base of the scheme, since one’s biological sex presupposes a certain gender (identity) and sexual orientation. The conflation has led society to believe that:

- There are only two biological sexes: male and female;
- It is acceptable to presume that males will identify as men, be masculine and be sexually attracted to females/women;
- It is acceptable to presume that females will identify as women, be feminine and be sexually attracted to males/men.⁴²⁰

⁴¹⁷ E. PICARRA and C. VISSER, “Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism”, *South African Journal on Human Rights* 2012, Vol. 28, p. 508.

⁴¹⁸ J. BUTLER, “Imitation and Gender Insubordination” in D. FUSS (ed.), *Inside/Out: Lesbian Theories, Gay Theories*, New York, Routledge, 1991, p. 28-29.

⁴¹⁹ F. VALDES, “Foreword. Notes on the “Conflation”, *California Law Review* 1995, Vol. 83(1), p. 12.

⁴²⁰ J. A. GREENBERG, “The Gender Nonconformity Theory: A Comprehensive Approach to Break Down the Maternal Wall and End Discrimination Against Gender Benders”, *Thomas Jefferson Law Review* 2003-04, Vol. 26, p. 44.

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While such assumptions are accurate for most human beings, they do not represent the entire population.⁴²¹

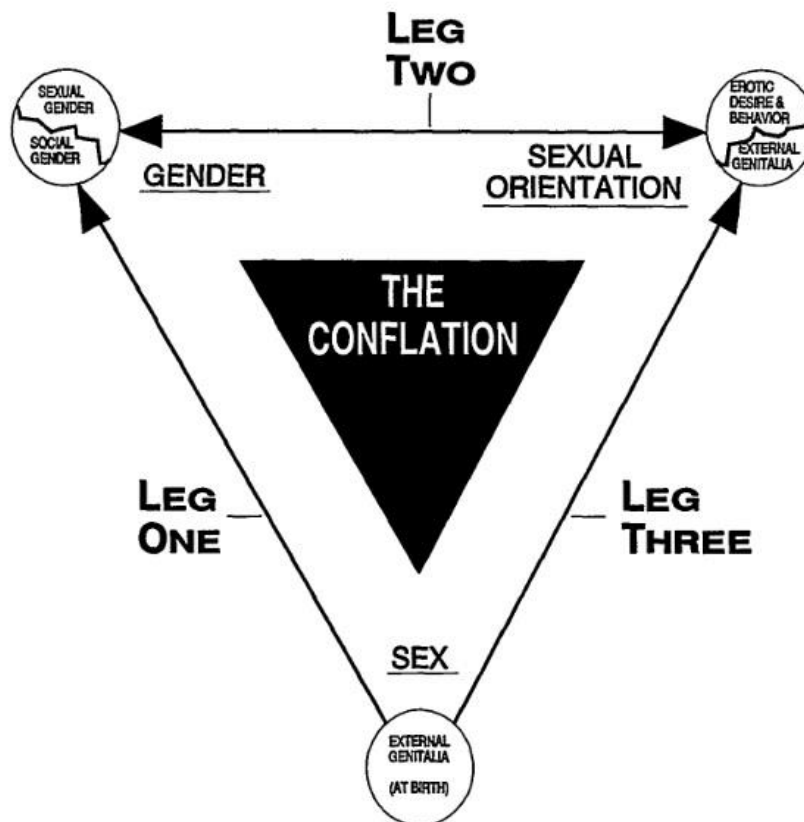


Figure 2: VALDES' conflation triangle

⁴²¹ B. VANDERHORST, "Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex", *Harvard Law & Policy Review* 2015, Vol. 9, p. 243.

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The first leg, conflating ‘sex’ and ‘gender (identity)’, holds that every person’s sex is also that person’s gender (identity).⁴²² This conflation is complemented by the aforementioned binary system: a biological man has a male gender (identity) and a biological woman has a female gender (identity). This model assumes that gender is essentially genitalia,⁴²³ and that the child’s gender (identity) will cause the child to begin to organise his or her behaviour to conform to either masculine or feminine patterns of presentation.⁴²⁴ In other words, the biological sex presupposes both one’s gender (identity) and one’s gender expression. The system appears to be justified by science, being simply a reflection of the natural order of biology and heredity.⁴²⁵ However, ‘gender’ does not always equate to ‘genitalia’:⁴²⁶ sex and gender can be aligned or discordant in a variety of ways.⁴²⁷ This conflation between ‘sex’ and ‘gender (identity)’ has long been taken for granted in both society and law – both terms are often used interchangeably –,⁴²⁸ but is untenable in the light of the indeterminacy of both sex and gender (identity) and the knowledge that they are both social constructions based on a conflated binary cultural ideal.⁴²⁹ Indeed, it is inaccurate to think of the body as already fixed by biology

⁴²² F. VALDES, “Foreword. Notes on the ‘Conflation’”, *California Law Review* 1995, Vol. 83(1), p. 12.

⁴²³ J. T. WEISS, “The Gender Caste System: Identity, Privacy, and Heteronormativity”, *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 156.

⁴²⁴ P. CURRAH, “Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities”, *Hastings Law Journal* 1996-97, Vol. 48, p. 1371.

⁴²⁵ J. T. WEISS, “The Gender Caste System: Identity, Privacy, and Heteronormativity”, *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 125.

⁴²⁶ *Ibid.*, p. 158.

⁴²⁷ H.G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 423.

⁴²⁸ J. A. GREENBERG, “Defining Male and Female: Intersexuality and the Collision Between Law and Biology”, *Arizona Law Review* 1999, Vol. 41, p. 274. See also S. WATTIER, “Le genre et le sexe des sénateurs depuis la Sixième Réforme de l’Etat [The gender and sex of senators since the Sixth State Reform]”, *Chroniques de Droit Public – Publiekrechtelijke Kronieken* 2017, p. 391.

⁴²⁹ F. VALDES, “Foreword. Notes on the ‘Conflation’”, *California Law Review* 1995, Vol. 83(1), p. 12. See in this regard also J. DOLGIN, “Discriminating gender: legal, medical, and social

which is then interpreted culturally: once it is understood that bodies are also socially produced, the manifold creative possibilities for the expression of gender (identity), desire and sexuality can surface.⁴³⁰ After all, as WILCHINS so fittingly states: “Sex is what culture makes when it genders my body”.⁴³¹

According to VALDES, sexual orientation serves as the sexual component of one’s gender (identity) in the conflation triangle (leg two).⁴³² The author refers to terms as ‘sissies’⁴³³ and ‘tomboys’^{434, 435} which are often used to denote homosexual men and lesbian women, thereby ‘reducing’ their male and female gender (identity) on the basis of their sexual orientation. Indeed, when individuals diverge from the cultural norms regarding gender expression for their sex, this behaviour is generally seen as a marker for non-heterosexual orientation.⁴³⁶ Even certain hobbies or occupations give rise to the presumption of a same-sex orientation.⁴³⁷ On the other hand, gay men and lesbian women are popularly assumed to display characteristics designated as appropriate to the other gender.⁴³⁸ Gender norms were even an integral part of the development of the concept of sexual orientation, by creating a separate identity for those who participate in same-sex sexual acts, exempting especially the heterosexual male.⁴³⁹ Historically, only if a man

presumptions about transgender and intersex people”, *Southwestern Law Review* 2018, Vol. 47, p. 61.

⁴³⁰ D. OTTO, “International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry”, *Melbourne Legal Studies Research Papers*, No. 620, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178769> (last visited 29 November 2016).

⁴³¹ R. A. WILCHINS, *Read My Lips: Sexual Subversion And the End of Gender*, Riverdale, Magnus Books, 1997, p. 51.

⁴³² F. VALDES, “Foreword. Notes on the ‘Conflation’”, *California Law Review* 1995, Vol. 83(1), p. 15.

⁴³³ Referring to ‘effeminate’ men.

⁴³⁴ Referring to ‘masculine’ women.

⁴³⁵ F. VALDES, “Foreword. Notes on the ‘Conflation’”, *California Law Review* 1995, Vol. 83(1), p. 14.

⁴³⁶ M. A. CASE, “Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence”, *The Yale Law Journal* 1995, Vol. 105(1), p. 2.

⁴³⁷ S. FARRELL, “Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights”, *Law & Sexuality Review* 2004, Vol. 13, p. 618.

⁴³⁸ *Ibid.*, p. 618.

⁴³⁹ *Ibid.*, p. 617.

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transgressed gender roles by engaging in activities reserved for women or expressing gender like a woman was he deemed homosexual, regardless of his sexual activities.⁴⁴⁰ The conflation between gender (identity) and sexual orientation thus stigmatises non-conforming sexuality, to primarily maintain the ideology of gender (role) differentiation and inequality.⁴⁴¹ Gender normativity therefore assumes heteronormativity.⁴⁴² In reaction, many gay men began to adopt gay masculinities in ways indistinguishable from the most oppressive forms of straight masculinities, leading to the increasing ostracism of more effeminate men.⁴⁴³ Nowadays, individuals identifying as homosexual are even expected to at least express their homosexuality in stereotypical gender normative ways.⁴⁴⁴

The third leg of the conflation triangle (sex and sexual orientation) is shown by the way in which sexual orientation is surmised by the sameness or difference of sex(es) within a coupling: a sameness of sex within a coupling results directly in conclusions of homosexual orientation for each participant whereas a difference of sexes produces conclusions of heterosexual orientation.⁴⁴⁵

The conflation between 'sex', 'sexual orientation' and 'gender (identity)' has led to several socially constructed rules and norms, which are reflected in cultural, societal and legal structures.⁴⁴⁶ Male masculinity has been socially defined in terms of male (hetero)sexual activity, which is interpreted as male power over women (hence linked to heterosexuality) and is such a powerful

⁴⁴⁰ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 632-633.

⁴⁴¹ S. FARRELL, "Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights", *Law & Sexuality Review* 2004, Vol. 13, p. 620.

⁴⁴² P. CURRAH, "Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities", *Hastings Law Journal* 1996-97, Vol. 48, p. 1380.

⁴⁴³ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 634-635.

⁴⁴⁴ *Ibid.*, p. 635.

⁴⁴⁵ F. VALDES, "Foreword. Notes on the 'Conflation'", *California Law Review* 1995, Vol. 83(1), p. 15.

⁴⁴⁶ E. PICARRA and C. VISSER, "Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 509.

aspect of masculinity that any deviation from heterosexuality, be it by men or women, challenges society's understanding of sex and gender.⁴⁴⁷ Moreover, transgender persons, transsexuals and persons with variations of sex characteristics who display a combination of both feminine and masculine stereotypical characteristics are presumed to be homosexual, i.e. deviant from the heterosexual standard, which is not necessarily the case.⁴⁴⁸ Conflating 'sex', 'sexual orientation' and 'gender (identity)' thus has resulted in strict societal binary gender classification, whereas these categories are neither obvious, uncontested, simple nor mutually interdependent.⁴⁴⁹ This norm system systematically disadvantages and marginalises all persons whose sex, gender (identity), gender expression and sexual orientation do not meet social expectations, predominantly on the basis of stereotypes.⁴⁵⁰

2. LGBTIQ+

As mentioned above, the acronym 'LGBTIQ+' stands for Lesbian, Gay, Bisexual, Transgender, Intersexed, Questioning/Queer persons.⁴⁵¹ Sometimes, the letter 'A' is also added, referring to either asexual or 'allied' persons, i.e. the persons who support LGBTIQ+ persons. Although LGBTIQ+ persons face different issues regarding their sex (persons with variations of sex characteristics), sexual orientation (lesbian, gay, bisexual, asexual persons) or gender (identity) (transgender, (gender)queer persons), they are all considered to be 'sexual minorities'.

The acronym – and especially its broadening from LGB over LGBT to LGBTIQ+ – and the community it represents, is an example of how human beings can intentionally create nurturing social spaces in which to foster community and

⁴⁴⁷ Ibid., p. 509.

⁴⁴⁸ Ibid., p. 509-510.

⁴⁴⁹ D. SPADE, "Documenting Gender", *Hastings Law Journal* 2008, Vol. 590, p. 747.

⁴⁵⁰ S. AGIUS and C. TOBLER, "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression", <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 23 March 2017), p. 13.

⁴⁵¹ The '+' refers to the open-endedness of the acronym, meaning that all other variations of sex, gender (identity), gender expression and sexual orientation are also captured.

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a sense of belonging.⁴⁵² Although the acronym has increased the visibility of sexual minorities and their claims regarding the law and policy,⁴⁵³ it has also been criticised for not working inclusively, since the designation of separate categories serves to highlight the differences between and among individuals based on their sexual identities and/or experiences.⁴⁵⁴ The conjunction of lesbian, gay, bisexual, transgender, intersex, questioning and asexual individuals as 'LGBTIQ+' is a spurious move that at once elides specificity silencing claims that are fundamentally different, and also produces a homogenised category of sexed/gendered others that will, by structural necessity, always remain 'othered'.⁴⁵⁵ In that sense, one can also question the use of the term 'sexual minorities', which (potentially) also emphasises the marginalisation and distinctiveness of the people concerned. Moreover, AMMATURO argues that under the banner of the 'LGBTIQ+' acronym, bisex, trans and intersex issues often risk being marginalised and overshadowed by the prominence of the discussion of lesbian and gay issues.⁴⁵⁶

The use of 'LGBTIQ+' in connection with issues regarding sex, sexual orientation and gender (identity) could also bolster the prevailing assumption

⁴⁵² M. A. FINEMAN, "Vulnerability, Resilience, and LGBT Youth", *Temple Political & Civil Rights Law Review* 2013-14, Vol. 23, p. 308.

⁴⁵³ See in this regard F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 34-35.

⁴⁵⁴ M. A. FINEMAN, "Vulnerability, Resilience, and LGBT Youth", *Temple Political & Civil Rights Law Review* 2013-14, Vol. 23, p. 314. See in this regard also NEDERLANDSE ORGANISATIE VOOR SEKSE DIVERSITEIT, "Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]", <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 55-58.

⁴⁵⁵ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 12. See in this regard N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 17. See also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 29.

⁴⁵⁶ F.R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 15.

that heterosexual, cisgender maleness is the universal norm.⁴⁵⁷ It could for instance imply that one has a gender (identity) or a sexual orientation only when they are contrary to the social norm.⁴⁵⁸ Besides, the acronym still overlooks certain persons who do not identify in accordance with one (or more) of the categories that it holds. Moreover, queer theorists have focused their attention on identity's contingency, fluidity, and constructedness, and the destabilisation of identity categories, especially within politics and the legal system.⁴⁵⁹ The fluidity of sex, sexual orientation and gender (identity) which was discussed above, shows the biological and social unfeasibility of categorising the human condition.⁴⁶⁰

A possible way to address the critiques regarding 'LGBTIQ+' is the use of the concept 'SOGIESC', which refers to 'sexual orientation, gender identity, gender expression and sex characteristics'. Since (almost) all people have a sexual orientation, gender (identity),⁴⁶¹ gender expression and sex characteristics, 'SOGIESC' would have a more inclusive range. However, to address the specific issues that people who are currently known as LGBTIQ+ face, one would still have to make use of terms as 'non-conforming' or 'variant', reducing the added value of the concept. Moreover, 'SOGIESC' does not refer to persons, but to their characteristics, hence potentially reducing the unity of their identity.

Since the guiding principle of this thesis is the right to personal autonomy, it will not make further use of the acronym 'LGBTIQ+'. It will refer to persons or individuals in general in gender inclusive terms, to avoid any binary constructions of gender, or make use of their self-identification, with respect

⁴⁵⁷ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 13.

⁴⁵⁸ *Ibid.*, p. 13.

⁴⁵⁹ P. CURRAH, "Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities", *Hastings Law Journal* 1996-97, Vol. 48, p. 1365.

⁴⁶⁰ See in that sense P. CURRAH, "Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities", *Hastings Law Journal* 1996-97, Vol. 48, p. 1382. In this light, CURRAH argues against the State's right to classify.

⁴⁶¹ As mentioned above, some people do not have a gender *identity* or want to overcome gender categories. See *supra* p. 107.

for the lived experiences of the persons concerned. This could occasionally lead to peculiar constructions from a grammatical perspective. When referring to the specific issues of 'LGBTIQ+' persons in general, the thesis will speak of persons with non-conforming sex, sexual orientation and/or gender (identity), to emphasise the constructionism of the concepts.⁴⁶² Indeed, sex, sexual orientation and gender (identity) are *social* constructs that regulate *all* identities,⁴⁶³ not only those of sexual minorities who 'deviate' from the social norm.⁴⁶⁴

- **Non-conforming persons:** Persons who do not conform to societal assumptions regarding their sex (characteristics), gender (identity), gender expression and/or sexual orientation.
- **Sexual minorities:** Persons who do not conform to societal assumptions regarding their sex (characteristics), gender (identity), gender expression and/or sexual orientation.

⁴⁶² In his work, D. CRUZ refers to LGBTIQ+ persons as 'gender dissidents'. See D. CRUZ, "Disestablishing Sex and Gender", *California Law Review* 2002, Vol. 90(4), p. 1084.

⁴⁶³ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 7.

⁴⁶⁴ This idea that sex and especially gender are constructs that regulate *all* identities, is also a critique to feminist theory, that allegedly 'monopolises' gender for women's issues.

Chapter III. Legal status of non-conforming persons with regard to sex: persons with variations of sex characteristics

Even though variations of sex characteristics are a common phenomenon, comprehensive (official) data about the prevalence of births of children with variations of sex characteristics,⁴⁶⁵ about medical treatment of persons with variations of sex characteristics, and about their living conditions are scarce.⁴⁶⁶ Besides, the national and international focus regarding variations of sex characteristics was for a long period of time limited to the (psycho-)medical issues that the persons concerned, and their social environment, face.⁴⁶⁷ However, the last decade has seen an increasing legal activity regarding variations of sex characteristics,⁴⁶⁸ especially at the European and international level. For instance, both the Council of Europe and the European Union recently published reports on the fundamental rights protection of persons with variations of sex characteristics,⁴⁶⁹ and several UN

⁴⁶⁵ N. CALLENS, C. LONGMAN and J. MOTMANS, “Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]”, <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 5.

⁴⁶⁶ Ibid., p. 56-57. Although there currently are two registers concerning persons with variations of sex characteristics available in Belgium (the BelLux DSD register of the Belgian Society for Pediatric Endocrinology and Diabetology and the European I-DSD Registry), they are based on an opt-in system and mostly contain information on endocrinological and genetic parameters. Moreover, not all medical practitioners are willing to make use of the register for reasons such as lack of time, priority of internal registers, lack of incentives etc.

⁴⁶⁷ In a contribution for the Belgian legal journal *Rechtskundig Weekblad* in 1970, J. MERTENS DE WILMARS wrote on the legal regulation of homosexuality. He described ‘hermaphrodites’ as fysiological homosexuals who – by mistake of nature – combine male and female sex characteristics. According to the author, transsexuals were also part of this subcategory of homosexuals and could also be equated with ‘hermaphrodites’.

⁴⁶⁸ See in this regard also M. TRAVIS and F. GARLAND, “Legislating Intersex Equality: Building the Resilience of Intersex People through Law”, *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 1. See also C. GONZALEZ CABRERA, “The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States”, *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 511.

⁴⁶⁹ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&In>

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human rights actors have addressed human rights violations that persons with variations of sex characteristics are routinely confronted with.⁴⁷⁰ In 2017 and 2018, the Netherlands and Russia even became the first countries to receive specific recommendations regarding persons with variations of sex characteristics in the light of their Universal Periodic Review by the UN Human Rights Council.⁴⁷¹ According to the UN High Commissioner for Human Rights, States have well-established obligations to respect, protect, and fulfil the human rights of all persons within their jurisdiction, including “LGBT and intersex persons”; these obligations extend to refraining from interference in the enjoyment of rights, preventing abuses by third parties and proactively tackling barriers to the enjoyment of human rights, including discriminatory attitudes and practices.⁴⁷² However, as explained in Chapter II, European societies are based on norms derived from the simplistic idea of a dichotomy of two mutually exclusive and biologically fixed sexes to whom different roles and behaviour are traditionally ascribed.⁴⁷³ People who do not easily fit these norms, such as persons with variations of sex characteristics, encounter

stranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>, (last visited 24 May 2017); EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, “The fundamental rights situation of intersex people”, <<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>> (last visited 24 May 2017); M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 1-117.

⁴⁷⁰ Among these actors were the CAT, CEDAW, CCPR, CRPD and CRC Committees, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment etc. See *infra* p. 192.

⁴⁷¹ HUMAN RIGHTS COUNCIL, “Report of the Working Group on the Universal Periodic Review – Netherlands”, <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/15> (last visited 25 August 2017), p. 16; “Draft report of the Working Group on the Universal Periodic Review – Russian Federation”, <https://www.upr-info.org/sites/default/files/document/russian_federation/session_30_-_may_2018/a_hrc_wg.6_30_l.11.pdf> (last visited 11 June 2018), p. 23.

⁴⁷² OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, “Discrimination and violence against individuals based on their sexual orientation and gender identity”, <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E> (last visited: 29 March 2017), p. 5.

⁴⁷³ S. AGIUS and C. TOBLER, “Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression”, <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 23 March 2017), p. 9.

Chapter III. Legal status of persons with variations of sex characteristics

numerous difficulties, both at the practical level of everyday life and at the legal level.⁴⁷⁴

The following part of this thesis will discuss three aspects of the legal status of persons with variations of sex characteristics: the matter of medical sex assigning/normalising treatment, official sex registration and protection against discrimination. The selection of these issues is based on the comparison of several reports with a legal focus by human rights actors (UN treaty bodies,⁴⁷⁵ the Council of Europe Parliamentary Assembly⁴⁷⁶, the Council of Europe Commissioner for Human Rights,⁴⁷⁷ the European Commission⁴⁷⁸, the EU Fundamental Rights Agency,⁴⁷⁹ and the Dutch College for Human Rights),⁴⁸⁰ activists (ILGA Europe,⁴⁸¹ Nederlandse Organisatie voor

⁴⁷⁴ Ibid., p. 9.

⁴⁷⁵ See *infra* p. 192.

⁴⁷⁶ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, "Resolution 1952 (2013) 'Children's right to physical integrity'", <<http://semanticpace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnRveG1sL1hSZWYvWDJILURXLWV4dHluYXNwP2ZpbGVpZD0yMDE3NCZsYW5nPUVO&xsl=aHR0cDovL3NlYWwFuZGljcGFjZS5uZXQvWHNsC9QZGYvWFJlZi1XRRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTlwMTc0>> (last visited 4 May 2017); "Resolution 2191 (2017) 'Promoting the human rights of and eliminating discrimination against intersex people'", <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>> (last visited 10 November 2017).

⁴⁷⁷ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people", <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>>, (last visited 4 May 2017).

⁴⁷⁸ S. AGIUS and C. TOBLER, "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression", <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 4 May 2017).

⁴⁷⁹ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, "The fundamental rights situation of intersex people", <<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>> (last visited 4 May 2017).

⁴⁸⁰ COLLEGE VOOR DE RECHTEN VAN DE MENS, "Achtergrondrapport Wetswijziging Agwb [Background report Amendment General Equal Treatment Act]", <<https://www.mensenrechten.nl/publicaties/detail/36909>> (last visited 4 May 2017).

⁴⁸¹ ILGA Europe, "Position Paper. Equality and full enjoyment of human rights for intersex people", <http://www.ilga-europe.org/sites/default/files/Attachments/intersex_final_position.pdf> (last visited 4 May 2017).

Chapter III. Legal status of persons with variations of sex characteristics

Seksediversiteit,⁴⁸² Amnesty International,⁴⁸³ Human Rights Watch⁴⁸⁴), policy advisors (the German Ethics Council,⁴⁸⁵ the Dutch Sociaal en Cultureel Planbureau,⁴⁸⁶ the French Senate⁴⁸⁷), and of scholarship.⁴⁸⁸ They therefore lie at the heart of the legal – and societal – problems that persons with variations of sex characteristics face. Moreover, it will be demonstrated that these three elements are mutually influenced by one another. Indeed, according to TRAVIS and GARLAND, they combine aspects of formal and substantive equality of persons with variations of sex characteristics.⁴⁸⁹ The

⁴⁸² NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 23 June 2017).

⁴⁸³ AMNESTY INTERNATIONAL, “First, do no harm. Ensuring the rights of children with variations of sex characteristics in Denmark and Germany”, <<https://www.amnesty.org/en/documents/eur01/6086/2017/en/>> (last visited 9 August 2017).

⁴⁸⁴ HUMAN RIGHTS WATCH and INTERACT, “I want to be like nature made me. Medically Unnecessary Surgeries on Intersex Children in the US”, <<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>> (last visited 9 August 2017).

⁴⁸⁵ German Ethics Council, “Intersexuality”, <<http://www.ethikrat.org/files/opinion-intersexuality.pdf>> (last visited 4 May 2017).

⁴⁸⁶ J. VAN LISDONK, “Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]”, <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 4 May 2017).

⁴⁸⁷ M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 23 June 2017).

⁴⁸⁸ E. REILLY, “Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality”, *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 309. See for instance also M. TRAVIS and F. GARLAND, “Legislating Intersex Equality: Building the Resilience of Intersex People through Law”, *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 1-21. See also J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, 535p.

⁴⁸⁹ M. TRAVIS and F. GARLAND, “Legislating Intersex Equality: Building the Resilience of Intersex People through Law”, *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 1.

implementation of these themes in the Belgian legal framework will be analysed through international law, foreign legislation, (inter)national case law, (inter)national soft law and scholarship, in order to identify the ‘best practice’ legal system with regard to a person’s sex (characteristics), from the perspective of the right to personal autonomy.

1. Sex assigning/normalising treatment of persons with variations of sex characteristics

Chapter II already described the forms of medical treatment that children who are born with a variation of sex characteristics often (have to) undergo.⁴⁹⁰ Indeed, the medical approach to variations of sex characteristics has consisted of surgically or hormonally modifying the ‘abnormality’ shortly after birth, or sometimes during adolescence, to bring the person concerned in accordance with the binary sex categories, i.e. ‘male’ or ‘female’ (= sex assigning/normalising treatment).⁴⁹¹ Some reports indicate that fetuses with a variation of sex characteristics are also within the reach of medical intervention (medication or selective abortion).⁴⁹² Although a variation of sex

⁴⁹⁰ See *supra* p. 70.

⁴⁹¹ See also J.L. NAGOSHI, C.T. NAGOSHI, S. BRZUZY, *Gender and Sexual Identity. Transcending Feminist and Queer Theory*, New York, Springer, 2014, p. 26; S. FARRELL, “Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights”, *Law & Sexuality Review* 2004, Vol. 13, p. 614; E. REILLY, “Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality”, *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 301.

⁴⁹² COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>>, (last visited 6 January 2017), p. 20. See also NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 36. See also M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 23 June 2017), p. 50-51. See also D.C. GHATTAS, “Standing Up for the Human Rights of Intersex People” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 432.

characteristics rarely causes health risks that require immediate intervention,⁴⁹³ this medical and surgical treatment of infants and minors rests on the belief that such treatment is necessary and desirable both for society and the people involved.⁴⁹⁴ Nevertheless, voices from the medical world state that treatment of variations of sex characteristics has, since the adoption of the Chicago Consensus, become more transparent, supervised, and respectful of the wishes of the person concerned, even though reports by various human rights actors indicate the continuing performance of non-consensual and deferrable sex assigning/normalising treatment on infants and children.⁴⁹⁵ Qualitative research based on interviews with persons with variations of sex characteristics and their parents also shows that, despite positive trends regarding care, follow-up and information concerning variations of sex characteristics, the embeddedness of treatment in society's binary normativity and gender stereotypes remains problematic and in need of further research.⁴⁹⁶

Moreover, it is important not to ignore the fact that individuals with variations of sex characteristics generally do not oppose a binary conceptualisation of sex and especially of gender (identity).⁴⁹⁷ Persons with

⁴⁹³ See also H.G. BEH and M. DIAMOND, "David Reimer's Legacy: Limiting Parental Discretion", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 12.

⁴⁹⁴ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people", <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>>, (last visited 6 January 2017), p. 23.

⁴⁹⁵ See *supra* p. 82.

⁴⁹⁶ See N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 48-50.

⁴⁹⁷ See *supra* p. 70. See NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, "Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]", <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 9 June 2017), p. 45. See also N. CALLENS, J. MOTMANS, C. LONGMAN, "Redactionele inleiding themanummer intersekse/DSD [Editorial introduction themed issue intersex/DSD]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 3. See also M. VAN DEN BRINK, "Mag het een hokje meer zijn? Ontwikkelingen rond seksregistratie [Can

variations of sex characteristics can therefore have the legitimate desire to undergo treatment on their sex characteristics to align their sex characteristics with their (binary) gender (identity). Besides, pressing medical necessity, for instance cancer treatment,⁴⁹⁸ treatment of salt-wasting with children born with congenital adrenal hyperplasia, or necessary improvement of the performance of bodily functions, such as urination,⁴⁹⁹ could also require treatment on a person's sex characteristics without considerations of societal norms of binary normativity.⁵⁰⁰ This thesis thus does not question the importance of early assessment of the specific variation of sex characteristics,

there be an extra box? Developments concerning sex registration]", *Ars Aequi* 2016, p. 776. See also M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 11. See also N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 11.

⁴⁹⁸ However, medical opinion also varies as to the necessity of medical treatment/surgery at a young age to prevent cancer related to a condition of intersex/DSD. See AMNESTY INTERNATIONAL, "First, do no harm. Ensuring the rights of children with variations of sex characteristics in Denmark and Germany", <<https://www.amnesty.org/en/documents/eur01/6086/2017/en/>> (last visited 11 May 2017), p. 28. The same conclusion can be found in a 2017 study on the rights of children in biomedicine by the Council of Europe Committee on Bioethics. See <<http://www.coe.int/en/web/bioethics/-/study-on-the-rights-of-children-in-biomedici-1>> (last visited 9 August 2017), p. 43. The recent qualitative study by CALLENS, LONGMAN and MOTMANS also nuances the necessity of preventive cancer treatment on a person's gonads in all cases, especially in the light of the high risk of sterility. See N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 27-28. See in this regard also S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, "Intersex, Variations of Sex Characteristics, and DSD: The Need for Change", <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 41; C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 466.

⁴⁹⁹ S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, "Intersex, Variations of Sex Characteristics, and DSD: The Need for Change", <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 15.

⁵⁰⁰ P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 232.

nor the legitimacy of treatment on the basis of personal free and informed consent. It neither aspires to negatively influence the access to appropriate, person-based, multidisciplinary and qualitative health care for persons with variations of sex characteristics. It is also important not to forget that not all social problems that persons with variations of sex characteristics face can be linked to non-consensual sex assigning/normalising treatment: research indicates that persons who did not (choose to) undergo treatment may also experience sexual, emotional and/or relational troubles.⁵⁰¹

The aforementioned narrative of medicalisation of persons with variations of sex characteristics has traditionally placed these issues within the private sphere and outside of public concern and therefore State responsibility.⁵⁰² Nevertheless, it is clear that medical treatment on the sex characteristics of persons with variations of sex characteristics, especially when performed without their personal, free, prior and informed consent, comes within the scope of their human rights. It is therefore important to analyse how the Belgian legal system deals with these medical interventions. The following sections will first establish the Belgian legal framework regarding informed consent to medical treatment, before analysing it in the light of the 'best practice' legal situation, from the perspective of the right to personal autonomy of persons with variations of sex characteristics. This 'best practice' legal system will be established through several sources of international (soft) law, foreign domestic law, (inter)national case law and scholarship. This evaluation will especially assess the situation of minors who do not have the legal capacity to provide informed consent to medical treatment. However, it will not comprehensively study the availability and quality of the current treatment regarding variations of sex characteristics, even though recent (Flemish and Dutch) research indicates that a lack of investment by the

⁵⁰¹ N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders], <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 54.

⁵⁰² M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 3.

government in long-term psychological support of persons with variations of sex characteristics (and their parents), especially when compared to the reimbursement of genital surgery, negatively influences the process of demedicalisation of variations of sex characteristics.⁵⁰³ In 2016-2017, CALLENS, LONGMAN and MOTMANS published two reports – ordered by the Belgian federal and Flemish governments – regarding the care and well-being of persons with variations of sex characteristics.⁵⁰⁴ These reports are unique and suggest several (non-legal) policy recommendations to improve the living-conditions of persons with variations of sex characteristics in Belgium/Flanders.

This part of the thesis only deals with medical treatment on the sex characteristics of persons with variations of sex characteristics. It will therefore not address interventions on a person's sex characteristics on the basis of religious motives, such as male circumcision and female genital mutilation. Nevertheless, it is clear that there exists an important parallel between the latter phenomena and sex assigning/normalising treatment.⁵⁰⁵ Any future legislative reform concerning treatment on a person's sex characteristics will therefore have to be mindful of the relation between the

⁵⁰³ N. CALLENS, T. VAN DER GRIFT, M. COOLS, "Een holistisch zorgbeleid voor Differences of Sex Development [Holistic health care for Differences of Sex Development]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 8.

⁵⁰⁴ N. CALLENS, C. LONGMAN and J. MOTMANS, "Terminologie en zorgdiscours m.b.t. Differences of Sex Development (DSD)/Intersekse in België [Terminology and care discourse concerning Differences of Sex Development (DSD)/Intersex in Belgium]", Staatssecretariaat voor Gelijke Kansen, 2016; N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018).

⁵⁰⁵ Subsection c) of Yogyakarta Principle 32 seems to indicate that religious reasons cannot justify modifications to the sex characteristics of children. See also M. JONES, "Intersex Genital Mutilation – A Western Version of FGM", *International Journal of Children's Rights* 2017, Vol. 25, p. 396-411. See also C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 492-493.

freedom of religion ex Article 9 ECHR and medical treatment on a person's sex characteristics.⁵⁰⁶

In the following sections, the thesis will first establish the Belgian legal framework regarding informed consent to medical treatment (A). This framework will subsequently be evaluated (B), taking into account the personal autonomy of persons with variations of sex characteristics (B.I). In this evaluation, attention will be given to the work of European and international institutional human rights actors (B.II) and the worldwide legal best practice at the national level (B.III). Finally, the last section will provide conclusive remarks (C).

A. Informed consent to medical treatment in Belgian law

It is a well-known rule of biomedical ethics that biomedical treatment may only be carried out after a patient has been informed of the purpose, nature, risks and consequences of the intervention, and has freely consented to it.⁵⁰⁷ Indeed, informed consent changes what would otherwise be a violation of fundamental rights into a legitimate medical intervention.⁵⁰⁸ This principle of free, prior and informed consent regarding medical treatment can be found in Belgian law.

⁵⁰⁶ In February 2018, several members of the Icelandic parliament proposed a bill to criminalise non-consensual male circumcision, with an exemption for circumcisions performed for health reasons. However, the proposal was dropped a few months later. If parliament had adopted the bill, Iceland would have become the first European country to outlaw circumcision until the child concerned has acquired the capacity to provide informed consent.

⁵⁰⁷ L. STULTIENS, T. GOFFIN, P. BORRY, K. DIERICKX and H. NYS, "Minors and Informed Consent: A Comparative Approach", *European Journal of Health Law* 2007, Vol. 14, p. 21. See also R. ANDORNO, "The Oviedo Convention: a European framework at the intersection of human rights and health law", *Journal of International Biotechnology Law* 2005, p. 138. See also P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 224.

⁵⁰⁸ A.E. SILVER, "An offer you can't refuse: coercing consent to surgery through the medicalization of gender identity", *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 502.

Belgium does not have any legislation directly dealing with sex assigning/normalising treatment of persons with variations of sex characteristics and the necessity of informed consent in that regard. The most specific applicable norm is the federal Act of 22 August 2002 concerning the rights of the patient.⁵⁰⁹ According to Article 2 of the Act, a patient is any natural person who receives medical treatment, whether at their own request or not. It is clear that persons with variations of sex characteristics who receive – with or without their informed consent – medical treatment on their sex characteristics fall within the scope of this provision.

The combination of the various provisions of the Act clearly induces that patients have the principal right to choose whether they give their informed consent to sex assigning/normalising treatment or not. Indeed, in accordance with Article 8, §4 of the Act a competent patient has the right to refuse medical treatment based on any motivation. The medical professional may only act without the prior informed consent of the patient in case of an emergency, when treatment is necessary in the immediate interest of the patient's health.⁵¹⁰ The consent that the patient gives, must be truly informed: according to Article 8, §2 of the Act, the obligation for the professional to provide information to the patient is extensive and must, *inter alia*, include the degree of urgency.

I. Minor patients' rights

As mentioned above, persons with variations of sex characteristics are often subjected to medical and surgical treatments while still being very young, to align their physical appearance with either of the binary sexes, even though they do not usually face actual health problems due to their biological composition.⁵¹¹ The legal position of the minor in relation to medical treatment is therefore of particular importance to the subject of this thesis.

⁵⁰⁹ Wet van 22 augustus 2002 betreffende de rechten van de patient [Act of 22 August 2002 concerning the rights of the patient], *Belgian Gazette* 26 September 2002, p. 43719. Relevant parts of this Act are included in the Annexes to this thesis. See *infra* p. 571.

⁵¹⁰ Article 8, §5 Act of 22 August 2002 concerning the rights of the patient.

⁵¹¹ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people",

Article 22bis of the Belgian Constitution states that every child has the right to respect for their moral, physical, mental and sexual integrity. All children have the right to express their opinion on all matters that concern them, to which due consideration is given in accordance with their age and capacity of discernment. In all decisions that affect the child, its best interests are the primary consideration. Although the provision seems to afford great protection to the participation of minors in medical decisions, it needs to be pointed out that Article 22bis of the Constitution does not have direct effect within the Belgian legal order. It mainly has a symbolical value and its enforcement is therefore dependent on concrete legislation, such as the Act concerning the rights of the patient.⁵¹² Nevertheless, the Belgian Constitutional Court deduced from Article 22bis, read together with Article 3 ECHR, the positive obligation for the State to adopt measures in order to protect the physical integrity of children.⁵¹³

According to Belgian law, a person comes of age at the age of eighteen years.⁵¹⁴ Until that moment, a person does not have the legal capacity to act alone.⁵¹⁵ Indeed, due to a lack of maturity, minors have to be protected against themselves and others.⁵¹⁶ Therefore, although a person is bearer of rights from birth, those rights will be exercised by the parents/legal guardian until that person comes of age, even when the situation concerns personality

<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 14 December 2016), p. 14.

⁵¹² Raad van State [Council of State] (Belgium) 29 May 2013, 223.630.

⁵¹³ Grondwettelijk Hof [Constitutional Court] (Belgium) 29 October 2015, 153/2015, §B.17.2.

⁵¹⁴ Note that a literal interpretation of Article 388 of the Civil Code indicates that only a person of the male or female sex can be considered to be a minor. However, this provision does not serve to exclude persons with variations of sex characteristics, since the Belgian legal system self-evidently interprets 'sex' in conformity with the dichotomy 'male/female'. Nevertheless, the provision is indicative of the pressure that the legal system exercises on parents of or physicians treating children born with variations of sex characteristics to align the latter with either the male or female sex.

⁵¹⁵ See Articles 488, 1123 and 1124 Civil Code.

⁵¹⁶ C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerpen, Intersentia, 2014, p. 821.

rights.⁵¹⁷ When Article 12 of the Act concerning the rights of the patients is read together with Article 2, one learns that, although minors who receive medical treatment are considered to be patients and therefore bearers of rights, they are not automatically granted the autonomy to exercise those rights. Indeed, even when minors can be considered capable of making a reasonable assessment of their interests, Article 12 of the Act only foresees a *possibility* that they act independently to provide informed consent to the medical treatment concerned.⁵¹⁸ In all other cases, the rights of minors are exercised through the legal representative, with involvement of the minor, taking into account their age and maturity. The goal of the involvement is to help the minor patient to gain an understanding of the nature of the (medical) situation, to tell them what to expect of the procedures/treatment, to assess whether they understand the situation and to inquire into their wishes regarding the proposed treatment.⁵¹⁹ Thus, when interpreting Article 12 of the Act, there are three stages in a minor's (medical) life:⁵²⁰

- In a first phase, the minor is incompetent (*'wilsonbekwaam'*) to provide an informed opinion (E.g. new-born children). The legal representative will fully exercise the rights on behalf of the minor;
- In a second phase, the minor is able to form and express an informed opinion, although not sufficiently to act alone (*'wilsonbekwaam'*) (E.g.

⁵¹⁷ Article 372 Civil Code and further.

⁵¹⁸ The provisions concerning minors in the Act concerning the rights of the patient have to be seen as a *lex specialis* in relation to the general rules regarding the legal capacity in the Civil Code. Indeed, some minors can autonomously exercise their rights under the Act, even though they are still considered incompetent to manage their assets under the Civil Code (*'handelingsonbekwaam'*). See C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerpen, Intersentia, 2014, p. 826.

⁵¹⁹ D. MANNAERTS, "Minderjarigen en participatie in de gezondheidszorg [Minors and participation in health care]", <https://wvg.vlaanderen.be/rechtspositie/04-good_practices/bekwaamheid/bijlagen/artikel_minderjarigen_en_participatie.pdf> (last visited 12 January 2017), p. 7.

⁵²⁰ C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerpen, Intersentia, 2014, p. 825.

most ten-year-old children). The legal representative still exercises the minor's rights, although in cooperation with the minor;

- In a third phase, the minor has acquired the capacity to exercise rights independently from the legal representative (*'wilsbekwaam'*) (E.g. seventeen-year-old minors). The latter will nevertheless *de facto* still be involved in the minor's decision making.⁵²¹

The assessment of the age and maturity of minors, or their capacity to make a reasonable assessment of their interests, is solely made by the medical professional.⁵²² Indeed, it belongs to the responsibility of the professional to secure the minor's participation as much as possible, both from a quantitative and qualitative perspective.⁵²³ However, neither the text of the Act, nor the preparatory works give any guidance as to how the professional has to perform this assessment, although the age of fourteen frequently returns in the latter source as a usable caesura.⁵²⁴ According to the literature, there is no true consensus in the medical world on how professionals have to assess the capacity of minors.⁵²⁵ Several context-specific elements are mentioned to have an effect on the outcome of the question, which have to be assessed *in concreto*: age,⁵²⁶ personal experience with decision making, social and psychological development, familial and social environment, the level of education, the nature of the decision, experience with illness,⁵²⁷ quantity and

⁵²¹ Ibid., p. 825.

⁵²² *Parl.Doc.* Chamber of representatives, 50-1642, p. 95-96.

⁵²³ C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 827.

⁵²⁴ *Parl.Doc.* Chamber of representatives, 50-1642, p. 29, 30, 34, 35.

⁵²⁵ P. BORRY, "Minderjarigen en medische besluitvorming [Minors and medical decision making], *Tijdschrift voor Jeugd en Kinderrechten* 2016, Vol. 3, p. 228.

⁵²⁶ The age of 14-16 years often returns as the start of a person's capacity to give informed consent to medical treatment. See C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerpen, Intersentia, 2014, p. 828-829.

⁵²⁷ Long-term ill, severely ill or terminally ill patients often show a higher degree of maturity than other minors of the same age. See C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS

quality of the information, nature and risks of the treatment etc.⁵²⁸ The *Raadgevend Comité voor de Bio-ethiek* (Advisory Committee for Bio-ethics), which advises the Belgian governments regarding biology, health care and medicine, suggests a so-called asymmetrical reasoning regarding the capacity of minors to consent to medical treatment: the level of capacity that is required for a certain decision depends on whether that decision is the most rational given the circumstances.⁵²⁹ The medical professional therefore is the true gatekeeper to the minor patient's exercise of the autonomy to provide informed consent to medical treatment. This status of the professional is met with responsibility: carelessly assuming the minor's capacity to provide informed consent could lead to liability due to the lack of consent by the legal representative; not asking for the informed consent of the minor who is capable to do so could lead to liability due to the violation of the minor's right to physical integrity.⁵³⁰ When professionals doubt whether the opinion of the minor concerned is in their best interest, they will also often question the minor's capacity to decide in the first place.⁵³¹ The professional is therefore advised to consult a multidisciplinary team and to carefully register the motivation of their decision concerning the minor's capacity to provide informed consent in the patient's file.⁵³²

(eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 830.

⁵²⁸ P. BORRY, "Minderjarigen en medische besluitvorming [Minors and medical decision making], *Tijdschrift voor Jeugd en Kinderrechten* 2016, Vol. 3, p. 228.

⁵²⁹ RAADGEVEND COMITE VOOR DE BIO-ETHIEK, "Advies nr. 16 d.d. 25 maart 2002 betreffende het weigeren van bloedtransfusie door de Getuigen van Jehova [Advice n. 16 d.d. 25 March 2002 concerning the refusal of blood transfusion by Jehovah's Witnesses], <http://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/7986420/Advies%20nr.%2016%20d.d.%2025%20maart%202002%20betreffende%20het%20w eigenen%20van%20bloedtransfusie%20door%20de%20Getuigen%20van%20Jehova.pdf> (last visited 12 January 2017), p. 25.

⁵³⁰ C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 828.

⁵³¹ P. BORRY, "Minderjarigen en medische besluitvorming [Minors and medical decision making], *Tijdschrift voor Jeugd en Kinderrechten* 2016, Vol. 3, p. 228.

⁵³² C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek*

The Act does not explicitly specify the circumstances in which the legal representative may exercise the rights of the minor patient, nor that they have to take into account the child's best interests, even though they are considered to do so.⁵³³ The literature suggests that the far-reaching and irreversible nature of the treatment could negatively influence the minor's capacity to decide independently.⁵³⁴ Besides, the Act does not specify the procedure that has to be followed when a conflict arises between the legal representative and minors in the exercise of their rights. According to the parliamentary preparatory works, the opinion of the former takes precedence, unless the professional argues that the minor is capable to exercise their rights independently.⁵³⁵ When a conflict arises between the professional and the legal representative, both parties can appeal to the responsible ombudsperson,⁵³⁶ or the family court.⁵³⁷ The minor who faces medical treatment is therefore fully dependent on the opinion of the legal representative or the medical professional under the Act concerning the rights of the patient.

Gezondheidsrecht. Volume II [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 828.

⁵³³ The parliamentary preparatory works vaguely refer to the Convention on the Rights of the Child, which holds the principle of the child's best interests at its centre. See *Parl.Doc.* Chamber of representatives, 50-1642, p. 95. Moreover, the obligation for parents to act in their child's best interests is enshrined in Article 22bis of the Belgian Constitution. See P. BORRY, "Minderjarigen en medische besluitvorming [Minors and medical decision making], *Tijdschrift voor Jeugd en Kinderrechten* 2016, Vol. 3, p. 224.

⁵³⁴ P. BORRY, "Minderjarigen en medische besluitvorming [Minors and medical decision making], *Tijdschrift voor Jeugd en Kinderrechten* 2016, Vol. 3, p. 225; C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 831.

⁵³⁵ *Parl.Doc.* Chamber of representatives, 50-1642, p. 95.

⁵³⁶ Article 11 Act of 22 August 2002 concerning the rights of the patient.

⁵³⁷ Article 387bis Civil Code.

Chapter III. Legal status of persons with variations of sex characteristics

§1. The minor patient's right to be informed

§1.1. First phase of minority

In the first phase of minority, the legal representative of the minor receives all information that is required according to Article 7 of the Act concerning the rights of the patient.

Article 7, §3 of the Act also holds the right not to be informed, unless this leads to an evidently serious disadvantage to the patient concerned or third parties. There is debate in the literature whether the legal representative of a minor can exercise this right not to be informed, given the fact that they act to protect the minor. One could argue that the right not to be informed concerns the emotional state of the person(s) exercising the patient's rights, i.e. the legal representative. The latter could therefore legally refuse to receive information concerning the medical condition of the child.⁵³⁸

In exceptional situations, the professional may refuse to provide information to the legal representative.⁵³⁹

§1.2. Second phase of minority

In the second phase of minority, the information is given to the legal representative and fully or partly to the minor patient, taking into account their age and maturity. Given the crucial importance of the way in which this information is communicated, the professional could refer the minor to specially qualified staff.⁵⁴⁰

The legal representative can exercise the right not be informed in this second phase as well. The minor patient can also request not to be informed, which

⁵³⁸ C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 840.

⁵³⁹ Article 7, §4 Act of 22 August 2002 concerning the rights of the patient.

⁵⁴⁰ C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 843.

has to be honoured as much as possible, in accordance with the minor's age and maturity. Whether the minor's refusal to be informed could lead to an evidently serious disadvantage is first assessed by the legal representative, given the intimate relationship with the child.⁵⁴¹

In exceptional situations, the professional may refuse to provide information to the legal representative and the minor patient.⁵⁴² Yet, when the information is given to the former, they can decide whether to inform the minor child or not. Once again, priority is given to the opinion of the legal representative, unless their refusal is inspired by the fear to share bad news with the child.⁵⁴³

§1.3. Third phase of minority

During the third phase of minority, the professional has to provide the information directly to the minor patient. The information may not be shared with the legal representative without the minor's permission.⁵⁴⁴ The same counts for the minor's right not to be informed and the professional's therapeutic exception to refuse to share information.

The right to be informed also applies to fatal information, although it is argued that the required level of maturity will be higher in this situation.⁵⁴⁵

§2. The minor's right to informed consent

The most relevant provision of the Act concerning the rights of the patient for this part of the thesis is Article 8, holding the right to prior and informed consent to medical treatment. A medical professional who performs medical treatment without prior and informed consent, could – in principle – be

⁵⁴¹ Ibid., p. 845.

⁵⁴² Article 7, §4 Act of 22 August 2002 concerning the rights of the patient.

⁵⁴³ C. LEMMENS, "De Handelings- en Wilsonbekwamen Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 846.

⁵⁴⁴ Ibid., p. 847.

⁵⁴⁵ Ibid., p. 848.

exposed to liability claims.⁵⁴⁶ The exercise of this right during a person's minority again depends on the phase of minority.

It is important to note that, in any phase of minority, in an emergency situation the medical professional may act without the consent of the legal representative or the minor patient, when medical treatment is necessary in the immediate interest of the patient's health.⁵⁴⁷

§2.1. First phase of minority

During the first phase of minority, the right to consent to medical treatment is fully exercised by the legal representative of the minor, in accordance with the best interests of the child.⁵⁴⁸ The concrete interpretation of how a minor's interests could best be served in a certain situation is firstly the legal representative's prerogative. They have to take into account the concrete place, time and context and the (future) development of the child.⁵⁴⁹ According to the literature, when a judge is asked to review parental decisions in the light of the child's best interests, some restraint is required: indeed, the judge can only condemn the decision when it manifestly fails to serve the child's best interests. The judge will therefore take into account all factors that could influence the child's physical, psychological and social wellbeing, including the child's own opinion.⁵⁵⁰

When a conflict arises between the minor's legal representative and the medical professional, the latter has a legal duty to act without the former's consent in exceptional, urgent situations where the representative's decision threatens the minor patient's life or could lead to a serious impairment of health.⁵⁵¹ In all other cases, the professional could inform the public

⁵⁴⁶ Ibid., p. 849.

⁵⁴⁷ Article 8, §5 Act of 22 August 2002 concerning the rights of the patient.

⁵⁴⁸ Article 22bis Constitution; Articles 3, 6, 18(1) Convention on the Rights of the Child.

⁵⁴⁹ C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 849.

⁵⁵⁰ Ibid., p. 850.

⁵⁵¹ Article 15, §2 Act of 22 August 2002 concerning the rights of the patient.

prosecutor in order to bring the matter before court.⁵⁵² Nevertheless, it is suggested in the literature that in non-urgent situations, the professional would first have to refer the legal representative to multidisciplinary consultation, or the ombudsperson.⁵⁵³

The aforementioned threat to the minor's patient's life or risk of serious impairment of the minor's health has to be assessed on the basis of (1) the chances of successful treatment, (2) the severity of potential damage in case of non-treatment, and (3) the severity of the risks or side-effects connected to the treatment.⁵⁵⁴ Elements concerning the (social) wellbeing of the child could also be taken into account, even though restraint on behalf of the professional in this regard is required: indeed, potential risk of, for instance, psychological problems or bullying are highly unsure and based on a value judgment.⁵⁵⁵

A medical professional also has the obligation under the Act concerning the rights of the patient to refuse to perform treatment when no therapeutical intention is available.⁵⁵⁶ Indeed, to do so would violate the right of the minor patient to qualitative health care under Article 5 of the Act and the right to physical integrity. However, this therapeutical intention is interpreted broadly, for instance by taking into account the dominant societal vision regarding the well-being of the child.⁵⁵⁷ Nevertheless, it is suggested that in case of doubt, no treatment may take place until the child has reached phase three of minority or has come of age.⁵⁵⁸

⁵⁵² Article 387bis Civil Code.

⁵⁵³ C. LEMMENS, "De Handelings- en Wilsonbekwamen [Incapacitated and Mentally Incompetent Persons]" in T. VANSWEEVELT and F. DEWALLENS (eds.), *Handboek Gezondheidsrecht. Volume II* [Handbook Health Law. Volume II], Antwerp, Intersentia, 2014, p. 857.

⁵⁵⁴ *Ibid.*, p. 860.

⁵⁵⁵ *Ibid.*, p. 862.

⁵⁵⁶ *Ibid.*, p. 862, 875.

⁵⁵⁷ *Ibid.*, p. 862.

⁵⁵⁸ *Ibid.*, p. 861.

§2.2. Second phase of minority

During the second phase of a person's minority, the right to provide prior and informed consent to medical treatment is *de iure* still exercised by the legal representative, but *de facto* as much as possible by the minor patient, in accordance with their age and maturity.⁵⁵⁹ Given the required cooperation between the legal representative and the minor, the consent can originally stem from either side. However, when a conflict arises, different paths have to be followed, depending on whether the disagreement exists between the minor and the representative, between the minor and the representative/professional or between the minor/professional and the representative.

When a minor alone, without knowledge of the legal representative, consults a medical professional, the latter has to refuse any form of medical treatment, unless the legal representative becomes involved and agrees, or the necessity-clause *ex* Article 15, §2 of the Act concerning the rights of the patient can be invoked. When the legal representative continues to refuse the treatment, the professional could also bring the case to the attention of the public prosecutor in accordance with Article 387bis of the Civil Code, in order to bring the case before court. As mentioned above, the judge who has to review a parental refusal regarding medical treatment, needs to show some restraint. The judge has to take into account all factors that influence the minor's best interests, including the child's own opinion. Considering the fact that minors generally have acquired (more) maturity during this second phase of minority, their consistent opinion will be valued more highly than in the first phase of minority.⁵⁶⁰

When a medical professional and the legal representative agree on a certain medical treatment, but the minor patient (continuously) refuses, the parental consent *de iure* takes precedence. However, although the representative exercises the right to consent, they have to take into account the opinion of the child. So, in practice, the abovementioned reasoning would also apply.

⁵⁵⁹ *Ibid.*, p. 868.

⁵⁶⁰ *Ibid.*, p. 869.

The professional could only impose the treatment on the minor by relying on the emergency clause of Article 15, §2 of the Act. In all other cases, a judge would have to take the minor's opinion very seriously, in accordance with their age and maturity.⁵⁶¹ Nevertheless, the required level of maturity is influenced by the nature and consequences of the medical condition, proposed treatment and refusal of treatment. One could therefore set aside the minor's opinion in the light of the (perceived) severity of the minor's condition, even though the threshold of Article 15, §2 of the Act is not met.

One can thus conclude that in the second phase of minority the nature of the treatment concerned is of vital importance:⁵⁶² the more serious the case, the more margin will be given to the legal representative to exercise the minor's rights. Moreover, the medical professional retains the right to overrule any decision, in case of a threat to the minor's patient's life or risk of serious impairment of the minor's health.

§2.3. Third phase of minority

During the third phase of minority, the minor patient exercises *de iure* all rights included in the Act concerning the rights of the patient autonomously, even though *de facto* parents will often be heavily involved.⁵⁶³ This not only means that only the minor can provide prior and informed consent to medical treatment, but also that the minor can refuse any form of treatment, even in case of a life-threatening condition.⁵⁶⁴ Nevertheless, the medical professional is the gatekeeper to this third phase of minority and will take into account the nature of the condition, as well as the aspects and risks of the treatment to decide on the required level of maturity.⁵⁶⁵ It is important to note that this level of maturity does not refer to the decision to receive/refuse treatment itself, but to the decision-making process: it has to be certain that the minor is capable to take into account all relevant factors.⁵⁶⁶

⁵⁶¹ Ibid., p. 870.

⁵⁶² Ibid., p. 871.

⁵⁶³ Ibid., p. 873.

⁵⁶⁴ Ibid., p. 872.

⁵⁶⁵ Ibid., p. 873.

⁵⁶⁶ Ibid., p. 873.

The medical professional is first and foremost responsible towards the minor patient. When a conflict between the latter and the legal representative arises concerning (the refusal of) medical treatment, the former may only rely on the opinion of the minor patient. Doing otherwise could lead to civil – and potentially criminal – liability.⁵⁶⁷ This also means that the professional may not unjustifiably ignore the minor's capacity to provide informed consent in order to surpass the latter's opinion.⁵⁶⁸ However, when the minor's desire for treatment is based on a non-therapeutical desire, the professional may refuse to perform treatment under Article 5 of the Act concerning the rights of the patient.

B. Evaluation of the Belgian legal framework

Now that the structure of the Belgian legal framework concerning informed consent to medical treatment is established, it will be analysed specifically with regard to sex assigning/normalising treatment of persons with variations of sex characteristics. Although the pathologisation of persons with variations of sex characteristics also brings other rights into play, this thesis will focus on the right to personal autonomy, since – as the Council of Europe Committee on Bioethics states – this right clearly intends to protect, *inter alia*, the right to physical and psychological integrity; the right to private life; the right to information; the freedom from torture, inhuman and degrading treatment; the right to the highest attainable standard of health and the right of children to be heard in matters affecting them.⁵⁶⁹ Moreover, recent (2018) French case law has shown that non-consensual treatment of persons with variations of sex characteristics might also affect their procedural rights, such as the right to a fair trial under Article 6 ECHR. Indeed, given the fact that, for a long time and up until today, sex assigning/normalising treatment has been presented as a medical necessity in order to preserve the child's best interests, it may take a long time for the person concerned to find out the

⁵⁶⁷ Ibid., p. 875.

⁵⁶⁸ Ibid., p. 875.

⁵⁶⁹ COUNCIL OF EUROPE COMMITTEE ON BIOETHICS, "The Rights of Children in Biomedicine", <<http://www.coe.int/en/web/bioethics/-/study-on-the-rights-of-children-in-biomedici-1>> (last visited 9 August 2017), p. 44.

true motivation for the treatment. In this period of time, which might stretch well into the person's adult life, the statute of limitations for bringing a criminal or civil complaint against the medical practitioner(s) concerned might have passed. In this regard, MORON-PUECH argues that statutes of limitations which do not take into account the actual moment at which the person concerned discovers the truth about the treatment they received are in violation of Article 6 ECHR.⁵⁷⁰ However, it goes beyond the scope of this thesis to address this particular legal question.⁵⁷¹

It should be clear by now that the matter of medical treatment of persons with variations of sex characteristics is not a black and white story. Indeed, as mentioned above in Chapter II, there is a difference between sex assigning/normalising treatment that is deferrable from a medical point of view and is often performed without the personal informed consent of the person with variations of sex characteristics concerned, and medically necessary treatment on a person's sex characteristics. In other words, legally speaking, there seem to be two important interests that need to be balanced: on the one hand the right to personal autonomy of the person with variations of sex characteristics, and on the other hand the protection of that person's right to health and access to qualitative and appropriate health care.

The following sections will analyse the aforementioned Belgian legal framework regarding medical treatment (of persons with variations of sex characteristics) in the light of the 'best practice' legal system, from the perspective of the right to personal autonomy. As explained in Chapter I, this best practice legal system is deduced from various sources, such as

⁵⁷⁰ See B. MORON-PUECH, "Rejet de l'action d'une personne intersexuée pour violences mutilantes. Une nouvelle 'mutilation juridique' par la Cour de cassation? [Rejection of intersex person's claim for mutilation. A new 'legal mutilation by the Court of cassation?]", *La Revue des Juristes de Sciences Po* 2018, Vol. 15, p. 71-104.

⁵⁷¹ Interestingly, in its 2019 concluding observations to Belgium, the UN Committee on the Rights of the Child urged the State to lift the statute of limitations in cases of non-consensual and deferrable sex assigning/normalising treatment of persons with variations of sex characteristics. See Concluding Observations to Belgium, CRC/C/BEL/CO/5-6 (2019).

international (soft) law, European law, foreign law, (inter)national case law and scholarship.

1. Informed consent to sex assigning/normalising treatment and personal autonomy

§1. General remarks and role of the ECHR

§1.1. International general standards

As mentioned above, the Belgian legal system does not specifically address the issues that arise from the sex assigning/normalising treatment that persons with variations of sex characteristics (are forced to) undergo, despite the State's positive obligation to protect the physical integrity of children under Article 22bis of the Constitution. The most appropriate piece of legislation is the general federal Act of 22 August 2002 concerning the rights of the patient. The Act's point of departure is the respect for the patient's human dignity and autonomy without any distinction.⁵⁷² It foresees – among other things – a right to qualitative health care according to the patient's needs,⁵⁷³ a comprehensive right to information⁵⁷⁴ and the right to free, prior and informed consent regarding treatment.⁵⁷⁵ Besides, it provides a system of protection to persons who lack the capacity to exercise their rights, such as minors.⁵⁷⁶ One could therefore state that the Act formally complies with the 1997 Oviedo Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,⁵⁷⁷ the WHO Declaration on the Promotion of Patients' Rights in Europe⁵⁷⁸ and the UNESCO Universal Declaration on Bioethics and Human Rights,⁵⁷⁹ which the ECtHR considers as

⁵⁷² Article 5 Act of 22 August 2002 concerning the rights of the patient.

⁵⁷³ Article 5 Act of 22 August 2002 concerning the rights of the patient.

⁵⁷⁴ Article 7 Act of 22 August 2002 concerning the rights of the patient.

⁵⁷⁵ Article 8 Act of 22 August 2002 concerning the rights of the patient.

⁵⁷⁶ Chapter IV Act of 22 August 2002 concerning the rights of the patient.

⁵⁷⁷ Articles 1, 2, 5, 6 and 8 of the Oviedo Convention.

⁵⁷⁸ Articles 2, 3 and 5 of the Declaration on the Promotion of Patients' Rights in Europe.

⁵⁷⁹ Articles 3, 5, 6, 7 and 8 of the UNESCO Universal Declaration on Bioethics and Human Rights.

the international “generally recognised standards” regarding medical treatment (of minors).⁵⁸⁰ These three sources of international (soft) law lay down the general rule of necessary free and informed consent to medical treatment, potentially through the consent of the legal representative when the person concerned does not have the capacity to provide consent. From the perspective of a formal reading of these international “generally recognised standards” only, there is no legal necessity to reform the Belgian legal framework.

Nevertheless, it needs to be examined how these “generally recognised standards” are actually implemented in practice. Considering the human rights perspective of this thesis, the following section will point out the ECtHR’s position on informed consent to medical treatment.

§1.2. Informed consent under the ECHR

*§1.2.1 Article 8 of the Convention*⁵⁸¹

As mentioned above, personal autonomy could be seen as a general principle of law within the framework of the European Convention on Human Rights.⁵⁸² More specifically, the European Court of Human Rights has stated that Article 8 ECHR encompasses, *inter alia*, the right to personal autonomy and personal development,⁵⁸³ even though it is not explicitly included in the Convention. This right to personal autonomy is described by the Court as “the ability to conduct one’s life in a manner of one’s own choosing, [which may include]

⁵⁸⁰ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §108.

⁵⁸¹ See also COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2> (last visited 3 February 2017), p. 31-32.

⁵⁸² See *supra* p. 53. N.R. KOFFEMAN, “(The right to) personal autonomy in the case law of the European Court of Human Rights”, <https://openaccess.leidenuniv.nl/bitstream/handle/1887/15890/N.R.+Koffeman+-+%28The+right%29+to+personal+autonomy+in+the+case+law+of+the+ECtHR+%282010%29.pdf;jsessionid=B61A5297472C85DB373DD0943F3B6AC8?sequence=3> (last visited 18 January 2017).

⁵⁸³ See for instance ECtHR 14 June 2016, 49304/09, Birzietis v. Lithuania, §32.

the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned”.⁵⁸⁴

Regarding medical treatment and/or healthcare decisions, the right to personal autonomy has been given legal effect through the requirement for consent to treatment and the corresponding legal recognition of the right to refuse treatment.⁵⁸⁵ Indeed, the Court has brought the matter of consent to medical treatment under Article 8,⁵⁸⁶ of which the guarantees are interpreted based on the underlying principle of personal autonomy.⁵⁸⁷ According to the Court, “a decision imposing a medical intervention in defiance of the subject’s will would give rise to an interference with respect to his or her private life, and in particular his or her right to physical integrity”.⁵⁸⁸ Every medical intervention, even of minor importance, that does not meet the condition of consent thus constitutes an interference with a person’s private life, and will violate Article 8 ECHR, unless it can be justified in terms of the second paragraph.⁵⁸⁹ This conclusion is also true in situations where the patient did not have the legal capacity to provide consent to the treatment: the Court considers that the decision to impose treatment on the patient in defiance of the legal proxy’s objections gives rise to an interference with the patient’s right to respect for private life, and in particular the right to physical integrity.⁵⁹⁰

⁵⁸⁴ ECtHR 29 April 2002, 2346/02, *Pretty v. the United Kingdom*, §61. In the *Pretty* case, ‘personal autonomy’ was still regarded as a ‘notion’, rather than as a ‘right’.

⁵⁸⁵ M. DONNELLY, *Healthcare Decision-Making and the Law. Autonomy, Capacity and the Limits of Liberalism*, Cambridge, Cambridge University Press, 2014, p. 52.

⁵⁸⁶ ECtHR 9 March 2004, 61827/00, *Glass v. the United Kingdom*, §70; 5 October 2006, 75725/01, *Trocellier v. France*, §1; 13 May 2008, 52515/99, *Juhnke v. Turkey*, §71; 2 June 2009, 31675/04, *Codarcea v. Romania*, §101; 23 March 2010, 45901/05 and 40146/06, *M.A.K. and R.K. v. the United Kingdom*, §75.

⁵⁸⁷ See *supra* p. 53.

⁵⁸⁸ ECtHR 9 March 2004, 61827/00, *Glass v. the United Kingdom*, §70; 13 May 2008, 52515/99, *Juhnke v. Turkey*, §71; 23 March 2010, 45901/05 and 40146/06, *M.A.K. and R.K. v. the United Kingdom*, §75; 12 June 2014, 32863/05, *L.M. v. Slovenia*, §177.

⁵⁸⁹ W. BUELENS, C. HERIJGERS and S. ILLEGEMS, “The View of the European Court of Human Rights on Competent Patients’ Right of Informed Consent. Research in the Light of Articles 3 and 8 of the European Convention on Human Rights”, *European Journal of Health Law* 2016, Vol. 23, p. 483.

⁵⁹⁰ ECtHR 9 March 2004, 61827/00, *Glass v. the United Kingdom*, §70.

The Court has also had the chance to rule on the *circumstances* in which the consent is given. Indeed, considering that health and possibly life itself are at stake when it comes to decisions concerning medical treatment, it accepts that the authenticity of the patient's decision (possibly refusal) of treatment is a legitimate concern.⁵⁹¹ It has therefore stated that "any medical intervention against the subject's will, or without the *free, informed* and *express* consent of the subject, constitutes an interference with his or her private life".⁵⁹² However, it is important to note that most cases before the Court dealing with consent to medical treatment concerned competent adult patients with full legal capacity. It is therefore less clear what the position of the Court is regarding medical treatment of minor patients, especially when these persons disagree later in life with the treatment they received during minority.

a. Free consent

First of all, the consent must be truly voluntary.⁵⁹³ Patients who are subjected to undue pressure or influence, or are in a subordinate position where they have difficulties in making their own choices, are not capable thereof.⁵⁹⁴ Of course, the evaluation of whether a person's consent was truly voluntary will depend on the concrete circumstances of the case at hand. The Court has for instance considered that a woman who is in labour and about to undergo a Caesarean section is not in the capacity to take the decision of her own free will whether or not to be sterilised.⁵⁹⁵ It has also held that there can be no

⁵⁹¹ ECtHR 10 June 2010, 302/02, Jehovah's Witnesses of Moscow and others v. Russia, §138.

⁵⁹² ECtHR 13 May 2008, 52515/99, Juhnke v. Turkey, §76.

⁵⁹³ W. BUELENS, C. HERIJGERS and S. ILLEGEMS, "The View of the European Court of Human Rights on Competent Patients' Right of Informed Consent. Research in the Light of Articles 3 and 8 of the European Convention on Human Rights", *European Journal of Health Law* 2016, Vol. 23, p. 484.

⁵⁹⁴ M. HARTLEV, "Patients' Rights" in B. TOEBES, M. HARTLEV, A. HENDRIKS and J. ROTHMAR HERRMANN (eds.), *Health and Human Rights in Europe*, Antwerp, Intersentia, 2012, p. 123.

⁵⁹⁵ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §112.

Chapter III. Legal status of persons with variations of sex characteristics

true consent to medical treatment, if the refusal of consent leads to the deprivation of the right to sexual identity and personal development.⁵⁹⁶

When the circumstances result in the vulnerability of the patient concerned, it is suggested that a closer examination of consent for the purposes of establishing voluntariness is required.⁵⁹⁷ Detainees, who are under the complete control of the authorities, are considered to be a vulnerable group and “in certain circumstances, a person in detention cannot be expected to continue to resist” medical treatment.⁵⁹⁸

b. Informed consent

The patient needs to provide the consent to the medical treatment on the basis of information. The Court has held that this information must include the patient’s health status, the proposed procedure and the alternatives to it.⁵⁹⁹ This information must enable the patient to consider all the relevant issues,⁶⁰⁰ and to assess the risks involved.⁶⁰¹ Moreover, the information needs to be communicated in such a way that the patient concerned is able to give informed consent.⁶⁰²

c. Explicit consent

The Court has stated in different cases that the patient’s consent must be explicit.⁶⁰³ It has for instance ruled that the mere fact that a patient did not actively resist taking medication in the hospital, cannot be considered as

⁵⁹⁶ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., Garçon and Nicot v. France, §130. See similarly, European Committee of Social Rights 15 May 2018, Transgender Europe and ILGA Europe v. the Czech Republic, §86.

⁵⁹⁷ W. BUELENS, C. HERIJGERS and S. ILLEGEMS, “The View of the European Court of Human Rights on Competent Patients’ Right of Informed Consent. Research in the Light of Articles 3 and 8 of the European Convention on Human Rights”, *European Journal of Health Law* 2016, Vol. 23, p. 484.

⁵⁹⁸ ECtHR 22 July 2003, 24209/94, Y.F. v. Turkey, §34; 13 May 2008, 52515/99, Juhnke v. Turkey, §76.

⁵⁹⁹ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §112.

⁶⁰⁰ *Ibid.*, §112.

⁶⁰¹ ECtHR 15 January 2013, 8759/05, Csoma v. Romania, §42.

⁶⁰² *Ibid.*, §42.

⁶⁰³ ECtHR 9 March 2004, 61827/00, Glass v. the United Kingdom, §82; 13 May 2008, 52515/99, Juhnke v. Turkey, §76.

indicative of consent.⁶⁰⁴ The Court therefore goes further than the international standard that a free and informed consent may be explicit – verbal or written – or implied.⁶⁰⁵

d. Justification of interferences

As mentioned above, every medical intervention that does not meet the conditions of free, informed and explicit consent constitutes an interference with a person's private life and therefore with Article 8 ECHR. However, the second paragraph of Article 8 states that an interference is justified when it is in accordance with the law, necessary in a democratic society, in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. A certain balance between the patient's right to personal autonomy and other interests is therefore possible under the Convention.

In the light of this thesis, the most important elements of this justification test are the legitimate aim and the proportionality. One of the justification grounds listed in Article 8, §2 ECHR is especially appropriate in the context of medical treatment, i.e. the protection of health. It is for instance suggested in the literature that the interest of public health and safety may permit restrictions to a patient's right to self-determination when the patient is suffering from an infectious disease, which could cause an epidemic.⁶⁰⁶ More interestingly in the light of the medical treatment of persons with variations of sex characteristics is the question whether arguments related to the patient's *own* health or wellbeing *alone* could legitimise an interference with the patient's right to personal autonomy. The Court has stated in this regard that "the freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to the principles of self-

⁶⁰⁴ ECtHR 12 June 2014, 32863/05, L.M. v. Slovenia, §178.

⁶⁰⁵ W. BUELENS, C. HERIJGERS and S. ILLEGEMS, "The View of the European Court of Human Rights on Competent Patients' Right of Informed Consent. Research in the Light of Articles 3 and 8 of the European Convention on Human Rights", *European Journal of Health Law* 2016, Vol. 23, p. 487.

⁶⁰⁶ *Ibid.*, p. 490.

determination and personal autonomy. A competent adult patient is free to decide, for instance, whether or not to undergo surgery or treatment [...]. However, for this freedom to be meaningful, patients must have the right to make choices that accord with their own views and values, regardless of how irrational, unwise or imprudent such choices may appear to others”.⁶⁰⁷ A medical intervention without informed consent, *only* with the aim to protect the patient’s *own* health, therefore constitutes a violation of Article 8 ECHR, except in case of emergency.⁶⁰⁸

Nevertheless, the Court has explicitly accepted the protection of a patient’s own rights and health as a legitimate aim under Article 8, §2 ECHR in a case concerning a man whose legal capacity was deprived by a judicial decision in the light of the severity of his psychological condition.⁶⁰⁹ It has also considered that actions taken by hospital staff that intended, as a matter of clinical judgment, to serve the interests of the minor patient, are based on a legitimate aim.⁶¹⁰

The interference also has to be necessary in a democratic society. This means that it corresponds to a pressing social need and is proportionate to the legitimate aim pursued.⁶¹¹ In a case involving a minor patient, the Court did not accept the necessity of medical treatment which the legal proxy refused – even though it was performed in the best interests of the child – since the intervention of the judiciary was not sought to resolve the conflict between the medical staff and the patient’s proxy and there was no true emergency

⁶⁰⁷ ECtHR 10 June 2010, 302/02, Jehovah’s Witnesses of Moscow and others v. Russia, §136.

⁶⁰⁸ W. BUELENS, C. HERIJGERS and S. ILLEGEMS, “The View of the European Court of Human Rights on Competent Patients’ Right of Informed Consent. Research in the Light of Articles 3 and 8 of the European Convention on Human Rights”, *European Journal of Health Law* 2016, Vol. 23, p. 486-87. According to the Court, there is an ‘emergency’ when medical treatment cannot be delayed (situation involving imminent risk of irreparable damage to the applicant’s life or health) and the appropriate consent cannot be obtained. ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §108-110.

⁶⁰⁹ ECtHR 5 July 1999, 31534/96, Matter v. Slovakia, §65.

⁶¹⁰ ECtHR 9 March 2004, 61827/00, Glass v. the United Kingdom, §77. The Court implicitly affirmed this viewpoint in its recent inadmissibility decision in the case of Charles Gard and Others v. the United Kingdom. ECtHR 27 June 2017, 39793/17, Charles Gard and Others v. the United Kingdom, §89-98.

⁶¹¹ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §139.

situation which could have prevented the chance to seek a judicial injunction.⁶¹² Nevertheless, the Court has accepted the necessity of imposed medical treatment, such as saliva and urine tests,⁶¹³ in order to obtain evidence in criminal procedures or to prevent crimes. However, it did not find an intrusive interference, such as a gynaecological examination, to be proportionate to the legitimate aim of protecting detention gendarmes against false accusations of sexual assault.⁶¹⁴

e. Positive obligation under Article 8 ECHR

The Court has accepted on several occasions a positive obligation under Article 8 ECHR on behalf of the State in relation to medical treatment.⁶¹⁵ In the light of this thesis, it is interesting to note the obligation for the State to adopt appropriate regulations to ensure respect for patients' physical integrity in order to protect the latter, in so far as possible, from the serious consequences which medical acts may give rise to. The States are therefore bound to adopt the necessary regulatory measures to ensure that doctors consider the foreseeable consequences of the planned medical procedure on their patients' physical integrity and to inform patients of these beforehand in such a way that they are able to give informed consent. In particular, as a corollary to this, if a foreseeable risk of this nature materialises without the patient having been duly informed in advance by doctors, and if, as in the instant case, those doctors work in a public hospital, the State Party concerned may be directly liable under Article 8 for this lack of information.⁶¹⁶

⁶¹² ECtHR 9 March 2004, 61827/00, *Glass v. the United Kingdom*, §79-81. In the aforementioned case of *Charles Gard v. the United Kingdom*, the Court implicitly accepted the necessity in a democratic society of a withdrawal of medical treatment in spite of parental refusal, considering the correct application of the domestic law that foresees a judicial procedure to surpass the consent/refusal of the legal representative. ECtHR 27 June 2017, 39793/17, *Charles Gard and Others v. the United Kingdom*, §96.

⁶¹³ ECtHR 5 January 2006, 32352/02, *Schmidt v. Germany*; ECtHR 6 April 1994, *Peters v. the Netherlands*.

⁶¹⁴ ECtHR 13 May 2008, 52515/99, *Juhnke v. Turkey*, §81.

⁶¹⁵ This paragraph does not present an exhaustive overview of the State's positive obligations under Article 8 in relation to medical treatment. It focusses on the most relevant obligations in the light of this part of the thesis.

⁶¹⁶ ECtHR 5 October 2006, 75725/01, *Trocellier v. France*, §4.

However, the Court has observed that in particular circumstances, the obligation to adopt appropriate regulations regarding informed consent is not sufficient. Indeed, the Court considered that the absence of legal safeguards giving *special consideration* to the rights of a vulnerable (group of) person(s) resulted in a failure by the State to comply with its positive obligation to secure a sufficient measure of protection enabling the patient to effectively enjoy the right to respect for private and family life.⁶¹⁷

The Court has also recognised a positive obligation on behalf of the State to provide an effective judicial system in the specific sphere of medical negligence, which could be fulfilled if the legal system affords victims full access to civil proceedings or to disciplinary proceedings which may lead to liability for medical negligence being established and a corresponding award of compensation.⁶¹⁸

§1.2.2. Article 3 of the Convention

The matter of informed consent regarding medical treatment has also been brought under Article 3 of the Convention, mostly in cases concerning detainees who are fully under State control. According to this provision, no one shall be subjected to torture or to inhuman or degrading treatment or punishment. It enshrines one of the most fundamental values of democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour.⁶¹⁹ For a situation to fall under the scope of Article 3, a minimum level of severity must be attained, taking into account all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.⁶²⁰ The absence of any purpose to humiliate or debase the victim does not inevitably lead to a finding that there has been no violation of Article 3.⁶²¹ Besides, the provision also creates a positive obligation on States to take

⁶¹⁷ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §154.

⁶¹⁸ ECtHR 15 January 2013, 8759/05, Csoma v. Romania, §43.

⁶¹⁹ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §100.

⁶²⁰ Ibid., §101.

⁶²¹ ECtHR 19 April 2001, 28624/95, Peers v. Greece, §68.

measures to protect people from suffering Article 3 abuses, whether carried out by State officials or private individuals.⁶²²

The Court's reasoning with regard to medical treatment under Article 3 differs from its reasoning under Article 8. Indeed, it has held, in relation to both competent and incompetent patients,⁶²³ that an imposed measure which is of a therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading.⁶²⁴ The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision exist and are complied with.⁶²⁵ In contrast, a medical intervention without informed consent, *only* with the aim to protect the patient's *own* health on the basis of medical necessity, constitutes a violation of Article 8 ECHR, except in case of emergency where the consent could not be attained.

Nevertheless, as mentioned above, the Court assesses the principles of Article 3 in the light of the concrete circumstances of the case. It has, for instance, noted that sterilisation constitutes a major interference with a person's reproductive health status, which bears on manifold aspects or the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life.⁶²⁶ In this light, the Court stated that the informed consent of the patient – a mentally competent adult person – was a prerequisite to the procedure, *even assuming that the latter was a necessity from a medical point of view*, except for an emergency involving imminent risk of irreparable damage to the patient's life or health where treatment cannot be delayed and the appropriate consent cannot be

⁶²² W. BUELENS, C. HERIJGERS and S. ILLEGEMS, "The View of the European Court of Human Rights on Competent Patients' Right of Informed Consent. Research in the Light of Articles 3 and 8 of the European Convention on Human Rights", *European Journal of Health Law* 2016, Vol. 23, p. 495.

⁶²³ *Ibid.*, p. 496.

⁶²⁴ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §103.

⁶²⁵ ECtHR 11 July 2006, 54810/00, Jalloh v. Germany, §69.

⁶²⁶ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §106; 6 April 2017, 79885/12, 52471/13 and 52596/13, A.P., Garçon and Nicot v. France, §128.

obtained.⁶²⁷ In other words, given the highly intrusive character of the medical treatment concerned, the Court set aside the principle that an imposed therapeutically necessary treatment cannot be considered inhuman or degrading to find a violation of Article 3 ECHR. The Court has developed some other criteria to assess the manner in which a forcible necessary medical treatment was carried out: whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention, whether the forcible medical procedure was ordered and administered by medical doctors, whether the person concerned was placed under constant medical supervision, whether the forcible medical treatment resulted in an aggravation of the patient's state of health and has lasting health consequences (both medical and psychological).⁶²⁸

One of the most important circumstances that the Court will take into account thus is the presence of informed consent itself. Indeed, the Court has mentioned the importance of a person's autonomy regarding medical treatment under Article 3. It has, for instance, characterised the actions of hospital staff as *paternalistic*, when the patient in practice was not offered any option but to agree to the very invasive procedure of sterilisation which the doctors considered appropriate in view of the situation.⁶²⁹ It also indicated that, although there was no indication that the medical staff acted with the intention of ill-treating the applicant, they nevertheless displayed gross disregard for the patient's right to autonomy and choice as a patient.⁶³⁰ However, the great importance of informed consent does not *per se* mean that Article 3 is violated as soon as there is lack of informed consent and no emergency situation.⁶³¹ Indeed, the element of informed consent is (only)

⁶²⁷ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §110.

⁶²⁸ W. BUELENS, C. HERIJGERS and S. ILLEGEMS, "The View of the European Court of Human Rights on Competent Patients' Right of Informed Consent. Research in the Light of Articles 3 and 8 of the European Convention on Human Rights", *European Journal of Health Law* 2016, Vol. 23, p. 498-499.

⁶²⁹ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §114.

⁶³⁰ *Ibid.*, §119.

⁶³¹ W. BUELENS, C. HERIJGERS and S. ILLEGEMS, "The View of the European Court of Human Rights on Competent Patients' Right of Informed Consent. Research in the Light of Articles 3

one of the circumstances that have to be taken into account. Nevertheless, some authors find that the importance of the informed consent and its relative position in relation to the medical necessity of the treatment is highly influenced by the (intrusive) nature of the treatment itself: the more intrusive the treatment, the more important the principle of informed consent will be to avoid a violation of Article 3, even in the light of a medically necessary treatment.⁶³²

§1.2.3. Evaluation

Since cases with regard to sex assigning/normalising treatment of persons with variations of sex characteristics have not yet been addressed by the European Court of Human Rights,⁶³³ it is unclear how the Court would assess the requirements regarding informed consent in the light of Articles 3 and 8 ECHR, especially in the situation where informed consent was given by the legal representative. However, one could deduce some insights from the Court's aforementioned general case law on informed consent to medical treatment. Besides, in its Resolution 2191 (2017), the Council of Europe Parliamentary Assembly considered that the matter of non-consensual sex assigning/normalising treatment of children with variations of sex characteristics might raise important issues under Articles 3 and 8 ECHR.⁶³⁴

and 8 of the European Convention on Human Rights", *European Journal of Health Law* 2016, Vol. 23, p. 501.

⁶³² Ibid., p. 503.

⁶³³ The first case involving an issue related to variations of sex characteristics (i.e. discrimination) that has reached the ECtHR was *Klaedes v. Cyprus*, which was declared inadmissible for failure to exhaust all available domestic remedies. See ECtHR 22 September 2015, 71491/12, *Klaedes v. Cyprus*. In May 2017, the Court communicated a case concerning the legal recognition of a person with variations of sex characteristics to the respondent State of Ukraine: see application no. 40296/16, *P. v. Ukraine*. Nevertheless, the Court already implicitly addressed the situation of persons with variations of sex characteristics in *Christine Goodwin v. United Kingdom*. It stated in paragraph 82 that "it is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual". See also F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 20.

⁶³⁴ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, "Resolution 2191 (2017) 'Promoting the human rights of and eliminating discrimination against intersex people'",

The general Belgian legislative framework regarding informed consent, as laid down in the Act concerning the rights of the patient, seems to be in conformity with the Court's case law. Under the aforementioned Belgian legislation, treatment without the informed consent of the competent patient, or without consent by the legal representative, would only be possible in emergency situations or on the basis of judicial authorisation when a conflict has arisen between the medical professional and the legal representative. In this regard, the Court has ruled that a medical intervention without the informed consent of a competent patient, only with the aim to protect the patient's health is a violation of Article 8, except in cases of emergency. It seems to be more liberal towards treatment of a minor when parental consent is refused, as a matter of clinical judgment, to serve the best interests of the minor patient.⁶³⁵ However, even though serving the best interests of the child's health could be seen as a legitimate aim, the treatment and the procedure around it would still have to be proportionate, for instance, by taking into account the requirement of judicial authorisation to surpass the opinion of the legal representative.

More specifically with regard to the matter of informed consent by the legal representative when the person concerned does not have the capacity to provide personal consent, there seems to be no guiding case law under Article 8, except for *Glass v. United Kingdom*, in which the Court only marginally reviewed the State's regulatory framework concerning the legal representation of minors to find it not in any way inconsistent in the light of the Oviedo Convention standards.⁶³⁶ When applying Article 8, the Court therefore does not generally expect from a State to go beyond the provisions of the Oviedo Convention, which allow consent by proxy in case of treatment

<<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>>
(last visited 27 October 2017).

⁶³⁵ ECtHR 9 March 2004, 61827/00, *Glass. v. the United Kingdom*, §77.

⁶³⁶ *Ibid.*, §75. The case concerned the situation where the hospital staff performed medical treatment on a child despite the mother's refusal, to serve the best interests of the child. The domestic law foresees the possibility for the medical staff to bring the parental refusal before court (cfr. the Belgian Act concerning the rights of the patient), which they did not do in the underlying case. There was no emergency at hand.

to minors. Nevertheless, it has argued, in a case with regard to the legal gender recognition of transgender persons, that there cannot be true consent to medical treatment, if the refusal of consent leads to the deprivation of the right to sexual identity and personal development.⁶³⁷ In this regard, it is necessary to already refer to the next part of Chapter III, i.e. the official sex registration of persons with variations of sex characteristics. It will be pointed out that the current system of sex registration puts pressure on parents and medical professionals, who are faced with a child born with variations of sex characteristics, to have the child conform to the binary 'male/female'. This pressure thus could also negatively influence the freedom for the legal representative to provide or refuse consent to sex assigning/normalising treatment.

Nevertheless, the most appropriate parallel with informed consent to medical treatment of persons with variations of sex characteristics in the current case law, could be found in a case under Article 3 ECHR, *V.C. v. Slovakia*, where the Court disqualified the informed consent given by a woman in labour, in the light of the severity of the medical treatment that was performed (sterilisation) and the fact that the medical staff acted in a paternalistic way, since, in practice, the doctors did not offer any option but to agree to the procedure which they considered appropriate in view of the patient's situation,⁶³⁸ even though there was no emergency situation.⁶³⁹ Given the importance the Court attaches to informed consent in this case, one could argue that – when there is no emergency situation at hand – it is plausible that the Court would consider (very) intrusive sex assigning/normalising treatment, such as a procedure (potentially) leading to sterility or genital surgery, that is performed without the personal free and informed consent of the person concerned, a violation of Article 3 ECHR, even when consent by the legal representative was provided, as foreseen by domestic law.

⁶³⁷ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., *Garçon and Nicot v. France*, §130.

⁶³⁸ ECtHR 8 November 2011, 18968/07, *V.C. v. Slovakia*, §106-114.

⁶³⁹ *Ibid.*, §117.

Moreover, it is also possible to argue that the current generally applicable Act concerning the rights of the patient would not meet the State's positive obligation under Article 8 ECHR to adopt appropriate regulations regarding informed consent. Indeed, as mentioned above, the Court has stated that a State has to foresee legal safeguards giving *special consideration* to the rights of a vulnerable (group of) person(s).⁶⁴⁰ The same requirement of special attention for vulnerability can also be found in Article 8 of the UNESCO Universal Declaration on Bioethics and Human Rights. Given the fact that several reports of the Council of Europe, the EU and the UN have condemned the widespread violations of human rights of persons with variations of sex characteristics,⁶⁴¹ it is plausible that the Court would consider the latter to be vulnerable, *a fortiori* during minority. Indeed, it was already argued above that the young age of the person with variations of sex characteristics concerned during treatment forms an essential aspect of this treatment's interference with personal autonomy. Society's binary normativity thus specifically targets persons with variations of sex characteristics during minority.

Lastly, even though it has already been substantively set out that there is a clear conceptual difference between the three elements of a person's sexual identity, the ECtHR's case law regarding sexual orientation and transgender persons is also not without importance for (medical treatment of) persons with variations of sex characteristics. While other parts of this thesis will more thoroughly address the Court's case law on sexual orientation and gender (identity),⁶⁴² it is important to already highlight one element that would influence the evaluation of the Belgian legal framework with regard to medical treatment of persons with variations of sex characteristics, i.e. the State's margin of appreciation under Article 8. In the recent case *A.P., Garçon and Nicot v. France*, the Court held for the first time that Article 8, "holds a right to self-determination, of which the freedom to define one's gender

⁶⁴⁰ See *supra* p. 163. The group concerned consisted of women of Roma origin in Slovakia.

⁶⁴¹ See *infra* p. 192.

⁶⁴² For a more comprehensive assessment of the Court's case law with regard to transgender persons, see *infra* p. 345 and further.

identity is one of the most essential elements”.⁶⁴³ In this regard, it is plausible that the Court would acknowledge a person’s sex (characteristics) as one of the most intimate aspects of a person’s private life, as it has done with sexual orientation and gender (identity).⁶⁴⁴ After all, the Parliamentary Assembly of the Council of Europe has called upon the Member States to ensure that no-one is subjected to deferrable medical or surgical treatment, or treatment that is cosmetic rather than vital for health during infancy or childhood; to guarantee bodily integrity, autonomy and self-determination to persons concerned.⁶⁴⁵ Besides, in the aforementioned case *A.P., Garçon and Nicot v. France*, the Court found a narrow margin of appreciation on behalf of the State in the matter of the requirement of compulsory sterilisation for legal gender recognition. Although the Court accepted that the case dealt with delicate ethical and moral questions, it pointed out that the case also concerned an essential aspect of a person’s intimate identity, or even existence, and the individual’s physical integrity.⁶⁴⁶ Moreover, the Court pointed out that numerous European and international institutional actors for human rights promotion and protection had taken a stance towards abandoning compulsory sterilisation.⁶⁴⁷ These considerations would presumably also lead to a narrow margin of appreciation for the State with regard to treatment on a person’s sex characteristics, even when the role of parental consent to the treatment is taken into account.

⁶⁴³ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P., Garçon and Nicot v. France*, §93 (own translation). See also B. MORON-PUECH, “L’arrêt *A.P., Garçon et Nicot c. France* ou la protection insuffisante par le juge européen des droits fondamentaux des personnes transsexuées [*A.P., Garçon and Nicot v. France* or the insufficient protection of transgender persons by the European judge of Human Rights]”, *Revue des droits de l’homme* 2017, <<http://revdh.revues.org/3049>> (last visited 22 May 2017), p. 9. Note that the Court’s choice of terminology is regrettable. Indeed, in French ‘gender identity’ is translated as ‘identité sexuée’ instead of ‘identité sexuelle’.

⁶⁴⁴ ECtHR 22 October 1981, *Dudgeon v. the United Kingdom*, 652; ECtHR 12 June 2003, 35968/97, *Van Kück v. Germany*, §56.

⁶⁴⁵ PARLIAMENTARY ASSEMBLY COUNCIL OF EUROPE, “Children’s Right to physical integrity”, <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=20057&lang=en>> (last visited 26 January 2017).

⁶⁴⁶ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P., Garçon and Nicot v. France*, §123.

⁶⁴⁷ *Ibid.*, §125.

In other words, although the Belgian legal framework on the rights of patients seems to be in conformity with current standards under the ECHR, (parts of) the Court's case law under Articles 3 and 8 ECHR could be seen as an incitement for the Belgian government to adopt special provisions regarding sex assigning/normalising treatment of (minor) patients with variations of sex characteristics.

§2. Effectiveness of protection of personal autonomy

Despite the tentative conclusion that the ECtHR's case law concerning informed consent to medical treatment might in the future lead to the finding of deficiency of the current Belgian model of informed consent, specifically regarding parental consent to sex assigning/normalising treatment, the Belgian framework currently seems to be in conformity with generally accepted human rights provisions regarding medical treatment of patients. Indeed, in the case of treatment of variations of sex characteristics patient rights provisions do not seem to demand other or more measures than informed consent, either provided by the patient concerned or by their legal representative. However, one could question whether these standards are capable of *effectively* protecting the personal autonomy of persons with variations of sex characteristics, especially when looking at emerging human rights standards that address the sexual identity of individuals from new perspectives.

The focus on health care of persons with variations of sex characteristics and the quality of their treatment not only influences what happens to them, but also infects our understanding of variations of sex characteristics, shifting focus off the social response to the individual and onto medicine.⁶⁴⁸ Indeed, even though psycho-medical research acknowledges that personal involvement of persons with variations of sex characteristics in their treatment options is a concern and raises questions from a human rights

⁶⁴⁸ E. REILLY, "Radical tweak – Relocating the power to assign sex. From enforcer of differentiation to facilitator of inclusiveness: revising the response to intersexuality", *Cardozo Journal of Law & Gender* 2005-06, vol. 12, p. 303.

perspective,⁶⁴⁹ a thorough discussion of potential human rights violations in treatment models remains rare.⁶⁵⁰ Reports concerning sex assigning/normalising treatment do not indicate that minors with variations of sex characteristics are presently necessarily treated without consent of the legal representative, nor that the latter do not receive information⁶⁵¹ or support from the hospital staff.⁶⁵² However, it needs reminding that, to date, there is no scientifically correct overall picture of whether and how aspects of a variation of sex characteristics (medical condition specific aspects, consequences of sex assigning/normalising treatment or non-treatment, consequences of potentially wrongful gender assignment, and reactions from the social environment) affect the health and well-being of persons with variations of sex characteristics.⁶⁵³ Moreover, stories about trauma due to sex

⁶⁴⁹ N. CALLENS, T. VAN DER GRIFT, M. COOLS, “Een holistisch zorgbeleid voor Differences of Sex Development [Holistic health care for Differences of Sex Development]”, *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 5, 11.

⁶⁵⁰ E. KEDER and A. DREGER, “Still ignoring human rights in intersex care”, *Journal of Pediatric Urology* 2016, Vol. 12, p. 436.

⁶⁵¹ See for instance N. CALLENS, C. LONGMAN and J. MOTMANS, “Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]”, <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 12. However, qualitative research indicates that parents do not necessarily take into account all information concerning the risks of sex assigning/normalising treatment, *inter alia*, based on their own bias regarding the binary sex model. See *infra* p. 174.

⁶⁵² See, for instance, J. VAN LISDONK, “Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]”, <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 25 January 2017); COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 25 January 2017); EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, “The fundamental rights situation of intersex people”, <<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>> (last visited 25 January 2017). See in this regard also M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 50.

⁶⁵³ J. VAN LISDONK, “Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary

assigning/normalising treatment still come to light.⁶⁵⁴ The next sections will therefore analyse whether the (implementation of the) Belgian framework regarding informed consent to medical treatment is actually capable of effectively respecting and protecting the personal autonomy of persons with variations of sex characteristics.

§2.1. Substitution of personal autonomy for consent by proxy

All relevant legal sources concerning medical treatment that were mentioned above, depart from the respect of the patient's autonomy and human dignity, regardless of the patient's age. Autonomy is seen as a limit on paternalist approaches which might ignore the wish of the patient,⁶⁵⁵ especially in situations where in practice the patient is not offered any option but to agree to the procedure which the medical staff considered appropriate in view of the circumstances.⁶⁵⁶ With regard to medical treatment, this precedence of individual autonomy over paternalism is represented by the prerequisite of personal informed consent.⁶⁵⁷ Although Belgian legislation foresees that a minor patient has to be involved in the consent by the legal representative to medical treatment or even has to be granted autonomy towards the end of minority, personal exercise of rights depends on the child's age, maturity and the nature and risks of the treatment, which are all assessed by the medical professional. Specifically for children with variations of sex characteristics, this creates a disproportionate flaw in the protection of their personal autonomy. After all, these criteria in practice hamper the opportunities for

research of the living conditions of persons with intersex/DSD]", <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 25 January 2017), p. 44.

⁶⁵⁴ Ibid. See also <<http://deredactie.be/cm/vrtnieuws/wetenschap/1.2873456>> (last visited 28 August 2018).

⁶⁵⁵ Paragraph 34 Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ccde5>> (last visited 25 January 2017).

⁶⁵⁶ ECtHR 8 November 2011, 18968/07, V.C. v. Slovakia, §114.

⁶⁵⁷ A. E. SILVER, "An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity", *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 513.

children with variations of sex characteristics to autonomously exercise their right to bodily integrity or even participate in decision making proceedings. Indeed, as mentioned above, on the basis of the socially constructed treatment model, deferrable sex assigning/normalising treatment often occurs close to a child's birth or in early childhood, and often takes the form of serious and invasive hormonal or surgical intervention, with risks for the person's fertility, genital sensitivity and sexual life.⁶⁵⁸ Treatment decisions thus are presented as inherently parental, medical, necessary, urgent decisions to protect the child's future well-being.

As mentioned above, the Act concerning the rights of the patient does not explicitly specify in which situations the legal representative may exercise the rights of the minor patient. However, these circumstances, e.g. the degree or urgency of the treatment, the nature of the treatment or the possible consequences, are at the very centre of the issues that persons with variations of sex characteristics face in relation to sex assigning/normalising treatment. Even though a variation of sex characteristics rarely causes health risks that *immediately* require medical intervention,⁶⁵⁹ there is no indication in the Act that these observations negatively influence the margin for consent by proxy with regard to the timing of the treatment. The legal requirement that medical treatment needs to serve a therapeutical cause,⁶⁶⁰ also does not appear to significantly influence the performance of sex

⁶⁵⁸ See *supra* p. 70. D. L. CLARK HOFMAN, "Male, Female and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law", *Tulane Journal of Law and Sexuality* 2012, Vol. 21, p. 12. See in this regard also N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 22.

⁶⁵⁹ D. L. CLARK HOFMAN, "Male, Female and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law", *Tulane Journal of Law and Sexuality* 2012, Vol. 21, p. 10. See in this regard also M. BLONDIN and C. BOUCHOUX, "Rapport d'Information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 22 June 2017), p. 53. See in this regard also H.G. BEH and M. DIAMOND, "David Reimer's Legacy: Limiting Parental Discretion", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 12.

⁶⁶⁰ Article 5 Act of 22 August 2002 concerning the rights of the patient.

assigning/normalising treatment on the basis of consent by proxy. These observations lead combined to *a de facto* dominance of and preference for parental consent over the personal autonomy of the person with variations of sex characteristics, and therefore a substitution of the latter's will in favour of the legal representative's will ('parentalism').⁶⁶¹

The already inherently questionable nature of this finding is exacerbated by the problematic position of parents when a child is born with a variation of sex characteristics.⁶⁶² Indeed, as CHRISTMAS documented, parents of a newborn are not always best placed to make decisions that will have life-long implications for their child, and far more support and information is required – especially about matters that parents may not want to contemplate so early on in their child's life, such as the adult child's sexual life.⁶⁶³ CLARK HOFMAN also sees a difference between sex assignment/normalising treatment and most cases in which parents serve as surrogates because of the cultural

⁶⁶¹ See D. L. CLARK HOFMAN, "Male, Female and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law", *Tulane Journal of Law and Sexuality* 2012, Vol. 21, p. 11.

⁶⁶² See in this regard H.G. BEH and M. DIAMOND, "David Reimer's Legacy: Limiting Parental Discretion", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 5. See also M. JONES, "Intersex Genital Mutilation – A Western Version of FGM", *International Journal of Children's Rights* 2017, Vol. 25, p. 401-407. See also J. GARLAND and M. DIAMOND, "Evidence-based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 98. See also P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 229. See also C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice", *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 344-345.

⁶⁶³ See E. MCDONALD, "Intersex People in Aotearoa New Zealand: The Challenges for Law and Social Policy. Part I: Critiquing Gender Normalising Surgery", *Victoria University Wellington Law Review* 2015, Vol. 46, p. 718. See also H.G. BEH and M. DIAMOND, "David Reimer's Legacy: Limiting Parental Discretion", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 28. See also N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 24-25. See also S. MONRO, D. CROCETTI, T. YEADON-LEE, F. GARLAND and M. TRAVIS, "Intersex, Variations of Sex Characteristics, and DSD: The Need for Change", <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 10.

implications of the decision and the shame that often accompanies the birth of a child with variations of sex characteristics:

*“Because an infant or very young child has no past judgment, parents who make medical decisions for the very young generally must act to protect the child’s best interests, rather than its autonomy. Parents of the intersexed, however, must make their decisions within the context of their own socialisation and biases: they do not just have a ‘sick’ baby, they have a ‘freak’ baby. If they follow the treatment protocol, most parents believe, they will be creating a normal life, not just for the child, but for themselves.”*⁶⁶⁴

According to CLARK HOFMAN, cases regarding medical treatment of children with variations of sex characteristics involve significant hurdles for providing parental informed consent: parents are confronted with their own cultural upbringing, stereotypes, and biases regarding (binary) sex and gender,⁶⁶⁵ and are often presented with information indicating a false sense of medical urgency based on the physicians’ apparent authority.⁶⁶⁶ Indeed, conflicted by their own distress, anxieties, guilt, shame, or repugnance, parents may not be able to act solely in their child’s best interests.⁶⁶⁷ Moreover, qualitative

⁶⁶⁴ D. L. CLARK HOFMAN, “Male, Female and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law”, *Tulane Journal of Law and Sexuality* 2012, Vol. 21, p. 12.

⁶⁶⁵ See M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 33.

⁶⁶⁶ D. L. CLARK HOFMAN, “Male, Female and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law”, *Tulane Journal of Law and Sexuality* 2012, Vol. 21, p. 12-13. See also P. DUNNE, “Towards Trans and Intersex Equality: Conflict or Complementarity?” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 234.

⁶⁶⁷ K. SANDBERG, “Intersex Children and the UN Convention on the Rights of the Child” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 529; H.G. BEH and M. DIAMOND, “David Reimer’s Legacy: Limiting Parental Discretion”, *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 5. See in this regard also the recent qualitative research by CALLENS, LONGMAN and MOTMANS, which argues that parents of children with variations of sex characteristics who consented to

research of 2013 indicates that parents tend to disfavour postponing surgery until the child is old enough to provide its own consent, despite lack of evidence concerning outcome data and despite being informed about issues such as their child's potential loss of sexual sensation.⁶⁶⁸ According to that same research, the origin of this readiness to consent to sex assigning/normalising treatment during childhood is unclear: some sources invoke social pressure or parents' long-held attitudes, others see parents influenced by the behaviour of professionals and the information they provide, which can appear medicalised or demedicalised, mainly depending on the context, cause, and proposed solution.⁶⁶⁹ Recent Flemish research also

early genital surgery did not point out that the child's potential opinion was an important factor within their decision making process. See N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 24-25. See also B. M. DICKENS, "Management of Intersex Newborns: legal and ethical developments", *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 4.

⁶⁶⁸ C. STREULI e.a., "Shaping Parents: Impact of Contrasting Professional Counseling on Parents' Decision Making for Children with Disorders of Sex Development", *Journal of Sexual Medicine* 2013, Vol. 10, p. 1954. See in this regard also M. BLONDIN and C. BOUCHOUX, "Rapport d'Information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 22 June 2017), p. 55. See also P. NEWCOMBE, "Blurred Lines – Intersexuality and the Law: An Annotated Bibliography", *Law Library Journal* 2017, Vol. 109(2), p. 225. See also M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 3.

⁶⁶⁹ C. STREULI e.a., "Shaping Parents: Impact of Contrasting Professional Counseling on Parents' Decision Making for Children with Disorders of Sex Development", *Journal of Sexual Medicine* 2013, Vol. 10, p. 1954. See also M. BLONDIN and C. BOUCHOUX, "Rapport d'Information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 32. See also N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 17; N. CALLENS, C. LONGMAN and J. MOTMANS, "Terminologie en zorgdiscours m.b.t. Differences of Sex Development (DSD)/Intersekse in België [Terminology and care discourse concerning

shows that parents want to protect their children from having to make difficult decisions concerning treatment on their sex characteristics.⁶⁷⁰ That same research also argues that some adult persons with variations of sex characteristics who received non-consensual treatment during (early) childhood agreed with their parents' decision, or even showed relief that they did not have to make the decision themselves.⁶⁷¹ However, these results are accompanied by an important caveat, i.e. the retrospective discourses by adult persons with variations of sex characteristics and by parents of children with variations of sex characteristics do not indicate that non-treatment was presented or experienced as a credible alternative to early non-consensual genital surgery.⁶⁷² Thus, the reliance on parental informed consent to perform non-consensual sex assigning/normalising treatment is essentially justified based on the risk of social stigma in childhood, parental distress and parental preferences, despite official recommendations of caution and regardless of statistical evidence of high risks of dissatisfaction regarding sex/gender assignment.⁶⁷³ These circumstances bring JONES to believe that the best interests of the child with variations of sex characteristics are not

Differences of Sex Development (DSD)/Intersex in Belgium]", Staatssecretariaat voor Gelijke Kansen, 2016, p. 22.

⁶⁷⁰ N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 24.

⁶⁷¹ Ibid., p. 22-25.

⁶⁷² Ibid., p. 50.

⁶⁷³ H.G. BEH and M. DIAMOND, "David Reimer's Legacy: Limiting Parental Discretion", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 20-21; J. GARLAND and M. DIAMOND, "Evidence-based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 90. See also P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 222-223.

sufficiently protected, in violation of Article 3 of the Convention of the Rights of the Child.⁶⁷⁴⁶⁷⁵

This substitution of the personal informed consent of the individual with variations of sex characteristics for consent by the legal representative is in clear defiance of Yogyakarta Principle 18, which holds the protection from medical abuses.⁶⁷⁶ Principle 18's subsection b) addresses sex assigning/normalising treatment of children with variations of sex characteristics. According to the provision, no child's body may be irreversibly altered in an attempt to impose a gender (identity) unless two conditions are satisfied: (1) the full, free and informed consent of the child in accordance with the age and maturity and (2) the primary consideration for the treatment

⁶⁷⁴ M. JONES, "Intersex Genital Mutilation – A Western Version of FGM", *International Journal of Children's Rights* 2017, Vol. 25, p. 401-407. See also C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 492-493. See also P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 234-235.

⁶⁷⁵ An interesting parallel exists with the evaluation of so-called sexual orientation change efforts (SOCE) (sometimes also referred to as 'conversion therapy') under the Convention on the Rights of the Child. According to NUGRAHA: "SOCE claim to change the sexual orientation of an LGB child. While science has demonstrated that its efficacy is dubious, such efforts are still contrary to the right of a child to have his or her identity respected under Article 8 of the CRC. [...] Most importantly, SOCE jeopardise the health of LGB children. The CRC Committee has held that 'the child's right to health and his or her health condition are central in assessing the child's best interest', and added that in light of uncertainty 'the advantages of all possible treatments must be weighed against all possible risks and side effects'. SOCE can induce harmful effects such as depression and suicidal urges [...]. Its proponents have also failed to produce evidence of its supposed beneficial effects. [...] Therefore, based on these elements, it can be concluded that SOCE in any form or in any terminology contravene the best interest of LGB children. [...] States cannot hide behind the veil of cultural relativism to impose SOCE on minors, as it would be contradictory to claim that practices that are contrary to the rights enunciated in the CRC (especially protection from physical or mental harm under Article 19) are within the best interests of the child. Furthermore, the text of the CRC itself does not allow cultural practices that are contrary to the rights of the child within the convention." See I. Y. NUGRAHA, "The compatibility of sexual orientation change efforts with international human rights law", *Netherlands Quarterly of Human Rights* 2017, <<https://doi.org/10.1177%2F0924015917724654>> (last visited 18 January 2019), p. 11-12.

⁶⁷⁶ See J.M. SCHERPE, "Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 211.

must be the child's best interests. It is interesting to note that Principle 18 does not mention the decision making capacity of the legal representative of a child in case of medical treatment during minority. The 2017 update of the Yogyakarta Principles clarified the scope of Principle 18. According to Principle 32, "no one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the person concerned". Moreover, the provision's wording makes it clear that stereotypes, social reasons and the concept of 'the best interests of the child' may not lead to violations of the child's right to bodily autonomy. Indeed, subsections a) to e) hold:

"A) Guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination;

B) Ensure that legislation protects everyone, including all children, from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics;

C) Take measures to address stigma, discrimination and stereotypes based on sex and gender, and combat the use of such stereotypes, as well as marriage prospects and other social, religious and cultural rationales, to justify modifications to sex characteristics, including of children;

D) Bearing in mind the child's right to life, non-discrimination, the best interests of the child, and respect for the child's views, ensure that children are fully consulted and informed regarding any modifications to their sex characteristics necessary to avoid or remedy proven, serious physical harm, and ensure that any such modifications are consented to by the child concerned in a manner consistent with the child's evolving capacity;

E) Ensure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity."

Moreover, SANDBERG and JONES argue that any non-consensual, medically deferrable intervention must be postponed in accordance with Article 12 of the Convention on the Rights of the Child, which grants the child the right to be heard in all matters concerning it.⁶⁷⁷ If such an intervention is undertaken at an earlier stage, it will constitute a violation of Article 3 of the same convention, regarding the best interests of the child.⁶⁷⁸ In any case, according to BREMS, State Parties to the Convention on the Rights of the Child have the obligation to realise cultural change if cultural reasons provide barriers to the right of children to be heard and to participate in matters affecting them.⁶⁷⁹ In this regard, States arguably have a positive obligation under the Convention on the Rights of the Child to prevent cultural reasons (such as

⁶⁷⁷ K. SANDBERG, "The Rights of LGBTI Children under the Convention on the Rights of the Child" in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 73. See also M. JONES, "Intersex Genital Mutilation – A Western Version of FGM", *International Journal of Children's Rights* 2017, Vol. 25, p. 408. See also R. BALLOFF, *Kinder vor dem Familiengericht. Praxishandbuch zum Schutz des Kindeswohls unter rechtlichen, psychologischen und pädagogischen Aspekten* [Children before the family court. Handbook for the protection of the well-being of children from legal, psychological and pedagogical perspectives], Baden-Baden, Nomos, 2018, p. 240-241. More on the effectiveness of Article 12 of the ICRC in medical law, see P. ALDERSON, "Giving Children's Views 'Due Weight' in Medical Law", *International Journal of Children's Rights* 2018, Vol. 26, p. 16-37. See also C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 488.

⁶⁷⁸ K. SANDBERG, "The Rights of LGBTI Children under the Convention on the Rights of the Child" in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 73; "Intersex Children and the UN Convention on the Rights of the Child" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 528. See also M. JONES, "Intersex Genital Mutilation – A Western Version of FGM", *International Journal of Children's Rights* 2017, Vol. 25, p. 401-407.

⁶⁷⁹ BREMS implicitly derived this requirement of cultural change from a 2009 general comment interpreting Article 12 drafted by the Committee on the Rights of the Child. E. BREMS, "Lessons for children's rights from women's rights? Emancipation rights as a distinct category of human rights" in E. BREMS, E. DESMET, W. VANDENHOLE (eds.), *Children's Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?*, London, Routledge, 2017, p. 102. See CRC Committee, "General Comment No 12 (2009) 'The right of the child to be heard', CRC/C/GC/12, §135.

binary sex normativity and cisnormativity) from limiting the autonomy rights of children.

§2.2. Social constructionism presented as medical necessity

It should be clear by now that many forms of medical treatment of persons with variations of sex characteristics are not based on evidence-based medical necessity, but on considerations regarding the socio-psychological well-being of the person concerned and cultural norms.⁶⁸⁰ Indeed, the interventions enable the individual to fit into the binary model of sex and avoid possible social stigmatisation and alienation.⁶⁸¹ It has already been stated above that this sex model is part of the binary normativity of society:⁶⁸² the medical model enforces this social constructionist norm by failing to respect the autonomy of children with variations of sex characteristics to decide what medical care is needed to experience and express their

⁶⁸⁰ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>>, (last visited 25 January 2017), p. 23. See also M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 33-34 and especially p. 53 ; B. M. DICKENS, “Management of Intersex Newborns: legal and ethical developments”, *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 8-9 ; C. LOWRY, “Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice”, *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 330-332.

⁶⁸¹ N. CALLENS, *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, 2014, p. 42. See also M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 33.

⁶⁸² D. L. CLARK HOFMAN, “Male, Female and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law”, *Tulane Journal of Law and Sexuality* 2012, Vol. 21, p. 19.

gender.⁶⁸³ Recent work of CALLENS, VAN DER GRIFT and COOLS even acknowledges that research on the influence of cultural and social factors is still in its infancy.⁶⁸⁴ Medical professionals who, in the information they provide, focus mainly on the essentiality of sex assigning/normalising treatment for the (social) development of a person with variations of sex characteristics, thus disguise its true (lack of) urgency.⁶⁸⁵ This enforcement of uncertain social constructions, together with the high level of scientific uncertainty regarding the benefits and/or negative consequences of sex assigning/normalising treatment deprive the medical model of non-consensual, deferrable treatment of its (legal and ethical) legitimacy.⁶⁸⁶ Indeed, SANDBERG finds that, based on the lack of medical necessity of sex

⁶⁸³ A. E. SILVER, "An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalisation of Gender Identity", *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 504. Note that this article includes persons with variations of sex characteristics under the umbrella term "transgender".

⁶⁸⁴ N. CALLENS, T. VAN DER GRIFT, M. COOLS, "Een holistisch zorgbeleid voor Differences of Sex Development [Holistic health care for Differences of Sex Development]", *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 7.

⁶⁸⁵ In their 2017 study, CALLENS, LONGMAN and MOTMANS point out that the credibility of non-operative treatment in the information by medical practitioners needs to be improved. See N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders], <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 55. See also C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice", *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 343.

⁶⁸⁶ J.A. GREENBERG, *Intersexuality and the Law: Why Sex Matters*, New York, New York University Press, 2012, p. 135. See also HUMAN RIGHTS WATCH and INTERACT, "I want to be like nature made me. Medically Unnecessary Surgeries on Intersex Children in the US", <<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>> (last visited 9 August 2017), p. 13. See also N. BEN-ASHER, "The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties", *Harvard Journal of Law & Gender* 2006, Vol. 29, p. 68. BEN-ASHER argues that the fact that no significant data has been collected on long-term 'outcomes' of sex assigning/normalising therapy, makes these forms of treatment experimental by nature. See also B. M. DICKENS, "Management of Intersex Newborns: legal and ethical developments", *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 8-9. See also C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice", *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 346-347.

assigning/normalising treatment, “parents have no right to consent to it; where there is no valid consent in performing surgery or other forms of treatment, medical doctors violate Article 19 of the Convention on the Rights of the Child, which gives the child a right to be protected from all forms of violence”.⁶⁸⁷ This essentially socially motivated and non-consensual intervention on the child’s body is also considered to violate Article 24 (3) of the Convention on the Rights of the Child, which requires States to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children.⁶⁸⁸ Moreover, the incorrect representation of sex assigning/normalising treatment as medical necessity could also be seen as a violation of the right to truth of victims of human right violations on the basis of sex characteristics which is laid down in Yogyakarta Principle 37.

§2.3. International case law

These findings about the effective protection of the autonomy of a child born with a variation of sex characteristics are not specific for the Belgian legal framework regarding medical treatment.⁶⁸⁹ In the 1990’s the Colombian Constitutional Court (*Corte Constitucional de Colombia*) delivered three landmark rulings concerning the constitutional rights of children with

⁶⁸⁷ K. SANDBERG, “The Rights of LGBTI Children under the Convention on the Rights of the Child” in A. HELMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p.73. See M. JONES, “Intersex Genital Mutilation – A Western Version of FGM”, *International Journal of Children’s Rights* 2017, Vol. 25, p. 408.

⁶⁸⁸ M. JONES, “Intersex Genital Mutilation – A Western Version of FGM”, *International Journal of Children’s Rights* 2017, Vol. 25, p. 407-408. On the basis of a joint general recommendation/general comment by the CEDAW Committee and the Committee on the Rights of the Child, female genital mutilation (FGM) is considered to be a harmful cultural practice in the sense of Article 24 (3) of the Convention on the Rights of the Child. See Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices cedaw/c/gc/31-crc/c/gc/18 14 November 2014. See also K. SANDBERG, “Intersex Children and the UN Convention on the Rights of the Child’ in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 528

⁶⁸⁹ In 2013, the Kenyan High Court of Kenya at Nairobi declared that all surgery on children born with variations of sex characteristics that is not based on medical necessity must first be approved through a judicial procedure. See <<http://kenyalaw.org/caselaw/cases/view/104234/>> (last visited 12 July 2018).

variations of sex characteristics with regard to sex assignment treatment⁶⁹⁰, sex normalising treatment and the role of parental consent. The cases established an important worldwide legal precedent and (partly) led to a moratorium in Colombia on the practice of sex assignment treatment and sex normalising surgery on infants and young children until they are old enough to personally consent to surgery.⁶⁹¹ Whereas the first case resulted in the protection of all individuals against sex assigning/normalising treatment without their *personal* informed consent, the latter cases enabled such treatment on the basis of a heightened standard of parental informed consent when children with variations of sex characteristics, due to their young age, cannot make competent medical decisions.⁶⁹²

More recently, in 2018, the Austrian Constitutional Court also commented on the performance of sex assigning/normalising treatment on children born with variations of sex characteristics. Although the case at hand actually concerned the binary normativity of Austrian official sex registration, the Court – by way of *obiter dictum* – discussed the pressure that society exercises on parents to have children that conform to the normative sex/gender model.

§2.3.1. Colombian Constitutional Court

The case law of the Colombian Constitutional Court is important in the light of this thesis, since constitutional fundamental rights are its point of departure.⁶⁹³ In the first case, the Court heavily relied on the constitutional right to identity, and the unlawful deprivation of identity, which could be inspired by the severity of the facts. The person involved was born with a

⁶⁹⁰ The first case dealt with a child who was born with typical male sex characteristics. However, the boy's penis was deformed during surgery, after which sex assignment treatment took place in order to raise him as a girl. Even though the child did not have a variation of sex characteristics birth, the Court's reasoning could also be applied to persons with variations of sex characteristics.

⁶⁹¹ R. L. WHITE, "Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson", *Fordham International Law Journal* 2014, Vol. 37, p. 797.

⁶⁹² *Ibid.*, p. 794.

⁶⁹³ R. RUBIO-MARIN and S. OSELLA, "Between Rights and Pragmatism: Intersexuality before the Colombian Constitutional Court" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 319.

penis, which was deformed through surgery after birth. His parents consented to any treatment that would improve their child's situation, including a sex 'reassignment'. However, the boy never developed a female gender (identity) and felt anguished living as a female.⁶⁹⁴ The situation thus amounted to a case of so-called 'transsexualisation' of persons with variations of sex characteristics. The Court held that the medical staff violated the child's constitutional rights by performing genital assigning surgery.⁶⁹⁵ According to the Court, the surgery violated the minor's constitutional right to identity, as part of the right to human dignity. It reasoned that each individual has the right to develop their identity freely, on the basis of autonomy/self-determination.⁶⁹⁶ Interestingly, the Court found that the medical staff violated the minor's rights and referred to Article 8 of the Convention on the Rights of the Child, which holds the child's right to preserve its identity, including nationality, name and family reasons as recognised by law without unlawful interference. On the basis of this provision, where a child is illegally deprived of some or all of the elements of its identity, the State shall provide appropriate assistance and protection, with a view to re-establishing speedily their identity. The Court further held that sex operations, without consent of the person concerned, violate an individual's right to develop one's own sexual identity, regardless of the possibility of legal representation when the person does not have the capacity to provide consent.⁶⁹⁷

Nevertheless, in two later cases,⁶⁹⁸ the Court specifically addressed the balance between a person's autonomy and parental decision making in the

⁶⁹⁴ R. L. WHITE, "Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson", *Fordham International Law Journal* 2014, Vol. 37, p. 795.

⁶⁹⁵ Corte Constitucional [Constitutional Court] (Colombia), T-477/95, Decision of Y.Y.

⁶⁹⁶ R. L. WHITE, "Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson", *Fordham International Law Journal* 2014, Vol. 37, p. 796.

⁶⁹⁷ *Ibid.*, p. 796-797. See also R. RUBIO-MARIN and S. OSELLA, "Between Rights and Pragmatism: Intersexuality before the Colombian Constitutional Court" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 324.

⁶⁹⁸ Corte Constitucional [Constitutional Court] (Colombia), SU-337/99, Decision of X.X.; T-551/99, Decision of N.N.

best interests of their child.⁶⁹⁹ The Court acknowledged that children possess their own individuality and dignity and develop greater autonomy with age. While the Court noted that sex assigning/normalising surgery lacks medical urgency, it also recognised that parents are often unable to comprehend the situation and can be blinded by their own fears and prejudices, leading to a decision to normalise the child as quickly as possible without a true concern for their best interests.⁷⁰⁰ The Court therefore required a heightened standard of parental informed consent, i.e. qualified and persistent informed consent, which exists when parents are given detailed information about the advantages and disadvantages of surgically altering their child's genitalia, are allowed ample periods of time to consider the alternatives to genital normalising surgery and make decisions in consideration of their child's best interests.⁷⁰¹ The case suggests that sex assigning/normalising treatment could only be a last resort when parents take decisions about their child's wellbeing. The Court's reasoning was confirmed in another case in 2008, that also dealt with the question of parental consent to treatment of a child born with both male and female sex characteristics.⁷⁰²

The Colombian Constitutional Court clearly attached heavy weight to the right of autonomy of a person with variations of sex characteristics, which has to be evaluated and considered in each case individually, taking into account the distinct elements of the case. Although it somewhat retreated from the broad prohibition of sex assigning/normalising treatment without *personal* informed consent in its later cases, it created only a narrow margin for parental consent when children are too young to decide themselves, i.e.

⁶⁹⁹ See R. L. WHITE, "Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson", *Fordham International Law Journal* 2014, Vol. 37, p. 798-800.

⁷⁰⁰ The Constitutional Court again heavily relied on the Convention on the Rights of the Child, and more specifically Article 18, which places the best interests of the child central in the responsibility of the parents for the upbringing and development of the child. See in this regard R. RUBIO-MARIN and S. OSELLA, "Between Rights and Pragmatism: Intersexuality before the Colombian Constitutional Court" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 328.

⁷⁰¹ Corte Constitucional [Constitutional Court] (Colombia), T-551/99, Decision of N.N.

⁷⁰² Corte Constitucional [Constitutional Court] (Colombia), T-912/08, Decision of Pedro v. Social Security et al.

younger than five years.⁷⁰³ Indeed, according to the studies relied on by the Court, children usually form a defined gender (identity) and consciousness about their own bodies starting at the age of five.⁷⁰⁴ In its 2008 case, the Constitutional Court summarised this as follows:⁷⁰⁵

- If the child is under the age of five years: if the parents are informed, qualified, and persistent in their decision, and if the decision is in accord with the respected and accredited recommendations of a medical board, treatment can be performed. Parents should be informed of the alternatives and the risks, as well as the possible negative future impact of the treatment.
- If the child is five years or older: treatment can be performed if the child consents, the parent(s) co-consent(s), and a respected and accredited medical board agrees with the decision. Both child and parents must be (capable to be) aware of the known risks, future consequences and possible side effects. If the child's decision does not match that of the parents, or the medical team does not agree with the decision of the child and parents, no treatment can be performed until the child is able to provide informed consent.⁷⁰⁶

⁷⁰³ B. VANDERHORST, "Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex", *Harvard Law & Policy Review* 2015, Vol. 9, p. 257. See also C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 499.

⁷⁰⁴ R. RUBIO-MARIN and S. OSELLA, "Between Rights and Pragmatism: Intersexuality before the Colombian Constitutional Court" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 328.

⁷⁰⁵ Corte Constitucional [Constitutional Court] (Colombia), T-912/08, Decision of Pedro v. Social Security et al., as translated by the International Commission of Jurists. See <<https://www.icj.org/sogicasebook/sentencia-su-33799-constitutional-court-of-colombia-12-may-1999/>> (last visited 5 May 2017). See in this regard also C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 475.

⁷⁰⁶ See R. RUBIO-MARIN and S. OSELLA, "Between Rights and Pragmatism: Intersexuality before the Colombian Constitutional Court" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 330-332.

According to the Court, if a child is old/mature enough (i.e. five years) to decide, *personal* consent is required for sex assigning/normalising treatment. When a child does not yet have the legal capacity to provide informed consent (i.e. younger than eighteen years), parental consent is also still necessary. Both the child (five-eighteen years) and the parents therefore have a right to oppose treatment. Besides, a multidisciplinary team must also agree with the decision to receive sex assigning/normalising treatment. When one of these three actors refuses to consent, no surgery can be performed until the child is old enough to autonomously provide informed consent (eighteen years). Moreover, although the Constitutional Court accepts the ‘best interests of the child’ as a justification for the interference with the child’s right to personal autonomy as long as it has not reached the age of five years, it has warned parents that a variation of sex characteristics does not constitute a medical emergency and that it is the duty of society to listen to people with variations of sex characteristics and not only learn to live with them but to learn from them.⁷⁰⁷ One could therefore deduce that non-consensual treatment is possible when it is based on motives of pressing medical necessity. As RUBIO-MARIN and OSELLA conclude, “the Constitutional Court determined the requirements for a mechanism of what we could call ‘reinforced parental consent’, a mechanism which was not conceived as a moratorium on intersex normalisation but rather as facilitating information and encouraging reflection and critical thinking, to enable mature, long-term and reasoned decision-making”.⁷⁰⁸

It appears that the Belgian Act concerning the rights of the patient does not abide by the standards set out by the Colombian Constitutional Court.

⁷⁰⁷ R. L. WHITE, “Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson”, *Fordham International Law Journal* 2014, Vol. 37, p. 801. See in this regard also P. NEWCOMBE, “Blurred Lines – Intersexuality and the Law: An Annotated Bibliography”, *Law Library Journal* 2017, Vol. 109(2), p. 259. See also R. RUBIO-MARIN and S. OSELLA, “Between Rights and Pragmatism: Intersexuality before the Colombian Constitutional Court” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 325.

⁷⁰⁸ R. RUBIO-MARIN and S. OSELLA, “Between Rights and Pragmatism: Intersexuality before the Colombian Constitutional Court” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 325.

Although it also foresees involvement of the minor or even the right to autonomously provide informed consent in respectively the second and third phases of minority, the enjoyment of these provisions is fully dependent on the assessment by the medical professional, taking into account the minor's age and maturity, and the nature of the foreseen treatment. Since these criteria are assessed by the medical professional, the latter becomes the true gatekeeper to the performance of consent by the minor. Moreover, since sex assigning/normalising treatment often takes place in early infancy, the personal consent of minors is not sought. On the basis of the case law of the Colombian Constitutional Court, all children who are (older than) five years have the right to veto sex assigning/normalising treatment,⁷⁰⁹ until they reach the age of majority, after which only they have the right to provide informed consent. Nevertheless, the situation for children younger than five years resembles the first phase of minority *ex* the Belgian Act concerning the rights of the patient. The only difference seems to lie in the specificity of the information that is required in order to be able to provide informed consent, and the fact that the Colombian Constitutional Court has discouraged parents to consent to treatment without medical necessity.

§2.3.2. The Austrian Constitutional Court

In June 2018, the Austrian Constitutional Court (*'Verfassungsgerichtshof'*) adopted a judgment in which it considered the Austrian Civil Status Act (*'Personenstandsgesetz'*) in conformity with Article 8 ECHR, insofar it is interpreted as allowing persons with variations of sex characteristics to have no registered sex or a self-defined non-binary marker such as 'diverse', 'inter' or 'open'. Although the facts of the case are related to the situation of a person with variations of sex characteristics, the Court's reasoning does not appear to be only applicable to those conditions.⁷¹⁰ Indeed, the Court argued that on the basis of the right to gender self-determination *ex* Article 8 ECHR, no person should be forced to be registered in a way that does not correspond

⁷⁰⁹ On the other hand, both the minor's parents, as well as the interdisciplinary team may also oppose the performance of sex normalising/assignment treatment.

⁷¹⁰ See P. DUNNE and J. MULDER, "Beyond the Binary: Towards a Third Sex Category in Germany?", *German Law Journal* 2018, Vol. 19, p. 642.

to their self-defined gender (identity).⁷¹¹ However, more importantly in the context of this chapter, the Court pointed out – by way of *obiter dictum* – that sex assigning/normalising medical interventions in new-borns and children with variations of sex characteristics can only be justified in exceptional cases based on sufficient medical indication.⁷¹² It also stated that families' fears of stigmatisation could never serve as a justification for intervention in a child's sex development. In this regard, the Court considered persons with variations of sex characteristics to be a vulnerable group in society because of their perceived 'otherness', which could put pressure on parents to have their children conform to the sex binary.⁷¹³

The reasons put forward by the Austrian and Colombian cases thus lead to the conclusion that the current Belgian framework regarding informed consent to sex assigning/normalising treatment of persons with variations of sex characteristics, does not effectively protect the latter's right to personal autonomy, especially during their first phase of minority.

II. (Inter)national and European call for ban on non-consensual sex assigning/normalising treatment

§1. UN human rights actors

Indicative of the shortcomings of the legal framework on informed consent to medical treatment for persons with variations of sex characteristics is the heightened attention for the matter with (international) institutional human rights actors. Indeed, several United Nations bodies have expressed their concerns about non-consensual treatment of persons with variations of sex characteristics and have increasingly called for specific legislative measures explicitly prohibiting the performance of deferrable surgical and other medical treatment on children with variations of sex characteristics until they reach an age when they can provide their free, prior and informed consent.⁷¹⁴

⁷¹¹ Verfassungsgerichtshof [Constitutional Court] (Austria) 15 June 2018, G 77/2018-9, §18.

⁷¹² *Ibid.*, §43.

⁷¹³ *Ibid.*, §16-20.

⁷¹⁴ See in this regard also M. BLONDIN and C. BOUCHOUX, "Rapport d'Information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la

Chapter III. Legal status of persons with variations of sex characteristics

Belgium received such recommendations for the first time in 2019 from the Committee on the Rights of the Child.

- In 2009, the Committee observing the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), consisting of 23 independent experts on women's rights, became the first UN treaty body to include the situation of persons with variations of sex characteristics in its country-specific concluding observations.⁷¹⁵ Since then, the CEDAW Committee has repeatedly qualified “medically unnecessary and irreversible surgery and other treatment” that is routinely performed on children with variations of sex characteristics as a concern in the light of the convention.⁷¹⁶ The Committee has therefore called for the adoption of “clear legislative provisions explicitly prohibiting the performance of unnecessary surgical and other medical treatment on intersex children until they reach an age when they can provide their free, prior and informed consent”.⁷¹⁷ On other occasions, the Committee recommended the development and implementation of “an appropriate rights-based health-care protocol for intersex children,

stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 36-41 ; D.C. GHATTAS, “Standing Up for the Human Rights of Intersex People” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 437-440. See also P. DUNNE, “Towards Trans and Intersex Equality: Conflict or Complementarity?” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 222-223.

⁷¹⁵ The country concerned was Germany. The CEDAW Committee requested the German government to enter into dialogue with non-governmental organisations of ‘intersexual’ and transsexual people in order to better understand their claims and to take effective action to protect their human rights. Complying to this recommendation, the German federal government requested the German Ethics Council (*Deutscher Ethikrat*) to draft a report on the legal and societal position of persons with variations of sex characteristics.

⁷¹⁶ See for instance the concluding observations of the CEDAW Committee on France CEDAW/C/FRA/CO/7-8 (2016); Switzerland CEDAW/C/CHE/CO/4-5 (2016); the Netherlands CEDAW/C/NLD/CO/6 (2016); Ireland CEDAW/C/IRL/CO/6-7 (2017); Germany CEDAW/C/DEU/CO/7-8 (2017); Chile CEDAW/C/CHL/CO/7 (2018); Luxembourg CEDAW/C/LUX/CO/7 (2018); Australia CEDAW/C/AUS/CO/8 (2018); Mexico CEDAW/C/MEX/CO/9 (2018); New Zealand CEDAW/C/NZL/CO/8 (2018) and Liechtenstein CEDAW/C/LIE/CO/5 (2018).

⁷¹⁷ See for instance the concluding observations of the CEDAW Committee on Germany CEDAW/C/DEU/CO/7-8 (2017).

which ensures that children and their parents are properly informed of all options and that children are, to the greatest extent possible, involved in decision-making about medical interventions and that their choices are fully respected”;⁷¹⁸

- The Committee of the Rights of the Child, a body consisting of eighteen independent experts that monitors the implementation of the International Convention on the Rights of the Child (ICRC) by its State parties, has recently repeatedly considered in various country specific reports that non-consensual, non-emergency, invasive and irreversible surgical and hormonal interventions in children with variations of sex characteristics are harmful and in violation of the rights of the child.⁷¹⁹ Importantly for this thesis, in 2019, the Committee urged Belgium to “prohibit the performance of unnecessary medical or surgical treatment on intersex children where those procedures can be safely deferred until children are able to provide their informed consent; [and to] ensure that intersex children and their families have access to adequate counselling and support and to effective remedies, including by lifting the statute of limitations”;⁷²⁰
- The Committee against Torture, which consists of ten independent experts that monitor the implementation of the Convention against Torture (CAT), has also paid attention to the situation of persons with variations of sex characteristics in its country-specific observations. Indeed, the Committee expressed its concerns about reports of

⁷¹⁸ See for instance the concluding observations of the CEDAW Committee on France CEDAW/C/FRA/CO/7-8 (2016); the Netherlands CEDAW/C/NLD/CO/6 (2016); Ireland CEDAW/C/IRL/CO/6-7 (2017).

⁷¹⁹ See for instance concluding observations of the CRC on Switzerland CRC/C/CHE/CO/2-4 (2015); Chile CRC/C/CHL/CO/4-5 (2015); Ireland CRC/C/IRL/CO/3-4 (2016); France CRC/C/FRA/CO/5 (2016); New Zealand CRC/C/NZL/CO/5 (2016); United Kingdom CRC/C/GBR/CO/5 (2016); Nepal CRC/C/NPL/CO/3-5 (2016); South Africa CRC/C/ZAF/CO/2 (2016); Denmark CRC/C/DNK/CO/5 (2017); Spain CRC/C/ESP/CO/5-6 (2018); Argentina CRC/C/ARG/CO/5-6 (2018); Italy CRC/C/ITA/CO/5-6 (2019). See also K. SANDBERG, “Intersex Children and the UN Convention on the Rights of the Child” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 530-533.

⁷²⁰ See the concluding observations of the CRC on Belgium CRC/C/BEL/CO/5-6 (2019).

unnecessary and sometimes irreversible surgical procedures performed on children with variations of sex characteristics without their informed consent or that of their relatives and without their having all possible options always explained to them.⁷²¹ The Committee therefore recommended to France to take “the necessary legislative, administrative and other measures to guarantee respect for the physical integrity of intersex individuals, so that no one is subjected during childhood to non-urgent medical or surgical procedures intended to establish one’s sex; and to ensure that no surgical procedure or medical treatment is carried out without the person’s full, free and informed consent and without the person, their parents or close relatives being informed of the available options including the possibility of deferring any decision on unnecessary treatment until they can decide for themselves.”⁷²² In relation to Austria, Denmark, Germany, Hong Kong, the Netherlands and Switzerland, the Committee recommended to take the necessary legislative, administrative and other measures to guarantee the respect for the physical integrity and autonomy of persons with variations of sex characteristics and ensure that no one is subjected during infancy or childhood to unnecessary medical or surgical procedures; and to ensure that full, free and informed consent is respected in connection with medical and surgical treatments for persons with variations of sex characteristics and that non-urgent irreversible medical interventions are postponed until a child is sufficiently mature to participate in decision-making and give full, free and informed consent.⁷²³ In relation to the Netherlands, the Committee recommended to undertake investigation of instances of surgical interventions or other medical procedures performed on

⁷²¹ See for instance the concluding observations of the CAT Committee on France CAT/C/FRA/CO/7 (2016); Denmark CAT/C/DNK/CO/6-7 (2016).

⁷²² See the concluding observations of the CAT Committee on France CAT/C/FRA/CO/7 (2016).

⁷²³ See the concluding observations of the CAT Committee on Germany CAT/C/DEU/CO/5 (2011); Austria CAT/C/AUT/CO/6 (2015); Switzerland CAT/C/CHE/CO/7 (2015); Denmark CAT/C/DNK/CO/6-7 (2016); Hong Kong CAT/C/CHN-HKG/CO/5 (2016); the Netherlands CAT/C/NLD/CO/7 (2018).

intersex persons without effective consent and prosecute and, if found responsible, punish perpetrators. According to the Committee, the State should also ensure that the victims are provided with redress including adequate compensation.⁷²⁴ In 2013 the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan MENDEZ, also brought certain forms of sex assigning/normalising treatment on children with variations of sex characteristics under the prohibition of torture and cruel, inhuman or degrading treatment or punishment *ex* Article 7 of the International Covenant on Civil and Political Rights. The report more specifically dealt with “irreversible sex assignment, involuntary sterilisation, involuntary genital normalising surgery, performed without their informed consent, or that of their parents, ‘in an attempt to fix their sex’, leaving them with permanent, irreversible infertility and causing severe mental suffering”.⁷²⁵ According to the Special Rapporteur, “there is an abundance of accounts and testimonies of persons being denied medical treatment, subjected to verbal abuse and public humiliation, psychiatric evaluation, a variety of forced procedures such as sterilisation, [...] hormone therapy and genital normalising surgeries under the guise of so called ‘reparative therapies’. These procedures are rarely medically necessary, can cause scarring loss of sexual sensation, pain, incontinence and lifelong depression and have also been criticised as being unscientific, potentially harmful and contributing to stigma.”;⁷²⁶

- The Human Rights Committee has also raised its concerns about the situation that “infants and children born with intersex variations are sometimes subject to irreversible and invasive medical interventions for purposes of gender assignment, which are often based on

⁷²⁴ See the concluding observations of the CAT Committee on the Netherlands CAT/C/NLD/CO/7 (2018).

⁷²⁵ SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez”, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf> (last visited 3 February 2017), p. 18-19.

⁷²⁶ *Ibid.*, p. 18.

stereotyped gender roles and are performed before they are able to provide fully informed and free consent”.⁷²⁷ The Committee brought these forms of sex assigning/normalising treatment in relation with, *inter alia*, the prohibition of torture, cruel, inhuman or degrading treatment, the right to private life and the prohibition of discrimination;

- The Committee on the Rights of Persons with Disabilities, which consists of independent experts that monitor the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) has repeatedly expressed concerns about the forced medical treatment of persons with variations of sex characteristics in the absence of their personal, free and informed consent.⁷²⁸ In this regard, it has called for a legislative framework that protects the bodily integrity, autonomy and self-determination of persons with variations of sex characteristics;
- The 2009 annual report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health stated that health care providers should strive to postpone non-emergency invasive and irreversible interventions until the child is sufficiently mature to provide informed consent. In a footnote, he added that “this is particularly problematic in the case of intersex genital surgery, which is a painful and high-risk procedure with no proven medical benefits”;⁷²⁹
- In 2015, twelve UN entities (ILO, OHCHR, UNAIDS, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO)

⁷²⁷ See the concluding observations of the Human Rights Committee on Australia CCPR/C/AUS/CO/6 (2017) and Switzerland CCPR/C/CHE/CO/4 (2017).

⁷²⁸ See the concluding observations of the Committee on the Rights of Persons with Disabilities on Germany CRPD/C/DEU/CO/1 (2015); Chile CRPD/C/CHL/CO/1 (2016); Italy CRPD/C/ITA/CO/1 (2016); Uruguay CRPD/C/URY/CO/1 (2016); United Kingdom CRPD/C/UK/CO/1 (2017); Morocco CRPD/C/MAR/CO/1 (2017).

⁷²⁹ SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH, “Right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/450/87/PDF/N0945087.pdf?OpenElement>> (last visited 23 May 2017), 10 August 2009, p. 14-15.

released a joint statement calling for an end to violence and discrimination against lesbian, gay, bisexual, transgender and intersex persons that condemned forced or coercive sterilisation, forced genital and anal examinations, and unnecessary surgery and treatment in children with variations of sex characteristics without their consent;⁷³⁰

- In September 2017, the UN High Commissioner for Human Rights called on the UN Member States to “allow individuals to love whom they choose, to outlaw discrimination, tackle hate crimes and the bullying so frequent in schools, and to protect intersex children from harm – including by banning medically unnecessary surgery on intersex infants”.⁷³¹

§2. European Human Rights Actors

The same rising consensus regarding the need to better guarantee personal informed consent regarding sex assigning/normalising treatment can also be found among European institutional human rights actors. This preference for personal autonomy of the person with variations of sex characteristics concerned is reflected by Resolution 1952 (2013) of the Parliamentary Assembly of the Council of Europe, which calls on Member States to “ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood”, to “guarantee bodily integrity, autonomy and self-determination to persons concerned” and to “adopt specific legal provisions to ensure that certain operations and practices will not be carried out before a child is old enough

⁷³⁰ OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS et al., “Joint UN statement on Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people”, <<http://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx>> (last visited 9 August 2017).

⁷³¹ UN HIGH COMMISSIONER FOR HUMAN RIGHTS, “Ending Violence & Discrimination against LGBTI Persons – LGBTI Core Group Ministerial Event”, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22110&LangID=E>> (last visited 22 September 2017).

to be consulted”.⁷³² Comparable recommendations can be found in 2015 reports from the Council of Europe Commissioner for Human Rights⁷³³ and the EU Fundamental Rights Agency.⁷³⁴ On 14 February 2017, the European Parliament adopted a resolution on promoting gender equality in mental health and clinical research.⁷³⁵ While the resolution comprehensively addressed many forms of mental health problems and (gendered) discrimination with regard to (access to) mental health care, it also dealt with the societal medicalisation and pathologisation of transgender persons and persons with variations of sex characteristics. Indeed, the European Parliament acknowledged not only the inherent problematic nature of forced medical treatment of transgender persons and persons with variations of sex characteristics, but also indicates the causal link between the medicalisation of both groups and their experiences of mental distress. The European Parliament thus urged for stronger action on behalf of the European Commission, EU Member States and local authorities in order to “prevent, ban and prosecute the forced sterilisation of women, a phenomenon that affects in particular women with disabilities, transgender and intersex persons, and Roma women” and to “prevent, ban and prosecute female genital mutilation and genital mutilation affecting intersex persons, and to

⁷³² COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, “Resolution 1952 (2013) ‘Children’s right to physical integrity’”, <<http://semanticpace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnVveG1sL1hSZWYvWDJlLURXLWV4dHluYXNwP2ZpbGVpZD0yMDE3NCZsYW5nPUVO&xsl=aHR0cDovL3NlbnRlbnQvZGljcGFjZS5uZUxvWHNsdc9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTlwMTc0>> (last visited 8 June 2017).

⁷³³ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 9 June 2017), p. 10.

⁷³⁴ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, “The fundamental rights situation of intersex people”, <<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>> (last visited 9 June 2017), p. 8.

⁷³⁵ EUROPEAN PARLIAMENT, “Resolution of 14 February 2017 on promoting gender equality in mental health and clinical research (2016/2096(INI)), <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2017-0028%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>> (last visited 27 March 2017).

provide mental health support, in conjunction with physical care, to victims and to those individuals likely to be targeted.” In February 2019, the European Parliament adopted Resolution 2018/2878 “on the rights of intersex people”, in which it strongly condemned sex-normalising treatments and surgery, welcomed the Maltese and Portuguese laws that prohibit such surgery, and encouraged EU Member States to adopt similar legislation as soon as possible.⁷³⁶

Importantly, in October 2017, the Council of Europe Parliamentary Assembly adopted a comprehensive and ground-breaking resolution on “promoting the human rights of and eliminating discrimination against intersex people”.⁷³⁷ The resolution recognised the serious breaches of physical integrity of children or infants with variations of sex characteristics who (have to) undergo non-consensual, medically unnecessary sex assigning/normalising treatment, based on considerations of ‘social emergency’. The Parliamentary Assembly therefore calls for a legal prohibition of medically unnecessary sex normalising surgeries, sterilisation and other treatments practised on children with variations of sex characteristics without their informed consent. The resolution further calls to ensure in any case that, except in cases where the life of the child is at immediate risk, any treatment “that seeks to alter” the sex characteristics of the child is deferred until the child is able to participate in the decision, based on the right to self-determination and on the principle of free and informed consent. However, it is not clear from the wording of the resolution, whether this focus on informed consent allows for participation of the child through the legal representative. This matter therefore needs to be addressed by legislation at the national level.

⁷³⁶ EUROPEAN PARLIAMENT, “Resolution on the rights of intersex people”, <http://www.europarl.europa.eu/doceo/document/B-8-2019-0101_EN.html?redirect> (last visited 21 February 2019).

⁷³⁷ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, “Resolution 2191 (2017) ‘Promoting the human rights of and eliminating discrimination against intersex people’”, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>> (last visited 13 October 2017).

§3. Yogyakarta Principles +10

The need for legislation to protect everyone, but especially children, against all forms of non-consensual, coercive or otherwise involuntary modification of their sex characteristics was also included in the 2017 update of the Yogyakarta Principles. As mentioned above,⁷³⁸ according to Principle 32, States shall ensure that children are fully consulted and informed regarding any modifications to their sex characteristics necessary to avoid or remedy proven, serious physical harm, and ensure that such modifications are consented to by the child concerned in a manner consistent with the child's evolving capacity. The provision thus also prohibits non-consensual treatment on a person's sex characteristics on the basis of social, religious and/or cultural rationales.

III. Malta and Portugal: legislative alternatives

The findings in the sections above regarding the effective protection of personal autonomy of persons with variations of sex characteristics and the recommendations of European and international institutional human rights actors, lead to the conclusion that persons with variations of sex characteristics need special legislative safeguards in relation to treatment on their sex characteristics. The first States worldwide to have taken such explicit normative action were Malta (2015) and Portugal (2018).⁷³⁹ According to

⁷³⁸ See *supra* p. 174.

⁷³⁹ R. HUPF, "Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital 'Normalizing' Surgery", *William and Mary Journal of Women and the Law* 2015, Vol. 22, p. 102. In January 2016 the Chilean Ministry of Health ordered through an executive order the suspension of sex assigning/normalising treatment on children with variations of sex characteristics, until they reach an age when they can make decisions on their own. See <<https://www.outrightinternational.org/content/chilean-government-stops-normalization-intersex-children>> (last visited 14 February 2017). See also M. CARPENTER, "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 510; C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 500-504. In August 2018, the Senate of California (United States) adopted a (non-binding) resolution which condemns the performance of non-consensual, deferrable treatment on the sex characteristics of persons born with variations of sex characteristics. The resolution "calls

TRAVIS and GARLAND, while States such as Germany and Australia have introduced formal equality provisions that focus on legal status and protection of identity, i.e. third sex/gender registration options and/or anti-discrimination provisions,⁷⁴⁰ the Maltese and Portuguese models represent an approach to legal reform based on a substantive equality model that concentrates on protecting bodily integrity of children with variations of sex characteristics by prohibiting deferrable surgeries.⁷⁴¹

On the basis of Article 1 of the Portuguese Act, every person has the right to protection of their sex characteristics, which – according to Article 5 – include primary and secondary sex characteristics. These provisions are implemented by Article 7, which holds that all surgical, pharmacological and other interventions on the sex characteristics of a minor must be deferred until that person's gender (identity) is manifested, except in situations of proven risk to the minor's health. Once the minor's gender (identity) is manifested, interventions on their sex characteristics may be performed when the minor gives express and informed consent through the legal representative, taking into account the principles of progressive autonomy and the child's best interests under the Convention on the Rights of the Child. It is remarkable that the Act makes use of the criterion of the manifestation of the child's gender (identity), since it is clear that treatment on sex characteristics may only be performed if and until the person concerned provides consent, either as an adult or through the legal representative. By adding the criterion of

upon stakeholders in the health professions to foster the well-being of children born with variations of sex characteristics, and the adults they will become, through the enactment of policies and procedures that ensure individualised, multidisciplinary care that respects the rights of the patient to participate in decisions, defers medical or surgical intervention, as warranted, until the child is able to participate in decision-making, and provides support to promote patient and family well-being". Contrary to Malta and Portugal, the Californian resolution thus mainly laid responsibility to protect the human rights of persons with variations of sex characteristics with medical professionals themselves. See <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SCR110> (last visited 30 August 2018).

⁷⁴⁰ See *infra* p. 262 and 253.

⁷⁴¹ M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 2.

gender (identity), the Act seems to prevent that treatment is performed that is not in conformity with the child's gender (identity). However, two nuances still have to be made. First of all, it is not clear from the wording of the Act how it may be assessed whether and how the child's gender (identity) is manifested. Secondly, research has shown that temporary experiences of gender non-conformity and gender fluidity are not uncommon among minors. Gender (identity) therefore does not necessarily become fixed during childhood. Moreover, by explicitly connecting the personal consent to treatment on sex characteristics to the manifestation of gender (identity), the Act does not seem to fundamentally problematise the socially constructed gender norms that are enforced on the bodies on persons with variations of sex characteristics, and does not recognise the other reasons for sex assigning/normalising treatment, such as aesthetics and sexual heteronormativity.

The Maltese legislative model is, from a purely human rights perspective, the most comprehensive legislation regarding persons with variations of sex characteristics and could therefore be seen as the legal best practice and the most suited inspiration for a legal transplant into the Belgian legal order.⁷⁴² The 'Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC) of 14 April 2015 to provide for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person' explicitly states in Article 14 that, based on the right to bodily integrity and physical autonomy:⁷⁴³

"It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which

⁷⁴² Ibid., p. 17. However, note that there has not been a comprehensive evaluation of the implementation of the Maltese legislation.

⁷⁴³ Gender Identity, Gender Expression and Sex Characteristics Act of 14 April 2015 to provide for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person, *Government Gazette of Malta* No. 19,410.

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treatment and, or intervention can be deferred until the person to be treated can provide informed consent; provided that such sex assignment treatment and, or surgical intervention on the sex characteristics of the minor shall be conducted if the minor gives informed consent through the person exercising parental authority or the tutor of the minor.”

However:

“In exceptional circumstances treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental authority or tutor of the minor who is still unable to provide consent; provided that medical intervention which is driven by social factors without the consent of the minor, will be in violation of this Act.

The interdisciplinary team shall be appointed by the Minister for a period of three years which period may be renewed for another period of three years.

The interdisciplinary team shall be composed of those professionals whom the Minister considers as appropriate.

When the decision for treatment is being expressed by a minor with the consent of the persons exercising parental authority or the tutor of the minor, the medical professionals shall:

(a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child be the paramount consideration; and

(b) give weight to the views of the minor having regard to the minor's age and maturity.”

The ground-breaking, comprehensive Maltese legislation addresses the balance between the right to bodily integrity and physical autonomy with the

protection of the minor's best interests,⁷⁴⁴ which was above identified as the core issue when bringing the medical treatment of persons (and especially children) with variations of sex characteristics on their sex characteristics into a legal framework. Indeed, the Maltese approach is two-layered:

- On the one hand, the GIGESC Act explicitly prohibits any sex assignment treatment or surgical intervention on the sex characteristics of minors, when such treatment can be delayed until the person can legally provide informed consent (i.e. according to Maltese law, after reaching the age of eighteen years).⁷⁴⁵ This prohibition is based on the right to bodily integrity and physical autonomy, which is guaranteed in Article 3(1)(d) of the same Act. However, the treatment can take place before this moment if the minor gives informed consent through the legal representative. When the minor, who cannot autonomously provide informed consent, expresses a decision concerning treatment through the legal representative, the medical staff shall give weight to the minor's views, having regard to age and maturity, with the best interests of the child as the paramount consideration. This latter situation closely resembles the aforementioned phase two of minority in the Belgian Act concerning the rights of the patient, during which minors give their opinion, according to age and maturity, through their legal representative. However, the legal representative would not be able to consent to therapy, in spite of the minor's refusal – a power which the legal representative *de iure* has in the Belgian framework – given the default ban on deferrable treatment on a minor's sex characteristics until the latter has come of age. Both provisions therefore explicitly aim to protect the autonomy of the person with variations of sex characteristics, without questioning the inherent value of treatment on a person's sex characteristics when it is

⁷⁴⁴ See T. NÍ MHUIRTHILE, "The Legal Status of Intersex Persons in Malta" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 365-367.

⁷⁴⁵ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Women's Law Journal* 2016, Vol. 39, p. 511.

performed with informed consent of the person concerned. Moreover, given the broad formulation of the treatment that is envisioned by the prohibition (“any sex assigning treatment, and, or surgical intervention on the sex characteristics of a minor”), it is of subsidiary importance whether the medical staff regard the intervention as sex assigning/normalising or not. In other words, all deferrable treatment on a minor’s sex characteristics is prohibited, even when the underlying intention is not to bring the child in conformity with the binary sex normativity.⁷⁴⁶ Through this legal prohibition, Maltese law addresses the most pressing lacuna in the legal status of persons with variations of sex characteristics, that nevertheless forms the most crucial aspect of the protection of their human rights protection, i.e. the protection of the individual autonomy during early childhood, when children are not yet capable of forming and expressing their own opinion (autonomously or through their legal representative);

- Nevertheless, the Act also provides the necessary flexibility to enable treatment on the sex characteristics of a minor who does not have the capacity to give informed consent (autonomously or through the legal representative). Such treatment may be effected in exceptional circumstances, which may not be driven by *social* factors, once agreement has been reached between the legal representative and an interdisciplinary team.⁷⁴⁷ Importantly, this interdisciplinary team also voices the opinion of intersex activists.⁷⁴⁸ After all, interdisciplinary information, including non-medical information, could be seen as an important and necessary safeguard against overarching treatment of

⁷⁴⁶ Note that the provision does not exempt treatment on the basis of religious motives, such as male circumcision.

⁷⁴⁷ The presence of an interdisciplinary (psycho-medical) team is in conformity with the 2006 Chicago Consensus.

⁷⁴⁸ The importance of the activist voice is also highlighted by qualitative research regarding parental consent to sex assigning/normalising surgery. Indeed, the activist tends to demedicalise the variation at hand. See C. STREULI e.a., “Shaping Parents: Impact of Contrasting Professional Counseling on Parents’ Decision Making for Children with Disorders of Sex Development”, *Journal of Sexual Medicine* 2013, Vol. 10, p. 1955.

persons with variations of sex characteristics.⁷⁴⁹ This provision makes it therefore possible to perform necessary medically necessary treatment on the sex characteristics of minors,⁷⁵⁰ when their best interests so require, for instance to improve the performance of bodily functions in order to avoid infections and fever or to treat life-threatening salt-wasting.⁷⁵¹ The requirement of agreement also leads to a right of veto for both the interdisciplinary team and the legal representative. However, the Act does not clarify which procedure has to be followed when no agreement can be reached between the interdisciplinary team and the legal representative. Moreover, it does not specify what can be understood under “exceptional circumstances” and “social factors”.⁷⁵²

⁷⁴⁹ N. CALLENS, T. C. VAN DER GRIFT, M. COOLS, “Een holistisch zorgbeleid voor Differences of Sex Development [Holistic health care for Differences of Sex Development]”, *Tijdschrift voor Seksuologie* 2017, Vol. 41(2), p. 7.

⁷⁵⁰ Note that this legal model should be complemented by increased interdisciplinary research into the situation of persons with variations of sex characteristics, taking into account condition specific elements, consequences of (non-) intervention and social interactions. This also assumes a better follow up of persons with variations of sex characteristics throughout their childhood, adolescence and adulthood. See also M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 22 June 2017).

⁷⁵¹ See M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 22 June 2017), p. 53.

⁷⁵² Council of Europe rapporteur on the rights of LGBTI people, Piet De Bruyn, indicated in his explanatory memorandum to the PACE resolution on promoting the human rights of and eliminating discrimination against intersex people that it would only be in cases putting the child’s life in immediate danger or creating an immediate risk of grave harm to the health of the child that it would be possible to intervene without the informed consent of the child. See COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY COMMITTEE ON EQUALITY AND NON-DISCRIMINATION, “Promoting the human rights of and eliminating discrimination against intersex people”, available at <<http://website-pace.net/documents/10643/3073880/20170918-intersexes-EN.pdf/d2a80169-5d1a-4a9a-b860-83641a559ca7>> (last visited 20 September 2017), p. 14.

Nevertheless, it is important to note that the GIGESC Act does not prevent parents from seeking treatment in other countries where sex assigning/normalising treatment is not prohibited, such as the United Kingdom.⁷⁵³

C. Conclusion

Persons with variations of sex characteristics have been and are still subjected to treatment on their sex characteristics in order to align them with society's binary sex normativity, often during (early) childhood (i.e. the first phase of minority) and therefore before their personal informed consent could be provided. These forms of treatment are often based on indecisive medical research, gender stereotypes, and bias by medical practitioners and parents, and are characterised by (sometimes high) risks of sterility, nerve damage and trauma. In this way, persons with variations of sex characteristics are made the object of medical treatment, instead of its subject. Although the Belgian legal framework concerning medical treatment (of minors) complies with the requirements of the general patient rights standards, it has not been able of preventing violations of the right to personal autonomy of persons with variations of sex characteristics who have been subjected to non-consensual, deferrable sex assigning/normalising treatment. Indeed, while criteria such as 'age', 'maturity', 'nature of the treatment' and 'risks of treatment' appear to be self-evident in order to evaluate a minor's capacity to provide informed consent, they are particularly harmful for minors born with variations of sex characteristics. After all, these criteria do not lead to a challenge of the inherently social nature of sex assigning or normalising treatment, nor the bias with many professionals and parents that growing up as soon as possible with 'normal' sex characteristics is of paramount importance for their child's well-being and functioning in society. Given the high risks that accompany treatment on sex characteristics, this situation does not protect the child's best interests.

⁷⁵³ M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 7.

While the law in itself is not capable to solely challenge and reform the practice of ‘translating’ the ‘social emergency’ that a variation of sex characteristics presents, into an assessment of the ‘medical emergency’, it can be argued that a strong and *specific* legal framework regarding variations of sex characteristics could address pressing human rights violations. However, this framework that enables the individual person’s choice and control, necessarily needs to be complemented by not only increased social acceptance, but also the (further) development of accessible and appropriate healthcare.⁷⁵⁴ Indeed, despite the required depathologisation of variations of sex characteristics, every person with variations of sex characteristics has the right to have their specific condition appropriately assessed (at birth and/or later in life), in order to ensure sufficient medical follow-up and/or care during their lives.⁷⁵⁵

The Maltese GIGESC Act addresses the flaws in the Belgian Act concerning the rights of the patient that were found above from the perspective of the right to personal autonomy of persons with variations of sex characteristics. Indeed, by explicitly prohibiting treatment on the sex characteristics of a minor who does not have the capacity to provide informed consent (autonomously or through the legal representative), when such treatment can be deferred until informed consent can be given, the Maltese Act outlines the circumstances where parental consent is not sufficient to protect the minor’s autonomy and integrity.⁷⁵⁶ After all, when compared with the present

⁷⁵⁴ S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, “Intersex, Variations of Sex Characteristics, and DSD: The Need for Change”, <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 8.

⁷⁵⁵ See COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, “Resolution 2191 (2017) ‘Promoting the human rights of and eliminating discrimination against intersex people’”, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>> (last visited 6 November 2017), para. 7.1.3-7.1.4. See also M. CARPENTER, “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 512-513; B. M. DICKENS, “Management of Intersex Newborns: legal and ethical developments”, *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 8-9.

⁷⁵⁶ See M. JONES, “Intersex Genital Mutilation – A Western Version of FGM”, *International Journal of Children’s Rights* 2017, Vol. 25, p. 408-409.

Belgian framework regarding informed consent during the first phase of minority – which arguably tacitly colludes with the harmful medicalisation of children with variations of sex characteristics –, the Maltese Act effectively protects the autonomy of persons with variations of sex characteristics in – what appears to be – the most critical part of their (medical) life. The Act also indicates the legislature’s attention for the social constructionism that underlies sex assigning/normalising treatment in order to bring persons with variations of sex characteristics in conformity with the sex binary and the deferrable nature of most treatment on sex characteristics. The fact that ‘exceptional circumstances’ may not be equated with social factors, leads to a better protection of the minor with variations of sex characteristics against treatment with no clear therapeutical aim than the Belgian legislation currently offers. After all, by interpreting the best interests of a child predominantly through the prism of society’s binary sex normativity and the correlated risks of social stigma, a heavy burden is placed on the individual child, instead of on society as a whole.⁷⁵⁷ As AMMATURO argues: “the best interests of the child tend, as far as the issue of intersex is concerned, to be confused with broader societal interests in relation to the perpetuation of the gender binary”.⁷⁵⁸ BEN-ASHER has stated that the best interests of a child with variations of sex characteristics are in no way synonymous with the fears of the child’s parents.⁷⁵⁹

A legal ban on deferrable, non-consensual treatment on the sex characteristics of a minor with variations of sex characteristics, also strengthens the latter’s ‘default’ position, in the light of the problematic lack of comprehensive multidisciplinary scientific research on all aspects related

⁷⁵⁷ See H.G. BEH and M. DIAMOND, “David Reimer’s Legacy: Limiting Parental Discretion”, *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 20. See also HUMAN RIGHTS WATCH and INTERACT, “I want to be like nature made me. Medically Unnecessary Surgeries on Intersex Children in the US”, <<https://www.hrw.org/news/2017/07/25/us-harmful-surgery-intersex-children>> (last visited 9 August 2017), p. 12.

⁷⁵⁸ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 87.

⁷⁵⁹ N. BEN-ASHER, “The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties”, *Harvard Journal of Law & Gender* 2006, Vol. 29, p. 63.

to a variation of sex characteristics (condition specific elements, consequences of (non) treatment, reactions from the social environment...). Indeed, in a recent report AMNESTY INTERNATIONAL referred to this lack of convincing proof of the dominant medical model's benefits as *the* human rights ground for why we must not make irreversible interventions.⁷⁶⁰ This astounding lack of convincing, longitudinal and multidisciplinary evidence of the benefits of sex assigning/normalising treatment in (early) childhood, also means that – even with the delay of treatment until the child can consent –, increased research and changes in health care protocols regarding the necessity of medical treatment on sex characteristics will be required, in order to take decisions that are evidence-based.⁷⁶¹

Moreover, it is suggested that the Maltese legislation meets the top priority of intersex activists and many other persons with variations of sex characteristics, i.e. to end the practice of cosmetic, non-consensual genital 'normalising' treatment, in order to integrate persons with variations of sex characteristics as full participants in society.⁷⁶² Besides, the Maltese

⁷⁶⁰ AMNESTY INTERNATIONAL, "First, do no harm. Ensuring the rights of children with variations of sex characteristics in Denmark and Germany", <<https://www.amnesty.org/en/documents/eur01/6086/2017/en/>> (last visited 9 June 2017), p. 40.

⁷⁶¹ COUNCIL OF EUROPE COMMITTEE ON BIOETHICS, "The Rights of Children in Biomedicine", <<http://www.coe.int/en/web/bioethics/-/study-on-the-rights-of-children-in-biomedici-1>> (last visited 9 August 2017), p. 44-45. See in this regard also N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 54-55.

⁷⁶² R. HUPF, "Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital 'Normalizing' Surgery", *William and Mary Journal of Women and the Law* 2015, Vol. 22, p. 91, 103. See also A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Women's Law Journal* 2016, Vol. 39, p. 535. See also H.G. BEH and M. DIAMOND, "David Reimer's Legacy: Limiting Parental Discretion", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 22. See also M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 12. See also P. DUNNE and J. MULDER, "Beyond the Binary: Towards a Third Sex Category in Germany?", *German Law Journal* 2018, Vol. 19, p. 641. See also M. SUDAI, "Revisiting the limits of professional autonomy: the intersex rights movement's path to de-medicalization", *Harvard Journal of Law & Gender* 2018, Vol. 41, p. 40-43.

prohibition is in clear conformity with the recent recommendations in the Yogyakarta Principles +10 and several other international soft law instruments mentioned above, i.e. a legal prohibition of deferrable sex assigning/normalising treatments on persons with variations of sex characteristics, until they have reached the capacity to provide personal free and informed consent, unless there is no doubt that the intervention is urgently or ‘vitaly’ medically indicated in the sense of preventing a risk to life or grave harm to health.⁷⁶³ The Maltese framework concerning variations of sex characteristics has also been praised as a leading example in a recent report by the German National Human Rights Institute, which called for a legislative ban on sex assigning/normalising treatment on children who do not have the capacity to provide informed consent.⁷⁶⁴

§1. Future legislation

It is commendable that Belgium follows the Maltese legislative example by banning deferrable, non-consensual treatment on the sex characteristics of a minor who is not able to provide consent (autonomously or through the legal

⁷⁶³ See *supra* p. 192.

⁷⁶⁴ DEUTSCHES INSTITUT FÜR MENSCHENRECHTE, “Geschlechtervielfalt im Recht. Status quo und Entwicklung von Regelungsmodellen zur Anerkennung und zum Schutz von Geschlechtervielfalt [Sexual diversity in the law. Status quo and development of models of recognition and protection of sex diversity], <<https://www.bmfsfj.de/blob/114066/7830f689ccdfead8bbc30439a0ba32b9/geschlechtervielfalt-im-recht---band-8-data.pdf>> (last visited 9 June 2017), p. 58-59. The developments in Germany are of particular importance, since it is recognised that the country has been one of the leading States with regard to the promotion of human rights of persons with variations of sex characteristics. See, for instance, NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 9 June 2017), p. 5. In February 2017, the French Senate adopted an information report regarding persons with variations of sex characteristics. Although the report expressed concerns with regard to non-necessary, non-consensual treatment of children with variations of sex characteristics, it only recommended the establishment of an official government protocol concerning treatment of variations of sex characteristics on the basis of the precautionary principle.

representative),⁷⁶⁵ but keeping the possibility to perform treatment in exceptional circumstances on the basis of explicit, formal agreement between the legal representative and an interdisciplinary team,⁷⁶⁶ that includes (a) social worker(s), and/or (a) representative(s) of an intersex organisation without medical background,⁷⁶⁷ as advised by, *inter alia*, the Council of Europe Commissioner for Human Rights and the Council of Europe Parliamentary Assembly.⁷⁶⁸ These ‘exceptional circumstances’ cannot amount to social reasons in the first phase of minority, given the lack of participation of the minor concerned in the decision-making process. In other words, in the suggested model, it would become prohibited to perform treatment in order to create congruence between the child’s sex characteristics and presumed gender (identity), to aesthetically ‘normalise’

⁷⁶⁵ See in this regard the recent recommendations by the Committee on the Rights of the Child to Belgium: CRC/C/BEL/5-6. Note that the prohibition, combined with the capacity of the minor to provide informed consent through the legal representative means that treatment could not take place on the basis of parental consent, in spite of the minor’s refusal.

⁷⁶⁶ In order to increase the understanding of the medical necessity of non-consensual treatment on the sex characteristics of persons with variations of sex characteristics, additional interdisciplinary research should be performed. Moreover, all forms of treatment performed on a child’s sex characteristics should be registered. See E. D. THORN, “Drop the Knife! Instituting Policies of Nonsurgical Intervention for Intersex Infants”, *Family Court Review* 2014, Vol. 52(3), p. 616. See also T. LIEFAARD, A. HENDRIKS and D. ZLOTNIK, “From Law to Practice: Towards a Roadmap to Strengthen Children’s Rights in the Era of Biomedicine”, <<https://rm.coe.int/leiden-university-report-biomedicine-final/168072fb46>> (last visited 20 September 2017), p. 35. See also S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, “Intersex, Variations of Sex Characteristics, and DSD: The Need for Change”, <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 34.

⁷⁶⁷ S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, “Intersex, Variations of Sex Characteristics, and DSD: The Need for Change”, <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 31. See also B. M. DICKENS, “Management of Intersex Newborns: legal and ethical developments”, *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 4.

⁷⁶⁸ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “A boy or a girl or a person – intersex people lack recognition in Europe”, <<http://www.coe.int/hu/web/commissioner/-/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-euro-1>>, (last visited 4 May 2017). COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, “Resolution 2191 (2017) ‘promoting the human rights of, and eliminating discrimination against intersex people’”, <<http://assembly.coe.int/nw/xml/XRef/Xref-XHTML-en.asp?fileid=24232&lang=en>> (last visited 6 November 2011), para. 7.1.3.

the child's sex characteristics, or to avoid situations of social stigma.⁷⁶⁹ During the second phase of minority, the framework would not preclude aesthetic 'normalising', treatment on sex characteristics on the basis of personal informed consent,⁷⁷⁰ for instance in the light of the self-defined gender (identity).⁷⁷¹ However, considering the inherent social, and therefore non-medically necessary nature of these forms of treatment, agreement of the interdisciplinary team would still be needed. If the legal representative would refuse to exercise the minor's rights according to their continuing opinion, the interdisciplinary team could grant decision making autonomy to the minor (third phase of minority) or inform the public prosecutor in order to start judicial proceedings in accordance with Article 387bis of the Civil Code. In other words, only the individual concerned could freely choose to conform to social expectations or stereotypes, not the social environment. On the other hand, the minor would obtain a right to veto any treatment in this second phase, except for emergency situations where consent cannot be obtained. Given the current situation that many parents are supportive of sex normalising treatment on their young children, the hypothesis that a child would give consent to treatment on their sex characteristics, but their parents would not, seems illusionary.

⁷⁶⁹ See C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 471.

⁷⁷⁰ On the basis of the Dutch legal framework concerning the rights of minor patients, personal consent to medical treatment is always required, next to parental consent, if the minor is 12-15 years old (cfr. the second phase of minority in Belgian law) and sufficiently capable of discernment. However, according to Dutch law, if the child's legal representative(s) refuse(s) to provide consent, the child's personal consent could be sufficient if the treatment is medically necessary, or if the minor continuously asks for the treatment. See F. M. DE KIEVIT, "Wie beslist? De autonomie van minderjarigen in het geven van toestemming voor een medische behandeling [Who decides? The autonomy of minors to give consent to medical treatment]", *Tijdschrift voor Familie- en Jeugdrecht* 2018, p. 66-72.

⁷⁷¹ In this sense, the framework would become comparable to the medical treatment of (some) transgender persons, who are considered to have the legitimate wish to undergo medical treatment on their sex characteristics in the light of their self-defined gender (identity). In other words, those persons receive treatment for social reasons that are not related to medical necessity or pathology.

Chapter III. Legal status of persons with variations of sex characteristics

The legislative innovation would lead to an amendment of the federal Act concerning the rights of the patient, and more specifically of its enforcement in the first and second phase of a person's minority. In sum, the introduction of a legal ban on non-consensual, medically non-necessary treatment on a minor's sex characteristics would lead to the following legal framework:

	Principle: informed consent given by	Exceptions
First phase of minority	<ul style="list-style-type: none">- Prohibition of deferrable treatment on sex characteristics;- Treatment possible in exceptional <i>medical</i> circumstances, in formal agreement between legal representative and interdisciplinary team. Prohibition of treatment based on <i>social</i> motives, including treatment related to gender (identity).	Emergency (no consent required)
Second phase of minority (based on age and maturity)	Legal representative, yet ONLY when the minor personally consents, in formal agreement with interdisciplinary team. Treatment possible on medical and social grounds, taking into account the minor's age and maturity and best interests.	Emergency (no consent required)
Third phase of minority (based on age and maturity)	Minor concerned	Emergency (no consent required)
Majority	Adult concerned	Emergency (no consent required)

Aside from a legal provision to stop non-consensual, deferrable treatment on a person's sex characteristics, the reasons underlying these acts should also be challenged.⁷⁷² Indeed, it should be clear from the previous sections that the stereotypes in society regarding variations of sex characteristics and the well-being of children with variations of sex characteristics are pervasive, potentially leading to early sex normalising treatment in order to reduce social stigma. Although the suggested model does not prohibit minors from choosing to comply to social stereotypes regarding the appearance of their sex characteristics or the congruence between their sex characteristics and their gender (identity), it necessarily must be complemented by government initiatives to raise awareness among and to educate psycho-medical professionals, parents and society at large about the situation and rights of persons with variations of sex characteristics, and everyone's role in reinforcing or promoting subjective social norms.⁷⁷³ Indeed, parents and

⁷⁷² R. HUPF, "Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital 'Normalizing' Surgery", *William & Mary Journal of Women and the Law* 2015, Vol. 22, p. 91.

⁷⁷³ See R. RUBIO-MARIN and S. OSELLA, "Between Rights and Pragmatism: Intersexuality before the Colombian Constitutional Court" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 336; M. CARPTENTER, "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 466. See also N. CALLENS, C. LONGMAN and J. MOTMANS, "Terminologie en zorgdiscours m.b.t. Differences of Sex Development (DSD)/Intersekse in België [Terminology and care discours concerning Differences of Sex Development (DSD)/Intersex in Belgium]", Staatssecretariaat voor Gelijke Kansen, 2016, p. 37. S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, "Intersex, Variations of Sex Characteristics, and DSD: The Need for Change", <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 20-28. COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, "Resolution 2191 (2017) 'Promoting the human rights of, and eliminating discrimination against intersex people'", <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>> (last visited 6 November 2017), para. 7.1 and 7.2. See also A. UPPALAPATI et al., "International Regulation of Sexual Orientation, Gender Identity, and Sexual Anatomy", *The Georgetown Journal of Gender and the Law* 2017, Vol. 18, p. 675. See also C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 497. See also D.C. GHATTAS, "Standing Up for the Human Rights of Intersex People" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 433. See also C. LOWRY, "Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice

clinicians must be helped in understanding that children may look and behave in non-stereotypical ways, or identify with an ‘unconventional’ gender.⁷⁷⁴ In this regard, it is noteworthy that the Portuguese Act of 2018 also created the positive obligation for the government to adopt measures in the education system to promote the right to gender self-determination and the right to protection of one’s sex characteristics, such as the combatting of discrimination and violence, the detection and prevention of situations that put persons with variations of sex characteristics at risk, adequate training of teachers, etc.⁷⁷⁵ Besides, persons born with a variation of sex characteristics (and their social environment) should be given sufficient non-medical information about their living conditions and (the opportunity of) long-term psychological support. Including activists or social workers without any medical background in the interdisciplinary care team could be beneficial in this regard. Nevertheless, the specific content of these standards of care, which would also have to include a protocol on the implementation of the information obligation in the specific situation of variations of sex characteristics,⁷⁷⁶ goes beyond the scope of this thesis.

§2. Impact on official sex registration

Moreover, any potential reform of the current legislation concerning the relation between medical treatment (on persons with variations of sex characteristics) and informed consent is closely connected to the registration of a person’s sex by the government. Indeed, one could say that the medical profession’s invisibilisation of variations of sex characteristics on the human body has contributed to a distinct lack of legal recognition and subsequent

Claims as a Vehicle for Gender Justice”, *Columbia Journal of Law and Social Problems* 2018, Vol. 52, p. 356.

⁷⁷⁴ J. GARLAND and M. DIAMOND, “Evidence-based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 100.

⁷⁷⁵ Article 14 of Law No. 75/XIII/2.

⁷⁷⁶ See F. GARLAND and M. TRAVIS, “What do Intersex People Want from the Law?”, <<http://silsablog.co.uk/blog/blog-posts/what-do-intersex-people-want-from-the-law/>> (last visited 25 October 2018).

protection as a defined sex.⁷⁷⁷ Nevertheless, on the other hand, it is fair to say that the normative binary conceptualisation of the law – on the basis of the dichotomy ‘male’/‘female’ – has enabled and potentially reinforced the urgency and pressure felt by many parents and medical professionals to have a child comply with the binary social construct of sex and gender.⁷⁷⁸ Indeed, TRAVIS and GARLAND argue that:

“Legal silence effectively legitimises the medical account of intersex as a purely material concern, permits attempts to ‘normalise’ these bodies and enables their social or cultural erasure. Thus, law aligns itself with the biomedical discourse of intersex depicting such bodies as deviant or unruly and in need of taming. In doing so, law reaffirms a binary understanding of sex and consequently places intersex individuals outside of the scope of law. [...] Law’s silence is therefore not neutral; rather it

⁷⁷⁷ M. TRAVIS, “Accommodating Intersexuality in European Union Anti-Discrimination Law”, *European Law Journal* 2015, Vol. 21, p. 183.

⁷⁷⁸ E. REILLY, “Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality”, *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 309-310; R. HUPF, “Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital ‘Normalizing’ Surgery”, *William & Mary Journal of Women and the Law* 2015, Vol. 22, p. 85. See in this regard also M. VAN DEN BRINK and J. TIGCHELAAR, “Gender identity and registration of sex by public authorities”, in EUROPEAN COMMISSION (ed.), “European Equality Law Review. Issue 2/2015”, <http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2955&Itemid=295> (last visited 19 June 2017), p. 31. See also M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 21 June 2017), p. 34, and especially p. 78. See also H.G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 441. See also L. HERAULT et al., “Etat civil de demain et Transidentité. Rapport final”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 247. The finding can also be deduced from para. 7.3.1 of Resolution 2191 (2017) of the Council of Europe Parliamentary Assembly. However, several legal systems, such as for instance the Belgian, Dutch and German legal systems, address this legal pressure on parents of children by delaying the period for initial registration when the child cannot be assigned the male or female sex at birth. However, this delay does not necessarily entail (a) non-binary form of registration at the end of the delay.

*perpetuates the existence of a striking power imbalance between intersex people, their families and the medical profession.”*⁷⁷⁹

In other words, the law does not merely reflect, but rather constructs sex.⁷⁸⁰ This suggests that breaking down the male/female binary could be seen as an *a priori* requirement to ending the non-consensual medicalisation of children born with variations of sex characteristics.⁷⁸¹ The next part of this thesis will therefore evaluate the Belgian legal framework regarding official sex registration.

2. Official registration of sex

The current status of the majority of legal systems worldwide shows how self-evident the law considers the ‘male’/‘female’ dichotomy⁷⁸² and how it fails to account for bodily diversity.⁷⁸³ This is best evidenced by the official

⁷⁷⁹ M. TRAVIS and F. GARLAND, “Legislating Intersex Equality: Building the Resilience of Intersex People through Law”, *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 3.

⁷⁸⁰ B. VANDERHORST, “Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex”, *Harvard Law & Policy Review* 2015, Vol. 9, p. 269. See in this regard also D. GONZALEZ-SALZBERG, “The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights”, *American University International Law Review* 2014, Vol. 29(4), p. 807. See also A. APPELL, “Certifying Identity”, *Capital University Law Review* 2014, Vol. 42, p. 17.

⁷⁸¹ R. HUPF, “Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital ‘Normalizing’ Surgery”, *William & Mary Journal of Women and the Law* 2015, Vol. 22, p. 86.

⁷⁸² W. O'BRIEN, “Can International Human Rights Law Accommodate Bodily Diversity?”, *Human Rights Law Review* 2015, Vol. 15, p. 5. See also M. VAN DEN BRINK, “‘The Legitimate Aim of Harmonising Body and Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 232. See also J. DOLGIN, “Discriminating gender: legal, medical, and social presumptions about transgender and intersex people”, *Southwestern Law Review* 2018, Vol. 47, p. 74. See also S.L. GOESSL, “From question of fact to question of law to question of private international law: the question whether a person is male, female or ...?” *Journal of Private International Law* 2016, Vol. 12(2), p. 262. See also S. HANSEN, “Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law”, *Oregon Law Review* 2017, Vol. 96, p. 288. See in this regard also T. HELMS, “The 2013 German Law: Analysis and Criticism” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 370.

⁷⁸³ W. O'BRIEN, “Can International Human Rights Law Accommodate Bodily Diversity?”, *Human Rights Law Review* 2015, Vol. 15, p. 5.

registration of sex/gender in the government's civil registers, starting with the official birth certificate.⁷⁸⁴ The importance of the birth certificate – and official registration in general – cannot be overlooked. First and foremost, birth registration recognises the existence of the child as a person before the law, as foreseen by Article 7 of the Convention on the Rights of the Child and Article 24(2) of the International Covenant on Civil and Political Rights.⁷⁸⁵ When including a sex/gender marker,⁷⁸⁶ the birth certificate codifies the sex/gender of a new-born child, giving it the aura of truth and permanence, institutionalising male or female as a characteristic of identity to this particular child.⁷⁸⁷ Indeed, queer scholar GONZALEZ-SALZBERG argues that “every person is constructed by the law as a legal woman or a legal man, and this legally imposed sex/gender is the first assumption of a person's identity. [...] This legal attribution has the value of a truth that is, at the same time,

⁷⁸⁴ Another important example is Article 388 of the Civil Code, which holds that: “*The minor is the person of the male or the female sex who has not yet reached the age of (eighteen) years*”. This provision clearly indicates the binary conceptualisation of ‘sex’ in the Belgian legal system. Even though it does not explicitly serve to exclude persons with variations of sex characteristics, it nevertheless achieves that result. By only recognising the male and female sex, Article 388 elevates the pressure felt by parents and treating physicians of children who are born with variations of sex characteristics, to have them conform with the sex dichotomy.

⁷⁸⁵ M. VAN DEN BRINK, “Mag het een hokje meer zijn? Ontwikkelingen rond sekserregistratie [Can there be an extra box? Developments concerning sex registration]”, *Ars Aequi* 2016, p. 774. See in this regard also A. SØRLIE, “Legal Gender Meets Reality: A Socio-legal Children's Perspective” in A. HELMUM (ed.), *Human Rights, Sexual Orientation, and Gender identity*, London, Routledge, 2017, p. 83. See also M. VAN DEN BRINK, “‘The Legitimate Aim of Harmonising Body and Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 236. See in this regard also A. APPELL, “Certifying Identity”, *Capital University Law Review* 2014, Vol. 42, p. 2, 8.

⁷⁸⁶ Article 7 of the Convention of the Rights of the Child does not mention a mandatory registration of the child's sex.

⁷⁸⁷ E. REILLY, “Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality”, *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 311. See also B. M. DICKENS, “Management of Intersex Newborns: legal and ethical developments”, *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 3.

read in and imposed on the body”.⁷⁸⁸ In civil law systems, such as the Belgian system, the official birth registration is a central source for personal records that informs all other registers and systems.⁷⁸⁹ This is an important difference with common law systems, that can be found in countries as the United Kingdom, Australia and New Zealand, which keep separate records for different purposes.⁷⁹⁰

By way of introduction, it is important to remind the reader of the societal and legal conflation between the elements of a person’s sexual identity, i.e. sex, gender (identity) and sexual orientation.⁷⁹¹ The thesis will therefore occasionally have to make use of the term ‘sex/gender registration’, in order to highlight this conflation within the official registration model. This term thus represents the *de lege lata* situation and will not be used when the ‘best practice’ legal system regarding official sex registration is discussed, meaning the registration of a person’s biological sex characteristics.

‘Sex/gender registration’: Term that refers to the *de lege lata* registration model that conflates between registration of biological sex and registration of gender (identity).

The following sections will first establish the Belgian legal framework regarding official sex registration, before analysing it in the light of the ‘best practice’ legal system, from the perspective of the right to personal autonomy

⁷⁸⁸ D. GONZALEZ-SALZBERG, “The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights”, *American University International Law Review* 2014, Vol. 29(4), p. 798-799. See also A. APPELL, “Certifying Identity”, *Capital University Law Review* 2014, Vol. 42, p. 17.

⁷⁸⁹ M. VAN DEN BRINK, P. REUß AND J. TIGCHELAAR, “Out of the Box, Domestic and Private International Law Aspects of Gender Registration. A Comparative Analysis of Germany and the Netherlands”, *European Journal of Law Reform* 2015, Vol. 17(2), p. 284.

⁷⁹⁰ *Ibid.*, p. 284.

⁷⁹¹ See in this sense also S. WATTIER, “Le genre et le sexe des sénateurs depuis la Sixième Réforme de l’Etat [The gender and sex of senators since the Sixth State Reform]”, *Chroniques de Droit Public – Publiekrechtelijke Kronieken* 2017, p. 391-397.

of persons with variations of sex characteristics. As explained in Chapter I, this best practice is deduced from various sources, such as international (soft) law, European law, foreign law, (inter)national case law and scholarship.

A. The Belgian Civil Code

1. Primary official sex registration

The basic provisions concerning the official registration of sex in Belgium, which are relevant for this thesis, can be found in the Civil Code. On the basis of Article 43, §1 a child's birth must be declared to the registrar within fifteen days after birth. On the basis of Article 43, §4 the registrar drafts the birth certificate without delay. Article 44, 1° of the Civil Code includes a person's sex within the compulsory information that is incorporated in the birth certificate. However, it does not specify the options regarding 'sex' that are available to the registrar. According to the literature, the registrar can only choose between the binary 'male'/'female', given its self-evidence in the Belgian legal order.⁷⁹² The registrar bases the registration of sex generally on a medical declaration made by the gynaecologist or midwife, who focus in practice on the new-born's external genitalia.⁷⁹³ Since 2007, Article 48 (previously Article 57, 1°) foresees a 'concession' towards (the parents of) children with variations of sex characteristics. Indeed, a delay of maximum

⁷⁹² E. VAN ROYEN, "De vermelding van het geslacht in de geboortekte [The indication of sex in the birth certificate]" in P. SENAËVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 273. For the self-evidence of binary legal sex based on external genitalia, see also J. KNOUSE, "Intersexuality and the social construction of anatomical sex", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12, p. 139.

⁷⁹³ K. UYTTERHOEVEN, "Het onderscheid tussen de vorderingen van staat en de vorderingen tot verbetering van een akte van de burgerlijke stand m.b.t. interseksuelen en transseksuelen [The distinction between the claims concerning civil status and the claims to correct a civil status certificate, with regard to intersexuals and transsexuals]", *Tijdschrift voor Belgisch Burgerlijk Recht* 2000, Vol. 1, p. 46. The Civil Code also implicitly acknowledges in Article 57, 1° of the Civil Code that the establishment of a person's sex can be based on other criteria than the structure of the external genitalia. See E. VAN ROYEN, "De vermelding van het geslacht in de geboortekte [The indication of sex in the birth certificate]" in P. SENAËVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 286.

three months – starting from the declaration of the child’s birth –⁷⁹⁴ for declaring the child’s sex is possible, when justified for medical reasons. The parliamentary preparatory works motivate this period of three months as the time that is normally required to perform medical tests – and potentially treatment – to determine the child’s sex.⁷⁹⁵ Although the sex can therefore be left unspecified during three months,⁷⁹⁶ in the current sex registration framework a choice between ‘male’ or ‘female’ must be eventually made.⁷⁹⁷

It is interesting to note that the original provision did not require that the eventual registration was supported by a new medical statement.⁷⁹⁸ In other words, it seemed that during the delay of three months, parents could decide which sex (‘male’ or ‘female’) would be recorded on the child’s birth certificate. Since 2018, the new Article 48 foresees that parents have to present a medical certificate when they declare their child’s sex after the delay. The provision was inspired by the difficulties both parents and the registrar face to comply with the registration obligations in the Civil Code (the obligatory time limit of fifteen days and the obligatory sex registration), with

⁷⁹⁴ E. VAN ROYEN, “De vermelding van het geslacht in de geboorteakte [The indication of sex in the birth certificate]” in P. SENA EVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 284.

⁷⁹⁵ *Parl.Doc.* Chamber of representatives 2006-07, nr. 51-1242/005, p. 6.

⁷⁹⁶ E. VAN ROYEN, “De vermelding van het geslacht in de geboorteakte [The indication of sex in the birth certificate]” in P. SENA EVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 283.

⁷⁹⁷ This is different to for instance article 1:19d of the Dutch Civil Code, according to which, after the initial delay of three months to register the sex of a child born with variations of sex characteristics, it is possible to uphold the sex as ‘unspecified’. However, in practice in most – if not all – cases, the child’s sex becomes clear (or is at least decided upon) within the delay of three months. See M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 1 March 2017), p. 20. See also M. VAN DEN BRINK, P. REUß and J. TIGCHELAAR, “Out of the Box, Domestic and Private International Law Aspects of Gender Registration. A Comparative Analysis of Germany and the Netherlands”, *European Journal of Law Reform* 2015, Vol. 17(2), p. 282.

⁷⁹⁸ E. VAN ROYEN, “De vermelding van het geslacht in de geboorteakte [The indication of sex in the birth certificate]” in P. SENA EVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 287.

regard to a child born with “ambiguous” sex characteristics.⁷⁹⁹ Whereas the representative of the Minister of Justice argued in the preparatory parliamentary proceedings that in such cases registration of the sex as ‘indeterminate’ is possible, concrete examples of municipal registries showed that no such registration could take place.⁸⁰⁰ Since the registrar may not refuse to draft a birth certificate when requested to, a choice between ‘male’ or ‘female’ would have to be made, leading to the potential necessity to lodge a procedure before court to correct the birth certificate later in life.⁸⁰¹ Importantly, in its 2019 judgment on the constitutionality of the 2017 Gender Recognition Act, the Belgian Constitutional Court suggested that the legislature could in the near future create one or more non-binary categories for sex registration at birth, in order to end the discriminatory nature of the compulsory binary sex/gender registration framework.⁸⁰²

According to Belgian law, the sex recorded on the birth certificate is part of the individual person’s civil status,⁸⁰³ which is a matter of public order.⁸⁰⁴ The information is considered to be correct, until proof of the contrary, and holds an authentic value of evidence in the legal order. The official information is then processed by the government in the secondary National Register (*Rijksregister*), which holds all information concerning the identification of natural persons and regulates the exchange of information between

⁷⁹⁹ *Parl.Doc.* Chamber of representatives 2006-07, nr. 51-1242/001, p. 3.

⁸⁰⁰ *Parl.Doc.* Chamber of representatives 2006-07, nr. 51-1242/005, p. 8-9.

⁸⁰¹ E. VAN ROYEN, “De vermelding van het geslacht in de geboorteakte [The indication of sex in the birth certificate]” in P. SENAEVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 279.

⁸⁰² Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.7.3.

⁸⁰³ See S. WATTIER, “Le genre et le sexe des sénateurs depuis la Sixième Réforme de l’Etat [The gender and sex of senators since the Sixth State Reform]”, *Chroniques de Droit Public – Publiekrechtelijke Kronieken* 2017, p. 392. See in this regard also S.L. GOESSL, “From question of fact to question of law to question of private international law: the question whether a person is male, female or ...?” *Journal of Private International Law* 2016, Vol. 12(2), p. 264.

⁸⁰⁴ F. SWENNEN, *Het personen- en familierecht* [Family Law], Antwerp, Intersentia, 2014, p. 137. See also M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions”, <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 23 June 2017), p. 76.

administrative authorities and towards private citizens.⁸⁰⁵ This information is then reflected on identification documents, such as the identity card, the international passport, etc. However, in its judgment on the 2017 Gender Recognition Act, the Constitutional Court suggested that both sex and gender (identity) could be removed from a person's civil status.⁸⁰⁶

Belgium's legal system also foresees the possibility of changing a person's registered sex when it is not in conformity with their gender (identity) ('legal gender recognition'). Given the focus of this part of the thesis on persons with variations of sex characteristics, the exposition of the available procedures of legal gender recognition in Belgium will predominantly focus on this group of persons. Generally speaking, there are two separate paths available for persons with variations of sex characteristics who are confronted with incongruence between their registered sex and their gender (identity): the judicial path and the administrative path.

II. Correction/change of sex registration

§1. Judicial path

When a person with variations of sex characteristics experiences incongruence between the registered sex and their gender (identity), recourse to the family court is possible in order to correct their civil status certificates, predominantly their birth certificate, on the basis of Article 31 *jo*. Article 35 of the Civil Code.⁸⁰⁷

According to the literature, the judicial claim to correct one's civil status certificates serves to repair a material error, that was made during the drafting of the certificate concerned.⁸⁰⁸ UYTTERHOEVEN argued in 2000 that,

⁸⁰⁵ Wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen [Act of 8 August 1983 regulating the National Register of natural persons], *Belgian Gazette* 21 April 1984.

⁸⁰⁶ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.7.3.

⁸⁰⁷ A similar provision exists in the Netherlands. On the basis of articles 1:24-24b of the Dutch Civil Code, a person with variations of sex characteristics may lodge an application to the courts to correct their registered sex.

⁸⁰⁸ K. UYTTERHOEVEN, "Het onderscheid tussen de vorderingen van staat en de vorderingen tot verbetering van een akte van de burgerlijke stand m.b.t. interseksuelen en transseksuelen

since persons with variations of sex characteristics are characterised by a discordance between their physical sex characteristics *at birth*, they can claim the correction of their birth certificate before court in order to register their ‘true’ sex when they experience incongruence between their physical and/or psychological development and the sex that was *ab initio* registered on the basis of external genitalia.⁸⁰⁹ Indeed, it appears from case law that in this situation the registrar is regarded to have made a material error, by basing the sex registration on a medical declaration that only (and wrongly) took into account the external genitalia of the child.⁸¹⁰ The courts are therefore willing to order the change of the sex registration of a person with variations of sex characteristics in the light of the gender (identity), given the fact that the ‘true’ sex (i.e. the one indicated by that person’s gender (identity)) was already present (in some form) at birth. The judge orders the correction of the civil status certificates in the operative part of the judgment, which is then included in the Database of Civil Certificates (*‘DABS’*). The registrar then makes the necessary changes to all relevant civil certificates on the basis of the corrected certificate.⁸¹¹ It is important to note that the correction only has effect for the future (*ex nunc*).

Nevertheless, it is not fully clear to what extent this judicial path can (still) be used by persons with variations of sex characteristics, especially after the

[The distinction between the claims concerning civil status and the claims to correct a civil status certificate, with regard to intersexuals and transsexuals]”, *Tijdschrift voor Belgisch Burgerlijk Recht* 2000, Vol. 1, p. 44.

⁸⁰⁹ Ibid., p. 46.

⁸¹⁰ Hof van Beroep Brussel [Court of Appeal Brussels] (Belgium) 12 June 1984; Rechtbank Luik [Tribunal Luik] (Belgium), 9 February 1973; Rechtbank Antwerpen [Tribunal Antwerp] (Belgium), 8 February 1979; Rechtbank Mons [Tribunal Mons] (Belgium) 11 May 1988 and 17 January 1990. Most of these cases concerned so-called ‘transsexualised’ persons with variations of sex characteristics, i.e. persons with variations of sex characteristics who were (medically and administratively) assigned a certain sex, which did not respond to their gender (identity). The variation of sex characteristics was used by the courts to circumvent the matter of a change of sex registration in case of transsexualism. See J.M. PAUWELS, “Verbetering van de geboorteakte van een transseksueel: gelukkige evolutie van de hogere rechtspraak [Correction of the birth certificate of a transsexual: happy evolution of the higher case law]”, *Rechtskundig Weekblad* 1984-85, p. 2007-2008.

⁸¹¹ Article 35, §3 Civil Code.

introduction of the administrative path in 2007 and its amendment in 2017,⁸¹² and the possibility of delaying the sex registration up to three months after the child's birth on the basis of Article 48 of the Civil Code. Indeed, this latter 'concession' to (parents of) persons with variations of sex characteristics presupposes, according to the parliamentary preparatory works, a (thorough) medical examination of a child born with 'ambiguous sex characteristics' in order to decide for sure the child's sex.⁸¹³ Moreover, the representative of the Minister of Justice stated in the preparatory works of this provision that the delay of three months essentially serves to prevent a judicial procedure to correct the sex registration on the birth certificate.⁸¹⁴ One could therefore argue that the delay of sex registration for children with variations of sex characteristics, combined with the necessary medical tests, significantly narrows down the possibility to claim that the registrar made a material error when the registered sex does not correspond to the gender (identity) of the person concerned. Anyway, the representative of the Minister of Justice did not seem to *per se* rule out this judicial path,⁸¹⁵ nor does family law scholar SWENNEN, who does not find any influence of the delay of registration on the possibility to rely on a judicial procedure to change the registered sex.⁸¹⁶

Corrections to civil status certificates can also be made by the civil registrar on the basis of Articles 33 and 34 of the Civil Code. These provisions introduced an administrative alternative to the judicial procedure in order to correct material errors in civil status certificates. Although the original proposal for Articles 33 and 34 (previously Articles 99 and 100) included the correction of the registered sex under the administrative procedure, the eventual text does not. This specific administrative procedure *ex* Articles 33 and 34 of the Civil Code before the registrar is therefore not available to

⁸¹² See *infra* p. 320.

⁸¹³ *Parl.Doc.* Chamber of representatives 2006-07, nr. 51-1242/005, p. 6.

⁸¹⁴ *Ibid.*, p. 8.

⁸¹⁵ *Ibid.*, p. 8.

⁸¹⁶ F. SWENNEN, *Het personen- en familierecht* [Family Law], Antwerp, Intersentia, 2014, p. 163. E. VAN ROYEN, "De vermelding van het geslacht in de geboorteakte [The indication of sex in the birth certificate]" in P. SENAËVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 287.

persons with variations of sex characteristics whose registered sex does not correspond to their gender (identity) and who want to bring congruence between these two aspects of their sexual identity.

§2. Administrative path

In 2007 the Belgian federal parliament adopted the Act on Transsexuality, which introduced an administrative procedure to change a person's registered sex in the civil status certificates.⁸¹⁷ Although the Act essentially aimed to improve the legal status of transsexual persons by transforming the legal recognition of their sex change from a judicial to an administrative procedure, it was also applicable to persons with variations of sex characteristics. Indeed, the parliamentary preparatory works indicate that it was not the original intention of the Act to exclude persons who are born with variations of sex characteristics,⁸¹⁸ although experts disagreed to what extent the possibilities for legal recognition should be identical for transsexual persons and persons with variations of sex characteristics. In the end, by amending the original bill in order to eliminate the definition of who constitutes a 'transsexual person', the Act became applicable to persons with variations of sex characteristics.

The then newly-created Article 62bis of the Civil Code enabled the legal recognition of a person's transition through an administrative procedure before the registrar, who took note of a person's declaration of the continuing and irreversible inner conviction of "belonging to the sex opposite to that which is mentioned in the birth certificate". The provision thus enabled a person, who experienced incongruence between sex and gender (identity), to align the former with the latter. This required compliance with very heavy and invasive conditions, i.e. sex (re)assignment therapy and surgery, sterilisation and compulsory psychiatric therapy. If persons with variations of sex characteristics thus wanted to benefit from the administrative path instead of the judicial procedure, they would have had to (again) undergo severe

⁸¹⁷ See more about the legal status of transgender persons in Chapter IV, *infra* p. 307.

⁸¹⁸ *Parl.Doc.* Chamber of representatives, 2005-06, nr. 51-0903/006, p. 9.

treatment on their sex characteristics, *inter alia* leading to sterility.⁸¹⁹ Indeed, so-called ‘transsexualised’ persons with variations of sex characteristics were potentially obliged to first correct the sex assigning/normalising treatment they underwent as a child by new sex assigning surgeries and hormone treatment, before being granted legal recognition of their gender (identity). The result of the administrative path was identical to the then applicable judicial path *ex* Article 1383 of the Judicial Code (now Article 31 *jo.* Article 35 of the Civil Code), i.e. the registrar mentions the ‘true’ sex of the person concerned (i.e. the one indicated by that person’s gender (identity)) on the side of the birth certificate in order to reach full congruence between the person’s bodily appearance and gender (identity).

In May 2017, the Belgian federal parliament adopted a new administrative procedure for legal gender recognition, based on the self-determination of the person concerned.⁸²⁰ Although the amendment was predominantly aimed at reconciling the Belgian legal framework concerning gender recognition with the human rights and bodily integrity of transgender persons, there is no indication that persons with variations of sex characteristics are necessarily excluded from its application. Contrary to the previous administrative procedure, the parliamentary preparatory works are silent on the situation of persons with variations of sex characteristics. On the basis of the amended Article 135/1 (previously Article 62bis) of the Civil Code, any adult person who experiences incongruence between their registered sex and their gender (identity), may make a declaration of this incongruence to the registrar and request a change of their registered sex in the birth certificate in the light of their gender (identity). After being informed of the legal and administrative consequences of this change of sex registration, the registrar provides the applicant with a receipt note and notifies the public

⁸¹⁹ D. L. CLARK HOFMAN, “Male, Female and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law”, *Tulane Journal of Law and Sexuality* 2012, Vol. 21, p. 20. Besides, note that many forms of sex assigning/normalising treatment are irreversible.

⁸²⁰ This new administrative procedure for legal gender recognition will be analysed more thoroughly in Chapter IV, in the context of the legal status of transgender persons. See *infra* p. 327.

prosecutor who, within a period of three months, may give negative advice to the legal change of registered sex on the basis of a conflict with public order. Minimum three and maximum six months after the issue of the receipt note, the applicant has to renew the declaration of incongruence between registered sex and gender (identity) before the registrar, who then drafts a certificate amending the registered sex, which is then connected in the Database of Civil Certificates with all relevant certificates. Any sixteen-year-old who has the capacity to have the continuing conviction that their registered sex is not in congruence with their gender (identity) – as confirmed by a psychiatrist –, may also apply for legal gender recognition to the registrar, when accompanied by the parents or legal representative. This administrative change of the registered sex was in principle irreversible, except for exceptional circumstances,⁸²¹ where the family court could reinstall the previous registered sex. However, the Constitutional Court annulled this provision in 2019. The Court considered the irreversibility and the heavy procedure with the family court discriminatory for gender fluid persons whose gender (identity) naturally changes throughout life.⁸²²

B. Evaluation of the Belgian official sex registration

This Belgian model of official sex registration will now be analysed in the light of the ‘best practice’ legal system from the perspective of the right to personal autonomy of persons with variations of sex characteristics. This best practice is deduced from various sources, such as international (soft) law, foreign law, (inter)national case law and scholarship. In this regard, the general characteristics of the Belgian registration framework will first be addressed. More specifically, the next section will deal with the binary nature

⁸²¹ These exceptional circumstances were not defined in the Act. The government’s preparatory memorandum indicates experiences of transphobia or error as exceptional circumstances. See *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 22-23.

⁸²² *Grondwettelijk Hof* [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.8.1-B.8.9. Since the 2017 Gender Recognition Act was amended in June 2018 (after the action for annulment was communicated to the Court), the currently applicable Article 135/1 was not challenged. Therefore, there was no automatic erasure of the principled irreversibility from the legal order due to the Court’s judgment. The legislature will therefore have to amend Article 135/1 again in order to comply with the Court’s ruling.

of sex registration, its conflation between sex registration and gender (identity) registration, and the rationale for sex registration. On the basis of these characteristics, a hypothesis will be deduced and used in the further analysis of the Belgian sex registration framework. Only the currently applicable framework will be analysed. In other words, potential legislative interventions following the Constitutional Court's ruling on the 2017 Gender Recognition Act will not be taken into account.

I. General characteristics of the Belgian official sex registration

§1. Compulsory binary registration

Present Belgian law requires (a) parent(s) to declare the birth of a child to the civil registrar, who immediately drafts a birth certificate that, *inter alia*, indicates the child's sex. Although neither the Belgian constitutional order⁸²³ nor the law explicitly limit the options for sex registration to the binary 'male' or 'female', it is presently considered self-evident for the registrar to choose between 'male' and 'female' on the basis of a medical statement concerning the external genitalia of the new-born child.⁸²⁴ However, as mentioned above, since 2007 Article 48 (previously Article 57, 1°) of the Belgian Civil Code foresees a 'concession' towards (the parents of) children with variations of sex characteristics. Indeed, a delay of maximum three months – starting from the declaration of the child's birth –⁸²⁵ for declaring the child's (binary) sex is possible, when justified for medical reasons. Although a child's sex can therefore be left unspecified during three months,⁸²⁶ a choice between 'male' or 'female' must be made eventually. This model of compulsory binary registration corroborates the general opinion in society that a person's sex is

⁸²³ Grondwettelijk Hof [Constitutional Court] (Belgium) 20 October 2004, 159/2004, §B.5.6; 19 June 2019, 99/2019, §B.6.6.

⁸²⁴ Note that, as mentioned above, the Constitutional Court suggested in its ruling on the 2017 Gender Recognition Act that the legislature could create one or more additional categories for sex/gender registration at birth in order to implement the judgment and remedy the found discriminations.

⁸²⁵ E. VAN ROYEN, "De vermelding van het geslacht in de geboorteakte [The indication of sex in the birth certificate]" in P. SENAEVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 284.

⁸²⁶ *Ibid.*, p. 283.

binary, is important and does not constitute a sensitive, confidential personal characteristic as for instance race, religion or sexual orientation.⁸²⁷

The need to fill out the child's birth certificate on the basis of binary sex categories, helps to create the 'emergency' confronting parents at the birth of a child with variations of sex characteristics and thus supports the urgency of swift and definitive medical intervention, including genital surgery.⁸²⁸ Beside the question concerning the ethical nature of a legal identity assignment based on a simple test of a person's biological sex characteristics, it has already been stated above that a significant number of persons are born without fully congruent biological sex determinants and therefore do not fit into the 'male'/'female' sex dichotomy.⁸²⁹ Since present law can only comprehend its subjects as legally sexed/gendered in a binary manner, it problematises every individual that does not fit properly within the binary understanding of these categories.⁸³⁰ Persons with variations of sex characteristics, especially those who do not (choose to) undergo sex assigning/normalising treatment, are rendered legally invisible on the basis of that forced binary assignment.⁸³¹

⁸²⁷ M. VAN DEN BRINK, "Mag het een hokje meer zijn? Ontwikkelingen rond sekserregistratie [Can there be an extra box? Developments concerning sex registration]", *Ars Aequi* 2016, p. 775.

⁸²⁸ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 310; J. GARLAND and M. DIAMOND, "Evidence-based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 88-92.

⁸²⁹ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 312.

⁸³⁰ D. GONZALEZ-SALZBERG, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights", *American University International Law Review* 2014, Vol. 29(4), p. 799.

⁸³¹ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 298.

§2. Conflation of 'sex' and 'gender (identity)' registration

Moreover, the particular legal identification based on the appearance of a child's external genitalia at birth conflates two very different processes, i.e. the legal recognition of a person's gender (identity) and the collection of public health information concerning a person's sex.⁸³² The conflation is based on the more profound conceptual misunderstanding that appears to dominate the legal system, i.e. the misconstruing of 'gender (identity)' and 'sex'. Indeed, while the official sex registration at birth is clearly based on the biological composition of the new-born child, it also presupposes – at least in the legal sense – congruence between the person's sex and gender (identity). This is evidenced by the possibility in many legal systems to change one's official recorded sex in the light of one's gender (identity), *a fortiori* when this legal gender recognition depends on invasive gender affirming hormonal and surgical therapy.⁸³³ By conflating sex and gender (identity), legal discourses have effectively effaced (the meaning of) sex.⁸³⁴ This conclusion is striking, considering that, as mentioned above, persons with variations of sex characteristics predominantly face legal and social issues that can be traced back to their sex and the composition of their *sex characteristics*. Indeed, most persons with variations of sex characteristics place their gender (identity) within the 'male'/'female' binary and are not faced with the so-called phenomenon of 'transsexualisation', meaning that they experience incongruence between their assigned sex and their self-defined gender (identity). Nevertheless, the conflation between sex registration and registration of gender (identity) potentially disadvantages all persons with variations of sex characteristics, since sex/gender assignment – and potential

⁸³² See B. M. DICKENS, "Management of Intersex Newborns: legal and ethical developments", *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 3.

⁸³³ For the evaluation of the legal status of transgender persons in the Belgian legal order, see Chapter IV, *infra* p. 307.

⁸³⁴ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 2.

accompanying sex assigning treatment – on the basis of projected gender (identity) is fraud with statistical uncertainty.⁸³⁵

Considering these general characteristics of the official sex registration model, the two main issues therefore appear to be:

- The registration of a person's sex at birth through a compulsory binary model;
- The conflation between sex registration and gender (identity) registration.

In order to effectively address both issues in the light of the right to personal autonomy of persons with variations of sex characteristics, it is important to establish the true rationale of sex registration, especially when compared to the registration of gender (identity).

§3. Rationale for official sex registration

In recent years, there has not been a comprehensive legal study of sex registration in Belgian law. However, in 2014, Dutch scholars VAN DEN BRINK and TIGCHELAAR were asked by the national government of the Netherlands to research if, and to what extent, a person's sex could be left unspecified in the legal system and which legal and practical problems could then arise or be solved, in the light of the Dutch international obligations.⁸³⁶ Given the fact that both Dutch and Belgian civil law are essentially based on Napoleon's *Code Civil* (1804), the report's findings are very relevant for this thesis. Although the study was primarily aimed at transgender persons, its personal scope embraced all 'trans*' persons, who, according to the authors, include all persons that in some way or another deviate from the social norms with

⁸³⁵ J. GARLAND and M. DIAMOND, "Evidence-based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 88-92.

⁸³⁶ M. VAN DEN BRINK and J. TIGCHELAAR, "M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]", <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 8 March 2017).

regard to sex/gender.⁸³⁷ The study is therefore also of great importance for the legal status of persons with variations of sex characteristics. According to the report, primary and secondary sex/gender registration – which goes back to Napoleonic times – serve several aims:⁸³⁸

- Structuring society's public order;⁸³⁹
- Enabling differences in the legal status of persons on the basis of their sex/gender,⁸⁴⁰ e.g. with regard to the law of filiation, sex/gender-specific social benefits. Connected with this rationale is the reference to a person's sex/gender as a prohibited ground for differential treatment;
- Enabling several government processes, e.g. preventive cancer screening, demographic research on the basis of the population's sex/gender;
- Enabling identification to the government and third parties, e.g. for international travelling, or in the context of sex/gender segregated goods and services.

This enumeration immediately shows an important anachronism, i.e. the function of sex/gender registration to structure society, in order to subsequently enable differentiation in the legal position of groups of persons on the basis of their recorded sex/gender. Indeed, since the late 20th and early 21st century, the Dutch and Belgian legal systems have tackled most direct differences in legal status on the basis of a person's sex/gender, with the law of filiation being the largest exemption.⁸⁴¹ On the basis of the Dutch report,

⁸³⁷ Ibid. p. 3.

⁸³⁸ Ibid., p. 11-18.

⁸³⁹ This aim of 'organising the social and legal order' for official – binary – sex registration was recognised by the French Court of Cassation in its judgment of 4 May 2017, where it denied the application of a person with variations of sex characteristics to rectify the sex marker in their birth certificate into a neutral sex marker. See *supra* p. 252.

⁸⁴⁰ See in this regard also S.L. GOESSL, "From question of fact to question of law to question of private international law: the question whether a person is male, female or ...?" *Journal of Private International Law* 2016, Vol. 12(2), p. 265.

⁸⁴¹ Article 10, subsection 3 of the Belgian Constitution guarantees equality between men and women. The most important sectors of the legal system that still differentiate on the basis of sex are family law (especially the law of filiation), legislation with regard to pregnancy and

primary and secondary sex/gender registration in current society seem to have two dominant rationales:

- Identification of a person to the government and third parties;⁸⁴²
- Collection of public information, to enable several government processes, mostly connected to the welfare state.

§3.1. Identification on the basis of sex

The identification function of sex registration – here seen as the registration based on a check of a person’s sex characteristics – is based on a conflation between a person’s sex on the one hand, and a person’s gender (identity)/gender expression on the other hand.⁸⁴³ The 2014 Dutch report rightly indicated that sex identification is actually based on the conformity between a person’s gender expression and the recorded sex/gender.⁸⁴⁴ This thesis has so-far already substantively shown that a person’s gender expression is not linked to that individual’s sex, but to the person’s gender (identity). This means that the current system of identification actually checks the conformity between a person’s gender expression during the check and that person’s gender (identity), which in that case would have to be reflected

child birth, and non-discrimination law (which enables affirmative action on the basis of sex, e.g. quota for women in leadership positions). See M. VAN DEN BRINK, “Mag het een hokje meer zijn? Ontwikkelingen rond sekserregistratie [Can there be an extra box? Developments concerning sex registration]”, *Ars Aequi* 2016, p. 779. See also C. SIMON, “Au-delà du binaire: penser le genre, la loi et le droit des personnes transgenres en Belgique [Beyond the binary : contemplating gender, the law and the rights of transgender persons in Belgium]”, *Canadian Journal of Women and the Law* 2016, Vol. 28, p. 545-547.

⁸⁴² See M. VAN DEN BRINK, “Mag het een hokje meer zijn? Ontwikkelingen rond sekserregistratie [Can there be an extra box? Developments concerning sex registration]”, *Ars Aequi* 2016, p. 779.

⁸⁴³ E. REILLY, “Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality”, *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 312.

⁸⁴⁴ M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Sekserregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 8 March 2017), p. 32-33.

on that person's official documents.⁸⁴⁵ Moreover, the overwhelming reliance on self-reported identity in almost every aspect of our lives shows how well-accepted self-identification is, and how reliable and accurate it is for the purposes for which the information is sought.⁸⁴⁶ The current model of sex registration for identification purposes, based on a medical examination of a child's external genitalia at birth and not on a person's gender (identity), therefore does not seem to be pertinent to attain the goal of identification. However, it is important to note that this flaw should not be held against the procedure of sex registration, yet against the conflation within the legal system between sex registration and gender (identity) registration and hence, the conflated usage of a person's recorded sex. Indeed, the system mistakenly assumes congruence between a person's (registered) sex and gender (identity) and expression.

This conclusion needs to be nuanced, considering the option that (transgender) persons have to have their officially registered sex changed in the light of their actually experienced gender (identity). As will be extensively explained in Chapter IV,⁸⁴⁷ when persons have the conviction that their registered sex is not in congruence with their actual gender (identity), their official sex/gender marker will be changed to reflect that gender (identity). In these instances, the problem of conflation between sex and gender in the

⁸⁴⁵ This conclusion is not affected by the observation that identity checks based on the information included in official ID-documents, are in some situations complemented by checks of body parts through the use of full body scanners. These devices – which make it possible to detect objects in or on a person's body without having to remove clothing – are increasingly used in airports and train stations around the world. Before using the scanner, the operator often has to indicate whether the person concerned is of the male or female sex, since the machine checks the conformity with a 'typical' male or female body. Separating sex registration from registration of gender (identity), and abolishing public sex registration would not obstruct the use of these scanners, since it would be possible to ask the person concerned whether they have male or female anatomy. However, these devices clearly ignore the existence of variations of sex characteristics.

⁸⁴⁶ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 313. See also B. T. RUOCCO, "Our Antitotalitarian Constitution and the Right to Identity", *University of Pennsylvania Law Review* 2016, Vol. 165, p. 221-222.

⁸⁴⁷ See *infra*, p. 314 and further.

context of identification would be reduced. However, as will also be explained in Chapter IV, this process of legal gender recognition does not take into account the bodily composition of the person concerned.⁸⁴⁸ In other words, after legal gender recognition, the law will still assume congruence between sex characteristics and the now registered gender (identity), which would significantly reduce the registration's pertinence for the purpose of collecting public health information based on the individual's sex characteristics.

Moreover, beside the question whether the current system of sex registration attains its purposes for identification, one could question whether any registration of sex and/or gender (identity) is necessary for identification purposes.⁸⁴⁹ In relation to a significant aspect of the use of sex/gender registration for identification purposes, i.e. identification during international travelling, New Zealand issued a report '*A review of the requirement to display the holder's gender on travel documents*' in the context of a meeting in 2012 of the International Civil Aviation Organisation (ICAO).⁸⁵⁰ The report analysed both the costs and the benefits of removing the requirement of sex/gender identification on international travel documents. Whereas the main advantage of such removal would lie in the fact that transgender passengers would be less likely to encounter problems during travelling and border authorities would not have to deal with passengers travelling on a travel document displaying a sex/gender marker and/or a gender expression that does not reflect the holder's identity, it could allegedly also lead to security issues. Indeed, the report indicates that removing the requirement to display a holder's sex/gender on travel documents would complicate the operations of border authorities with regard to risk assessment of arriving passengers, and the functionalities of current electronic detection machines. The report therefore concludes that removing a person's sex/gender on international travel documents would primarily lead to increasing misconceptions and

⁸⁴⁸ See *infra*, p. 381 and further.

⁸⁴⁹ See B. MORON-PUECH, "Le droit des personnes intersexuées", <<http://journals.openedition.org/socio/2983#text>> (last visited 16 February 2018).

⁸⁵⁰ See <http://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-21/Tag-Mrtd21_IP04.pdf> (last visited 4 January 2019).

risks. However, one could question whether the currently conflated model of sex/gender registration is actually the most appropriate for security risk assessments. As VAN DEN BRINK and TIGCHELAAR point out, the guidelines of the ICAO already allow the use of 'X' as sex/gender marker on international travel documents, which could already be used for passports of all citizens of a certain State, if that State abolished all forms of sex/gender registration.⁸⁵¹ In any case, they argue that the number of potential problems is necessarily related to the number of countries that would abolish sex/gender registration and would not limit a State's legal competence to do so.⁸⁵²

§3.2. Collection of public (health) information

The report by VAN DEN BRINK and TIGCHELAAR indicates the importance of sex registration for the government for certain specific processes that require differentiation on the basis of biological sex, and are therefore mostly related to a person's general health condition.⁸⁵³ Probably the best known example of these government processes are the invitations for periodical, preventive cancer screening.⁸⁵⁴ Moreover, the government may also want to examine differences between individuals on the basis of their biological sex in the context of demographic research, which could support policy decisions. Conversely, this recorded health information could also be very useful for private individuals who want to provide evidence for the (non-)existence of

⁸⁵¹ M. VAN DEN BRINK and J. TIGCHELAAR, "M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]", <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 8 March 2017), p. 61.

⁸⁵² *Ibid.*, p. 33, 76.

⁸⁵³ See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 949-951. Information about a person's biological sex would not be necessary for processes that are not related to a person's biological health condition. The relation between socio-economic indicators and a person's gender could be processed on the basis of that person's self-defined gender (identity).

⁸⁵⁴ M. VAN DEN BRINK and J. TIGCHELAAR, "M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]", <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 8 March 2017), p. 29.

discrimination on the basis of sex (characteristics), or for a certain configuration of sex characteristics in order to enter sports competitions that are organised in a binary (male/female) way.⁸⁵⁵ Support for this rationale for sex registration can also be found in the broader literature. For instance, REILLY commends a shift of the understanding of sex designation from establishing identity to providing statistical public health information.⁸⁵⁶ Indeed, she states that sex registration should be situated where it matters, i.e. as a data point for assessing collective, aggregate, socially useful information, and thus dissociated from the individual's identity.⁸⁵⁷ LAU also argues that health-related research is a legitimate reason for the government to register in some form people's biological sex at birth.⁸⁵⁸

However, the fact that registration of biological sex could serve aims that need to be considered as legitimate does not *ipso facto* lead to the conclusion that such registration is actually indispensable for policy purposes. Indeed, it could be questioned why only sex characteristics need to be registered from a public health perspective, when many another elements or personal characteristics that are deemed private or even sensitive, may be as important or even more important for the health of human beings, such as height, weight, blood pressure, HIV status, mental health, cancer incidence, smoking or non-smoking, consumption of fruits and vegetables etc. The list of potential health indicators that are relevant for public health considerations is possibly endless. Moreover, statistical purposes do not require information on biological sex characteristics to be traceable to each individual person. Nevertheless, as will be explained in §4 of this section, this thesis will make

⁸⁵⁵ See *infra* p. 287. See on the challenge of variations of sex characteristics and gender incongruence for sports A. D'ESPALLIER, *Gender & Sport. Hink-stap-sprong naar een inclusief beleid* [Gender & Sports. Hop-Step-Jump to an inclusive policy], Brussels, Flemish Ombudsservice, 2019.

⁸⁵⁶ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 312.

⁸⁵⁷ *Ibid.*, p. 312.

⁸⁵⁸ H. LAU, "Gender Recognition as a Human Right" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

use of the hypothesis that the State has opted to maintain registering sex and that therefore a framework of official sex registration is in place, in order to serve (a) legitimate aim(s). It will then be analysed how this framework should be designed in order to meet the requirements of the right to personal autonomy.

Although the current practice at birth to register sex based on a check of the new-born's sex characteristics could largely be deemed pertinent for the purpose of collecting public health information, the situation becomes more complex when the person concerned applies for legal gender recognition. As explained above and in Chapter IV,⁸⁵⁹ the process of legal gender recognition does not (any longer) take into account the bodily composition of the person concerned. Indeed, when they experience incongruence between their registered sex and their actual gender (identity), the official sex marker will be changed to reflect gender (identity). Since in those situations the law will simply assume congruence between that person's registered gender (identity) and their sex characteristics, the trustworthiness of the registered information for public health purposes becomes clearly hampered. This conclusion would become even more true when the Belgian federal legislature would introduce one or more non-binary options for gender (identity) registration in order to implement the Constitutional Court's judgment on the 2017 Gender Recognition Act. After all, if a person would have their registered binary sex changed in for instance 'X', this would certainly not mean that they would have a variation of sex characteristics.

§4. Hypothesis

On the basis of the considerations above regarding the general characteristics of the Belgian framework of official sex registration and its potential rationales, the remaining part of this section will depart from a double hypothesis:

- Persons with variations of sex characteristics and the legal system benefit from a clear conceptual distinction between gender (identity)

⁸⁵⁹ See *infra*, p. 381.

and sex in the law, and more specifically with regard to official registration;

- Official sex registration (could) serve(s) (a) legitimate aim(s), specifically relating to the collection of public health information.⁸⁶⁰

The next sections will analyse the Belgian model of official sex registration from a perspective of the right to personal autonomy of persons with variations of sex characteristics, and taking into account this hypothesis. The question of how the deconflated model of sex registration would affect the official registration of gender (identity) will be thoroughly addressed in Chapter IV.⁸⁶¹

II. Medical registration of sex

§1. Interference with personal autonomy

When reading the relevant provisions of the Civil Code, it becomes immediately clear that the current Belgian model of sex registration is not based on personal autonomy with regard to the sex of the persons concerned. Registration solely occurs on the basis of a (sometimes more thorough than other times) examination of the new-born child's sex characteristics by medical professionals, which is then accepted for fact by the registrar.⁸⁶² The recorded sex hereby obtains within the legal system an authentic value of evidence *juris tantum*, or in other words, until its falseness is proven.⁸⁶³ Moreover, it becomes public information through the secondary registration in the National Register (*Rijksregister*) and its inclusion on official identity documents, such as the identity card and the international passport. Refuting

⁸⁶⁰ H. LAU, "Gender Recognition as a Human Right" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also S. KATYAL, "The Numerus Clausus of Sex", *The University of Chicago Law Review* 2017, Vol. 84, p. 481.

⁸⁶¹ See *infra*, p. 327 and further.

⁸⁶² See S.L. GOESSL, "From question of fact to question of law to question of private international law: the question whether a person is male, female or ...?" *Journal of Private International Law* 2016, Vol. 12(2), p. 264.

⁸⁶³ See, comparatively, also N. ALTHOFF, "Gender Diversity in Law: the German Perspective" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 398.

one's official primary sex registration through legal gender recognition is also not fully based on the person's personal autonomy. Indeed, if a person with variations of sex characteristics desires a change of the official recorded sex, two legal paths are available:

- A judicial procedure to correct the birth certificate *ex* Article 31 *jo*. Article 35 of the Civil Code;
- An administrative procedure to change the recorded sex *ex* Article 135/1 of the Civil Code.

Both procedures to change the recorded sex in the light of one's gender (identity) clearly fail to fully respect the individual's right to personal autonomy: in the judicial procedure the correction of one's birth certificate is dependent on a court's appreciation of evidence of existing 'opposite' sex characteristics at the moment of birth, and in the administrative procedure the person has to comply with several paternalising administrative requirements, such as a waiting period of minimum three and maximum six months, and the advice by the public prosecutor.⁸⁶⁴ Until 2017, a person even had to comply with very invasive psycho-medical requirements, such as a psychiatric assessment, sterilisation and compulsory gender affirming surgery.⁸⁶⁵ Moreover, the administrative procedure only serves the interests of persons with variations of sex characteristics who were assigned the 'wrong' sex in the light of their developed and self-defined gender (identity).

§2. Violation of personal autonomy?

It thus seems clear that the current Belgian model of sex registration and change of sex registration is at least an *interference* with a person's right to

⁸⁶⁴ This procedure will be extensively evaluated in Chapter IV. See *infra* p. 320 and further. In its judgment on the 2017 Gender Recognition Act, the Constitutional Court considered the principled irreversibility of the change of registered sex to be a violation of the right to equality *ex* Articles 10 and 11 of the Constitution, read together with Article 8 ECHR and Article 22 of the Constitution.

⁸⁶⁵ Moreover, both procedures fail to appreciate the particular issues that persons with variations of sex characteristics face and are traced back to non-consensual sex assigning/normalising treatment. This has been called above the 'transsexualisation' of persons with variations of sex characteristics.

personal autonomy. However, it is worth questioning whether this model actually amounts to a *violation* of the right to personal autonomy, *a fortiori* when sex registration is undone of its conceptual conflation with registration of gender (identity) and is seen in the light of the aforementioned aim of providing statistical public health information for specific government processes. With regard to the effective enforcement of these potential legitimate aims, which relies on the truthfulness of the information concerning the biological composition of a person's sex characteristics, registration on the basis of a medical statement does not seem disproportionate. Moreover, given the aforementioned remark that sex registration *sensu stricto* does not seem to be pertinent to serve the purpose of identification towards government authorities or third parties,⁸⁶⁶ the recorded biological sex would not have to be indicated on a person's birth certificate⁸⁶⁷ or secondary identity documents, such as the identity card and the international passport.⁸⁶⁸ This level of privacy regarding sex registration would reduce the anxiety concerning the sex of a child born with a variation of sex characteristics and erase the State's persuasive power to have the child conform to the sex binary.⁸⁶⁹ The elimination of the registration of a person's sex in identity documents and as part of their legal personality is also required by Yogyakarta Principe 31.

⁸⁶⁶ Indeed, a person's identification is usually based on a check of the conformity between one's gender expression at the moment of identification and one's (registered) gender (identity). As mentioned above, the legal system assumes congruence between a person's recorded sex and the gender (identity).

⁸⁶⁷ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 534. See in this regard also B. MORON-PUECH, "Le droit des personnes intersexuées", <<http://journals.openedition.org/socio/2983#text>> (last visited 16 February 2018).

⁸⁶⁸ With regard to the guidelines of the ICAO, the national legal system could issue passports with sex marker 'X' for all citizens or could choose to register a person's gender (identity) instead.

⁸⁶⁹ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 535.

Chapter III. Legal status of persons with variations of sex characteristics

If a person would, later in life, undergo (partial) sex (re)assignment or ‘normalising’ treatment on the basis of free and informed consent,⁸⁷⁰ the registration of the biological composition of that person’s sex characteristics would have to be altered on the basis of a renewed medical statement.⁸⁷¹ Thus, when sex registration is undone of its conflation with gender (identity) registration, the administrative procedure to change one’s recorded sex could not be based on a self-declaration of gender (identity). In any case, continuing to limit the possibility to change a person’s recorded sex to the situation where the person concerned experiences incongruence between their sex (characteristics) and their gender (identity), would amount to a violation of personal autonomy of persons with variations of sex characteristics who choose to undergo normalising treatment on their sex characteristics.

In their 2014 report, VAN DEN BRINK and TIGCHELAAR discussed the proportionality of the possibility of sex registration through medical examination, as opposed to self-identification, in order to enable specific government policies such as preventive cancer screening.⁸⁷² From a human rights perspective, they also point out the necessity of the protection of

⁸⁷⁰ For instance a person with variations of sex characteristics who chooses to undergo sex ‘normalising’ treatment, a transsexual person who undergoes full gender affirming therapy or a transgender person who undergoes partial treatment on sex characteristics. It is, for instance, possible for a transgender person, born with ‘typical’ male sex characteristics, to undergo a penectomy without removing the prostate. This person would still have to be invited for preventive prostate cancer screening.

⁸⁷¹ It is thus important that the legal sex classification system is not too rigid. However, legal recognition of changes in the composition of a person’s sex characteristics may not influence the medical treatment of the persons concerned. Indeed, it must be the automatic consequence of the decision of the individual person to receive treatment on their sex characteristics.

⁸⁷² M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 10 March 2017), p. 74. On the role of proportionality with regard to official sex registration, see also H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

privacy of all persons concerned.⁸⁷³ In other words, the recorded sex data would have to be kept in a secured database. Exchange of information with regard to a person's recorded sex to governmental administrative bodies or other third parties⁸⁷⁴ would have to be proven pertinent and proportionate in the light of the legitimate aim for which the information would be used.⁸⁷⁵ For instance if, – as seems to be at least the case in certain professional sports competitions organised by the International Association of Athletics Federations (IAAF) – a person would be required to provide evidence of their biological sex configuration, they could provide access to their private medical registration of sex characteristics. Access could also be granted to medical practitioners such as the general practitioner, urologist or gynaecologist for whom information on sex characteristics could be relevant in the performance of their job. This level of privacy with regard to a person's recorded sex also seems to be in conformity with the standards set out in the ECtHR's case law. Indeed, it is very plausible that the Court would acknowledge one's sex (characteristics) as one of the most intimate aspects of a person's private life under Article 8 ECHR, as it has done with one's sexual orientation and gender (identity).⁸⁷⁶ Other direct guidance cannot be drawn from the Court's case law, since it has only addressed legal recognition through registration of *gender (identity)*, on the basis of the change of a person's recorded sex.

Indeed, the Court's jurisprudence regarding the positive obligation to foresee legal gender recognition⁸⁷⁷ is only very indirectly relevant for persons with variations of sex characteristics, certainly when taking into account the

⁸⁷³ M. VAN DEN BRINK and J. TIGCHELAAR, "M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]", <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 10 March 2017), p. 75.

⁸⁷⁴ For instance the organisation of sports competitions.

⁸⁷⁵ See in this regard also B. MORON-PUECH, "Le droit des personnes intersexuées", <<http://journals.openedition.org/socio/2983#text>> (last visited 16 February 2018).

⁸⁷⁶ ECtHR 22 October 1981, *Dudgeon v. the United Kingdom*, 652; 12 June 2003, 35968/97, *Van Kück v. Germany*, §56.

⁸⁷⁷ See *infra* p. 335.

aforementioned hypothesis. While it may be assumed that the Court would draw a parallel between the positive obligation of legal gender recognition for transgender persons and a change of official sex registration for persons with variations of sex characteristics who have undergone treatment on their sex characteristics on the basis of their informed consent, there is no indication in current case law that it would oblige States to differentiate between sex registration and gender (identity) registration under Article 8 ECHR. Nevertheless, MORON-PUECH argues that, by analogy with the cases concerning the legal recognition of the gender (identity) of transgender persons, the Court would have to find the obligation of persons with variations of sex characteristics to be registered on the basis of the binary a disproportionate interference with their right to respect for private life under Article 8 ECHR.⁸⁷⁸

§3. Consequences for transgender persons

Although this suggested amendment of the Belgian framework of official sex registration predominantly addresses the legal problems that persons with variations of sex characteristics who do not (choose to) undergo sex assigning/normalising treatment face, it would also have implications for transgender persons who may want to (partly) align (the appearance of) their sex characteristics with their self-defined gender (identity). Indeed, such medical treatment on their sex characteristics would also have to be reflected in the official sex registration, in order to preserve the effective enforcement of its legitimate aim. However, since this part of the thesis departed from the hypothesis that sex registration needs to be distinguished from gender (identity) registration, these proposed amendments to the official sex registration model would not necessarily endanger the current model of legal gender (identity) recognition on the basis of self-determination,⁸⁷⁹ as long as it is undone of the conceptual conflation between sex and gender.

⁸⁷⁸ B. MORON-PUECH, “Le droit des personnes intersexuées”, <<http://journals.openedition.org/socio/2983#text>> (last visited 16 February 2018).

⁸⁷⁹ See *infra* p. 320.

Next to the question of the legitimacy, pertinence and proportionality of compulsory (deconflated) sex registration, the current binary normativity of the Belgian model of sex registration also needs to be addressed. Indeed, as repeatedly mentioned above, persons with variations of sex characteristics challenge the conceptualisation of sex as either ‘male’ or ‘female’. The following section will therefore analyse the binary normativity in the Belgian model of official sex registration and challenge its legitimacy. It will continue the analysis taking into account the abovementioned hypothesis that registration of sex and registration of gender (identity) need to be separated.

III. Binary sex normativity

§1. General remarks

Although the previous section argued that a registration framework based on a medical examination – as is the case in present Belgian law –, when undone of its conceptual conflation with gender (identity) registration, generally would not violate the right to personal autonomy of persons with variations of sex characteristics, it needs to be questioned whether such framework sufficiently respects the individual situation of all members of this group. Indeed, as mentioned above, according to the conceptualisation of ‘inclusiveness’ as ‘inclusive universality’, exclusion consists of the fact that when human rights standards are formulated or interpreted, the needs, concerns and values of members of non-dominant groups are not taken into account to the same extent as those of the members of dominant groups.⁸⁸⁰ By not sufficiently taking into account the specific challenges that persons with variations of sex characteristics face, i.e. through the registration of a person’s sex on the basis of the ‘male’/‘female’ dichotomy, which can only be changed when one experiences incongruence between the recorded sex and one’s gender (identity), the present Belgian legal framework excludes persons with variations of sex characteristics. After all, persons with variations of sex characteristics show that universal sex bipolarity does not exist in nature,

⁸⁸⁰ See *supra* p. 56.

even if it does exist in culture or cultural norms.⁸⁸¹ Rather, society's culture promulgates an ideal which includes standards of normality for our bodies and how we think about them.⁸⁸² This acceptance, unquestioned and virtually invisible, has made the legal system an active enforcer of differentiation that operates inexorably to exclude persons with variations of sex characteristics.⁸⁸³ A compulsory binary system of sex classification thus is inadequate to capture the extent of human diversity,⁸⁸⁴ and is deeply fraught with empirically unwarranted presumptions.⁸⁸⁵ REILLY argues that, while it is problematic enough when the law fails to recognise a pattern of exclusionary behaviour as deserving of legal remedy, it is much worse for the law to be the very mechanism that requires and enforces exclusionary behaviour.⁸⁸⁶ In Resolution 2048 (2015), the Parliamentary Assembly of the Council of Europe already suggested broadening registration categories with a non-binary option. The Assembly strengthened its recommendations in Resolution 2191 (2017), in which it explicitly called on the States to ensure, *wherever gender classifications are in use by public authorities*, that *a range of options* are available for all people, including "those intersex people who do not identify as either male or female".⁸⁸⁷ However, if interpreted strictly, both resolutions only call for a non-binary *gender* option.

⁸⁸¹ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 307.

⁸⁸² J. T. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 161.

⁸⁸³ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 299-300.

⁸⁸⁴ H.G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 440.

⁸⁸⁵ S. KATYAL, "The Numerus Clausus of Sex", *The University of Chicago Law Review* 2017, Vol. 84, p. 406.

⁸⁸⁶ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 300.

⁸⁸⁷ PACE Resolution 2191 (2017) also called on Member States to consider making the sex registration on birth certificates and other identity documents optional for all people.

In any case, (a) non-binary option(s) of sex registration will be required, taking into account the necessary legislative reforms to stop human rights breaches through non-consensual sex assigning/normalising treatment on persons with variations of sex characteristics. Indeed, it was extensively argued above that Belgian law should introduce a legal prohibition of non-consensual, deferrable treatment on the sex characteristics of a minor, with the possibility to perform such treatment in exceptional circumstances on the basis of agreement between the minor's legal representative and an interdisciplinary team, in order to preserve the person's rights to physical integrity and personal autonomy.⁸⁸⁸ After all, the medicalisation of persons with variations of sex characteristics not only heavily influences what happens to the persons concerned, but it also infects our societal understanding of variations of sex characteristics, shifting focus off the social response to the individual and onto medicine.⁸⁸⁹ Such legislative ban would lead to a number of new-born children whose sex characteristics could not be qualified as either 'male' or 'female' during the official registration. The cultural norm expressed by the ban would therefore also have to be reflected in and enforced by the system of registration. Moreover, as mentioned above, in its 2019 ruling on the Gender Recognition Act, the Belgian Constitutional Court suggested that the federal legislature could introduce one or more non-binary categories for sex/gender registration at birth.⁸⁹⁰ In other words, the legislature could make it possible to create (a) non-binary option(s) for the official registration of sex, since a person's gender (identity) is not known at birth.

Given the fact that non-binary sex registration is presently unknown to the Belgian legal system, and has not been addressed by the ECtHR,⁸⁹¹ the

⁸⁸⁸ See *supra* p. 208.

⁸⁸⁹ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 303.

⁸⁹⁰ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.7.9.

⁸⁹¹ Given the fact that the ECtHR accepts the preservation of the unavailability, truthfulness and coherence of the civil status as a legitimate public interest under Article 8 ECHR (See ECtHR 6 April 2017, 79885/12, 52471/13 and 52596/13, A.P., Garçon and Nicot v. France, §132), and the small number of European States that foresee non-binary sex registration, it could be assumed that at this moment, the State would enjoy a large margin of appreciation.

following section will first address present forms of non-binary registration in foreign legal systems in order to find the international legal best practice. Afterwards, the proportionality of compulsory non-binary sex registration of persons with variations of sex characteristics who have not undergone assigning/normalising treatments on their sex characteristics in order to comply with the binary sex model, will be analysed, both in relation to the legal system as to the individual person concerned.

§2. Non-binary options for sex/gender registration in foreign legal systems

In recent years, several jurisdictions worldwide have introduced neutral, non-binary, or ‘third’ options for sex/gender registration,⁸⁹² mostly leading to the categories ‘m’/‘f’/‘x’ or ‘m’/‘f’/‘other’. Some of these examples concern the official registration in civil registers, while others deal with the indication of a person’s sex/gender on official documents, such as the international passport, identity card or driver’s license.⁸⁹³ The developments in the countries mentioned below indicate that – despite their innovative character – at this point there is no fundamental shift away from the binary sex/gender model.⁸⁹⁴ Moreover, what immediately strikes the attention is the different personal scope and underlying motivation for the measures: from only children born with variations of sex characteristics in Germany and the Netherlands, to the very broad category of ‘third gender people’ in India and Nepal, or any person in New Zealand. This finding is corroborated by the clear conflation between ‘sex’ and ‘gender (identity)’ in almost all mentioned legal

⁸⁹² See B. M. DICKENS, “Management of Intersex Newborns: legal and ethical developments”, *International Journal of Gynecology and Obstetrics* 2018, <<https://doi.org/10.1002/ijgo.12573>> (last visited 22 November 2018), p. 5.

⁸⁹³ As mentioned above, national legislation enabling the sex marker ‘X’ is facilitated by the guidelines of the International Civil Aviation Organisation (ICAO) with regard to Machine Readable Travel Documents, which allow the indication of ‘M’/‘F’/‘X’ on international passports. See <http://www.icao.int/publications/Documents/9303_p4_cons_en.pdf> (last visited 2 March 2017).

⁸⁹⁴ M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 2 March 2017), p. 52.

systems. In any case, the examples are indicative of a heightened international attention for the perspective of sex and/or gender (identity) as a non-binary continuum and the consequences inadequate sex/gender registration might have for the persons concerned.⁸⁹⁵

§2.1. France, Germany, the Netherlands, Malta, Portugal: neutral/blank/unspecified registration

§2.1.1. France

In France, a circular letter of 28 October 2011 tolerates that the sex of a child can be left unspecified for a period of one to two years after the declaration of the child's birth,⁸⁹⁶ when the medical professional cannot immediately indicate the child's sex, and it is expected to be possible to do so after 'appropriate treatment'.⁸⁹⁷ Authorisation by the public prosecutor is required. After this delay, the sex must be registered as either 'male' or 'female'.⁸⁹⁸ On 4 May 2017, the French Court of Cassation had to rule on the legal question whether a person with variations of sex characteristics, whose (binary) biological sex could not be determined at birth, yet who was assigned the male legal sex, could claim a rectification of their birth certificate in order to obtain a neutral sex marker (*'sexe neutre'*). The Court of Cassation ruled

⁸⁹⁵ Ibid., p. 54.

⁸⁹⁶ However, a 2018 report pointed out that with some local authorities, the practice exists where no declaration of birth is made until the child's (binary) sex is established. At that moment, the child's parents bring the case to the attention of the public prosecutor who seizes the *tribunal de grande instance* to have the child's civil status declared by judgment. See L. HERAULT et al., "Etat civil de demain et Transidentité. Rapport final", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 245-246.

⁸⁹⁷ Note that this concession towards (parents of) persons with variations of sex characteristics is believed to actually increase the pressure to perform sex assigning/normalising treatment. See B. MORON-PUECH, "The Legal Status of Intersex Persons in France" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 309.

⁸⁹⁸ See M. BLONDIN and C. BOUCHOUX, "Rapport d'Information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 23 June 2017), p. 81. See also B. MORON-PUECH, "Le droit des personnes intersexuées", <<http://journals.openedition.org/socio/2983#text>> (last visited 16 February 2018).

that, even though there was an interference with the applicant's right to private life *ex* Article 8 ECHR, the legal recognition of the binary sex model ('m/f'), served a legitimate aim, i.e. the organisation of the social and legal order, of which 'sex' is a founding element. The inference with the person's private life was deemed proportionate, given the fact that they had established a male gender expression, and the profound consequences for the French legal system if a neutral sex marker was recognised.⁸⁹⁹ By using the applicant's congruence between their legal sex and gender expression as an argument against the rectification of the former, the Court also conflated the conceptual meaning of 'sex' and 'gender (identity)'. MORON-PUECH observed that the Court, by preserving a socially constructed scheme of binary sex, actually created an explicit legal provision of binary sex that does not have a reflection in French legislation.⁹⁰⁰ Moreover, he criticised that the Court substituted the applicant's lived experience for its own opinion on the congruence between the applicant's sex and gender (identity).⁹⁰¹

§2.1.2. Germany

On the basis of the German Civil Status Act (*'Personenstandsgesetz'*) every person's sex must be certified in the civil register at birth.⁹⁰² Although the Act does not define what is meant by 'sex', historically the recorded marker could only be 'male' or 'female' and has solely been determined by the biological sex characteristics of the child.⁹⁰³ However, as of 2019, the Act permits that no sex or a 'diverse' sex is recorded in the civil register, when the child cannot

⁸⁹⁹ Cour de Cassation [Court of Cassation] (France) 4 May 2017, No. 531. See B. MORON-PUECH, "The Legal Status of Intersex Persons in France" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 305-317.

⁹⁰⁰ B. MORON-PUECH, "Rejet de la neutralité à l'état civil : l'affirmation plutôt que la démonstration", <<https://sexandlaw.hypotheses.org/213>> (last visited 7 June 2017). See also B. MORON-PUECH, "The Legal Status of Intersex Persons in France" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 305-317.

⁹⁰¹ *Ibid.*

⁹⁰² §21(1)(3) Civil Status Act.

⁹⁰³ A. DUTTA, "The legal status of transsexual and transgender persons in Germany" in J.M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, p. 208.

be assigned the female or male sex at birth on the basis of the external genitalia.⁹⁰⁴ Such registration is based on a medical statement and is perceived to be mandatory,⁹⁰⁵ although some authors hold otherwise.⁹⁰⁶ This means that persons with variations of sex characteristics may not have any sex marker on their birth certificate, which can legally persist until the death of the person concerned.⁹⁰⁷ Such person – or their parents – may later in life notify the registrar that a ‘male’, ‘female’ or ‘diverse’ sex should be registered in the birth certificate, based on medical evidence that the affiliation to one of these markers is proven.⁹⁰⁸ It is not possible to change one’s legal sex from ‘male’ or ‘female’ to ‘unspecified’ or ‘unrecorded’,⁹⁰⁹ although it is possible since 2019 for a person born with variations of sex characteristics to change their registered sex to ‘diverse’ based on a medical statement or an affidavit

⁹⁰⁴ §22(3) Civil Status Act.

⁹⁰⁵ M. TRAVIS, “Accommodating Intersexuality in European Union Anti-Discrimination Law”, *European Law Journal* 2015, Vol. 21, p. 184. See also S. L. GÖSSL, “From ‘Binary+’ to ‘Binary No More’: On the recognition of a third sex in German law”, <<https://sexandlaw.hypotheses.org/320>> (last visited 18 December 2017). See also N. ALTHOFF, “Gender Diversity in Law: the German Perspective” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 399.

⁹⁰⁶ T. HELMS, “The 2013 German Law: Analysis and Criticism” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 370.

⁹⁰⁷ See A. DUTTA, “The legal status of transsexual and transgender persons in Germany” in J.M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, p. 208.

⁹⁰⁸ §27(3)(4) Civil Status Act. See N. ALTHOFF, “Gender Diversity in Law: the German Perspective” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 403.

⁹⁰⁹ However, interestingly, German case law indicates that a person may ask the *deletion* of the recorded ‘male’ or ‘female’ sex altogether (thus without *changing* it to a non-binary option). See M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 2 March 2017), p. 47. See also M. VAN DEN BRINK, P. REUß AND J. TIGCHELAAR, “Out of the Box, Domestic and Private International Law Aspects of Gender Registration. A Comparative Analysis of Germany and the Netherlands”, *European Journal of Law Reform* 2015, Vol. 17(2), p. 287; M. VAN DEN BRINK, “Mag het een hokje meer zijn? Ontwikkelingen rond seksregistratie [Can there be an extra box? Developments concerning sex registration]”, *Ars Aequi* 2016, p. 777.

Chapter III. Legal status of persons with variations of sex characteristics

certifying their condition.⁹¹⁰ Although German law does not specify the consequences of an unrecorded or a ‘diverse’ legal sex – with regard to marriage, filiation etc.,⁹¹¹ it is suggested in the literature that it might help to avoid an issue that some persons with variations of sex characteristics otherwise might face, i.e. the experience of incongruence between the recorded sex and the self-defined gender (identity),⁹¹² and might diminish the pressure on parents who need to declare the birth of a child with variations of sex characteristics.⁹¹³ Nevertheless, recent evidence has shown that since the Act was amended in 2013, the blank option was rarely used and when used, the legal sex was often quickly changed to ‘male’ or ‘female’,⁹¹⁴ while

⁹¹⁰ § 22(3) of the Civil Status Act. However, in May 2019 the federal government announced a proposal for a new amendment of the sex/gender registration framework, which would make it possible for all persons to change their registered sex (be it male, female, diverse or unspecified) to either one of the available options ‘male’, ‘female’, ‘diverse’ or ‘unspecified’. The material conditions for changing one’s registered sex are different for persons with variations with sex characteristics and transgender persons. See <<https://www.tagesspiegel.de/downloads/24322986/1/tsgreform.pdf>> (last visited 14 May 2019). See also J. T. THEILEN, “Subversion Subverted: Developments in German Civil Status Law on the Recognition of Intersex and Non-Binary Persons” in E. BREMS, P. CANNOOT & T. MOONEN (eds.), *Protecting Trans* Rights in the Age of Gender Self-Determination* (forthcoming).

⁹¹¹ See M. TRAVIS and F. GARLAND, “Legislating Intersex Equality: Building the Resilience of Intersex People through Law”, *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 14-15. See also T. HELMS, “The 2013 German Law: Analysis and Criticism” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 375. See also N. ALTHOFF, “Gender Diversity in Law: the German Perspective” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 396.

⁹¹² A. DUTTA, “The legal status of transsexual and transgender persons in Germany” in J.M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, p. 209.

⁹¹³ Nevertheless, it is also suggested that leaving the sex of a child unrecorded actually increases the tendency of parents to consent to deferrable sex assigning/normalising treatment, to avoid stigma. See M. TRAVIS, “Accommodating Intersexuality in European Union Anti-Discrimination Law”, *European Law Journal* 2015, Vol. 21, p. 184. See also T. HELMS, “The 2013 German Law: Analysis and Criticism” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 372.

⁹¹⁴ T. HELMS, “The 2013 German Law: Analysis and Criticism” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 373. See also N. ALTHOFF, “Gender Diversity in Law: the German Perspective” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 395.

at the same time the prevalence of sex assigning/normalising treatment has increased.⁹¹⁵ Indeed, it is also argued that leaving the sex of a child unrecorded actually increases the tendency of parents to consent to deferrable sex assigning/normalising treatment, in order to avoid stigma.⁹¹⁶

In October 2017, the German Federal Constitutional Court (*'Bundesverfassungsgericht'*) adopted a landmark ruling in which it held that the binary normativity ('male' – 'female') of the official sex registration in the Civil Status Act, as reflected in §21(1)3 and §22(3), violated the prohibition of discrimination on the basis of sex/gender (identity) *ex* Article 3(3) of the German Constitution.⁹¹⁷ According to the Court, the Civil Status Act disadvantaged persons who are neither male nor female because of their gender, given that they cannot – unlike men and women – be 'positively' registered in accordance with their gender. Moreover, the Act also violated the right to personality (Articles 2(1) *jo.* 1(1) of the German Constitution) of persons who do not identify as either 'male' or 'female'. The Court pointed out that the Constitution did not require gender to be exclusively binary or even a part of civil status. Although it acknowledged that the introduction of a possible third gender option could create additional bureaucratic or financial burden, the Court held that interests of third parties could not justify the interference with the individual right to self-development. Nevertheless, it did not grant a right to have a random gender-related marker registered. In other words, a standardised third gender option was arguably sufficient to remove the violation of constitutional rights. Alternatively, the Court suggested that the legislature could generally dispense with information on gender in civil status. With this judgement the Constitutional Court not only seemed to secure accommodation for non-binary persons in the law, but also effectively redefined 'sex' registration as 'gender (identity)' registration. After all, it interpreted the abovementioned regulation of a blank registration for

⁹¹⁵ M TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 15.

⁹¹⁶ *Ibid.*, p. 15.

⁹¹⁷ Bundesverfassungsgericht [Federal Constitutional Court] (Germany) 10 October 2017, 2019/16.

children born with variations of sex characteristics – and thus with a variation in their biological sex characteristics – as necessarily leading to the possibility of a positive non-binary gender registration for all persons.

In August 2018, the German federal Cabinet released a legislative proposal to implement the judgment. The government chose to give a narrow reading to the judgment's scope, by limiting the introduction of a third gender option 'diverse' ('*divers*') to persons with variations of sex characteristics.⁹¹⁸ On the basis of the proposal, all persons who apply for the third option must substantiate their request with a medical certificate or an affidavit confirming a variation of sex characteristics. The proposal was adopted by the federal Parliament on 14 December 2018. The 're-pathologisation' of persons with variations of sex characteristics, as well as the under-inclusiveness of the proposed procedure were immediately heavily criticised by activists and scholars.⁹¹⁹ Indeed, the new 'diverse' marker not only ignores the situation of non-binary transgender persons,⁹²⁰ but also maintains the conflation between registration of sex and gender (identity).

§2.1.3. Malta

Since the introduction of the 2015 GIGESC Act (Gender Identity, Gender Expression, Sex Characteristics Act), the Maltese Civil Code foresees the

⁹¹⁸ <<https://www.bmi.bund.de/SharedDocs/kurzmeldungen/DE/2018/08/geburtenregister.html>> (last visited 4 January 2019).

⁹¹⁹ See, for instance, G. BAARS, "New German Intersex Law: Third Gender but not as we want it", <<https://verfassungsblog.de/new-german-intersex-law-third-gender-but-not-as-we-want-it/>> (last visited 27 August 2018). See also N. ALTHOFF, "Gender Diversity in Law: the German Perspective" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 411.

⁹²⁰ In May 2019, the German government announced a proposal for a new amendment to the sex/gender registration framework. Essentially, the amendment would make it possible for non-binary transgender persons to also apply for the 'diverse' gender option in the context of the procedure of legal gender recognition. However, the proposed amendment did not erase the renewed pathologisation of persons with variations of sex characteristics who (want to) obtain the non-binary marker. Moreover, transgender persons would still have to be assessed by medical court experts in order to evaluate whether the person indeed does not identify with the sex assigned at birth and whether it may be assumed with high probability that the person's claimed gender identity will not evolve through time. See <<https://www.tagesspiegel.de/downloads/24322986/1/tsgreform.pdf>> (last visited 14 May 2019).

possibility of leaving the registered sex unspecified at birth. Indeed, according to Article 278, every birth certificate must mention the sex of the child, “provided that the identification of the sex of the minor may not be included until the gender identity of the minor is determined”. Although the provision seems to offer the possibility to leave open the registered sex of *all* new-born children, it is argued in the literature that (only) children born with variations of sex characteristics were aimed.⁹²¹ If a child’s sex marker is left unspecified at birth, the persons exercising parental authority or the tutor must apply for a declaration of the child’s gender (identity) with the civil court before the minor reaches the age of eighteen, following the minor’s express consent and taking into account the minor’s best interests and evolving capacities. Although it was introduced to reduce the pressure felt by parents to have their child conform to the sex binary immediately after birth,⁹²² the provision still clearly conflates the meaning of registration of sex characteristics and the registration of gender (identity). Indeed, despite the focus in Maltese legislation on the protection of the right to gender (identity) and the flexible procedure for legal gender recognition, the Civil Code regrettably still refers to ‘sex registration’ instead of ‘gender (identity) registration’. Moreover, before reaching the age of majority, all minors must be registered as either male or female.⁹²³ In this regard, the ‘neutral’ registration introduced by Article 278 of the Civil Code does not remedy the problems facing non-binary (transgender) persons.

Since the Autumn of 2017, all people who do not identify as either ‘male’ or ‘female’ may have their sex/gender marker on official documents such as the identity card, international passport or residence permit changed into ‘X’. A male or female sex/gender marker on birth certificates may not be changed into a non-binary option.

⁹²¹ L. HERAULT et al., “Etat civil de demain et Transidentité. Rapport final”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 62-63.

⁹²² T. NÍ MHUIRTHILE, “The Legal Status of Intersex Persons in Malta” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 365.

⁹²³ *Ibid.*, p. 364.

§2.1.4. The Netherlands

On the basis of Article 1:19d of the Dutch Civil Code, if the sex of a child is unclear at birth, a period of three months is granted in order to determine the child's sex. If, after this period the sex remains unclear, the birth certificate states that the child's sex could not be determined.⁹²⁴ However, if during the delay of three months the child's sex is established, the initial uncertainty will not be in any way visible.⁹²⁵ Once a person with variations of sex characteristics has defined their gender (identity), the 'indeterminate' sex marker can be rectified to the binary 'male' or 'female' through the judicial procedure ex Article 1:24 of the Civil Code.⁹²⁶ However, no time limit is set. In other words, the legal sex of a person with variations of sex characteristics can remain unspecified until that person's death. In this regard, since birth certificates inform official personal records, persons whose sex remains undecided will receive an automatic 'X' on their international passport.⁹²⁷ However, in 2007 the Dutch Supreme Court decided that a person who is registered as 'male' or 'female', cannot apply for a change of the sex marker from 'male'/'female' to 'unknown'.⁹²⁸

⁹²⁴ Research from 2013 indicated that of the 67 persons registered in the Netherlands (both Dutch nationals and foreigners) without information regarding their sex, only one person was born in the Netherlands (and therefore presumably fell under the scope of article 1:19d of the Civil Code). See M. VAN DEN BRINK, "Mag het een hokje meer zijn? Ontwikkelingen rond sekserregistratie [Can there be an extra box? Developments concerning sex registration]", *Ars Aequi* 2016, p. 776.

⁹²⁵ M. VAN DEN BRINK, "The Legal Status of Intersex Persons in the Netherlands" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 296.

⁹²⁶ M. VAN DEN BRINK and J. TIGCHELAAR, "M/V en verder. Sekserregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]", <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 23 February 2017), p. 20. Persons with variations of sex characteristics cannot make use of the administrative procedure for legal gender recognition that is available to transgender persons under article 1:28 of the Civil Code.

⁹²⁷ M. VAN DEN BRINK, "The Legal Status of Intersex Persons in the Netherlands" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 296.

⁹²⁸ Hoge Raad [Supreme Court] (The Netherlands) 30 March 2007, ECLI:NL:HR:2007:AZ5686. See M. VAN DEN BRINK, P. REUß AND J. TIGCHELAAR, "Out of the Box, Domestic and Private

Nevertheless, on 28 May 2018 the tribunal of Roermond ordered the civil registry to draft a *new* birth certificate in order to change a person's female sex/gender marker into the statement that "the child's sex could not be determined".⁹²⁹ Even though the applicant concerned seemed to indicate that they wanted legal recognition of the fact that they were born with variations of sex characteristics, it was clear to the tribunal that they had a non-binary gender (identity).⁹³⁰ In the light of the growing social acceptance of gender diversity and national and international legal developments – such as the Yogyakarta Principles +10 –, the tribunal considered that the aforementioned vision by the Supreme Court was contrary to the right of self-determination ex Article 8 ECHR and could not any longer be maintained.⁹³¹ Moreover, the tribunal seemed to indicate that a person's self-defined gender (identity) should form the only basis for official registration, implicitly emphasising the evolution of sex registration into gender (identity) registration. Since the law does not allow a 'positive' non-binary form of gender registration, the tribunal made use of the only 'neutral' form of registration presently available in Dutch law. Nevertheless, it suggested the

International Law Aspects of Gender Registration. A Comparative Analysis of Germany and the Netherlands", *European Journal of Law Reform* 2015, Vol. 17(2), p. 282.

⁹²⁹ Rechtbank Limburg [Tribunal Limburg] (The Netherlands) 28 May 2018, ECLI:NL:RBLIM:2018:4931. See in this regard M. VAN DEN BRINK, "The Legal Status of Intersex Persons in the Netherlands" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 293-303. See also P. CANNOOT, "De knuppel in het genderhok: op weg naar M/V/X in de Nederlandse geslachtsregistratie? [Towards M/F/X in Dutch sex registration?]", *Tijdschrift voor Familierecht* 2019, p. 47-56.

⁹³⁰ By way of interim decision in December 2017, the tribunal had ordered a medical, chromosomal examination to decide whether the applicant was indeed a person with variations of sex characteristics. However, both appointed medical professionals stated that there was insufficient information to establish whether such was the case. Moreover, the second medical professional indicated that the applicant's claim was identity related and not a question of biology. In the end, the tribunal rather based its decision on the recognition of the applicant's self-defined non-binary gender (identity), since the person concerned did not identify as either 'male' or 'female' and the official sex registration had developed into gender (identity) registration. See also M. VAN DEN BRINK, "The Legal Status of Intersex Persons in the Netherlands" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 300-301.

⁹³¹ M. VAN DEN BRINK, "The Legal Status of Intersex Persons in the Netherlands" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 300.

need for the legislature to adopt legislation enabling (a) non-binary form(s) of gender registration.⁹³² As VAN DEN BRINK holds, the judgment was actually *contra legem*, since the Dutch Civil Code does not provide for the option to change a binary sex registration in a non-binary option.⁹³³ Moreover, the Civil Code only foresees in the correction or amendment of a person's sex/gender marker on their birth certificate and not in the possibility to draft an entire new birth certificate.

§2.1.5. Portugal

In Portuguese cases concerning the declaration of a child born with variations of sex characteristics, a person reporting the birth at the civil registry office is advised to choose a first name that is easily adapted to either sex. It is expected that the birth certificate will be amended accordingly, once a binary sex can be attributed.⁹³⁴

It is interesting to note that the Portuguese Act of July 2018 that introduced a legal ban of non-consensual, deferrable treatment on a minor's sex characteristics until their gender (identity) is established, explicitly renounced the introduction of a third, neutral or blank sex registration option for children born with variations of sex characteristics. According to the government's explanatory memorandum, those options may reinforce the

⁹³² On 19 October 2018, the applicant received a new international passport and driver's licence with 'X' as sex/gender marker. On the same day, the Dutch secretary of state for home affairs announced his intention to extend the personal scope of the judgment through a change of law. See <<https://nos.nl/artikel/2255409-geen-m-of-v-maar-x-voor-het-eerst-paspoort-veranderd-in-genderneutraal.html>> (last visited 22 October 2018). However, in January 2019, the government announced that they would await further international developments. See <<https://www.volkskrant.nl/nieuws-achtergrond/kabinet-ziet-af-van-wetswijziging-die-aanvraag-genderneutraal-paspoort-makkelijker-maakt~b0071137/>> (last visited 22 January 2019).

⁹³³ M. VAN DEN BRINK, "Recht doen aan genderidentiteit. Evaluatie drie jaar transgenderwet in Nederland. 2014-2017" [Doing justice to gender identity. Evaluation three years transgender law in the Netherlands. 2014-2017], <https://www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf> (last visited 17 April 2018), p. 34-35.

⁹³⁴ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, "The fundamental rights situation of intersex people", <<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>> (last visited 23 February 2017), p. 5.

pressure to carry out treatments or interventions to normalise the genitals of children born with variations of sex characteristics and submit them to undesirable exposure, further promoting stigma and discrimination.⁹³⁵

§2.2. Australia

Sex/gender in official civil registers in Australia is a competence of the States/Territories, while sex/gender registration on international passports is a federal competence.⁹³⁶ This means that various systems of registration exist, as well as different systems for changing one's legal sex/gender on birth certificates. The most interesting models for this part of the thesis are the legal systems of the Australian Capital Territory (ACT) and South Australia.⁹³⁷ In a departure from the traditional binary categories, the ACT's 'Births, Deaths and Marriages Registration Act 1997' provides for a possibility for persons with variations of sex characteristics to change their legal sex/gender, based on self-identification, to any of the legal categories, i.e. 'male', 'female', 'unspecified/indeterminate/intersex', 'unspecified', 'indeterminate' or 'intersex'.⁹³⁸ According to ACT law, a person with variations of sex characteristics is a person who has physical, hormonal or genetic features that are, (a) not fully female or fully male; or (b) a combination of male or female; or (c) not female or male.⁹³⁹ In the ACT, the primary assignment of a person's legal sex at birth is obligatory either 'male' or 'female' and is based on a medical practitioner's inspection of the external genitalia of the child.⁹⁴⁰

⁹³⁵

See

<<http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=41320>> (last visited 25 October 2018).

⁹³⁶ C. FENTON-GLYNN, "The Legal Status of Intersex Persons in Australia" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 243.

⁹³⁷ Nevertheless, it appears that, in practice, other States and territories also provide other sex markers than 'male' and 'female'. See L. HERAULT et al., "Etat civil de demain et Transidentité. Rapport final", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 95-96.

⁹³⁸ R. WALLBANK, "The legal status of people who experience difference in sexual formation and gender expression in Australia" in J.M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, p. 499.

⁹³⁹ Ibid., p. 499.

⁹⁴⁰ Ibid., p. 497.

Chapter III. Legal status of persons with variations of sex characteristics

However, when the new-born possesses genitalia resembling that of neither or both sexes, the registration of sex may be postponed, or a preliminary assignment may be made, subject to later correction.⁹⁴¹ Options for preliminary registration are: 'intersex', 'indeterminate' and 'to be advised'.⁹⁴² Interestingly, the aforementioned possibility in the ACT to change one's primary sex registration means that persons with variations of sex characteristics may have their bodily variation recognised on an 'opt-in' basis, without the obligation to identify as 'intersex'.⁹⁴³ Even though the ACT's definition of a person with variations of sex characteristics is not linked to gender (identity), its system of self-determination is closely therefore related to legal gender recognition. In South Australia it is also possible to leave the child's sex unspecified during registration at birth. Moreover, since 2017, the South Australia 'Births, Deaths, and Marriages Registration Act 1996' provides for the possibility – for all persons – to have one's official sex/gender changed in one of four options: male, female, non-binary, undetermined/intersex/non specified. However, an application for a change of registered sex must still be accompanied by a statement by a medical practitioner or a psychologist certifying that the person has undertaken a sufficient amount of appropriate clinical treatment, which does not have to amount to gender affirming treatment.⁹⁴⁴

The question of how to slot individuals who do not conform to the socially constructed norms regarding sex and gender (identity), into the binary system was also dealt with in Australian courts in 2013, when the New South Wales

⁹⁴¹ Ibid., p. 497.

⁹⁴² C. FENTON-GLYNN, "The Legal Status of Intersex Persons in Australia" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 244. According to CARPENTER no children have been assigned to these non-binary classifications as of early 2018. See M. CARPENTER, "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 486.

⁹⁴³ M. TRAVIS, "Accommodating Intersexuality in European Union Anti-Discrimination Law", *European Law Journal* 2015, Vol. 21, p. 183.

⁹⁴⁴ C. FENTON-GLYNN, "The Legal Status of Intersex Persons in Australia" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 246-247.

Court of Appeal in the case *Norrie v. Registrar of Births, Deaths and Marriages* directly challenged the binary system of categorisation.⁹⁴⁵ Norrie was registered male at birth in Scotland and in 1989 underwent gender affirming surgery involving castration and the creation of a semi-functioning vagina. Not identifying within the binary, Norrie applied to the registrar to be registered as having a non-specific sex. Although the registrar approved Norrie's application, the reissued birth certificate had been altered so that the entry 'not specified' had been replaced with the words 'not stated'. The Court held that "the medical, psychological and social developments relating to sexual identity reflected in the literature, case law and dictionary definitions and the statutory changes over the last two decades, evidence an increasing understanding, not only in science and medicine but also in the law and in other professional disciplines, that sexual identity is not dependent solely upon physical characteristics and is not necessarily unambiguous."⁹⁴⁶ Based on a comprehensive semantic interpretation of the word 'sex' in the New South Wales 'Births, Deaths and Marriages Registration Act 1995', which in Part 5A enables a change of sex where a person has undergone a 'sex affirmation procedure', from multiple perspectives, i.e. the English language;⁹⁴⁷ the medical, psychological and social developments relating to sexual identity in the time during which the Act was adopted;⁹⁴⁸ the historic and social context;⁹⁴⁹ and the use of the term in case law and legislation.⁹⁵⁰ The judge concluded that "it follows from what I have said that I consider that the word 'sex' in Pt 5A of the Act does not bear a binary meaning of 'male' or 'female' and that a person is entitled to have an entry in the Register of a sex other than either of those two identifiers. There are other sexual

⁹⁴⁵ New South Wales Court of Appeal (Australia) 31 May 2013, *Norrie v. Registrar of Births, Deaths and Marriages*; A. KENNEDY, "Fixed at Birth: Medical and Legal Erasures of Intersex Variations", *University of New South Wales Law Journal* 2016, Vol. 39, p. 828-829.

⁹⁴⁶ New South Wales Court of Appeal (Australia) 31 May 2013, *Norrie v. Registrar of Births, Deaths and Marriages*, §182.

⁹⁴⁷ *Ibid.*, §175-181.

⁹⁴⁸ *Ibid.*, §181-188.

⁹⁴⁹ *Ibid.*, §189-191.

⁹⁵⁰ *Ibid.*, §192-199.

identifications that may be registered.”⁹⁵¹ The ruling of the New South Wales Court of Appeal was confirmed by the High Court of Australia in 2014.⁹⁵² The result of the *Norrie* case was thus that a person’s recorded sex in the birth certificate could be changed outside the binary, considering the existence of non-binary gender identities. Interestingly, considerations with regard to human rights were not part of the reasoning.⁹⁵³

Even though the opinions differ with regard to the legal soundness of the interpretation that both the New South Wales Court of Appeal and the High Court of Australia gave to the NSW Births, Deaths and Marriages Registration Act in order to establish the possibility of a non-binary legal sex/gender, it is fair to say that both judgments contain a lack of clarity concerning the meaning of core concepts as sex, gender, diversity in sexual formation, diversity in gender expression and legal sex.⁹⁵⁴ In particular, both judgments appear to confuse persons with variations of sex characteristics with transsexual and transgender persons, and to equate legal sex with both gender (identity)/expression and biological sex.⁹⁵⁵ The *Norrie* case thus conflates concepts of sex and gender and, in so doing, creates a third, non-binary category for legal sex registration.⁹⁵⁶ According to VAN DEN BRINK, it is even more worrying that it seemed to be the Court’s observation that there may not be incorrect sex/gender entries; in other words, someone like Norrie

⁹⁵¹ Ibid., §200.

⁹⁵² High Court of Australia 2 April 2014, *NSW Registrar of Births, Deaths and Marriages v. Norrie*.

⁹⁵³ See M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Sekserregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 2 March 2017), p. 50.

⁹⁵⁴ R. WALLBANK, “The legal status of people who experience difference in sexual formation and gender expression in Australia” in J.M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, p. 521.

⁹⁵⁵ Ibid., p. 521.

⁹⁵⁶ Ibid., p. 521.

might be compelled to have their non-binary gender stated as ‘non-specific’, rather than leaving the individual the choice to remain within the binary.⁹⁵⁷

Following the *Norrie* case, the Australian Federal Government issued guidelines on the ‘Recognition of Sex and Gender’ in personal records held by the Australian Government departments and agencies, recognising that “individuals may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy, or as a gender which is not exclusively male or female”, i.e. ‘X’.⁹⁵⁸ The guidelines describe ‘X’ as ‘indeterminate/intersex/unspecified’.⁹⁵⁹ Interestingly, the guidelines acknowledge that a person’s sex and gender may not necessarily be the same and show a systemic conflation between sex registration and gender (identity) registration.⁹⁶⁰ However, the Government indicated that the preferred approach is to collect and use gender information, and therefore to amend the recorded sex at birth in the light of one’s actual gender (identity). These developments extended the 2011 revision of the Department of Foreign Affairs and Trade policy to include ‘X’ as a sex/gender category on Australian international passports.⁹⁶¹ Moreover, the 2013 amendment of the ‘Sex Discrimination Act 1984’ implicitly recognises non-binary sex/gender

⁹⁵⁷ M. VAN DEN BRINK, “‘The Legitimate Aim of Harmonising Body and Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 241.

⁹⁵⁸ See Australian Government Guidelines on the Recognition of Sex and Gender, <<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>> (last visited 21 February 2017), p. 3.

⁹⁵⁹ *Ibid.*, p. 4.

⁹⁶⁰ R. WALLBANK, “The legal status of people who experience difference in sexual formation and gender expression in Australia” in J.M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, p. 494. The guidelines for instance indicate that a person’s gender (identity) can be ‘intersex’. However, as described above, ‘intersex’ refers to a variation of person’s sex characteristics and not to a person’s gender (identity). See also M. CARPENTER, “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 487.

⁹⁶¹ A. KENNEDY, “Fixed at Birth: Medical and Legal Erasures of Intersex Variations”, *University of New South Wales Law Journal* 2016, Vol. 39, p. 829. The application for a passport marked ‘X’ must be supported by a confirmation from a registered medical practitioner or psychologist that the person concerned is of indeterminate sex or is intersex.

(identity). Indeed, together with the adoption of ‘intersex status’ as a separate, prohibited ground for discrimination, other parts of the Act were amended to include non-binarity.⁹⁶²

§2.3. Austria

In June 2018, the Austrian Constitutional Court (*‘Verfassungsgerichtshof’*) adopted a judgment in which it considered the Austrian Civil Status Act (*‘Personenstandsgesetz’*) in conformity with Article 8 ECHR, insofar it is interpreted as allowing persons with variations of sex characteristics to have no registered sex or a self-defined non-binary marker such as ‘diverse’, ‘inter’ or ‘open’. Although the Court accepted that the introduction of non-binary gender recognition would create a burden for the government, it did not consider bureaucracy a legitimate justification to limit the individual’s right to gender self-determination.⁹⁶³

Interestingly in the context of this chapter, the case concerned a person born with variations of sex characteristics who wanted their official sex registration changed from ‘male’ to ‘inter’. According to the Court, Article 8 ECHR requires with regard to persons with variations of sex characteristics sufficiently flexible rules which also recognise variations of sex development in the context of sex registration, next to ‘male’ and ‘female’, such as ‘diverse’, ‘inter’ or ‘open’. For the Court, it should also be possible to leave sex assignment permanently open or open until the persons concerned are able to make a self-determined assignment. The Court assumed that this right should also include that people only have to accept those State-defined sex attributions that correspond to their gender identity.

In January 2019, Organisation Intersex International (OII) Europe reported that on 20 December 2018, the Federal Ministry of the Interior had adopted

⁹⁶² The notion ‘opposite sex’ was changed into ‘different sex’. See also COLLEGE VOOR DE RECHTEN VAN DE MENS, “Achtergrondrapport Wetswijziging Agwb [Background report Amendment General Equal Treatment Act]”, <<https://www.mensenrechten.nl/publicaties/detail/36909>> (last visited 23 March 2017), p. 23.

⁹⁶³ Verfassungsgerichtshof [Constitutional Court] (Austria) 15 June 2018, G 77/2018-9, §34-36.

a decree implementing the Court's judgment. On the basis of the decree, a third sex/gender option 'diverse' was introduced. As in Germany, the new marker is reserved for persons with variations of sex characteristics who provide medical evidence of their condition. However, contrary to the new German framework, persons with variations of sex characteristics who apply for the non-binary marker need to obtain a certificate from a government controlled medical authority confirming the existence of a variation of sex characteristics.

§2.4. Belgium

In early 2018, the 2017 Belgian Gender Recognition Act, which introduced a procedure of legal gender recognition based on gender self-determination, was challenged before the Constitutional Court on grounds of the absence of recognition of non-binary gender (identities). As mentioned above,⁹⁶⁴ although the procedure of legal gender recognition is not directly aimed at them, persons with variations of sex characteristics are free to apply for gender recognition if the sex marker assigned to them at birth is incongruent with their experienced gender (identity).

In June 2019, the Constitutional Court found the lacuna of non-binary gender recognition a violation of the right to equality *ex* Articles 10 and 11 of the Constitution, read together with Article 8 ECHR and Article 22 of the Constitution.⁹⁶⁵ In the light of the right to gender self-determination, the Court did not consider the binary or non-binary nature of a person's gender (identity) a pertinent criterion for differential treatment. Although it is the federal legislature's prerogative to now implement the judgment and to break the gender binary in Belgium, the Court already indicated how the lacuna could be filled. First, it stated that the legislature could create one or more new categories for sex/gender registration at birth and in the procedure of legal gender recognition. Secondly, it indicated that both sex and gender could be removed as elements of the individual civil status. In other words, the Court implicitly suggested that, next to one or more non-binary *gender*

⁹⁶⁴ See *supra* p. 228 and further.

⁹⁶⁵ Article 22 of the Belgian Constitution holds the right to respect for private life.

categories, the legislature could also create one or more non-binary sex categories. It now remains to be seen how the federal parliament will amend the official sex/gender registration framework.

§2.5. Canada

Since 2017, the province of Ontario has made it possible to change the sex/gender marker on birth certificates in the option 'X', which is not only open to non-binary (transgender) persons, but also to persons who do not wish to share information about their gender (identity). Since 2016, a person's sex marker is also no longer visible on the official health card. A similar policy was adopted by the Northwest Territories.

In 2017, the Canadian federal government also announced its decision to introduce the option 'X' for international passports. Awaiting the entry into force of the policy, persons could have the observation included that "the sex of the bearer should read as X, indicating that it is unspecified".⁹⁶⁶ In June 2019, the federal government announced that non-binary persons could apply for the marker 'X' on their international passports.

§2.6. Colombia

In 2013, the Colombian Constitutional Court adopted a judgment in which it held that – under the constitutional right to legal personality – children who cannot be identified as either 'male' or 'female' at birth may be registered with an undetermined sex marker on their birth certificate.⁹⁶⁷ When the child's (binary) gender is assigned, all elements referring to the indeterminate sex must be deleted. Nevertheless, the administrative implementation of the judgment resulted in a system where – in case of the birth of a child with variations of sex characteristics – parents may freely tick the male or female

⁹⁶⁶ See <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html>> (last visited 15 May 2018).

⁹⁶⁷ Corte Constitucional [Constitutional Court] (Colombia), T-450A/13, Decision of M.P. Gonzalez Cuervo.

box according to their preference.⁹⁶⁸ Despite the Court's recognition of a constitutional right to a non-binary sex assignment at birth, Colombia's legal practice therefore currently does not allow non-binary sex/gender markers in birth registration.

§2.7. New Zealand

On the basis of the Births, Deaths, Marriages and Relationships Act 1995, a person's sex can be recorded as 'indeterminate' at birth, if it cannot be ascertained at birth whether the person is of the male or female sex. This indeterminate sex may be changed through a declaration by the family court to 'male' or 'female' on the basis of an application by the legal guardian, if the court is convinced that it is in the best interests of the child to be brought up as either 'male' or 'female'. However, Article 29(3)(c) and (d) and Article 29(4) of the Act clearly link this declaration to the performance of gender affirming medical treatment. The legal system also foresees a judicial procedure for adults to amend their recorded sex in the birth certificate in the light of their gender (identity), although non-binary sex markers are not available for this procedure.⁹⁶⁹

Since December 2012, an international passport may be issued in New Zealand mentioning the individual person's self-determined gender (identity) without the need for an official change of the recorded sex in the birth certificate.⁹⁷⁰ The choices in the administrative process are either 'm', 'f' or 'x' (meaning indeterminate or unspecified). Any person may apply to have their recorded sex amended, not only transgender persons or persons with

⁹⁶⁸ R. RUBIO-MARIN and S. OSELLA, "Between Rights and Pragmatism: Intersexuality before the Colombian Constitutional Court" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 335.

⁹⁶⁹ DEPARTMENT OF INTERNAL AFFAIRS, "General information regarding Declarations of Family Court as to sex to be shown on birth certificates", <[http://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/\\$file/GeninfoDeclarationsofFamilyCourt.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/$file/GeninfoDeclarationsofFamilyCourt.pdf)> (last visited 23 February 2017), p. 4.

⁹⁷⁰ E. MCDONALD and J. BYRNE, "The legal status of transsexual and transgender persons in Aotearoa New Zealand" in J.M. SCHERPE (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2015, p. 539.

variations of sex characteristics.⁹⁷¹ Indeed, no medical evidence is required for the application.

§2.8. India

In 2014, the Supreme Court of India delivered a remarkable landmark judgment in the case National Legal Services Authority v. Union of India (NALSA). The case concerned the legal recognition of other gender identities than ‘male’ or ‘female’ on the basis of constitutionally protected rights to equality, personal liberty, protection of life, dignity and autonomy. It is important to note that the case dealt with the rights of transgender persons and persons with variations of sex characteristics generally, given the Supreme Court’s use of the broad umbrella definition of ‘transgender’, which, *inter alia*, embraces *hijras*, a group that also includes persons with variations of sex characteristics.⁹⁷² Interestingly, the Supreme Court commenced its reasoning by pointing out the historical presence of, *inter alia*, *hijras* in India and the Hindu mythology and other religious texts, which altered drastically from the 18th century onwards due to colonial rule.⁹⁷³ Indeed, as is the case for Nepal,⁹⁷⁴ the NALSA judgment especially aimed at providing a dignified existence for a distinct historically and culturally recognised group, which suffered from widespread discrimination and marginalisation, and is not necessarily congruent with Western conceptualisations of non-heterosexual persons, transgender persons and/or persons with variations of sex characteristics.⁹⁷⁵

⁹⁷¹ Ibid., p. 539.

⁹⁷² Supreme Court of India 15 April 2014, 400/2012, National Legal Services Authority v. Union of India and others, §11; 43-44. The identity known as *hijra* is historically recognised in India, Pakistan, Nepal and Bangladesh. It constitutes a third sex/gender and (may) encompass(es) several forms of non-conformity with regard to a person’s sexual identity, such as transgender persons, persons with variations of sex characteristics and/or non-heterosexual persons. See B. VANDERHORST, “Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex”, *Harvard Law & Policy Review* 2015, Vol. 9, p. 248.

⁹⁷³ Supreme Court of India 15 April 2014, 400/2012, National Legal Services Authority v. Union of India and others, §12-16.

⁹⁷⁴ See *infra* p. 274.

⁹⁷⁵ M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the

Although the Supreme Court recognised that a relatively small group of persons may be born with bodies that incorporate both or certain aspects of both male and female physiology, it nevertheless focussed on the matter of a person's gender (identity). Indeed, it held that "each person's self-defined gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."⁹⁷⁶ The Supreme Court found that "despite the constitutional guarantee of equality, *hijras*/transgender persons have been facing extreme discrimination in all spheres of society. Non-recognition of the identity of *hijras*/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police."⁹⁷⁷ The Supreme Court pointed out that "recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender [...] constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under the Constitution."⁹⁷⁸ Moreover, "self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India."⁹⁷⁹ According to the Supreme Court, "self-identified gender can be either male or female or a third gender".⁹⁸⁰ "*Hijras*/Eunuchs, therefore, have to be considered as third gender, over and above binary genders under our

government and the legal position of transgender persons]", <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 6 March 2017), p. 59. This legal recognition of the human rights of a distinct historically known cultural group in India and Nepal is contrasted with the other mentioned examples, which do not specify the personal scope of the measures based on societal composition. See also M. VAN DEN BRINK, "Mag het een hokje meer zijn? Ontwikkelingen rond seksregistratie [Can there be an extra box? Developments concerning sex registration]", *Ars Aequi* 2016, p. 777.

⁹⁷⁶ Supreme Court of India 15 April 2014, 400/2012, *National Legal Services Authority v. Union of India and others*, §20.

⁹⁷⁷ *Ibid.*, §55.

⁹⁷⁸ *Ibid.*, §68.

⁹⁷⁹ *Ibid.*, §69.

⁹⁸⁰ *Ibid.*, §70.

Constitution and the laws.”⁹⁸¹ The Supreme Court concluded that “gender identity [...] is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.”⁹⁸²

The Supreme Court framed its analysis by canvassing to great extent the protections for sexual minorities in international law – in particular the Yogyakarta Principles – and diverse legislation and case law from other legal systems.⁹⁸³ On the basis of this extensive comparative survey of the protections of ‘transgender’ persons in various jurisdictions, the Supreme Court deduced the emerging rule in modern cases and legislation that the test of gender is not biological but psychological, and binary conceptions of gender are increasingly recognised as inadequate.⁹⁸⁴ On the basis of its judgment, the Court issued a set of affirmative actions, *inter alia*, stating that the national and state governments must grant legal recognition of the gender (identity) of ‘transgender’ persons, such as ‘male’, ‘female’ or ‘third gender’.⁹⁸⁵

Even though the Supreme Court firmly enhanced the right to self-determination and human dignity of transgender persons and persons with variations of sex characteristics with regard to their gender (identity), the judgment is nevertheless characterised by a strong conflation between ‘sex’ and ‘gender (identity)’. Indeed, on various occasions the Supreme Court stated that *hijras* are persons of (a) third gender (identity), even though this group also includes “hermaphrodites”, and therefore persons with variations of sex characteristics who do not necessarily have non-binary gender identities. By calling for the registration of this entire group as the non-binary ‘third gender’, which may not be refused on the basis of the right to self-determination regarding gender (identity), the ruling is both overinclusive

⁹⁸¹ Ibid., §74.

⁹⁸² Ibid., §76.

⁹⁸³ B. BOYCE, “Sexuality and Gender Identity Under the Constitution of India”, *The Journal of Gender, Race & Justice* 2015, Vol. 18, p. 50.

⁹⁸⁴ Ibid., p. 51.

⁹⁸⁵ Supreme Court of India 15 April 2014, 400/2012, National Legal Services Authority v. Union of India and others, §129.

and underinclusive.⁹⁸⁶ Sex registration for persons with variations of sex characteristics is thus – not necessarily correctly – partly influenced by their perceived non-binary gender (identity). Nevertheless, one may assume that a child born with ambiguous sex characteristics will be registered within the third category.⁹⁸⁷ Besides, even though the judgment is very progressive, registration is not always performed in conformity with the law in (parts of) India, leading to problematic access to education and health care.⁹⁸⁸ Some of the legal advancements through the ruling of the Supreme Court could therefore be illusory for individuals in their day-to-day life.⁹⁸⁹

§2.9. Nepal

Nepal has known an evolution similar to the Indian example, ever since the landmark judgment of the Nepalese Supreme Court in the case *Sunil Babu Pant* of 2007.⁹⁹⁰ The applicants argued that sexual minorities (who are described as ‘homosexuals and third gender persons’, ‘third types of people’ or ‘lesbian, gay, bisexual, transgender and intersexual’ persons) were discriminated on the basis of their sexual orientation and gender (identity), and that it was the responsibility of the State to, *inter alia*, recognise the existence of a third gender, next to ‘male’ and ‘female’ on official documents. The applicants documented various examples of discrimination and violence on the basis of gender (identity) and sexual orientation, both by public and

⁹⁸⁶ B. BOYCE, “Sexuality and Gender Identity Under the Constitution of India”, *The Journal of Gender, Race & Justice* 2015, Vol. 18, p. 54.

⁹⁸⁷ M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 2 March 2017), p. 48.

⁹⁸⁸ *Ibid.*, p. 47.

⁹⁸⁹ See in this regard also L. HERAULT et al., “Etat civil de demain et Transidentité. Rapport final”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 117.

⁹⁹⁰ Supreme Court of Nepal 21 December 2007, 917/2007, *Sunil Babu Pant and others v. Nepal Government and others*. For a translation in English, see <<https://www.icj.org/wp-content/uploads/2012/07/Sunil-Babu-Pant-and-Others-v.-Nepal-Government-and-Others-Supreme-Court-of-Nepal.pdf>> (last visited 27 February 2017).

private actors. It is important to note that the Nepalese society historically recognised a cultural ‘third gender’, i.e. the *hijras*.⁹⁹¹

The Supreme Court first argued that, as a matter of social justice, it is a constitutional duty and responsibility of the State to make the deprived and socially backwarded classes and communities able to utilise the opportunity and enable them to enjoy the rights equally as other people do. It recognised that, since the traditional society only recognised two types of sexes, i.e. male and female, there were practices of treating the people of the third sex differently. After extensively referring to international (soft) law – the ICCPR and the Yogyakarta Principles – and case law of, *inter alia*, the ECtHR, the US Supreme Court and Australian, South African and British domestic courts, the Supreme Court found that the traditional norms and values with regard to sex, sexuality, sexual orientation and gender (identity) were changing gradually. Moreover, according to the Supreme Court, the concept that homosexuals and ‘third gender people’ are not mentally ill but leading a normal life style, was in the process of entrenchment. Therefore, the Supreme Court held that all constitutionally protected fundamental rights were also vested in the ‘third gender people’, since they are human beings as other men and women are, and citizens of Nepal as well. Indeed, according to the Supreme Court, the State should recognise the existence of all natural persons including the people of third gender other than men and women, who cannot be deprived from enjoying the constitutional fundamental rights.⁹⁹²

Whereas the Supreme Court initially based its ruling on a growing consensus within the international community with regard to the legal recognition of (non-binary) gender (identity), it referred towards the end of its judgment to the rights of privacy and self-determination as the underlying principles for

⁹⁹¹ See M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 2 March 2017), p. 47.

⁹⁹² More specific, the case dealt with the right to equality (Article 13 Interim Constitution), and the right to freedom (Article 12 Interim Constitution).

the legal protection of the third gender. Moreover, the Supreme Court refused to ignore the human rights of sexual minorities on the basis of the risk of social 'pollution'. Given the necessary equal treatment of persons on the basis of their gender (identity), the Court ordered to make the necessary arrangements, including making new laws or amending existing laws, to ensure that people of different gender identities could enjoy their rights without discrimination. Indeed, according to the Supreme Court, legal recognition and protection of the rights of persons of third gender responds to the commitments and duties of Nepal to the international community. The Supreme Court further ordered that the new Constitution adopted by the Constituent Assembly should guarantee non-discrimination on the ground of gender (identity).

The ruling of the Supreme Court drastically changed the legal position of persons who are non-conforming with regard to sex, sexual orientation and gender (identity), taking into account a clear human rights reasoning. Indeed, with this judgment the Supreme Court recognised that sexual minorities are a legitimate reality within society and their rights may not be ignored from a perspective of social justice.⁹⁹³ However, the Supreme Court consistently conflated 'sex' and 'gender (identity)' and sex registration and gender (identity) registration, when discussing the potential legal recognition of a third gender, by sometimes referring to persons of the 'third sex' and at other times to persons of the 'third gender' or 'transgender persons'.⁹⁹⁴ Moreover, the Supreme Court clearly misconstrued the meaning of 'variations of sex characteristics'. Indeed, according to the Supreme Court, "intersexuals are born naturally with the both genetic sex organs of male and female. [...] Their gender is determined on the basis of their sexual orientation when they

⁹⁹³ M.F. MOSCATI and H. PHUYAL, "The Third Gender Case' Decision of the Supreme Court of Nepal on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex People", *Journal of Comparative Law* 2009, Vol. 4, p. 296.

⁹⁹⁴ The conflation is partly explained by the historical and cultural presence of third gender persons in the Nepalese society, such as *hijras*. As discussed with regard to the Indian example, the term '*hijra*' refers to both (certain) transgender persons and persons with variations of sex characteristics.

become adult”.⁹⁹⁵ It therefore does not seem to recognise the possibility of persons with variations of sex characteristics identifying within the ‘male’/‘female’ binary. Interestingly, it even appears from the reasoning that the biological development of children with variations of sex characteristics specifically convinced the Supreme Court of the natural humanity of the non-binary, third gender.⁹⁹⁶ Thus, although the Court aspired to conceptually differentiate between sex, sexual orientation and gender (identity), it did not succeed. Indeed, in the end, the Court only seemed to distinguish ‘homosexuals and third gender people’ within the group of sexual minorities, with the latter including all transgender persons and persons with variations of sex characteristics.⁹⁹⁷ By tossing up the meaning of non-binary gender (identity), transgender, transsexual, sexual orientation and (variations of) sex characteristics, the Supreme Court found a constitutional right to legal recognition of a third gender, that is both overarching and underinclusive from a purely conceptual perspective. One could therefore conclude that the Supreme Court considers the category ‘third gender’ to be applicable to all persons who do not identify as ‘male’ or ‘female’,⁹⁹⁸ and all persons with variations of sex characteristics, considering the socially constructed rules regarding gender (identity) that accompany the binary sex system.

It is important to note that the Supreme Court extended the right to equal treatment also to sexual orientation, which – despite multiple connotations

⁹⁹⁵ Besides, the applicants also seem to include persons with variations of sex characteristics in the broad group of ‘third gender’ persons.

⁹⁹⁶ Indeed, the Supreme Court spoke of ‘natural persons’.

⁹⁹⁷ See M. BOCHENEK and K. KNIGHT, “Establishing a third gender category in Nepal: process and prognosis”, *Emory International Law Review* 2012, Vol. 26, p. 18-19. Sometimes the ‘third gender people’ also include non-heterosexual persons, even though the Supreme Court recognises at other instances that ‘sexual orientation’ in itself is not inherently related to gender (identity). See also M. BOCHENEK and K. KNIGHT, “Establishing a third gender category in Nepal: process and prognosis”, *Emory International Law Review* 2012, Vol. 26, p. 23.

⁹⁹⁸ See also M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 1 March 2017), p. 46.

with gender (identity) – it also based on the right to privacy and self-determination. Although the Supreme Court initially seemed to call for including non-heterosexual persons within the ‘third gender people’, it eventually correctly differentiated between sex/gender (identity) and sexual orientation.

Since the Supreme Court’s 2007 ruling, the Nepalese government progressively implemented the third gender category into the legal system. However, full implementation and consequent registration remain far from a reality.⁹⁹⁹ The government agreed with activists to ‘translate’ the third gender category to ‘other’.¹⁰⁰⁰ Since 2011, Nepal’s federal census also includes a third gender category.

§2.10. United States of America

In recent years, the States of California, Oregon and Washington have become the first American States to allow either the legal gender recognition of a non-binary gender (identity) or the recognition of a non-binary sex in the birth certificate.¹⁰⁰¹ In 2017 and 2018, Oregon and California also became the first States to introduce a non-binary gender option on licenses and identification cards, fully based on self-determination.¹⁰⁰² The innovation was aimed at all people whose gender (identity) does not correspond to the binary

⁹⁹⁹ M. BOCHENEK and K. KNIGHT, “Establishing a third gender category in Nepal: process and prognosis”, *Emory International Law Review* 2012, Vol. 26, p. 12; M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Sekseregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 28 February 2017), p. 47.

¹⁰⁰⁰ M. BOCHENEK and K. KNIGHT, “Establishing a third gender category in Nepal: process and prognosis”, *Emory International Law Review* 2012, Vol. 26, p. 13.

¹⁰⁰¹ See J.A. GREENBERG, “The Legal Status of Intersex Persons in the United States” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 340-343. See also <<https://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-non-binary-gender-status-n654611>> (last visited 28 August 2018). See also K. REINECK, “Running from the gender police: reconceptualizing gender to ensure protection for non-binary people”, *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 282-283.

¹⁰⁰² J.A. GREENBERG, “The Legal Status of Intersex Persons in the United States” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 340-343.

‘male’ and ‘female’ options.¹⁰⁰³ Since then, Arkansas, New Jersey, Maine, Minnesota, New York City, and Washington DC have followed these examples.¹⁰⁰⁴ The non-binary option is inclusive of both non-binary sex and gender options.

§2.11. Summary

This comparative study indicated that several countries already introduced – through legislation or case law – (a) non-binary option(s) for sex/gender registration. However, most examples cannot serve as a source of inspiration for the best practice model of non-binary sex registration. Indeed, the innovations made by the abovementioned jurisdictions all amount to some level or another to a conflation between sex registration and gender (identity) registration and/or do not legally acknowledge the existence of non-binary sex characteristics or the existence of a non-binary gender (identity) at the same time. This conflation is especially problematic – for both persons with variations of sex characteristics and non-binary persons – when a right to non-binary gender recognition is founded on the existence of a variation of sex characteristics.¹⁰⁰⁵ As DUNNE aptly concludes, such move

*“implicitly concedes that sex characteristics determine gender. If persons must be able to register a non-male/female gender because they have ambiguous genitalia, must all those persons who identify within the binary reproduce standard male and female anatomy?”*¹⁰⁰⁶

¹⁰⁰³ See <<https://www.theguardian.com/us-news/2017/jun/15/oregon-third-gender-option-identity-law>> (last visited 23 June 2017). See also P. NEWCOMBE, “Blurred Lines – Intersexuality and the Law: An Annotated Bibliography”, *Law Library Journal* 2017, Vol. 109(2), p. 237.

¹⁰⁰⁴ See J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 896-898.

¹⁰⁰⁵ See M. CARPENTER, “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p.445-513.

¹⁰⁰⁶ P. DUNNE, “Towards Trans and Intersex Equality: Conflict or Complementarity?” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 237. See in this regard also M. CARPENTER, “The ‘Normalisation’ of

The same conclusion is reached by CLARKE who argues that, although the legal accommodation of persons with variations of sex characteristics might eventually be to the benefit of non-binary (transgender) persons, there is a risk that legal recognition beyond M/F would be reserved to people with an immutable or natural biological trait, which is open to medical detection.¹⁰⁰⁷ Indeed, it is important to remind that most persons with variations of sex characteristics have a gender (identity) that conforms with the binary ‘male’/‘female’.¹⁰⁰⁸ It is therefore crucial not to lump *all* persons with variations of sex characteristics into a new collective (third) category, based on their perceived gender (identity).¹⁰⁰⁹ After all, doing so would still heavily conflate the concepts of ‘sex’ and ‘gender (identity)’.

§3. Proportionality of non-binary forms of official sex registration

When addressing the need to introduce (a) non-binary option(s) for sex registration, the question arises whether persons with variations of sex characteristics could be obliged to be registered under the non-binary sex option(s). According to the 2010 Opinion of the German Ethics Council with regard to ‘intersexuality’, which is regarded among intersex activists as a leading study concerning the rights of persons with variations of sex characteristics,¹⁰¹⁰ the compulsory categorisation of persons with variations of sex characteristics *as belonging to either the male or the female sex*

Intersex Bodies and ‘Othering’ of Intersex Identities” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 507.

¹⁰⁰⁷ J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 928-929.

¹⁰⁰⁸ See *supra* p. 70.

¹⁰⁰⁹ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”,

<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 14 December 2016), p. 15.

¹⁰¹⁰ NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 12 June 2017), p. 3.

constitutes a grave interference with the right to personality¹⁰¹¹ and the right to self-determination of the persons concerned.¹⁰¹² However, it has also been suggested in the literature that compulsory registration of persons with variations of sex characteristics *as (a form of) non-binary sex* would equally interfere with the right to personal autonomy.¹⁰¹³ It is argued that “having intersex as a third sex could lead to a situation in which liberty is, in fact, decreased due to a further stigmatisation of intersexual bodies”,¹⁰¹⁴ or that a third category consisting of a small minority would exacerbate the dominance of the binary ‘male’/‘female’.¹⁰¹⁵ The 2015 report on ‘intersex’ by the Council

¹⁰¹¹ The right to personal development is also recognised by the ECtHR under Article 8 ECHR, though not in the context of legal recognition of persons with variations of sex characteristics. Indeed, as mentioned above, most cases with regard to a person’s sexual identity deal with the right to gender recognition of a (post-operative) transsexual person. See for instance ECtHR 14 June 2016, 49304/09, *Birzietis v. Lithuania*, §32; 10 March 2015, 14793/08, *Y.Y. v. Turkey*, §57.

¹⁰¹² German Ethics Council, “Intersexuality”, <<http://www.ethikrat.org/files/opinion-intersexuality.pdf>> (last visited 13 March 2017), p. 130.

¹⁰¹³ M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 13 March 2017), p. 77; M. TRAVIS, “Accommodating Intersexuality in European Union Anti-Discrimination Law”, *European Law Journal* 2015, Vol. 21, p. 186; M. VAN DEN BRINK, “Mag het een hokje meer zijn? Ontwikkelingen rond seksregistratie [Can there be an extra box? Developments concerning sex registration]”, *Ars Aequi* 2016, p. 780; J.M. SCHERPE, “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 216. See also N. ALTHOFF, “Gender Diversity in Law: the German Perspective” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 395-396.

¹⁰¹⁴ M. TRAVIS, “Accommodating Intersexuality in European Union Anti-Discrimination Law”, *European Law Journal* 2015, Vol. 21, p. 186. See also COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 16 March 2017), p. 38.

¹⁰¹⁵ M. VAN DEN BRINK, “Mag het een hokje meer zijn? Ontwikkelingen rond seksregistratie [Can there be an extra box? Developments concerning sex registration]”, *Ars Aequi* 2017, p. 780. See also G. MAK, *Doubting Sex. Inscription, bodies and selves in the nineteenth century hermaphrodite case histories*, Manchester, Manchester University Press, 2012. See also H.G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender*

of Europe Commissioner for Human Rights also expressed concerns about the recognition of third and blank classifications, stating that these may lead to forced outings and cause increasing pressure on parents of children with variations of sex characteristics to avoid this additional stigma.¹⁰¹⁶ Indeed, any compulsory registration or legal conceptualisation of persons with variations of sex characteristics as a 'third'/non-binary sex/gender would ignore the lived gender (identities) of the majority of that group and, as CARPENTER holds, would "erect barriers to self-understanding and self-determination".¹⁰¹⁷ Moreover, it could strengthen the medicalisation of persons with variations of sex characteristics, as sex normalising treatment could be seen as a prerequisite for belonging to the binary.¹⁰¹⁸

However, as indicated above, if the model of sex registration is stripped of its conceptual conflation with gender (identity) registration and used to serve the legitimate aim of collecting statistical public health information, a fair balance could be struck between public interests and the right to personal autonomy, in spite of the compulsory 'categorisation' of the persons

& *Society* 2014, Vol. 29(3), p. 438. See also M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 14. See also J. KNOUSE, "Intersexuality and the social construction of anatomical sex", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12, p. 153-154. See also A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 524.

¹⁰¹⁶ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people", <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 13 July 2017), p. 38. See also P. NEWCOMBE, "Blurred Lines – Intersexuality and the Law: An Annotated Bibliography", *Law Library Journal* 2017, Vol. 109(2), p. 238 N. ALTHOFF, "Gender Diversity in Law: the German Perspective" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 401; M. CARPENTER, "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 485-486.

¹⁰¹⁷ M. CARPENTER, "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 490.

¹⁰¹⁸ *Ibid.*, p. 498-506.

concerned. Indeed, as mentioned above, the biological composition of a person's sex characteristics should be registered on the basis of a purely medical statement to serve the indicated legitimate aim. Given the fact that a person's recorded sex is actually not used for public purposes, complete confidentiality of the data could be assured. In any case, a person's biological sex should not be part of the civil status or be recorded in public records, such as the birth certificate. Besides, the registration model could even go further than a general sex categorisation and only register the concrete composition of certain, from a medical point of view, key sex characteristics, without referring to this composition as 'male', 'female' or 'non-binary/intersex/variations of sex characteristics'.¹⁰¹⁹ Given the clear negative consequences of the binary construction of sex in society for non-conforming persons, this radical decategorisation of biological sex in future registration frameworks might actually be preferable from a human rights perspective. Moreover, given the necessary protection of privacy with regard to a person's recorded sex, all government administrative bodies and third parties would have to prove the pertinence and proportionality in the light of a legitimate aim in order to make use of the data.

Lastly, it is suggested in the literature that reforming the current model of sex registration to include (a) non-binary option(s), could be disproportionate in the light of the financial and administrative burden for the government and the rights of the majority whose sex characteristics are either typically 'male' or 'female'.¹⁰²⁰ However, considering the fact that centuries of naturalisation of binary sex by the (international) legal system have complicated recourse to human rights law for sexual minorities, a fundamental challenge of the

¹⁰¹⁹ See in this regard also H. LAU, "Gender Recognition as a Human Right" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹⁰²⁰ M. VAN DEN BRINK and J. TIGCHELAAR, "M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]", <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 14 March 2017), p. 41. See also Cour de Cassation [Court of Cassation] (France) 4 May 2017, No. 531.

current model of sex registration is required to ensure that the legal system is capable of understanding, championing and fulfilling the rights of people with variations of sex characteristics in particular.¹⁰²¹ Indeed, although the German Constitutional Court for instance already acknowledged that a change to the registration framework could lead to additional bureaucracy or financial burdens for the government, it did not consider these arguments to be able to justify the discrimination of (non-binary) persons with variations of sex characteristics.¹⁰²² The Belgian Constitutional Court concurred with this statement in its ruling on the 2017 Gender Recognition Act.¹⁰²³ TRAVIS and GARLAND also argue that the State has a responsibility to redress ongoing social and legal inequalities that ‘intersex embodied people’ face.¹⁰²⁴ Moreover, a substantive State response acknowledges the role the law has played in creating and/or facilitating the conditions for problems around variations of sex characteristics to occur.¹⁰²⁵ VAN DEN BRINK and TIGCHELAAR also state that the severity of the breach of human rights (of trans* persons) cannot be overlooked when addressing the proportionality of any reform of the official sex registration system.¹⁰²⁶ Their report indicates that all studied countries that introduced (a) non-binary option(s) for sex/gender registration did not report severe problems of a legal or administrative nature that were caused by that introduction, both at the national and international level.¹⁰²⁷

¹⁰²¹ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 2. See also D. L. CLARK HOFMAN, "Male, Female and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law", *Tulane Journal of Law and Sexuality* 2012, Vol. 21, p. 19.

¹⁰²² Bundesverfassungsgericht [Federal Constitutional Court] (Germany) 10 October 2017, 2019/16.

¹⁰²³ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.6.6.

¹⁰²⁴ M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 1-21.

¹⁰²⁵ *Ibid.*, p. 16-19.

¹⁰²⁶ M. VAN DEN BRINK and J. TIGCHELAAR, "M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]", <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 14 March 2017), p. 41.

¹⁰²⁷ *Ibid.*, p. 75-79. See in this regard also M. VAN DEN BRINK and J. TIGCHELAAR, "Gender identity and registration of sex by public authorities" in EUROPEAN COMMISSION (ed.),

They pointed out that, although there are many international agreements and EU norms, mostly relating to transnational movement and exchange of information regarding foreign individuals, that demand information on the individual's sex, they hardly ever specify the form that information should take (binary or including (a) non-binary option(s)).¹⁰²⁸ Other current sex-related international and supranational provisions, such as for instance regarding protection of pregnancy or prohibition of discrimination, could not be regarded as limiting national possibilities to change national sex registration systems since States are generally free to offer more protection than the minimum described by those international instruments.¹⁰²⁹ Moreover, ignoring scientific reality jeopardises the law's ability to achieve (social) justice.¹⁰³⁰ Reflecting the natural human condition would not ask the law to perform the impossible task of single-handedly and immediately altering culture; it simply asks that the law ceases playing a role that prevents culture from changing, or changing more quickly.¹⁰³¹ From a human rights perspective, the recognition of biological truth is thus to end the insistence upon classifying each individual as either male or female before according full personhood before the law.¹⁰³²

C. Conclusion

Legislative innovations with regard to the prohibition of non-consensual and deferrable treatment on the sex characteristics of a person with variations of

"European equality law review. Issue 2/2015", <http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2955&Itemid=295> (last visited 20 June 2017), p. 35-38.

¹⁰²⁸ M. VAN DEN BRINK and J. TIGCHELAAR, "Gender identity and registration of sex by public authorities" in EUROPEAN COMMISSION (ed.), "European equality law review. Issue 2/2015", <http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2955&Itemid=295> (last visited 20 June 2017), p. 36.

¹⁰²⁹ Ibid., p. 37.

¹⁰³⁰ See in this regard also H.G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 424.

¹⁰³¹ E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 308.

¹⁰³² Ibid., p. 308.

sex characteristics would lead to an enhanced visibility of persons with variations of sex characteristics in society. However, for the time being, Belgian law, and especially the model of official sex registration, strongly expresses binary sex normativity. Moreover, the recorded binary sex, which is usually based on a superficial check of a new-born child's genitalia by a medical professional, is predominantly used for matters relating to a person's gender (identity)/expression.¹⁰³³ This finding is corroborated by the 2017 Gender Recognition Act, which enables the amendment of a person's registered sex in the light of their gender (identity), solely on the basis of self-determination. In other words, not only is the usage of sex registration conflated, its functionality is reduced when it no longer reflects a person's bodily composition, yet their gender (identity).¹⁰³⁴ The current binary model of sex registration thus not only excludes persons with variations of sex characteristics who did not or chose not to undergo sex assigning/normalising treatment, but it is also in many occasions impertinent to guarantee the achievement of its predominant legitimate aim, i.e. the collection of public health information to enable government processes. This chapter demonstrated that a person's registered sex should in any case not be any longer part of their legal identity (the civil status), and should be capable of reflecting at any moment in life a person's actual composition of sex characteristics.

Section 2 of this chapter made use of the hypothesis that the State would organise a system of official sex registration in order to achieve certain legitimate aims, predominantly related to the protection of public health. Although compulsory sex registration on the basis of a medical statement interferes with a person's right to personal autonomy, it is not disproportionate in the light of its legitimate aim if it is deconflated from registration of gender (identity). Indeed, sex registration through a model of self-declaration in order to preserve a person's self-determination, could

¹⁰³³ See in this regard also L. HERAULT et al., "Etat civil de demain et Transidentité. Note de synthèse", <http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/> (last visited 14 May 2018), p. 9.

¹⁰³⁴ Ibid., p. 8.

actually impede its biological truthfulness and therefore its functionality. Besides, sex registration needs to include persons with variations of sex characteristics by enabling (a) non-binary form(s) of registration, or even a registration purely based on the relevant characteristics. In this regard, international law seems to pose relatively few limitations.¹⁰³⁵ In the light of its legitimate aim, compulsory (non-binary) sex registration could fully abide by the necessary levels of privacy, as long as it is no longer perceived as an essential component of legal personhood.

Nevertheless, a better legal accommodation of the bodily variety of persons with variations of sex characteristics could also lead to increased visibility in society, and hence to increased vulnerability for discrimination. TRAVIS and GARLAND state in this regard that “legal recognition is not always a liberating experience and there is a danger that law could actually decrease the resilience of intersex embodied people”.¹⁰³⁶ The last part of this chapter will therefore address the position of persons with variations of sex characteristics in present non-discrimination law.

3. Discrimination of persons with variations of sex characteristics

According to the Council of Europe Commissioner for Human Rights, persons with variations of sex characteristics, especially those who do not (choose to) conform to society’s binary sex normativity,¹⁰³⁷ are vulnerable to discrimination and abuse in all spheres of life.¹⁰³⁸ Indeed, the general lack of

¹⁰³⁵ M. VAN DEN BRINK and J. TIGCHELAAR, “Gender identity and registration of sex by public authorities” in EUROPEAN COMMISSION (ed.), “European equality law review. Issue 2/2015”, <http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2955&Itemid=295> (last visited 20 June 2017), p. 39.

¹⁰³⁶ M. TRAVIS and F. GARLAND, “Legislating Intersex Equality: Building the Resilience of Intersex People through Law”, *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 2.

¹⁰³⁷ It needs to be reminded that certain persons with variations of sex characteristics might have the legitimate desire to conform to social expectations about sex and therefore undergo treatment on their sex characteristics.

¹⁰³⁸ See M. BLONDIN and C. BOUCHOUX, “Rapport d’Information fait au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les variations du développement sexuel: lever un tabou, lutter contre la stigmatisation et les

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knowledge about variations of sex characteristics in society can result in the perpetration of discrimination with impunity especially in the absence of specific non-discrimination guarantees.¹⁰³⁹ The Commissioner's 2015 report indicates that persons with variations of sex characteristics may experience various forms of discrimination, not only based on visible physical differences, sex characteristics or infertility but also on what perpetrators see as gender non-conformity in behaviour, appearance or in both.¹⁰⁴⁰ Reported cases are varied:¹⁰⁴¹ direct and indirect discrimination in access to sports competitions,¹⁰⁴² access to health care services (e.g. medical treatment may

exclusions", <http://www.senat.fr/rap/r16-441/r16-441_mono.html> (last visited 22 June 2017), p. 66.

¹⁰³⁹ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people",

<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 17 March 2017), p. 43.

¹⁰⁴⁰ Ibid., p. 43; J. VAN LISDONK, "Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]", <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 20 March 2017), p. 53.

¹⁰⁴¹ See D.C. GHATTAS, "Standing Up for the Human Rights of Intersex People" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 432-436.

¹⁰⁴² The highly mediatised case of Caster Semenya is probably the best known example of the struggles that persons with variations of sex characteristics face with regard to sports competitions. Semenya was temporarily withdrawn from international competition until she was cleared by the International Association of Athletics Federations (IAAF). In April 2018, the IAAF released new 'Eligibility Regulations for Female Classification' for certain events. According to the IAAF's website, "the new regulations require any athlete who has a Difference of Sexual Development (DSD) that means her levels of circulating testosterone (in serum) are five (5) nmol/L or above and who is androgen-sensitive to meet the following criteria to be eligible to compete in Restricted Events in an International Competition (or set a world record in a Restricted Event at competition that is not an International Competition): (a) she must be recognised at law either as female or as intersex (or equivalent); (b) she must reduce her blood testosterone level to below five (5) nmol/L for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and (c) thereafter she must maintain her blood testosterone level below five (5) nmol/L continuously (ie: whether she is in competition or out of competition) for so long as she wishes to remain eligible". After a challenge by Semenya, the Court of Arbitration for Sport (CAS) found the regulations not to be discriminatory on the basis of legal sex or innate biological characteristics. Although the CAS argued that the regulations treated females with a 46 XY variation of sex characteristics

only be available to the one or the other sex, despite the presence of incongruent sex characteristics, social security coverage for certain expenses), bullying,¹⁰⁴³ teasing,¹⁰⁴⁴ physical violence and hate speech.¹⁰⁴⁵ Moreover, persons with variations of sex characteristics are at the intersection of several forms of discrimination. After all, Chapter II of this thesis already pointed out that the dominant treatment model of variations of sex characteristics has been based on motives related to society's heteronormativity (i.e. enabling heterosexual penetrative sex) and cisnormativity (i.e. securing congruence between sex and gender (identity)). However, research also indicates that persons with variations of sex

differently from all other females, it considered them to be necessary, reasonable and proportionate to achieve the legitimate objective of guaranteeing fairness in competitive female athletics. Since, according to the CAS, the reason for the separation between male and female categories in competitive athletics is founded on biology, other than legal status or gender identity, the exposure to levels of circulating testosterone in the adult male range is necessary to ensure that females do not have to compete against persons who enjoy a performance advantage. Indeed, the CAS considered the exposure to adult male testosterone levels the only competitive factor that only men have access to. Nevertheless, the CAS warned that the regulations might have to be amended in the future if it would provide to be impossible for an athlete to comply with the necessary testosterone levels through no fault of her own. Semenya appealed against the decision before the Swiss Supreme Court. Awaiting its judgment, the Supreme Court suspended the IAAF's DSD regulations on 31 May 2019. Interestingly, the organisation of competitive sports along the 'male/female' binary was not included in the initial challenge. The CAS therefore evaluated the IAAF's regulations from the perspective of the binary. See <<https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica>> and <<https://www.tas-cas.org/en/general-information/news-detail/article/semenya-asa-and-iaaf-executive-summary.html>> (last visited 2 May 2019).

¹⁰⁴³ J. VAN LISDONK, "Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with variations of sex characteristics. A preliminary research of the living conditions of persons with intersex/DSD]", <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 29 March 2017), p. 54.

¹⁰⁴⁴ D. MACKENZIE, A. HUNTINGTON and J.A GILMOUR, "The experience of people with an intersex condition: a journey from silence to voice", *Journal of Clinical Nursing* 2009, Vol. 18, p. 1779.

¹⁰⁴⁵ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people", <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 17 March 2017), p. 43-44.

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characteristics whose conditions do not lead to visible atypical sex characteristics, do not necessarily experience discrimination.¹⁰⁴⁶

By applying so-called self-management/self-stigmatisation through limited personal openness and the avoiding of certain situations and places, persons with variations of sex characteristics may protect themselves against possible unwanted reactions and situations.¹⁰⁴⁷ Even though it is argued that openness about one's variation of sex characteristics is beneficial in the process of self-acceptance and the creation of a positive self-image,¹⁰⁴⁸ this voluntary invisibility, often incited by shame due to ignorance, and discomfort of others, makes it difficult to paint a comprehensive picture of all forms of discrimination that persons with variations of sex characteristics face.¹⁰⁴⁹ While qualitative research based on interviews indicates that most persons

¹⁰⁴⁶ See N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 38.

¹⁰⁴⁷ J. VAN LISDONK, "Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with variations of sex characteristics. A preliminary research of the living conditions of persons with intersex/DSD]", <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 20 March 2017), p. 52-53. See also NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, "Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]", <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 67. See also N. CALLENS, C. LONGMAN and J. MOTMANS, "Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]", <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 36.

¹⁰⁴⁸ D. MACKENZIE, A. HUNTINGTON and J.A. GILMOUR, "The experience of people with an intersex condition: a journey from silence to voice", *Journal of Clinical Nursing* 2009, Vol. 18, p. 1777. See also NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, "Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]", <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 62.

¹⁰⁴⁹ J. VAN LISDONK, "Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]", <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 20 March 2017), p. 52.

with variations of sex characteristics align their gender (identity) with the sex they had been assigned at birth, persons concerned nevertheless spoke of the need to be conscious of how they looked, walked and acted to ensure that the assignment was upheld.¹⁰⁵⁰ Besides, it is possible that persons with variations of sex characteristics do not experience undesirable reactions as non-acceptation or discrimination,¹⁰⁵¹ on the basis of a (perceived) lack of intention to hurt the person concerned.¹⁰⁵² Indeed, so-called ‘modern interphobia’ occurs when a person rationally understands that a person’s difference should not lead to discriminating treatment, yet implicitly enforces stereotypes based on binary normativity.¹⁰⁵³ Nevertheless, research indicates that less understanding is shown for undesirable reactions, ignorance and a lack of respect by medical professionals.¹⁰⁵⁴ Where interviewed individuals

¹⁰⁵⁰ D. MACKENZIE, A. HUNTINGTON and J.A GILMOUR, “The experience of people with an intersex condition: a journey from silence to voice”, *Journal of Clinical Nursing* 2009, Vol. 18, p. 1778-1779.

¹⁰⁵¹ See NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 61.

¹⁰⁵² J. VAN LISDONK, “Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]”, <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 12 April 2017), p. 54. See also NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 10 May 2017), p. 65.

¹⁰⁵³ NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, “Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]”, <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 9 May 2017), p. 65-66.

¹⁰⁵⁴ J. VAN LISDONK, “Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]”, <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 25 April 2017), p. 11. See also N. CALLENS, C. LONGMAN and J. MOTMANS, “Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders],

spoke of recurring medical examinations or treatments, often with others present ‘learning’ about variations of sex characteristics and/or taking photographs, the feelings of shame, vulnerability, offence, and anger were greater.¹⁰⁵⁵ Moreover, qualitative research from Australia indicated that the levels of school attendance by children with variations of sex characteristics were significantly lower, due to bullying, pubertal development, and continued hormonal and surgical treatments and examinations.¹⁰⁵⁶ Many human rights scholars and activists therefore link the presence of a variation of sex characteristics to experiences of discrimination, yet are confronted with very limited information.¹⁰⁵⁷

It is important to note that a renewed and deconflated legal conceptualisation of ‘sex’ would not necessarily mean that ‘sex’ would become meaningless in the law and society. Indeed, as mentioned above, registration of sex could still serve a legitimate aim, such as the collection of public health information for the organisation of preventive cancer screenings. Differentiation on the basis of sex in government processes would therefore still be possible, when desirable. Moreover, deconflating and

<<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 38.

¹⁰⁵⁵ D. MACKENZIE, A. HUNTINGTON and J. A. GILMOUR, “The experiences of people with an intersex condition: a journey from silence to voice”, *Journal of Clinical Nursing* 2009, Vol. 18, p. 1776; J. VAN LISDONK, “Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]”, <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 25 April 2017), p. 54-55. See also N. CALLENS, C. LONGMAN and J. MOTMANS, “Intersekse/DSD in Vlaanderen [Intersex/DSD in Flanders]”, <<http://www.gelijkekansen.be/Portals/GelijkeKansen/Documents/Samenvatting%20rapport%20intersekse%20dsd%20Vlaanderen.pdf>> (last visited 23 August 2018), p. 62.

¹⁰⁵⁶ T. JONES, B. HART, M. CARPENTER, G. ANSARA, W. LEONARD, J. LUCKE, “Intersex: Stories and Statistics from Australia”, <<https://interactadvocates.org/wp-content/uploads/2016/01/Intersex-Stories-Statistics-Australia.pdf>> (last visited 11 June 2018), p. 130.

¹⁰⁵⁷ J. VAN LISDONK, “Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with intersex/DSD. A preliminary research of the living conditions of persons with intersex/DSD]”, <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 29 March 2017), p. 54.

opening up sex registration in order to properly include persons with variations of sex characteristics, would not automatically eradicate physical violence or hate speech on the basis of sex characteristics. The abolishment of sex as a matter of legal personhood thus would not lead to redundancy of non-discrimination legislation for persons with variations of sex characteristics, even though it could considerably stimulate cultural acceptance of the latter group. Indeed, the widespread practice of sex assigning/normalising treatment on persons with variations of sex characteristics to enforce the binary sex categories on their bodies, has literally led to the invisibility of persons with variations of sex characteristics within anti-discrimination cases on the basis of sex *sensu stricto*,¹⁰⁵⁸ and their invisibility in society in general. On the other hand, TRAVIS and GARLAND have argued that a sole focus on non-discrimination of persons with variations of sex characteristics as a form of formal equality would not in itself challenge the medicalisation of variations of sex characteristics, since non-discrimination law is not designed to prohibit medical interventions, making it unclear how far such provisions would shift power away from the medical jurisdiction towards individuals with variations of sex characteristics.¹⁰⁵⁹ Protecting sex characteristics as a prohibited ground for discrimination is therefore closely related to legal reforms concerning the prevalence of sex assigning/normalising treatment and official sex registration.

The report by the CoE Commissioner for Human Rights indicates that persons with variations of sex characteristics may be vulnerable to hate speech and/or physical violence in instances in which they either disclose their variation of sex characteristics or if their behaviour and/or outer appearance do not match stereotypical notions of male and female norms.¹⁰⁶⁰ This part of the

¹⁰⁵⁸ M. TRAVIS, "Accommodating Intersexuality in European Union Anti-Discrimination Law", *European Law Journal* 2015, Vol. 21, p. 183-185.

¹⁰⁵⁹ M. TRAVIS and F. GARLAND, "Legislating Intersex Equality: Building the Resilience of Intersex People through Law", *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 6.

¹⁰⁶⁰ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people", <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&In>

thesis will therefore depart from the hypothesis that any change in the legislative framework to protect persons with variations of sex characteristics against discrimination, must be complemented by a similar change in the legislative framework concerning hate speech and violence.

The next section will first establish the current stance of Belgian anti-discrimination legislation. This framework will then be subsequently analysed in the light of the ‘best practice’ legal system. As explained in Chapter I, this best practice is deduced from various sources, such as international (soft) law, foreign law, (inter)national case law and scholarship.

A. Belgian non-discrimination legislation

The Belgian legal framework comprehensively prohibits discrimination on the basis of sex. In 2002, the federal Parliament included a special provision in Article 10 of the Constitution, which holds the principle of equality. Since then, subsection 3 states:

“De gelijkheid van vrouwen en mannen is gewaarborgd. [The equality between women and men is guaranteed.]”

According to the parliamentary preparatory works, Parliament and the federal government wanted to acknowledge the symbolic importance of the provision, in order to affirm the full inclusion of women within the law and society.¹⁰⁶¹ In other words, the provision does not aim to serve as a *lex generalis* with regard to equal treatment on the basis of the broadly defined concept of ‘sex’, but is focused on equal treatment between the categories ‘men’ and ‘women’. According to the Belgian Constitutional Court, the provision should not be interpreted as reflecting a fundamental binary conceptualisation of the Belgian constitutional order,¹⁰⁶² nor as preventing

stranetImage=2933521&SecMode=1&DocId=2367288&Usage=2> (last visited 17 March 2017), p. 43.

¹⁰⁶¹ *Parl.Doc.* Chamber of representatives, 50-1140/002.

¹⁰⁶² Grondwettelijk Hof [Constitutional Court] (Belgium) 20 October 2004, 159/2004, §B.5.6; 19 June 2019, 99/2019, §B.6.6.

the adoption of measures to fight inequalities on the basis of non-binary gender (identities).¹⁰⁶³

In the Belgian federal State structure, the competence to adopt non-discrimination legislation is shared between the federal level, the regions¹⁰⁶⁴ and the communities¹⁰⁶⁵ and is connected to their material competences. All adopted acts, which prohibit discrimination based on a closed system of discrimination grounds, are based on several directives of the European Union, that harmonised non-discrimination legislation within the internal market, i.e.:

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;
- Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women;
- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, amended by Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002;
- Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, amended by Council Directive 96/97/EC of 20 December 1996;
- Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex;
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;

¹⁰⁶³ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.6.6.

¹⁰⁶⁴ Flemish Region, Walloon Region and Brussels-Capital Region.

¹⁰⁶⁵ Flemish Community, French Community and German-Speaking Community.

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- Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood;
- Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

The Belgian non-discrimination acts currently in force are:

- Wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie [Act of 10 May 2007 combatting certain forms of discrimination] (federal level);
- Wet van 10 mei 2007 ter bestrijding van discriminatie tussen vrouwen en mannen [Act of 10 May 2007 combatting discrimination between women and men] (federal level);¹⁰⁶⁶
- Decreet van 10 juli 2008 houdende een kader voor het Vlaamse gelijke kansen- en gelijkebehandelingsbeleid [Decree of 10 July 2008 holding a framework for the Flemish equal opportunities and equal treatment policy] (Flemish Region and Flemish Community);
- Décret de 6 novembre 2008 relatif à la lutte contre certaines formes de discrimination [Decree of 6 November 2008 combatting certain forms of discrimination] (Walloon Region);
- Décret de 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination [Decree of 12 December 2008 combatting certain forms of discrimination] (French Community);
- Décret de 19 mars 2012 visant à lutter contre certaines formes de discrimination [Decree of 19 March 2012 to combat certain forms of discrimination] (German-Speaking Community);
- Ordonnantie van 4 september 2008 betreffende de strijd tegen discriminatie en de gelijke behandeling op het vlak van de

¹⁰⁶⁶ Note that the federal anti-discrimination legislation is split into two acts. The second act is the most important for this thesis, since it addresses discrimination on the basis of sex *sensu lato*.

tewerkstelling [Ordonnance of 4 September 2008 concerning the combat against discrimination and equal treatment with regard to employment]; Ordonnantie van 5 oktober 2017 ter bestrijding van bepaalde vormen van discriminatie en ter bevordering van gelijke behandeling [Ordonnance of 5 October 2017 concerning the combat of certain forms of discrimination and concerning the promotion of equal treatment] (Brussels-Capital Region).

All mentioned acts prohibit both direct and indirect discrimination on the basis of sex within the sphere of competences of the State entity concerned.¹⁰⁶⁷ The discrimination ground 'sex' is not defined. However, all acts align other concepts to 'sex', thus giving some interpretation of the concept. Interestingly, this alignment is different between the various pieces of legislation. Indeed, in the model of the federal level,¹⁰⁶⁸ the Flemish Region and Community,¹⁰⁶⁹ the French Community,¹⁰⁷⁰ and the Brussels-Capital Region,¹⁰⁷¹ 'sex' is interpreted as, *inter alia*,¹⁰⁷² also including 'gender identity', 'gender expression' and 'transsexuality/change of sex'. In the model of the Walloon Region,¹⁰⁷³ and the German-Speaking Community,¹⁰⁷⁴ 'sex' also includes 'transsexuality/change of sex', but there is no mention of gender (identity) and/or gender expression. None of the acts explicitly mentions discrimination on the basis of a variation of sex characteristics or sex

¹⁰⁶⁷ All acts include specific and general justification grounds for both direct and indirect discrimination on the basis of sex. The acts also enable positive action on the basis of sex.

¹⁰⁶⁸ Article 4, §2-3 Act of 10 May 2007 combatting discrimination between women and men, *Belgian Gazette* 30 May 2007.

¹⁰⁶⁹ Article 16, §3, §5 Decree (Flemish Region & Community) of 10 July 2008 holding a framework for the Flemish equal opportunities and equal treatment policy, *Belgian Gazette* 23 September 2008.

¹⁰⁷⁰ Article 2, 3° Decree (French Community) of 12 December 2008 combatting certain forms of discrimination, *Belgian Gazette* 13 January 2009.

¹⁰⁷¹ Article 8, §3 Ordonnance (Brussels-Capital Region) of 5 October 2017 concerning the combat of certain forms of discrimination and concerning the promotion of equal treatment, *Belgian Gazette* 19 October 2017.

¹⁰⁷² Other alignments include pregnancy, childbirth and motherhood.

¹⁰⁷³ Article 3, 2° Decree (Walloon Region) of 6 November 2008 combatting certain forms of discrimination, *Belgian Gazette* 19 December 2008.

¹⁰⁷⁴ Article 3, 1° Decree (German-Speaking Community) of 19 March 2012 to combat certain forms of discrimination, *Belgian Gazette* 5 June 2012.

characteristics as falling under the prohibited sex discrimination. However, the parliamentary preparatory works of the federal and the Flemish acts indicate the willingness of the legislature to include persons with variations of sex characteristics under the non-discrimination legislation. Indeed, according to the preparatory works, persons with variations of sex characteristics (“*interseksuelen*”) are included within the umbrella term of ‘transgender persons’ for whom the discrimination grounds ‘gender identity’ and ‘gender expression’ were introduced.¹⁰⁷⁵ The acts thus do not address the conceptual difference between ‘sex (characteristics)’ and ‘gender (identity)/gender expression’, neither *in abstracto*, nor specifically in relation to discrimination of persons with variations of sex characteristics, yet align gender discrimination with sex discrimination.¹⁰⁷⁶

As mentioned above, all Belgian non-discrimination acts are based on directives by the European Union. In this regard, it is interesting to note that the alignment of discrimination on the basis of ‘gender identity’/‘gender expression’ – interpreted as either also holding ‘variations of sex characteristics’ or not – with discrimination on the basis of ‘sex’ was not explicitly obliged by EU law, nor by case law of the EU Court of Justice. In the landmark case *P. v. S. and Cornwall County Council*, the Court of Justice held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or the other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.¹⁰⁷⁷ In other words, the Court of Justice limited the extension of the interpretation of ‘sex’ discrimination to (pre- or post-operative) transsexuality, and continued to make use of a binary

¹⁰⁷⁵ *Parl.Doc.* Chamber of representatives, 53-3483/003, p. 3; *Parl.Doc.* Flemish Parliament, 2013-14, 2413/1, p. 5-6. Note that persons with variations of sex characteristics were not mentioned in the preparatory works of the extension of the discrimination ground ‘sex’ in the French Community.

¹⁰⁷⁶ As mentioned above, most issues that persons with variations of sex characteristics face are not related to their gender (identity), but to (treatment on) their sex characteristics.

¹⁰⁷⁷ CJEU 30 April 1996, C-13/94, *P. v. S. and Cornwall County Council*.

conceptualisation of 'sex'.¹⁰⁷⁸ Additionally, no case of discrimination against persons with variations of sex characteristics has yet reached the Court of Justice to challenge the current understanding of 'sex' discrimination.¹⁰⁷⁹ Nevertheless, the EU Fundamental Rights Agency has called for at least extending the interpretation of 'sex' in equal treatment directives to also include 'intersex/DSD' or 'sex characteristics', or even the introduction of a new discrimination ground.¹⁰⁸⁰

B. Evaluation of the Belgian legal framework

I. Towards a specific non-discrimination ground

Chapter II of this thesis addressed the societal non-conformity of persons with variations of sex characteristics. This non-conformity leads to a so-called 'social emergency',¹⁰⁸¹ since persons with variations of sex characteristics challenge by their very presence the basic organisation of society along the binary sex model. Although the law in itself is not able to solely change the binary normativity of society in the short term, it can offer protection to non-conforming persons on the basis of anti-discrimination legislation.

¹⁰⁷⁸ M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 53; M. TRAVIS, "Accommodating Intersexuality in European Union Anti-Discrimination Law", *European Law Journal* 2015, Vol. 21, p. 185. See also COLLEGE VOOR DE RECHTEN VAN DE MENS, "Achtergrondrapport Wetswijziging Agwb [Background report Amendment General Equal Treatment Act]", <<https://www.mensenrechten.nl/publicaties/detail/36909>> (last visited 23 March 2017), p. 8.

¹⁰⁷⁹ S. AGIUS and C. TOBLER, "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression", <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 23 March 2017), p. 82.

¹⁰⁸⁰ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, "The fundamental rights situation of intersex people", <<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>> (last visited 23 March 2017), p. 3.

¹⁰⁸¹ See H.G. BEH and M. DIAMOND, "David Reimer's Legacy: Limiting Parental Discretion", *Cardozo Journal of Law & Gender* 2005-06, Vol. 12(5), p. 13; H. G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 441. See also D.C. GHATTAS, "Standing Up for the Human Rights of Intersex People" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 431.

The invisibility of persons with variations of sex characteristics in European and national legislation and case law speaks volumes about the lack of knowledge about variations of sex characteristics¹⁰⁸² and its invisibility in society as well as about the lack of protection of the individuals concerned against human rights violations.¹⁰⁸³ Indeed, cases concerning persons with variations of sex characteristics before courts in Europe are extremely rare¹⁰⁸⁴. Although international human rights are universal and several international non-discrimination provisions – such as Article 14 ECHR – are characterised by their open wording, it is argued that specific non-discrimination provisions increase the visibility of the group in question, promote equality and raise attention for the specificities of their situation.¹⁰⁸⁵ However, only a very limited number of jurisdictions worldwide have addressed discrimination of persons with variations of sex characteristics through inclusive interpretation of existing non-discrimination legislation or the introduction of a separate ground. Moreover, even in the latter case, only six countries (Australia, Bosnia and Herzegovina, Greece, Malta, the Netherlands and Portugal) and three Spanish autonomous regions (Basque country, Madrid and Murcia) managed to acknowledge the conceptual difference between a person's sex, gender (identity) and gender expression.

¹⁰⁸² See for instance the remarks made by the UN High Commissioner for Human Rights at the 2015 Expert meeting on ending human rights violations against persons with variations of sex characteristics: "When I started as High Commissioner a year ago, I knew little about intersex people. I don't think I was alone in this: it reflects a general lack of awareness. Too many people assume, without really thinking about it, that everyone can be fitted into two distinct and mutually exclusive categories: male or female." See <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431>> (last visited: 29 March 2017).

¹⁰⁸³ S. AGIUS and C. TOBLER, "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression", <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 23 March 2017), p. 83.

¹⁰⁸⁴ *Ibid.*, p. 83.

¹⁰⁸⁵ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people", <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 21 March 2017), p. 44. See also W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 3. The same question was addressed with regard to women's rights.

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Indeed, they introduced new non-discrimination grounds such as ‘intersex status’, ‘intersexuality’, and ‘sex characteristics’.¹⁰⁸⁶

However, it has also been argued in the literature that there is actually no true legal necessity to expand current non-discrimination legislation with an additional ground for persons with variations of sex characteristics, such as ‘sex characteristics’ or ‘intersex/DSD status’.¹⁰⁸⁷ Indeed, given the fact that discrimination of persons with variations of sex characteristics on the basis of their condition in present society is strongly linked to the (biological and legal) sex assigned to a person at birth and its direct consequences,¹⁰⁸⁸ an authoritative interpretation by the legislature or the courts could explicitly align ‘sex characteristics/intersex/DSD’ with ‘sex’.¹⁰⁸⁹ However, it is of course important that such interpretation would be accompanied by a legal conceptualisation of ‘sex’, that allows for (a) non-binary option(s),¹⁰⁹⁰ which would not necessarily be self-evident for a judge. Nevertheless, if the Belgian

¹⁰⁸⁶ As mentioned above, the introduction of a specific non-discrimination ground for persons with variations of sex characteristics does not necessarily lead to an increased protection of their human rights. Indeed, a 2016 ruling of the Australian Family Court affirmed that parents can consent to cosmetic genital surgery on their infant child, even when it results in irreversible sterility. See Family Court of Australia 20 January 2016, Carla (Medical Procedure). See also M. TRAVIS and F. GARLAND, “Legislating Intersex Equality: Building the Resilience of Intersex People through Law”, *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 11; M. CARPENTER, “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p.446, 474-482.

¹⁰⁸⁷ COLLEGE VOOR DE RECHTEN VAN DE MENS, “Achtergrondrapport Wetswijziging Agwb [Background report Amendment General Equal Treatment Act]”, <<https://www.mensenrechten.nl/publicaties/detail/36909>> (last visited 27 March 2017), p. 4.

¹⁰⁸⁸ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, “The fundamental rights situation of intersex people”, <<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>> (last visited 27 March 2017), p. 3.

¹⁰⁸⁹ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 27 March 2017), p. 46.

¹⁰⁹⁰ M. TRAVIS, “Accommodating Intersexuality in European Union Anti-Discrimination Law”, *European Law Journal* 2015, Vol. 21, p. 185-186.

federal legislature would, following the Constitutional Court's ruling on the 2017 Gender Recognition Act, introduce one or more non-binary categories for sex registration at birth, binary sex normativity among judges would probably be much reduced.

Others, such as VAN DEN BRINK & DUNNE, Amnesty International¹⁰⁹¹ and Nederlandse Organisatie voor Seksediversiteit (NNID),¹⁰⁹² have suggested that a specific provision for persons with variations of sex characteristics, such as 'sex characteristics' or 'intersex/DSD status', would have the advantage of serving legal certainty and of playing an educational role for society at large as well as providing visibility to a marginalised group.¹⁰⁹³ Such need for specific attention for marginalised groups suffering from intersectional discrimination, such as persons with variations of sex characteristics, through tailored policies, is also reflected by Resolution 2016/2096(INI), which was adopted by the European Parliament in February 2017. In its advisory report to the Dutch parliament, the Dutch College for Human Rights even considered there to be a societal wish to increase the visibility of discrimination suffered

¹⁰⁹¹ AMNESTY INTERNATIONAL, "First, do no harm. Ensuring the rights of children with variations of sex characteristics in Denmark and Germany", <<https://www.amnesty.org/en/documents/eur01/6086/2017/en/>> (last visited 11 May 2017), p. 46-48.

¹⁰⁹² NEDERLANDSE ORGANISATIE VOOR SEKSE DIVERSITEIT, "Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]", <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 15 May 2017), p. 61.

¹⁰⁹³ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, "Human Rights and intersex people", <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 27 March 2017), p. 46; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, "The fundamental rights situation of intersex people", <<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>> (last visited 27 March 2017), p. 3. See also P. DUNNE and J. MULDER, "Beyond the Binary: Towards a Third Sex Category in Germany?", *German Law Journal* 2018, Vol. 19, p. 638. See also M. VAN DEN BRINK, "The Legal Status of Intersex Persons in the Netherlands" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 292; M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 10, 46-47.

by persons with variations of sex characteristics through the introduction of a separate non-discrimination ground.¹⁰⁹⁴ Moreover, failing to explicitly acknowledge that discrimination occurs on the grounds of a person's sex characteristics, e.g. because of an actual or perceived incongruence between them, disavows the root cause of rights abuses for certain persons with variations of sex characteristics.¹⁰⁹⁵ In any case, every alignment of the issues that persons with variations of sex characteristics face in relation to their sex characteristics with the ground 'gender identity/gender expression' should be avoided.¹⁰⁹⁶

II. The role of the EU

As mentioned above, all Belgian non-discrimination acts are based on directives stemming from the European Union. The natural *locus* to improve the legal status of persons with variations of sex characteristics with regard to non-discrimination would therefore be EU law. However, it is questionable whether progress could be expected at short notice.¹⁰⁹⁷ Indeed, the constituent Treaty on the European Union clearly conceptualises 'sex' in a dichotomous manner, focussing on the equality between women and men,¹⁰⁹⁸ which was affirmed by the case law of the Court of Justice and the spirit of the 'Recast' Equal Treatment Directive, a consolidating measure that attempted to amalgamate EU anti-discrimination law that concerned sex and

¹⁰⁹⁴ COLLEGE VOOR DE RECHTEN VAN DE MENS, "Achtergrondrapport Wetswijziging Agwb [Background report Amendment General Equal Treatment Act]", <<https://www.mensenrechten.nl/publicaties/detail/36909>> (last visited 27 March 2017), p. 4.

¹⁰⁹⁵ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 2.

¹⁰⁹⁶ S. AGIUS and C. TOBLER, "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression", <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 27 March 2017), p. 82.

¹⁰⁹⁷ See NEDERLANDSE ORGANISATIE VOOR SEKSEDIVERSITEIT, "Standpunten & Beleid. Sekse als continuüm, zonder taboe en zonder sociale- of medische stereotypering, voor 2025 [Opinions & Policy. Sex as continuum, without taboo and without social or medical stereotyping, before 2025]", <http://nnid.nl/files/10/NNID-Standpunten-en-Beleid-2013-2014-V1_0.pdf> (last visited 15 May 2017), p. 61.

¹⁰⁹⁸ See Articles 2 and 3(2) TEU.

gender into a singular piece of legislation.¹⁰⁹⁹ In this regard, it is unlikely that, in the near future, the EU secondary legislature or the Court of Justice would interpret the existing ground ‘sex’ broadly, in order to include non-binary individuals (both with regard to sex and gender (identity)), such as (certain) persons with variations of sex characteristics, or would introduce a new non-discrimination ground ‘sex characteristics’, without an extension of the EU’s competences through a formal Treaty revision.¹¹⁰⁰ Nevertheless, in a 2019 Resolution “on the rights of intersex people”, the European Parliament deplored “the lack of recognition of sex characteristics as a ground of discrimination across the EU”.¹¹⁰¹ Beyond this, it is important to realise that EU non-discrimination law is but a minimum regime which does not prevent the Member States from providing for protection against discrimination on additional grounds and more generally for better protection of victims of discrimination.¹¹⁰² Moreover, inspiration also cannot be found in the ECtHR’s case law. The Court has thus far not addressed cases concerning persons with variations of sex characteristics under Article 14 ECHR, nor interpreted the prohibition of sex discrimination in a non-binary manner. This thesis therefore urges Belgian legislators to proceed with the better protection of persons with variations of sex characteristics in non-discrimination legislation, independently from evolutions at the European level (both EU and Council of Europe).

¹⁰⁹⁹ M. TRAVIS, “Accommodating Intersexuality in European Union Anti-Discrimination Law”, *European Law Journal* 2015, Vol. 21, p. 189.

¹¹⁰⁰ S. AGIUS and C. TOBLER, “Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression”, <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 27 March 2017), p. 87. See also M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 53-54.

¹¹⁰¹ EUROPEAN PARLIAMENT, “Resolution on the rights of intersex people”, <http://www.europarl.europa.eu/doceo/document/B-8-2019-0101_EN.html?redirect> (last visited 21 February 2019).

¹¹⁰² S. AGIUS and C. TOBLER, “Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression”, <<http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>> (last visited 27 March 2017), p. 87.

C. Conclusion

In conclusion, it can be argued that, even though there appears to be no strict legal necessity to explicitly expand present non-discrimination legislation with a separate ground ‘sex characteristics’ there is a social and legal wish to do so.¹¹⁰³ Indeed, as Advocate-General Elmer pointed out in his opinion to the *P. v. S. Cornwall County Council* case, non-discrimination law needs to be adjusted to society.¹¹⁰⁴ Moreover, O’BRIEN argues that a *fundamental* challenge to the present law is required to ensure that the human rights system is capable of understanding, championing and fulfilling the rights of people with variations of sex characteristics.¹¹⁰⁵ In this regard, when introducing a new non-discrimination ground, it is commendable to choose ‘sex characteristics’ over ‘intersex status’, since the latter concept inevitable requires some affirmative action through self-identification by the individual (or the legal representative) to ‘activate’ their legal protection.¹¹⁰⁶ Choosing ‘sex characteristics’ over ‘intersex status’ would also meet the recommendations of the Council of Europe Commissioner for Human Rights¹¹⁰⁷, the Council of Europe Parliamentary Assembly¹¹⁰⁸, the European

¹¹⁰³ See for instance the 2015 recommendations of the UN High Commissioner for Human Rights: OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, “Discrimination and violence against individuals based on their sexual orientation and gender identity”,

<http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E> (last visited: 29 March 2017), p. 21. See also M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 46.

¹¹⁰⁴ Opinion AG Elmer, CJEU 30 April 1996, C-13/94, *P. v. S. Cornwall County Council*, §9.

¹¹⁰⁵ W. O’BRIEN, “Can International Human Rights Law Accommodate Bodily Diversity?”, *Human Rights Law Review* 2015, Vol. 15, p. 2.

¹¹⁰⁶ M. TRAVIS and F. GARLAND, “Legislating Intersex Equality: Building the Resilience of Intersex People through Law”, *Legal Studies* 2018, <<https://doi.org/10.1017/lst.2018.17>> (last visited 25 October 2018), p. 6.

¹¹⁰⁷ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, “Human Rights and intersex people”,

<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>> (last visited 29 March 2017), p. 46.

¹¹⁰⁸ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, “Resolution 2191 (2017) ‘Promoting the human rights of and eliminating discrimination against intersex people’”,

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Parliament¹¹⁰⁹ and the EU Fundamental Rights Agency, which considered it to best identify the needs of persons with variations of sex characteristics.¹¹¹⁰ Besides, it is commendable to interpret ‘sex characteristics’ as broadly as possible, in order not to exclude certain persons with variations of sex characteristics from the protection against discrimination. The interpretation in Maltese legislation could in this regard serve as the leading example.¹¹¹¹

As indicated above, the introduction of a new and specific non-discrimination ground would go hand in hand with the substantive implementation of the right to personal autonomy of persons with variations of sex characteristics, that, as already argued above, also prevents non-consensual, deferrable treatments on a person’s sex characteristics, and tackles the present inadequate official sex registration and the binary conceptualisation of ‘sex’ in the legal system.¹¹¹² Indeed, these legal emancipations would highly increase societal visibility of persons with variations of sex characteristics and could therefore, on short term, potentially expose them to a higher risk of discrimination. In any case, the introduction of the new discrimination ground

<<https://www.bmi.bund.de/SharedDocs/kurzmeldungen/DE/2018/08/geburtenregister.html>> (last visited 24 August 2018), §7.4. See also COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY COMMITTEE ON EQUALITY AND NON-DISCRIMINATION, “Promoting the human rights of and eliminating discrimination against intersex people”, available at <<http://website-pace.net/documents/10643/3073880/20170918-intersexes-EN.pdf/d2a80169-5d1a-4a9a-b860-83641a559ca7>> (last visited 20 September 2017), p. 17.

¹¹⁰⁹ EUROPEAN PARLIAMENT, “Resolution on the rights of intersex people”, <http://www.europarl.europa.eu/doceo/document/B-8-2019-0101_EN.html?redirect> (last visited 21 February 2019).

¹¹¹⁰ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, “The fundamental rights situation of intersex people”, <<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>> (last visited 29 March 2017), p. 3. Moreover, the open wording of ‘sex characteristics’, especially in comparison with ‘intersex status’, would extend the protection to persons without a variation of sex characteristics, yet who are discriminated on the basis of a sex characteristic, e.g. transgender persons who underwent partial gender affirming therapy or women with smaller breasts than the social norm demands.

¹¹¹¹ T. NÍ MHUIRTHILE, “The Legal Status of Intersex Persons in Malta” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 365.

¹¹¹² See also S. MONRO, D. CROCKETT, T. YEADON-LEE, F. GARLAND and M. TRAVIS, “Intersex, Variations of Sex Characteristics, and DSD: The Need for Change”, <<http://eprints.hud.ac.uk/id/eprint/33535/>> (last visited 6 November 2017), p. 35.

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should be complemented by an overall commitment by the legal system to conceptualise 'sex' in conformity with the non-binary reality that includes all individuals, instead of the dichotomous 'male'/'female' categories that only include the dominant group.

Chapter IV. Legal status of non-conforming persons with regard to gender (identity): transgender persons

In recent years, transgender issues have made their way into mainstream media, with positive representations of transgender persons increasingly appearing in popular culture.¹¹¹³ Indeed, cultural awareness and social recognition of many forms of gender roles, gender (identity) and gender expression have continued to progress around the globe.¹¹¹⁴ Over the last decade, transgender rights and gender non-conformity as a legal and a human rights issue have also been high on the agenda, both at the international and national level.¹¹¹⁵ As mentioned above in Chapter II, ‘transgender’ is an umbrella term for all persons who have a varying, non-conforming gender (identity), i.e. all persons whose gender (identity or expression) (at some point) does not (fully) match their registered sex at birth or the gender (identity) society traditionally attaches to it. Both society and the law have until very recently quasi uniquely focussed on providing legal accommodation for transsexual persons who desired to, legally and physically, belong to the

¹¹¹³ E. BRIBOSIA and I. RORIVE, “Human rights integration in action: making equality law work for trans people in Belgium” in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 111. See also S. BRAGG, E. RENOLD, J. RINGROSE, C. JACKSON, “‘More than boy, girl, male, female’: exploring young people’s views on gender diversity within and beyond school contexts”, *Sex Education* 2018, Vol. 18(4), p. 421. See also J.M. SCHERPE, “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 203. See also A. R. CHANG and S. M. WILDMAN, “Gender In/Sight: Examining Culture and Constructions of Gender”, *The Georgetown Journal of Gender and the Law* 2017, Vol. 43, p. 50. See also S. GARRISON, “On the Limits of ‘Trans Enough’: Authenticating Trans Identity Narratives”, *Gender & Society* 2018, Vol. 32(5), p. 614.

¹¹¹⁴ A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 494. See also S. HINES, Z. DAVY, S. MONRO, J. MOTMANS, A.C. SANTOS, J. VAN DER ROS, “Introduction to the themed issue: Trans* policy, practice and lived experience within a European context”, *Critical Social Policy* 2018, Vol. 38(1), p. 5.

¹¹¹⁵ M. VAN DEN BRINK, “‘The Legitimate Aim of Harmonising Body and Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 247.

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(binary) sex opposite to the one assigned to them at birth.¹¹¹⁶ Nevertheless, although transsexual persons are probably the best known members of the transgender community, they are only ‘the tip of the iceberg’ of gender variation.¹¹¹⁷ 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,¹¹¹⁸ the prevalence of gender incongruence (0.7% of persons assigned male at birth and 0.6% of persons assigned female at birth) and gender ambivalence (2.2% of persons assigned male at birth and 1.9% of persons assigned female at birth) was much higher.¹¹¹⁹ 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.¹¹²⁰ Gender incongruence was found with 1.1% of persons assigned male at birth and 0.8% of persons assigned female at birth.¹¹²¹ However, given

¹¹¹⁶ See in this regard for instance D. A. GONZALEZ-SALZBERG, “The Accepted Transsexual and the Absent Transgender: a Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights”, *American University International Law Review* 2014, Vol. 29(4), p. 828.

¹¹¹⁷ See in this regard S. HANSSEN, “Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law”, *Oregon Law Review* 2017, Vol. 96, p. 308.

¹¹¹⁸ G. DE CUYPERE, M. VAN HEMELRIJCK, A. MICHEL, B. CARAEL, G. HEYLENS, R. RUBENS, P. HOEBEKE, S. MONTSREY, “Prevalence and demography of transsexualism in Belgium”, *European Psychiatry* 2007, Vol. 22(3), p. 137-141. These estimations only take into account transsexuals who seek access to medical and/or surgical treatment.

¹¹¹⁹ E. VAN CAENEGEM, K. WIERCKX, E. ELAUT, A. BUYSSE, A. DEWAELE, F. VAN NIEUWERBURGH, G. DE CUYPERE, G. T’SJOEN, “Prevalence of Gender Nonconformity in Flanders, Belgium”, *Archives of Sexual Behaviour* 2015, Vol. 44(5), p. 1281-1287. In a study among Belgian transgender persons in 2017, 20.4% of respondents indicated having a non-binary/genderqueer/gender fluid/polygender/agender gender (identity). See J. MOTMANS, E. WYVERKENS, J. DEFREYNE, “Being Transgender in Belgium. Ten Years Later”, <https://igvm-iefh.belgium.be/sites/default/files/118_-_being_transgender_in_belgium.pdf> (last visited 6 December 2018), p. 24.

¹¹²⁰ L. KUYPER, “Transgenders in Nederland: prevalentie en attitudes [Transgender persons in the Netherlands: prevalence and attitudes]”, *Tijdschrift voor Seksuologie* 2012, Vol. 36(2), p. 132. 0.7% of persons assigned male at birth are gender ambivalent and wish to undergo some forms of treatment. 0.2% of persons assigned female at birth are gender ambivalent and wish to undergo some forms of treatment.

¹¹²¹ *Ibid.*, p. 132. 0.3% of persons assigned male at birth are gender incongruent and wish to undergo some forms of treatment. 0.05% of persons assigned female at birth are gender incongruent and wish to undergo some forms of treatment.

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the absence of commonly shared definitions of what constitutes gender non-conformity and biases that may accompany methodological choices to measure its prevalence, all figures have to be assessed with caution.¹¹²²

It is important not to lump persons with variations of sex characteristics and transgender persons together under the same heading.¹¹²³ While (some) members of both sexual minorities (might) struggle with issues related to their sex characteristics, BEN-ASHER argues that trans(sexual) individuals “often desire the future body that they *should have*, while intersex individuals often mourn the body they *had* before an unwanted normalising surgery interfered with it”.¹¹²⁴ She continues that “the legal claim for freedom from early intersex surgery can be viewed as a claim for individual negative liberty of non-interference with one’s body, while in contrast, the claim for trans surgery is a claim for positive liberty, for State action for the welfare of the individual”.¹¹²⁵ In a more abstract way, AMMATURO holds that, while the claims of persons with variations of sex characteristics and transgender persons seem to be antithetical, they actually share a common goal: a radical disruption of gender norms; a challenge to the boundaries of the normative regulation of bodies (and identities) along the lines of sexual binarity.¹¹²⁶

¹¹²² S. MÜLLER, G. DE CUYPERE, G. T’SJOEN, “Transgender Research in the 21st Century: a Selective Critical Review from a Neurocognitive Perspective”, *American Journal of Psychiatry* 2017, p. 1155-1156.

¹¹²³ J.M. SCHERPE, “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 203.

¹¹²⁴ N. BEN-ASHER, “The necessity of sex change: a struggle for intersex and transsex liberties”, *Harvard Journal of Law & Gender* 2006, Vol. 29, p. 51. See also J. DOLGIN, “Discriminating gender: legal, medical, and social presumptions about transgender and intersex people”, *Southwestern Law Review* 2018, Vol. 47, p. 69. See also D.C. GHATTAS, “Standing Up for the Human Rights of Intersex People” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 430-431.

¹¹²⁵ N. BEN-ASHER, “The necessity of sex change: a struggle for intersex and transsex liberties”, *Harvard Journal of Law & Gender* 2006, Vol. 29, p. 96. See also J. DOLGIN, “Discriminating gender: legal, medical, and social presumptions about transgender and intersex people”, *Southwestern Law Review* 2018, Vol. 47, p. 63.

¹¹²⁶ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 69.

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Indeed, both groups have been coerced to conform their bodies, behaviour, identity and/or expression to a stereotypical normative ideal.¹¹²⁷

This chapter will focus on the legal recognition of a (transgender) person's self-defined gender (identity),¹¹²⁸ since, arguably, procedures of legal gender

¹¹²⁷ B. VANDERHORST, "Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex", *Harvard Law & Policy Review* 2015, Vol. 9, p. 266. See also P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 218-220.

¹¹²⁸ As was the case with the evaluation of the legal status of persons with variations of sex characteristics, this thesis does not question the importance of correct medical assessment of the issues that (some) transgender persons (potentially) face, nor the legitimacy and/or necessity of treatment on the sex characteristics of a transgender person on the basis of personal, free and informed consent. It neither aspires to negatively influence the access to appropriate, person-based, multidisciplinary and qualitative health care for transgender persons. Moreover, the matter of depathologising transgender identities is also relevant for the context of health care. Indeed, the transgender experience is still pathologised by leading international classifications of diseases and mental disorders and a diagnosis/psychiatric assessment continues to be a condition for transgender health care in many countries. In this context, it is also important to refer to the case law of the ECtHR, which holds that determining the medical necessity of gender affirming measures is not a matter of legal definition or appreciation. See ECtHR 12 June 2003, 35968/97, *Van Kück v. Germany*, §54; 8 January 2009, 29002/06, *Schlumpf v. Switzerland*, §57. This complementary focus on access to qualitative transgender health care is important since Dutch research has shown that, even if no there are no medical requirements for legal gender recognition, applications for an amendment of registered sex are often connected to a prior medical path. See M. VAN DEN BRINK, "Recht doen aan genderidentiteit. Evaluatie drie jaar transgenderwet in Nederland [Doing justice to gender identity. Evaluation three years trans law in the Netherlands]", <https://www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf> (last visited 15 February 2018), p. 22. These findings also come forward from the empirical research performed by DIETZ in Denmark, which shows that when gender self-determination in procedures for legal gender recognition is not complemented by depathologised access to body modification technologies, the inclusive intentions of legal reform might be undermined. See C. DIETZ, "Governing Legal Embodiment: On the Limits of Self-Declaration", *Feminist Legal Studies* 2018, <<https://doi.org/10.1007/s10691-018-9373-4>> (last visited 9 May 2018). See in this regard also L. HERAULT et al., "Etat civil de demain et Transidentité. Note de synthèse", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 14 May 2018), p. 11. In other words, difficulties that transgender persons might be confronted with regarding access to body modification technologies might have a negative affect on the willingness to apply for legal gender recognition. In this regard, it is noteworthy that the legal gender recognition framework in Argentina, Malta, Portugal and Uruguay also includes a right of access to what is considered to be transgender specific health care.

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recognition are the first and necessary step towards substantive equality¹¹²⁹ and the protection of the human dignity of transgender persons.¹¹³⁰ 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 transgender persons.¹¹³¹ Indeed, as DIETZ holds, “introducing one reform which recognises people’s gender status [...] before certifying restricting access to body modification technologies hardly reflects a holistic strategy for addressing the complexities of legal embodiment”.¹¹³² Moreover, it is important not to forget that legal human rights protections of transgender persons without broader societal acceptance constitute only a partial solution to transphobia at large.¹¹³³ All over the world alarming rates of violence and

¹¹²⁹ On the basis of a case study concerning transgender children in schools, SØRLIE argues that legal gender recognition based on self-determination alone is not sufficient to reach full substantive equality of transgender persons. She points out that other policies are necessary to disrupt the cisnormativity of law and society. See A. SØRLIE, “The Insufficiency of Gender Recognition Acts: the Example of Trans* Schooldays” in E. BREMS, P. CANNOOT and T. MOONEN (eds.), *Protecting Trans* Rights in the Age of Gender Self-Determination*, Cambridge, Intersentia (forthcoming). These findings were also affirmed by the empirical research performed with children and teenagers by BRAGG et al. See S. BRAGG, E. RENOLD, J. RINGROSE, C. JACKSON, “‘More than boy, girl, male, female’: exploring young people’s views on gender diversity within and beyond school contexts”, *Sex Education* 2018, Vol. 18(4), p. 430-431.

¹¹³⁰ E. BRIBOSIA and I. RORIVE, “Human rights integration in action: making equality law work for trans people in Belgium” in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 114. See also R. KUCHAR, S. MONRO, J. TAKACS, “Trans* citizenship in post-socialist societies”, *Critical Social Policy* 2018, Vol. 38(1), p. 107; M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 55.

¹¹³¹ See for instance C. DIETZ, “Governing Legal Embodiment: On the Limits of Self-Declaration”, *Feminist Legal Studies* 2018, <<https://doi.org/10.1007/s10691-018-9373-4>> (last visited 9 May 2018). DIETZ empirically researched the effectiveness of the gender self-declaration model of legal gender recognition in Denmark, particularly concerning restrictions on the access to health care of transgender persons and persons with variations of sex characteristics.

¹¹³² C. DIETZ, “Governing Legal Embodiment: On the Limits of Self-Declaration”, *Feminist Legal Studies* 2018, <<https://doi.org/10.1007/s10691-018-9373-4>> (last visited 9 May 2018).

¹¹³³ J. T. THEILEN, “Between Novelty and Timelessness: The Right to Legal Gender Recognition. Comment on Holning Lau’s “Gender Recognition as a Human Right”” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also E. BRIBOSIA and I. RORIVE,

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discrimination of transgender persons are reported.¹¹³⁴ Indeed, according to KUHAR, MONRO and TAKACS, transgender rights are increasingly targeted by anti-gender mobilisations, as gender non-conforming people are considered to be fundamentally challenging the “neatly organised heteronormative binary gender system”.¹¹³⁵ Nevertheless, as THEILEN argues, the legal institutionalisation of gender (identity) rights is a worthwhile means to bring about societal changes.¹¹³⁶ Indeed, as MARSHALL holds:

*“Law defines; it both includes and excludes entities as human beings to be protected by human rights law. It allows, permits, protects and provides; it also recognises, misrecognises and ignores identities. In doing so, it conditions the formation of certain types of identity.”*¹¹³⁷

In this regard, SØRLIE also argues that “if the law does not exclude certain identities or create otherness, this may change attitudes in society and may improve [...] self-esteem, eventually opening the way to full self-realisation for gender non-conforming people in accordance with their right to respect

“Human rights integration in action: making equality law work for trans people in Belgium” in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 114. See also M. DIERCKX and R. L. PLATERO, “The meaning of trans* in a family context”, *Critical Social Policy* 2018, Vol. 38(1), p. 93.

¹¹³⁴ E. BRIBOSIA and I. RORIVE, “Human rights integration in action: making equality law work for trans people in Belgium” in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 112-113. See also J. MOTMANS, E. WYVERKENS, J. DEFREYNE, “Being Transgender in Belgium. Ten Years Later”, <https://igvm-iefh.belgium.be/sites/default/files/118_-_being_transgender_in_belgium.pdf> (last visited 6 December 2018), p. 16-18.

¹¹³⁵ R. KUHAR, S. MONRO, J. TAKACS, “Trans* citizenship in post-socialist societies”, *Critical Social Policy* 2018, Vol. 38(1), p. 115.

¹¹³⁶ J. T. THEILEN, “Between Novelty and Timelessness: The Right to Legal Gender Recognition. Comment on Holning Lau’s “Gender Recognition as a Human Right”” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹¹³⁷ J. MARSHALL, *Human Rights Law and Personal Identity*, London, Routledge, 2014, p. 18-19.

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for their private life and non-discrimination.”¹¹³⁸ In any case, Chapter V will further elaborate on several possible State obligations towards transgender persons stemming from the recognition of the true scope of the right to personal autonomy regarding gender (identity) and expression.¹¹³⁹ As a final introductory note, it is also important to point out that the evolution towards full protection of gender self-determination does not necessarily lead to a genderless society, in which a person’s gender (identity) is considered unimportant.¹¹⁴⁰ Quite to the contrary, according to NEUMAN WIPFLER, “gender is too important and too individualised to serve as a site for governmental categorisation”.¹¹⁴¹

In the following sections, the Belgian gender registration framework since its last amendment in 2017 will be analysed. Before evaluating it, the registration framework will first be established (1.A). Since legal gender recognition refers to the possibility to change one’s registered sex/gender, it is necessary to start with the official sex/gender registration at birth (1.A.I). Afterwards, the gender recognition procedures that were introduced by the 2007 Act on Transsexuality (1.A.II) and the 2017 Gender Recognition Act (1.A.III) will be explained. This sex/gender registration framework will then be evaluated (1.B.) in the light of current international human rights standards, focussing on the (scope of the) recognition of gender self-determination (1.B.I), the depathologisation of transgender persons (1.B.II), the lingering cisnormativity and conflation between sex and gender (identity) (1.B.III), and the binary normativity in law (1.B.IV). Before concluding (3), this chapter will also

¹¹³⁸ A. SØRLIE, “Legal Gender Meets Reality: A Socio-Legal Children’s Perspective” in A. HELMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 103.

¹¹³⁹ See *infra* p. 489 and further.

¹¹⁴⁰ See D. COOPER and F. RENZ, “If the state decertified gender, what might happen to its meaning and value?”, *Journal of Law and Society* 2016, Vol. 43(4), p. 486. See also S. BRAGG, E. RENOLD, J. RINGROSE, C. JACKSON, “‘More than boy, girl, male, female’: exploring young people’s views on gender diversity within and beyond school contexts”, *Sex Education* 2018, Vol. 18(4), p. 431.

¹¹⁴¹ A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 494.

question the rationale, pertinence and proportionality of sex/gender registration in the age of gender self-determination (2). The evaluation will of course fully take into account the 2019 judgment of the Belgian Constitutional Court on the Gender Recognition Act.

1. The legal recognition of gender (identity)

While official sex/gender registration can also be considered as problematic, burdensome or superfluous for cisgender persons, it is deemed to be specifically challenging for transgender persons who experience incongruence between their official sex/gender marker and their experienced gender (identity).¹¹⁴² In this regard, the concept of the legal recognition of a person's gender (identity), or simply 'legal gender recognition', essentially refers to the judicial or administrative possibility that the law offers to (transgender) persons to seek congruence between their experienced gender (identity) and their official sex/gender marker, as assigned and registered by the State.¹¹⁴³ In other words, on the basis of legal gender recognition, a person is able to have their registered sex amended in the light of their personal experience of gender (identity). While only a few countries worldwide enable this procedure on the basis of a person's simple declaration of their self-determined gender (identity),¹¹⁴⁴ most States require some conditions, ranging from medical requirements such as an expert assessment/diagnosis, gender affirming treatment and/or compulsory sterility, age requirements, to compulsory divorce.¹¹⁴⁵ Considering the invasive medical requirements, legal gender recognition is often preserved

¹¹⁴² B. T. RUOCCO, "Our Antitotalitarian Constitution and the Right to Identity", *University of Pennsylvania Law* 2016, Vol. 165, p. 196-197.

¹¹⁴³ See J. T. THEILEN, "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe" in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 375.

¹¹⁴⁴ Argentina, Belgium, Brazil, Chile, Colombia, Costa Rica, Denmark, Ireland, Luxembourg, Malta, Norway, Pakistan, Portugal and Uruguay.

¹¹⁴⁵ See M. VAN DEN BRINK, "'The Legitimate Aim of Harmonising Body and Soul'. Changing Legal Gender: Family Life and Human Rights" in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 243.

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for transsexual persons, or transgender persons who are willing to undergo gender affirming surgical treatment, although they actually do not desire to do so. This is referred to by AMMATURO as “the denial of legal subjectivity to the broader category of transgender persons”.¹¹⁴⁶

However, for the purpose of this thesis, next to the procedure of legal gender recognition which – considering its conceptual definition – necessarily takes place at a later point in life, it is also important to study the effects of the original sex/gender registration at birth on transgender persons and their right to personal autonomy. In this regard, it is especially important to focus on the position of minors who experience (some form of) incongruence between their registered sex and their gender (identity).

In the following sections the Belgian legal framework regarding sex/gender registration and legal gender recognition will first be established. Since the aim of this thesis is to evaluate the *current* legal status of non-conforming persons with regard to sex, sexual orientation and gender (identity) in the light of their right to personal autonomy, the main focus will be laid on *present* Belgian law. This demarcation is important, considering the paradigm shift in Belgian law that was introduced by the 2017 Act reforming the regulations concerning transgender persons regarding the mention and amendment of the registration of sex in civil certificates and the consequences thereof.¹¹⁴⁷ Nevertheless, since this paradigm shift is essentially linked to the – from a human rights perspective – inherent problematic nature of the 2007 Act on Transsexuality, it is still necessary to concisely establish the administrative procedure for legal gender recognition

¹¹⁴⁶ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 69.

¹¹⁴⁷ Wet van 25 juni 2017 tot hervorming van regelingen inzake transgenders wat de vermelding van een aanpassing van de registratie van het geslacht in de akten van de burgerlijke stand en de gevolgen hiervan betreft [Act of 25 June 2017 reforming the regulations concerning transgender persons regarding the mention and amendment of the registration of sex in civil certificates and the consequences thereof], *Belgian Gazette* 10 July 2017 (hereafter: the 2017 Gender Recognition Act). See in this regard E. BRIBOSIA, N. GALLUS, I. RORIVE, “Une nouvelle loi pour les personnes transgenres en Belgique [A new law for transgender persons in Belgium]”, *Journal des Tribunaux* 2018, p. 262.

that was introduced by that latter Act. Moreover, parts of the 2017 Act have been annulled by the Constitutional Court in a groundbreaking judgment of June 2019.¹¹⁴⁸ Since implementing the judgment will require intervention by the federal legislature, the Civil Code will be amended in the near future. Although requirements regarding the marital status of (transgender) persons who apply for legal gender recognition, which are still present across the Council of Europe,¹¹⁴⁹ are very questionable from a human rights perspective, they will not be dealt with below since Belgian law has known ‘same-sex’ marriage since 2003.

A. Sex/gender registration in Belgian law

I. Sex/gender registration at birth

Since legal gender recognition refers to the amendment of a person’s assigned legal sex/gender, it is necessary to first recapitulate the present basic provisions regarding the official sex/gender registration at birth, which can be found in the Belgian Civil Code. On the basis of Article 43, §1 a child’s birth must be declared to the registrar within fifteen days after birth. On the basis of Article 43, §4 the registrar drafts the birth certificate without delay. Article 44, 1° of the Civil Code includes a person’s ‘sex’¹¹⁵⁰ within the compulsory information that is incorporated in every person’s birth certificate. However, the provision does not specify the options regarding ‘sex’ that are available to the registrar. According to the literature, the registrar can presently only choose between the binary male/female, given its self-evidence in the Belgian legal order.¹¹⁵¹ The registrar bases the

¹¹⁴⁸ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019.

¹¹⁴⁹ See <https://tgeu.org/wp-content/uploads/2018/05/SideB_TGEU2018_Print.pdf> (last visited 16 August 2018).

¹¹⁵⁰ It will be established below that sex registration has been implicitly replaced by gender (identity) registration since the 2017 Gender Recognition Act. See *infra* p. 381.

¹¹⁵¹ E. VAN ROYEN, “De vermelding van het geslacht in de geboorteakte [The indication of sex in the birth certificate]” in P. SENAEVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 273. For the self-evidence of binary legal sex based on external genitalia, see also J. KNOUSE, “Intersexuality and the social construction of anatomical sex”, *Cardozo Journal of Law & Gender* 2005-06, Vol. 12, p. 139.

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registration generally on a medical declaration made by the gynaecologist or midwife, who focus in practice on the new-born's external genitalia.¹¹⁵²

II. The 2007 Act on Transsexuality

Although transsexual persons in Belgium have been able to seek legal gender recognition through judicial procedures since the 1960's, changing one's registered sex/gender after gender affirming therapy was very often based on the courage of individual transsexual persons and creative judges.¹¹⁵³ The outcome could be very uncertain, since the issue related to concepts that could induce subjective convictions with the judge at hand, which could be unfavorable to the individual concerned.¹¹⁵⁴ Taking into account this legal uncertainty,¹¹⁵⁵ the burdensome procedure for the individual, developments in several European and other States, and the case law of the European Court of Human Rights, the Belgian federal Parliament adopted in 2007 the Act on

¹¹⁵² K. UYTTERHOEVEN, "Het onderscheid tussen de vorderingen van staat en de vorderingen tot verbetering van een akte van de burgerlijke stand m.b.t. interseksuelen en transseksuelen [The distinction between the claims concerning civil status and the claims to correct a civil status certificate, with regard to intersexuals and transsexuals]", *Tijdschrift voor Belgisch Burgerlijk Recht* 2000, Vol. 1, p. 46. See also S.L. GOESSL, "From question of fact to question of law to question of private international law: the question whether a person is male, female or ...?" *Journal of Private International Law* 2016, Vol. 12(2), p. 264. The Civil Code also implicitly acknowledges in Article 48 (previously Article 57, 1°) of the Civil Code that the establishment of a person's sex can be based on other criteria than the structure of their external genitalia. Article 48 provides for a delay of three months for the registration of a child's sex if it is not possible to, based on a medical examination, immediately decide on its sex after birth. See E. VAN ROYEN, "De vermelding van het geslacht in de geboorteakte [The indication of sex in the birth certificate]" in P. SENAËVE and K. UYTTERHOEVEN (eds.), *De rechtspositie van de transseksueel* [The legal status of the transsexual], Antwerp, Intersentia, 2008, p. 286.

¹¹⁵³ T. BALTHAZAR, "Transseksualiteit in het Belgisch recht [Transsexuality in Belgian law]" in G. T'SJOEN, M. VAN TROTSBURG and L. GIJS (eds.), *Transgenderzorg [Transgender care]*, Leuven, Acco, 2013, p. 243.

¹¹⁵⁴ C. SIMON, "Au-delà du binaire: penser le genre, la loi et le droit des personnes transgenres en Belgique [Beyond the binary : contemplating gender, the law and the rights of transgender persons in Belgium]", *Canadian Journal of Women and the Law* 2016, Vol. 28, p. 530.

¹¹⁵⁵ See E. BRIBOSIA and I. RORIVE, "Human rights integration in action: making equality law work for trans people in Belgium" in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 119.

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Transsexuality, which introduced an administrative procedure for legal gender recognition in the Civil Code.¹¹⁵⁶

As mentioned above,¹¹⁵⁷ the then newly-created Article 62bis enabled the legal recognition of a person's sex 'reassignment' through an administrative procedure before the registrar, who took note of a person's declaration of the *continuing* and *irreversible* inner conviction of belonging to the 'sex opposite to that which is mentioned in the birth certificate'. The provision thus enabled a person, who experienced incongruence between their registered and therefore biological sex, and gender (identity), to align the assigned legal sex with their lived gender (identity). However, this administrative change required compliance with very heavy and invasive conditions, which had to be confirmed by a psychiatrist and surgeon:

- The person concerned had the continuing and irreversible conviction of belonging to the sex opposite to the one mentioned in the birth certificate;
- The fulfilment of gender affirming therapy, as far as medically possible and justifiable;
- No longer being able to procreate according to the 'previous sex', i.e. sterility.¹¹⁵⁸

The registrar drafted a certificate mentioning the 'new sex', which was included in the birth register, at the earliest thirty days after the expiration of the period of appeal of sixty days following the drafting of the certificate. During that period of sixty days, the Public Prosecutor, who was notified within three days of the drafting of the certificate, as well as any interested party (e.g. the applicant's spouse or child), could appeal against the change

¹¹⁵⁶ Wet van 10 mei 2007 betreffende de transseksualiteit [Act of 10 May 2007 on Transsexuality], *Belgian Gazette* 11 July 2007, p. 37823.

¹¹⁵⁷ See *supra* p. 317.

¹¹⁵⁸ Note that the requirement of sterility before the entry into force of the 2007 Act on Transsexuality was not necessarily based on the jurisprudence, but on treatment protocols used by medical gender teams. According to the author of the 2007 Act, sterility is inherent to legal recognition, since "'natural laws' need to be respected". See *Parl.Doc.* Chamber of representatives, 51-0903/006, p. 59.

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of legal sex/gender before the court of first instance. Moreover, the registrar could refuse to draft a certificate if, according to the parliamentary preparatory works, no check of the authenticity of the required documents could be performed.¹¹⁵⁹ However, this check could not amount to a so-called 'opportunity check'.¹¹⁶⁰ In case of a refusal, the registrar had to immediately notify the applicant concerned, provide him with the motives for refusal, as well as notify the Public Prosecutor. The applicant concerned could then appeal before the court of first instance. The inclusion of the certificate in the register of births applied *ex nunc* and resulted in the mention of the 'new sex' on the side of the person's birth certificate. Schematically, the administrative procedure of legal gender recognition thus was as follows:

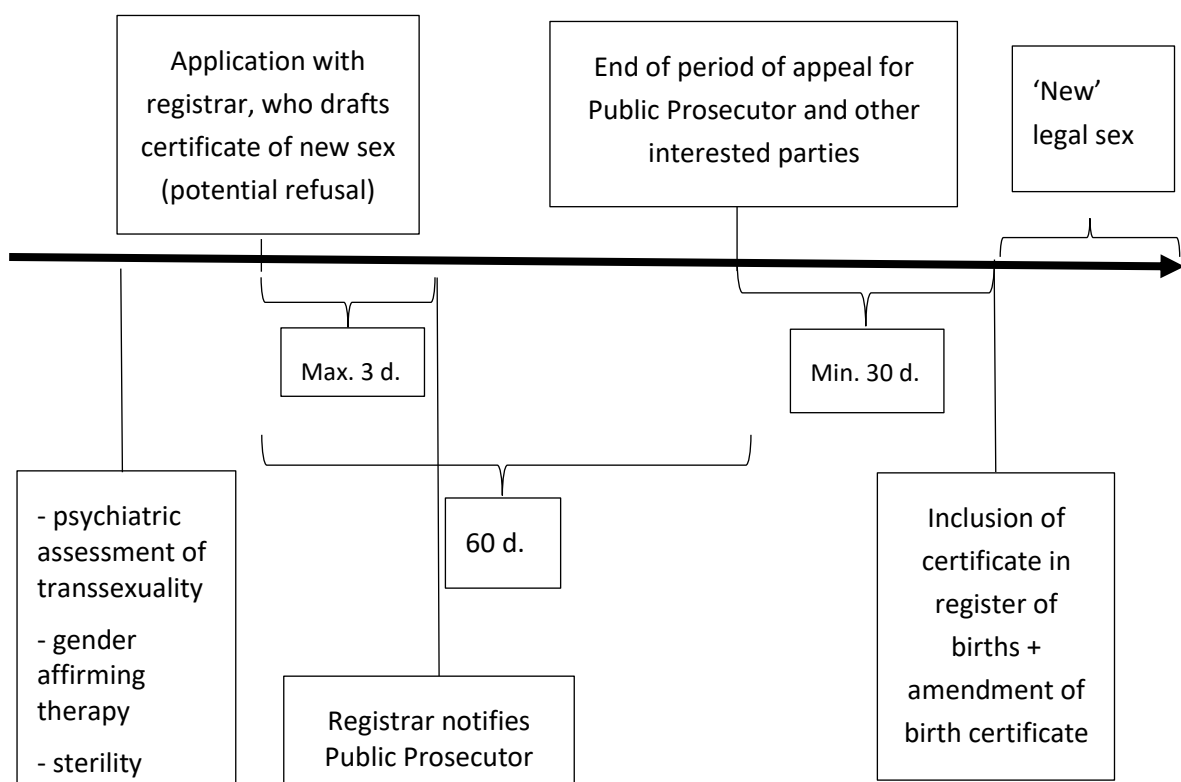


Figure 3: Administrative procedure for legal gender recognition under 2007 Act

¹¹⁵⁹ *Parl.Doc.* Senate, 3-1794/5.

¹¹⁶⁰ *Ibid.* See also Article M2, para. 2, part 3 of the Circular Letter of 1 February 2008 concerning the Act on Transsexuality, *Belgian Gazette* 20 February 2008.

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According to research by the Belgian Institute for the Equality of Women and Men, the 2007 Act led to a significant increase of the number of instances of official legal gender recognition.

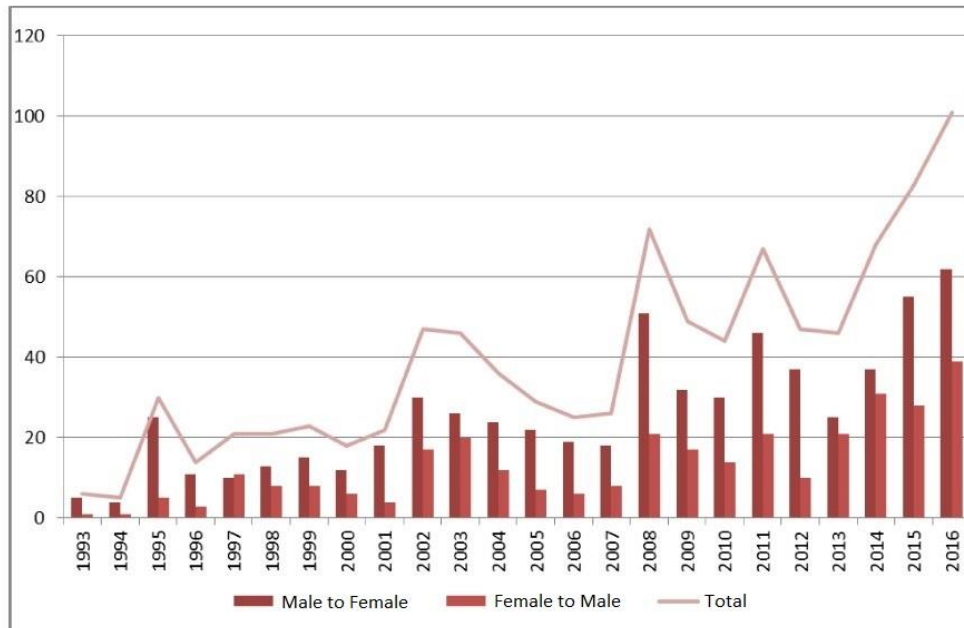


Figure 4: Graphical presentation of the increase of the number of legal gender recognitions after the 2007 Act. Source: Institute for the Equality of Women and Men.

III. The 2017 Gender Recognition Act

In May 2017, the Belgian federal Parliament adopted a new administrative procedure for legal gender recognition, based on the self-determination of the (transgender) person concerned. The amendment of Article 62bis (now Article 135/1) of the Civil Code was predominantly aimed at reconciling the Belgian legal framework concerning gender recognition with international human rights standards and the bodily integrity of transgender persons,¹¹⁶¹ and is considered to be a vast improvement of the 2007 Act on Transsexuality. However, the legislature not only *removed* requirements for legal gender recognition, but also *introduced* new conditions in order to prevent (and/or

¹¹⁶¹ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 4. The new Belgian framework for legal gender recognition will be evaluated in the light of, *inter alia*, those international human rights standards. See *infra* p. 327.

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detect) ‘light-hearted’ decisions to seek legal gender recognition and/or (identity) fraud.¹¹⁶² Importantly, the revised Article 62bis (now Article 135/1) of the Civil Code also effectively¹¹⁶³ introduced legal gender recognition for minors. The following sections will first establish the new administrative procedure for adults, before turning to the provisions that are applicable to minors.¹¹⁶⁴ Since it is important to indicate all relevant evolutions, the procedure will be established as it was *before* the 2019 judgment of the Belgian Constitutional Court. This judgment will be predominantly taken into account in the evaluation of the procedure (section B). Moreover, since the implementation of the judgment will require the legislature’s intervention,¹¹⁶⁵ Article 135/1 is currently still in force in the version predating the judgment.

§1. Legal gender recognition for adults

On the basis of Article 135/1 of the Civil Code, every person¹¹⁶⁶ who “has the conviction that the sex mentioned in his birth certificate is not in congruence with his inner experienced gender identity” may declare such conviction to the registrar. This declaration occurs by handing over a signed declaration which mentions that one has been convinced for a long time that the sex mentioned in one’s birth certificate is not in congruence with one’s inner experienced gender identity and that one desires the administrative and legal

¹¹⁶² *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 4.

¹¹⁶³ Although the administrative procedure under the 2007 Act did not mention any age criterion, minors were not able to apply for legal gender recognition, since in practice it is impossible in Belgium to undergo full gender affirming treatment before reaching the age of majority.

¹¹⁶⁴ Note that the following sections reflect the Act’s terminology as closely as possible.

¹¹⁶⁵ The action of annulment of the 2017 Gender Recognition Act was brought before the Constitutional Court in early January 2018. Since Article 62bis of the Civil Code was amended and renumbered by the Act of 18 June 2018 holding diverse provisions regarding civil law and provisions to improve alternative dispute settlement, the current procedure *ex* Article 135/1 was not challenged before the Constitutional Court. Therefore, the legislature will have to intervene in order to implement the Court’s ruling.

¹¹⁶⁶ I.e. Belgians and foreigners registered in the Belgian civil registers. The Belgian Code of International Private Law provides for the rules on the applicable law in case of an application for legal gender recognition by foreigners in Belgium. See J. VERHELLEN, “De Belgische transgenderwet in een internationale context [The Belgian transgender act in an international context]”, *Tijdschrift@IPR.be* 2018, p. 185-198.

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consequences of an amendment of the registered sex in one's birth certificate. After this first declaration, a number of requirements/conditions that are aimed at preventing (identity) fraud and 'light-hearted' decisions have to be complied with:

- According to the original version of Article 135/1, the registrar pointed out to the applicant the principled irreversible character of the amendment of the sex mentioned in the birth certificate.¹¹⁶⁷ The registrar also informs the applicant about the further steps of the procedure, its administrative and legal consequences and provides the applicant with an information brochure, as well as the contact details of transgender organisations. The registrar finally takes note of the declaration and provides the applicant with a receipt note;
- Within three days, the registrar then notifies the Public Prosecutor, who – within a period of three months – may issue positive or negative advice in the light of the protection of public order. In the absence of any advice within the period of three months, the advice is considered to be positive. According to the parliamentary preparatory works, 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,¹¹⁶⁸ or by potential terrorists;¹¹⁶⁹
- The applicant has to make a second declaration, minimum three months and maximum six months after the issue of the receipt note of the first declaration. The applicant hands over a signed declaration that mentions that:

¹¹⁶⁷ The Constitutional Court annulled the principled irreversibility of the change of registered sex. However, the annulment did not automatically lead to the erasure of this provision from the legal order. As mentioned above, since Article 62bis of the Civil Code was amended and renumbered by the Act of 18 June 2018 holding diverse provisions regarding civil law and provisions to improve alternative dispute settlement, the current procedure *ex* Article 135/1 was not challenged before the Constitutional Court.

¹¹⁶⁸ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 21.

¹¹⁶⁹ *Parl.Doc.* Chamber of representatives, 54-2403/004, p. 17.

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- One is still convinced that the 'sex' mentioned in one's birth certificate¹¹⁷⁰ is not in congruence with one's inner experienced gender identity;
- One is conscious about the administrative and legal consequences that the amendment of the registered 'sex' in one's birth certificate implies;
- One is conscious of the principled irreversible character of the amendment of the registered 'sex' in one's birth certificate.¹¹⁷¹

In the absence of negative advice by the Public Prosecutor, the registrar drafts a certificate of the amendment of the registered 'sex' and links this certificate to all civil certificates that mention the sex of the person concerned in the Database of Civil Certificates ('DABS'). Once the certificate is drafted, the amendment of the legal 'sex' enters into force;

- The registrar refuses to draft the certificate in case of negative advice by the Public Prosecutor, or on the basis of other motives, e.g. intoxication of the applicant¹¹⁷² or extreme cases of public order,¹¹⁷³ that are immediately communicated to the applicant. According to the parliamentary preparatory works, these motives should not correspond to a mere personal conviction held by the registrar.¹¹⁷⁴

On the basis of the original Gender Recognition Act of 2017, the registrar mentioned the amendment of the registered sex on the side of all civil certificates that apply to the applicant and their lineal descendants in the first grade. However, since an update of 18 June 2018, that entered into force in January 2019, the registrar has to link the amendment of the registered sex

¹¹⁷⁰ Note that the Act in this instance does not refer to the 'registered sex', but only to the 'sex mentioned in one's birth certificate'.

¹¹⁷¹ This provision was annulled by the Constitutional Court. However, as explained above, the legislature will have to intervene to implement the Court's judgment, since the current version of Article 135/1 was not part of the action of annulment.

¹¹⁷² *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 21.

¹¹⁷³ *Parl.Doc.* Chamber of representatives, 54-2403/004, p. 23. Note that the legislature did not provide any examples.

¹¹⁷⁴ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 20.

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to all civil certificates that mention the sex of (only) the person concerned.¹¹⁷⁵ The amendment of the registered sex only works *ex nunc* and is irreversible (in principle). In case of refusal by the registrar, the applicant has the right to appeal with the family court within a period of 60 days on the basis of Article 1385duodécies of the Judicial Code. The Public Prosecutor can claim the certificate's invalidity at any time on the basis of a violation of public order before the family court.

Also according to the original version of Article 135/1, only in cases of 'exceptional circumstances', the person concerned could request the family court to reverse the amendment of their registered sex. These exceptional circumstances were not defined in the Act. The government's explanatory memorandum indicates experiences of transphobia or a decline in well-being (proving the person concerned made an 'error') as exceptional circumstances.¹¹⁷⁶ The parliamentary preparatory works did not consider an evolution in gender (identity), i.e. gender fluidity, as a valid exceptional circumstance. As will be explained below, this provision was rightly annulled by the Constitutional Court.

§2. Legal gender recognition for minors

Since the 2017 Gender Recognition Act, 16- and 17-year-old minors have been effectively able to apply for legal gender recognition. In essence, the aforementioned procedure for adults is also applicable to them. Nevertheless, there are two important differences:

- The minor applicant has to hand over a declaration by a child and adolescent psychiatrist that they have the necessary discernment to have the continuing¹¹⁷⁷ conviction that the sex registered in their birth certificate is not in congruence with their inner experienced gender

¹¹⁷⁵ Article 12 of the Act of 18 June 2018 containing diverse provisions concerning civil law and provisions for the purpose of promoting alternative forms of dispute settlement, *Belgian Gazette* 2 July 2018, p. 53455.

¹¹⁷⁶ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 22-23.

¹¹⁷⁷ Note that the 'continuing' conviction is not required with adults.

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(identity). According to the parliamentary preparatory works, this interference by a psychiatrist has no diagnostic aim;¹¹⁷⁸

- The minor applicant has to be assisted by both parents or the legal representative. If (one of) these persons refuse(s) to do so, the minor may request the family court to be assisted by an *ad hoc* guardian.

Schematically, the administrative procedure of legal gender recognition thus is as follows:

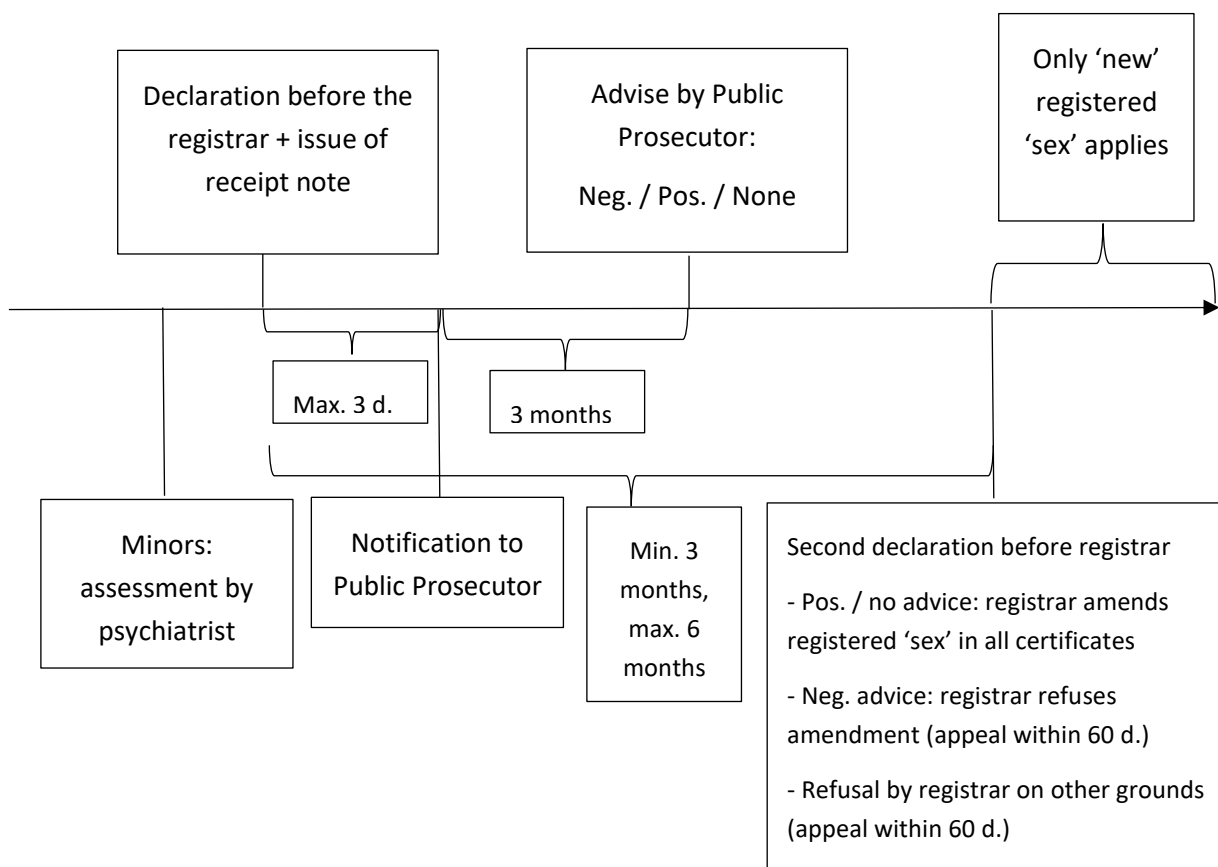


Figure 5: Administrative procedure for legal gender recognition under 2017 Act.

The 2017 Act also introduced new rules regarding filiation, considering the abolishment of the requirement of sterility for legal gender recognition. In

¹¹⁷⁸ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 16; 54-2403/004, p. 18.

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essence, transgender persons who have and/or recognise children born after the amendment of their registered sex, will be recognised in the parental role (co-mother/father) that is congruent with their gender (identity). However, if a transman gives birth to a child, he will still be recognised as the child's mother, due to the rule of *mater semper certa est* (i.e. mother is always certain), that is central to Belgian filiation law.¹¹⁷⁹ Since this section of the thesis is focussed on the matter of legal gender recognition, the new filiation rules will not be thoroughly examined.¹¹⁸⁰

Official figures released by the federal Institute for the Equality of Women and Men in November 2018 showed a significant increase in the number of instances of legal gender recognition due to the 2017 Gender Recognition Act. The amendments of registered sex between April¹¹⁸¹ and September 2018 amounted to thirty-five percent of the total number of amendments since 1993. Applications came predominantly from people younger than twenty-five, and especially from transmen. The 2017 Act thus clearly met high needs among transgender persons.

¹¹⁷⁹ See G. VERSCHULDEN, "Deel II. De aanpassing van de geslachtsregistratie: voorwaarden, gevolgen en overgangsrecht [Part II. The amendment of sex registration: conditions, consequences and transitional arrangements]" in J. MOTMANS and G. VERSCHULDEN (eds.), *De rechtspositie van transgenderpersonen in België. Een multidisciplinaire analyse na de wet van 25 juni 2017* [The legal status of transgender persons in Belgium. A multidisciplinary analysis after the Act of 25 June 2017], Antwerp-Cambridge, Intersentia, 2019 (forthcoming). The rule of 'mater semper certa est' essentially refers to the fact that – at birth – only the relationship between the child and the person who gives birth to the child can be known for certain. On the basis of a cisnormative logic, this latter person has female sex characteristics and therefore a female gender (identity). This person is therefore called the child's mother. In October 2018, the Council of Europe Parliamentary Assembly called on Member States to ensure that transgender parents' gender identity is correctly recorded on their children's birth certificate. See Resolution 2239 (2018) 'Private and family life: achieving equality regardless of sexual orientation', <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25166&lang=en>> (last visited 21 December 2018).

¹¹⁸⁰ See in this regard E. BRIBOSIA, N. GALLUS, I. RORIVE, "Une nouvelle loi pour les personnes transgenres en Belgique [A new law for transgender persons in Belgium]", *Journal des Tribunaux* 2018, p. 265-266.

¹¹⁸¹ Due to the waiting period of minimum three months, the first amendments of registered sex occurred in April 2018.

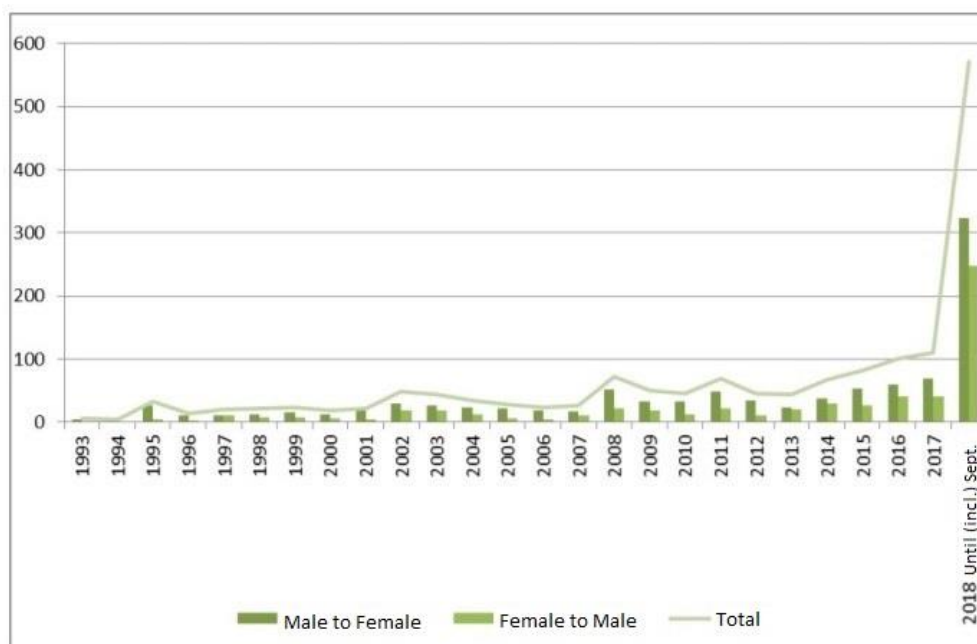


Figure 6: Graphical presentation of the increase of the number of legal gender recognitions after the 2017 Act. Source: Institute for the Equality of Women and Men

B. Evaluation of the Belgian gender registration framework

Now that the structure of the Belgian legal framework concerning sex/gender registration is established, it will be evaluated through the lens of the right to personal autonomy of transgender persons. A combination of international (soft) law, foreign law, (inter)national case law and scholarship will be used, in order to identify the ‘best practice’ legal system regarding gender recognition. Both the original sex/gender registration at birth, and the administrative procedure for legal gender recognition will be analysed. Indeed, even though most attention in recent international activities has been given to the relaxing of standards for amending sex/gender designation, it also needs to be questioned whether and/or how governments should issue gender designation in the first place.¹¹⁸² The evaluation will of course take

¹¹⁸² A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 496.

into account the Constitutional Court's groundbreaking ruling of 19 June 2019.

The following sections will first analyse the scope of the recognition of gender self-determination in Belgian law (I). Subsequently, it will be analysed to what extent the Belgian sex/gender registration framework (still) expresses notions of pathologisation of transgender persons (II), cisnormativity and conflation between sex and gender (identity) (III) and binary normativity (IV).

I. The right to (legal recognition of) gender (identity) and personal autonomy

Although at this point it might seem self-evident in Belgian law to *have* procedures that enable the correct registration of a person's gender (identity), it needs to be discussed whether there exists a *right* to (the legal recognition of) gender (identity) in human rights law in the first place. This discussion is not purely theoretical, since the first paragraph of the Belgian government's explanatory memorandum to the 2017 Gender Recognition Act explicitly refers to Belgium's obligations under (international) human rights law regarding legal gender recognition.¹¹⁸³

§1. The right to (legal recognition of) gender (identity) in international (soft) law instruments

Transgender persons, unlike people who are socially discriminated against on grounds like sex,¹¹⁸⁴ race, ethnicity or disability, lack a particular international convention which obliges States to ensure that their human rights, and more specifically their right to equality and non-discrimination, are respected, protected and fulfilled.¹¹⁸⁵ However, according to the Office of the UN High

¹¹⁸³ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 4.

¹¹⁸⁴ Except in situations where 'sex' is – explicitly or through case law – interpreted as also including 'gender (identity and/or expression)'.

¹¹⁸⁵ A. HELLUM, "Human Rights, Sexual Orientation, and Gender identity" in A. HELLUM (ed.), *Human Rights, Sexual Orientation and Gender Identity*, London, Routledge, 2017, p. 1. See also R. HOLTMAAT and P. POST, "Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?" in A. HELLUM (ed.), *Human Rights, Sexual Orientation and Gender Identity*, London, Routledge, 2017, p. 43. See also M. VAN DEN BRINK, "The Legitimate Aim of Harmonising Body and

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Commissioner for Human Rights, “protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards; the legal obligations of States to safeguard the human rights of LGBT people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights standards”.¹¹⁸⁶ Authors like LAU,¹¹⁸⁷ THEILEN,¹¹⁸⁸ SCHERPE,¹¹⁸⁹ and BAISLEY¹¹⁹⁰ concur that gender (identity) rights exist or are emerging under present international human rights law. However, a vast number of States – in all continents – still resist the recognition of gender (identity) rights in international law, especially within the more ‘political’ bodies of the UN, such as the Human Rights Council.¹¹⁹¹

The (emergence of the) existence of a right to (legal recognition of) gender (identity) based on personal autonomy/self-determination is also notable in

Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 234; M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 53.

¹¹⁸⁶ Office of the United Nations High Commissioner for Human Rights, “Combatting Discrimination Based on Sexual Orientation and Gender identity”, <<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>> (last visited 12 October 2017).

¹¹⁸⁷ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹¹⁸⁸ J. T. THEILEN, “Between Novelty and Timelessness: The Right to Legal Gender Recognition. Comment on Holning Lau’s “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹¹⁸⁹ J.M. SCHERPE, “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 208.

¹¹⁹⁰ E. BAISLEY, “Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity”, *Human Rights Quarterly* 2016, Vol. 38, p. 134-163.

¹¹⁹¹ Ibid., p. 136. See also A.T. CHASE, “Human rights contestations: sexual orientation and gender identity”, *The International Journal of Human Rights* 2016, Vol. 20(6), p. 705.

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influential international soft law instruments,¹¹⁹² starting with the Yogyakarta Principles +10, which apply existing standards of international human rights law to issues of sexual orientation, gender identity, gender expression and sex characteristics. Principle 3, holds that States shall:

“[...] 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 [...]”.*¹¹⁹³

Principle 3 was further elaborated in the 2017 update of the Yogyakarta Principles. On the basis of Principle 31, States shall:

“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;

¹¹⁹² See H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also M. VAN DEN BRINK, “‘The Legitimate Aim of Harmonising Body and Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 234.

¹¹⁹³ See <<http://www.yogyakartaprinciples.org/principle-3/>> (last visited 13 October 2017).

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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."

In 2015, the Council of Europe Parliamentary Assembly adopted Resolution 2048 (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 transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents.¹¹⁹⁴ The same

¹¹⁹⁴ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, "Resolution 2048 (2015) 'Discrimination against transgender people in Europe'", <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>> (last visited 13 October 2017).

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call regarding legal gender recognition was repeated in Resolution 2191 (2017).¹¹⁹⁵ UN human rights treaty bodies, such as the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), and the CEDAW Committee have also started to bring attention to the situation of transgender persons in their General Comments and country-specific concluding observations.¹¹⁹⁶

From this (emerging) existence of gender (identity) rights under international law, LAU deduces the right for individuals to obtain government-issued identity documents that match their gender (identity).¹¹⁹⁷ He argues that the right to gender recognition is grounded in the right to privacy, the right to health, the right to bodily integrity, and – more importantly for this thesis – the *right to personal autonomy* ex Article 22 of the Universal Declaration of Human Rights.¹¹⁹⁸ Indeed, an important aspect of personal autonomy is the freedom to determine one's own identity.¹¹⁹⁹ According to LAU, such claims are particularly important with respect to decisions that are socially

¹¹⁹⁵ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, "Resolution 2191 (2017) 'promoting the human rights of and eliminating discrimination against intersex people'", <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>> (last visited 13 October 2017).

¹¹⁹⁶ See M. VAN DEN BRINK, "'The Legitimate Aim of Harmonising Body and Soul'. Changing Legal Gender: Family Life and Human Rights" in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 235. See also M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 36-40.

¹¹⁹⁷ H. LAU, "Gender Recognition as a Human Right" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). LAU strongly supports the argument that gender (identity) rights are based on longstanding civil rights and are therefore only 'new' in very narrow regards.

¹¹⁹⁸ Article 22 UDHR holds: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". This is arguably also true for Article 8 ECHR, in the light of the ECtHR's case law regarding personal autonomy and self-determination of gender (identity).

¹¹⁹⁹ See also e.g. ECtHR 12 June 2003, 35968/97, *Van Kück v. Germany*, §73, where the Court stated that the freedom to define one's gender (identity) is one of the most basic essentials of self-determination.

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constructed as being salient to intersubjective identity, as is the case with gender (identity); after all, gender (identity) is a particularly important aspect of the identities that people hold in relation to each other, making self-determination of gender (identity) all the more crucial to protect.¹²⁰⁰ In November 2017, the Inter-American Court of Human Rights issued an advisory opinion that held that – referring *inter alia* to the Yogyakarta Principles +10 – all individuals have the right to have their name and official documents amended in the light of their gender (identity) on the basis of self-determination, and therefore without having to comply with any medical conditions.¹²⁰¹

Developments in international law thus cautiously seem to indicate the emergence of the existence of both a right to gender (identity) and a right to the legal recognition thereof, solely on the basis of personal autonomy/self-determination.¹²⁰² Moreover, since 2012, a small, yet increasing number of countries worldwide have adopted a procedure of legal gender recognition based on gender self-determination, i.e. Argentina, Belgium, Brazil, Chile, Colombia, Costa Rica,¹²⁰³ Denmark, Ireland, Luxembourg,¹²⁰⁴ Malta, Norway,

¹²⁰⁰ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹²⁰¹ IACtHR 24 November 2017, Advisory Opinion OC-24/17 ‘Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples’. See also J.M. SCHERPE, “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 209.

¹²⁰² See B. VANDERHORST, “Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex”, *Harvard Law & Policy Review* 2015, Vol. 9, p. 245.

¹²⁰³ In Costa Rica, legal gender recognition based on self-determination only applies to a change of first name on all official identity documents (gender information is not included on identity cards in order to avoid stigmatisation). The reform was the result of a judgment by the Costa Rica Supreme Electoral Court, which asked for the aforementioned advisory opinion by the Inter-American Court of Human Rights (IACtHR). In its opinion, the IACtHR recognised the right to the legal recognition of gender based on self-determination.

¹²⁰⁴ Although the Luxembourgish procedure does not require any form of medical treatment or diagnosis, applicants for legal gender recognition are still required to prove the veracity of their claim. By all means, they should prove either (a) that they publicly present themselves according to their alleged gender, (b) that they are known with family, friends, professionally

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Pakistan, Portugal and Uruguay.¹²⁰⁵ In Malta and Portugal, all individuals even have the explicit subjective right to gender (identity) self-determination.¹²⁰⁶ 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.¹²⁰⁷ In this regard, BAISLEY argues that,

or socially as their alleged gender, or (c) that they obtained a change of first name that conforms to their alleged gender.

¹²⁰⁵ Although France and Greece also abolished all forms of medical requirements for legal gender recognition, transgender persons still have to seek judicial authorisation, which creates an additional layer of formality. As VAN DEN BRINK and DUNNE point out, “where obtaining recognition necessitates additional legal knowledge, this may dissuade individuals from making an application. It may also require legal assistance which many people – especially those in situations of economic vulnerability – may be unable to afford. In addition, in certain jurisdictions, judicial procedures place domestic judges in a ‘gate-keeper’ role. This allows judges to exercise high levels of personal discretion as to whether they should formally acknowledge preferred gender.” See M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 57-58. In March 2018 the Brazilian Supreme Court held that it may no longer be required from transgender persons to undergo medical treatment and/or psychiatric assessment for the legal recognition of their gender identity and an official change of first name.

¹²⁰⁶ Article 3 of Gender Identity, Gender Expression and Sex Characteristics Act of 14 April 2015 to provide for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person, *Government Gazette of Malta* No. 19,410; Article 1 of Law No. 75/XIII/2. Nevertheless, regrettably the legal system still makes use of the term ‘sex registration’ instead of ‘gender (identity) registration’. See L. HERAULT et al., “Etat civil de demain et Transidentité. Rapport final”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 61. See also T. NÍ MHUIRTHILE, “The Legal Status of Intersex Persons in Malta” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 358.

¹²⁰⁷ J. T. THEILEN, “The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe” in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 390. However, also in other countries, scholars see a right to gender self-determination in national (constitutional) law. See for instance LANGLEY (USA), who argues that “to fully realize the Fourteenth Amendment’s promise of liberty, people must be able to determine gender for themselves”. See L. LANGLEY, “Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities”, *Texas Journal on Civil Liberties and Civil Rights* 2006, Vol. 12, p. 101. See in this regard also K. REINECK, “Running from the gender police: reconceptualizing gender to ensure protection for non-binary people”, *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 306 and further.

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next to high-ranking UN officials, States have been the most effective norm entrepreneurs concerning issues of gender (identity).¹²⁰⁸ Moreover – as is the case with the case law of the ECtHR – developments at the national level that bring about a paradigm shift may lead to similar results in other States on the basis of a judgment by an international court that takes notice of a rising international trend and/or consensus.

However, more importantly for this thesis, it also needs to be questioned whether a right to (legal recognition of) gender (identity) can also be deduced from the case law of the ECtHR. Given the great importance of the Court's case law for Belgian law, the next section will establish the scope of gender (identity) rights under Article 8 ECHR.

§2. The right to (legal recognition of) gender (identity) under Article 8 ECHR¹²⁰⁹

The ECHR does not explicitly mention the matter of gender (identity), nor the registration thereof. However, as mentioned above, the ECtHR has held in the past that the individual freedom to define one's gender (identity) is one of the most basic essentials of self-determination.¹²¹⁰ Indeed, according to the Court, one's right to gender (identity) and to personal development is a fundamental aspect of the right to respect for private life.¹²¹¹ Although it has only once explicitly placed individual decisions regarding gender (identity)

¹²⁰⁸ E. BAISLEY, "Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity", *Human Rights Quarterly* 2016, Vol. 38, p. 163.

¹²⁰⁹ This section will solely focus on Article 8 ECHR, that according to THEILEN, is the natural fall-back provision for all matters that are personal and identity-related, and thus a good focal point for transgender rights. See J. T. THEILEN, "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe" in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 376.

¹²¹⁰ ECtHR 11 October 2018, 55216/08, S.V. v. Italy, §54-55; 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., Garçon and Nicot v. France, §93; 12 June 2003, 35968/97, Van Kück v. Germany, §73.

¹²¹¹ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., Garçon and Nicot v. France, §93; 10 March 2015, 14793/08, Y.Y. v. Turkey, §66. See in this sense also ECtHR 17 January 2019, 29683/16, X v. the Former Yugoslav Republic of Macedonia, §38.

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under the scope of the right to personal autonomy *ex* Article 8 ECHR,¹²¹² it has consistently considered that “elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8”,¹²¹³ of which the guarantees are interpreted based on the underlying principle of personal autonomy.¹²¹⁴ It has in that sense also stated that “protection is given to the personal sphere of each individual, including their right to establish details of their identity as human beings”,¹²¹⁵ which arguably also encompasses the harmonisation of one’s sex and self-perceived gender (identity).¹²¹⁶ One can therefore state that the right to establish one’s personal and gender (identity) is founded on the right to personal autonomy under Article 8 of the Convention.

From that right, the Court has over time¹²¹⁷ deduced the positive obligation for States to implement a framework of legal gender recognition for (post-operative)¹²¹⁸ transsexual persons. In this regard, the true landmark case was

¹²¹² See ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., Garçon and Nicot v. France, §93.

¹²¹³ See *inter alia* ECtHR 10 March 2015, 14793/08, Y.Y. v. Turkey, §56; ECtHR 22 October 1981, Dudgeon v. the United Kingdom, Series A no. 45, p. 18-19, §41. See in this sense also ECtHR 17 January 2019, 29663/16, X v. the Former Yugoslav Republic of Macedonia, §38.

¹²¹⁴ See *supra* p. 45.

¹²¹⁵ ECtHR 11 July 2002, 28957/95, Christine Goodwin v. the United Kingdom, §90.

¹²¹⁶ B. RUDOLF, “European Court of Human Rights: Legal status of postoperative transsexuals”, *International Journal of Constitutional Law* 2003, Vol. 1(4), p. 721.

¹²¹⁷ In the first cases concerning legal gender recognition that reached Strasbourg, the Court did not find a violation of Article 8, despite being “conscious of the seriousness of the problems affecting transsexuals and the distress they suffer”. Departing from a very biological vision of sex and gender, and taking into account the lack of consensus among States, the Court left it open to the margin of appreciation of States to accommodate the demands of trans(sexual) persons. See ECtHR 17 October 1986, 9532/81, Rees v. the United Kingdom; 27 September 1990, 10843/84, Cossey v. the United Kingdom; 30 July 1998, 22985/93 and 23390/94, Sheffield and Horsham v. the United Kingdom.

¹²¹⁸ The recent cases of S.V. v. Italy (2018) and X v. the Former Yugoslav Republic of Macedonia (2019) might be indicative of a cautious expansion of the positive obligation towards pre-operative transsexual persons. However, no conclusive arguments in that sense can be deduced from these cases, since the former case concerned a change of first name. In the latter case, the Court – somewhat artificially – avoided commenting on the requirement of full gender affirming surgery for legal gender recognition. Indeed, the Court only stipulated that the State has the positive obligation to foresee a framework of legal gender recognition on the basis of quick, transparent and accessible procedures. See ECtHR 17 January 2019, 29663/16, X v. the Former Yugoslav Republic of Macedonia, §69-70.

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Christine Goodwin v. United Kingdom,¹²¹⁹ in which trans(sexual) persons were arguably written into legal existence at the European level.¹²²⁰ After acknowledging that gender (identity) is an important aspect of personal identity, the Court referred to international evolutions in science, medicine, society and the law to find that the matter of legal gender recognition could no longer fall within the State's margin of appreciation, save as regards the appropriate means of achieving this recognition (i.e. the conditions for legal gender recognition). Importantly, the Court noted that there was:

*"[...] clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."*¹²²¹

Since there were no significant factors of public interest to weigh against the interest of the applicant in obtaining legal recognition of her gender re-assignment, the Court reached the conclusion that the fair balance tilted decisively in favour of the applicant.¹²²² It affirmed this ruling in later case law,¹²²³ in which it held that the legal recognition of a person's 'sexual identity' amounts to a right of the individual under Article 8 ECHR.¹²²⁴ In *X v.*

¹²¹⁹ ECtHR 11 July 2002, 35968/97, *Christine Goodwin v. the United Kingdom*. J. T. THEILEN, "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe" in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 377. See in this regard also F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 22.

¹²²⁰ J. T. THEILEN, "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe" in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 377.

¹²²¹ ECtHR 11 July 2002, 35968/97, *Christine Goodwin v. the United Kingdom*, §85.

¹²²² *Ibid.*, §92-93.

¹²²³ See for instance ECtHR 10 March 2015, 14793/08, *Y.Y. v. Turkey*, §110; 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., *Garçon and Nicot v. France*, §99-100.

¹²²⁴ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., *Garçon and Nicot v. France*, §132. Nevertheless, there are still a number of Council of Europe Member States that do not provide a possibility of legal gender recognition: Albania, Andorra, Cyprus, Kosovo, Liechtenstein, North-Macedonia, Monaco and San Marino. In States as Bulgaria, Latvia and Lithuania, although certain individuals have obtained recognition of their gender (identity), there are no rules, or only incomplete rules for legal gender recognition. See M. VAN DEN

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the Former Yugoslav Republic of Macedonia (2019), the Court added that this legal recognition must be based on “quick, transparent and accessible procedures”, mirroring the wording of the Council of Europe Parliamentary Assembly’s Resolution 2048 (2015).¹²²⁵ Moreover, States have the positive obligation to grant the benefits connected to the ‘new’ sex/gender after its legal recognition, such as pension rights.¹²²⁶ Nevertheless, States still maintain a margin of appreciation to set conditions to the exercise of the right to legal gender recognition. In other words, while individuals have the right to define their own gender (identity) based on their personal autonomy under Article 8,¹²²⁷ the *legal recognition thereof* may be made conditional by the State, which may include medical requirements with the exception of a condition of sterility.¹²²⁸ The ECtHR’s case law therefore appears to be less progressive than the emerging standards regarding gender recognition in international (soft) law.¹²²⁹

§3. The 2017 Gender Recognition Act

Although it is regrettable that the Belgian 2017 Gender Recognition Act – contrary to Malta’s 2015 GIGESC Act and the 2018 Portuguese Gender Recognition Act –¹²³⁰ does not explicitly refer to a (transgender) person’s

BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 55-56.

¹²²⁵ ECtHR 17 January 2019, 29663/16, X v. the Former Yugoslav Republic of Macedonia, §70.

¹²²⁶ ECtHR 23 May 2006, 32570/03, Grant v. the United Kingdom, §43.

¹²²⁷ J. T. THEILEN, “The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe” in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 377.

¹²²⁸ See J. T. THEILEN, “The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe” in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 378. See also F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 77. See also M. VAN DEN BRINK, “‘The Legitimate Aim of Harmonising Body and Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 237.

¹²²⁹ See F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 73-75.

¹²³⁰ Article 3 of Gender Identity, Gender Expression and Sex Characteristics Act of 14 April 2015 to provide for the recognition and registration of the gender of a person and to regulate

subjective right to legal gender recognition, it is clearly implicitly based thereon, as recognised by the Constitutional Court.¹²³¹ Nevertheless, it seems that the Act is still embedded in a logic concerning legal gender recognition that can also be found in the ECtHR's case law. Indeed, the parliamentary preparatory works indicate that, although self-determination is the principle underlying the new legal gender recognition framework, it is self-determination '*under limitations*'.¹²³² In other words, while the Belgian legislature recognised its obligations to respect every person's personal autonomy regarding their gender (identity), and significantly improved the legal status of transgender persons, it made use of the margin of appreciation granted by the ECtHR to set conditions to implement the positive obligation to legally recognise a person's gender (identity) which limit their right to personal autonomy.

Given this dual nature of the 2017 Gender Recognition Act, the restrictions to the full measure of self-determination that are, on the one hand, explicitly renounced, and/or, on the other hand, upheld or even introduced by the Act, will be evaluated in the next sections. These abolished, lingering or new restrictions relate to the act of registering sex/gender itself, the conceptual framing of 'registered sex', and the material and formal conditions for legal gender registration. In this regard, the (de)pathologisation of transgender persons (II), the cisnormativity (III) and binary normativity (IV) of the Act will be thoroughly discussed. Moreover, since the Act changed the administrative procedure to amend a person's registered sex/gender, it is also important to analyse its impact on the general sex/gender registration framework.

II. Depathologisation of transgender persons

The most important restriction to the full implementation of self-determination regarding legal gender recognition has to do with the so-called pathologisation of gender non-conformity, transsexuality and transgender

the effects of such a change, as well as the recognition and protection of the sex characteristics of a person, *Government Gazette of Malta* No. 19,410.

¹²³¹ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.1.2.

¹²³² *Parl.Doc.* Chamber of representatives, 54-2403/004, p. 5-6.

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persons in society and law. Although transgenderism and transsexuality are no longer considered to be mental disorders by leading international classifications of mental pathologies – yet are still linked to other medical diagnoses such as gender dysphoria –, some transgender persons consider their gender (identity) to be a health issue and therefore seek access to health care to receive treatment, for instance on their sex characteristics.¹²³³ However, many transgender persons have no interest in hormone treatment or surgery, especially when leading to sex ‘reassignment’.¹²³⁴ Other transgender persons who do seek access to health care face a vast amount of different reasons which prevent treatment.¹²³⁵ In this regard, MOTTET distinguishes ten reasons why transgender persons might not have access to medical treatment:

- *“Some individuals cannot afford the surgery they desire, especially given that a large majority of private and public health insurance plans do not currently’ cover sex reassignment surgeries.*
- *Many people have medical conditions that make surgery risky or contraindicated.*
- *Many people who want and can afford surgery do not pursue it because they fear complications.*
- *Many individuals are unsure whether the surgery will provide the desired physical or aesthetic result, especially given individual variation and the chance of achieving an optimal result.*

¹²³³ See H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹²³⁴ J. T. THEILEN, “Depathologisation of Transgenderism and International Human Rights Law”, *Human Rights Law Review* 2014, Vol. 14, p. 334. See in this regard also H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also B. T. RUOCCO, “Our Antitotalitarian Constitution and the Right to Identity”, *University of Pennsylvania Law Review* 2016, Vol. 165, p. 202.

¹²³⁵ See E. BRIBOSIA and I. RORIVE, “Human rights integration in action: making equality law work for trans people in Belgium” in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 121.

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- *Some are prevented by practical considerations involved in undergoing major surgery, including having difficulty in taking several weeks off from work or school, having caregiving responsibilities for family members, or lacking caregivers for themselves following surgery.*
- *Some hold sincere religious beliefs, or personal beliefs, against surgical body modification.*
- *Some have family members or other loved ones who would be upset if they had the surgery, and thus forgo surgeries to maintain these relationships.*
- *For some, maintaining reproductive capacity is important and many surgeries eliminate this possibility.*
- *Some are denied access to needed approval or diagnosis "letters" from psychologists when their life experiences do not neatly fit the "transsexual" pattern, when they do not match closely enough the stereotypes of man or woman, or when they are not sufficiently "clinically distressed."*
- *A significant percentage of transgender people have determined that surgery is not necessary for them to be comfortable living in their new gender. Many transgender people determine that the alterations they make to their gendered appearance, names, and pronouns give them the well-being they need without further medical treatment.*¹²³⁶

Nevertheless, many States in Europe and around the globe have reflected this pathologisation of transgender persons in law, by making legal gender recognition dependent on requirements of a psycho-medical nature, ranging from a psycho-medical assessment or even a diagnosis of transsexuality/gender dysphoria, over gender affirming treatment, to compulsory sterility. These requirements thus often amount to some kind of

¹²³⁶ L. MOTTET, "Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People", *Michigan Journal of Gender & Law* 2013, Vol. 19, p. 407-408.

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pathologisation and modification of the bodies of persons applying for the legal recognition of their gender (identity).¹²³⁷

Besides being conceptually based on stereotypes of transgenderism,¹²³⁸ cisnormativity and binary normativity, these medical requirements for legal gender recognition are also highly disputed from a human rights perspective. It is therefore necessary to evaluate the new Belgian framework regarding legal gender recognition from this perspective of depathologisation. Before turning to the 2017 Gender Recognition Act, it will first be established what standards of depathologisation can be deduced from international and European human rights law.

§1. Right to depathologisation under (international) human rights law

§1.1. Transgender depathologisation under international law

According to THEILEN, several developments at the international level are indicative of the existence of a right to the depathologisation of transgender identities under international law,¹²³⁹ and more specifically under the right to non-discrimination regarding health *ex* Articles 12 *jo.* 2(2) of the International Covenant on Economic, Social and Cultural Rights, the right to private life *ex* Articles 8 ECHR and 17 ICCPR, and the right to personal autonomy under Article 8 ECHR.¹²⁴⁰ They deduce the existence of such right predominantly from international and European soft law instruments, such as Yogyakarta Principles 3 and 18,¹²⁴¹ the Issue Paper on human rights and gender identity by former Council of Europe Commissioner for Human Rights

¹²³⁷ J. T. THEILEN, “The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe” in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 382-383.

¹²³⁸ I.e. the conflation between transsexuality and transgenderism.

¹²³⁹ See Z. DAVY, A. SØRLIE, A. SUESS SCHWEND, “Democratising diagnoses? The role of the depathologisation perspective in constructing corporeal trans citizenship”, *Critical Social Policy* 2018, Vol. 38, p. 15, 22-24.

¹²⁴⁰ J. T. THEILEN, “Depathologisation of Transgenderism and International Human Rights Law”, *Human Rights Law Review* 2014, Vol. 14, p. 331-337.

¹²⁴¹ Since the author’s writings, Principle 3 was further elaborated by Principle 31 in the 2017 update to the Yogyakarta Principles. See *supra* p. 328.

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HAMMARBERG,¹²⁴² and the country specific-concluding observations by the UN Committee on Economic, Social and Cultural Rights (CESCR),¹²⁴³ which all renounce in some form the conceptualisation of transsexuality/transgenderism as a medical condition and the usage of pathologising conditions in legal gender recognition procedures. Moreover, since THEILEN's writings (2014), other institutional human rights actors have also repeatedly called for the elimination of any pathologisation of transgender persons. Indeed, several UN treaty bodies and agencies have called for the abolition of medical requirements in the context of legal gender recognition for transgender persons.¹²⁴⁴ Among European institutions, the Council of Europe Parliamentary Assembly¹²⁴⁵ and the European Parliament¹²⁴⁶ undertook similar initiatives. According to HAMMARBERG, from a human rights and health care perspective, no diagnosis is needed in order to give access to treatment for a situation in need of medical care.¹²⁴⁷ Nevertheless, the depathologisation of transgender persons does not necessarily contradict the recognition of the legitimate question of some

¹²⁴² T. HAMMARBERG, "Human Rights and Gender Identity", <<https://rm.coe.int/16806da753>> (last visited 10 October 2017).

¹²⁴³ See for instance the concluding observations by the CESCR on the fifth report of Germany on the implementation of the International Covenant on Economic, Social and Cultural Rights, E/C.12/DEU/CO/5 (2011).

¹²⁴⁴ See for instance the concluding observations by the CEDAW Committee on Montenegro, CEDAW/C/SVK/CO/5-6 (2017), p. 14; and on Slovakia, CEDAW/C/MNE/CO/2 (2016), p. 12. See also the Interagency statement by ILO, OHCHR, UNAIDS, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO calling for an end to violence and discrimination against lesbian, gay, bisexual, transgender and intersex persons that condemned forced or coercive sterilisation, forced genital and anal examinations, and unnecessary surgery and treatment in intersex children without their consent (*supra* p. 192).

¹²⁴⁵ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, "Resolution 2048 (2015) 'Discrimination against transgender people in Europe'", <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>> (last visited 10 October 2017).

¹²⁴⁶ EUROPEAN PARLIAMENT, "Resolution of 14 February 2017 on promoting gender equality in mental health and clinical research (2016/2096(INI))", <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2017-0028%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>> (last visited 10 October 2017).

¹²⁴⁷ T. HAMMARBERG, "Human Rights and Gender Identity", <<https://rm.coe.int/16806da753>> (last visited 10 October 2017), p. 10-11.

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transgender persons to have access to health care in order to undergo treatment on their sex characteristics. Indeed, the coverage of several expenses regarding pregnancy shows that having a disease is not a necessary condition for being afforded health care.¹²⁴⁸

Next to these international developments that specifically concern legal gender recognition, LAU argues that the human right to bodily integrity also supports the depathologisation of transgender persons in law. The right to bodily or physical integrity, which can be derived from the right to private life and/or the right to be free from torture and other cruel, inhuman or degrading treatment,¹²⁴⁹ includes the freedom to make decisions concerning one's own body. According to LAU, this means that the government must not force individuals to undergo unwanted medical treatment and therefore must not make the right to gender recognition contingent on the individual undergoing medical care such as surgeries to alter genitalia.¹²⁵⁰ DAVY, SØRLIE and SUESS SCHWEND concur that the human rights principles of human dignity, bodily integrity, self-determination and protection from medical abuse oppose the pathologisation of transgender identities.¹²⁵¹ In other words, there seems to exist a considerable parallel between the compulsory pathologisation of transgender persons and the performance of non-consensual sex assigning/normalising treatment of persons with variations of sex characteristics.

¹²⁴⁸ J. T. THEILEN, "Depathologisation of Transgenderism and International Human Rights Law", *Human Rights Law Review* 2014, Vol. 14, p. 336.

¹²⁴⁹ The ECtHR has for instance, in a case related to three transgender persons, brought the right to bodily integrity under Articles 3 and 8 ECHR. See ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., Garçon and Nicot v. France, §131.

¹²⁵⁰ H. LAU, "Gender Recognition as a Human Right" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹²⁵¹ Z. DAVY, A. SØRLIE, A. SUESS SCHWEND, "Democratising diagnoses? The role of the depathologisation perspective in constructing corporeal trans citizenship", *Critical Social Policy* 2018, Vol. 38, p. 27.

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§1.2. *Trans depathologisation under the ECHR*

Departing from their hypothesis that a right to depathologisation of transgender identities exists under international human rights law, THEILEN identifies an obligation on every State of respect, i.e. to refrain from requiring any medical condition in order to have a person's legally assigned sex/gender amended,¹²⁵² ranging from some sort of medical or psychological report or assessment to the compulsory requirement of sterility. In this regard, it is also worth questioning whether the same obligation of respect for a transgender person's self-defined gender (identity) exists under the ECHR, as interpreted by the ECtHR, whose case law is authoritative not only within the Council of Europe, but also around the globe.¹²⁵³ The developments in the Court's case law on (the legal recognition of) gender (identity) will be analysed in the next section. It will be argued that – despite the existence of a right to gender self-determination under Article 8 ECHR – the same message of depathologisation cannot be deduced from the Court's rulings.¹²⁵⁴ *A fortiori*, it may even be argued that – to a certain extent – the Court has facilitated the perseverance of the pathologisation of transgender persons in law.

§1.2.1. Developments in the ECtHR's case law

Although it was already mentioned above that the Court recognises under Article 8 ECHR a right to self-determination with regard to gender (identity) and a positive obligation on States to provide a procedure for legal gender

¹²⁵² J. T. THEILEN, "Depathologisation of Transgenderism and International Human Rights Law", *Human Rights Law Review* 2014, Vol. 14, p. 337.

¹²⁵³ Moreover, the ECtHR is the human rights monitoring body that has dealt with the largest number of cases that are related to transgender persons. See D. GONZALEZ-SALZBERG, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights", *American University International Law Review* 2014, Vol. 29(4), p. 801; *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 5. See in this regard also H. LAU, "Rewriting Schalk and Kopf: shifting the locus of deference" in E. BREMS (ed.), *Diversity and European Human Rights. Rewriting Judgments of the ECtHR*, Cambridge, Cambridge University Press, 2015, p. 258.

¹²⁵⁴ See L. HERAULT et al., "Etat civil de demain et Transidentité. Rapport final", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 144.

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recognition under Article 8 ECHR,¹²⁵⁵ the legal pathologisation of transgender persons has only scarcely reached its attention. Even though cases concerning aspects of medical gender affirming therapy had previously reached the Court, until 2017 they did not explicitly address the issue of the conformity with the ECHR of medical requirements as a prerequisite to obtaining legal gender recognition.¹²⁵⁶ Nevertheless, one could at least deduce from the case law that the Court considered medical conditions to be an interference with the right to gender (identity) and personal development, and therefore with Article 8 ECHR.¹²⁵⁷

In 2007, the Court found a violation of Article 8 ECHR in *L. v. Lithuania* because of the authorities' persistent failure to adopt legislation enabling gender affirming surgery, even though the Civil Code provided for a right to legal gender recognition on the basis of full sex 'reassignment'.¹²⁵⁸ It found that the limited legislative gap regarding gender affirming surgery left the individual transsexual person in a situation of distressing uncertainty with regard to the private life and the recognition of their true identity.¹²⁵⁹ Nevertheless, the Court did not address the conformity of the requirement of gender affirming surgery for legal gender recognition with Article 8. Moreover, from this case, trans(sexual) persons cannot deduce a right to gender reaffirming surgery or trans specific health care *in abstracto*.¹²⁶⁰

One year later, in 2008, the Court had the chance to address the conformity of the compulsory requirement of hormonal and surgical treatment for legal

¹²⁵⁵ See *supra* p. 335.

¹²⁵⁶ X, "Case Comment. Transgender people: sex reassignment surgery – obligatory sterilisation as a pre-condition for surgery", *European Human Rights Law Review* 2015, Vol. 4, p. 423. See also J.M. SCHERPE, "Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 209.

¹²⁵⁷ ECtHR 10 March 2015, 14793/08, *Y.Y. v. Turkey*, §66.

¹²⁵⁸ ECtHR 11 September 2007, 27527/03, *L. v. Lithuania*.

¹²⁵⁹ *Ibid.*, §59.

¹²⁶⁰ D. GONZALEZ-SALZBERG, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights", *American University International Law Review* 2014, Vol. 29(4), p. 824.

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gender recognition, yet declared the case manifestly ill-founded.¹²⁶¹ Taking into account the State's margin of appreciation, it found the conditioning of legal gender recognition on the completion of the hormonal-surgical process of sex 'reassignment' not unreasonable under Article 8 ECHR.¹²⁶²

In *Y.Y. v. Turkey* (2015), the Court held that the requirement of sterilisation to have access to gender affirming therapy violated Article 8 of the Convention. However, interestingly, it made use of arguments that related more to legal gender recognition than to the access to medical sex 'reassignment'. The Court first held that, in accordance with the principle of subsidiarity, it was primarily for the Contracting States to decide on the measures necessary to resolve within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status. However, it attached less importance to the lack of evidence of a common European approach than to the existence of clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transgender persons but of legal recognition of the 'new' gender (identity) of post-operative transgender persons.¹²⁶³ In that connection it emphasised that, "in the Appendix to Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers of the Council of Europe stated that prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements. Furthermore, in Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity, the Parliamentary Assembly of the Council of Europe called on the Member States to address the specific discrimination and human rights violations faced by transgender persons and, in particular, to ensure in legislation and in practice their right to official documents that reflected the individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as gender reassignment

¹²⁶¹ ECtHR 27 May 2008, 18367/06, *Nuñez v. France*.

¹²⁶² *Ibid.*, §1.

¹²⁶³ ECtHR 10 March 2015, 14793/08, *Y.Y. v. Turkey*, §106-108.

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surgery or hormone therapy.”¹²⁶⁴ The Court then argued that “the same is undoubtedly true in relation to the legal requirements governing access to medical or surgical procedures for transgender persons wishing to undergo the physical changes associated with gender reassignment.”¹²⁶⁵ It therefore held that the respect for a person’s physical integrity under Article 8 ECHR opposed the requirement of compulsory sterilisation.¹²⁶⁶

The matter of compulsory medical requirements as a prerequisite for legal gender recognition finally explicitly arose in the case of *A.P., Garçon and Nicot v. France*.¹²⁶⁷ At the time of the relevant facts, French law required – on the basis of jurisprudence of the Court of Cassation – the fulfilment of two medical conditions in order to have the sex marker on one’s birth certificate changed in the light of one’s gender (identity) through a judicial procedure before the tribunal of first instance. The applicant concerned needed to present proof of the real existence and persistence of the ‘syndrome of transsexuality’ and the ‘irreversibility of the transformation of the bodily appearance’ to the ‘opposite’ sex. The courts were usually satisfied with evidence on the basis of medical and psychological certificates, yet sometimes ordered the applicant to be subjected to a medical expert examination in case of doubt.¹²⁶⁸ The ECtHR first addressed the matter of ‘irreversibility of the transformation of the bodily appearance’. While the French Government argued that this irreversibility did not necessarily entail a surgical intervention or treatment leading to the person’s sterility, the Court nevertheless aligned this condition with a *de facto* condition of surgical or hormonal sterilisation.¹²⁶⁹ In other words, the Court did not explicitly address other medical conditions which could fall under ‘irreversibility of the transformation of the bodily appearance’, such as gender affirming surgery

¹²⁶⁴ Ibid., §110.

¹²⁶⁵ Ibid., §107.

¹²⁶⁶ Ibid., §119.

¹²⁶⁷ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., Garçon and Nicot v. France.

¹²⁶⁸ The latter situation was the case for applicant A.P.

¹²⁶⁹ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., Garçon and Nicot v. France, §83, 116.

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or gender affirming hormonal treatment.¹²⁷⁰ Secondly, the Court acknowledged the State's positive obligation to respect the private life of the applicants under Article 8 ECHR, through foreseeing a procedure for legal gender recognition.¹²⁷¹ It then proceeded by verifying whether the State, taking into account its margin of appreciation, struck a fair balance between the general interest and the rights of the applicants, who renounced the conditions with which they had to comply for the recognition of their gender (identity). The Court pointed out that the margin of appreciation of the State was restrained. Indeed, even though there was no European consensus on the condition of sterility for legal gender recognition, and the matter concerned the civil status and delicate moral and ethical questions, the right to sexual identity and personal development is a fundamental aspect of the right to respect for one's private life under Article 8.¹²⁷² Moreover, a person's physical integrity is directly at stake in case of a sterilisation.¹²⁷³ The Court then noted the international tendency to abandon the condition of sterility in the context of legal gender recognition, which France *nota bene* joined in October 2016, and that "*numerous European and international institutional actors for the promotion and defense of human rights precisely took position in favour of the abolishment of the criterion of sterility, which they find a violation of fundamental rights*".¹²⁷⁴ The Court held that conditioning legal gender recognition on sterilising surgery or treatment, which the person concerned does not wish to undergo, comes down to conditioning the exercise of the right to respect for one's private life under Article 8 on the renunciation of one's right to physical integrity, protected by Articles 8 and 3

¹²⁷⁰ See also J.M. SCHERPE, "Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 209. Queer scholar GONZALEZ-SALZBERG argues that the condition of compulsory gender affirming therapy is also covered by the Court's findings in the case. See D. GONZALEZ-SALZBERG, "An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*", *The Modern Law Review* 2018, Vol. 81(3), p. 527.

¹²⁷¹ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., *Garçon and Nicot v. France*, §99.

¹²⁷² *Ibid.*, §123.

¹²⁷³ *Ibid.*, §123.

¹²⁷⁴ *Ibid.*, §124-125 (own translation).

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ECHR, which creates an impossible dilemma.¹²⁷⁵ Even though it acknowledged the importance of the general interests of the non-disposability, truthfulness and coherence of the civil status,¹²⁷⁶ it found that the State had failed to strike a fair balance between those interests and the rights of the applicants and therefore violated Article 8 ECHR.¹²⁷⁷ Nevertheless, the Court upheld the condition of providing evidence of the existence of the ‘syndrome of transsexuality’ and the possibility for the State to order the performance of a medical expert examination,¹²⁷⁸ considering the wide margin of appreciation for the State and the smaller consequences for the persons concerned. The case thus had for direct effect the illegality of a condition of sterility for legal gender recognition under Article 8 ECHR, while upholding the legal pathologisation of trans(sexual) persons in general.¹²⁷⁹

¹²⁷⁵ Ibid., §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 gender affirming 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 transgender 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 Charter (para. 86).

¹²⁷⁶ The Court affirmed this in the later case of *S.V. v. Italy*, in which it found that the non-disposability, truthfulness and coherence of the civil status, and the requirement of legal certainty justify rigorous procedures in order to verify the “profound motivations” for legal gender recognition. See ECtHR 11 October 2018, 55216/08, *S.V. v. Italy*, §69.

¹²⁷⁷ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P., Garçon and Nicot v. France*, §132. The Court did not mention Article 3 ECHR in the operative part of its judgment.

¹²⁷⁸ The validation of this genital exam may be seen as an argument to support the narrow reading of the Court’s interpretation of the ‘irreversibility of the transformation of the bodily appearance’, i.e. only covering sterilising treatment. Indeed, it would lack any coherence to prohibit gender affirming surgery for legal gender recognition but allowing genital examinations. See in this regard also D. GONZALEZ-SALZBERG, “An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon v France*”, *The Modern Law Review* 2018, Vol. 81(3), p. 536.

¹²⁷⁹ See B. MORON-PUECH, “L’arrêt *A.P., Garçon et Nicot c. France* ou la protection insuffisante par le juge européen des droits fondamentaux des personnes transsexuées [*A.P., Garçon and Nicot v. France* or the insufficient protection of transgender persons by the European judge of Human Rights]”, *Revue des droits de l’homme* 2017, <<http://revdh.revues.org/3049>> (last visited 22 May 2017), p. 10. See also B. MORON-PUECH, “Changement de sexe: la fin d’un dilemma insoluble, mais pas d’une pathologisation

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The Court's caution to depathologise transgender identities also became clear in the recent cases of *X v. Russia* (2018), *S.V. v. Italy* (2018) and *X v. the Former Yugoslav Republic of Macedonia* (2019)¹²⁸⁰:

- The first case concerned a person who was registered as male at birth, yet who adopted a female gender expression later on in life. The applicant showed interests in a minor boy, which were interpreted as romantic/sexual feelings by the authorities, and was involuntarily institutionalised for showing “delusional” behaviour. Although the Court found a violation of Article 5 ECHR due to the failure by the authorities to prove that the applicant's condition actually warranted compulsory confinement, it did not address the authorities' transphobic motives. While the Court noted that the authorities “paid detailed attention and attached decisive importance to the applicant's change of hair colour, his interest in women's clothes, jewellery, and make-up” in order to proceed with the compulsory hospitalisation, it chose not to “express an opinion on whether these aspects of the applicant's life can be said to demonstrate the existence of any mental disorder”.¹²⁸¹ In other words, not only did the Court not conceptualise the applicant's behaviour as non-conforming gender identity/expression, it also did not point out the inherent pathologisation of the applicant by the Russian authorities. While the Court did not go as far as declaring the applicant's gender expression a medical condition in the same way it has done with transsexuality, it did not exclude this classification either.
- In *S.V. v. Italy*, the Court considered the situation in which a transwoman was forced to wait 2.5 years to have her first name changed in the light of her gender (identity) a violation of Article 8 ECHR. The applicant, who was born with male sex characteristics and

outrangère”, <<https://sexandlaw.hypotheses.org/205>> (last visited 7 June 2017). See also F. RENZ, “Stopping forced sterilisations is not enough – the limitations of the recent ECHR judgement on trans rights”, <<https://verfassungsblog.de/stopping-forced-sterilisation-is-not-enough-the-limitations-of-the-recent-echr-judgement-on-trans-rights/>> (last visited 26 October 2018).

¹²⁸⁰ ECtHR 17 January 2019, 29683/16, *X v. the Former Yugoslav Republic of Macedonia*.

¹²⁸¹ ECtHR 20 February 2018, 3150/15, *X v. Russia*, §44.

had received judicial authorisation to undergo gender affirming surgery, was unable to have her first name officially changed until she proved that the sex 'reassignment' was completed in the course of a second judicial procedure. Given the fact that the applicant already had socially transitioned for several years and had adopted a feminine physical appearance,¹²⁸² the Court considered the waiting period in between both judicial procedures a violation of the right to respect for private life leading to feelings of vulnerability, humiliation and anxiety.¹²⁸³ However, since the applicant was a transsexual woman, who therefore personally did not object to undergoing gender affirming therapy, the Court considered that physical integrity was not at stake and did not deem it necessary to consider the acceptability under the Convention of compulsory sex 'reassignment' as a legal condition for amending the civil status.¹²⁸⁴ Moreover, it noted that the non-disposability, truthfulness and coherence of the civil status, and the requirement of legal certainty justify rigorous procedures in order to verify the 'profound motivations' for legal gender recognition.¹²⁸⁵ The judgment is therefore confined to the issue of temporality in the procedure of legal recognition of the gender (identity) of transsexual persons, especially when they already have been in the process of social and physical transition 'for a long time'. For those persons, having to wait for a change of civil status until full sex 'reassignment' is completed is now deemed disproportionate;

- The case of *X v. the Former Yugoslav Republic of Macedonia* concerned a transman, who the Court identified as a pre-operative transsexual.¹²⁸⁶ 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 gender affirming genital surgery. From 2011

¹²⁸² ECtHR 11 October 2018, 55216/08, S.V. v. Italy, §70.

¹²⁸³ Ibid., §72.

¹²⁸⁴ Ibid., §65.

¹²⁸⁵ Ibid., §69.

¹²⁸⁶ ECtHR 17 January 2019, 29683/16, X v. the Former Yugoslav Republic of Macedonia, §65.

onwards, the applicant had lodged several applications with the Macedonian civil registry in order to have the sex/gender marker and the numerical personal code¹²⁸⁷ 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”.¹²⁸⁸ 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 gender affirming surgery a violation of this right to bodily integrity under Article 8 ECHR. However, the Court only addressed the quality of the regulatory framework, in a somewhat artificial manner. Indeed, the Court focussed on the legal uncertainty for transgender persons regarding the required evidence they needed to present to the civil registry.¹²⁸⁹ 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.¹²⁹⁰ Taking into account this uncertainty regarding the required evidence, the Court decided not to speculate whether a condition of compulsory gender affirming surgery was indeed required or not.¹²⁹¹ Nevertheless, as the dissenting judges – who argued that the applicant’s claim did not fall under the scope of Article 8 to begin with – rightly stated, there were

¹²⁸⁷ This 10-digit administrative code indicates whether a person was of the male or female sex.

¹²⁸⁸ ECtHR 17 January 2019, 29683/16, X v. the Former Yugoslav Republic of Macedonia, §10-17.

¹²⁸⁹ Ibid., §68.

¹²⁹⁰ Ibid., §70.

¹²⁹¹ Ibid., §69.

numerous indications in the domestic procedures that the Macedonian authorities indeed required full gender affirming surgery and would continue to do so.¹²⁹² 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 gender affirming therapy, instead of the lack of an accessible and foreseeable regulatory framework for gender recognition.

§1.2.2. Facilitation of transgender pathologisation by the ECtHR?¹²⁹³

The question then arises whether the ECtHR's case law not only upholds, but also reinforces or even facilitates the legal pathologisation of transgender persons at the domestic level.¹²⁹⁴ After all, it is striking that the Court continues to allow the requirement of providing evidence of the existence of the 'syndrome of transsexuality' and the possibility for the State to order the performance of a medical expert examination, considering its recognition that the psycho-pathologisation of gender (identity) reinforces stigmatisation of transgender persons¹²⁹⁵ and considering the *narrow* margin of appreciation regarding the condition of compulsory sterility.¹²⁹⁶ It may be argued that the continuing acceptance of the legal pathologisation of transgender persons in the case law, is based on the Court's insufficient conceptual understanding of gender non-conformity in all its varieties, and

¹²⁹² ECtHR 17 January 2019, 29683/16, X v. the Former Yugoslav Republic of Macedonia, Dissenting Opinion of Judges Pejchal and Wojtyczek, §10.

¹²⁹³ See P. CANNOOT, "The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition", *Netherlands Quarterly of Human Rights* 2019, Vol. 37(1), p. 14-35.

¹²⁹⁴ See J. T. THEILEN, "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe" in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 385.

¹²⁹⁵ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., Garçon and Nicot v. France, §138.

¹²⁹⁶ See in this regard D. GONZALEZ-SALZBERG, "An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France", *The Modern Law Review* 2018, Vol. 81(3), p. 533.

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more specifically on its adherence to binary normativity regarding sex/gender, which, as mentioned above, appears to be self-evident in law.¹²⁹⁷

a. The Court's insufficient conceptualisation of transgender identities

With regard to the case law concerning sexual orientation, JOHNSON argued that “the Court [is] not simply a judicial organisation that determines the scope of the Convention rights for those homosexual subjects who come before it, but [a] site at which the homosexual subject of rights is ‘made up’. In other words, [the Court is] not only an institutional gatekeeper that grants human rights to sovereign homosexual subjects, but [a] performative mechanism through which the homosexual subject is given legal and social coherence”.¹²⁹⁸ The Court's conceptualisation of sexual minorities, such as transgender persons, is therefore not only important for the scope of their protected rights, but it also defines them as legal subjects.¹²⁹⁹ This process is also influenced by the applicants themselves. As JOHNSON held, again in relation to cases concerning sexual orientation, “an essential aspect of applications to the Court in respect of homosexuality, therefore, is their attempt to use the Court as a mechanism to challenge the dominant discursive constructions of homosexuality that underpin and perpetuate legal discrimination. In this sense, applications [...] must be seen as vehicles through which the interests of a community and a social movement are both imagined and advanced”.¹³⁰⁰ In this regard, the essentialised conceptualisation of the transgender person as a social and legal subject in the Court's case is decisive for understanding and explaining the gaps in the protection of their human rights under the ECHR.

The Court's terminology regarding gender (identity) variance has subtly changed over the years. Whereas early cases on legal gender recognition,

¹²⁹⁷ See *supra* p. 219.

¹²⁹⁸ P. JOHNSON, *Homosexuality and the European Court of Human Rights*, Abingdon, Routledge, 2012, p. 41.

¹²⁹⁹ See in this sense D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 7.

¹³⁰⁰ *Ibid.*, p. 43.

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such as *Rees v. United Kingdom* (1986) and *B. v. France* (1992) referred to ‘transsexuals’, the more recent cases of *Y.Y. v. Turkey* (2015), *A.P., Garçon and Nicot v. France* (2017) and *X v. the Former Yugoslav Republic of Macedonia* (2019) denoted the applicants as ‘transgender persons’. However, for a conceptual analysis, the most important case has been *Christine Goodwin v. United Kingdom* (2002), in which the Court described ‘transsexualism’ as an internationally widely recognised *medical condition* for which treatment is provided in order to afford relief.¹³⁰¹ Indeed, ever since the *Goodwin* case, the Court has connected the right to legal gender recognition to a status of ‘post-operative transsexuality’,¹³⁰² seeing bodily transformation as the appropriate solution for the medical condition of gender non-conformity. This remains true up until today, since *A.P., Garçon and Nicot v. France* only limited the State’s margin of appreciation with regard to explicit or implicit conditions of sterility and/or sterilising treatments, and thus only with regard to the most extreme medical requirement for legal gender recognition. After all, the Court not only deliberately and explicitly chose to interpret the condition of the ‘irreversibility of the transformation of the bodily appearance’ in French law in the aforementioned narrow way – without any convincing stimuli in that direction –,¹³⁰³ but also upheld the condition of a diagnosis of the ‘syndrome of transsexuality’. This continued allowance of the psycho-pathologisation of transgender persons was motivated on the basis of the State’s wide margin of appreciation. However, it is difficult to concur with the Court that there was no international trend – at least not comparable with the developments regarding the condition of compulsory sterility – towards the abolishment of a diagnosis as a condition for legal gender recognition. Indeed, as GONZALEZ-SALZBERG noted, “if a trend towards forbidding sterilisation was enough to

¹³⁰¹ ECtHR 11 July 2002, 28957/95, *Christine Goodwin v. the United Kingdom*, §81.

¹³⁰² See F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 68.

¹³⁰³ See B. MORON-PUECH, “L’arrêt *A.P., Garçon et Nicot c. France* ou la protection insuffisante par le juge européen des droits fondamentaux des personnes transsexuées [*A.P., Garçon and Nicot v. France* or the insufficient protection of transgender persons by the European judge of Human Rights]”, *Revue des droits de l’homme* 2017, <<http://revdh.revues.org/3049>> (last visited 11 October 2017), p. 14-15.

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limit the discretion of States, a similar tendency can be found regarding the depathologisation of trans identities. [...] Many [international bodies] have expressed their strong views against both sterilisation and pathologisation”.¹³⁰⁴ The Court thus fails to offer a straightforward opinion on the medicalisation of transgender persons in law and continues to accept the medical science to be the gatekeeper for legal gender recognition.¹³⁰⁵

On the basis of pathologising rhetoric, the ECtHR, like many other courts and legislators, thus has quasi-exclusively focused on *transsexuality* and mostly ignored the existence of gender non-conformity as a broader category.¹³⁰⁶ Indeed, only in the cases of *A.P., Garçon and Nicot v. France* (2017), *S.V. v. Italy* (2018) and *X. v. the Former Yugoslav Republic of Macedonia* (2019), the Court (albeit implicitly) acknowledged that the fact that medical conditions are required for legal gender recognition leads to the exclusion of non-transsexual transgender persons, which could raise questions under Article 8 ECHR.¹³⁰⁷ Nevertheless, it has refused to examine this difference of treatment between transsexual persons and non-transsexual transgender persons

¹³⁰⁴ D. GONZALEZ-SALZBERG, “An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*”, *The Modern Law Review* 2018, Vol. 81(3), p. 534.

¹³⁰⁵ *Ibid.*, p. 538.

¹³⁰⁶ Note that, although the Court has made use of the term ‘transgender’ in its case law, it has mainly used this as a synonym for ‘transsexual’. See J. T. THEILEN, “Depathologisation of Transgenderism and International Human Rights Law”, *Human Rights Law Review* 2014, Vol. 14, p. 334. See also D. GONZALEZ-SALZBERG, “An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*”, *The Modern Law Review* 2018, Vol. 81(3), p. 529-530.

¹³⁰⁷ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P., Garçon and Nicot v. France*, §94; 11 October 2018, 55216/08, *S.V. v. Italy*, §56; 17 January 2019, 29683/16, *X v. the Former Yugoslav Republic of Macedonia*, §38. COJOCARIU, international human rights lawyer and associated with TGEU, deduced from this statement and the parallels between the reasoning concerning the prohibition of compulsory sterility to protect the right to bodily integrity under Article 8 ECHR, and the reasoning concerning prohibiting compulsory gender affirming surgery under Article 8, that the scope of *A.P., Garçon, Nicot v. France* cannot be limited to the condition of compulsory sterility (personal communication). GONZALEZ-SALZBERG also argues that the Court has implicitly abandoned its focus on genitocentrism, since genital surgery can be considered a sterilising procedure. See D. GONZALEZ-SALZBERG, “An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*”, *The Modern Law Review* 2018, Vol. 81(3), p. 532.

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under Articles 14 *jo.* 8 ECHR. With these rulings, the Court therefore did not explicitly overrule its above-mentioned 2008 inadmissibility decision in *Nuñez v. France*, where it stated that the reservation of legal gender recognition for persons who fully complete the process of hormonal and surgical sex ‘reassignment’ did not appear unreasonable under Article 8 ECHR.¹³⁰⁸ In other words, while most cases that have reached Strasbourg concerned post-operative transsexual persons, the ECtHR has already had the chance to broaden the scope of legal gender recognition from the ‘true transsexual’¹³⁰⁹ to other forms of gender non-conformity. Indeed, in *X v. the Former Yugoslav Republic of Macedonia*, the Court refused to address the situation of a person who was diagnosed as transsexual, but refused to undergo genital surgery.¹³¹⁰ In this regard, it has even argued that psycho-pathologisation is necessary to ascertain that individuals who are not ‘truly’ transsexual do not erroneously pursue a gender transition process.¹³¹¹

The continuing pathologisation of transgender experiences and its exclusionary effects are also tellingly proven by the Court’s refusal in *A.P., Garçon and Nicot v. France* to address the applicants – who could not be seen as ‘post-operative transsexuals’ – by their self-defined gender (identity).¹³¹² Indeed, the Court noted that the applicants were still officially registered as men and therefore needed to be addressed in the male form. Nevertheless, this lack of official gender recognition in domestic law did not stop the Court

¹³⁰⁸ ECtHR 27 May 2008, 18367/06, *Nuñez v. France*, §1. See also J. T. THEILEN, “The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe” in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 383.

¹³⁰⁹ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 77.

¹³¹⁰ ECtHR 17 January 2019, 29683/16, *X v. the Former Yugoslav Republic of Macedonia*.

¹³¹¹ See D. GONZALEZ-SALZBERG, “An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*”, *The Modern Law Review* 2018, Vol. 81(3), p. 534.

¹³¹² ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P., Garçon and Nicot v. France*, §6. See in this regard also F. RENZ, “Stopping forced sterilisation is not enough – the limitations of the recent ECHR judgement on trans rights”, <<https://verfassungsblog.de/stopping-forced-sterilisation-is-not-enough-the-limitations-of-the-recent-echr-judgement-on-trans-rights/>> (last visited 26 October 2018).

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in previous and later cases from addressing the applicants – who were indeed post-operative or even pre-operative *diagnosed transsexuals* – on the basis of their self-defined gender (identity).¹³¹³ In other words, agreeing with AMMATURO, the ECtHR has demonstrated only a limited knowledge of the sociological data available on the different experiences, identities, and kinship and life arrangements of transgender persons across Europe.¹³¹⁴

This conclusion is striking, especially considering its clear inconsistency with other elements in the Court's own broader case law concerning gender (identity).¹³¹⁵ Indeed, in the cases of *Van Kück v. Germany* (2003) and *Schlumpf v. Switzerland* (2009), which concerned access of transsexual persons to trans-specific health care, the Court noted that determining the medical necessity of gender affirming measures is not a matter of legal definition or appreciation.¹³¹⁶

Given the exclusionary effects of the Court's case law, it is necessary to examine this commitment to medical discourse in legal gender recognition beyond the arguably messy conceptualisation of transgender persons and gender non-conformity. In this regard, the continuing pathologisation of transgender persons in the case law is arguably connected to the Court's general adherence to strictly demarcated binary sex/gender normativity, which appears to be self-evident in law.

¹³¹³ ECtHR 6 April 2017, 79885/12, 52471/13, 52596/13, A.P., *Garçon and Nicot v. France*, §6. In the case of *X v. FYR of Macedonia*, the Court referred to the applicant as male, even though he had not obtained a change of his female registered sex. Although the applicant did not want to undergo gender affirming surgery, he was diagnosed with transsexuality. Nevertheless, the Court wished to respect the applicant's self-identification. It remains to be seen whether the Court will extend this respect for self-identification to trans applicants who have not been assessed or diagnosed as transsexuals. See ECtHR 17 January 2019, 29683/16, *X v. Former Yugoslav Republic of Macedonia*, §1.

¹³¹⁴ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 71.

¹³¹⁵ See also J. T. THEILEN, "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe" in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 387.

¹³¹⁶ ECtHR 12 June 2003, 35968/97, *Van Kück v. Germany*, §54; 8 January 2009, 29002/06, *Schlumpf v. Switzerland*, §57.

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b. The Court's adherence to binary sex/gender normativity

Although it may be assumed that the Court is not aware of all forms of gender non-conformity and the existence and experiences of non-binary (transgender) persons, it is clear that the Court adheres to a clearly defined binary sex/gender normativity through its pathologising conceptualisation of transgender identities.¹³¹⁷ In other words, since the Court uses the arguably self-evident hypothesis that there are only two clearly defined sexes/gender identities as a point of departure, it has made use of the medicalisation of transgender persons to bring them within this binary framework and the scope of the Convention.

According to GONZALEZ-SALZBERG, the *Christine Goodwin v. United Kingdom* case, in which the Court notably relied more heavily on pathologising discourse than in previous cases, effectively changed the Court's definition of sex/gender.¹³¹⁸ Indeed, during the first twenty years of case law concerning gender non-conformity, the Court refused to accept that the applicant (in all cases a transsexual person) could *truly* abandon the sex assigned and registered by the law at birth.¹³¹⁹ In *Cossey v. United Kingdom* (1990) and *Sheffield and Horsham v. United Kingdom* (1998), for instance, it pointed out that "gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex".¹³²⁰ In other words, the Court

¹³¹⁷ F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 75; D. GONZALEZ-SALZBERG, "An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*", *The Modern Law Review* 2018, Vol. 81(3), p. 535. See also J. T. THEILEN, "Beyond the gender binary: rethinking the right to legal gender recognition", *European Human Rights Law Review* 2018, p. 254.

¹³¹⁸ D. GONZALEZ-SALZBERG, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights", *American University International Law Review* 2014, Vol. 29(4), p. 824. He has since argued that the Court has left this anatomical model of sex/gender for a purely psychiatric model. See D. GONZALEZ-SALZBERG, "An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*", *The Modern Law Review* 2018, Vol. 81(3), p. 532-533.

¹³¹⁹ D. GONZALEZ-SALZBERG, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights", *American University International Law Review* 2014, Vol. 29(4), p. 807.

¹³²⁰ ECtHR 27 September 1990, 10843/84, *Cossey v. the United Kingdom*, §40; 30 July 2007, 22985/93 and 23390/94, *Sheffield and Horsham v. the United Kingdom*, §56.

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joined the legal conceptualisation of sex/gender as an innate, biological truth, which was at that point dominant in English law.¹³²¹ However, as some dissenting judges in *Cossey v. United Kingdom* noted, this strongly biological conceptualisation of sex/gender effectively meant that a trans(sexual) person could “[fall] somewhere between the sexes”.¹³²²

Since trans(sexual) persons continued to challenge this biologically *fixed* categorisation of sex/gender, GONZALEZ-SALZBERG argues that the law needed to re-incorporate these bodies into the binary, through an operation of ‘normalisation’, that did not have to necessarily follow purely biological criteria.¹³²³ In *Christine Goodwin v. United Kingdom*, the Court pointed out that “in short, the unsatisfactory situation in which post-operative transsexuals live *in an intermediate zone* as not quite one gender or the other is no longer sustainable”.¹³²⁴ Although the Court did not fully abandon the idea of an innate, ‘true’ biological sex,¹³²⁵ it arrived at acknowledging the need for legal gender recognition of transsexual persons under Article 8 on the basis of a reasoning that was strongly linked to the idea that the

¹³²¹ This purely biological definition of (legal) sex was based on the 1970 British case *Corbett v. Corbett*.

¹³²² ECtHR 27 September 1990, 10843/84, *Cossey v. the United Kingdom*, Joint Dissenting Opinion of Judges Palm, Foighel and Pakkanen, §5.

¹³²³ D. GONZALEZ-SALZBERG, “The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights”, *American University International Law Review* 2014, Vol. 29(4), p. 811. A certain temporal motivation for the Court’s move in the *Christine Goodwin* case is also seen by THEILEN, who refers to the following paragraph: “*In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved*” (ECtHR 11 July 2002, 28957/95, *Christine Goodwin v. the United Kingdom*, §90.). See J. T. THEILEN, “Between Novelty and Timelessness: The Right to Legal Gender Recognition. Comment on Holning Lau’s ‘Gender Recognition as a Human Right’” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹³²⁴ ECtHR 11 July 2002, 28957/95, *Christine Goodwin v. the United Kingdom*, §90.

¹³²⁵ *Ibid.*, §62.

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pathologisation of trans(sexual) experiences maintained clearly defined sex/gender categories.¹³²⁶

“While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex [...], the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals”.¹³²⁷

“A test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender.”¹³²⁸

While the right to legal gender recognition that was found in the *Goodwin* case was constructed in general terms, the Court’s argument was tailored

¹³²⁶ See in this regard also C. HUTTON, “Legal sex, self-classification and gender self-determination”, *Law and Humanities* 2017, Vol. 11(1), p. 70.

¹³²⁷ ECtHR 11 July 2002, 28957/95, *Christine Goodwin v. the United Kingdom*, §82.

¹³²⁸ *Ibid.*, §100.

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specifically to the applicant's status as a *post-operative* transsexual.¹³²⁹ And although the Court granted the States a margin of appreciation to decide on the appropriate means for achieving legal gender recognition,¹³³⁰ sex/gender re-assignment became the decisive factor to normalise trans(sexual) persons within the clearly defined binary sex/gender legal system.¹³³¹ This conclusion is somewhat corroborated by the importance the Court attaches to the (commitment to) suffering by trans(sexual) persons:

*“Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment.”*¹³³²

This (acceptance of) legal pathologisation of transgender persons has since persisted in the Court's case law, all the way to the 2017 judgment in *A.P., Garçon and Nicot v. France*, the 2018 judgment in *S.V. v. Italy* and the 2019 judgment in *X v. the Former Yugoslav Republic of Macedonia*.¹³³³ Or, in the

¹³²⁹ J. T. THEILEN, “The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe” in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 383. See in this regard also F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 74.

¹³³⁰ ECtHR 11 July 2002, 28957/95, *Christine Goodwin v. the United Kingdom*, §93.

¹³³¹ See C. HUTTON, “Legal sex, self-classification and gender self-determination”, *Law and Humanities* 2017, Vol. 11(1), p. 71. See also F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 75.

¹³³² ECtHR 11 July 2002, 28957/95, *Christine Goodwin v. the United Kingdom*, §81. See also F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 73-74.

¹³³³ See H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming); F. RENZ, “Stopping forced sterilisation is not enough – the limitations of the recent ECHR judgement on trans rights”, <<https://verfassungsblog.de/stopping-forced-sterilisation-is-not-enough-the-limitations-of-the-recent-echr-judgement-on-trans-rights/>> (last visited 26 October 2018). Although it may be argued that the Court could not conceptually fully grasp the situation of gender non-conformity in the *Christine Goodwin* case, it should have given more attention to the gender spectrum in later cases such as *A.P., Garçon, Nicot v. France*. The conceptual difference between transgenderism and transsexuality was raised by the applicants in the latter case.

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words of THEILEN, “there are many roads that the ECtHR has, so far, refused to walk”.¹³³⁴ LAU therefore argues that the ECtHR has acknowledged only a partial right to gender (identity) recognition.¹³³⁵ Or, as AMMATURO holds, the ECtHR “established clear boundaries between ‘legitimate’ and ‘illegitimate’ positions for transgender persons as human rights holders”.¹³³⁶

§1.2.3. Summary

Although the ECtHR recognises a positive obligation for States under Article 8 ECHR to foresee a procedure for legal gender recognition, its case law is accepting of transgender pathologisation and is conceptually inconsistent. By changing its conceptual understanding of the binary sex/gender categories on the basis of a medical discourse that included gender affirming therapy, the Court could ‘normalise’ transsexual persons and protect their human rights. Even after the ground-breaking case of *A.P., Garçon and Nicot v. France* a human right to depathologisation for transgender persons cannot be deduced from the ECHR.¹³³⁷ This restriction of legal gender recognition to a certain carefully constructed class of transgender persons therefore excludes those persons who cannot or do not wish to submit to medical interventions, such as a diagnosis of gender dysphoria/transsexuality and/or gender affirming treatment, but nevertheless seek legal gender recognition.¹³³⁸ This conclusion is striking, since the Court has recognised that the legal recognition

¹³³⁴ J. T. THEILEN, “The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe” in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 387.

¹³³⁵ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹³³⁶ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 75.

¹³³⁷ See F. RENZ, “Stopping forced sterilisation is not enough – the limitations of the recent ECHR judgement on trans rights”, <<https://verfassungsblog.de/stopping-forced-sterilisation-is-not-enough-the-limitations-of-the-recent-echr-judgement-on-trans-rights/>> (last visited 26 October 2018).

¹³³⁸ J. T. THEILEN, “The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe” in G. SCHREIBER (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, Berlin, De Gruyter, 2016, p. 383. See also L. J. MOORE and P. CURRAH, “Legally Sexed” in R. E. DUBROFSKY and S. A. MAGNET (eds.), *Feminist Surveillance Studies*, Durham, Duke University Press, 2015, p. 68-70.

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of transgender persons who have not undergone gender affirming treatment approved by the authorities are not outside the scope of Article 8 ECHR.¹³³⁹ However, for the Court, self-determination regarding gender (identity) thus only applies to decisions falling within the boundaries of the binary norm,¹³⁴⁰ and as long as no legal gender recognition is sought.

In any case, the Court continues to conceptualise gender non-conformity as a medical condition, instead of human diversity.¹³⁴¹ However, the importance of medical discourse and gender affirming treatment for legal gender recognition should not be surprising, since it was precisely the existence and increasing prevalence of medical gender affirming treatment, on the basis of which transsexual persons could transition from the one category to the other, that brought the Court to adopting a conceptual framing of sex/gender in the first place.¹³⁴² Individuals who do not strictly fit in either category of sex are left legally unrecognised, unless and until they undergo surgical treatment.¹³⁴³ As AMMATURO aptly concludes: “the case law of the ECtHR regarding issues of gender identity confines [transgender] persons within the logic of the gender binary, without granting the possibility of rethinking human rights and the consequent claims to citizenship beyond the discrete

¹³³⁹ D. GONZALEZ-SALZBERG, “An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*”, *The Modern Law Review* 2018, Vol. 81(3), p. 529.

¹³⁴⁰ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 78. See also M. VAN DEN BRINK, “‘The Legitimate Aim of Harmonising Body and Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 239.

¹³⁴¹ D. GONZALEZ-SALZBERG, “An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*”, *The Modern Law Review* 2018, Vol. 81(3), p. 535.

¹³⁴² D. GONZALEZ-SALZBERG, “The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights”, *American University International Law Review* 2014, Vol. 29(4), p. 803. See also C. HUTTON, “Legal sex, self-classification and gender self-determination”, *Law and Humanities* 2017, Vol. 11(1), p. 67.

¹³⁴³ S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 405.

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categories of male/female.”¹³⁴⁴ Nevertheless, certain elements in the Court’s judgment in *A.P., Garçon and Nicot v. France* might be indicative of a recognition that this conceptualisation of gender diversity excludes certain transgender persons whose claims in any case fall within the scope of the protection that the ECHR provides.

Now that the existence and scope of the right to depathologisation of transgender persons under international and European human rights law is established, the 2017 Gender Recognition Act will be analysed in the light of these findings.

§2. Depathologisation of transgender persons in the 2017 Gender Recognition Act

When reading the parliamentary preparatory works to the Belgian 2017 Gender Recognition Act, it is indisputable that the government’s primary aim by introducing the Act was depathologising transgender persons within the legal procedure of gender recognition. This already becomes clear in the first paragraph of the government’s explanatory memorandum to the Act, which explicitly refers to the non-compliance of the 2007 Act’s invasive medical requirements with international human rights law standards.¹³⁴⁵ Indeed, the government enumerated many of the instruments of international (soft) law and the recent ECtHR cases that were mentioned above, to support the necessity of the abolition of *all* medical requirements for legal gender recognition that were introduced by the 2007 Act on Transsexuality, in order to comply with human rights standards.¹³⁴⁶ In this regard, the Belgian legislature became more progressive than is required by the ECtHR’s most recent case law and joined the abovementioned group of States that depathologised the procedure of legal gender recognition in domestic law.

¹³⁴⁴ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 65.

¹³⁴⁵ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 4.

¹³⁴⁶ *Ibid.*, p. 4-8.

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The depathologisation of transgender persons was attained through the abolition of the three material requirements for gender recognition that existed under the 2007 Act on Transsexuality, i.e.:

- The person concerned has the continuing and irreversible conviction of belonging to the sex opposite to the one mentioned in the birth certificate, as assessed by a psychiatrist;
- The fulfilment of gender affirming therapy, as far as medically possible and justifiable, as assessed by a surgeon;
- No longer being able to procreate according to the 'prior sex', i.e. sterility.

Nevertheless, despite the obvious and commendable progress in the protection of the human rights of transgender persons, two important critiques can still be made: (1) the Act did not fully depathologise transgender *minors*, and (2) the legal *pathologisation* of transgender persons was replaced by legal *paternalisation*.

*§2.1. Continued pathologisation of minor transgender persons*¹³⁴⁷

Since the entry into force of the 2017 Gender Recognition Act, 16- and 17-year-old minors have been effectively able to apply for legal gender recognition. Although the procedure is essentially the same as for adult applicants, the minor applicant has to hand over a declaration¹³⁴⁸ by a child and adolescent psychiatrist that they have the necessary discernment to have the continuing conviction that the sex registered in their birth certificate is not in congruence with their inner experienced gender (identity).¹³⁴⁹

¹³⁴⁷ See in this regard also E. BRIBOSIA and I. RORIVE, "Human rights integration in action: making equality law work for trans people in Belgium" in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 135.

¹³⁴⁸ A model declaration was provided by the Circular letter that clarified the scope and interpretation of the Gender Recognition Act.

¹³⁴⁹ A similar requirement was introduced by the Portuguese legislature in 2018. A 16 or 17-year old minor has to hand over a medical certificate which attests exclusively to the capacity of decision and informed will, without reference to a diagnosis of gender (identity). This requirement was introduced after the President of Portugal vetoed the first version of the act, which provided for complete gender self-determination for minors aged 16 or 17.

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According to the parliamentary preparatory works, this interference by a psychiatrist has no diagnostic aim;¹³⁵⁰ yet serves to affirm the minor's *capacity to have* the continuing¹³⁵¹ conviction that their inner experienced gender (identity) is not in congruence with the registered sex on the birth certificate.¹³⁵² Moreover, as with any legal act performed by a minor, the registrar who receives a minor's application for legal gender recognition must check whether the minor has the necessary understanding to grasp the legal and administrative consequences of that act.¹³⁵³

The necessary psychiatric assessment of the minor's cognitive capacity to have the conviction that there is incongruence between registered sex and gender (identity) is motivated in the preparatory works by the "far-reaching" *legal and administrative* consequences of the amendment of the registered sex.¹³⁵⁴ However, there is no enumeration of what these consequences are, nor why they are necessarily "far-reaching", especially in relation to a change of the minor's first name,¹³⁵⁵ which is possible at age twelve. In any case, given its purely legal and administrative motivation, a psychiatrist assessment appears to be impertinent and disproportionate. Indeed, the capacity of understanding the administrative and legal consequences of the amendment of the registered 'sex' is mandatorily checked by the registrar anyway, since

¹³⁵⁰ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 16; 54-2403/004, p. 18.

¹³⁵¹ Note that it is not required for adults to declare that they have the 'continuing' conviction that their registered sex is not in congruence with their inner experienced gender (identity). However, there is also a form of temporal requirement included in the procedure. See *infra* p. 370.

¹³⁵² Note that this expert assessment, its scope and motivation is comparable to the expert assessment that all applicants for legal gender recognition in the Netherlands have to undergo since the adoption of the 2014 transgender law. See M. VAN DEN BRINK, "Recht doen aan genderidentiteit. Evaluatie drie jaar transgenderwet in Nederland [Doing justice to gender identity. Evaluation three years trans law in the Netherlands]", <https://www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf> (last visited 15 February 2018), p. 14-16.

¹³⁵³ The same principle also applies to adults. The parliamentary preparatory works indicate that the registrar must refuse the application for legal gender recognition when the person concerned is in a condition of intoxication. See *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 21.

¹³⁵⁴ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 16.

¹³⁵⁵ *Ibid.*, p. 30.

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the latter must be ensured that the minor is mentally competent to perform a legal act.¹³⁵⁶

Although the age limit of sixteen for gender recognition is somewhere in between the most progressive and ‘conservative’ legal gender recognition frameworks that are based on self-determination,¹³⁵⁷ its discrepancy with the new rules regarding the change of first name is striking. Since the entry into force of the 2017 Gender Recognition Act, children who are *twelve* years or older and who have the conviction that their registered sex is not in congruence with their inner experienced gender (identity) may apply for a change of first name, when assisted by their parents or legal representative. Although this discrepancy is essentially based on a stereotypical assumption regarding the importance of legal sex/gender, it leads to a risk that the gender history of children will be disclosed in public and that minors who have changed their first name but not their registered sex would encounter administrative difficulties.¹³⁵⁸ As SØRLIE argues, this prevents twelve- to fifteen-year-old children of obtaining the greatest possible self-respect.¹³⁵⁹

¹³⁵⁶ This conclusion becomes even more striking when taking into account that the child and adolescent psychiatrist of the Ghent University Hospital Gender Team argued before parliament *against* the compulsory psychiatric assessment of minors, based on standards by the World Professional Association of Transgender Health (WPATH) and own scientific research. See *Parl.Doc.* Chamber of representatives, 54-2403/004, p. 40-41.

¹³⁵⁷ Among the other countries that introduced administrative procedures for legal gender recognition based on self-determination, only Luxembourg, Norway, Portugal and Uruguay allow for minors to make use of the same administrative procedure as adults, albeit mostly through or assisted by the legal representative. In Argentina, Chile, Ireland and Malta, minors have to apply for legal gender recognition through a judicial procedure. Nevertheless, in Argentina, Chile, Luxembourg, Malta, Norway and Uruguay, there is either no age requirement, or a (significantly) lower age requirement than the one mentioned in the Belgian 2017 Gender Recognition Act. Portugal has the same age requirement of 16 as Belgium. Denmark has not (yet) opened legal gender recognition for minors.

¹³⁵⁸ See M. VAN DEN BRINK, “Recht doen aan genderidentiteit. Evaluatie drie jaar transgenderwet in Nederland [Doing justice to gender identity. Evaluation three years trans law in the Netherlands]”, <https://www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf> (last visited 15 February 2018), p. 30.

¹³⁵⁹ A. SØRLIE, “Legal Gender Meets Reality: A Socio-Legal Children’s Perspective” in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 93.

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The continued pathologisation of transgender minors is regrettable. Since the psychiatric assessment does not serve to establish whether the minor actually *has* gender dysphoria or the conviction that their registered sex is not in conformity with their inner experienced gender (identity), the condition arguably not only reflects a lingering pathologisation of *transgender identities*, but also effectively pathologises *minority* as such. Moreover, the legislature was not able to base the requirement of a psychiatric assessment of minors, combined with the age requirement, on any other argument than its unsubstantiated claim of the severity of legal gender recognition for a person's private life, based on the assumed profound legal and administrative consequences.

§2.2. Pathologisation becomes paternalisation

Moreover, it can be argued that the *pathologisation* of transgender persons has been replaced by *paternalisation*. Although the new procedure effectively respects transgender persons' right to bodily integrity and autonomy regarding decisions about medical treatment, it has upheld the irrational 'fear' towards transgender experiences,¹³⁶⁰ and anxiety about the possible inability of an identity document to maintain a fixed correspondence with an individual throughout their life span,¹³⁶¹ that was reflected by the compulsory medical requirements under the 2007 Act on Transsexuality (i.e. gender affirming surgery and sterility).

The government's explanatory memorandum to the Gender Recognition Act sees the introduction of several 'guarantees'¹³⁶² in the procedure of gender recognition as the necessary and natural complement to the depathologisation of transgender persons, in order to avoid not only fraud,

¹³⁶⁰ See E. BRIBOSIA and I. RORIVE, "Human rights integration in action: making equality law work for trans people in Belgium" in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 133-134.

¹³⁶¹ L. J. MOORE and P. CURRAH, "Legally Sexed" in R. E. DUBROFSKY and S. A. MAGNET (eds.), *Feminist Surveillance Studies*, Durham, Duke University Press, 2015, p. 74.

¹³⁶² These guarantees were already briefly mentioned above. See *supra* p. 242.

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but also ‘light-hearted’ applications for gender recognition.¹³⁶³ Throughout the procedure, several measures were 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 transgender person concerned, even though it was explicitly recognised that “all individuals need to have maximal chances to develop into who they truly are”.¹³⁶⁴

These paternalising measures are:

- The applicant has to point out that they have had the conviction that their registered sex is not in congruence with their inner experienced gender (identity) “*for a long time*”. Even though the latter concept was not defined in the Act or preparatory works, it creates the impression that it is to be used by the registrar to evaluate the ‘seriousness’ of the application.¹³⁶⁵ In other words, at least at a theoretical level, the registrar was given the discretionary power to evaluate the applicant’s conviction of incongruence between legal ‘sex’ and gender (identity), solely on the basis of an unspecified temporal requirement. However, the circular letter clarifying the scope and interpretation of the Act, explicitly stated that the registrar does not have the power to refuse an application for legal gender recognition on the basis of this phrase. This was corroborated by the provision in the letter of a model application that literally copies the Act’s wording. It may therefore be

¹³⁶³ Research by VAN DEN BRINK indicates that this fear for increasing (identity) fraud and light-hearted applications for legal gender recognition were also shared by the Dutch legislature when diagnostic and therapeutic medical requirements for legal gender recognition were abolished in 2014. In order to prevent such risks, an application for legal gender recognition still required an *a priori* (psychiatric) expert assessment. The assessment has no diagnostic aim, but must ensure that the person concerned has the capacity to understand the consequences of their actions and is fully informed. See M. VAN DEN BRINK, “Recht doen aan genderidentiteit. Evaluatie drie jaar transgenderwet in Nederland [Doing justice to gender identity. Evaluation three years trans law in the Netherlands]”, <https://www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf> (last visited 15 February 2018), p. 14-15.

¹³⁶⁴ *Parl.Doc.* Chamber of representatives, 54-2403/004, p. 9.

¹³⁶⁵ *Ibid.* p. 17.

argued that the phrase does not have any legal meaning, and only serves to illustrate the legislature's opinion that transgender persons may not exercise their right to self-determination 'light-heartedly'. In other words, the paternalisation of transgender persons here lies within the law's expressive function, not in its actual effect;

- It is not sufficient for the transgender person to make the declaration for legal gender recognition once; after a 'waiting period' of (minimum) three to (maximum) six months, the declaration needs to be repeated before the registrar to prove that one *still* has the same conviction after reading the information brochure that the registrar provided after the first declaration. Although the compulsory 'waiting period' was inspired by the Danish model of gender recognition,¹³⁶⁶ the government failed to provide any form of empirical evidence to support the pertinence of this requirement for avoiding 'light-hearted' applications. Indeed, the obligatory waiting period of six months in Danish law was met with severe criticism by the transgender community,¹³⁶⁷ that saw in the requirement the perpetuation of the misconception of transgender people as being 'confused' about their gender.¹³⁶⁸ Moreover, the requirement of a waiting period of several months is not shared by the other countries that introduced a model of legal gender recognition based on self-determination, except for Argentina;
- During the minimum 'waiting period' of three months, the Public Prosecutor may issue positive or negative advice in light of the protection of public order. In the absence of any advice within the period of three months, the advice is considered to be positive. As mentioned above, according to the parliamentary preparatory works, the Public Prosecutor's interference is essentially aimed at preventing

¹³⁶⁶ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 7.

¹³⁶⁷ P. BORGHS, "Nieuwe Deense transgenderwet is voorbeeld voor België [New Danish transgender act is example for Belgium]", *De Juristenkrant* 2014, Vol. 294, p. 12.

¹³⁶⁸ See <<https://tgeu.org/tgeu-statement-historic-danish-gender-recognition-law-comes-into-force/>> (last visited 25 October 2017).

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the commitment of (identity) fraud, e.g. by persons who are the object of an arrest warrant,¹³⁶⁹ or by potential terrorists.¹³⁷⁰ However, it remains 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 – the applicant does not have to substantiate the declaration with evidence from the personal sphere to support the conviction of incongruence between the registered sex and their actual gender (identity).¹³⁷¹ 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.¹³⁷² After all, persons who are

¹³⁶⁹ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 21.

¹³⁷⁰ *Parl.Doc.* Chamber of representatives, 54-2403/004, p. 17. It is remarkable to note that the Public Prosecutor does not have to intervene in the renewed administrative procedure for a change of first and last name. Indeed, since 2018, these procedures fall within the responsibility of the civil registry, which has a discretionary competence to decide on acceptability of applications. According to the circular letter accompanying the introduction of the new procedure, civil registrars have the responsibility to check the applicant's existing criminal records before allowing a change of name. See *Omzendbrief van 11 juli 2018 betreffende de wet van 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing, waarbij de bevoegdheid inzake de verandering van voornamen wordt overgedragen aan de ambtenaren van de burgerlijke stand en de voorwaarden en de procedure ervan worden geregeld* [Circular letter of 11 July 2018 concerning the Act of 18 June 2018 holding diverse provisions concerning civil law and provisions promoting alternative dispute settlement, whereby the competence regarding change of first names is distributed to the civil registrars and whereby the conditions and the procedure are regulated], *Belgian Gazette* 18 July 2017, p. 57657.

¹³⁷¹ Testimonies from applicants for legal gender recognition living in the judicial districts of Charleroi, Liège and Luxembourg indicate, however, that the Public Prosecutor started a police investigation into the truthfulness of the application concerned, contrary to the official guidelines drafted by the Minister of Justice and the College of Prosecutors-General. See in this regard also the research undertaken by HERAULT et al., which shows the presence of lingering stereotypical assumptions regarding masculinity and femininity with magistrates in the new French judicial procedure for legal gender recognition: L. HERAULT et al., "Etat civil de demain et Transidentité. Note de synthèse", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 14 May 2018), p. 14-16.

¹³⁷² See L. HERAULT et al., "Etat civil de demain et Transidentité. Rapport final", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 75-76. See also A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of

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allegedly fleeing from justice arguably attract more attention when taking on some form of gender non-conforming behaviour,¹³⁷³ given the lingering societal marginalisation of transgender persons.¹³⁷⁴ Further, the risk of exploitation of rights is minor, considering that few rights or duties are gender specific,¹³⁷⁵ and that going against the cisnormativity of society is more difficult than what is involved in amending legal gender.¹³⁷⁶ Besides, governments are arguably able to

Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 508. See also L. J. MOORE and P. CURRAH, “Legally Sexed” in R. E. DUBROFSKY and S. A. MAGNET (eds.), *Feminist Surveillance Studies*, Durham, Duke University Press, 2015, p. 72. See also J.M. SCHERPE, “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 213.

¹³⁷³ L. MOTTET, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, *Michigan Journal of Gender & Law* 2013, Vol. 19, p. 414. See also H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also M. VAN DEN BRINK, “Recht doen aan genderidentiteit. Evaluatie drie jaar transgenderwet in Nederland [Doing justice to gender identity. Evaluation three years trans law in the Netherlands]”, <https://www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf> (last visited 15 February 2018), p. 23-24.

¹³⁷⁴ See M. VAN DEN BRINK, “Recht doen aan genderidentiteit. Evaluatie drie jaar transgenderwet in Nederland [Doing justice to gender identity. Evaluation three years trans law in the Netherlands]”, <https://www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf> (last visited 15 February 2018), p. 48.

¹³⁷⁵ In this regard, it is interesting to note that in many countries, there still is a difference in retirement age between men and women. In Argentina, where women may retire at 60 and men at 65, a registered male applied for legal gender recognition based on self-declaration at age 59. The application stirred the debate about the possibility to commit fraud by changing one’s registered sex for ulterior motives. See <<https://www.forbes.com/sites/ebauer/2018/03/27/the-curious-case-of-sergioa-the-argentinian-pensioner/#377c96261994>> (last visited 17 April 2018). In the aftermath of the 2018 local elections in Belgium, one of the Aldermen of Gooik announced in the press that he considered amending his official sex/gender registration. Indeed, because of quota in favour of female politicians, he was not eligible for a new nomination as alderman. However, since the announcement was only meant to criticise the alleged undemocratic nature of affirmative actions towards women, the man did not pursue any concrete action. See <http://www.standaard.be/cnt/dmf20181119_03961060> (last visited 21 November 2018).

¹³⁷⁶ A. SØRLIE, “Legal Gender Meets Reality: A Socio-Legal Children’s Perspective” in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 100.

link previous personal information to current personal information in their software systems, so that criminal records are automatically transferred in case of legal gender recognition.¹³⁷⁷ Nevertheless, the registrar is obliged to refuse the application for gender recognition in case of negative advice by the Public Prosecutor. The latter may also *at any point in time* challenge the validity of the (finalised) gender recognition based on a conflict with public order.¹³⁷⁸ Even in case of positive advice, the registrar may refuse the application on the basis of a conflict with public order. Although the government pointed out in the preparatory works that this discretionary power would be limited to marginal cases, it may be questioned whether such opportunity assessment is compatible with the right to gender self-determination.¹³⁷⁹ This friction between the underlying principle of self-determination and the potential interference by the civil registrar was also noted by the Council of State in its advice to Parliament.¹³⁸⁰ In any case, by explicitly linking legal gender recognition based on self-determination to fraud, the legislature sends a message that there is

¹³⁷⁷ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). In this regard, it should be noted that in January 2019, police services indicated that their databases are not automatically connected to civil registers. This means that a change of registered sex, but especially a change of first name and last name results in a loss of information regarding a certain person. However, the fact that Belgian law does not currently foresee an automatic link between the National Register (*Rijksregister*) and police databases, does not affect the argument that they are able of doing so. See <https://www.knack.be/nieuws/belgie/criminelen-kunnen-ontkomen-dankzij-nieuwe-voornaam/article-normal-1420223.html?utm_medium=social_knack&utm_source=Twitter#Echobox=1548227398> (last visited 23 January 2019).

¹³⁷⁸ In personal communication, the advocate-general to the Antwerp Court of Appeal stated that the weight of the public prosecutor’s role in the procedure of legal gender recognition lies in this reactive power.

¹³⁷⁹ See L. HERAULT et al., “Etat civil de demain et Transidentité. Rapport final”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 76.

¹³⁸⁰ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 58.

something inherently flawed about a transgender person's existence;¹³⁸¹

- The cornerstone of the 'guarantees' against fraud and/or 'light-hearted' applications was the principle of the *irreversibility* of legal gender recognition. In other words, the amendment of the registered sex was considered to be definitive, except for 'exceptional circumstances'. If such circumstances could be proven by the person concerned, the family court could reinstall the original registration.¹³⁸² Moreover, every following request for legal gender recognition by that same person would have had to be based on this strict judicial procedure.¹³⁸³ The government motivated this principled irreversibility of legal gender recognition on the basis of the need to avoid that a person would "regularly" apply for an amendment of their registered 'sex', given the principled non-disposability of the civil status.¹³⁸⁴ 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*".¹³⁸⁵ The level of paternalism towards transgender persons in the government's reasoning is striking, especially considering the total absence of any form of qualitative or

¹³⁸¹ See also E. BRIBOSIA, N. GALLUS, I. RORIVE, "Une nouvelle loi pour les personnes transgenres en Belgique [A new law for transgender persons in Belgium]", *Journal des Tribunaux* 2018, p. 264. See also M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 996.

¹³⁸² Judicial authorisation for a reversal of the amendment of a person's registered sex is also required in Argentina, Malta (except if during the first amendment the person concerned was a minor) and Portugal.

¹³⁸³ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 22.

¹³⁸⁴ *Ibid.*, p. 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, 79885/12, 52471/13, 52596/13, A.P., Garçon and Nicot v. France, §142 and ECtHR 11 October 2018, 55216/08, S.V. v. Italy, §69. However, importantly, in a 2017 ruling, the German Constitutional Court denounced the importance of the role of gender for a person's civil status. The Belgian Constitutional Court concurred in its 2019 ruling on the 2017 Gender Recognition Act. See *infra* p. 396.

¹³⁸⁵ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 22.

quantitative evidence to support their claim of the harm that gender fluidity would pose to society or that gender fluidity would even regularly occur.¹³⁸⁶ 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. It thus appears that the government did not question their own stereotyped assumptions regarding the self-evident importance of sex/gender registration and its innate form.¹³⁸⁷ This conclusion is corroborated by the examples of ‘exceptional circumstances’ given in the preparatory works, i.e. the experience of transphobia and 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 evolved over time, despite the Act’s underlying principle of self-determination. In other words, the logic of granting legal gender recognition to definitively ‘normalise’ gender non-conforming persons within the binary sex/gender model, which effectively snowballed since *Christine Goodwin v. United Kingdom*, was still

¹³⁸⁶ See E. BRIBOSIA, N. GALLUS, I. RORIVE, “Une nouvelle loi pour les personnes transgenres en Belgique [A new law for transgender persons in Belgium]”, *Journal des Tribunaux* 2018, p. 263-266. Research by VAN DEN BRINK has shown that, even when legal gender recognition is easily reversible, the number of reversions remains low. See M. VAN DEN BRINK, “Recht doen aan genderidentiteit. Evaluatie drie jaar transgenderwet in Nederland [Doing justice to gender identity. Evaluation three years trans law in the Netherlands]”, <https://www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf> (last visited 15 February 2018), p. 19. See also P. DUNNE, “Towards Trans and Intersex Equality: Conflict or Complementarity?” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 226-227; and P. BORGHS, “Transgenderwet is nog te rigide [Transgender act is still too rigid]”, *De Juristenkrant* 2018, No. 362, p. 11. See also L. MOTTET, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, *Michigan Journal of Gender & Law* 2013, Vol. 19, p. 416. See also E. BRIBOSIA and I. RORIVE, “Human rights integration in action: making equality law work for trans people in Belgium” in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 134.

¹³⁸⁷ This binary normativity in the Belgian sex/gender registration system will be more thoroughly dealt with below. See *infra* p. 396.

present in the Act. The principled irreversibility of legal gender recognition thus served the same goal of preserving the seemingly necessary permanence of the amendment of the registered sex as the previous medical requirements did.¹³⁸⁸ However, on a more pragmatic note, the principled *irreversibility* of legal gender recognition also affected the legitimacy of gender registration. Indeed, by excluding the possibility of any natural fluidity in gender (identity), the individual's right to personal autonomy was not only compromised, but the usefulness of the gender marker was also strongly diminished, increasing the likelihood of false negatives.¹³⁸⁹ After all, if gender fluid persons would not have been able to have their registered sex changed according to their evolving gender (identity), sex/gender registration would have been increasingly unable to reflect a person's actual status. As HUTTON argues, a side-effect of this irreversible legal binary system is that it has no grasp of the actual lived complexity of individuals, families and communities.¹³⁹⁰ Ironically, MOTTET even states that this potential lack of correct gender information could actually impede State security more than a procedure that allows for gender fluidity, because of the risk that the registered sex/gender would actually not correspond to the person's lived experience.¹³⁹¹

¹³⁸⁸ See L. J. MOORE and P. CURRAH, "Legally Sexed" in R. E. DUBROFSKY and S. A. MAGNET (eds.), *Feminist Surveillance Studies*, Durham, Duke University Press, 2015, p. 70-71.

¹³⁸⁹ H. LAU, "Gender Recognition as a Human Right" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also A. SØRLIE, "Legal Gender Meets Reality: A Socio-Legal Children's Perspective" in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 100-101. The evolution towards a more dynamic civil status was also noted by several French magistrates who were interviewed in the context of a study on the importance of sex/gender for the civil status: see L. HERAULT, "Etat civil de demain et Transidentité. Rapport final", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 201-204.

¹³⁹⁰ C. HUTTON, "Legal sex, self-classification and gender self-determination", *Law and Humanities* 2017, Vol. 11(1), p. 79.

¹³⁹¹ L. MOTTET, "Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People", *Michigan Journal of Gender & Law* 2013, Vol. 19, p. 414.

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Moreover, by strictly regulating any potential fluidity in gender (identity), the Belgian government might have disclosed some transgender persons' gender (identity) (history) against their will, making them targets of discrimination and potentially persecution,¹³⁹² as well as creating a chilling effect on self-identification and the free expression of the private individual self.¹³⁹³ The principled irreversibility of an amendment of registered sex was found unconstitutional by the Belgian Constitutional Court in its judgment of 19 June 2019. The Court considered that, given the right to gender self-determination, the differential treatment between gender fluid persons and persons who do not experience fluidity in gender (identity) not justified in light of the legislature's aim to prevent fraud and 'light-hearted' applications for legal gender recognition. According to the Court, it was not evident how the measures to prevent fraud and 'light-hearted' decisions in the basic procedure were not sufficient in cases of a new (second, third, fourth ...) application for legal gender recognition.¹³⁹⁴ As the Court pointed out, the civil registry and Public Prosecutor would be perfectly aware of the fact that legal gender recognition had already been granted in the past.¹³⁹⁵

In order to avoid fraud and/or 'light-hearted' applications for legal gender recognition, the legislature thus introduced *paternalising* 'guarantees' that are considered to be naturally complementary to a system of self-determination, but in essence strive to achieve the same goals that the *pathologising* conditions tried to do, as modelled by the ECtHR's case law:

¹³⁹² H. LAU, "Gender Recognition as a Human Right" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹³⁹³ J. T. WEISS, "Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas", *Journal of Race, Gender and Ethnicity* 2010, Vol. 5, p. 6.

¹³⁹⁴ The Court did not evaluate the pertinence and proportionality of these administrative measures, since this was not part of the applicants' claim.

¹³⁹⁵ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.8.4-8.9.

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reserving the procedure of legal gender recognition for ‘true’ transgender persons,¹³⁹⁶ and maintaining the fixed and binary nature of the legal sex/gender registration.¹³⁹⁷ In this regard, the new Act – and especially the preparatory works – still strongly reflect the logic behind the ECtHR’s case law, which appears to reserve legal gender recognition for persons who can substantiate a required level of commitment and continuing conviction.¹³⁹⁸ Nevertheless, the aforementioned argumentation shows that the government’s motives are essentially based on stereotypes and bias, that have no support in quantitative or qualitative evidence¹³⁹⁹ and therefore amount to an unjustified interference of the transgender person’s right to personal autonomy. Thus, although pathologising conditions for legal gender recognition were removed, the Act and its preparatory works still expose the presumption that there is something ‘abnormal’ with gender non-conforming identities and behaviour.¹⁴⁰⁰ Moreover, the legislature seems to ignore the role of the law in the creation of gender and its norms and therefore the parameters with which gender fraud will be measured, implicitly placing blame onto individuals for a discrepancy between registered sex/gender and the actual experienced gender (identity) rather than placing this blame squarely at the feet of law.¹⁴⁰¹ By denying the existence of the self-defined

¹³⁹⁶ See F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 73-74. See also L. J. MOORE and P. CURRAH, “Legally Sexed” in R. E. DUBROFSKY and S. A. MAGNET (eds.), *Feminist Surveillance Studies*, Durham, Duke University Press, 2015, p. 68-70.

¹³⁹⁷ See also S. KATYAL, “The Numerus Clausus of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 399, 410.

¹³⁹⁸ See *supra* p. 354.

¹³⁹⁹ See L. MOTTET, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, *Michigan Journal of Gender & Law* 2013, Vol. 19, p. 417.

¹⁴⁰⁰ S.K. KATYAL, “The Numerus Clausus of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 423. See also L. HERAULT et al., “Etat civil de demain et Transidentité. Note de synthèse”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 14 May 2018), p. 13.

¹⁴⁰¹ See M. TRAVIS, “The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment”, *Social & Legal Studies* 2018, p. 12.

gender (identity) of some persons, the State thus (continues to) sanction(s) the oppression of transgender persons.¹⁴⁰²

Even though the principled irreversibility of legal gender recognition will now be removed from Article 135/1 of the Civil Code, the paternalising stereotypes regarding the required levels of conviction of and commitment to gender incongruence were not the only ones that were still lingering in the 2017 Gender Recognition Act and the official sex/gender registration system taken as a whole. Indeed, according to the current Belgian legal system, sex is binary and biologically transparent, and gender (identity) maps easily and predictably onto sex.¹⁴⁰³ The next sections will therefore successively address the cis- and binary normativity of the official Belgian sex/gender registration and to what extent they were upheld by the 2017 Gender Recognition Act.

III. Cisnormativity – Conflation between sex and gender (identity)

The paradigm shift in official sex/gender registration towards (limited) self-determination has redefined sex/gender as a legal category based on a person's self-defined gender (identity) rather than their bodily sex (characteristics).¹⁴⁰⁴ Indeed, whereas the registration could be considered as a bureaucratic assignment of sex at birth, it has evolved into an affirmation of the experienced gender (identity).¹⁴⁰⁵ However, in Chapter III it was already

¹⁴⁰² B. T. RUOCCO, "Our Antitotalitarian Constitution and the Right to Identity", *University of Pennsylvania Law Review* 2016, Vol. 165, p. 213.

¹⁴⁰³ P. CURRAH, "Gender Pluralisms under the Transgender Umbrella" in P. CURRAH, R. M. JUANG, S. PRICE MINTER (eds.), *Transgender Rights*, Minneapolis, University of Minnesota Press, 2006, p. 24.

¹⁴⁰⁴ See G. VERSCHULDEN, "Vernietigingsberoepen tegen de Transgenderwet: aanloop naar of valkuil voor de non-binaire genderoptie? [Actions for annulment against the Transgender law: run-up to or pitfall for the non-binary gender option?]", *Tijdschrift voor Familierecht* 2018, p. 66. See also A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 522. See in this regard also E. BRIBOSIA, N. GALLUS, I. RORIVE, "Une nouvelle loi pour les personnes transgenres en Belgique [A new law for transgender persons in Belgium]", *Journal des Tribunaux* 2018, p. 263. See also L. HERAULT et al., "Etat civil de demain et Transidentité. Note de synthèse", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 14 May 2018), p. 7.

¹⁴⁰⁵ L. HERAULT et al., "Etat civil de demain et Transidentité. Rapport final", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May

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argued that the law – at all possible levels – is characterised by a strong conflation between sex and gender (identity).¹⁴⁰⁶ Indeed, as was established in Chapter II, this conflation is endemic to society at large.¹⁴⁰⁷ The conflation, on the basis of which it appears to be legitimate to assume that a person who is born with male sex characteristics has/will develop a male gender (identity) and a person who is born with female sex characteristics has/will develop a female gender (identity), is also referred to as the ‘cisnormativity’ of society and the law.¹⁴⁰⁸ Nevertheless, as AMMATURO points out, the pervasive and imperative character of these gender norms, as well as the severity with which they are enforced, is derived from a fundamentally shaky basis.¹⁴⁰⁹

The law’s cisnormative nature is best evidenced by the official sex/gender registration system and the administrative procedure of legal gender recognition. As mentioned above, in the Belgian framework of sex/gender registration every child is assigned a legal ‘sex’ at birth, upon declaration to the registrar.¹⁴¹⁰ The assignation of either the ‘male’ or ‘female’ sex is based on a superficial check of the new-born’s genitals at birth by a medical practitioner. However, while the official registration at birth is clearly based on the biological composition of the new-born child, it also stereotypically presupposes – at least in the legal sense – congruence between that person’s sex and gender (identity).¹⁴¹¹ Besides being an implicit legal principle,

2018), p. 257. Interestingly, this evolution was confirmed by the tribunal of Roermond (the Netherlands), which held that the official sex/gender registration should reflect a person’s self-defined gender (identity), based on self-determination. According to the tribunal, the registration framework should also include (a) non-binary option(s). See *Rechtbank Limburg* [Tribunal Limburg] (the Netherlands) 28 May 2018, ECLI:NL:RBLIM:2018:4931.

¹⁴⁰⁶ See *supra* p. 232. See in this regard also H. G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 422.

¹⁴⁰⁷ See *supra* p. 123.

¹⁴⁰⁸ See S. K. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 391.

¹⁴⁰⁹ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 69. See also M. TRAVIS, “The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment”, *Social & Legal Studies* 2018, p. 13.

¹⁴¹⁰ Articles 43 and 44 of the Civil Code.

¹⁴¹¹ See B. VANDERHORST, “Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex”, *Harvard Law & Policy Review* 2015, Vol. 9, p. 242.

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cisnormativity is also explicitly evidenced by (1) the conflated use of the registered 'sex' – predominantly by the government, but also by private parties – during a person's entire life, and (2) the possibility of legal gender recognition.

§1. Conflated use of sex/gender registration

Chapter III already established that, based on the 2014 report by Dutch scholars VAN DEN BRINK and TIGCHELAAR, present¹⁴¹² official sex/gender registration serves a number of rationales:

- Enabling several government processes, e.g. demographic research on the basis of the population's sex/gender, gendered policies, public health policies;
- Enabling identification to the government and third parties, e.g. for international travelling and provision of gender segregated goods and services;
- Enabling differentiation in legal status on the basis of sex/gender (largely an anachronism, besides possibilities of affirmative action).

For all potentially legitimate aims, the present Belgian sex/gender registration lacks pertinence. Being essentially based on an inherent conflation between sex and gender (identity), it leads simultaneously to over- and under-inclusiveness. After all, if the sex/gender marker is used for 'sex' purposes, it potentially over-includes transgender persons who applied for legal gender recognition but did not undergo any treatment on their sex characteristics. If the marker is used for purposes related to gender (identity), it potentially under-includes those transgender persons whose gender (identity) does not necessarily correspond to their sex, but who have not (yet) applied for legal

¹⁴¹² Indeed, the report indicated that two other rationales for sex/gender registration are structuring society's public order; and enabling differences in the legal status of persons on the basis of their sex/gender, e.g. with regard to the law of filiation, sex/gender-specific social benefits. However, these rationales were identified in Chapter III as anachronisms. See *supra* p. 234.

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gender recognition, for instance due to the principled irreversibility of that procedure.

Moreover, VAN DEN BRINK also argues that the current system of blanket registration of sex/gender, without even necessarily being based on a certain identifiable legitimate aim, very often actually represents a self-evident habit, rather than a pertinent government tool.¹⁴¹³ Indeed, BEH and DIAMOND argue that “there is no urgent legal imperative to designate an infant’s legal sex/gender, other than that imposed by common practice”.¹⁴¹⁴ Given its importance, this issue will be more thoroughly dealt with under section 2 of this chapter.¹⁴¹⁵

§2. *Reversed* cisnormativity of legal gender recognition

It should be sufficiently clear by now that on the basis of legal gender recognition, it is possible to have one’s registered sex amended in the light of one’s gender (identity). Upon completion of such procedure, this registered gender (identity)¹⁴¹⁶ becomes the sole source of information regarding that person’s sex/gender, and therefore the sole sex/gender marker *for all possible aims* that are related to sex/gender. In other words, as has been argued above, ‘sex’ registration actually has to be perceived as registration of ‘gender (identity)’. However, completing a procedure of legal gender recognition does not of itself end the abovementioned conflation between sex and gender (identity) in law.¹⁴¹⁷ Neither does legal gender recognition

¹⁴¹³ M. VAN DEN BRINK, “Mag het een hokje meer zijn? Ontwikkelingen rond sekregistratie [Can there be an extra box? Developments concerning sex registration]”, *Ars Aequi* 2016, p. 780.

¹⁴¹⁴ H. G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 443. See also E. REILLY, “Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality”, *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 322.

¹⁴¹⁵ See *infra* p. 409.

¹⁴¹⁶ However, it is usually officially still called registered ‘sex’.

¹⁴¹⁷ See L. HERAULT et al., “Etat civil de demain et Transidentité. Rapport final”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 73.

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necessarily change the law's cisnormative nature, as is evidenced by the 2017 Gender Recognition Act.

As mentioned above, the 2007 Act on Transsexuality required invasive medical conditions for legal gender recognition, i.e. compulsory gender affirming surgery and compulsory sterility. The 2007 Act thus strongly adhered to cisnormativity in its most literal form by requiring – as far as medically possible – physical congruence between the transsexual person's sex (characteristics) and gender (identity). After all, the previous section established that precisely this (possibility and demand of) physical congruence proved to be the overriding argument for granting legal rights to transgender persons who thereby became 'normalised' within the existing sex/gender system, that remained grounded in biological determinism. While the (preparatory works to the) 2017 Gender Recognition Act recognised the human rights violations stemming from the obligatory medical conditions for legal gender recognition,¹⁴¹⁸ the law's cisnormativity was not challenged.¹⁴¹⁹ Indeed, even though the Belgian registration framework has conceptually overhauled the pervasive misconception that genitals form the standard for legal gender assignment, stereotypes still persist.¹⁴²⁰

The law's stereotypical cisnormative character was upheld by the 2017 Gender Recognition Act, albeit more clearly in the form of a legal fiction than before. While *at birth* all persons are legally considered to have/develop a gender (identity) that is in conformity with their registered sex (characteristics),¹⁴²¹ this cisnormative presumption is effectively altered in the administrative procedure of legal gender recognition. After all, persons who apply for gender recognition will be legally considered to have a body

¹⁴¹⁸ See *supra* p. 328.

¹⁴¹⁹ See in this sense S. WATTIER, "Le genre et le sexe des sénateurs depuis la Sixième Réforme de l'Etat [The gender and sex of senators since the Sixth State Reform]", *Chroniques de Droit Public – Publiekrechtelijke Kronieken* 2017, p. 397.

¹⁴²⁰ See E. BRIBOSIA, N. GALLUS, I. RORIVE, "Une nouvelle loi pour les personnes transgenres en Belgique [A new law for transgender persons in Belgium]", *Journal des Tribunaux* 2018, p. 263.

¹⁴²¹ Note that the registered sex is – for the time being – necessarily binary, which is problematic with regard to persons with variations of sex characteristics. See *supra* p. 248.

that is in congruence with their declared gender (identity).¹⁴²² In other words, since the direction of the presumption is *reversed*, it can be argued that the 2017 Gender Recognition Act installed a system of ‘*reversed cisnormativity*’, while simultaneously not ending the cisnormative registration system at birth. The Act is therefore indicative of what KATYAL calls the ‘silent conflict’ of two relatively vast stand-alone regimes in law: one that recognises the constructed dimensions of identity, and another that largely requires the existence of these identities – both virtual and real – for its regulatory functions to function successfully.¹⁴²³

Given the remaining cisnormativity in sex/gender registration, the next section will address how these stereotypes might be overturned.

§3. Separating sex and gender (identity)

In order to recognise the discontinuity of the fictitious relationship between sex and gender (identity), and therefore remove the stereotypical cisnormative nature of the Belgian sex/gender registration system, it appears that a more thorough revision is needed than offered by the 2017 Gender Recognition Act.¹⁴²⁴ Indeed, AMMATURO calls for the ‘radical queering’ of the cisgendered matrix.¹⁴²⁵ Chapter III of this thesis already showed the importance of deconflating the legal meaning of ‘sex’ and ‘gender (identity)’ in order to protect both the right to personal autonomy of persons with variations of sex characteristics, and the effectiveness of legitimate government processes that are related to the biological composition of all persons. Since ‘sex’ and ‘gender (identity)’ can be aligned or discordant in a variety of ways, classifications in registration cannot rely on either a person’s sex characteristics or gender (identity) as a final arbiter of their *entire* sexual

¹⁴²² This fact does not follow from the GRA, but from the lack of distinction between sex and gender (identity) registration in the Civil Code.

¹⁴²³ S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 397.

¹⁴²⁴ *Ibid.*, p. 395.

¹⁴²⁵ F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 38.

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identity label.¹⁴²⁶ It was therefore concluded that, in order to achieve both aims, a conceptual difference between ‘sex’ and ‘gender (identity)’ for all registration purposes should be made.¹⁴²⁷ This conclusion is only corroborated by the established cisnormativity of the original sex/gender registration at birth and the reversed cisnormativity that is inherent to the Belgian model of legal gender recognition.

When approached solely from the perspective of registration of gender (identity), it is clear that a registration system that assumes a person’s gender (identity) entirely on the basis of (the appearance of) that person’s sex characteristics at birth, does not meet the full measure of personal autonomy that is required by the (increasing number of) international human rights standards mentioned above. Although most instruments that reflect this emerging right to autonomy regarding gender (identity) deal with self-determination in the context of legal gender recognition, there is no reason to assume that this right should not apply to the original registration at birth. Indeed, if it is argued that a person’s assigned gender should be open to amendment solely on the basis of a simple declaration by the person concerned, the same level of self-determination should count for the initial assignment of that gender. After all, gender (identity), and potential discordance with sex can never be known at birth,¹⁴²⁸ and the law should refrain from privileging certain persons over others by enforcing a cisgender

¹⁴²⁶ H. G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 423. See also L. HERAULT et al., “Etat civil de demain et Transidentité”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 14 May 2018), p. 8-9.

¹⁴²⁷ See J.T. WEISS, “The Gender Caste System: Identity, Privacy, and Heteronormativity”, *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 167. See also L. HERAULT et al., “Etat civil de demain et Transidentité”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 257.

¹⁴²⁸ H. G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 433.

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standard as the norm.¹⁴²⁹ While cisgender identities may be considered most common, if the right to gender (identity) is to be fully respected, they are not the only identities entitled to protection, respect and privilege¹⁴³⁰ under the law.¹⁴³¹

If then a model of registration of gender (identity) would be deconflated from sex registration and undone of its (reversed) cisnormative character in order to respect every person's right to personal autonomy, it is clear that the current Belgian system of sex/gender registration – both at birth and through legal gender recognition – could not be maintained. Indeed, in order to ensure both the individual's right to personal autonomy and the effectiveness of government performance,¹⁴³² it is essential that a person's registered gender (identity) reflects the *actual* gender (identity) at the moment of registration. Any form of cisnormative, biological determinism – be it enforced in reality or through legal fiction – therefore needs to be excluded.¹⁴³³ These findings essentially lead to the following conclusions:

¹⁴²⁹ M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 999. See also S. KATYAL, "The *Numerus Clausus* of Sex", *The University of Chicago Law Review* 2017, Vol. 84, p. 401-403, 416. See also J. T. WEISS, "Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for *Lawrence v. Texas*", *Journal of Race, Gender and Ethnicity* 2010, Vol. 5, p. 3.

¹⁴³⁰ See P. CURRAH, "Gender Pluralisms under the Transgender Umbrella" in P. CURRAH, R. M. JUANG, S. PRICE MINTER (eds.), *Transgender Rights*, Minneapolis, University of Minnesota Press, 2006, p. 12.

¹⁴³¹ M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 1001. See also F. R. AMMATURO, *European Sexual Citizenship. Human Rights, Bodies and Identities*, London, Palgrave, 2017, p. 37 and S. KATYAL, "The *Numerus Clausus* of Sex", *The University of Chicago Law Review* 2017, Vol. 84, p. 401-403. The idea that transgender rights are granted by the cisgender majority is also present in the ECtHR's case law. For instance, in its landmark ruling in *Christine Goodwin v. United Kingdom*, the Court held that "society may be reasonably expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost". See ECtHR 11 July 2002, 35968/97, *Christine Goodwin v. the United Kingdom*, §90.

¹⁴³² See A. SØRLIE, "Legal Gender Meets Reality: A Socio-Legal Children's Perspective" in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 102.

¹⁴³³ *Ibid.*, p. 92.

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- No gender (identity) ought to be registered before the person concerned has an awareness of their gender (identity);¹⁴³⁴
- Any registered gender (identity) ought to be open to administrative amendment solely on the basis of self-determination.

In this regard, inspiration could be drawn from the 2015 Maltese GIGESC Act. On the basis of Article 7(4) of the Act, the persons exercising parental authority over a minor whose gender has not been declared at birth, shall before the minor attains the age of eighteen, file an application in the registry of the Civil Court¹⁴³⁵ in order to declare the gender of the minor, and following the express consent of the minor, taking into consideration the evolving capacities and the best interests of the minor.¹⁴³⁶ In other words, when one's 'gender' was not registered at birth – which, despite the open-endedness of the provision, essentially is aimed at the birth of children with variations of sex characteristics –¹⁴³⁷ the person concerned has the right to self-define their gender (identity) and declare it – through the legal representative – to the civil court before reaching the age of majority. Although this model of registration still reflects reversed cisnormativity and presupposes judicial intervention,¹⁴³⁸ it is currently the only legal framework worldwide that in

¹⁴³⁴ See L. HERAULT et al., "Etat civil de demain et Transidentité", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 14 May 2018), p. 20. See also B. T. RUOCCO, "Our Antitotalitarian Constitution and the Right to Identity", *University of Pennsylvania Law Review* 2016, Vol. 165, p. 219.

¹⁴³⁵ Note that the model put forward by this thesis is fully based on an *administrative* procedure.

¹⁴³⁶ Art. 7(4) of Gender Identity, Gender Expression and Sex Characteristics Act of 14 April 2015 to provide for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person, *Government Gazette of Malta* No. 19,410.

¹⁴³⁷ See L. HERAULT et al., "Etat civil de demain et Transidentité. Rapport final", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 62-63.

¹⁴³⁸ Indeed, the registered gender (identity) is also considered to reflect the individual's sex. This is evidenced by Article 278(c) of the Maltese Civil Code, which holds that the sex of the child is included on the birth certificate, provided that the identification of the sex of the minor may not be included until the gender (identity) of the minor is determined.

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general terms allows for a delay of gender registration,¹⁴³⁹ in order to respect the individual's (autonomous) right to gender (identity). Nevertheless, in order to preserve the right to gender (identity) of *all* persons, the Act should have made the delay in registration compulsory for *all* births. After all, a delay of registration for non-conforming persons, but *not* for the majority of the population, could lead to enhanced societal stigma of the former group.¹⁴⁴⁰ Indeed, in order to avoid such trigger for discrimination, transgender persons and cisgender persons should anticipate the same treatment.¹⁴⁴¹

§5. Gender registration/recognition of minors

While a delay of gender (identity) registration would presumably benefit all (transgender) persons who currently seek legal gender recognition,¹⁴⁴² it is

¹⁴³⁹ Although the Dutch and German legal system allow for a delay in registration by granting a preliminary status of 'unspecified' sex until the person concerned declares their preferred marker, this only applies to children born with variations of sex characteristics. In those cases, it is medically not possible to immediately decide on the child's 'sex'.

¹⁴⁴⁰ See for instance M. TRAVIS, "Accommodating Intersexuality in European Union Anti-Discrimination Law", *European Law Journal* 2015, Vol. 21, p. 186. See also J. VAN LISDONK, "Leven met intersekse/DSD. Een verkennend onderzoek naar de leefsituatie van personen met intersekse/DSD [Living with variations of sex characteristics. A preliminary research of the living conditions of persons with variations of sex characteristics]", <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Leven_met_intersekse_DSD> (last visited 24 October 2017), p. 14; M. VAN DEN BRINK, "Mag het een hokje meer zijn? Ontwikkelingen rond sekserregistratie [Can there be an extra box? Developments concerning sex registration]", *Ars Aequi* 2016, p. 780. See also H. G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 438. See also E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 326. See also J.M. SCHERPE, "Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 216. See also N. ALTHOFF, "Gender Diversity in Law: the German Perspective" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 401.

¹⁴⁴¹ A. SØRLIE, "Legal Gender Meets Reality: A Socio-Legal Children's Perspective" in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 94.

¹⁴⁴² See L. HERAULT et al., "Etat civil de demain et Transidentité", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 14 May 2018), p. 20.

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especially important for minors. Indeed, in its explanatory memorandum to the 2017 Gender Recognition Act, the Belgian government explicitly recognised that most persons are already aware of their gender (identity) at a very young age.¹⁴⁴³ However, it is also important to note that the clear majority of children who show some form of gender non-conformity during childhood will not identify as transgender when reaching adolescence, yet as gay, lesbian or bisexual.¹⁴⁴⁴ A certain level of gender fluidity is therefore not uncommon among minors.¹⁴⁴⁵ Yet, in present Belgian law and society, personal identity formation for (transgender) children occurs alongside strict provisions on legal sex/gender that coerce cisnormativity,¹⁴⁴⁶ and may influence whether or not those children may gain parental support, and consequently their ability to freely shape their identity.¹⁴⁴⁷ Indeed, not only is the initial sex/gender registration of children at birth strongly cisnormative, but also legal gender recognition during minority is still restricted to 16- and

¹⁴⁴³ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 10. See also J. M. SCHERPE and P. DUNNE, "Comparative Analysis and Recommendations" in J. M. SCHERPE, *The Legal Status of Transgender and Transsexual Persons*, Cambridge, Intersentia, 2014, p. 627. See also H. G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 434.

¹⁴⁴⁴ G. VERSCHULDEN and K. DHONDT, "Juridische aspecten van transgenderzorg voor minderjarigen [Legal aspects of transgender treatment for minors]", *Tijdschrift voor Jeugd en Kinderrechten* 2016, Vol. 3, 234. See also J. RISTORI and T. D. STEENSMA, "Gender dysphoria in childhood", *International Review of Psychiatry* 2016, Vol. 28(1), p. 13-20. See also P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 228-229.

¹⁴⁴⁵ H. G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 435.

¹⁴⁴⁶ See D. CRUZ, "Disestablishing Sex and Gender", *California Law Review* 2002, Vol. 90(4), p. 1056. See also B. VANDERHORST, "Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex", *Harvard Law & Policy Review* 2015, Vol. 9, p. 270.

¹⁴⁴⁷ A. SØRLIE, "Legal Gender Meets Reality: A Socio-Legal Children's Perspective" in A. HELSUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 78.

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17-year olds,¹⁴⁴⁸ after an assessment by a child and adolescent psychiatrist, and with assistance of both parents or the legal representative.¹⁴⁴⁹

The law thus determines which minors can freely shape their identity and whose identities can obtain full recognition in a system of imposed normality.¹⁴⁵⁰ For those children who (at least temporarily) experience a mismatch between their assigned sex and their gender (identity) and who do not have access to any remedy, their legal sex/gender becomes a challenging obstacle.¹⁴⁵¹ Indeed, the early rush to legally label children makes it more difficult for the transgender child to accept the gender (identity) that emerges.¹⁴⁵² SCHERPE and DUNNE therefore argue that “where a child must bear the burden of incongruent identity document, that individual will be subjected to continuous ‘outings’, where their transgender history is

¹⁴⁴⁸ The age limit of 16 is inspired by the medical protocol on the basis of which transgender minors are treated with cross-sex hormones when they are 16 or older. This medical motivation for the age limit of 16 can also be found in the 2014 Dutch transgender law. See M. VAN DEN BRINK, “Recht doen aan genderidentiteit. Evaluatie drie jaar transgenderwet in Nederland [Doing justice to gender identity. Evaluation three years trans law in the Netherlands]”, <https://www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf> (last visited 15 February 2018), p. 16.

¹⁴⁴⁹ See *supra* p. 324.

¹⁴⁵⁰ A. SØRLIE, “Legal Gender Meets Reality: A Socio-Legal Children’s Perspective” in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 78. See also C. SIMON, “Au-delà du binaire: penser le genre, la loi et le droit des personnes transgenres en Belgique [Beyond the binary : contemplating gender, the law and the rights of transgender persons in Belgium]”, *Canadian Journal of Women and the Law* 2016, Vol. 28, p. 547. See in this sense also A. R. CHANG and S. M. WILDMAN, “Gender In/Sight: Examining Culture and Constructions of Gender”, *The Georgetown Journal of Gender and the Law* 2017, Vol. 43, p. 56.

¹⁴⁵¹ A. SØRLIE, “Legal Gender Meets Reality: A Socio-Legal Children’s Perspective” in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 78. See also E. BRIBOSIA, N. GALLUS, I. RORIVE, “Une nouvelle loi pour les personnes transgenres en Belgique [A new law for transgender persons in Belgium]”, *Journal des Tribunaux* 2018, p. 265. The authors also point out that choice for a fixed age limit of 16 in the context of legal gender recognition is difficult to reconcile with other pieces of legislation that are applicable to both adults and minors. Indeed, the aforementioned Act of 22 August 2002 concerning the rights of the patient and the Act of 28 May 2002 relating to euthanasia make use of general criteria that are related to the discernment of the minor concerned.

¹⁴⁵² H. G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 443.

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involuntarily revealed to others and where they may be exposed to bullying, social discrimination and, in extreme cases, transphobic violence.¹⁴⁵³

A gender registration system based on a delay of registration until the person concerned is aware of their gender (identity), is arguably a natural consequence of the (emerging) right to gender self-determination. Indeed, NEUMAN WIPFLER argues that, “if self-attestation is an accepted standard for changing the sex designation on one’s birth certificate, it makes little sense presumptively to assign a legal sex to an infant who cannot attest to anything at the time the [birth certificate] is created”.¹⁴⁵⁴ Research also highlights the importance of the capacity for choice provided by law and legal regulations for the formation of a person’s identity within a social context.¹⁴⁵⁵ On the basis of empirical research, SØRLIE argues that birth registration, that was supposed to ensure children’s rights, results in the erosion of their dignity, integrity and right to personal identity.¹⁴⁵⁶ In other words, as SCHERPE and DUNNE aptly state, “if the primary concern of legal gender recognition is truly the ‘best interests of the child’, it makes little sense to force a person who has, from an early age, expressed a clear and consistent gender (identity) to live in a way which does not reflect that lived experiences of gender, and which may create significant emotional harm”.¹⁴⁵⁷

¹⁴⁵³ J. M. SCHERPE and P. DUNNE, “Comparative Analysis and Recommendations” in J. M. SCHERPE, *The Legal Status of Transgender and Transsexual Persons*, Cambridge, Intersentia, 2014, p. 627.

¹⁴⁵⁴ A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 529. See also N. ALTHOFF, “Gender Diversity in Law: the German Perspective” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 402.

¹⁴⁵⁵ A. SØRLIE, “Legal Gender Meets Reality: A Socio-Legal Children’s Perspective” in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 93.

¹⁴⁵⁶ *Ibid.*, p. 94.

¹⁴⁵⁷ J. M. SCHERPE and P. DUNNE, “Comparative Analysis and Recommendations” in J. M. SCHERPE, *The Legal Status of Transgender and Transsexual Persons*, Cambridge, Intersentia, 2014, p. 627. See also M. D. LEVASSEUR, “Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights”, *Vermont Law Review* 2014-15, Vol. 39, p. 958.

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Moreover, by letting the legal need for identity dictate the timing of identity registration,¹⁴⁵⁸ there seems to be no insurmountable disadvantage for proper government performance when registration of gender (identity) is delayed until the person concerned can effectively indicate their gender (identity) on the basis of personal autonomy, be it independently or assisted by the legal representative on the basis of express consent.¹⁴⁵⁹ This finding is especially true for young children, who do not participate in legal or administrative transactions.¹⁴⁶⁰ In this regard, it can be argued that – *rebus*

¹⁴⁵⁸ A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 536.

¹⁴⁵⁹ In this regard, the current Norwegian Gender Recognition Act could serve as an inspiration. On the basis of this Act, sixteen-year-old minors can independently apply for legal gender recognition and thus without parental involvement. See A. SØRLIE, “Legal Gender Meets Reality: A Socio-Legal Children’s Perspective” in A. HELMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 85. This caesura would not be abnormal in Belgian law, considering the age limit for legal gender recognition in the 2017 Gender Recognition Act. The requirement of personal consent by the minor, either independently or assisted by the legal representative, resembles the requirement of informed consent to sex assigning/normalising treatment of children with variations of sex characteristics mentioned above. Indeed by requiring the minor’s consent for any declaration of gender (identity), the *default position* of the minor would be considerably improved.

¹⁴⁶⁰ H. G. BEH and M. DIAMOND, “Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender”, *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 442-443. See also A. SØRLIE, “Legal Gender Meets Reality: A Socio-Legal Children’s Perspective” in A. HELMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 100. See also A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 503, 538 and N. ALTHOFF, “Gender Diversity in Law: the German Perspective” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 402. See also E. REILLY, “Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality”, *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 316. Agreeing with the latter author, it is important to note that a delay in gender (identity) registration would not necessarily hamper government processes based on gender (identity), since in reality that information is only accurate once the person concerned is aware of their gender (identity). Information based on the child’s sex could still be processed based on the registration model that was developed in Chapter III (see *supra* p. 242). Moreover, delaying legal gender (identity) registration does not hinder the ‘gendering’ of an infant or child at a social level.

sic stantibus—¹⁴⁶¹ delaying registration of gender (identity) would certainly be possible *for all persons* until the age of twelve years, when according to Belgian law an identity card is compulsorily issued to every person, or even until the age of majority,¹⁴⁶² as is the case in the Maltese system.¹⁴⁶³ Besides, this evolution would not necessarily go against the course on which the Belgian legislature already embarked in the 2017 Gender Recognition Act. Indeed, a child who has the conviction that the registered sex is not in congruence with their inner experienced gender (identity) may already apply for a change of first name at the age of twelve years, assisted by both parents or the legal representative. Although the preparatory works to the Act seem to indicate that this change is considerably less important for a child's life than the amendment of the registered sex/gender,¹⁴⁶⁴ Swedish and Norwegian qualitative research with transgender children and their parents indicates the opposite.¹⁴⁶⁵ Remarkably, this assumption implies that changing legal gender is a more serious decision than the child's commitment to be open about their gender (identity) and break gender norms, for instance by legally changing their name.¹⁴⁶⁶

Nevertheless, in order to both effectively respect every person's right to autonomy regarding their gender (identity) and ensure effective government

¹⁴⁶¹ The public and compulsory nature of present gender registration will be thoroughly dealt with below. See *infra* p. 409.

¹⁴⁶² Note that this delay of registration would not necessarily require a procedure with high thresholds that would confer a sense of weightiness to the registration process. Registration of gender (identity) could occur online, through an easily accessible digital application. Indeed, it would be of paramount importance that any reform of the sex/gender registration system would not be undermined by new procedural requirements.

¹⁴⁶³ See H. G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 444. See also E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 315-316, 318.

¹⁴⁶⁴ *Parl.Doc.* Chamber of representatives, 54-2403/001, p. 30.

¹⁴⁶⁵ A. SØRLIE, "Legal Gender Meets Reality: A Socio-Legal Children's Perspective" in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 93.

¹⁴⁶⁶ *Ibid.*, p. 100.

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performance, it can be questioned whether deconflating sex and gender, and abolishing the cisnormative nature of gender (identity) registration would be sufficient.¹⁴⁶⁷ Indeed, the present Belgian framework regarding sex/gender registration also strongly reflects society's binary normativity, i.e. its categorisation of all people as either 'male' or 'female'.

IV. Binary normativity

§1. Right to non-binary gender (identity)

The questions of when, how and by whom gender (identity) can be registered, are very different from the question how many registration options there are.¹⁴⁶⁸ Probably an even more radical challenge for the law than tackling its cisnormative nature, is the recognition and accommodation of non-binary (transgender) persons.¹⁴⁶⁹ As established in Chapter III and above, the present Belgian sex/gender registration framework self-evidently only recognises a rigid dichotomy of 'male' and 'female',¹⁴⁷⁰ both at birth and in the context of legal gender recognition. However, the law's binary normativity will be broken in the near future, since the Belgian Constitutional Court considered the absence of recognition of non-binary gender (identities) in the 2017 Gender Recognition Act a violation of the constitutional right to equality, read together with Article 8 ECHR and Article 22 of the Constitution.¹⁴⁷¹

¹⁴⁶⁷ See S. KATYAL, "The Numerus Clausus of Sex", *The University of Chicago Law Review* 2017, Vol. 84, p. 404.

¹⁴⁶⁸ J. A. CLARKE, "They, Them and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 922.

¹⁴⁶⁹ See J. DOLGIN, "Discriminating gender: legal, medical, and social presumptions about transgender and intersex people", *Southwestern Law Review* 2018, Vol. 47, p. 90. See also S. HINES, Z. DAVY, S. MONRO, J. MOTMANS, A.C. SANTOS, J. VAN DER ROS, "Introduction to the themed issue: Trans* policy, practice and lived experience within a European context", *Critical Social Policy* 2018, Vol. 38(1), p. 7. See also P. DUNNE and J. MULDER, "Beyond the Binary: Towards a Third Sex Category in Germany?", *German Law Journal* 2018, Vol. 19, p. 636; J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 922-924.

¹⁴⁷⁰ C. SIMON, "Au-delà du binaire: penser le genre, la loi et le droit des personnes transgenres en Belgique [Beyond the binary : contemplating gender, the law and the rights of transgender persons in Belgium]", *Canadian Journal of Women and the Law* 2016, Vol. 28, p. 528.

¹⁴⁷¹ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 2019/99, §B.6.1-7.

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In Chapter II of this thesis, it was already established that the human gender (identity)/expression needs to be conceptualised as a continuum with the ‘male’ and ‘female’ gender (identities) at both ends of the spectrum respectively.¹⁴⁷² In between are ‘non-binary’, ‘genderqueer’, or ‘genderfuck’ persons, who may identify as neither male, nor female, as both male and female, or as different genders at different times. Moreover, importantly, some persons might even resist acknowledging the existence of (a) gender (identity) in the first place.¹⁴⁷³ Nevertheless, as KATYAL argues, the law’s commitment to gender standardisation has essentially foreclosed alternative, i.e. non-binary, modes of identification and excluded those who fall outside of the *numerus clausus* of sex/gender.¹⁴⁷⁴ According to the author, this *numerus clausus* serves to shoehorn other types of gender (identity) into male or female, irrespective of the complex human reality.¹⁴⁷⁵ Indeed, laws that assume a binary model of gender cannot claim to be universally applicable.¹⁴⁷⁶ Exclusion of non-binary persons from legal recognition may lead to a denial of benefits,¹⁴⁷⁷ and unwanted disclosure of their gender history, potentially subjecting them to public shame, discrimination, harassment and physical danger.¹⁴⁷⁸ According to MONRO and VAN DER PAS

¹⁴⁷² See *supra* p. 101.

¹⁴⁷³ See C. SIMON, “Au-delà du binaire: penser le genre, la loi et le droit des personnes transgenres en Belgique [Beyond the binary : contemplating gender, the law and the rights of transgender persons in Belgium]”, *Canadian Journal of Women and the Law* 2016, Vol. 28, p. 545.

¹⁴⁷⁴ S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 399, 404, 410. See also S.L. GOESSL, “From question of fact to question of law to question of private international law: the question whether a person is male, female or ...?” *Journal of Private International Law* 2016, Vol. 12(2), p. 265.

¹⁴⁷⁵ S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 399, 408. See also B. T. RUOCCO, “Our Antitotalitarian Constitution and the Right to Identity”, *University of Pennsylvania Law Review* 2016, Vol. 165, p. 216.

¹⁴⁷⁶ T. DREYFUS, “The ‘Half-Invention’ of Gender identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles”, *The Australian Feminist Law Journal* 2012, Vol. 37, p. 36.

¹⁴⁷⁷ S. HINES and A.C. SANTOS, “Trans* policy, politics and research: The UK and Portugal”, *Critical Social Policy* 2018, Vol. 38(1), p. 52. See also J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 934-936.

¹⁴⁷⁸ See J. T. WEISS, “The Gender Caste System: Identity, Privacy, and Heteronormativity”, *Law and Sexuality Review* 2001, Vol. 10, p. 132-133. See also M. POGOFISKY, “Transgender

the continued binary normativity mirrors the so-called new homonormativity of the law, i.e. the legal recognition of the situation of “normative gays and lesbians [who] ‘dutifully’ occupy the private sphere, leaving heterosexist family norms undisrupted”.¹⁴⁷⁹ In other words, while “the ‘good’ transsexual passes as the woman/man s/he identifies as – leaving gender binaried social norms and structures undisrupted – non-binary trans* people and others who visibly transgress gender norms [...] disrupt the assumptions of discrete male/female categories”.¹⁴⁸⁰

According to LAU, if the law is to take the abovementioned right to (recognition of) gender (identity) on the basis of personal autonomy/self-determination seriously, it ought to grant individuals the ability to place their gender (identity) outside the binary.¹⁴⁸¹ According to CLARKE, legal recognition of non-binary gender (identity) not only legitimates non-binary identities as a civil status, but also confers legal dignity and protection.¹⁴⁸² This conclusion is reinforced by an emerging attention in several instruments of international (soft) law for non-binary gender (identity).¹⁴⁸³ Indeed, as

Persons Have a Fundamental Right to Use Public Bathrooms Matching their Gender Identity”, *Depaul Law Review* 2018, Vol. 67, p. 756. Belgian research among transgender persons from 2017 indicated that 46.7% of non-binary respondents avoided certain locations out of fear of being assaulted, threatened or harassed. 43% of non-binary respondents avoided expressing their gender (identity). See J. MOTMANS, E. WYVERKENS, J. DEFREYNE, “Being Transgender in Belgium. Ten Years Later”, <https://igvm-iefh.belgium.be/sites/default/files/118_-_being_transgender_in_belgium.pdf> (last visited 6 December 2018), p. 72.

¹⁴⁷⁹ S. MONRO and J. VAN DER PLAS, “Trans* and gender variant citizenship and the state in Norway”, *Critical Social Policy* 2018, Vol. 38(1), p. 60.

¹⁴⁸⁰ *Ibid.*, p. 60.

¹⁴⁸¹ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also S. KATYAL, “The Numerus Clausus of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 399, 408. See also L. HERAULT et al., “Etat civil de demain et Transidentité. Rapport final”, <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 23 May 2018), p. 63.

¹⁴⁸² J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 936-938.

¹⁴⁸³ However, note that a binary conceptualisation of gender (identity) is still widespread in (international) human rights law. See T. DREYFUS, “The ‘Half-Invention’ of Gender identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles”, *The Australian Feminist Law Journal* 2012, Vol. 37, p. 37.

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mentioned above, Yogyakarta Principle 31 calls for States to make available a multiplicity of gender marker options. In its Resolution 2048 (2015), the Parliamentary Assembly of the Council of Europe also already suggested to the Member States to *consider* broadening registration categories with a *third gender option* for those who seek it.¹⁴⁸⁴ The Assembly strengthened this recommendation in Resolution 2191 (2017), in which it explicitly called on the States to “*ensure, wherever gender classifications are in use by public authorities*”, that “*a range of options*” are available for all people.¹⁴⁸⁵ In other words, according to the Parliamentary Assembly, a single third option for gender recognition (e.g. ‘X’) would no longer be sufficient to meet the requirements stemming from the right to self-determination. This reference to a ‘range of options’ seems in conformity with the scope of Yogyakarta Principle 3, which holds that “[...] persons of *diverse* [...] *gender identities* shall enjoy legal capacity in all aspects of life. Each person’s *self-defined* [...] gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. [...] States shall [...] fully respect and legally recognise each person’s self-defined gender identity [...] and 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 [...]”.¹⁴⁸⁶ According to OTTO, this necessary recognition of

¹⁴⁸⁴ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, “Resolution 2048 (2015) ‘Discrimination against transgender people in Europe’”, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>> (last visited 31 October 2017), para. 6.2.4.

¹⁴⁸⁵ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, “Resolution 2191 (2017) ‘Promoting the human rights of and eliminating discrimination against intersex people’”, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>> (last visited 31 October 2017), para. 7.3.3. Resolution 2191 (2017) also called on the Member States to consider making the sex registration on birth certificates and other identity documents optional for all people.

¹⁴⁸⁶ See <<http://www.yogyakartaprinciples.org/principle-3/>> (last visited 7 November 2017). See also M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Sekserregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 7 November 2017), p. 39. However, OTTO argues that the concept of gender (identity) in the

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diversity of gender (identity) in law can also be deduced from Article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which requires States to take the appropriate measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.¹⁴⁸⁷ Despite the Article’s dualistic language, she argues that “fully recognising the social and cultural nature of gender practices and stereotypes inexplorably leads 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”.¹⁴⁸⁸

In 2017 the German Federal Constitutional Court (*‘Bundesverfassungsgericht’*) adopted a landmark ruling in which it held that the binary normativity (‘male’ – ‘female’) of the official sex/gender registration violated the prohibition of discrimination on the basis of sex/gender (identity) *ex* Article 3(3) of the German Constitution, as well as the constitutionally guaranteed right to personality of non-binary persons.¹⁴⁸⁹ In the judgment, the Court struck down the self-evidence of the binary conceptualisation of sex/gender in the law as it pointed out that the German constitutional order did not require civil status to be exclusively binary in terms of sex/gender, nor was opposed to the civil status recognition of a third sex/gender marker beyond male and female. In June 2018, the Austrian

Yogyakarta Principles is actually confined to the ‘male’/‘female’ dualism, and that the Principles therefore fail to fundamentally challenge the existing stereotypical dichotomous gender categories in human rights law. See D. OTTO, “Queering Gender [Identity] in International Law” in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 38.

¹⁴⁸⁷ Article 5(a) Convention on the Elimination of All Forms of Discrimination Against Women.

¹⁴⁸⁸ D. OTTO, “Queering Gender [Identity] in International Law” in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 27. See also R. HOLTMAAT, “The CEDAW: a Holistic Approach to Women’s Equality and Freedom” in A. HELLUM and H. SINDING AASEN (eds.), *Women’s Human Rights: CEDAW in International, Regional and National Law*, Cambridge, Cambridge University Press, 2013, p. 115-116.

¹⁴⁸⁹ Bundesverfassungsgericht [Federal Constitutional Court] (Germany) 10 October 2017, 2019/16.

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Constitutional Court (*Verfassungsgerichtshof*) ruled that the *Personenstandsgesetz* - the Civil Status Act - had to be interpreted in the light of the right to gender self-determination *ex* Article 8 ECHR. According to the Court, no person can be forced to have a gender registration that does not correspond to the self-defined gender identity. The Austrian legislation should therefore be interpreted in such a way that it is possible to change one's registered sex in a non-binary option, such as 'inter', 'diverse' or 'open'.¹⁴⁹⁰ In May 2018, the tribunal of Roermond (the Netherlands) ordered the local civil registry to draft a new birth certificate in order to change a person's 'female' sex marker into the phrase that "the child's sex could not be determined".¹⁴⁹¹ According to the tribunal, this phrase was the only possibility that Dutch law offered at that point to recognise the applicant's non-binary gender (identity). Interestingly, the tribunal also considered that a positive obligation to recognise a person's self-defined non-binary gender (identity) could be deduced from the right to personal autonomy *ex* Article 8 ECHR, read together with the Yogyakarta Principles. In this regard, the applicant's interests in having their gender (identity) officially recognised outweighed the general interest to maintain the binary system of sex/gender registration, taking into account the increased social acceptance of gender diversity. However, the judgment also needs to be criticised on this point, since it failed to comprehensively consider what the general interests in maintaining the binary sex/gender registration are and how precisely they needed to be balanced with the applicant's personal interests. This lack of motivation is somewhat surprising, especially taking into account the government's repeated position not to challenge the binary normativity of the official sex/gender registration following proposals by opposition parties in parliament. In June 2018, the UK High Court of Justice ruled in first instance

¹⁴⁹⁰ Verfassungsgerichtshof [Constitutional Court] (Austria) 15 June 2018, G 77/2018-9. In May 2019, the first Austrian national received identity documents with non-binary gender markers ('divers' on the birth certificate and X' on the international passport). See <<https://www.reuters.com/article/us-austria-lgbt-regulations/intersex-austrian-becomes-first-to-get-third-sex-identity-documents-idUSKCN1SL26T>> (last visited 17 May 2019).

¹⁴⁹¹ Rechtbank Limburg [Tribunal Limburg] (The Netherlands) 28 May 2018, ECLI:NL:RBLIM:2018:4931.

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that under Article 8 of the ECHR, there is no obligation for the government to issue an international passport to non-binary persons with 'X' as sex/gender marker. According to the judge, no convincing trend could be deduced from international developments, leading to a large margin of appreciation for the State. Nevertheless, the judge indicated that a non-binary gender (identity), like a binary gender (identity), is an important and integral component of the individual's personal and social identity. He therefore communicated a clear message to the government to carry out thorough research into the possible legal recognition of other identities than the male and female, as well as the pertinence and proportionality of the registration model in the light of the ever-increasing social and legal acceptance of the importance of diversity and equal rights.¹⁴⁹²

As mentioned above, in June 2019 the Belgian Constitutional Court struck down several parts of the 2017 Gender Recognition Act.¹⁴⁹³ Importantly for this part of the thesis, the Court considered the absence of any form of recognition of non-binary persons in the Act a violation of the constitutional right to equality, read together with the right to gender self-determination *ex* Article 8 ECHR and Article 22 of the Constitution.¹⁴⁹⁴ The Court held that persons with a binary gender (identity) and persons with a non-binary gender (identity) are comparable categories. In light of the right to gender self-determination and the legislature's aim to give all persons maximal chances to be who they really are, it did not consider the binary or non-binary nature of one's gender (identity) a pertinent criterion for differential treatment in procedures of legal gender recognition. Indeed, both binary and non-binary persons have the same interest in not being obliged to have identity documents that do not correspond to their experienced reality. Concurring with the German Constitutional Court, the Court considered the fact that breaking the sex/gender binary would lead to additional legal changes, no justification for the differential treatment. Reflecting the ECtHR's statement

¹⁴⁹² High Court of Justice (United Kingdom) 22 June 2018, CO/2704/2017.

¹⁴⁹³ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.6.1-7.

¹⁴⁹⁴ Article 22 of the Constitution holds the right to respect for private life. The Constitutional Court considers Article 22 to be an analogous provision to Article 8 ECHR.

in *Christine Goodwin v. United Kingdom*, it held that society may be expected to tolerate certain inconveniences to allow all persons to live a life in dignity in conformity with their gender (identity). The Court also held that the Belgian constitutional order did not require a binary conceptualisation of sex/gender, nor prohibited the adoption of positive measures to fight inequalities on the basis of a person's non-binary gender (identity). This statement resembled an earlier ruling from 2004. Even though the case at hand did not deal with issues related to transgender persons or the legal recognition of gender (identity), the Constitutional Court held then that a 'fundamental sex/gender binarity' could not be seen as a general principle of the Belgian constitutional order.¹⁴⁹⁵ Although it is the legislature's prerogative to decide on how to implement the judgment, the Court already suggested some solutions. According to the Court, the legislature could decide to add one or more categories for the registration of sex and gender (identity) at birth and in the procedure of legal gender recognition or could eliminate sex and gender (identity) as elements of a person's civil status. The latter option could result in the end of public and compulsory sex/gender registration.

Over the last decade, various governments have begun to acknowledge the complexity of gender (identity) as bodily anatomy and identity have become less presumptively linked.¹⁴⁹⁶ In a limited, yet increasing number of countries worldwide, a non-binary form of sex/gender registration has already been introduced in the registration system, predominantly by providing a third option (mostly 'X' or 'other') next to 'male' and 'female'. Some of these examples concern the official registration in civil registers – comparable to the Belgian model – , while others – mostly common law jurisdictions like Australia and New-Zealand – deal with the indication of a person's sex/gender on official identification documents, such as an international passport, identity card or driver's license. Chapter III already compared several foreign models of non-binary forms of sex/gender registration. In this regard, it was

¹⁴⁹⁵ Grondwettelijk Hof [Constitutional Court] (Belgium) 20 October 2004, 159/2004, §B.5.6.

¹⁴⁹⁶ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 491.

concluded that none of these systems could fully serve as an example for future reforms of the Belgian registration system, since they either did not end the cisnormative conflation of sex and gender (identity) or did not effectively erase the (potential) social stigma attached to sex/gender non-binarity. Moreover, the most recent challenges to the binary registration models in Europe originated from cases involving persons with variations of sex characteristics. In this regard, it remains to be seen to what extent the reforms that acknowledge the existence of non-binary forms of registration in Austria, Germany and the Netherlands will remain confined to persons with variations of sex characteristics, or will also be opened up to non-binary (transgender) persons.¹⁴⁹⁷ The non-binary gender options introduced in Asian jurisdictions, also cannot serve as an inspiration, given the very particular conceptualisation of the ‘third gender’ in the light of the historical presence of cultural groups known as ‘*hijra*’.

§2. ‘X’ or ‘inclusive neutrality’?

The introduction of non-binarity in the official sex/gender registration model could not only take the form of a third category ‘X’/‘other’ – or even more categories for that matter –¹⁴⁹⁸, but also be based on complete ascriptive self-determination. From a human rights approach, there seem to be some reservations regarding ‘othering’ non-binary persons from the binary ‘m/f’. Indeed, since non-binary persons defy gender categorisation as a group, a non-binary gender category is in many ways a misfit for legal categorisation.¹⁴⁹⁹ As HUTTON holds, “a system with a male-female binary is

¹⁴⁹⁷ As mentioned above, in August 2018, the German federal Cabinet (*‘Bundeskabinett’*) agreed on a proposal for a third gender option. On the basis of the proposal, (only) persons with variations of sex characteristics have the possibility to have their sex/gender registration changed into ‘diverse’ (*‘divers’*), next to ‘male’ and ‘female’, on the basis of a medical certificate or an affidavit certifying the existence of a variation of sex characteristics. See <<https://www.bmi.bund.de/SharedDocs/kurzmeldungen/DE/2018/08/geburtenregister.html>> (last visited 23 August 2018). The proposal was adopted by the federal Parliament on 14 December 2018. See in this regard also J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 928-929.

¹⁴⁹⁸ As mentioned above, the Belgian Constitutional Court suggested the addition of one or *more* categories for sex/gender registration at birth and later in life.

¹⁴⁹⁹ J. A. CLARKE, “They, Them and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 901-902.

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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.¹⁵⁰⁰ 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.¹⁵⁰¹ Indeed, the creation of such third category could actually reinforce the dichotomy of ‘male’ and ‘female’ as the dominant standards,¹⁵⁰² since most non-conforming, ‘dubious’ cases would be removed.¹⁵⁰³ HUTTON therefore argues that one of the

¹⁵⁰⁰ C. HUTTON, “Legal sex, self-classification and gender self-determination”, *Law and Humanities* 2017, Vol. 11(1), p. 80. See also M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Sekseregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 7 November 2017), p. 27. See also P. DUNNE, “Towards Trans and Intersex Equality: Conflict or Complementarity?” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 238. See also M. CARPENTER, “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 502. See also J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 939-940.

¹⁵⁰¹ S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 485; M. VAN DEN BRINK, “Mag het een hokje meer zijn? Ontwikkelingen rond sekseregistratie [Can there be an extra box? Developments concerning sex registration]”, *Ars Aequi* 2016, p. 780. See also A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 513. See also J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 940.

¹⁵⁰² Nevertheless, MONRO and VAN DER ROS argue that a so-called ‘gender pluralist’ model would destabilise the hegemonic position of gender binarism. See S. MONRO and J. VAN DER PLAS, “Trans* and gender variant citizenship and the state in Norway”, *Critical Social Policy* 2018, Vol. 38(1), p. 72. See also M. SUDAI, “Revisiting the limits of professional autonomy: the intersex rights movement’s path to de-medicalization”, *Harvard Journal of Law & Gender* 2018, Vol. 41, p. 44.

¹⁵⁰³ M. VAN DEN BRINK, “Mag het een hokje meer zijn? Ontwikkelingen rond sekseregistratie [Can there be an extra box? Developments concerning sex registration]”, *Ars Aequi* 2016, p. 780. See in this regard also S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 485. See in this regard also A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 502. See also M. VAN DEN BRINK, “‘The Legitimate Aim of Harmonising Body and Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A.

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consequences of a right to gender self-determination (which he calls ‘the ending of gender coercion’) might be an explosion of gender categories in law.¹⁵⁰⁴ After all, a registration system based on a delay of gender (identity) registration until the person concerned can exercise their right to gender (identity) would remain in part inherently ascriptive if the number of categories is stereotypically limited.¹⁵⁰⁵ Although a system of centralised gender (identity) standardisation offers some degree of uniformity and therefore a reduction of information costs, it still disenfranchises certain (transgender) individuals from full-fledged legal recognition and citizenship.¹⁵⁰⁶ HINES and SANTOS thus argue that “a politics of recognition is [...] problematic for theorizing gender diversity as it may contribute to the construction and replication of identity-based narratives around authenticity or gendered ‘realness’.¹⁵⁰⁷ [...] Thus, pro-trans* laws and social policy often remain [...] disregarding the nuances through which trans* lived experiences and embodiments are managed and negotiated in the everyday.”¹⁵⁰⁸

Respect for the individual’s right to personal autonomy regarding their gender (identity) would have to lead to a system of what CRUZ calls “inclusive

FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 243. See also P. DUNNE and J. MULDER, “Beyond the Binary: Towards a Third Sex Category in Germany?”, *German Law Journal* 2018, Vol. 19, p. 644.

¹⁵⁰⁴ C. HUTTON, “Legal sex, self-classification and gender self-determination”, *Law and Humanities* 2017, Vol. 11(1), p. 72. See also S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 399.

¹⁵⁰⁵ C. HUTTON, “Legal sex, self-classification and gender self-determination”, *Law and Humanities* 2017, Vol. 11(1), p. 74.

¹⁵⁰⁶ See also J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 939-940.

¹⁵⁰⁷ See *supra* for the discussion on the ‘guarantees’ that were introduced in the Belgian 2017 GRA to prevent so-called ‘light-hearted’ applications for gender recognition, p. 366.

¹⁵⁰⁸ S. HINES and A.C. SANTOS, “Trans* policy, politics and research: The UK and Portugal”, *Critical Social Policy* 2018, Vol. 38(1), p. 38-39. Research by BRAGG et al. with children and young people in the UK showed the expanding gender vocabulary among participants: 23 different terms for gender (identity) were used. See S. BRAGG, E. RENOLD, J. RINGROSE, C. JACKSON, “‘More than boy, girl, male, female’: exploring young people’s views on gender diversity within and beyond school contexts”, *Sex Education* 2018, Vol. 18(4), p. 423.

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neutrality”,¹⁵⁰⁹ enabling *all*¹⁵¹⁰ persons to self-identify and reducing the power of the State to use its own criteria to determine gender (identity).¹⁵¹¹ Indeed, any ascriptive gender category on the basis of majoritarian gender definitions advances a gender truth, and therefore crosses the line from accommodation of gender non-conformity to impermissible establishment of gender.¹⁵¹² In other words, what is necessary is more than simply lowering the requirements for State-recognised transition between ‘male’, ‘female’, and/or ‘X’, but an active and inclusive embrace by the law of those who are gender non-conforming.¹⁵¹³ After all, by not affording full self-determination to all persons, the law’s registration system is not merely reflecting, but rather constructing gender (identity),¹⁵¹⁴ and trying to press diverse gender subjectivities into a grid of gender normativity.¹⁵¹⁵ When this conclusion is combined with the foregoing remarks concerning the cisnormativity of the sex/gender registration system, it would lead to a framework where every person would have the right to fully self-determine their gender (identity),

¹⁵⁰⁹ D. CRUZ, “Disestablishing Sex and Gender”, *California Law Review* 2002, Vol. 90(4), p. 1042.

¹⁵¹⁰ Indeed, as OTTO argues, the potential conflation between ‘gender (identity)’ and ‘transgender persons’, i.e. the assumption that gender (identity) only matters to transgender persons, limits our ability to treat gender as a fully social and performative phenomenon that plays a key role in shaping everyone’s access to resources and opportunities in life. See D. OTTO, “Queering Gender [Identity] in International Law” in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 42. See also M. CARPENTER, “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 514.

¹⁵¹¹ S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 481.

¹⁵¹² D. CRUZ, “Disestablishing Sex and Gender”, *California Law Review* 2002, Vol. 90(4), p. 1060.

¹⁵¹³ S. KATYAL, “The *Numerus Clausus* of Sex”, *The University of Chicago Law Review* 2017, Vol. 84, p. 487.

¹⁵¹⁴ B. VANDERHORST, “Wither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex”, *Harvard Law & Policy Review* 2015, Vol. 9, p. 269. See also S. MONRO and J. VAN DER PLAS, “Trans* and gender variant citizenship and the state in Norway”, *Critical Social Policy* 2018, Vol. 38(1), p. 73.

¹⁵¹⁵ D. OTTO, “Queering Gender [Identity] in International Law” in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 39.

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without being limited to any ascriptive category,¹⁵¹⁶ and register it with the government when they become aware of it and within a certain set time limit.

Ending the (reversed) cisnormativity and the binary normativity of the official gender (identity) registration framework is necessary to protect the individual's right to personal autonomy and to ensure legal inclusivity of all persons. Moreover, it is also necessary to ensure accurate and inclusive government performance. After all, as mentioned above, all forms of gender normativity registration necessarily and simultaneously leads to over- and under-inclusiveness of individuals,¹⁵¹⁷ and therefore a potential lack of pertinence of the sex/gender marker for aspired government performance.

However, CLARKE questions the practical workability of categorical expansionism¹⁵¹⁸ in law.¹⁵¹⁹ Moreover, this argument of categorical expansionism does not question the assumed interests of the State in gender registration.¹⁵²⁰ Indeed, - as was suggested by the German and Belgian Constitutional Courts -, it may be clear by now that an alternative path to respect a person's right to personal autonomy regarding their gender (identity) could also consist of ending registration of gender (identity) altogether.¹⁵²¹ After all, it is argued that "as long as the State records gender

¹⁵¹⁶ See also A. SØRLIE, "Legal Gender Meets Reality: A Socio-Legal Children's Perspective" in A. HELLM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 102.

¹⁵¹⁷ See *supra* p. 383.

¹⁵¹⁸ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 512. The same concept is referred to by MONRO and VAN DER ROS as recognition of 'gender pluralism'. See S. MONRO and J. VAN DER ROS, "Trans* and gender variant citizenship and the state in Norway", *Critical Social Policy* 2018, Vol. 38(1), p. 58.

¹⁵¹⁹ J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 939.

¹⁵²⁰ See also A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 521.

¹⁵²¹ MONRO and VAN DER ROS call this the 'degendering' strategy. See S. MONRO and J. VAN DER ROS, "Trans* and gender variant citizenship and the state in Norway", *Critical Social Policy* 2018, Vol. 38(1), p. 58.

identity, it will also police its boundaries”.¹⁵²² 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.¹⁵²³ The next section will therefore address whether and to what extent a rationale for gender registration (still) exists, whether public, compulsory gender registration is pertinent and proportionate in the light of those goals, and why State-issued identity documents publicly designate gender.

2. Rationale, pertinence and proportionality of gender (identity) registration¹⁵²⁴

It should be sufficiently clear by now that the current model of official gender (identity) registration pursues certain aims, which can be seen as legitimate aspirations.¹⁵²⁵ Indeed, according to the 2014 report by VAN DEN BRINK and

¹⁵²² A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 543. See also G. BAARS, “The Politics of Recognition and the Limits of Emancipation through Law”, <<http://verfassungsblog.de/the-politics-of-recognition-and-the-limits-of-emancipation-through-law/>> (last visited 5 December 2017). See also S. HINES and A.C. SANTOS, “Trans* policy, politics and research: The UK and Portugal”, *Critical Social Policy* 2018, Vol. 38(1), p. 39. See also J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 942-943.

¹⁵²³ M. VAN DEN BRINK, “‘The Legitimate Aim of Harmonising Body and Soul’. Changing Legal Gender: Family Life and Human Rights” in K. BOELE-WOELKI and A. FUCHS (eds.), *Same-Sex Relationships and Beyond. Gender Matters in the EU*, Cambridge, Intersentia, 2017, p. 233. See also D. COOPER and F. RENZ, “If the state decertified gender, what might happen to its meaning and value?”, *Journal of Law and Society* 2016, Vol. 43(4), p. 487.

¹⁵²⁴ The previous chapter already dealt with the rationale, pertinence and proportionality of registration of sex (characteristics), more specifically in relation to persons with variations of sex characteristics. See *supra* p. 234.

¹⁵²⁵ See for instance H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 503.

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TIGCHELAAR, one's official gender marker serves two main rationales in present law:¹⁵²⁶

- Enabling identification to the government and third parties, e.g. for international travelling, guarding public safety,¹⁵²⁷ opening bank accounts, renting a house, school registration, gender segregated services...¹⁵²⁸
- Enabling several government processes, e.g. demographic research on the basis of the population's gender (identity), gendered policies;

Beside the question to what extent the current Belgian framework of sex/gender registration is pertinent in the light of its inherent (reversed) cisnormativity and binary normativity, it is worth questioning whether registration of gender (identity) is actually necessary for effectively achieving the abovementioned goals, and if so, whether one's official gender marker should be publicly available information. Moreover, even assuming *arguendo* that the government should be able to register gender (identity), it could be questioned whether the current system of blanket registration, without being explicitly connected to a specific aim, is proportionate. Indeed, VAN DEN BRINK and BEH and DIAMOND have argued that the system of blanket registration of gender very often actually represents a self-evident habit, rather than a pertinent government tool.¹⁵²⁹ Moreover, such broadly scoped

¹⁵²⁶ M. VAN DEN BRINK and J. TIGCHELAAR, "M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons]", <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 22 November 2017), p. 11-18. See also M. VAN DEN BRINK, "Mag het een hokje meer zijn? Ontwikkelingen rond seksregistratie [Can there be an extra box? Developments concerning sex registration]", *Ars Aequi* 2016, p. 775.

¹⁵²⁷ H. LAU, "Gender Recognition as a Human Right" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹⁵²⁸ The official 'information brochure' that was drafted in the aftermath of the 2017 Belgian Gender Recognition Act and is handed to persons who apply for legal gender recognition by the civil registrar, contains a non-exhaustive list of administrative uses of a person's sex/gender marker relating to identification.

¹⁵²⁹ M. VAN DEN BRINK, "Mag het een hokje meer zijn? Ontwikkelingen rond seksregistratie [Can there be an extra box? Developments concerning sex registration]", *Ars Aequi* 2016, p.

gender registration system indicates the assumed importance of one's sex/gender for the law, i.e. the stereotype that gender always matters everywhere.¹⁵³⁰ However, as RUOCCO argues, since transgender persons disproportionately experience homelessness, unemployment and poverty, they are actually more likely to be in positions where legal gender and the accompanying government control are imposed. After all, they are more likely to be subjected to government-controlled programmes and facilities, such as shelters, unemployment programmes, prisons etc.¹⁵³¹

A. Identification on the basis of recorded gender (identity)

The abovementioned aim of identification is arguably the primary reason for gender registration.¹⁵³² Indeed, through the identification process, it will be checked whether one's gender expression matches the gender (identity) marker (supposedly) expressed on the official identification document concerned. Identification on the basis of a person's gender marker and expression is rooted in the widely held belief that one's classification as male or female will not change over time.¹⁵³³

Even if this recorded gender (identity) is based on self-determination and undone of its cisnormativity, it can be argued that the very existence of a public gender marker already invites others to perform so-called 'gender policing' on the basis of the stereotyped expectations about appearance and

780. H. G. BEH and M. DIAMOND, "Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender", *Wisconsin Journal of Law, Gender & Society* 2014, Vol. 29(3), p. 443. See also E. REILLY, "Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality", *Cardozo Journal on Law & Gender* 2005-06, Vol. 12, p. 322.

¹⁵³⁰ See also M. VAN DEN BRINK, "Mag het een hokje meer zijn? Ontwikkelingen rond sekserregistratie [Can there be an extra box? Developments concerning sex registration]", *Ars Aequi* 2016, p. 780.

¹⁵³¹ B. T. RUOCCO, "Our Antitotalitarian Constitution and the Right to Identity", *University of Pennsylvania Law Review* 2016, Vol. 165, p. 199-200.

¹⁵³² M. VAN DEN BRINK, "Mag het een hokje meer zijn? Ontwikkelingen rond sekserregistratie [Can there be an extra box? Developments concerning sex registration]", *Ars Aequi* 2016, p. 779.

¹⁵³³ P. CURRAH and T. MULQUEEN, "Securitizing Gender: Identity, Biometrics, and the Transgender Bodies at the Airport", *Social Research* 2011, Vol. 78(2), p. 559.

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gender expression.¹⁵³⁴ Indeed, as LAU states, one “should realise that gender markers are only a rough tool for verifying [a person’s] legitimacy”, since “there is no correct way to look or behave based on one’s gender marker”.¹⁵³⁵ These instances of ‘gender policing’ may then lead to a violation of informational privacy (the right not to have one’s gender history revealed)¹⁵³⁶ or even discrimination, hate speech and/or violence.¹⁵³⁷

Identification of a person could easily take place without reference to a recorded gender (identity) – be it public or not.¹⁵³⁸ Indeed, as LAU and RUOCCO argue, identity verification could be facilitated by including a photograph of the document holder.¹⁵³⁹ CRUZ also holds that a photograph of the person concerned as they customarily appear should be adequate for the State’s legitimate identificatory purposes.¹⁵⁴⁰ Besides, biometric data,

¹⁵³⁴ See M. D. LEVASSEUR, “Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights”, *Vermont Law Review* 2014-15, Vol. 39, p. 1000. See also B. T. RUOCCO, “Our Antitotalitarian Constitution and the Right to Identity”, *University of Pennsylvania Law Review* 2016, Vol. 165, p. 198-199.

¹⁵³⁵ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also B. MORON-PUECH, “Le droit des personnes intersexuées”, <<http://journals.openedition.org/socio/2983#text>> (last visited 16 February 2018).

¹⁵³⁶ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also ECtHR 25 March 1992, 13343/87, B. v. France, §57.

¹⁵³⁷ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See also P. CURRAH and T. MULQUEEN, “Securitizing Gender: Identity, Biometrics, and the Transgender Bodies at the Airport”, *Social Research* 2011, Vol. 78(2), p. 562. See in this sense also D. COOPER, “A Very Binary Drama: The Conceptual Struggle for Gender’s Future”, *Feminists@Law* 2019, Vol. 9(1), p. 13.

¹⁵³⁸ See also A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 505.

¹⁵³⁹ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming); B. T. RUOCCO, “Our Antitotalitarian Constitution and the Right to Identity”, *University of Pennsylvania Law Review* 2016, Vol. 165, p. 219. See also J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 947.

¹⁵⁴⁰ D. CRUZ, “Disestablishing Sex and Gender”, *California Law Review* 2002, Vol. 90(4), p. 1057-1058.

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such as fingerprints, are increasingly used for identification purposes, and are certainly more reliable than sex/gender markers.¹⁵⁴¹ In this regard, it is important to point out that on the basis of EU law, all international passports issued by EU Member States are already required to contain the fingerprints of the person concerned.¹⁵⁴²

Despite its impertinence and/or disproportionality for identification purposes, a person's gender (actually cisnormatively in the form of 'sex') is, according to Belgian law, still considered to be part of a person's civil status, which officially *identifies* a person within the family, nation and legal transactions, and determines that person's rights and duties. Ending registration of gender (identity) would therefore lead to a 'loss' of information, which is to date considered of legal importance. However, in their landmark rulings, the German and Belgian Constitutional Courts downplayed the importance of gender information for a person's civil status. Indeed, according to the German Court, the Constitution did not require the inclusion of a person's gender (identity) in their civil status which defines the central aspects of one's legally relevant identity.¹⁵⁴³ The Court thus suggested that – in order to avoid a violation of a person's right to personality and personal development, and the prohibition of discrimination, the legislature could generally dispense with information on gender (identity) in civil

¹⁵⁴¹ In May 2017, the Belgian federal government decided that all Belgian identity cards should contain an electronic version of a person's fingerprints for identification purposes from 2019 onwards. Parliament adopted the necessary legislation in November 2018, immediately leading to strong criticism in the media given the impact on the right to privacy. See also A. SØRLIE, "Legal Gender Meets Reality: A Socio-Legal Children's Perspective" in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 102. See also P. CURRAH and T. MULQUEEN, "Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport", *Social Research* 2011, Vol. 78(2), p. 568. See also B. MORON-PUECH, "The Legal Status of Intersex Persons in France" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 317.

¹⁵⁴² Council Regulation (EC) 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

¹⁵⁴³ Bundesverfassungsgericht [Federal Constitutional Court] (Germany) 10 October 2017, 2019/16. See also B. MORON-PUECH, "Le droit des personnes intersexuées", <<http://journals.openedition.org/socio/2983#text>> (Last visited 16 February 2018). MORON-PUECH argues that sex/gender is not an indispensable element of a person's civil status.

status.¹⁵⁴⁴ The Belgian Constitutional Court concurred with this vision by suggesting in its ruling on the 2017 Gender Recognition Act that the legislature could eliminate sex/gender as part of the personal civil status.¹⁵⁴⁵

It may thus be concluded that, first of all, a framework of official gender (identity) registration is impertinent for personal identification purposes. Moreover, even assuming that registering gender (identity) is pertinent for identifying persons, it is unnecessary, since other identification elements, such as biometric data, are increasingly replacing gender information as instrument for identification. Lastly, official gender (identity) registration is disproportionate in the light of its assumed legitimate aim, since it does not prevent discriminatory gender-policing of non-conforming persons.

B. Other government processes based on recorded gender (identity)

Would registration of gender (identity) then be necessary for other government processes, such as the performance of statistical demographic research or the implementation of gendered policies, e.g. affirmative actions on the basis of a person's gender identity¹⁵⁴⁶? It is clear that a complete abolishment of gender (identity) registration would lead to loss of information and an increase of transaction and/or information costs.¹⁵⁴⁷ In other words, registration of gender (identity) would have to be considered pertinent in the light of certain legitimate aims.

However, it needs to be questioned whether the State would be able to achieve the same policy goals on the basis of less restrictive means than a system of public, compulsory gender (identity) registration, even if it would abide by the measures that are required to fully commit to the protection of personal autonomy by ending its (reversed) cisnormative and binary

¹⁵⁴⁴ Bundesverfassungsgericht [Federal Constitutional Court] (Germany), 10 October 2017, 2019/16.

¹⁵⁴⁵ Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019, §B.7.3.

¹⁵⁴⁶ See D. COOPER and F. RENZ, "If the state decertified gender, what might happen to its meaning and value?", *Journal of Law and Society* 2016, Vol. 43(4), p. 487-488.

¹⁵⁴⁷ D. CRUZ, "Disestablishing Sex and Gender", *California Law Review* 2002, Vol. 90(4), p. 1061. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 948-949.

normative character.¹⁵⁴⁸ After all, these latter approaches also illustrate how the State's respect for the individual's gender (identity) could simultaneously result in heightened anxiety over accuracy and security, and reify the importance of gender classification.¹⁵⁴⁹ This question relates to what WEISS calls the two elements of gender autonomy: all individuals are free to not only define their own gender identity (*gender self-determination*), but also to publicly identify as that gender, free from State contradiction (*gender self-identification*).¹⁵⁵⁰

I. Public registration of gender (identity)

The previous section already pointed out that public gender (identity) registration cannot be seen as a pertinent and proportionate means to achieve the identification aim that is usually connected to the registration model. Considering the fact that a person's identification to State authorities or private parties could arguably be seen as the most important public application of a person's recorded gender (identity), it is hard to contrive other reasons why a gender marker should be publicly available information. Indeed, if a gender marker would be used to support internal government processes, for instance through statistical demographic research, it would not have to take the form of publicly available information.¹⁵⁵¹

The 2017 update of the Yogyakarta Principles also called for the end of public gender (identity) registration. According to Principle 31, States must 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 gender of the person in identity documents such as birth certificates, identification cards, passports

¹⁵⁴⁸ See *supra* p. 381 and 396.

¹⁵⁴⁹ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 491-492.

¹⁵⁵⁰ J. T. WEISS, "Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for *Lawrence v. Texas*", *Journal of Race, Gender and Ethnicity* 2010, Vol. 5, p. 6.

¹⁵⁵¹ See also B. MORON-PUECH, "Le droit des personnes intersexuées", <<http://journals.openedition.org/socio/2983#text>> (Last visited 16 February 2018).

and driver licences, and as part of their legal personality. In this regard, it is interesting to note that following the advisory opinion of the Inter-American Court of Human Rights and a judgment by the national Supreme Electoral Court, the government of Costa Rica announced the removal of all gender information from national identity cards.¹⁵⁵²

II. Compulsory registration of gender (identity)

Even though so-called ‘expansionist’ approaches, i.e. the expansion of available official gender (identity) categories, and a delay of registration would be necessary from a human rights perspective, it is also argued that they ultimately reify gender as a natural, necessary and defining feature of personhood.¹⁵⁵³ In other words, if all persons are to acquire full personal autonomy regarding their gender (identity) and gender expression, all forms of compulsory gender registration would need to be abolished.¹⁵⁵⁴ According to CRUZ, it violates the disestablishment (i.e. autonomy) of gender to force unwilling citizens first to declare a gender (identity) or subject them to an ascription on majority terms, and then to perform that identification.¹⁵⁵⁵ He therefore argues in favour of self-identification by the person concerned when the government provides a legitimate aim to acquire gender information.¹⁵⁵⁶

¹⁵⁵² See <<https://news.co.cr/transgender-population-in-costa-rica-will-be-able-to-choose-the-name-shown-in-their-id/73032/>> (last visited 31 May 2018).

¹⁵⁵³ A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 542. See also G. BAARS, “The Politics of Recognition and the Limits of Emancipation through Law”, <<http://verfassungsblog.de/the-politics-of-recognition-and-the-limits-of-emancipation-through-law/>> (last visited 5 December 2017).

¹⁵⁵⁴ A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 523-524. See also <<http://verfassungsblog.de/the-politics-of-recognition-and-the-limits-of-emancipation-through-law/>> (last visited 5 December 2017). See also P. DUNNE and J. MULDER, “Beyond the Binary: Towards a Third Sex Category in Germany?”, *German Law Journal* 2018, Vol. 19, p. 645.

¹⁵⁵⁵ D. CRUZ, “Disestablishing Sex and Gender”, *California Law Review* 2002, Vol. 90(4), p. 1038-1039.

¹⁵⁵⁶ *Ibid.*, p. 1042.

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While it is clear that compulsory registration of gender (identity) for government processes other than ad hoc self-identification lowers information costs and is therefore pertinent, obliging all persons to publicly share a potentially sensitive and complex element of personal identity for this reason only is disproportionate.¹⁵⁵⁷ Moreover, a clear parallel may be drawn with other identity-related elements, such as religion¹⁵⁵⁸ and sexual orientation, that are used as indicators for government policy and demographic research, and are prohibited grounds for discrimination, but are not officially and compulsorily registered.¹⁵⁵⁹ The concept of *ad hoc* self-identification is therefore not new to the legal system, government performance, and the protection of fundamental rights.¹⁵⁶⁰ *A fortiori*, self-declaration/self-identification is arguably already the dominant way of addressing or mapping intimate elements of a person's identity that may have some value for legal or policy purposes.¹⁵⁶¹ In any case, CRUZ argues that any loss of gender information for the government is well worth the substantial gain in gender (identity) autonomy.

Ending official gender registration – or, according to COOPER and RENZ, decertifying gender – thus would not necessarily mean that the State withdraws from recognising gender (identities) or from recognising gender as a relation of inequality that needs to be regulated.¹⁵⁶² State withdrawal from

¹⁵⁵⁷ See A. SØRLIE, “Legal Gender Meets Reality: A Socio-Legal Children’s Perspective” in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 102.

¹⁵⁵⁸ On the parallels between the relationships of law and religion, and law and gender, see D. CRUZ, “Disestablishing Sex and Gender”, *California Law Review* 2002, Vol. 90(4), p. 997-1086. See also D. COOPER, “Diversifying, Abolishing, Equalising Gender... Can the Law Do All Three?”, <<https://futureoflegalgender.kcl.ac.uk/2018/08/22/diversifying-abolishing-equalising-gender-can-the-law-do-all-three/>> (last visited 13 September 2018).

¹⁵⁵⁹ See J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 951-953.

¹⁵⁶⁰ See in this regard for instance K. REINECK, “Running from the gender police: reconceptualizing gender to ensure protection for non-binary people”, *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 283.

¹⁵⁶¹ D. CRUZ, “Disestablishing Sex and Gender”, *California Law Review* 2002, Vol. 90(4), p. 1061.

¹⁵⁶² D. COOPER and F. RENZ, “If the state decertified gender, what might happen to its meaning and value?”, *Journal of Law and Society* 2016, Vol. 43(4), p. 488. See also D. VADE,

recognising only its own determined gender (identity) categories does not necessarily leave the State without legal tools to measure gender (identity) and base policy decisions on gender grounds, nor does it leave people without legal tools to fight discrimination.¹⁵⁶³ Indeed, the most important element for anti-discrimination law is not a person's label *per se* – but rather the fact that one has faced discrimination because of a perceived label, regardless of whether the attribution of the label is made by the State.¹⁵⁶⁴

III. The need for 'interim measures'

Although a human rights approach supports the abolishment of compulsory and public registration of gender (identity), NEUMAN WIPFLER argues that having a State-issued document that publicly reflects one's self-defined gender (identity) would offer protection against transphobic violence, and could provide sentimental and affirmational value for transgender persons.¹⁵⁶⁵ Indeed, if a gatekeeper is withholding gender-specific services, or

"Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People", *Michigan Journal of Gender and Law* 2005, Vol. 11(3), p. 278. See also D. COOPER, "Diversifying, Abolishing, Equalising Gender... Can the Law Do All Three?", <<https://futureoflegalgender.kcl.ac.uk/2018/08/22/diversifying-abolishing-equalising-gender-can-the-law-do-all-three/>> (last visited 13 September 2018). See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 940-945. See in this sense also : M. J. FRUG, "A postmodern feminist legal manifesto (an unfinished draft)", *Harvard Law Review* 1992, Vol. 105, p. 1051-1052.

¹⁵⁶³ D. COOPER and F. RENZ, "If the state decertified gender, what might happen to its meaning and value?", *Journal of Law and Society* 2016, Vol. 43(4), p. 488-489.

¹⁵⁶⁴ E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 76.

¹⁵⁶⁵ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 541; P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 239. See also M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 959. See also E. BRIBOSIA & I. RORIVE, "Human rights integration in action: making equality law work for trans people in Belgium" in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 113-114. See also D. COOPER and F. RENZ, "If the state decertified gender, what might happen to its meaning and value?", *Journal of Law and Society* 2016, Vol. 43(4), p. 493-494. See in this regard also B. MORON-PUECH, "Le droit des personnes intersexuées",

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access to a gender-specific space, the person concerned could present their gendered ID as proof of their self-proclaimed gender.¹⁵⁶⁶ In other words, at least in the short term, gender registration could be protective of the rights of transgender persons, since an official gender (identity) marker could provide an authoritative means in situations of perceived gender misrecognition.¹⁵⁶⁷ However, identification on the basis of public gender (identity) information would not eliminate the stereotyped idea that gender information can never be authentically proven by self-identification. In other words, a legal framework that maintains gender registration for identification purposes would at the very least need to be complemented by a principled focus on self-identification and strong protection of non-discrimination on the basis of self-defined gender (identity) expression, unhindered by the State's (in)validation.¹⁵⁶⁸

<<http://journals.openedition.org/socio/2983#text>> (last visited 16 February 2018). See also P. DUNNE and J. MULDER, "Beyond the Binary: Towards a Third Sex Category in Germany?", *German Law Journal* 2018, Vol. 19, p. 646. See also J. A. CLARKE, "They, Them, Theirs", *Harvard Law Review* 2019, Vol. 132, p. 903, 949-950.

¹⁵⁶⁶ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 541.

¹⁵⁶⁷ D. COOPER and F. RENZ, "If the state decertified gender, what might happen to its meaning and value?", *Journal of Law and Society* 2016, Vol. 43(4), p. 495-496. See also S. HANSSEN, "Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law", *Oregon Law Review* 2017, Vol. 96, p. 309 and N. ALTHOFF, "Gender Diversity in Law: the German Perspective" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 402. See also S. GARRISON, "On the Limits of 'Trans Enough': Authenticating Trans Identity Narratives", *Gender & Society* 2018, Vol. 32(5), p. 618-619.

¹⁵⁶⁸ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 543. See also G. BAARS, "The Politics of Recognition and the Limits of Emancipation through Law", <<http://verfassungsblog.de/the-politics-of-recognition-and-the-limits-of-emancipation-through-law/>> (last visited 5 December 2017). See also D. VADE, "Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualisation of Gender that is More Inclusive of Transgender People", *Michigan Journal of Gender and Law* 2005, Vol. 11(3), p. 313. See also B. T. RUOCCO, "Our Antitotalitarian Constitution and the Right to Identity", *University of Pennsylvania Law Review* 2016, Vol. 165, p. 221-222. See also M. GRAVEN and M. VAN DEN BRINK, "Trans m/v. Genderdiversiteit, seksegelijkheid en het recht [Trans m/f. Gender diversity, sex equality and the law]", *Tijdschrift voor Genderstudies* 2008, p. 63.

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NEUMAN WIPFLER thus holds that – at least intermediately – *optional* gender registration would arguably offer “the best of both worlds, allowing cardholders who cannot access any other form of ID that matches their self-defined gender finally to legitimise their identity when questioned or challenged, while allowing cardholders who do not wish to have a [...] designation displayed to keep their gender private”.¹⁵⁶⁹ Moreover, when persons choose to provide their gender identification to the State, the latter could make use of that information in pursuit of its – *arguendo* – legitimate aims,¹⁵⁷⁰ resulting in lower information and transaction costs. In relation to all other persons who did not voluntarily declare their gender (identity), the government could rely on a representative sample or choose to ask for *ad hoc* self-declaration, as established above.

Lastly, it is important to note that, if gender (identity) registration is to become truly voluntary, it is clear that the registration framework would have to foresee a delay in gender registration until the person concerned is able to self-identify, as well as the possibility for the person concerned to decide not to register their gender (identity).¹⁵⁷¹ In other words, delaying registration would not only eliminate the (reversed) cisnormative nature of the present sex/gender marker, but also effectively create the opportunity for all persons to have their self-defined gender (identity) accurately reflected by the legal system, without having to undergo any potential negative effect of an incongruent legal classification or a coerced registration.¹⁵⁷²

¹⁵⁶⁹ A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 526.

¹⁵⁷⁰ See also P. DUNNE and J. MULDER, “Beyond the Binary: Towards a Third Sex Category in Germany?”, *German Law Journal* 2018, Vol. 19, p. 646.

¹⁵⁷¹ See also J.M. SCHERPE, “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 216.

¹⁵⁷² See J. T. THEILEN, “Beyond the gender binary: rethinking the right to legal gender recognition”, *European Human Rights Law Review* 2018, p. 256.

IV. Summary

It is clear that evolutions regarding official gender (identity) registration – be it the original registration at birth or legal gender recognition – need to ultimately address two seemingly conflicting needs: the need for government recognition and substantiation of gender (identity) and the need to be free from government prescription of gender (identity).¹⁵⁷³ Indeed, next to the legitimate goals that the government may pursue in registering gender (identity), it is also argued that – at least in the short term – gender-affirming registration that reflects and substantiates a person's gender (identity) provides for agency over one's gender (identity), which may reduce the dysphoria or transphobia that transgender persons face.¹⁵⁷⁴ However, in any case, if official registration of gender (identity) is to be upheld in some form, it needs to be undone of its conceptualisation as the validation by the State of one's (self-defined) gender (identity) within a categorisation model that presents gender (identity) as a necessary instrument for order and a necessary element of legal personhood. Otherwise, all efforts to protect the individual's gender autonomy and inclusion in the legal system will risk being neutralised by the reification of gender as an important, State-guided legal categorisation instrument. Indeed, as CRUZ states, to the extent that gender ceases to matter in law, getting gender 'right' will seem less imperative.¹⁵⁷⁵ In other words, any evolution regarding official gender registration that would abolish gender (identity) as a legal category or reduce its value, must be based on complementary policies that focus on gender self-identification and protection of gender (identity) expression. After all, if in the future reformed gender (identity) registration is to be seen as an interim measure in the evolution towards its full abolishment, the role of gender affirming

¹⁵⁷³ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 497.

¹⁵⁷⁴ *Ibid.*, p. 497. See also <<http://verfassungsblog.de/the-politics-of-recognition-and-the-limits-of-emancipation-through-law/>> (last visited 5 December 2017).

¹⁵⁷⁵ D. CRUZ, "Getting Sex Right: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship", *Duke Journal of Gender Law & Policy* 2010, Vol. 18, p. 222.

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documentation should be inferior to self-identification and self-declaration of gender (identity) when necessary.¹⁵⁷⁶ In this regard, COOPER and RENZ argue that such policy of self-declaration/self-identification would oblige the State, individuals and organisations to recognise and accept those who self-identify with the relevant gender (identity) regardless of whether they wish to recognise them in those terms.¹⁵⁷⁷ HANSSEN concurs that “as a principle, self-identification provides an individual with autonomy or agency over their gender identity”.¹⁵⁷⁸

Although registration of gender (identity) is problematic from a human rights perspective, it is clear that the importance of a gender marker currently stands unquestioned in the eyes of the law.¹⁵⁷⁹ Although the State, the individual concerned and other private parties could have a legitimate interest for gender (identity) registration, a general, compulsory and public registration model comparable to present Belgian law has to be considered disproportionate. A potential – temporary – solution could be the introduction of a completely new model of gender (identity) registration, i.e. the gender pass(port).¹⁵⁸⁰ In this suggested model, all persons (whether gender non-conforming or not) would have the right to *voluntarily* declare their gender (identity) to the civil registry in the deconflated and non-binary

¹⁵⁷⁶ See in this sense also J. GABILONDO, “Holy Gender! Promoting Free Exercise of Gender by Discernment Without Establishing Binary Sex or Compulsory Fluidity”, *Seattle Journal for Social Justice* 2018, p. 665.

¹⁵⁷⁷ D. COOPER and F. RENZ, “If the state decertified gender, what might happen to its meaning and value?”, *Journal of Law and Society* 2016, Vol. 43(4), p. 497.

¹⁵⁷⁸ S. HANSSEN, “Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law”, *Oregon Law Review* 2017, Vol. 96, p. 307. See also K. REINECK, “Running from the gender police: reconceptualizing gender to ensure protection for non-binary people”, *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 283. See also A. R. CHANG and S. M. WILDMAN, “Gender In/Sight: Examining Culture and Constructions of Gender”, *The Georgetown Journal of Gender and the Law* 2017, Vol. 43, p. 79.

¹⁵⁷⁹ A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 521. See also B. T. RUOCCO, “Our Antitotalitarian Constitution and the Right to Identity”, *University of Pennsylvania Law Review* 2016, Vol. 165, p. 198-199.

¹⁵⁸⁰ The Flemish ‘Transgender Infopunt’ already issues a Gender Pass(port) to transgender persons who are transitioning, but have not yet been granted full legal gender recognition.

way that has been described above.¹⁵⁸¹ This declared gender (identity) would then be registered by the government and a public gender pass(port) would be issued. Nevertheless, this document would not have any official identification value or become part of a person's civil status. However, the registered gender (identity) could be used by the government or other third parties to pursue the abovementioned aims, hence lowering transaction and information costs.

It needs to be stressed that the introduction of a so-called gender pass(port), issued by the State on the basis of voluntary registration of a person's self-defined gender,¹⁵⁸² is only an intermediate solution, since it may cause harm to transgender persons if a system of self-declaration is imposed too soon on (administrative) gatekeepers, who are potentially stuck in stereotypes. Indeed, in the end, it is only abolition of legal gender that will achieve true freedom of gender (identity) and gender expression.¹⁵⁸³

3. Conclusion: limits of inclusive gender (identity) registration based on personal autonomy?

According to RUOCCO, "one way the government affirmatively produces identity and conformity is by documenting and enforcing legal gender".¹⁵⁸⁴ In this regard, Belgium's legal gender registration framework is more respectful of the rights of transgender persons than ever before.¹⁵⁸⁵ However, the 2017 Belgian Gender Recognition Act did not profoundly overhaul the State's quasi

¹⁵⁸¹ See *supra* p. 418.

¹⁵⁸² See B. MORON-PUECH, "Le droit des personnes intersexuées", <<http://journals.openedition.org/socio/2983#text>> (last visited 16 February 2018).

¹⁵⁸³ A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 498.

¹⁵⁸⁴ B. T. RUOCCO, "Our Antitotalitarian Constitutional and the Right to Identity", *University of Pennsylvania Law Review* 2016, Vol. 165, p. 196.

¹⁵⁸⁵ E. BRIBOSIA and I. RORIVE, "Human rights integration in action: making equality law work for trans people in Belgium" in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 136. See also E. BRIBOSIA, N. GALLUS, I. RORIVE, "Une nouvelle loi pour les personnes transgenres en Belgique [A new law for transgender persons in Belgium]", *Journal des Tribunaux* 2018, p. 266.

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monopoly power to determine, recognise and ultimately administer (gender) identity,¹⁵⁸⁶ both with regard to the original sex/gender registration at birth and the procedure of legal gender recognition. Not only does the State take power regarding one of the most intimate aspects of a person's life, it does so on the basis of what KATYAL calls, "an inordinately messy, shifting, complex, and contradictory set of rules, demonstrating a near total absence of coherence".¹⁵⁸⁷ Indeed, the previous sections pointed out the inherent paternalising, cisnormative and binary normative nature of the present Belgian official sex/gender registration framework. In this regard, the law remains a problematic key structure through which gender diversity is understood both by the individual (transgender) person and wider society.¹⁵⁸⁸ As RUOCCO holds, "government rejection of trans[gender] people's gender identity causes expressive and dignitary harm".¹⁵⁸⁹ However, the future seems hopeful, since the Belgian Constitutional Court found the Act's differential treatment of gender fluid and non-binary persons unjustified in light of the right to gender self-determination. It is now up to the legislature to break the sex/gender binary in a way that best protects the autonomy rights of all persons.

According to LEVASSEUR, the law must allow for the full range of human variation and must refrain from privileging certain identities over by enforcing a cisgender and binary standard as the norm.¹⁵⁹⁰ In other words, as CURRAH argues, the Endgame is to "dis-establish gender from the State by ending the State's authority to police the relation between one's legal sex assigned at birth, one's gender (identity), and one's gender expression; by attempting to

¹⁵⁸⁶ S. KATYAL, "The *Numerus Clausus* of Sex", *The University of Chicago Law Review* 2017, Vol. 84, p. 411.

¹⁵⁸⁷ *Ibid.*, p. 412.

¹⁵⁸⁸ M. TRAVIS, "The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment", *Social & Legal Studies* 2018, p. 4.

¹⁵⁸⁹ B. T. RUOCCO, "Our Antitotalitarian Constitution and the Right to Identity", *University of Pennsylvania Law Review* 2016, Vol. 165, p. 203.

¹⁵⁹⁰ M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 999. See in this regard also M. TRAVIS, "The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment", *Social & Legal Studies* 2018, p. 6.

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stop the State's use of 'sex' as a marker of identity on identification documents; and by ending the State's reliance on sex/gender as a legal category".¹⁵⁹¹ In this regard, it can be argued that the first step of reform should consist of the separation of sex and gender (identity) in and for the law.¹⁵⁹²

Even though the protection of the right to personal autonomy, as well as the inclusion of non-conforming persons regarding gender (identity) are best served by a total abolition of all forms of gender (identity) registration, it is clear that present societal circumstances still demand some form of registration in order to pursue aims that are legitimate to the individual person concerned. Indeed, it can be argued that in the short term, deep-seated gender prejudice with (administrative) gatekeepers would be hard to overcome if (transgender) persons would not be able to substantiate their self-declared gender (identity) on the basis of an official, public gender-affirming document.¹⁵⁹³ However, the present Belgian official sex/gender registration framework, as amended by the 2017 Gender Recognition Act is neither pertinent, nor proportionate to achieve those aims. Indeed, while an increased focus on self-determination regarding gender (identity) has resulted in a paradigm shift regarding sex/gender registration, Belgian law still falls short because of its paternalisation of transgender persons, (reversed) cisnormativity and binary normativity. Moreover, the 2017 amendment has not been able to eliminate the pervasive stereotypical assumptions regarding the importance of (binary) gender for the law.¹⁵⁹⁴ The Belgian 2017 Gender

¹⁵⁹¹ P. CURRAH, "Gender Pluralisms under the Transgender Umbrella" in P. CURRAH, R. M. JUANG, S. PRICE MINTER (eds.), *Transgender Rights*, Minneapolis, University of Minnesota Press, 2006, p. 24.

¹⁵⁹² M. D. LEVASSEUR, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights", *Vermont Law Review* 2014-15, Vol. 39, p. 999. See in this regard also L. HERAULT et al., "Etat civil de demain et Transidentité. Note de synthèse", <<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>> (last visited 14 May 2018), p. 8-9.

¹⁵⁹³ See in this regard A. J. NEUMAN WIPFLER, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 540-542.

¹⁵⁹⁴ See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 946-947.

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Recognition Act has therefore shown that the legal recognition of gender self-determination remains inherently limited when introduced into a stereotyped legal system.¹⁵⁹⁵ Although Belgium certainly deserves a place among the world-leading countries with regard to the protection of transgender rights, it missed the opportunity to fundamentally reform its sex/gender registration framework and shake off lingering stereotypes concerning sex, gender and gender non-conformity. It remains to be seen whether the 2019 ruling by the Constitutional Court will inspire the legislature to not only break the sex/gender binary, but also to fundamentally review the 2017 Gender Recognition Act in light of the right to gender self-determination.

Since it is clear that any fundamental legal reform of the sex/gender registration, such as the abolition of gender (identity) registration, will be met with a slower change in society that will continue to perform forms of gender control or regulation,¹⁵⁹⁶ it is suggested that – as an intermediate solution – the Belgian legislature should remove all gender information from identification documents, such as the birth certificate and the identity card, and start issuing a so-called gender pass(port), solely on the basis of a simple, convertible, and voluntary declaration of gender (identity). In order to eliminate all forms of cis- and binary normativity, this gender pass(port) could only be issued when the person concerned is capable of self-identification and should not be limited to any ascriptive categories.

Moreover, in order to make registration of gender (identity) truly voluntary, the introduction of a gender pass(port) should be complemented by policies

¹⁵⁹⁵ See E. BRIBOSIA, N. GALLUS, I. RORIVE, “Une nouvelle loi pour les personnes transgenres en Belgique [A new law for transgender persons in Belgium]”, *Journal des Tribunaux* 2018, p. 266.

¹⁵⁹⁶ See A. J. NEUMAN WIPFLER, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents”, *Harvard Journal of Law & Gender* 2016, Vol. 39, p. 523-524. See also D. COOPER and F. RENZ, “If the state decertified gender, what might happen to its meaning and value?”, *Journal of Law & Society* 2016, Vol. 43(4), p. 505. See also J. T. THEILEN, “Beyond the binary: rethinking the right to legal gender recognition”, *European Human Rights Law Review* 2018, p. 255.

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that focus on the centrality of self-declaration of gender (identity) and the protection of gender expression. In other words, as long as gender (identity) continues to have a significance for legal and/or administrative purposes – even when gender (identity) is abolished as a legal category that is officially registered –, gender self-determination would only be served when mere self-declaration of gender (identity) is sufficient to support one's claim.

Chapter V. The right to personal autonomy regarding sex (characteristics), gender (identity and/or expression) and sexual orientation

Since the 1990's, several decades since the beginnings of modern international human rights law - sex (characteristics), gender (identity and/or expression) and sexual orientation have been increasingly considered as 'human rights issues'¹⁵⁹⁷ in need of being addressed by various international and European human rights actors.¹⁵⁹⁸ Rights concerning a person's sexual identity¹⁵⁹⁹ are therefore seen as 'new' or emerging rights within the international legal order. The same development can also be seen at the national level, since in recent years in various countries around the world the legal status of sexual minorities has significantly improved on the basis of human rights claims.¹⁶⁰⁰ However, a diverging trend is also occurring in several States, especially in parts of Africa, Eastern Europe and parts of the Americas.¹⁶⁰¹ Indeed, rights related to sexual minorities are still one of the

¹⁵⁹⁷ The terms 'human rights' and 'fundamental rights' will be used interchangeably throughout this chapter.

¹⁵⁹⁸ F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 2-3. See in this regard also J. MERTUS, "Applying the Gatekeeper Model of Human Rights Activism: The U.S.-Based Movement for LGBT Rights" in C. BOB (ed.), *The International Struggle for New Human Rights*, Philadelphia, Penn Press, 2008, p. 56. See also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995. See also M. LANGFORD, "Same-sex marriage in polarized times: revisiting *Joslin v New Zealand*" in E. BREMS and E. DESMET (eds.), *Integrated human rights in practice: rewriting human rights decisions*, Cheltenham, Edward Elgar Publishing, 2017, p. 121.

¹⁵⁹⁹ For reasons of legibility, this chapter will often refer to the right to personal autonomy regarding a person's sexual identity, instead of the right to personal autonomy regarding a person's sex (characteristics), gender (identity and/or expression) and sexual orientation. As explained in Chapter II, 'sexual identity' is used as an umbrella term for the three latter notions.

¹⁶⁰⁰ A. RAUB, A. CASSOLA, I. LATZ, J. HEYMANN, "Protection of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions", *Yale Journal of Law and Feminism* 2016, Vol. 28(149), p. 151-152.

¹⁶⁰¹ For instance, according to ILGA Europe's 2018 'Rainbow Map', 18 European national constitutions contain prohibitions of same-sex marriage, provisions allowing legislation to prohibit same-sex marriage or an explicit protection of marriage as a union between a man and a woman. In October 2018, the US Trump administration (Department of Health and

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most contentious issues in contemporary human rights law across the globe.¹⁶⁰² Sexual minorities, together with elderly persons, remain one of the last global 'groups' vulnerable to structural discrimination, not to have their 'own' human rights treaties.¹⁶⁰³ Moreover, the first comprehensive comparative study of 193 national constitutions showed that, as of May 2014, only ten constitutions specifically guaranteed equality or prohibited discrimination on the basis of sexual orientation,¹⁶⁰⁴ and only five constitutions guaranteed some aspect of equality or non-discrimination on the basis of gender (identity and/or expression)¹⁶⁰⁵.¹⁶⁰⁶ Although the protection against discrimination on the basis of sex is a much more common provision among national constitutions, Chapter III showed that this does not

Human Services) announced its intention to legally define the legal concept of 'sex' as "a person's status as male or female based on immutable biological traits identifiable by or before birth". This decision followed the administration's policy to ban transgender persons who require or have undergone gender affirming treatment from the military. In January 2019, the US Supreme Court decided (5-4) to grant a request by the administration to lift injunctions blocking the policy from entering into force while challenges continue in lower courts. In the meantime, Hungarian prime minister Orbán banned gender studies in university education, declaring that there only are biological males and females. See A. FAUSTO-STERLING, "Why Sex Is Not Binary. The complexity is more than cultural. It's biological, too", <<https://www.nytimes.com/2018/10/25/opinion/sex-biology-binary.html>> (last visited 26 October 2018). See also M. HADLER and J. SYMONS, "World Society Divided: Divergent Trends in State Responses to Sexual Minorities and Their Reflection in Public Attitudes", *Social Forces* 2018, Vol. 96(4), p. 1724. See also P. LIOLA TONA KATTO, "A critical comparative law analysis on challenging anti-homosexual legislation in Uganda", *UCL Journal of Law and Jurisprudence* 2018, Vol. 7, p. 82-113.

¹⁶⁰² A.T. CHASE, "Human rights contestations: sexual orientation and gender identity", *The International Journal of Human Rights* 2016, Vol. 20(6), p. 704. See in this regard also M. HADLER and J. SYMONS, "World Society Divided: Divergent Trends in State Responses to Sexual Minorities and Their Reflection in Public Attitudes", *Social Forces* 2018, Vol. 96(4), p. 1724-1726.

¹⁶⁰³ F. MEGRET, "The Human Rights of Older Persons: A Growing Challenge", *Human Rights Law Review* 2011, p. 64.

¹⁶⁰⁴ Bolivia, Ecuador, Fiji, Malta, Mexico, New Zealand, Portugal, South Africa, Sweden, United Kingdom.

¹⁶⁰⁵ Bolivia, Ecuador, Fiji, Malta, United Kingdom.

¹⁶⁰⁶ A. RAUB, A. CASSOLA, I. LATZ, J. HEYMANN, "Protection of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions", *Yale Journal of Law and Feminism* 2016, Vol. 28(149), p. 157.

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necessarily mean that persons with variations of sex characteristics are captured by its protective scope.¹⁶⁰⁷

The previous chapters demonstrated that the Belgian legal order insufficiently protects the personal autonomy of persons with variations of sex characteristics and transgender persons. Indeed, Belgian law unjustifiably remains embedded in normative stereotypes, resulting in the legal and social exclusion of persons who do not, cannot or do not wish to abide by these expectations.

This chapter will combine these considerations and address whether the introduction of a constitutional fundamental right to the personal autonomy regarding a person's sexual identity could enhance the legal status of persons who are socially non-conforming with regard to their sex (characteristics), gender (identity/expression) and/or sexual orientation. It will first deal with the role of constitutional fundamental rights in general and in relation to sexual minorities (1.), before elaborating on the value of a right to autonomy (2.) and its potential formulation – taking into account Belgium's legal and constitutional tradition – and scope (3.). The chapter ends with concluding remarks (4.).

1. The role of constitutional fundamental rights

A. The role of fundamental rights

1. The importance of fundamental rights

Ever since the conception of human rights law, scholars have written extensively on the nature of fundamental rights, their importance, their role and their scope. Although a thorough analysis of this theme in the literature goes beyond the scope of this thesis, it is useful to present some of the most recurring themes. Generally, human rights are seen as a necessary component of any democratic society. They are conceived as a way to

¹⁶⁰⁷ See *supra* p. 287.

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constrain the State's powers¹⁶⁰⁸ and to overcome the limitations of politics and decision making on the basis of (a simple) majority, in order to guarantee entitlements and protection to all human beings.¹⁶⁰⁹ Besides creating an obligation to respect, protect and fulfil, the adoption of human rights also symbolically attracts attention to a certain issue, encourages proactive policymaking, dynamises existing efforts and provides a crucial standard for future generations.¹⁶¹⁰

According to AMMATURO, human rights protection has a clear mobilising and community- and identity-building aim, especially in Europe. On the basis of its commitment to strong and efficient human rights protection, 'Europe' therefore ceases to be a purely geo-political area, but becomes a prescriptive and normative idea: in order to become more 'European', countries have to radically transform their legal, political and social structures.¹⁶¹¹ In this regard, she considers the centrality of (the recognition of) human rights as an 'access gate' to full membership of the individuals concerned in the (political) community.¹⁶¹² This strategic importance of human rights is also noted by JOHNSON, who holds that "although the term 'human rights' evades definition and is deployed across multiple sites in different ways", its essential utility lies in its capacity to discursively construct certain issues as an innate and inalienable characteristic of human beings and claim recognition for this as a 'right'.¹⁶¹³ Indeed, when human rights are constituted as claims by groups within society that are oppressed and marginalised, they may in a powerful way advance cultural, economic, political and social empowerment.¹⁶¹⁴ In this

¹⁶⁰⁸ E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 32.

¹⁶⁰⁹ F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 32.

¹⁶¹⁰ F. MEGRET, "The Human Rights of Older Persons: A Growing Challenge", *Human Rights Law Review* 2011, p. 64.

¹⁶¹¹ F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 100.

¹⁶¹² Ibid., p. 100.

¹⁶¹³ P. JOHNSON, *Homosexuality and the European Court of Human Rights*, Abingdon, Routledge, 2012, p. 8. See in this regard also D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 1.

¹⁶¹⁴ A.T. CHASE, "Human rights contestations: sexual orientation and gender identity", *The International Journal of Human Rights* 2016, Vol. 20(6), p. 703. See in this regard also C. BOB,

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regard, MEGRET points out the unique capacity of human rights discourse to 'de-naturalise' certain issues, and 're-politicise' them: a human rights discourse may emphasise that challenges in society for certain groups are not necessarily based on an inherent condition, yet on the constructionist and political choices that society has made.¹⁶¹⁵ Given the perceived usefulness of attaching the label 'human right' to a certain claim, a wide range of special interest groups invest many efforts in order to locate their cause under the banner of human rights.¹⁶¹⁶

Perhaps the most convincing proof of the relevance of fundamental rights, especially for minorities, lies in the stark opposition that various State and non-State actors have expressed over the last decades. For instance, in the context of sexual minorities, the denial of the existence of fundamental rights relating to sexual identity at the national and international level is considered to be used by domestic authorities as a means for constructing national identity against the West, based on the protection of 'traditional values'.¹⁶¹⁷ Nevertheless, maybe somewhat ironically, the use of human rights claims to advance the legal and social position of sexual minorities has also been criticised from within the minority population itself, especially from a post-structuralist point of view. The most radical contestation in this regard is that

"Introduction: Fighting for New Rights" in C. BOB (ed.), *The International Struggle for New Human Rights*, Philadelphia, Penn Press, 2008, p. 1. See in this regard also H. LAU, "Rewriting Schalk and Kopf: shifting the locus of deference" in E. BREMS (ed.), *Diversity and European Human Rights. Rewriting Judgments of the ECtHR*, Cambridge, Cambridge University Press, 2015, p. 248.

¹⁶¹⁵ F. MEGRET, "The Human Rights of Older Persons: A Growing Challenge", *Human Rights Law Review* 2011, p. 63-64. See in this regard also C. BOB, "Introduction: Fighting for New Rights" in C. BOB (ed.), *The International Struggle for New Human Rights*, Philadelphia, Penn Press, 2008, p. 9.

¹⁶¹⁶ P. ALSTON, "Conjuring Up New Human Rights: A Proposal for Quality Control", *American Journal of International Law* 1984, Vol. 78, p. 614. See in this regard also C. GONZALEZ CABRERA, "The Role of International Human Rights Law in Mediating between the Rights of Parents and Their Children Born with Intersex Traits in the United States", *William and Mary Journal of Women and the Law* 2018, Vol. 24, p. 498.

¹⁶¹⁷ A.T. CHASE, "Human rights contestations: sexual orientation and gender identity", *The International Journal of Human Rights* 2016, Vol. 20(6), p. 705. See also M. LANGFORD, "Same-sex marriage in polarized times: revisiting *Joslin v New Zealand*" in E. BREMS and E. DESMET (eds.), *Integrated human rights in practice: rewriting human rights decisions*, Cheltenham, Edward Elgar Publishing, 2017, p. 138.

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the drive for the recognition of fundamental rights sublimates the emancipatory queer challenge to hierarchical State authority in ways that are ultimately disempowering.¹⁶¹⁸ According to this critique, the ultimate goal is to overthrow the State's authority over a person's sexual identity, which could not be reached through the instrument of fundamental rights. After all, fundamental rights protection essentially involves the State's authority and enforcement.

II. Criteria for creating new fundamental rights

§1. The creation of new fundamental rights at the international level

§1.1. The risk of proliferation of new fundamental rights

Given the importance of fundamental rights, the question arises whether any issue may be regarded as 'worthy' of being qualified as a fundamental right.¹⁶¹⁹ Indeed, in the light of the ever increasing protection of fundamental rights, concerns have arisen about the 'protectability' of certain values or claims. Although much of the scholarship has focused in this regard on the creation of so-called 'new rights' at the international level and European level, VELAERS also argues that the actualisation of national constitutional fundamental rights catalogues should not lead to the 'banalisation' of human rights and the Constitution.¹⁶²⁰ However, on the other hand, it is argued that it is precisely the capacity of the human rights regime to change in order to remain connected to emerging concerns and claims within society, especially from marginalised and oppressed groups, that keeps human rights alive and

¹⁶¹⁸ A.T. CHASE, "Human rights contestations: sexual orientation and gender identity", *The International Journal of Human Rights* 2016, Vol. 20(6), p. 704. See in this sense also D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 21.

¹⁶¹⁹ T.S. BULTO, "The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery", *Melbourne Journal of International Law* 2011, p. 7.

¹⁶²⁰ J. VELAERS, "Over de noodzaak om Titel II van de Grondwet over 'De Belgen en hun rechten' te herzien [On the necessity to amend Title II of the Constitution concerning 'The Belgians and their rights']" in A. ALLEN et al. (eds.), *La Constitution hier, aujourd'hui et demain*, Brussels, Bruylant, 2006, p. 113.

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relevant.¹⁶²¹ In this regard, CHASE holds that “it is strategically counterproductive to acquiesce to a status quo that refuses inclusion of groups not explicitly named in documents such as the Universal Declaration of Human Rights of 1948”.¹⁶²² Indeed, it is argued in the literature that the most important source of human rights is not the will of States, but the will of humanity.¹⁶²³ By way of compromise, BOUWHUIS suggests that “[although] those within the system are generally conscious that the field of international human rights will change over time as global society changes, the system must do so at a pace and in a manner that its members will bear”.¹⁶²⁴

As mentioned above, at the international level the discussion of whether anything can be a fundamental right often surrounds the legitimacy of ‘new rights’. On the one hand, the UN Human Rights Council considers that “human rights, which are by nature dynamic and constantly evolving, need to accommodate new rights, just as each generation should contribute to their evolution, in keeping with the aspirations and values of the time”.¹⁶²⁵ The mandates of other UN human rights institutions also often require them to develop, protect and promote human rights.¹⁶²⁶ On the other hand, this development of human rights by low-ranked, non-political institutions instead of sovereign States is sometimes heavily criticised.¹⁶²⁷ In 1984, Philip ALSTON published a seminal Article on “Conjuring Up New Human Rights: A

¹⁶²¹ A.T. CHASE, “Human rights contestations: sexual orientation and gender identity”, *The International Journal of Human Rights* 2016, Vol. 20(6), p. 713.

¹⁶²² *Ibid.*, p. 713.

¹⁶²³ L.E. RODRIGUEZ-RIVERA, “Is the Human Right to Environment Recognised under International Law? It Depends on the Source”, *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 40.

¹⁶²⁴ S. BOUWHUIS, “Revisiting Philip Alston’s Human Rights and Quality Control”, *European Human Rights Law Review* 2016, p. 483.

¹⁶²⁵ HUMAN RIGHTS COUNCIL, “Report of the Independent Expert on International Solidarity”, UN DOC A./HRC/12/27 (2009), para. 11.

¹⁶²⁶ R. FREEDMAN, “‘Third Generation’ Rights: Is There Room For Hybrid Constructs Within International Human Rights Law?”, *Cambridge Journal of International and Comparative Law* 2013, Vol. 2(4), p. 935.

¹⁶²⁷ See in this regard for instance L.E. RODRIGUEZ-RIVERA, “Is the Human Right to Environment Recognised under International Law? It Depends on the Source”, *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 30-31. See also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 79.

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Proposal for Quality Control”, in which he criticised the international developments regarding four emerging ‘new rights’, i.e. the right to a clean environment, the right to development, the right to peace and the right to popular participation.¹⁶²⁸ While ALSTON acknowledged both the validity and necessity of a dynamic approach to human rights as well as the expansion of the list of recognised human rights, he criticised the lack of any established procedure by which ‘candidates’ for new rights are scrutinised.¹⁶²⁹ According to ALSTON, this had resulted in a practice where, for instance, lower, non-political UN (treaty bodies) rather than the General Assembly – which he regards as having the legal authority to decide which claims should be deemed rights and which should not – proclaimed the existence of new rights.¹⁶³⁰ As a consequence, new human rights claims were often directly conceived at an international forum – under pressure from special interest groups – and had not had the benefit of careful scrutiny at the national level,¹⁶³¹ potentially leading to higher levels of contestation within the more political bodies of the UN. In order to avoid proliferation of new human rights claims that could lead to a serious devaluation of the overall human rights system, ALSTON proposed seven substantive criteria which a given claim must satisfy in order to qualify as a human right in terms of international law.¹⁶³² The claim must:

- Reflect a fundamentally important social value;
- Be relevant, inevitably to varying degrees, throughout a world of diverse value systems;
- Be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of

¹⁶²⁸ P. ALSTON, “Conjuring Up New Human Rights: A Proposal for Quality Control”, *American Journal of International Law* 1984, Vol. 78, p. 607-621.

¹⁶²⁹ Ibid., p. 608.

¹⁶³⁰ This practice has remained true up until today. See for instance *supra* the list of UN treaty bodies that have proclaimed human rights for persons with variations of sex characteristics, p. 192.

¹⁶³¹ P. ALSTON, “Conjuring Up New Human Rights: A Proposal for Quality Control”, *American Journal of International Law* 1984, Vol. 78, p. 614.

¹⁶³² Ibid., p. 614-615.

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customary law rules or a formulation that is declaratory of general principles of law;

- Be consistent with, but not merely repetitive of, the existing body of international human rights law;
- Be capable of achieving a very high degree of international consensus;
- Be compatible or at least not clearly incompatible with the general practice of States; and
- Be sufficiently precise as to give rise to identifiable rights and obligations.¹⁶³³

However, given the practical unworkability of such a list of substantive criteria based on rational and objective considerations, ALSTON concluded that any claim should only become an international human right when the UN General Assembly – after taking into account procedural criteria – says it is.¹⁶³⁴ No such standardised, formal process was ever adopted. Nevertheless, a 2016 Article that could be seen as a follow-up study of ALSTON's 1984 publication, showed that – despite the lack of any formal guarantees regarding the creation of new fundamental rights – neither a proliferation of rights, nor a serious devaluation of rights could be seen at the international level.¹⁶³⁵ Actually, developments within various UN (treaty) bodies through which fundamental rights were claimed, considered, scrutinised and often rejected, have in most cases proved to be the kind of 'thoughtful considerations' or 'quality control' that ALSTON proposed.¹⁶³⁶ In this regard, BOB argues that "of

¹⁶³³ Ibid., p. 615.

¹⁶³⁴ Ibid., p. 617.

¹⁶³⁵ S. BOUWHUIS, "Revisiting Philip Alston's Human Rights and Quality Control", *European Human Rights Law Review* 2016, p. 477.

¹⁶³⁶ Ibid., p. 477. See in this regard also C. BOB, "Introduction: Fighting for New Rights" in C. BOB (ed.), *The International Struggle for New Human Rights*, Philadelphia, Penn Press, 2008, p. 3. Moreover, it may be argued that – regardless of the normativity objection to international soft law standards – modern international law has evolved into a more political and diplomatic interdependent order, and less of a legal order. See L.E. RODRIGUEZ-RIVERA, "Is the Human Rights to Environment Recognised under International Law? It Depends on the Source", *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 41.

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course, any group can trumpet its grievances as rights issues, but this alone has little effect. Most important in changing the group's situation is the right's implementation by governments. But in the long quest to achieve that end, adoption by gatekeeper NGOs and international organisations plays a critical initial role and is far from certain".¹⁶³⁷ In other words, while it may seem that there are no limitations to the protectability of certain claims or values on a substantial level, self-imposed procedural requirements and rationalisation¹⁶³⁸ of new human rights claims seem to limit a proliferation of new human rights at the international level.

§1.2. State compliance with new fundamental rights

Despite its obvious relevance, it seems that even a recognition of a claim as a fundamental right by the required majority in political bodies such as the UN General Assembly or the UN Human Rights Council is not sufficient to guarantee the protection and enforcement of the new right within the international community. Indeed, the biggest handicap of soft law instruments such as resolutions, declarations, principles and action plans is that – despite their increasing importance as sources of international (human rights) law –¹⁶³⁹ they do not have any form of legal enforceability.¹⁶⁴⁰ Countries that vote against a resolution or abstain from the vote might find the wiggle room to evade responsibility to respect, protect and fulfil the right.¹⁶⁴¹ It is therefore argued that the establishment of a firm legal basis, which clarifies the existence of the right, its scope and the related State obligations, is necessary for right holders, activists, litigants, policymakers and duty bearers.¹⁶⁴² In other words, at the international level, new human rights

¹⁶³⁷ C. BOB, "Introduction: Fighting for New Rights" in C. BOB (ed.), *The International Struggle for New Human Rights*, Philadelphia, Penn Press, 2008, p. 13.

¹⁶³⁸ Ibid., p. 10-11.

¹⁶³⁹ L.E. RODRIGUEZ-RIVERA, "Is the Human Rights to Environment Recognised under International Law? It Depends on the Source", *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 41-43. See in this regard also E. BREMS, "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", *European Journal of Human Rights* 2014, p. 450.

¹⁶⁴⁰ T.S. BULTO, "The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery", *Melbourne Journal of International Law* 2011, p. 21.

¹⁶⁴¹ Ibid., p. 4.

¹⁶⁴² Ibid., p. 5.

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appear to be best served by explicitly including them in primary sources of international law.¹⁶⁴³ This reality has been criticised by human rights scholars for restricting the development of human rights, since those challenged, the States, are awarded exclusive control over the legitimacy of the complaints made against them by their own victims.¹⁶⁴⁴

Nevertheless, as MEGRET argues, much of the attention for the adoption of new human rights should be less focused on the binding force of these instruments – and therefore how they relate to other binding sources of international human rights law – , than on a basic claim to visibility and equality.¹⁶⁴⁵ Indeed, “more often than not it is the process of adopting a treaty and the sort of bottom-up coalition building and soul-searching that it creates that is one of the most enduring legacies of human rights treaty adoption”.¹⁶⁴⁶

§1.3. Recognition of human rights along group lines

One of the defining phenomena of the human rights project since the second half of the twentieth century has been its increasing fragmentation through specific instruments. As BREMS points out, these instruments can be differentiated in several ways, such as the governance level at which they operate, their scope *ratione materiae*, their legal force, the monitoring mechanisms that accompany them, and their scope *ratione personae*.¹⁶⁴⁷ Although many human rights instruments are universal – applying to all human beings within the jurisdiction of the States Parties – some instruments

¹⁶⁴³ Ibid., p. 6.

¹⁶⁴⁴ L.E. RODRIGUEZ-RIVERA, “Is the Human Right to Environment Recognised under International Law? It Depends on the Source”, *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 3. See in this regard also K. DZEHTSIAROU, “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, *German Law Journal* 2011, Vol. 12, p. 1743.

¹⁶⁴⁵ F. MEGRET, “The Human Rights of Older Persons: A Growing Challenge”, *Human Rights Law Review* 2011, p. 65.

¹⁶⁴⁶ F. MEGRET, “The Human Rights of Older Persons: A Growing Challenge”, *Human Rights Law Review* 2011, p. 65.

¹⁶⁴⁷ E. BREMS, “Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration”, *European Journal of Human Rights* 2014, p. 448-451.

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develop rights for a specific target group such as women,¹⁶⁴⁸ children,¹⁶⁴⁹ persons with disabilities,¹⁶⁵⁰ and indigenous peoples¹⁶⁵¹.¹⁶⁵² At the UN level, this attention for the specific rights of specific groups has not only led to new conventions, but also to the appointment of ‘Special Rapporteurs’ who focus on group-related rights.¹⁶⁵³ Specialised human rights instruments have a clear symbolic, as well as functional purpose. For instance, by setting out in detail States’ obligations to respect, protect and fulfill the listed rights of a specific group, group-related instruments complement generalised provisions in universally applicable human rights instruments in order to achieve more effective protection of the group’s fundamental rights.¹⁶⁵⁴ In this regard, it is argued that the adoption of the Convention on the Elimination of Discrimination Against Women (CEDAW) acknowledged that the specificities of discrimination and structural oppression of women and girls required specific rights-language and the enumeration of rights tailored to address the particularities of gender.¹⁶⁵⁵ Indeed, it was feared that the specificities of women’s lives would have been overlooked when only covered by the universal provisions in human rights law.¹⁶⁵⁶

However, the creation of new rights in specific conventions and specific attention along group lines is not only functional, but arguably also leads to qualitative differentiation, i.e. suggesting subtle but often significant

¹⁶⁴⁸ E.g. UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

¹⁶⁴⁹ E.g. UN Convention on the Rights of the Child (CRC).

¹⁶⁵⁰ E.g. UN Convention on the Rights of People with Disabilities (CRPD).

¹⁶⁵¹ E.g. UN Declaration on the Rights of Indigenous Peoples; ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries.

¹⁶⁵² F. MEGRET, “The Human Rights of Older Persons: A Growing Challenge”, *Human Rights Law Review* 2011, p. 39. See in this regard also E. BREMS, “Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration”, *European Journal of Human Rights* 2014, p. 449.

¹⁶⁵³ For instance, the Special Rapporteurs for Migrants, Indigenous Peoples, Human Rights Defenders, Violence against Women, Persons with Disabilities, etc.

¹⁶⁵⁴ E. BREMS, “Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration”, *European Journal of Human Rights* 2014, p. 463.

¹⁶⁵⁵ W. O’BRIEN, “Can International Human Rights Law Accommodate Bodily Diversity”, *Human Rights Law Review* 2015, Vol. 15, p. 3.

¹⁶⁵⁶ *Ibid.* p. 3.

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differences in which the fundamental rights of the groups should be treated.¹⁶⁵⁷ Although this level of fragmentation of fundamental rights may be in line with a need for sensitivity for the diversity of the human experience, it could eventually – as ALSTON feared – undermine the intelligibility and coherence of (the universality of) human rights.¹⁶⁵⁸ The absence of a specific international human rights convention for a certain group, might create the impression that the issue is less worthy of human rights attention than others.¹⁶⁵⁹ Moreover, the increased fragmentation of human rights protection has arguably led to a framework of legal pluralism in which human rights holders, authorities and monitoring bodies are confronted with a diversity of applicable norms.¹⁶⁶⁰ While this pluralistic model might be considered positive for the rights holder, who can go ‘forum shopping’ in order to ensure the highest protection of their fundamental rights, it might also be considered to be a complex labyrinth in which rights holders may get lost.¹⁶⁶¹ BREMS has therefore called for an inclusive perspective for implementing and enforcing fundamental rights – a so-called smart ‘integrated’ approach – on the basis of which the complex human rights architecture would be approached through the lens of its users.¹⁶⁶²

§2. Teleological, and dynamic/evolutive interpretation of existing international fundamental rights

Despite ALSTON’s skepticism of new human rights, it seems that the creation of new and specialised human rights treaties and soft law instruments with newly formulated claims presents an indispensable tool in the current

¹⁶⁵⁷ F. MEGRET, “The Human Rights of Older Persons: A Growing Challenge”, *Human Rights Law Review* 2011, p. 39.

¹⁶⁵⁸ *Ibid.*, p. 41.

¹⁶⁵⁹ *Ibid.*, p. 64.

¹⁶⁶⁰ E. BREMS, “Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration”, *European Journal of Human Rights* 2014, p. 451.

¹⁶⁶¹ *Ibid.*, p. 451.

¹⁶⁶² *Ibid.*, p. 452. See also E. BREMS, “Smart Human Rights Integration” in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives*, Cheltenham, Edward Elgar Publishing, 2018, p. 165-193.

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international regime of human rights protection.¹⁶⁶³ However, in the absence of the creation of such instruments, other ways for the effective protection¹⁶⁶⁴ and promotion of human rights are also sought. Indeed, directly related to the explicit creation of ‘new’ fundamental rights provisions, is the matter of dynamic or evolutive, and teleological interpretation of existing fundamental rights. By means of these interpretation techniques, specific rights articulations and derivative/ancillary rights are ‘read in’ in the meaning of another explicit right, by national and international courts, institutional human rights actors, or States.¹⁶⁶⁵ For instance, it was already mentioned above that the ECtHR derived the right to personal autonomy from the right to respect for private life *ex* Article 8 ECHR in *Pretty v. United Kingdom*.¹⁶⁶⁶ Through this right to personal autonomy, the Court then brought rather sensitive, or even controversial, issues within the scope of the Convention, such as – to name a few – the right to self-determination of gender (identity),¹⁶⁶⁷ abortion, assisted suicide and euthanasia.¹⁶⁶⁸ In this way new human rights articulations or a progressive development of the content of existing rights¹⁶⁶⁹ may be regarded more as ‘discoveries’ than as ‘inventions’.¹⁶⁷⁰ Although a pragmatic use of existing fundamental rights might redefine human rights protection from below, it could also endanger the ‘radicalisation’ that can be allegedly required to overthrow existing

¹⁶⁶³ F. MEGRET, “The Human Rights of Older Persons: A Growing Challenge”, *Human Rights Law Review* 2011, p. 64.

¹⁶⁶⁴ K. DZEHTSIAROU, “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, *German Law Journal* 2011, Vol. 12, p. 1732.

¹⁶⁶⁵ T.S. BULTO, “The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery”, *Melbourne Journal of International Law* 2011, p. 4. See also F. MEGRET, “The Human Rights of Older Persons: A Growing Challenge”, *Human Rights Law Review* 2011, p. 49-50. See also K. MÖLLER, *The Global Model of Constitutional Rights*, Oxford, Oxford University Press, 2012, p. 3.

¹⁶⁶⁶ See *supra* p. 53.

¹⁶⁶⁷ ECtHR 12 June 2003, 35968/97, *Van Kück v. Germany*, §73.

¹⁶⁶⁸ See J. GERARDS, “Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights”, *Human Rights Law Review* 2018, Vol. 18(3), p. 507.

¹⁶⁶⁹ P. ALSTON, “A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law”, *Netherlands International Law Review* 1982, p. 316-317.

¹⁶⁷⁰ T.S. BULTO, “The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery”, *Melbourne Journal of International Law* 2011, p. 25.

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suppression or social exclusion of certain (minority) groups based on normative principles in law and society.¹⁶⁷¹ Moreover, ‘reading in’ new and specific articulations in existing human rights standards on a scattered, case-by-case basis could generally fail to take into account the whole range of the group’s human rights or the way in which numerous rights of the group are affected, potentially leading to normative ‘gaps’.¹⁶⁷²

When judges extend the scope of human rights protection through evolutive interpretation, the technique is often met with critiques of (extreme) ‘judicial activism’, according to which judges impose their own vision or convictions concerning important societal debates on politically accountable institutions such as parliament or the government.¹⁶⁷³ Nevertheless, the controversy surrounding the development of rights related to sexual and reproductive health (‘SRHR’) as new articulations of existing human rights by several consecutive UN thematic conferences and working groups in the 1970-1990’s, is also illustrative for the fact that legitimacy-based critiques are not limited to judicial interpretation of human rights instruments.¹⁶⁷⁴ Soft law instruments that dynamically interpret existing human rights are thus not necessarily less controversial than instruments that innovatively adopt new human rights provisions.

On the basis of the Vienna Convention on the Law of Treaties a treaty should be interpreted in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose, *taking into account any subsequent practice* in the application of the treaty and any

¹⁶⁷¹ C. CLARK, “Of What Use is a Deradicalized Human Right to Water?”, *Human Rights Law Review* 2017, p. 260. See in this regard also C. BOB, “Introduction: Fighting for New Rights” in C. BOB (ed.), *The International Struggle for New Human Rights*, Philadelphia, Penn Press, 2008, p. 9.

¹⁶⁷² F. MEGRET, “The Human Rights of Older Persons: A Growing Challenge”, *Human Rights Law Review* 2011, p. 51.

¹⁶⁷³ For a thorough comparative discussion of judicial activism, see L.P. COUTINHO, M. LA TORRE, S.D. SMIT, *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences*, Lisbon, Springer, 2015.

¹⁶⁷⁴ See L. B. PIZZAROSSA, “Here to Stay: the Evolution of Sexual and Reproductive Health and Rights in International Human Rights Law”, *Laws* 2018, doi:10.3390/laws7030029 (last visited 24 September 2018).

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relevant norms applicable between its parties.¹⁶⁷⁵ Despite also being criticised in the literature, dynamic interpretation is considered to be necessary to ensure the practical and effective protection of human rights that are guaranteed in a certain instrument.¹⁶⁷⁶ The dynamic interpretation of an existing human rights instrument can be used in two types of situations: either a new situation that was not envisaged at the moment of the drafting of the instrument occurs, or a situation that occurred at the moment of drafting, yet was excluded from the instrument, is reassessed in the light of social, cultural or legal changes.¹⁶⁷⁷ The ECtHR has for instance affirmed the need for a dynamic interpretation of the ECHR by stating that the Convention is a 'living instrument' that should be interpreted in the light of 'present day conditions'.¹⁶⁷⁸ An analysis of these 'present day conditions' often comes down to a comparative analysis of the legislation of Council of Europe Member States and international law.¹⁶⁷⁹ By bringing a certain issue or claim in the protective scope of one of the Convention rights, the Court broadens the *definitions* of the fundamental rights that are the same for all individuals

¹⁶⁷⁵ Articles 31(1) and 31(3) of the Vienna Convention of 23 May 1969 on the Law of Treaties.

¹⁶⁷⁶ A. PAPROCKA, "Creating an Identity of the 'European Democratic Society'? – Margin of Appreciation vs. the ECtHR's Dynamic Interpretation of the European Convention on Human Rights", <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666261> (last visited 19 June 2018), p. 6. See also K. DZEHTSIAROU, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", *German Law Journal* 2011, Vol. 12, p. 1739.

¹⁶⁷⁷ A. PAPROCKA, "Creating an Identity of the 'European Democratic Society'? – Margin of Appreciation vs. the ECtHR's Dynamic Interpretation of the European Convention on Human Rights", <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666261> (last visited 19 June 2018), p. 6.

¹⁶⁷⁸ K. DZEHTSIAROU, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", *German Law Journal* 2011, Vol. 12, p. 1731.

¹⁶⁷⁹ See G. LETSAS, "The ECHR as a Living Instrument: Its Meaning and Legitimacy", <<https://ssrn.com/abstract=2021836>> (last visited 24 September 2018), p. 2. Nevertheless, a focus on social or scientific developments and evolutions in public opinion may also occur. This has for instance been the case with regard to the protection of homosexual activities between consenting persons (ECtHR 22 October 1981, 7525/76, *Dudgeon v. United Kingdom*, §60), the recognition of same-sex relations as family life (ECtHR 24 June 2010, 30141/04, *Schalk and Kopf v. Austria*, §52, 93), or the need for legal gender recognition (ECtHR 11 July 2002, 28957/95, *Christine Goodwin v. United Kingdom*, §81).

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within the jurisdiction of the Council of Europe Member States.¹⁶⁸⁰ Moreover, the finding that a common European approach or a European consensus exists – or sometimes even a continuing international trend –¹⁶⁸¹ may sometimes constitute the basis for the ECtHR to declare that a certain matter can no longer be left to the appreciation of the State, but becomes part of the basic human rights standards required by the ECHR.¹⁶⁸² In other words, not only can a common legal framework among States be indicative for the Court to recognise a ‘new’ articulation of a pre-existing right, but a consensus among States can also lead to a significant reduction of the State’s margin in guaranteeing and protecting that right in its domestic legal order.¹⁶⁸³ According to GERARDS, the use of the consensus theory provides an acceptable middle road between the legitimacy of the interpretation of an existing human rights standard in the light of State sovereignty and the principle of effectiveness of human rights protection.¹⁶⁸⁴

A specific form of dynamic interpretation is teleological interpretation. On the basis of teleological interpretation, primary importance is given to the object and purpose of the legal provision concerned, rather than giving the provision a narrow and restricted meaning based in its narrow and restricted

¹⁶⁸⁰ J. GERARDS, “Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights”, *Human Rights Law Review* 2018, Vol. 18(3), p. 497.

¹⁶⁸¹ ECtHR 11 July 2002, 28957/95, Christine Goodwin v. United Kingdom, §85.

¹⁶⁸² However, in some cases the lack of a ‘European consensus’ has prevented the Court from using the evolutive interpretation. See K. DZEHTSIAROU, “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, *German Law Journal* 2011, Vol. 12, p. 1731.

¹⁶⁸³ For instance, in the case of *Schalk and Kopf v. Austria* the ECtHR acknowledged that the right to same-sex marriage can be ‘read in’ in the wording of Article 12 ECHR, which was also supported by the wording of Article 9 of the EU Charter of Fundamental Rights (§ 55, 61). However, due to, *inter alia*, an absence of consensus among Contracting States regarding the regulation of same-sex marriage, Austria was granted a wide margin of appreciation and was therefore not obliged under the ECHR to grant same-sex couple access to marriage (§ 63).

¹⁶⁸⁴ J. GERARDS, “Judicial Deliberations in the ECtHR” in N. HULS, M. ADAMS, J. BOMHOFF (eds.), *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberations and Beyond*, The Hague, TMC Asser Press, 2009, p. 407-436. See in this regard also L. HELFER, “Consensus, Coherence and the European Convention on Human Rights”, *Cornell International Law Journal* 1993, Vol. 26, p. 136-137.

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wording.¹⁶⁸⁵ It may even be considered that allowing space for teleological interpretation is inherent to human rights treaty-making. The use of ambiguities allows the incorporation of human rights that eluded the explicit list of the drafters at a particular time.¹⁶⁸⁶ Indeed, it is not because a certain claim does not have a historical basis in a human rights provision, that it has no normative basis in it.¹⁶⁸⁷ Moreover, the universality of human rights, as well as the effective protection of human rights are important principles complementing the teleological interpretation.

§3. Relevance of qualification as ‘new’ fundamental right

Nevertheless, it may be argued that the discussion whether a fundamental right should be qualified as a ‘new’ right, an ‘emerging new right’ or rather a ‘new’ articulation of a pre-existing right is somewhat theoretical and predominantly serves strategic purposes. Indeed, as LAU holds, “[when] legal institutions have only begun to acknowledge and protect [these rights], there is momentum building. One threat to that momentum, however, is the argument that [they are] radically new right[s] that ought to be rejected”.¹⁶⁸⁸ In other words, the framing of rights as a logical implementation of longstanding rights is generally considered to be the best strategy for activists and norm entrepreneurs to improve a certain group’s legal and social status.¹⁶⁸⁹ Moreover, THEILEN argues that newly articulated legal rights can non-paradoxically be considered both new and not new at the same time,

¹⁶⁸⁵ T.S. BULTO, “The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery”, *Melbourne Journal of International Law* 2011, p. 9.

¹⁶⁸⁶ Ibid., p. 11.

¹⁶⁸⁷ E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 86.

¹⁶⁸⁸ H. LAU, “Gender Recognition as a Human Right” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹⁶⁸⁹ See E. BAISLEY, “Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity”, *Human Rights Quarterly* 2016, Vol. 38(1), p. 134-163. See in this regard also L.E. RODRIGUEZ-RIVERA, “Is the Human Right to Environment under International Law? It Depends on the Source”, *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 18. See also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p.22.

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depending on the perspective one takes.¹⁶⁹⁰ While on the one hand the derivation of the new articulation is brought back to a pre-existing legal standard by way of justification, on the other hand it is essentially also a creative act of interpretation, and therefore ‘new’.¹⁶⁹¹ In this regard, the contested nature of a ‘new’ right could be seen as useful for achieving inclusive and substantive rights: underlining the label of a ‘new’ right highlights the need for change and generates the possibility for radical, grassroots challenges to established views.¹⁶⁹² Stressing the novelty of fundamental rights, or their connection to longstanding provisions could thus, depending on the context, similarly serve the overarching goal of human rights protection. As ESKRIDGE has stated:

*“A court or a legislature’s announcement of a [...] right serves an expressive function at the very least. In the international context, human rights are typically articulated and endorsed long before they can be fully implemented, yet the official announcement of such a right contributes to the creation of a public norm to that effect. Public values and norms can influence private as well as public conduct. More important, they can embolden their intended beneficiaries to demand better treatment from private as well as public authorities.”*¹⁶⁹³

§4. New international human rights relating to sexual identity

Although there is still ample debate on the recognition of rights related to sex characteristics, sexual orientation and gender (identity/expression) at the

¹⁶⁹⁰ J.T. THEILEN, “Between Novelty and Timelessness: The Right to Legal Gender Recognition” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming). See in this regard also F. MEGRET, “The Human Rights of Older Persons: A Growing Challenge”, *Human Rights Law Review* 2011, p. 66.

¹⁶⁹¹ J.T. THEILEN, “Between Novelty and Timelessness: The Right to Legal Gender Recognition” in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹⁶⁹² Ibid.

¹⁶⁹³ W. ESKRIDGE JR., *Equality Practice: Civil Unions and the Future of Gay Rights*, New York, Routledge, 2002, p. 153.

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international level,¹⁶⁹⁴ it seems that doubts concerning the protectability of a person's sexual identity as a human rights issue are steadily fading away. Indeed, a rapidly increasing number of soft law instruments and judgments have addressed human rights violations based on a person's sexual identity, especially in the course of the last fifteen years, as was evidenced by the previous chapters of this thesis. The best answer to the question of whether there already are fundamental rights for sexual minorities at the international level is therefore: "It depends on the source".¹⁶⁹⁵

As mentioned above, in the absence of any specific treaty for sexual minorities, fundamental rights concerning variations of sex characteristics, sexual orientation and gender (identity/expression) have been connected to existing human rights standards since the 1980's. By way of example, in the context of the protection of the fundamental rights of transgender persons, LAU has argued that "the right to gender recognition is only *new* in the sense that it is a newly recognised aspect of preexisting rights".¹⁶⁹⁶ He holds that the right to gender recognition can be derived from longstanding and internationally recognised 'basic' rights as the right to personal autonomy, the right to privacy, the right to health and the right to bodily integrity. A recognition of the basic right leads to the recognition of the 'derivative' right.¹⁶⁹⁷ This normative effort to link fundamental rights of sexual minorities to preexisting rights may also be seen with the Yogyakarta Principles +10. As mentioned above, according to the accompanying introduction, the Principles aim to generate a "[...] consistent understanding of the comprehensive regime of international human rights law and its application to issues of

¹⁶⁹⁴ See in this regard also M. HADLER and J. SYMONS, "World Society Divided: Divergent Trends in State Responses to Sexual Minorities and Their Reflection in Public Attitudes", *Social Forces* 2018, Vol. 96(4), p. 1724.

¹⁶⁹⁵ See in this regard, L.E. RODRIGUEZ-RIVERA, "Is the Human Right to Environment Recognised under International Law? It Depends on the Source", *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 44.

¹⁶⁹⁶ H. LAU, "Gender Recognition as a Human Right" in A. VON ARNAULD, K. VON DER DECKEN, M. SUSI (eds.), *The Cambridge Handbook on The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (forthcoming).

¹⁶⁹⁷ Ibid. See also J. RAZ, "On the Nature of Rights", *Mind* 1984, Vol. 93, p. 197-199.

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sexual orientation and gender identity”.¹⁶⁹⁸ The preamble continues that “it is critical to collate and clarify State obligations under existing international human rights law, in order to promote and protect all human rights for all persons on the basis of equality and without discrimination”.¹⁶⁹⁹ In other words, rather than creating ‘new’ rights, the Principles bring the protection of a person’s sexual identity within the scope of existing international human rights law standards. This work was affirmed by the UN High Commissioner for Human Rights, who stated that “protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards; the legal obligations of States to safeguard the human rights of LGBT people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights standards”.¹⁷⁰⁰ It may thus be argued that rights related to sexual identity are chronologically ‘new’, yet inherently related to firmly established, first and second generation rights.¹⁷⁰¹

Although the role that international and European institutional human rights actors, especially the various UN treaty bodies, the IACtHR, as well as the Council of Europe Parliamentary Assembly and the ECtHR have played in applying existing human rights standards to improve the protection of the fundamental rights of sexual minorities is undeniable, it appears that sovereign States have played the most efficient role as norm entrepreneurs.¹⁷⁰² Despite the fact that the ECtHR’s case law has had a significant impact on the adoption of legislative and political changes on stances towards homosexuality and transgender persons throughout

¹⁶⁹⁸ See <<https://yogyakartaprinciples.org/introduction/>> (last visited 18 June 2018).

¹⁶⁹⁹ Ibid.

¹⁷⁰⁰ Office of the United Nations High Commissioner for Human Rights, “Combatting Discrimination Based on Sexual Orientation and Gender identity”, <<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>> (last visited 18 June 2018).

¹⁷⁰¹ E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 85.

¹⁷⁰² E. BAISLEY, “Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity”, *Human Rights Quarterly* 2016, p. 149.

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Europe,¹⁷⁰³ it is clear that the Court has remained attentive of its subsidiary role in human rights protection. Indeed, the previous chapters have shown the importance that the Court has given to the consensus-reasoning in cases concerning sexual identity, for instance leaving a wide margin of appreciation to the Contracting State regarding the conditions for legal gender recognition and the recognition of same-sex marriage. Moreover, States – together with high-ranking UN officials – have brought the human rights situation of sexual minorities under the attention of political bodies such as the UN Human Rights Council and the UN General Assembly. In this regard, BAISLEY argues that, because of these State initiatives, rights related to sexual identity are reaching a crucial ‘tipping point’, before entering in a cascade of broad acceptance towards strong institutionalisation.¹⁷⁰⁴ It thus appears that the national legal order is still a crucial level for the development, protection and promotion of human rights related to a person’s sexual identity.

§5. National constitutional developments

Whereas most legal doctrine concerning new human rights is focussed on the international level, it is important not to forget that the explicit legal recognition of a new (fundamental) right and/or the evolutive interpretation of existing rights may also be a process that takes place at the domestic level.¹⁷⁰⁵ Indeed, as ANAGNOSTOU argues, national constitutions are flexible and adaptable to social changes, since they are continuously being revised and reinterpreted through judicial review and public interpretation.¹⁷⁰⁶ In this regard, over the years, the dynamic interpretation of national constitutional law provisions has already proven to be instrumental for the improvement of the legal status of sexual minorities in the domestic legal order. Chapters III

¹⁷⁰³ F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 20.

¹⁷⁰⁴ E. BAISLEY, “Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity”, *Human Rights Quarterly* 2016, p. 162-163.

¹⁷⁰⁵ S. BOUWHUIS, “Revisiting Philip Alston’s Human Rights and Quality Control”, *European Human Rights Law Review* 2016, p. 476. See in this regard also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 28.

¹⁷⁰⁶ D. ANAGNOSTOU, “Gender equality and parity in European national constitutions” in H. IRVING (ed.), *Constitutions and Gender*, Cheltenham, Edward Elgar Publishing, 2017, p. 269.

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and IV referred for instance to the case law of the Austrian, Belgian, Colombian and German Constitutional Courts which, by dynamically interpreting national constitutional rights, protected the fundamental rights of persons with variations of sex characteristics and non-binary transgender persons. By way of another example, same-sex marriage became legalised in all US States after the Supreme Court's ruling in *Obergefell v. Hodges*,¹⁷⁰⁷ in which the Court considered the prohibition of same-sex marriage a violation of the Constitution's Fourteenth Amendment (the *Due Process* clause). In this regard, the creation of a 'new' human right or the 'discovery' of a new articulation of an existing right by national authorities may be considered the natural exercise of State sovereignty, which is regarded as one of the pillars of international (human rights) law,¹⁷⁰⁸ and therefore in line with ALSTON's critiques. Moreover, much attention is often primarily given to the role of courts and judicial review for the development, promotion and protection of fundamental rights. Indeed, 'living constitutionalism', on the basis of which constitutional fundamental rights are interpreted in the light of present-day conditions, has become the dominant interpretation method in modern Western – and especially European – constitutionalism.¹⁷⁰⁹ It has however also been argued that national (constituent) legislatures – and therefore not the judiciary – are and should be at the centre of human rights protection and development.¹⁷¹⁰ The next section will therefore address the importance of

¹⁷⁰⁷ SUPREME COURT OF THE UNITED STATES (USA), 26 June 2015, 14-556, *Obergefell et al. v. Hodges*, Director Ohio Department of Health, et al.

¹⁷⁰⁸ L.E. RODRIGUEZ-RIVERA, "Is the Human Right to Environment under International Law? It Depends on the Source", *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 2.

¹⁷⁰⁹ J. GOLDSWORTHY, "Constitutional Interpretation" in M. ROSENFELD and A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 695; C. JENART, "Rechterlijk activisme in keuze tussen vrijheid en gelijkheid? Vergelijkende rechtspraakanalyse van het US Supreme Court en het EHRM over het huwelijk tussen personen van hetzelfde geslacht [Judicial activism in choice between freedom and equality? Comparative analysis of same-sex marriage case law of the US Supreme Court and the ECtHR]", *Publiekrechtelijke Kronieken* 2017, p. 611.

¹⁷¹⁰ G. WEBBER and P. YOWELL, "Introduction: Securing Human Rights through Legislation" in G. WEBBER, P. YOWELL, R. EKINS, M. KOPCKE, B.W. MILLER, F.J. URBINA (eds.), *Legislated Rights: Securing Human Rights through Legislation*, Cambridge, Cambridge University Press, 2018, p. 1.

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the adoption of fundamental rights by the Constituent Power in a national constitution for human rights protection.

B. The role of constitutions and constitutional rights

Almost all human rights that have been recognised in the domain of international law have been claims which have long been made at the national level, and which, in many instances have been formally recognised as fundamental rights in national constitutions.¹⁷¹¹ Indeed, national constitutions historically embody the first legal source of fundamental rights protection.¹⁷¹² The role of national constitutions for the protection of human rights therefore cannot be overlooked.¹⁷¹³

In the aforementioned comprehensive study of the worldwide constitutional protection of equal rights across sexual orientation and gender identity, the importance of national constitutions was also emphasised. According to the authors, “although governments may use a variety of legislative and policy channels to address rights in these areas, constitutions are particularly important tools. The symbolic and legal weight of constitutional rights can be leveraged to oppose or encourage the introduction of legislation. Because constitutions are typically more difficult to repeal or amend than other laws and policies, they may also be more resistant to reversal when governments change. Furthermore, constitutions often include specific mechanisms for redress when provisions are violated by States or private actors”.¹⁷¹⁴ Similarly,

¹⁷¹¹ P. ALSTON, “Conjuring Up New Human Rights: A Proposal for Quality Control”, *American Journal of International Law* 1984, Vol. 78, p. 614.

¹⁷¹² S. VAN DROOGHENBROECK and O. VAN DER NOOT, “Between assimilation and exclusion: is there room for an ‘integrated’ approach towards constitutional and international protection of human rights?”, in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 139.

¹⁷¹³ Nevertheless, as mentioned above, constitutional provisions that explicitly address rights based on sex characteristics, sexual orientation, gender (identity) are rare. See A. RAUB, A. CASSOLA, I. LATZ, J. HEYMANN, “Protection of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions”, *Yale Journal of Law and Feminism* 2016, Vol. 28(149), p. 160.

¹⁷¹⁴ A. RAUB, A. CASSOLA, I. LATZ, J. HEYMANN, “Protection of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions”, *Yale Journal of*

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GAVISON identifies (at least) three main purposes and functions of constitutions. First, the constitution both authorises and creates limits on the powers of political authorities; second, it enhances the legitimacy and stability of the political order; third, it institutionalises a distinction between 'regular politics' and 'the rules of the game' and other constraints, such as human rights, within which ordinary politics must be played.¹⁷¹⁵ With regard to the protection of fundamental rights, there are therefore two main elements to the importance of national constitutions: symbolism and pragmatism. The following sections will address both functions.

I. Symbolism

The constitution may be considered to be the State's 'identity card',¹⁷¹⁶ which embodies its "national temperament and tradition, the political, sociological, ideological, religious and ethnic features".¹⁷¹⁷ It serves as a 'symbol' of the State and of its continuity in time.¹⁷¹⁸ While this of course in the first place refers to provisions concerning the State structure and separation of powers, the modern constitution is also supposed to contain fundamental rights which reflect the contemporary aspirations, needs and expectations of society.¹⁷¹⁹ It is argued in the literature that the constitution (needs to)

Law and Feminism 2016, Vol. 28(149), p. 152-153. See in this sense also R. GAVISON, "What Belongs in a Constitution?", *Constitutional Political Economy* 2002, Vol. 13, p. 93.

¹⁷¹⁵ R. GAVISON, "What Belongs in a Constitution?", *Constitutional Political Economy* 2002, Vol. 13, p. 90.

¹⁷¹⁶ K. RIMANQUE, "Duistere, overbodige, misleidende en onevenwichtige bepalingen in de Grondwet [Obscure, superfluous, misleading and disproportionate provisions in the Constitution]" in A. ALLEN et al. (eds.), *La Constitution hier, aujourd'hui et demain*, Brussels, Bruylant, 2006, p. 72.

¹⁷¹⁷ J. VELAERS, "Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 269.

¹⁷¹⁸ O. VAN DER NOOT, "Debate on the Modernisation of the Constitutional Bill of Rights in Europe. General Overview", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 139-140.

¹⁷¹⁹ J. VELAERS, "De samenloop van grondrechten in het Belgische rechtsbestel [The concurrence of fundamental rights in the Belgian legal order]" in Vereniging voor de vergelijkende studie van het recht van België en Nederland (ed.), *Samenloop van grondrechten in verschillende rechtssystemen, multiculturaliteit in het strafrecht & schuldsanering en collectieve schuldenregeling [Concurrence of fundamental rights in different legal systems, multiculturalism in criminal law & debt restructuring and collective*

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mirror(s) the national identity, and national constitutional values,¹⁷²⁰ which are subject to evolution.¹⁷²¹ Although broad agreement among the population concerning certain values and principles is important and desirable, it should not be considered absolutely necessary: inclusion in the national constitution may be considered an affirmation of a normative commitment to a shared framework or principle even if in fact some parts of the population find these commitments difficult.¹⁷²² It is interesting to note in this regard that progressiveness concerning the legal status of sexual minorities is for instance considered to be constitutive to Belgium's national identity, despite not being reflected by the formal constitution.¹⁷²³ In other

debt settlement], The Hague, Boom Juridische Uitgevers, 2008, p. 96. See in this regard also S. LAMBRECHT, "De meerwaarde van een grondwettelijke catalogus van grondrechten in een gelaagd systeem van grondrechtenbescherming [The added value of a constitutional catalogue of fundamental rights in a multilevel system of human rights protection]", *Jura Falconis* 2011-2012, Vol. 48(2), p. 276. See also K. MÖLLER, *The Global Model of Constitutional Rights*, Oxford, Oxford University Press, 2012, p. 89. See also D. ANAGNOSTOU, "Gender equality and parity in European national constitutions" in H. IRVING (ed.), *Constitutions and Gender*, Cheltenham, Edward Elgar Publishing, 2017, p. 269. See also S. VAN DROOGHENBROECK and O. VAN DER NOOT, "Between assimilation and exclusion: is there room for an 'integrated' approach towards constitutional and international protection of human rights?", in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 139.

¹⁷²⁰ J. GERARDS, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights", *Human Rights Law Review* 2018, Vol. 18(3), p. 495.

¹⁷²¹ E. CLOOTS, "Het mysterie van de Belgische nationale en constitutionele identiteit [The mystery of the Belgian national and constitutional identity]", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2017, p. 311. See also E. BREMS, "De nieuwe grondrechten in de Belgische Grondwet en hun verhouding tot het Internationale, inzonderheid het Europese Recht [The new fundamental rights in the Belgian Constitution and their relation to International, especially European Law]", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 1995, p. 633. See also A. J. NIEUWENHUIS, "Uitbreiding van de nationale grondrechtencanon? Over de opname van nieuwe grondrechten in de Grondwet [Extending the national fundamental rights catalogue? On the inclusion of new fundamental rights in the Constitution]", *Tijdschrift voor Constitutioneel Recht* 2011, p. 257, 264.

¹⁷²² R. GAVISON, "What Belongs in a Constitution?", *Constitutional Political Economy* 2002, Vol. 13, p. 98.

¹⁷²³ E. CLOOTS, "Het mysterie van de Belgische nationale en constitutionele identiteit [The mystery of the Belgian national and constitutional identity]", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2017, p. 320. See in this regard also P. POPELIER and

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words, there seems to be a logical and close association between both ‘Belgianness’ and friendliness towards sexual minorities.¹⁷²⁴

The importance of the constitution’s expressive function was also emphasised by BREMS and GERARDS. Not only should the constitution explicitly express the principles that shape society, but it also has a clear educational function for the nation’s citizens.¹⁷²⁵ VAN NIEUWENHUIS and VELAERS concur by pointing out the relevance for citizens to be able to easily find and have insight into their fundamental rights.¹⁷²⁶ The (assumed) high visibility and solemn nature of national constitutions help in making a civil-shared culture of commitment to human rights.¹⁷²⁷ In this regard, HERTIG RANDALL argues that the symbolic (added) value of the national constitution does not only reside in its substance, but also in the process of constitution-

K. LEMMENS, *The Constitution of Belgium. A Contextual Analysis*, Oxford, Hart Publishing, 2015, p. 227.

¹⁷²⁴ F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 8.

¹⁷²⁵ E. BREMS, “De nieuwe grondrechten in de Belgische Grondwet en hun verhouding tot het Internationale, inzonderheid het Europese Recht [The new fundamental rights in the Belgian Constitution and their relation to International, especially European Law]”, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 1995, p. 626. See in this regard also J. GERARDS, “The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It”, *Revue Interdisciplinaire d’Etudes Juridiques* 2016, p. 210. See also R. GAVISON, “What Belongs in a Constitution?”, *Constitutional Political Economy* 2002, Vol. 13, p. 96. Research from 2016-2018 also proved that there is a correlation between the State’s positions on human rights concerning sexual orientation and gender (identity), and acceptance in public opinion. See M. HADLER and J. SYMONS, “World Society Divided: Divergent Trends in State Responses to Sexual Minorities and Their Reflection in Public Attitudes”, *Social Forces* 2018, Vol. 96(4), p. 1743-1744.

¹⁷²⁶ A. J. NIEUWENHUIS, “Uitbreiding van de nationale grondrechtencanon? Over de opname van nieuwe grondrechten in de Grondwet [Extending the national fundamental rights catalogue? On the inclusion of new fundamental rights in the Constitution]”, *Tijdschrift voor Constitutioneel Recht* 2011, p. 259; J. VELAERS, “Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission”, *Revue Interdisciplinaire d’Etudes Juridiques* 2016, p. 279. See in this regard also S. VAN DROOGHENBROECK, “The Contribution of the Constitution to the Protection of Human Rights. Introduction”, *Revue Interdisciplinaire d’Etudes Juridiques* 2016, p. 137. See also K. MÖLLER, *The Global Model of Constitutional Rights*, Oxford, Oxford University Press, 2012, p. 89.

¹⁷²⁷ R. GAVISON, “What Belongs in a Constitution?”, *Constitutional Political Economy* 2002, Vol. 13, p. 96.

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making itself,¹⁷²⁸ as it opens up space for national deliberation and identity formation. Moreover, BREMS holds that the constitution's expressive function also has a clear international dimension: including a certain fundamental right in the constitution proves to the international community that the State is not 'staying behind'.¹⁷²⁹

Despite the symbolic importance of the State's commitments as laid down in the constitution, the reality faced by many individuals in diverse societies around the world is often far-removed from that expressed in these constitutional ideals.¹⁷³⁰ In this regard, BILCHITZ argues that fundamental rights included in constitutional catalogues can be understood as a form of 'bridge', i.e. moral ideals that create pressure on the authorities for legal institutionalisation leading to a change of existing social conditions.¹⁷³¹ This may be considered especially true for matters that are controversial such as the acceptance of persons who do not conform to societal expectations concerning sex, sexual orientation and gender (identity/expression).¹⁷³² In other words, the somewhat idealistic and programmatic nature of constitutional rights does not necessarily diminish their importance within the national legal order. After all, the recognition of these fundamental rights

¹⁷²⁸ M. HERTIG RANDALL, "The Swiss Federal Bill of Rights in the Context of International Human Rights Protection: Added Value and Shortcomings", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 165. See in this regard also S. VAN DROOGHENBROECK, "The Contribution of the Constitution to the Protection of Human Rights. Introduction", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 138.

¹⁷²⁹ E. BREMS, "De nieuwe grondrechten in de Belgische Grondwet en hun verhouding tot het Internationale, inzonderheid het Europese Recht [The new fundamental rights in the Belgian Constitution and their relation to International, especially European Law]", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 1995, p. 626.

¹⁷³⁰ D. BILCHITZ, "Fundamental Rights as Bridging Concepts: Straddling the Boundary Between Ideal Justice and an Imperfect Reality", *Human Rights Quarterly* 2018, Vol. 40, p. 119. See in this regard also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 92-104.

¹⁷³¹ D. BILCHITZ, "Fundamental Rights as Bridging Concepts: Straddling the Boundary Between Ideal Justice and an Imperfect Reality", *Human Rights Quarterly* 2018, Vol. 40, p. 121. See in this regard also L.E. RODRIGUEZ-RIVERA, "Is the Human Right to Environment Recognised under International Law? It Depends on the Source", *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 32.

¹⁷³² A.R. REEVES, "Sexual Identity as a Fundamental Right", *Buffalo Human Rights Law Review* 2009, Vol. 15, p. 222-223.

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(positively) affects the legitimacy of the social order,¹⁷³³ and may be seen as a necessary step towards changing minds and attitudes.¹⁷³⁴ The adoption of a fundamental right by the constitutional drafters thus confers the authority on the legislature to change the law in order to bring about the change that is envisioned by the right concerned.¹⁷³⁵

Lastly, on a more philosophical level, it is argued in the literature that the symbolic value of the national constitution lies in the fact that people do not 'need' a constitution, in contrast to food or water, to survive. Indeed, as VAN DER NOOT holds, "it is precisely because we do not need a constitution that it represents an ideal to us, i.e. an ethical model that we strive to realise in our legal order, which thereby becomes a community of free and dignified human beings".¹⁷³⁶

II. Pragmatism

§1. Normative value and constitutional review

There appear to be many pragmatic reasons for including fundamental rights in the national constitution, which are certainly not only specific to the Belgian situation. First and foremost, the constitution is the national norm with the highest legal weight within the national legal order, meaning that the national legislature and all other authorities are bound by its provisions.¹⁷³⁷

¹⁷³³ D. BILCHITZ, "Fundamental Rights as Bridging Concepts: Straddling the Boundary Between Ideal Justice and an Imperfect Reality", *Human Rights Quarterly* 2018, Vol. 40, p. 127.

¹⁷³⁴ E. MITTELSTAEDT, "Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations", *Chicago Journal of International Law* 2008, Vol. 9, p. 355.

¹⁷³⁵ G. WEBBER and P. YOWELL, "Introduction: Securing Human Rights through Legislation" in G. WEBBER, P. YOWELL, R. EKINS, M. KOPCKE, B.W. MILLER, F.J. URBINA (eds.), *Legislated Rights: Securing Human Rights through Legislation*, Cambridge, Cambridge University Press, 2018, p. 3.

¹⁷³⁶ O. VAN DER NOOT, "Debate on the Modernisation of the Constitutional Bill of Rights in Europe. General Overview", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 142.

¹⁷³⁷ See in this regard for instance A. J. NIEUWENHUIS, "Uitbreiding van de nationale grondrechtencanon? Over de opname van nieuwe grondrechten in de Grondwet [Extending the national fundamental rights catalogue? On the inclusion of new fundamental rights in the Constitution]", *Tijdschrift voor Constitutioneel Recht* 2011, p. 254. See also J. GERARDS, "The

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The weight of the constitution is reflected by the procedure for constitutional amendment, which is traditionally more burdensome and lengthy than the normal legislative procedure. This special procedure – which may directly or indirectly involve the participation of the electorate – is designed to protect the constitution against the ideas of an accidental majority that might undermine the basics of the State structure and the constitutional fundamental rights.¹⁷³⁸

Probably more important than the mere position of the constitution in the hierarchy of norms is the dual role of the constitution, and its fundamental rights catalogue, in its relation with the legislature.¹⁷³⁹ On the one hand, the constitution can be seen as authorising – or even compelling – the legislature to adopt legislation to structure society in conformity with human rights. On the other hand, the constitution serves to limit the legislature through the procedure of constitutional review, i.e. the evaluation of the constitutionality of legislation and other regulations.¹⁷⁴⁰ In many States across Europe and around the world, the constitution's authority is enforced by enabling individual or institutional applicants (through actions for annulment) and judges (through preliminary procedures) to challenge the validity of legislation in court, often a centralised constitutional court. It is argued that (constitutional) courts are well-placed to protect minorities and their

Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 210-211.

¹⁷³⁸ See in this regard also J. GERARDS, "The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 228.

¹⁷³⁹ See more on the complex relationship between the legislature and the judiciary for the protection and promotion of fundamental rights in G. WEBBER, P. YOWELL, R. EKINS, M. KOPCKE, B.W. MILLER, F.J. URBINA (eds.), *Legislated Rights: Securing Human Rights through Legislation*, Cambridge, Cambridge University Press, 2018.

¹⁷⁴⁰ See in this regard R. GAVISON, "What Belongs in a Constitution?", *Constitutional Political Economy* 2002, Vol. 13, p. 96. See also G. WEBBER and P. YOWELL, "Introduction: Securing Human Rights through Legislation" in G. WEBBER, P. YOWELL, R. EKINS, M. KOPCKE, B.W. MILLER, F.J. URBINA (eds.), *Legislated Rights: Securing Human Rights through Legislation*, Cambridge, Cambridge University Press, 2018, p. 2. In this regard, LAU has for instance argued that reliance on entrenched stereotypes impair democratic deliberation. See H. LAU, "Rewriting Schalk and Kopf: shifting the locus of deference" in E. BREMS (ed.), *Diversity and European Human Rights. Rewriting Judgments of the ECtHR*, Cambridge, Cambridge University Press, 2015, p. 248.

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fundamental rights against legislation that (only) serves the interests of the majority, *inter alia* because of their judicial independence and counter-majoritarian role.¹⁷⁴¹ For instance in Belgium, the Constitutional Court (formerly called the Court of Arbitration) has been competent to review the constitutionality of the legislative acts adopted by the federal level, the communities and the regions since its establishment in 1980.¹⁷⁴² Through several constitutional amendments since 1988, the Court was granted the power to review the legislature's compliance with constitutional fundamental rights.

GERARDS argues that the (constitutional) courts' power of constitutional review is essential for the national constitution(al rights catalogue) to have a vital role within the national legal order.¹⁷⁴³ Moreover, the national bill of rights, because of its familiarity with society, contributes to ensuring an efficient rights protection in the State concerned.¹⁷⁴⁴ In this regard however, it is interesting to note that the Belgian Constitutional Court often cannot rely on the Belgian Constitution but constantly has to borrow from international human rights treaties, such as the ECHR.¹⁷⁴⁵ Since VELAERS argues that this 'outsourcing' of the protection of human rights can endanger the (added)

¹⁷⁴¹ G. WEBBER and P. YOWELL, "Introduction: Securing Human Rights through Legislation" in G. WEBBER, P. YOWELL, R. EKINS, M. KOPCKE, B.W. MILLER, F.J. URBINA (eds.), *Legislated Rights: Securing Human Rights through Legislation*, Cambridge, Cambridge University Press, 2018, p. 7.

¹⁷⁴² P. POPELIER and K. LEMMENS, *The Constitution of Belgium. A Contextual Analysis*, Oxford, Hart Publishing, 2015, p. 196.

¹⁷⁴³ J. GERARDS, "The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 211, 213. See in this regard also M. HERTIG RANDALL, "The Swiss Federal Bill of Rights in the Context of International Human Rights Protection: Added Value and Shortcomings", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 151.

¹⁷⁴⁴ S. VAN DROOGHENBROECK, "The Contribution of the Constitution to the Protection of Human Rights. Introduction", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 137; S. VAN DROOGHENBROECK and O. VAN DER NOOT, "Between assimilation and exclusion: is there room for an 'integrated' approach towards constitutional and international protection of human rights?", in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 139.

¹⁷⁴⁵ J. VELAERS, "Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 281.

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value of the constitution,¹⁷⁴⁶ the following section will address the relation between constitutional rights and international fundamental rights in general and within the Belgian context. More specifically, it will deal with the question to what extent the national constitution can – pragmatically – offer an added value for the protection of fundamental rights, given the increasing internationalisation of human rights.

§2. The relation between constitutional rights and international fundamental rights

§2.1. The internationalisation of human rights and national rights protection and adjudication

The previous section showed the importance of national human rights protection through constitutional adjudication for modern conceptions of constitutionalism.¹⁷⁴⁷ Modern constitutional practice is also characterised by the rapidly emerging practice of the migration of constitutional ideas across legal systems.¹⁷⁴⁸ Indeed, the protection of fundamental rights at the national constitutional level is increasingly influenced by constitutional developments in other countries, as well as developments in international human rights law.¹⁷⁴⁹ This evolution has met the critique that differences among national constitutions and constitutional rights catalogues, which reflect diverse national values and traditions, seem hard to reconcile with the notion of the

¹⁷⁴⁶ Ibid., p. 281. See in this regard also O. VAN DER NOOT, “Debate on the Modernisation of the Constitutional Bill of Rights in Europe. General Overview”, *Revue Interdisciplinaire d’Etudes Juridiques* 2016, p. 147.

¹⁷⁴⁷ See in this regard also M. HERTIG RANDALL, “The Swiss Federal Bill of Rights in the Context of International Human Rights Protection: Added Value or Shortcomings”, *Revue Interdisciplinaire d’Etudes Juridiques* 2016, p. 164. See also A. SPERTI, *Constitutional Courts, Gay Rights and Sexual Orientation Equality*, Oxford, Bloomsbury, 2017, p. 2.

¹⁷⁴⁸ S. CHOUDRY, “Migration as a new metaphor in comparative constitutional law” in S. CHOUDRY (ed.), *The migration of constitutional ideas*, Cambridge, Cambridge University Press, 2006, p. 13. See in this regard also W. LACEY, “Gender equality: international law and national constitutions” in H. IRVING (ed.), *Constitutions and Gender*, Cheltenham, Edward Elgar Publishing, 2017, p. 135.

¹⁷⁴⁹ S. LAMBRECHT, “De meerwaarde van een grondwettelijke catalogus van grondrechten in een gelaagd systeem van grondrechtenbescherming [The added value of a constitutional catalogue of fundamental rights in a multilevel system of human rights protection]”, *Jura Falconis* 2011-2012, Vol. 48(2), p. 227.

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universality of human rights.¹⁷⁵⁰ In this regard, it is argued that contemporary times are characterised by an increase both of “texts, and of courts and agencies with a mission to protect human rights”.¹⁷⁵¹ Probably the most influential human rights instrument for the Belgian constitutional order – and that of other European States –, is the European Convention on Human Rights, as interpreted by the ECtHR. The relation between the protection of fundamental rights at the national constitutional level and the international/European level has been the concern of much scholarly debate, mostly focusing on the (added) value of national human rights protection in the light of the increasing internationalisation of human rights. In any case, human rights protection has clearly increasingly become a matter of mutual cooperation and interdependency in a multilevel network of legislators, courts and institutional human rights actors.¹⁷⁵² Since national constitutional bills of rights and human rights treaties are broadly similar in substance, this relationship is characterised by complementarity, interaction, dialogue, mutual respect and deference.¹⁷⁵³

As is the case with most national constitutions around the world, the Belgian Constitution contains a catalogue of fundamental rights, called “The Belgians and their rights”.¹⁷⁵⁴ While at the time of its creation the Belgian Constitution was considered a model of liberal constitutionalism based on the comprehensive protection of (civil and political) rights, the current catalogue

¹⁷⁵⁰ J. GERARDS, “Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights”, *Human Rights Law Review* 2018, Vol. 18(3), p. 496.

¹⁷⁵¹ J. VELAERS, “Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission”, *Revue Interdisciplinaire d’Etudes Juridiques* 2016, p. 265.

¹⁷⁵² S. LAMBRECHT, “De meerwaarde van een grondwettelijke catalogus van grondrechten in een gelaagd systeem van grondrechtenbescherming [The added value of a constitutional catalogue of fundamental rights in a multilevel system of human rights protection]”, *Jura Falconis* 2011-2012, Vol. 48(2), p. 228.

¹⁷⁵³ J. VELAERS, “Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission”, *Revue Interdisciplinaire d’Etudes Juridiques* 2016, p. 266.

¹⁷⁵⁴ The title of this catalogue is misleading, since on the basis of Article 191 of the Constitution all rights are also granted to foreigners, except in those situations as defined by law.

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of fundamental rights is generally considered to be outdated.¹⁷⁵⁵ Reflecting its 19th century origins, the Constitution held a strong focus on rights such as the freedom of assembly, freedom of speech and freedom of association.¹⁷⁵⁶ Although social, economic and cultural rights emerged internationally already in the middle of the 20th century, they were only (partly) included in the Belgian catalogue of fundamental rights in 1994 via the introduction of Article 23, that protects the right to live in dignity, which includes *inter alia* the right to employment, social security and health care, decent housing, protection of a healthy environment, family allowances and cultural and social development. Other recent actualisations include for instance the introduction of the equality between women and men (2002), the abolition of capital punishment (2004) and the rights of the child (2000 and 2008). In this regard, it is suggested in the literature that the modernisation of the Belgian constitutional rights catalogue has taken the form of constitutional ‘pointillism’, reflecting particular interests of society and the government of the day.¹⁷⁵⁷ However, some of the most basic human rights are not explicitly

¹⁷⁵⁵ P. POPELIER and K. LEMMENS, *The Constitution of Belgium. A Contextual Analysis*, Oxford, Hart Publishing, 2015, p. 223; J. VELAERS, “Over de noodzaak om Titel II van de Grondwet over ‘De Belgen en hun rechten’ te herzien [On the necessity to amend Title II of the Constitution concerning ‘The Belgians and their rights’]” in A. ALLEN et al. (eds.), *La Constitution hier, aujourd’hui et demain*, Brussels, Bruylant, 2006, p. 111; S. VAN DROOGHENBROECK and O. VAN DER NOOT, “Between assimilation and exclusion: is there room for an ‘integrated’ approach towards constitutional and international protection of human rights?”, in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 139. ; A. ALLEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook of Belgian Constitutional Law], Mechelen, Wolters Kluwer, 2011, p. 66.

¹⁷⁵⁶ Other rights include the right to nationality, the right to equality before the law, the right to individual liberty, the principle of legality in criminal matters, the inviolability of the home, the protection of property, the freedom of the press, the freedom of belief and expression, the confidentiality of correspondence etc. Notable exception to the civil and political nature of these rights is the right to education, which may be considered a social and cultural right.

¹⁷⁵⁷ M. VERDUSSEN, “Le pointillisme constitutionnel” in A. ALLEN et al. (eds.), *La Constitution hier, aujourd’hui et demain*, Brussels, Bruylant, 2006, p. 121. See in this regard also J. VELAERS, “Over de noodzaak om Titel II van de Grondwet over ‘De Belgen en hun rechten’ te herzien [On the necessity to amend Title II of the Constitution concerning ‘The Belgians and their rights’]” in A. ALLEN et al. (eds.), *La Constitution hier, aujourd’hui et demain*, Brussels, Bruylant, 2006, p. 114; S. VAN DROOGHENBROECK and O. VAN DER NOOT, “Between assimilation and exclusion: is there room for an ‘integrated’ approach towards constitutional

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included in the Belgian Constitution, such as the right to life, the prohibition of torture and inhuman and degrading treatment, the right to marry and the right to a fair trial. Nevertheless, these constitutional lacunae do not result in a gap in human rights protection, due to the dynamic interpretation of the Constitution by the Constitutional Court,¹⁷⁵⁸ as well as due to Belgium's international human rights commitments and the direct applicability of international human rights treaties, especially the ECHR, in the Belgian legal order.¹⁷⁵⁹

The status of the ECHR within the Belgian legal order is generally uncontested.¹⁷⁶⁰ The Convention's influence is so far-reaching that it is also referred to in the literature as Belgium's 'shadow constitution'.¹⁷⁶¹ Not only do the majority of the provisions of the ECHR and the Additional Protocols

and international protection of human rights?", in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 142.

¹⁷⁵⁸ J. VELAERS, "Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 280-281.

¹⁷⁵⁹ J. VELAERS, "Over de noodzaak om Titel II van de Grondwet over 'De Belgen en hun rechten' te herzien [On the necessity to amend Title II of the Constitution concerning 'The Belgians and their rights']" in A. ALLEN et al. (eds.), *La Constitution hier, aujourd'hui et demain*, Brussels, Bruylant, 2006, p. 115 ; S. VAN DROOGHENBROECK and O. VAN DER NOOT, "Between assimilation and exclusion: is there room for an 'integrated' approach towards constitutional and international protection of human rights?", in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 141-144.

¹⁷⁶⁰ P. POPELIER and K. LEMMENS, *The Constitution of Belgium. A Contextual Analysis*, Oxford, Hart Publishing, 2015, p. 228.

¹⁷⁶¹ S. LAMBRECHT, "De meerwaarde van een grondwettelijke catalogus van grondrechten in een gelaagd systeem van grondrechtenbescherming [The added value of a constitutional catalogue of fundamental rights in a multilevel system of human rights protection]", *Jura Falconis* 2011-2012, Vol. 48(2), p. 229. See in this regard also O. VAN DER NOOT, "Debate on the Modernisation of the Constitutional Bill of Rights in Europe. General Overview", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 140; S. VAN DROOGHENBROECK and O. VAN DER NOOT, "Between assimilation and exclusion: is there room for an 'integrated' approach towards constitutional and international protection of human rights?", in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 144. The same situation is true for the Netherlands. See in this regard also J. GERARDS, "The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 220.

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have direct effect, but the Court of Cassation also considers the judgments of the ECtHR to be inextricably linked to the Convention.¹⁷⁶² Moreover, the Court of Cassation has also consistently held since the 1970's that international law with direct effect, such as the ECHR, takes precedence over conflicting national law, including the Constitution.¹⁷⁶³ Nevertheless, international human rights law arguably exercises the biggest influence on the Belgian constitutional order through the case law of the Constitutional Court. Indeed, the Constitutional Court has the competence to review the constitutionality of all legislative acts – from the federal level and the federated entities – in the light of international human rights by combining the analogous constitutional right or the constitutional principle of equality (Articles 10-11) with fundamental rights included in international treaties, irrespective of their direct effect.¹⁷⁶⁴ This practice not only means that international human rights treaties effectively complement and have implicitly structurally updated and modernised the Belgian constitutional rights catalogue,¹⁷⁶⁵ but also that analogous constitutional rights are interpreted in the light of the corresponding international provisions, as interpreted in international case law.¹⁷⁶⁶ Moreover, the focus on the proportionality test in the ECtHR's case law when addressing the limitations to fundamental rights has clearly influenced the Constitutional Court, which considers proportionality to be a key term in constitutional rights

¹⁷⁶² P. POPELIER and K. LEMMENS, *The Constitution of Belgium. A Contextual Analysis*, Oxford, Hart Publishing, 2015, p. 229.

¹⁷⁶³ Ibid., p. 228.

¹⁷⁶⁴ Ibid., p. 230. See also A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook on Belgian Constitutional Law], Mechelen, Wolters Kluwer, 2011, p. 80.

¹⁷⁶⁵ S. LAMBRECHT, "De meerwaarde van een grondwettelijke catalogus van grondrechten in een gelaagd systeem van grondrechtenbescherming [The added value of a constitutional catalogue of fundamental rights in a multilevel system of human rights protection]", *Jura Falconis* 2011-2012, Vol. 48(2), p. 237.

¹⁷⁶⁶ See S. VAN DROOGHENBROECK and O. VAN DER NOOT, "Between assimilation and exclusion: is there room for an 'integrated' approach towards constitutional and international protection of human rights?", in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 142-143.

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adjudication.¹⁷⁶⁷ In any case, the Constitutional Court considers itself bound by the ECtHR's case law in which it provides interpretation to the ECHR.¹⁷⁶⁸ These developments have resulted in a multilevel structure in which the ECHR plays the principal role for human rights protection,¹⁷⁶⁹ and the ECtHR *de facto* functions as the 'supreme court' for fundamental rights adjudication in Belgium.¹⁷⁷⁰ In this regard, VELAERS has argued that, by being too loyal to the Strasbourg Court, the Belgian Constitutional Court has risked missing opportunities to offer added value to the national protection of fundamental rights.¹⁷⁷¹ However, the Court's ruling on the 2017 Gender Recognition Act shows that sometimes, it offers higher levels of protection of fundamental rights – such as the right to gender self-determination – than the ECtHR.

§2.2. Constitutional rights and the ECtHR's subsidiarity

Given this strong influence of international human rights on the Belgian constitutional order, one may wonder whether the introduction of a new right regarding sexual identity in the Belgian national constitution would have any value, especially in relation to the protection provided by the ECHR. However, it needs to be pointed out that the ECHR and the complaint

¹⁷⁶⁷ P. POPELIER and K. LEMMENS, *The Constitution of Belgium. A Contextual Analysis*, Oxford, Hart Publishing, 2015, p. 241.

¹⁷⁶⁸ J. THEUNIS, "Report: the influence of the ECHR on national constitutional jurisprudence: the example of the Belgian Constitutional Court", <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2005\)057prov-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2005)057prov-e)> (last visited 3 May 2018), p. 13; S. VAN DROOGHENBROECK and O. VAN DER NOOT, "Between assimilation and exclusion: is there room for an 'integrated' approach towards constitutional and international protection of human rights?", in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users' Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 144.

¹⁷⁶⁹ E. BREMS "Vers des clauses transversales en matière de droits et libertés dans la Constitution belge? [Towards transversal clauses for human rights in the Belgian Constitution?]", *Rev. Trim. Dr. H.* 2007, p. 352.

¹⁷⁷⁰ S. LAMBRECHT, "De meerwaarde van een grondwettelijke catalogus van grondrechten in een gelaagd systeem van grondrechtenbescherming [The added value of a constitutional catalogue of fundamental rights in a multilevel system of human rights protection]", *Jura Falconis* 2011-2012, Vol. 48(2), p. 240.

¹⁷⁷¹ J. VELAERS, "Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 282.

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mechanism with the ECtHR only serve as a subsidiary form of human rights protection. Indeed, the ECHR – as well as other international and European human rights conventions – was not intended to abolish national constitutions and fundamental rights protection, which is reflected in Article 53 of the Convention.¹⁷⁷² In this regard, not only are individual applicants with the ECtHR obliged to exhaust all domestic remedies before bringing their claim to Strasbourg – including a procedure of constitutional review with the national constitutional court –,¹⁷⁷³ but also the Court leaves a certain latitude as to the way in which the Convention standards are applied by the Contracting States in particular social, cultural, political and legal circumstances (the margin of appreciation)¹⁷⁷⁴.¹⁷⁷⁵ The ECHR therefore seeks to offer (only) a minimum standard of protection of fundamental rights across Europe.¹⁷⁷⁶ In other words, the national authorities, including the

¹⁷⁷² Ibid., p. 266. See in this regard also S. VAN DROOGHENBROECK and O. VAN DER NOOT, “Between assimilation and exclusion: is there room for an ‘integrated’ approach towards constitutional and international protection of human rights?”, in E. BREMS and S. OUALD-CHAIB (eds.), *Fragmentation and Integration in Human Rights Law. Users’ Perspectives*, Cheltenham, Edward Elgar Publishers, 2018, p. 139.

¹⁷⁷³ A. MOWBRAY, “Subsidiarity and the European Convention on Human Rights”, *Human Rights Law Review* 2015, Vol. 15, p. 316.

¹⁷⁷⁴ Based on qualitative research of the ECtHR’s recent case law, GERARDS argues that the margin of appreciation as the central tool for granting deference to national authorities has been replaced by incrementalism. See J. GERARDS, “Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights”, *Human Rights Law Review* 2018, Vol. 18(3), p. 495-515.

¹⁷⁷⁵ A. PAPROCKA, “Creating an Identity of the ‘European Democratic Society’? – Margin of Appreciation vs. the ECtHR’s Dynamic Interpretation of the European Convention on Human Rights”, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666261> (last visited 4 May 2018), p. 2. See on the margin of appreciation in the ECtHR’s case law also e.g. O.M. ARNARDOTTIR, “Rethinking the two margins of appreciation”, *European Constitutional Law Review* 2016, p. 27-53; J. KRATOCHVÍL, “The inflation of the margin of appreciation by the European Court of Human Rights”, *Netherlands Quarterly of Human Rights* 2011, p. 324-357; G. LETSAS, “Two Concepts of the Margin of Appreciation”, *Oxford Journal of Legal Studies* 2006, p. 705-732.

¹⁷⁷⁶ J. VELAERS, “Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission”, *Revue Interdisciplinaire d’Etudes Juridiques* 2016, p. 267. See in this regard also M. HERTIG RANDALL, “The Swiss Federal Bill of Rights in the Context of International Human Rights Protection: Added Value and Shortcomings”, *Revue Interdisciplinaire d’Etudes Juridiques* 2016, p. 152. See also H. LAU, “Rewriting Schalk and Kopf: shifting the locus of deference” in E. BREMS (ed.), *Diversity and European Human Rights. Rewriting Judgments of*

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constitutional court, remain the first responsible for the human rights protection of all individuals within the national legal order.¹⁷⁷⁷

Although it may be argued that it is illusory to have the national constitution replace the ECHR as the central locus for human rights protection in Belgium given its general outdated fundamental rights catalogue and the Constitutional Court's openness towards the ECtHR,¹⁷⁷⁸ it is clear that the creation of a new fundamental right to personal autonomy regarding a person's sexual identity at the national constitutional level would have an added value in relation to the human rights protection at the European level. Not only would the right provide for a stronger protection of sexual minorities than the ECHR, the ECtHR's case law and other international human rights treaties currently offer,¹⁷⁷⁹ but it would also 'free' sexual minorities from the legal uncertainty¹⁷⁸⁰ that is connected to a protection of human rights based on a judicial dynamic interpretation of existing human rights provisions that do not explicitly mention notions as sexual orientation or gender

the ECtHR, Cambridge, Cambridge University Press, 2015, p. 254. See also J. GERARDS, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights", *Human Rights Law Review* 2018, Vol. 18(3), p. 496.

¹⁷⁷⁷ S. VAN DROOGHENBROECK, "The Contribution of the Constitution to the Protection of Human Rights. Introduction", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 137. See in this regard also J. KRATOCHVÍL, "The inflation of the margin of appreciation by the European Court of Human Rights", *Netherlands Quarterly of Human Rights* 2011, p. 326. See also J. GERARDS, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights", *Human Rights Law Review* 2018, Vol. 18(3), p. 497.

¹⁷⁷⁸ E. BREMS "Vers des clauses transversales en matière de droits et libertés dans la Constitution belge? [Towards transversal clauses for human rights in the Belgian Constitution?]", *Rev. Trim. Dr. H.* 2007, p. 382; O. VAN DER NOOT, "Debate on the Modernisation of the Constitutional Bill of Rights in Europe. General Overview", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 148. See in this regard also J. GERARDS, "The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 221.

¹⁷⁷⁹ See in this regard M. HERTIG RANDALL, "The Swiss Federal Bill of Rights in the Context of International Human Rights Protection: Added Value and Shortcomings", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 168. See also E. BREMS, "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", *European Journal of Human Rights* 2014, p. 464.

¹⁷⁸⁰ See in this regard K. DZEHTSIAROU, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", *German Law Journal* 2011, Vol. 12, p. 1742.

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(identity/expression).¹⁷⁸¹ In this sense, a national protection of sexual identity could eventually contribute to the emergence of a common European approach/consensus in dealing with the rights of sexual minorities,¹⁷⁸² which – as mentioned above – has proved to be instrumental in the past. In other words, the creation of a national constitutional right could eventually (help) strengthen the legal status of sexual minorities across Europe. Beside the clear symbolic value of constitutional recognition mentioned before, national constitutions also continue to have a considerable pragmatic value for the protection of the human rights of all individuals, despite the ever increasing internationalisation of fundamental rights.¹⁷⁸³

¹⁷⁸¹ This problem of legal uncertainty in the absence of (constitutional) entrenchment of rights related to gender identity was for instance illustrated by developments in the United States in 2018 and early 2019. In October 2018, the New York Times reported the Trump administration's intention to legally define sex and gender as being male or female, and unchangeable once determined at birth. This interpretation of the legal notions of 'sex' and 'gender' would lead to the exclusion of transgender persons from protection of the federal civil rights law that bans discrimination on the basis of sex/gender. The Obama administration had enacted an interpretation of 'sex' and 'gender' that included protection of transgender persons against discrimination, following several judicial procedures. This decision followed the administration's policy to ban transgender persons who require or have undergone gender affirming treatment from the military. In January 2019, the US Supreme Court decided (5-4) to grant a request by the administration to lift injunctions blocking the policy from entering into force while challenges continue in lower courts. See <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html?action=click&module=Top%20Stories&pgtype=Homepage>.

¹⁷⁸² S. LAMBRECHT, "De meerwaarde van een grondwettelijke catalogus van grondrechten in een gelaagd systeem van grondrechtenbescherming [The added value of a constitutional catalogue of fundamental rights in a multilevel system of human rights protection]", *Jura Falconis* 2011-2012, Vol. 48(2), p. 241. See in this regard also J. VELAERS, "Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission", *Revue Interdisciplinaire d'Etudes Juridiques* 2016, p. 268.

¹⁷⁸³ E. BREMS, "Vers des clauses transversales en matière de droits et libertés dans la Constitution belge? [Towards transversal clauses for human rights in the Belgian Constitution?]", *Rev. Trim. Dr. H.* 2007, p. 382-383. See in this regard also A. J. NIEUWENHUIS, "Uitbreiding van de nationale grondrechtencanon? Over de opname van nieuwe grondrechten in de Grondwet [Extending the national fundamental rights catalogue? On the inclusion of new fundamental rights in the Constitution]", *Tijdschrift voor Constitutioneel Recht* 2011, p. 259.

2. Why a right to autonomy?

A. The emancipatory function of autonomy

As mentioned above, the principal analytic framework for this research has been the right to personal autonomy of all individual human beings.¹⁷⁸⁴ Traditionally, the concept of ‘personal autonomy’ refers to the idea that, provided others are not harmed, each individual should be entitled to follow their own life plan in the light of their beliefs and convictions.¹⁷⁸⁵ Specifically in the context of sexual minorities, the right to autonomy also comes down to a right to be free from oppressive socially constructed normative expectations regarding sexual identity. Indeed, post-structuralist feminist and queer scholars see autonomy as a beacon against normative social constructions which constitute what persons are allowed to be, to do, how they are able to think and conceive of themselves, what they can and should desire and what their preferences in life are.¹⁷⁸⁶ As SCHERPE aptly states, “the problem [for sexual minorities] is how societies and laws currently deal with [them], based on preconceived notions of ‘normality’ and maleness and femaleness, instead of being open-minded, embracing differences and respecting the autonomy of the individual”.¹⁷⁸⁷ It is important to reiterate that personal autonomy should not be mistaken for the mere centrality of autonomous choice. Indeed, the notion does not necessarily only concern volitional behaviour, but refers to independent self-governance.¹⁷⁸⁸ In this regard, it is argued that discovering and defining one’s identity is one of the

¹⁷⁸⁴ See *supra* p. 45.

¹⁷⁸⁵ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 57.

¹⁷⁸⁶ *Ibid.*, p. 60.

¹⁷⁸⁷ J.M. SCHERPE, “The Legal Status of Intersex Persons: An Introduction” in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 6.

¹⁷⁸⁸ J.T. WEISS, “Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for *Lawrence v. Texas*”, *Journal of Race, Gender and Ethnicity* 2010, Vol. 5, p. 7.

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most personal and individual practices one engages in during one's lifetime, and is central to personal autonomy.¹⁷⁸⁹

Chapters II, III and IV of this thesis extensively elaborated on the normative stereotypes that surround sexual identity in present society and how these assumptions are reflected in law. More specifically, Chapters III and IV showed that the current Belgian legal system fails to effectively protect, respect and fulfil the fundamental right to autonomy of persons with variations of sex characteristics and transgender persons, essentially on the basis of binary normative and cisnormative assumptions that fail to grasp the specific situation of these sexual minorities in a conceptually correct way. Hence, by not fully taking into account the correct scope, meaning and value of a person's sexual identity, the law excludes persons who do not conform to stereotyped expectations. For instance, it was established that the persistent stereotype about the importance of congruence between a child's sex characteristics and presumed gender (identity) for its well-being effectively prevented respecting that person's right to autonomously provide informed consent to treatment on their sex characteristics. Furthermore, strong cisnormative expectations about the innate entanglement of sex and gender (identity) prevent both the effective respect for many transgender persons' right to gender self-determination, as well as the functionality and pertinence of the official sex/gender registration model. Moreover, the wrongful social and legal conception of sex and gender (identity) along the compulsory dichotomy of 'male' and 'female', has effectively excluded persons with variations of sex characteristics and non-binary (transgender) persons from any form of legal recognition. Although the Belgian Constitutional Court did not explicitly address the gender stereotypes underlying the sex/gender registration framework, it clearly stated that the right to gender self-determination, which the federal legislature introduced in the 2017 Gender Recognition Act, requires that no person should be confronted with a sex/gender marker that does not correspond to reality.

¹⁷⁸⁹ B. T. RUOCCO, "Our Antitotalitarian Constitution and the Right to Identity", *University of Pennsylvania Law Review* 2016, Vol. 165, p. 204.

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Including a new and explicit right to personal autonomy regarding one's sexual identity in a constitutional rights catalogue would have a clear emancipatory function. First and foremost, such right would encapsulate the demand of sexual minorities to end the State-condoned denial of their right to be different from the normative expectations regarding sex (characteristics), gender (identity/expression) and sexual orientation.¹⁷⁹⁰ In other words, a right to autonomy affirms the agency of all persons regarding their own sexual identity. In this regard, an emphasis on autonomy arguably radically and critically unpacks the protective dimension under which sex, sexual orientation and gender (identity/expression) have been addressed under human rights law, seeing sexual minorities as inherently vulnerable and weak.¹⁷⁹¹ Although BREMS argues that such emphasis should not be considered as negative per se, given that any form of protection against human rights violations is in itself a good thing, an emphasis on protection could be seen as an expression of paternalism that reinforces stereotypes.¹⁷⁹² It may therefore be stated that the best way of protecting the rights of sexual minorities is to grant them the autonomy to live their lives according to their own choices and experiences.

B. Autonomy vs. equality

Focussing on personal autonomy regarding sexual identity instead of a right to equality/prohibition of discrimination is somewhat deviating from the way in which human rights instruments have traditionally addressed the situation of structurally oppressed groups in society.¹⁷⁹³ In this regard, lessons can be

¹⁷⁹⁰ J. MERTUS, "Applying the Gatekeeper Model of Human Rights Activism: The U.S.-Based Movement for LGBT Rights" in C. BOB (ed.), *The International Struggle for New Human Rights*, Philadelphia, Penn Press, 2008, p. 65.

¹⁷⁹¹ See in this sense E. BREMS, "Lessons for children's rights from women's rights? Emancipation rights as a distinct category of human rights" in E. BREMS, E. DESMET, W. VANDENHOLE (eds.), *Children's Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?*, London, Routledge, 2017, p. 95-96.

¹⁷⁹² Ibid., p. 96.

¹⁷⁹³ See in this sense K. REINECK, "Running from the gender police: reconceptualizing gender to ensure protection for non-binary people", *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 306-307.

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drawn from feminist scholarship and legal developments concerning women's rights. For instance, the CEDAW Convention provides the basics for the realisation of *equality* between women and men through ensuring women's *equal* access to, and *equal* opportunities in public and private life. However, feminist legal scholars have argued that a focus on non-discrimination created a structural dynamic of comparison whereby women's rights can only be conceptualised as far as matching the rights that are already enjoyed by men.¹⁷⁹⁴ O'BRIEN argues that the overall result of such framework is the creation of a legal system in which women are offered formal equality, as objects of a protectionist law, rather than substantive rights bearers with full legal capacity.¹⁷⁹⁵ HOLTMAAT concurs by pointing out that – from a feminist perspective – it would be recommendable to think beyond the equality framework in order to combat the gender stereotypes that lie behind and cause human rights violations.¹⁷⁹⁶ One of the critical questions raised by feminists has therefore been: How to address oppression and discrimination against women without reinstating protective narratives and stereotypes of vulnerable women that eventually could impede women's emancipation in law and society?¹⁷⁹⁷ This challenge is arguably very similar in relation to the legal and social emancipation of sexual minorities.

Although claims concerning equality have been of considerable strategic importance for non-conforming persons regarding sex, gender (identity/expression) and sexual orientation, rhetoric of equality and tolerance is also considered to hide discourses of normalisation of

¹⁷⁹⁴ See in this sense S. FREDMAN, "Substantive equality revisited", *International Journal of Constitutional Law* 2016, Vol. 14(3), p. 719.

¹⁷⁹⁵ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 9.

¹⁷⁹⁶ R. HOLTMAAT, "The Head of the Woman is the Man. The Failure to Address Gender Stereotypes in the Legal Procedures around the Dutch SGP" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 171.

¹⁷⁹⁷ L. PERONI and A. TIMMER, "Gender Stereotyping in Domestic Violence Cases. An Analysis of the European Court of Human Rights' Jurisprudence" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 48. See in this sense also M. J. FRUG, "A postmodern feminist legal manifesto (an unfinished draft)", *Harvard Law Review* 1992, Vol. 105, p. 1045-1075.

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difference.¹⁷⁹⁸ Indeed, AMMATURO argues that these socially non-conforming persons have been carefully “constructed as human rights subjects in ways that ensure their normalisation and assimilation” within the heteronormative, cisnormative and binary normative society.¹⁷⁹⁹ This focus on normalising and assimilating sexual minorities through equality creates the risk of continually excluding persons who fundamentally challenge the narrative and normative values on which society is created, such as the importance of stable and monogamous family life and the binary conceptualisation of sex and gender (identity).¹⁸⁰⁰ A ‘concession’ of rights that are already enjoyed by the norm-conforming majority and represent normative values, through a model of formal legal equality¹⁸⁰¹ may be considered as an attempt to ‘tame’ the diversity of non-conforming persons.¹⁸⁰² In other words, the latter become subjected to both dynamics of inclusion, and processes of reinforcement of pre-existing normative hierarchies and the creation of new marginalised subjects because of their challenge to societal institutions.¹⁸⁰³ According to TRAVIS, these dynamics highlight the vulnerability of the normative sexual identity and the ways in

¹⁷⁹⁸ F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 2-3. See in this sense also S. SUTEU, “Gender in Comparative Constitutional Change” in X. CONTIADES and A. FOTIADOU (eds.), *Routledge Handbook on Comparative Constitutional Change*, London, Routledge, 2019 (forthcoming). Also available at <<https://ssrn.com/abstract=3344251>> (last visited 9 April 2019), p. 10.

¹⁷⁹⁹ Ibid., p. 33. It is interesting to note that this ‘ideal’ member of sexual minorities has been used in ideological discourses of so-called ‘queer nationalism’ in order to emphasise the alleged superiority of the West in comparison with Islamic countries. See in this regard J. LIEVENS and P. CANNOOT, “De strijd voor holebi’s en transpersonen is nog lang niet gestreden [The struggle for LGBT+ persons is not over yet]”, <<http://www.knack.be/nieuws/belgie/de-strijd-voor-holebi-s-en-transpersonen-is-nog-lang-niet-gestreden/article-opinion-1153011.html>> (last visited 31 May 2018).

¹⁸⁰⁰ J. MULDER, “Dignity or discrimination: what paves the road towards equal recognition of same-sex couples in the European Union?”, *Journal of Social Welfare and Family Law* 2018, Vol. 40(1), p. 136.

¹⁸⁰¹ D. SPADE, “Trans Law Reform Strategies, Co-optation, and the Potential for Transformative Change”, *Women’s Rights Law Review* 2009, Vol. 30, p.297.

¹⁸⁰² F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 52-53.

¹⁸⁰³ Ibid., p. 54, 91-92. See in this regard also J. MULDER, “Dignity or discrimination: what paves the road towards equal recognition of same-sex couples in the European Union?”, *Journal of Social Welfare and Family Law* 2018, Vol. 40(1), p. 137.

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which sexual minorities are normalised (or neutralised) and “encouraged to fit into an agenda that supports (rather than challenges)” the heteronormative, cishnormative and binary normative State.¹⁸⁰⁴

The law is significant because it is one of the most authoritative mechanisms through which normative ‘truths’ are established.¹⁸⁰⁵ The right to personal autonomy arguably better encapsulates the necessary ‘radical queering’ of the fundamentally heteronormative, cishnormative and binary normative matrix that is inherent to the legal system, than a sole focus on equality/non-discrimination does.¹⁸⁰⁶ The focus on an explicit right to autonomy regarding one’s sexual identity better enables to challenge the law’s insufficient conceptualisation of sexual minorities, particularly where these conceptualisations have been used to justify inequalities or perpetuations of inequality.¹⁸⁰⁷ In this regard, the recognition of a fundamental right to autonomy regarding one’s sexual identity presents the opportunity and obligation for a more pluralistic conceptualisation of identities within the law, since it essentially pushes for the recognition of sex, gender (identity/expression) and sexual orientation as aspects of subjectivity.¹⁸⁰⁸ A constitutional recognition of autonomy regarding one’s sexual identity thus vests the primary authority for determining the ‘gendered’ directions in life in the individual,¹⁸⁰⁹ and affirms the agency of sexual minorities over their own identity, instead of their inherent vulnerability.

¹⁸⁰⁴ M. TRAVIS, “The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment”, *Social & Legal Studies* 2018, p. 18.

¹⁸⁰⁵ P. JOHNSON, *Homosexuality and the European Court of Human Rights*, Abingdon, Routledge, 2012, p. 9.

¹⁸⁰⁶ F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 37-38. See in this regard also D. GONZALEZ-SALZBERG, “An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot v France*”, *The Modern Law Review* 2018, Vol. 81(3), p. 535.

¹⁸⁰⁷ See in this regard M. TRAVIS, “The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment”, *Social & Legal Studies* 2018, p. 5.

¹⁸⁰⁸ A.T. CHASE, “Human rights contestations: sexual orientation and gender identity”, *The International Journal of Human Rights* 2016, Vol. 20(6), p. 707, 710.

¹⁸⁰⁹ D. CRUZ, “Getting Sex Right: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship”, *Duke Journal of Gender Law & Policy* 2010, Vol. 18, p. 222.

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Nevertheless, this focus on personal autonomy does not necessarily reduce the importance of the right to equality, which is guaranteed in Articles 10 and 11 of the Belgian Constitution through an open-ended provision.¹⁸¹⁰ Indeed, equality may be seen as the logical complement to personal autonomy.¹⁸¹¹ If the law is not entitled to adhere to a certain construction of sex, gender (identity/expression) and sexual orientation, then it is also not entitled to privilege one construction over the other.¹⁸¹² Treating people as equals requires respecting their autonomous experiences and autonomous choices about what the good life requires, rather than imposing on them the majority's choices or normative expectations.¹⁸¹³ A focus on equality can therefore also deliver positive results, as long as the current biased nature of

¹⁸¹⁰ The open-ended right to equality/non-discrimination is implemented through several non-discrimination acts (on the federal level and the level of the federated entities). These acts contain explicit prohibitions of discrimination on the basis of sex (though not sex characteristics), sexual orientation, change of sex, transsexuality, gender (identity), and/or gender expression. Including a prohibition of discrimination on the basis of sex (characteristics), gender (identity/expression) and sexual orientation in the Constitution is therefore not necessary from a legal perspective, but is also contrary to Belgium's constitutional tradition as reflected in Articles 10 and 11.

¹⁸¹¹ See in this regard K. MÖLLER, *The Global Model of Constitutional Rights*, Oxford, Oxford University Press, 2012, p. 42. This complementarity between autonomy and equality is also reflected by the concept of 'equal liberty' in US constitutional law, on the basis of which all persons have the equal freedom to define and express their identity free from governmental subordination of a socially salient group to which they belong based on stereotypical assumptions. See L. A. BOSO, "Dignity, Inequality, and Stereotypes", *Washington Law Review* 2017, Vol. 92, p. 1135. Interestingly, FREDMAN seems to incorporate a right to autonomy as a measure for redressing stigma, stereotyping and humiliation in her model of substantive equality. FREDMAN reconceptualised substantive equality as a four dimensional framework of aims and objectives. According to the author, "firstly the right to substantive equality should aim to redress disadvantage. Second, it should counter prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic. Third, it should enhance voice and participation, countering both political and social exclusion. Finally, it should accommodate difference and achieve structural change". See S. FREDMAN, "Substantive equality revisited", *International Journal of Constitutional Law* 2016, Vol. 14(3), p. 727.

¹⁸¹² See in this regard also A. R. CHANG and S. M. WILDMAN, "Gender In/Sight: Examining Culture and Constructions of Gender", *The Georgetown Journal of Gender and the Law* 2017, Vol. 43, p. 66 and further.

¹⁸¹³ K. MÖLLER, *The Global Model of Constitutional Rights*, Oxford, Oxford University Press, 2012, p. 42. See in this regard also L. A. BOSO, "Dignity, Inequality, and Stereotypes", *Washington Law Review* 2017, Vol. 92, p. 1183.

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legal and social constructs concerning sexual identity is unveiled and openly contested.¹⁸¹⁴ In this regard, PICARRA and VISSER argue that “if [it] is to be achieved [that all persons are afforded the same right of dignity, equality, and freedoms], it is essential that the most fundamental elements of humanity of sex, gender and sexual orientation be understood, not within a heterosexual framework, but within the reality of human experience and diversity”.¹⁸¹⁵ The conceptualisation of the rights of sexual minorities as claims that are autonomy-based is therefore responsive to the critique put forward by AMMATURO that “the focus on realising a framework of formal equality [...] unaccompanied by a critical discussion of the very criteria to define human rights holders [...] represents only a partial outlook on patterns of injustice, inequality and marginalisation”.¹⁸¹⁶ After all, as she aptly states:

“[Current rights-based discourse on the equality of all individuals] [scratches] the surface of the problem without addressing the root causes of discrimination and hostility towards those who seem not to comply with [gender] norms. [The] rights claims of those who appropriate the label of ‘LGBTQI’ for themselves, need to be decoupled from mechanistic notions of both ‘equality’ and ‘freedom’, which narrow down the possibility of having one’s rights recognised by becoming equal to heterosexual and cisgendered counterparts or as free as them.”¹⁸¹⁷

¹⁸¹⁴ R. HOLTMAAT, “The Head of the Woman is the Man. The Failure to Address Gender Stereotypes in the Legal Procedures around the Dutch SGP” in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 172. See similarly in this regard J. MULDER, “Dignity or discrimination: what paces the road towards equal recognition of same-sex couples in the European Union?”, *Journal of Social Welfare and Family Law* 2018, Vol. 40(1), p. 138-139.

¹⁸¹⁵ E. PICARRA and C. VISSER, “Victor, Victoria or V? A Constitutional Perspective on Transsexuality and Transgenderism”, *South African Journal on Human Rights* 2012, Vol. 28, p. 531.

¹⁸¹⁶ F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 94.

¹⁸¹⁷ *Ibid.*, p. 102, 113.

3. Formulation and scope of the right to personal autonomy regarding sexual identity

Given the normative aim of this part of the thesis, it is appropriate to suggest a formulation of a new constitutional right to personal autonomy regarding a person's sexual identity that would tackle the autonomy-related issues mentioned in the previous chapters, as well as remain in accordance with the Belgian legal and constitutional tradition established above. In this regard, inspiration is drawn from present Belgian constitutional rights provisions, as well as the Yogyakarta Principles +10 and the CEDAW Convention. Indeed, Article 5(a) of the latter instrument contains an often-cited provision that obliges State authorities to address harmful gender-based stereotypes that oppress women and girls in society.¹⁸¹⁸ However, as explained below, Article 5(a) is considered by some authors as also having a 'transformative potential' whereby the State's obligation to fight gender stereotypes should enable everyone to experience their gender (identity) in the way they choose, without suffering discriminatory consequences.¹⁸¹⁹ Principle 30 of the Yogyakarta Principles +10 also lists a number of State obligations to take the appropriate and effective measures to eradicate the root causes for all forms of discrimination, violence or harm on grounds of sex characteristics, gender (identity), gender expression and sexual orientation. Principle 32 also calls on States to take measures to address stigma, discrimination and stereotypes

¹⁸¹⁸ The wording of Article 5(a) is also reflected by Articles 12 and 14 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). A similar obligation for States to combat stereotypes, prejudices and harmful practices can also be found in Article 8(b) of the Convention on the Rights of Persons with Disabilities.

¹⁸¹⁹ See *infra* p. 507.

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based on sex and gender. The new constitutional right could be formulated as follows:

§1. Everyone has the right to personal autonomy regarding their sexual identity, including sex, sex characteristics, gender and sexual orientation, provided the exceptions prescribed by law.

§2. The laws, federate laws and rules referred to in Article 134 shall provide all appropriate measures to modify the legal, social and cultural patterns concerning sexual identity, with a view to achieving the elimination of prejudice, customary and all other practices which are based on stereotyped assumptions about sexual identity, including sex, sex characteristics, gender and sexual orientation.

As is often the case with human rights provisions, the new constitutional right would be worded in general terms, beyond which implementing legislation and judicial interpretation will be required.¹⁸²⁰ Given the necessary dynamism that accompanies human rights protection mentioned above, it is indeed not the task for human rights drafters, such as a Constituent power, to precisely define the scope of any human right. However, drafters of fundamental rights often provide valuable information concerning the right's rationale and scope in the *travaux préparatoires*. In most cases, it becomes the role of courts or monitoring bodies to interpret and enforce rights, taking into account these preparatory works, but also conflicting visions in law and society and values of human life.¹⁸²¹ Nevertheless, in the scope of this thesis, some basic questions concerning the scope of a fundamental right need to be addressed. The following sections will therefore elaborate on the material scope of a

¹⁸²⁰ See in this sense S. SUTEU, "Gender in Comparative Constitutional Change" in X. CONTIADES and A. FOTIADOU (eds.), *Routledge Handbook on Comparative Constitutional Change*, London, Routledge, 2019 (forthcoming). Also available at <<https://ssrn.com/abstract=3344251>> (last visited 9 April 2019), p. 12.

¹⁸²¹ L.E. RODRIGUEZ-RIVERA, "Is the Human Right to Environment Recognised under International Law? It Depends on the Source", *Columbia Journal of International Environmental Law* 2001, Vol. 12, p. 13.

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newly created right to autonomy concerning one's sexual identity (A.), its absolute or relative character (B.), its resulting negative obligations (C.) and positive obligations (D.) and its personal scope (E.).

A. Material scope

This thesis has predominantly focussed on the right to personal autonomy of persons with variations of sex characteristics and transgender persons. However, the introduction of a constitutional right to autonomy regarding a person's sexual identity would also cover legal issues related to a person's sexual orientation. Nevertheless, it may be questioned whether it is necessary to include all three elements of a person's sexual identity in the right's material scope. Indeed, it may be argued that autonomy regarding sex (characteristics) and gender (identity/expression) would lead to an inclusive legal system which does not regard these elements of sexual identity to be a legal category that is defined by the State, which would by consequence also mean that sexual orientation would not amount to a legal category. After all, sexual orientation can be seen as a social construction that is inherently related to social constructions of sex (characteristics) and gender (identity/expression). Terms like "homosexual", "heterosexual" and "bisexual" presume the existence of only two genders or sexes.¹⁸²²

However, there appear to be at least two reasons why including autonomy regarding sexual orientation in the material scope of the newly created constitutional right would be necessary to protect the rights of persons who are considered to be non-conforming in relation to their sexual orientation, i.e. non-heterosexual persons: the continued legal relevance of sexual orientation (I) and the persistence of heteronormativity and the development of homonormativity in society (II).

¹⁸²² D. VADE, "Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People", *Michigan Journal of Gender and Law* 2005, Vol. 11(3), p. 270. See in this sense also D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 17-18.

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1. Continued legal relevance of sexual orientation

Although sexual orientation has lost its main relevance as a legal category in the Belgian legal order since the adoption of marriage equality in 2003 and the possibility for couples of the same sex/gender to jointly adopt children in 2006,¹⁸²³ it has not necessarily lost its legal relevance. For instance, on the basis of the anti-discrimination legislation, sexual orientation is a prohibited ground for differential treatment. In this regard, it was already mentioned above that a right to equality is logically complementary to the right of autonomy, which better encapsulates the need for a more pluralistic conceptualisation of identities within the law.¹⁸²⁴ In other words, an explicit right to autonomy regarding sexual orientation would grant all persons the right to self-define their sexuality, whenever this notion would obtain legal relevance. After all, a legal conceptualisation of sexual orientation must not render it restrictive and relevant only to an exclusive group of people who have the cultural privilege to adhere to assumptions expressed in law of what it means to have a certain sexual orientation or preference.¹⁸²⁵ By constitutionally protecting a person's autonomy regarding their sexual orientation, all individuals are granted the freedom to conceptualise their understanding of what it means to be for instance heterosexual, homosexual, bisexual or pansexual, and to be free from having to label their individual experience.

Moreover, the relative nature of the right to autonomy regarding sexual identity, which is addressed below, would arguably mean that both sex (characteristics) and gender (identity/expression) could still be instrumentalised by the State, if the latter pursues a legitimate aim for such use, and abides by the boundaries of the necessity in a democratic society. This use – which might for instance take the form of a registration – could potentially also be considered relevant for situations related to sexual

¹⁸²³ See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 925-926.

¹⁸²⁴ See *supra* p. 470.

¹⁸²⁵ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 611.

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orientation, for instance based on pervasive stereotypes regarding sexuality. Indeed, stereotypes regarding sexual orientation are closely related to the policing of gender norms: non-heterosexuality violates fundamental tenets of 'true' masculinity and femininity.¹⁸²⁶ The incorporation of sexual orientation within the right to autonomy would thus also accommodate the risk of potential abuses that could accompany any use of information relating to sex characteristics or gender (identity/expression) to stretch it to the sphere of sexuality.

Lastly, including sexual orientation within the material scope of the new fundamental right to personal autonomy regarding sexual identity would also entrench at the constitutional level the legal progress that has been made since the end of the 20th century. As explained above, the legal status of non-heterosexual persons has gradually improved through various legislative initiatives. However, given its essentially legislative nature, a majority in Parliament could theoretically reverse the formal legal equality of non-heterosexual persons in the future. Considering the aforementioned pragmatic value of constitutional rights provisions in the domestic legal order, awarding constitutional value to a person's autonomy concerning their sexual orientation would arguably nothing but strengthen the legal position of non-heterosexual persons.

II. Heteronormativity – Homonormativity

As mentioned above, formal equality on the basis of sexual orientation is already almost completely achieved in the Belgian legal system. However, the suggested formulation of a new constitutional right to autonomy regarding sexual identity could have an important role in addressing the persistence of heteronormativity in law and society. As mentioned in Chapter II, by 'heteronormativity' is meant the "institutions, structures of understanding and practical orientations that make heterosexuality seem not only coherent but also privileged".¹⁸²⁷ Heteronormativity is sometimes also referred to as compulsory heterosexuality, and is closely related to normative assumptions

¹⁸²⁶ Ibid., p. 597.

¹⁸²⁷ P. JOHNSON, *Homosexuality and the European Court of Human Rights*, Abingdon, Routledge, 2012, p. 11.

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about gender roles in society. In this regard, Chapter II already established the conflation and intersections between the three relevant aspects of a person's sexual identity. Although since the 1980's non-heterosexual persons have increasingly entered the spheres of mainstream life, heteronormativity is arguably still, like masculinity, all around us, often at an invisible level.¹⁸²⁸

Under a constitutional right to autonomy regarding sexual orientation, the law should not only refrain from privileging heterosexuality over other forms of sexual orientation, but it should also avoid or resist essentialist definitions or conceptualisations of a person's sexuality in a way that excludes marginal group members from the law's protective reach.¹⁸²⁹ As MERTUS argues, many sexual minorities do not view their sexuality in terms of the hetero/homo dichotomy, yet as a wide variety of sexual identities that resist simplistic categorisation.¹⁸³⁰ Constitutionally providing autonomy to all persons to define their own sexual orientation could for instance become relevant in cases of alleged discrimination based on sexual orientation. As mentioned above, discrimination law would remain one of the areas where sexual orientation would continue to remain within the legal system's regulatory reach. On the basis of the autonomy provision, legal analysis in discrimination cases should focus on whether a person's expectations or assumptions about another individual's sexual orientation and behaviour, i.e. the perceived sexual orientation, differ from how that latter person identifies or expresses their sexual orientation.¹⁸³¹ In other words, discrimination occurs when a person acts on the basis of harmful assumptions and stereotypes about another person's self-defined sexual orientation, whatever that may be. This means that even in a society that might be perceived as accepting of non-heterosexual persons, a certain individual might discriminate if another

¹⁸²⁸ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 614.

¹⁸²⁹ *Ibid.*, p. 580.

¹⁸³⁰ J. MERTUS, "Applying the Gatekeeper Model of Human Rights Activism: The U.S.-Based Movement for LGBT Rights" in C. BOB (ed.), *The International Struggle for New Human Rights*, Philadelphia, Penn Press, 2008, p. 65.

¹⁸³¹ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 580. See also K. REINECK, "Running from the gender police: reconceptualizing gender to ensure protection for non-binary people", *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 271.

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person fails to act gay ‘correctly’¹⁸³² or ‘enough’ in the light of the former’s stereotypical expectations.¹⁸³³ If, for instance, a homosexual man would be harassed on grounds that he fails to act in conformity with a person’s expectations that he would be only interested in what are considered to be ‘typically’ feminine objects or activities, or would demonstrate ‘typically’ feminine qualities and behaviour, he would be discriminated on the basis of his sexual orientation. This remains true even when the harasser could be generally perceived as being accepting of (effeminate) homosexuals. The same counts for the lesbian woman who is harassed for not acting or speaking as is expected from the ‘butch’ lesbian.

Next to the heteronorm, there thus also appears to be a developing ‘homonorm’, on the basis of which members of society – which includes members of sexual minorities – devalue certain identities because they do not act like ‘the right kind of gay person’, i.e. in accordance with the stereotyped expectations for what is appropriate for non-heterosexual self-identification.¹⁸³⁴ Since non-heterosexual persons have become able to become part of the conservative mainstream (heteronormative) life –¹⁸³⁵ and in many ways are substituting their outsider status with insider status – exclusion on the basis of sexual orientation or heteronormative assumptions has taken on new forms.¹⁸³⁶ BOSO argues for instance that “due to increasing convergence of gay and straight respectability markers, hetero- and homonormative individuals may respond negatively to those who remain single well into their adult life, single people who are not monogamous,

¹⁸³² It is for instance a widely spread phenomenon among gay men to ‘act straight’ or to expect a partner not to be effeminate.

¹⁸³³ L. A. BOSO, “Acting Gay, Acting Straight: Sexual Orientation Stereotyping”, *Tennessee Law Review* 2016, Vol. 83, p. 580. See in this regard also M. DIERCKX, P. MEIER and J. MOTMANS, “‘Beyond the Box’: A Comprehensive Study of Sexist, Homophobic, and Transphobic Attitudes Among the Belgian Population”, *DiGeSt. Journal of Diversity and Gender Studies* 2017, Vol. 4(1), p. 7-9.

¹⁸³⁴ L. A. BOSO, “Acting Gay, Acting Straight: Sexual Orientation Stereotyping”, *Tennessee Law Review* 2016, Vol. 83, p. 581.

¹⁸³⁵ See in this regard also S. MONRO and J. VAN DER ROS, “Trans* and gender variant citizenship and the state in Norway”, *Critical Social Policy* 2018, Vol. 38(1), p. 62.

¹⁸³⁶ L. A. BOSO, “Acting Gay, Acting Straight: Sexual Orientation Stereotyping”, *Tennessee Law Review* 2016, Vol. 83, p. 620. See in this regard also A. SPERTI, *Constitutional Courts, Gay Rights and Sexual Orientation Equality*, Oxford, Bloomsbury, 2017, p. 196.

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couples who have open marriages, individuals who frequent bathhouses or sex parties, or who have other kinds of kinky sex, anyone who chooses not to have children, or those who vocally express their activism on any of these and countless other issues”.¹⁸³⁷ GLAZER also states that bisexual individuals are considered to fail to conform to both heterosexual and homosexual expectations of conduct and attraction (so-called bi(sexual) erasure).¹⁸³⁸ Adding ‘sexual orientation’ to the constitutional right to autonomy therefore amounts to the necessity to ensure that all persons have the right to be free from normative expectations regarding their sexuality, and especially – within the group of sexual minorities – to protect the marginalised among the marginalised.¹⁸³⁹ A constitutional right to autonomy regarding sexual orientation thus would ‘queer’ the notion of sexual orientation within law and especially society.¹⁸⁴⁰ As the following sections will show, such legal ‘queering’ would lead to concrete legal (negative and positive) obligations for the State.¹⁸⁴¹

Moreover, formal equality based on sexual orientation does not necessarily lead to substantive equality.¹⁸⁴² Indeed, research from all over the world shows (very) high levels of homophobic hate speech, physical and material violence.¹⁸⁴³ These incidents of name-calling and violence reflect a pervasive

¹⁸³⁷ L. A. BOSO, “Acting Gay, Acting Straight: Sexual Orientation Stereotyping”, *Tennessee Law Review* 2016, Vol. 83, p. 629.

¹⁸³⁸ E. GLAZER, “Sexual Reorientation”, *Georgetown Law Journal* 2012, Vol. 100, p. 1056-1058.

¹⁸³⁹ L. A. BOSO, “Acting Gay, Acting Straight: Sexual Orientation Stereotyping”, *Tennessee Law Review* 2016, Vol. 83, p. 581.

¹⁸⁴⁰ The term ‘queer’ is here used in the same way as it is interpreted by ‘queer theory’. As mentioned above, Gonzalez-Salzberg has argued that queer theory works within a poststructural understanding of identities that contests their stability, challenging not only the fixity of categories such as sex, gender sexuality, but also the traditional construction of these characteristics as opposed to binaries. In this regard, a radical legal ‘queering’ of the notion of sexual orientation would mean that all legal affirmations of socially constructed stereotypes regarding sexual orientation would have to be removed from and avoided by law. See *supra* p. 43 and further.

¹⁸⁴¹ On the relevance of queer theory for law, see *supra* p. 49 and further.

¹⁸⁴² On the difference between formal and substantive equality, see S. FREDMAN, “Substantive equality revisited”, *International Journal of Constitutional Law* 2016, Vol. 14(3), p. 712-738.

¹⁸⁴³ See A. UPPALAPATI et al., “International Regulation of Sexual Orientation, Gender Identity, and Sexual Anatomy”, *The Georgetown Journal of Gender and the Law* 2017, Vol.

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societal desire to police heterosexuality and to assure everyone's conformity to it.¹⁸⁴⁴ In many parts of the world, including Belgium, 'coming-out' as non-heterosexual still is accompanied by risks of exclusion, violence, mental health problems and economic harms.¹⁸⁴⁵ In this regard, as mentioned below, a right to autonomy regarding sexual identity would strengthen the positive obligation for the State to fight societal homophobia by taking all appropriate constitutional, legislative, administrative and other measures. Although homophobic opinions and behaviour already fall within the scope of present anti-discrimination law, homophobia also reduces the victim's autonomously self-defined, lived and expressed sexuality to an inferior form.

Lastly, excluding sexual orientation from the scope of the newly created right to autonomy would ignore the role of heteronormativity in the persistence of gender and sex stereotypes in society and *vice versa*.¹⁸⁴⁶ It was already mentioned at various places in this thesis that the normative heterosexuality in society has inspired medical practitioners to perform non-consensual, deferrable sex normalising treatment on children born with variations of sex characteristics, in order to enable penetrative heterosexual activities. Moreover, assumptions regarding a person's sexual preference and sexual life influence normative expectations regarding a person's gender (identity), gender expression and gender role, and *vice versa*.¹⁸⁴⁷ As BOSO argues, in traditional Western society masculinities are defined in opposition to femininity, and male homosexuality presents a masculinity problem because

18, p. 635-709. See also M. DIERCKX, P. MEIER and J. MOTMANS, "'Beyond the Box': A Comprehensive Study of Sexist, Homophobic, and Transphobic Attitudes Among the Belgian Population", *DiGeSt. Journal of Diversity and Gender Studies* 2017, Vol. 4(1), p. 7.

¹⁸⁴⁴ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 613.

¹⁸⁴⁵ *Ibid.*, p. 616.

¹⁸⁴⁶ See in this regard also P. DUNNE, "Towards Trans and Intersex Equality: Conflict or Complementarity?" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 239.

¹⁸⁴⁷ See H. LAU, "Gender scripting and deliberative democracy" in M. FINEMAN (ed.), *Transcending the boundaries of law. Generations of feminism and legal theory*, Abingdon, Routledge, 2010, p. p. 334-337. See also M. DIERCKX, P. MEIER and J. MOTMANS, "'Beyond the Box': A Comprehensive Study of Sexist, Homophobic, and Transphobic Attitudes Among the Belgian Population", *DiGeSt. Journal of Diversity and Gender Studies* 2017, Vol. 4(1), p. 5-34.

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it threatens men's status as superior to, and unlike, women.¹⁸⁴⁸ Due to pervasive, conflated stereotypes transgender persons and persons with variations of sex characteristics, who show a combination of both 'masculine' and 'feminine' features, are often presumed to be homosexual, i.e. deviant of the heterosexual norm.¹⁸⁴⁹ Even within sexual minorities, certain persons who are known to be non-heterosexual might be excluded or discriminated for not adopting or precisely adopting the gender expression that is stereotypically believed to be associated with non-heterosexual sexual orientation, e.g. the effeminate gay man and the butch lesbian woman. Heteronormativity thus particularly hurts gender non-conforming non-heterosexual persons, leading to the popularity – especially among gay men – to act 'straight', in order to enjoy the privileges connected to white (male) heterosexual cisgenderism.¹⁸⁵⁰ Given this strong intersection between sexual orientation and gender (identity/expression), it only seems logical to include both elements of sexual identity within the sphere of the new constitutional right to autonomy.

B. Absolute vs. relative right

It seems clear that a newly introduced right to personal autonomy regarding one's sexual identity would not constitute an absolute right, as is the case with all rights that are derived from the right to personal autonomy as an inherent part of the right to respect for private life.¹⁸⁵¹ Indeed, there is no unlimited, unburdened right to define oneself; hence, law may impose norms

¹⁸⁴⁸ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 599. See also M. DIERCKX, P. MEIER and J. MOTMANS, "'Beyond the Box': A Comprehensive Study of Sexist, Homophobic, and Transphobic Attitudes Among the Belgian Population", *DiGeSt. Journal of Diversity and Gender Studies* 2017, Vol. 4(1), p. 23.

¹⁸⁴⁹ E. PICARRA, and C. VISSER, "Victor, Victoria or V? A Constitutional Perspective on Transsexuality and Transgenderism", *South African Journal on Human Rights* 2012, Vol. 28, p. 509.

¹⁸⁵⁰ L. A. BOSO, "Acting Gay, Acting Straight: Sexual Orientation Stereotyping", *Tennessee Law Review* 2016, Vol. 83, p. 634.

¹⁸⁵¹ See in this regard for instance the second paragraph of Article 8 ECHR which lays down the conditions under which the right to respect for private life may be interfered with by the authorities.

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that affirmatively shape lives and social order.¹⁸⁵² At the very least, the autonomy right could conflict with other fundamental rights that are constitutionally protected or fall within the scope of international human rights instruments, such as the ECHR.¹⁸⁵³ Although the Belgian Constitution contains neither a general transversal limitation clause, nor any fully-fledged rights-specific limitation clauses, the Constitutional Court has filled this gap by mirroring the ECtHR's case law in its interpretation of the possible limitations to the rights included in the Belgian constitutional rights catalogue.¹⁸⁵⁴

Like the Belgian Constitution, the ECHR also does not contain a transversal limitation clause. However, several provisions, such as Articles 8, 9, 10 and 11 include full and specific so-called 'escape clauses', which allow for a limitation of the right concerned. A justified interference with these Convention rights needs to comply with a three-step test: the interference needs to be 'prescribed by law' or be 'in accordance with the law' (1), pursue a legitimate aim (2) and be necessary in a democratic society (3). On the basis of the latter criterion, the ECtHR evaluates whether the interference is proportionate in the light of the legitimate aim it pursues. By mirroring the ECtHR's case law, this material proportionality analysis has also reached a key place in Belgian constitutional rights adjudication.¹⁸⁵⁵ Nevertheless, it is worth mentioning that the Belgian Constitution differs from the escape clauses included in the ECHR – as interpreted by the ECtHR – in two ways:

¹⁸⁵² B. T. RUOCCO, "Our Antitotalitarian Constitution and the Right to Identity", *University of Pennsylvania Law* 2016, Vol. 165, p. 196.

¹⁸⁵³ For more on the concept of conflicting human rights, especially in the case law of the ECtHR, see E. BREMS and S. SMET (eds.), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?*, Oxford, Oxford University Press, 2017.

¹⁸⁵⁴ J. VELAERS, "Over de noodzaak om Titel II van de Grondwet over 'De Belgen en hun rechten' te herzien [On the necessity to amend Title II of the Constitution concerning 'The Belgians and their rights']" in A. ALEN et al. (eds.), *La Constitution hier, aujourd'hui et demain*, Brussels, Bruylant, 2006, p. 114-115.

¹⁸⁵⁵ P. POPELIER and K. LEMMENS, *The Constitution of Belgium. A Contextual Analysis*, Oxford, Hart Publishing, 2015, p. 241. See also A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook of Belgian Constitutional Law], Mechelen, Wolters Kluwer, 2011, p. 80.

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- According to several constitutional provisions, limitations have to be foreseen by law or by virtue of the law. This means that any justified interference with a constitutional rights provision must be (essentially) based on an intervention by the federal legislature or the legislatures of the federated entities.¹⁸⁵⁶ By requiring this formal criterion, the Belgian constitutional limitation mechanism is more strict than the ECtHR's case law, which uses a material assessment of the (foreseeability of the) legal basis of the interference.¹⁸⁵⁷ In cases of overlap between the ECHR and the Constitution, the Belgian Constitutional Court therefore gives precedence to this constitutional formalism, since it results in a higher level of protection for the rights holder.¹⁸⁵⁸
- Preventive limitations to constitutional rights as the freedom of religion, the freedom of assembly, the freedom of association and the free press, are prohibited. This prohibition of preventive limitations to the exercise of key civil constitutional rights was historically motivated by the profound distrust towards the executive after the Belgian independence in 1830.¹⁸⁵⁹ However, the second paragraph of Article 26 foresees an exception for meetings in open air, which are subject to police regulations.¹⁸⁶⁰

Because of the Constitutional Court's established practice of applying escape clauses, based on a material proportionality analysis, in cases of limitations of constitutional rights, it seems sufficient at this point to adhere to the Belgian constitutional tradition of confining limitation clauses to the phrase that

¹⁸⁵⁶ A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook of Belgian Constitutional Law], Mechelen, Wolters Kluwer, 2011, p.795-796.

¹⁸⁵⁷ E. BREMS, "Vers des clauses transversales en matière de droits et libertés dans la constitution belge ?", *Revue Trimestrielle des Droits de l'Homme* 2007, p. 358-359.

¹⁸⁵⁸ A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook of Belgian Constitutional Law], Mechelen, Wolters Kluwer, 2011, p. 80.

¹⁸⁵⁹ *Ibid.*, p. 78-79.

¹⁸⁶⁰ Interestingly, the Court of Cassation has extended the scope of this exception to the exercise of all fundamental right in public spaces. However, this extensive reading has been criticised by the Council of State and in the legal literature. See A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook of Belgian Constitutional Law], Mechelen, Wolters Kluwer, 2011, p. 78-79.

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interferences with the fundamental right concerned should be adopted by law or by value of the law. Taking into account the Belgian federal state structure, this also includes laws by the federated entities (regions and communities), which are called ‘decrees’ and ‘ordonnances’ (or rules referred to in Article 134 of the Constitution).¹⁸⁶¹

Nevertheless, a more important question than the newly created right’s mere relative or absolute nature, deals with the State’s obligations that would be generated by the newly created constitutional right. Although fundamental rights have long been conceptualised as a defence mechanism against an intrusive State it has been gradually accepted that they are also “based on a much richer view of freedom, which pays attention to the extent to which individuals are in a position actually to exercise those rights”.¹⁸⁶² In this regard, international human rights law traditionally recognises three types of State obligations: the obligation to respect, protect and fulfill human rights. According to LAVRYSEN, “under this classification, the obligation to respect requires States to refrain from interfering with human rights, the obligation to protect requires State to prevent human rights violations by third parties and the obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of human rights”.¹⁸⁶³ The obligation to respect human rights/ to refrain from human rights violations is also called a negative obligation. The obligations to protect and fulfil human rights are conceptualised as positive obligations. In order to make the suggested new right to autonomy regarding one’s sexual identity more concrete, the following sections will provide illustrations of some of the negative and positive obligations that would be generated.

¹⁸⁶¹ A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook of Belgian Constitutional Law], Mechelen, Wolters Kluwer, 2011, p. 81.

¹⁸⁶² S. FREDMAN, *Human Rights Transformed*, Oxford, Oxford University Press, 2008, p. 1.

¹⁸⁶³ L. LAVRYSEN, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Antwerp, Intersentia, 2016, p. 11.

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C. The State's negative obligations

According to BREMS, “human rights have a revolutionary calling; they challenge the laws and practices of societies, even if those are long-standing.”¹⁸⁶⁴ Although the task of changing laws and society might suggest a strong focus on positive obligations, negative obligations should not be overlooked. In this regard, the newly introduced constitutional right to autonomy regarding a person's sexual identity clearly has a strong negative component in its first paragraph, as is the case with most civil and autonomy-based rights.¹⁸⁶⁵ Indeed, it would generate the obligation for the State to refrain from expressing or acting upon stereotypes and other normative expectations regarding a person's sex (characteristics), sexual orientation and/or gender (identity/expression). After all, the legal system arguably shapes and reinforces social realities and meanings.¹⁸⁶⁶ This negative obligation thus essentially amounts to what may be described as “the excluded reasons conception of autonomy”.¹⁸⁶⁷ In other words, the State should refrain from unjustifiably encroaching on or controlling all individuals' freedom to decide on how they identify themselves, how they experience personal relationships and how they give meaning to their own bodies in full dignity and humanity.¹⁸⁶⁸

However, given the new right's relative nature, the State would still have the possibility of interfering with a person's autonomy over their sexual identity, if it is able to provide a justification for doing so. Protecting, respecting and

¹⁸⁶⁴ E. BREMS, “Accommodating Diversity in International Human Rights: Legal Techniques” in P. MEERTS (ed.), *Culture and International Law*, The Hague, Hague Academic Press, 2008, p. 63-81. See in this sense also K. REINECK, “Running from the gender police: reconceptualizing gender to ensure protection for non-binary people”, *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 315.

¹⁸⁶⁵ See in this regard E. HEINZE, *Sexual Orientation: A Human Rights*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 85.

¹⁸⁶⁶ L. A. BOSO, “Acting Gay, Acting Straight: Sexual Orientation Stereotyping”, *Tennessee Law Review* 2016, Vol. 83, p. 607.

¹⁸⁶⁷ K. MÖLLER, *The Global Model of Constitutional Rights*, Oxford, Oxford University Press, 2012, p. 45.

¹⁸⁶⁸ See in this regard also the statements made by the drafters in the Introduction to the Yogyakarta Principles +10, <<http://yogyakartaprinciples.org/introduction/>> (last visited 15 November 2018).

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fulfilling the individual's right to autonomy regarding their sexual identity would not mean that sexual identity necessarily always falls outside of the law's regulatory scope. In order to justify its interference with the individual's right to autonomy, the State would have to prove the existence of a legal basis, a legitimate aim, and a relation of proportionality between the concrete measure and the aim concerned. In this regard, Chapter IV already demonstrated how the State could for instance rely on reasons of public order or public safety to limit the right of all individuals to freely define their gender (identity) and to have that identity subsequently recognised by the legal system.¹⁸⁶⁹ Chapter III pointed out how the protection of the best interests of children born with variations of sex characteristics could be put forward to overrule their right to autonomously make decisions concerning their bodily features. Nevertheless, as with any other relative human right, a violation of autonomy regarding sexual identity still occurs in these cases if the State's measures are not proportionate in relation to the pursued legitimate aim, even when that aim is undone of any stereotype or bias regarding sexual identity. In this regard, the ECtHR has repeatedly considered a person's sexual identity one of the most intimate aspects of private life, and one of the most basic elements of self-determination, which suggests only a limited margin of appreciation for the State to balance public interests with the interests of affected individuals.¹⁸⁷⁰

The question of what constitutes the boundaries of the State's negative obligations under the new right will eventually be answered on a case-by-case basis. The answer may be different in each situation, given the interests at stake and the relevant contextual factors.¹⁸⁷¹ However, although the assessment of the legitimacy and proportionality of measures that the legislature implements that limit personal autonomy would eventually fall

¹⁸⁶⁹ The Belgian legislature relied on the protection of public order and the non-disposability of the civil status to introduce several so-called 'guarantees' in the procedure of legal gender recognition, such as a compulsory waiting period, the *ex ante* intervention by the Public Prosecutor and the principled irreversibility of the amendment of the registered sex.

¹⁸⁷⁰ See *supra* p. 53.

¹⁸⁷¹ J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 935-936.

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within the competence of the Belgian Constitutional Court,¹⁸⁷² Parliament may be seen as the first responsible for the interpretation of constitutional provisions.¹⁸⁷³ It is therefore commendable that the introduction of the right to autonomy regarding a person's sexual identity would be accompanied by clear preparatory works that indicate the historical violations of the human rights of sexual minorities, which the Constituent power aims to end, and name and contest the underlying harming stereotypes and normative expectations on which they were often based.¹⁸⁷⁴ In this regard, it is important to note that the Belgian Constitutional Court in the past has appeared to be very reluctant to express opinions on the Constituent power's choices that come forward from the Constitution's wording or preparatory works.¹⁸⁷⁵

The previous chapters already extensively elaborated on the persistence of stereotypes regarding sexual identity and non-conformity in law and society, resulting in a violation of the right to personal autonomy of sexual minorities. The introduction of a fundamental right to autonomy regarding sexual identity would therefore address the core of the problematic imperfection of sexual minorities' legal status, i.e. the perceived legitimacy of the State's performance, which is actually rooted in harmful stereotypes. As VAN DEN BRINK and TIGCHELAAR argue, any reform of the stereotyped legal system that ensures refrainment from the exclusion of non-conforming persons, will

¹⁸⁷² Either directly through actions for annulment of legislative acts or through a preliminary question.

¹⁸⁷³ T. MOONEN, *De keuzes van het Grondwettelijk Hof. Argumenten bij de interpretatie van de Grondwet* [The Constitutional Court's choices. Arguments concerning the interpretation of the Constitution], Bruges, die Keure, 2015, p. 77-91. See in this regard also J. VELAERS, "Over de noodzaak om Titel II van de Grondwet over 'De Belgen en hun rechten' te herzien [On the necessity to amend Title II of the Constitution concerning 'The Belgians and their rights']" in A. ALEN et al. (eds.), *La Constitution hier, aujourd'hui et demain*, Brussels, Bruylant, 2006, p. 115; E. BREMS, "Vers des clauses transversales en matière de droits et libertés dans la Constitution belge? [Towards transversal clauses for human rights in the Belgian Constitution?]", *Rev. Trim. Dr. H.* 2007, p. 360.

¹⁸⁷⁴ As BREMS and TIMMER point out, "naming stereotypes is a prerequisite for changing them". See E. BREMS and A. TIMMER, "Introduction" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 4.

¹⁸⁷⁵ See in this regard for instance Grondwettelijk Hof [Constitutional Court] (Belgium) 3 April 2014, 57/2014, B.7.1; 28 May 2015, 81/2015, B.12.

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necessarily entail some complex bottlenecks.¹⁸⁷⁶ Although it goes beyond the scope of this thesis to elaborate on all concrete legal consequences of the introduction of a constitutional right to autonomy regarding one's sexual identity in the (Belgian) legal order,¹⁸⁷⁷ several preliminary examples were either already addressed in the previous chapters, or can easily come to mind:

- One of the clear consequences of the State's negative obligations would be the reform of the official registration of sex/gender by conceptually distinguishing the registration of sex (characteristics) from the registration of gender (identity). Indeed, it was established in Chapters III and IV that the current model of sex/gender registration is incompatible with the right to personal autonomy. Although official sex/gender registration is arguably based on legitimate aims such as the protection of public health, the protection of public order through identification processes, the protection of public safety and public morals through sex/gender segregation, and the enablement of government policies on the basis of demographic research, it was demonstrated that the current legal framework is neither pertinent nor proportionate in the light of those grounds. First of all, the current framework conflates the meaning of 'sex' and 'gender (identity)' and is based on incorrect, stereotyped assumptions about how 'sex', 'gender (identity)' and their presumed congruence are to be conceptualised. More specifically, the State assigns every person an official sex marker at birth, which is limited to the binary options of 'male' and 'female' – despite the potential presence of a natural variation of sex characteristics – and is usually based on a superficial check of the sex of the new-born child. This binary sex marker is then assumed to reflect the person's gender (identity), until the person concerned chooses to apply for legal gender recognition. As demonstrated in Chapter IV, this process of legal gender recognition

¹⁸⁷⁶ M. VAN DEN BRINK and J. TIGCHELAAR, "M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal position of transgender persons], <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 17 October 2017), p. 72.

¹⁸⁷⁷ See *infra* p. 528.

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includes impertinent and disproportionate conditions, such as the *ex ante* intervention of the Public Prosecutor and – until the 2019 ruling of the Constitutional Court – the principled irreversibility of the amendment of registered sex. In any case, the gender options for that person are currently stereotypically limited to ‘male’ and ‘female’, which excludes a whole spectrum of human gender variations. In June 2019, the Constitutional Court considered this absence of any form of recognition of non-binary gender (identities) discriminatory in light of the right to gender self-determination, and therefore unconstitutional. Moreover, a change of sex registration to reflect the individual’s self-defined gender (identity) continues to assume congruence with their biological sex. Lastly, specifically with regard to the matter of personal identification on the basis of a person’s official sex/gender marker, Chapter IV argued that other data, such as a photograph and biometric data, would guarantee higher levels of accuracy than a sex/gender marker that remains linked to gender bias in society. It was therefore concluded that any (continued)¹⁸⁷⁸ registration of biological sex (characteristics) and/or gender (identity) would thus have to refrain from expressing cisnormativity and binary normativity, in order to both respect human rights and safeguard effective and inclusive government performance that guarantees the realisation of public safety, public order, or public policy;¹⁸⁷⁹

- Chapter II addressed the heteronormative rationale that underlies sex/gender segregation in public services and infrastructure, such as restrooms, prisons, hospital wards etc.¹⁸⁸⁰ It was stated that, on the basis of the heteronormative logic – which is strongly connected to patriarchy – all biological males, regardless of their gender (identity) and/or sexual orientation, desire females, and many of them are

¹⁸⁷⁸ On the necessity of continuing official registration of sex, see *supra* p. 242. On the necessity of continuing official registration of gender (identity), see *supra* p. 418, and *infra* p. 498 and further.

¹⁸⁷⁹ See *supra* p. 381 and 396.

¹⁸⁸⁰ See *supra* p. 95 and further. See also J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 975-976.

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willing to use force to get access to them.¹⁸⁸¹ Since in any patriarchal model women are considered to be weak – or at least weaker than men – they are presumed to be always at (hetero)sexual risk in public spaces. Sex/gender segregated services are therefore mostly motivated on the grounds of the protection of public (i.e. women's) safety, privacy and public morals. However, it is questionable whether such strict sex/gender segregation is pertinent and/or proportionate, taking into account its exclusionary effects towards binary transgender persons, non-binary persons and persons with variations of sex characteristics.¹⁸⁸² Indeed, FINLAYSON, JENKINS and WORSDALE demonstrate that segregated spaces, to which access is predominantly given on the basis of self-identification,¹⁸⁸³ do not offer any convincing value for the protection of women's safety.¹⁸⁸⁴ Such effect would be dependent on robust procedures that risk-assess anyone asking entry (whatever the gender they are presenting as), which is not feasible in practice, with the exception of a few situations like prisons and shelters.¹⁸⁸⁵ On the other hand, spaces and services that are segregated along strict binary sex/gender lines, fail to provide any accommodation to (some) persons with variations of sex characteristics,¹⁸⁸⁶ non-binary persons and even binary transgender persons.¹⁸⁸⁷ In any case, the world's first empirical study concerning the safety and privacy in public restrooms, locker rooms and changing rooms showed that there is no empirical ground for fears of increased

¹⁸⁸¹ J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 975-976.

¹⁸⁸² *Ibid.*, p. 981-986.

¹⁸⁸³ See in this regard also M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 84-85.

¹⁸⁸⁴ L. FINLAYSON, K. JENKINS, R. WORSDALE, "'I'm not transphobic but...': A feminist case against the feminist case against trans inclusivity", <<https://www.versobooks.com/blogs/4090-i-m-not-transphobic-but-a-feminist-case-against-the-feminist-case-against-trans-inclusivity>> (last visited 12 November 2018).

¹⁸⁸⁵ *Ibid.*

¹⁸⁸⁶ I.e. when the segregation is interpreted to be along binary sex lines.

¹⁸⁸⁷ I.e. when the segregation is interpreted to be along binary sex lines, and the person concerned has not undergone full sex 'reassignment'. See in this regard also M. VAN DEN BRINK and P. DUNNE, *Trans and intersex equality rights in Europe – a comparative analysis*, Luxembourg, Publications Office of the European Union, 2018, p. 86.

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unsafety and privacy violations when persons are free to access facilities solely on the basis of their self-defined gender (identity).¹⁸⁸⁸ Although a constitutional right to autonomy regarding sexual identity would not prevent the organisation or design of public services and infrastructure in a way that guarantees the protection of privacy and public safety as much as possible, it would prohibit the authorities to organise public services and to design public infrastructure in a way that excludes individuals on the basis of heteronormative assumptions that find no support in reality and scientific evidence. Moreover, all forms of legal and/or administrative regulations that compel segregation along sex or gender lines would have to be reviewed in order to check whether they express stereotypical binary normative or cisnormative assumptions that lead to the unjustifiable exclusion of the aforementioned non-conforming persons. In this regard, guaranteeing autonomy regarding sexual identity could lead to the compulsory inclusive and therefore non-sexed/gendered design of public services and spaces or segregation on the basis of complete self-identification that provides the possibility to freely step outside the binary;¹⁸⁸⁹

- Heteronormative and cisnormative assumptions are also still clearly present in Belgian family law,¹⁸⁹⁰ despite considerable progress since

¹⁸⁸⁸ A. HASENBUSH, A. R. FLORES, J. L. HERMAN, "Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms", *Sexuality Research and Social Policy* 2018, <<https://doi.org/10.1007/s13178-018-0335-z>> (last visited 19 October 2018), p. 1-14.

¹⁸⁸⁹ The latter option could result in segregation in the form of 'male', 'female', 'X/other/inclusive'. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 981-983.

¹⁸⁹⁰ According to queer legal scholar GONZALEZ-SALZBERG, heteronormativity is underpinned and supported by other normalising regimes: "the idea of a *sexual imperative*, which assumes that every person conceives sexuality as an essential part of their lives; a *mononormativity* that reifies the couple form as the ideal type of intimate relationship; a *repronormativity* that presents reproduction as an irresistible natural drive; and, certainly, *cisnormativity*, which reveals that a heterosexual cultural also assumes all people to be cissexual". See D. A. GONZALEZ-SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law*, Oxford, Hart Publishing, 2019, p. 20-21.

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the beginning of the 21st century.¹⁸⁹¹ For instance, not only are two men not able to establish a relation of original filiation regarding a mutual child at the same time, but also the recognition of parenthood is limited to two persons, which reflects a lasting adherence to the traditional (heteronormative) nuclear family. This is also true for the protection of relationships through marriage or registered partnerships, which necessarily involve only two persons at the same time. Moreover, Belgium's filiation framework – which was updated by the 2017 Gender Recognition Act – still prevents that a (trans)man, who gives birth to a child, is recognised as a parent in conformity with his male gender (identity). Although it can be argued that the abovementioned rule of *mater semper certa est*,¹⁸⁹² and the restriction of legal protection to stable, affectionate and monogamous relationships between two persons are based on legitimate considerations of securing public order and structuring society, it can be questioned whether heteronormative relics of the past remain proportionate in present-day society. Indeed, at the very least, these measures fail to provide any form of legal accommodation to increasing social realities on the basis of often outdated social constructions of what constitutes proper parenthood, a child's best interests, and relationships deserving of recognition. A negative obligation to refrain from expressing stereotypical assumptions regarding sexual identity could thus certainly lead to a structural evaluation of family law;¹⁸⁹³

- The State would have to refrain from using terminology related to sexual identity that generates differentiation on the basis of sex/gender or excludes individuals, without legitimate reason. In this regard, the legislature and other levels of government would have the

¹⁸⁹¹ P. BORGHS, "Heteronormativiteit in het Belgische familierecht" in E. BREMS and L. STEVENS (eds.), *Recht en gender in België [Law and gender in Belgium]*, Bruges, die Keure, 2011, p. 86.

¹⁸⁹² I.e. a child's mother is always known. See *supra* p. 324 and further.

¹⁸⁹³ See in this regard P. BORGHS, "Heteronormativiteit in het Belgische familierecht" in E. BREMS and L. STEVENS (eds.), *Recht en gender in België [Law and gender in Belgium]*, Bruges, die Keure, 2011, p. 105. See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 957.

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duty to evaluate the use of explicit binary terms such as ‘man’/‘male’, ‘woman’/‘female’, ‘mother’, ‘father’ or implicit binary conceptualisations of terms as ‘sex’ and ‘gender (identity)’ in all pieces of legislation and regulation and replace all inappropriate terminology. In this regard, DIERCKX and PLATERO for instance argue that “real acceptance of gender diversity can only be achieved when the dual female/male boxes are critically questioned and alternative narratives regarding gender identity are offered”.¹⁸⁹⁴ In other words, this negative obligation would result in a significant formal ‘degendering’ of the legal system.¹⁸⁹⁵ An example could provide more clarity. While it is considered to be legitimate for the State to provide government support after child birth in the form of paid leave (currently called pregnancy and maternity leave), it could be questioned whether legally limiting that support to ‘mothers’ or ‘women’ is proportionate or even pertinent in the light of that aim. Indeed, limiting pregnancy leave to ‘mothers’ stereotypically excludes transmen or non-binary persons who give birth to children.¹⁸⁹⁶ Since the legitimate aim consists of supporting persons who gave birth to

¹⁸⁹⁴ M. DIERCKX and R. L. PLATERO, “The meaning of trans* in a family context”, *Critical Social Policy* 2018, Vol. 38(1), p. 93.

¹⁸⁹⁵ In their 2014 study that dealt with the compulsory binary nature of the official sex/gender framework in the Netherlands, VAN DEN BRINK and TIGCHELAAR performed a preliminary screening of all pieces of legislation where gender specific wording was used. For the report, see M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Sekseregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Official sex registration and the legal status of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 1 October 2018), p. 60 and further. For the complete inventory of 159 pages, see <https://www.wodc.nl/binaries/2393-bijlage_tcm28-73313.pdf> (last visited 1 October 2018). See also the research done by the German Human Rights Institute which made a similar inventory of German law and drafted proposals for a degendering of law. See DEUTSCHES INSTITUT FÜR MENSCHENRECHTE, “Gutachten: Geschlechtervielfalt im Recht. Status Quo und Entwicklung von Regelungsmodellen zur Anerkennung und zum Schutz von Geschlechtervielfalt [Sexual diversity in the law. Status quo and development of models of recognition and protection of sex diversity]”, <<https://www.bmfsfj.de/blob/114066/8a02a557eab695bf7179ff2e92d0ab28/imag-band-8-geschlechtervielfalt-im-recht-data.pdf>> (last visited 4 October 2018).

¹⁸⁹⁶ See in this sense also P. DE SUTTER, “Over voortplanting, genetica en ethiek [On reproduction, genetics and ethics]”, *Tijdschrift voor Familierecht* 2018, p. 26. See also J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 954-956.

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children, there seems to be no convincing argument against the less restrictive measure of legally providing support to the ‘person who gives birth’ instead of supporting the ‘mother’. In any case, considering the implications of the Constitutional Court’s ruling on the 2017 Gender Recognition Act, the legislature and administrations will already have the obligation to scan all legislation and regulations for unnecessary binary mentions of sex and – especially – gender (identity), independent from the explicit introduction of a new constitutional provision.

D. The State’s positive obligations

The realisation of many human rights not only depends on the State’s refrainment to interfere with the free exercise of those rights by individuals, but also on detailed positive obligations.¹⁸⁹⁷ It has become clear under international and national human rights law that the State can cause harm not only by acting, but also by failing to intervene in order to ensure the full and effective enjoyment of human rights.¹⁸⁹⁸ In the context of the ECHR, STARMER deduced five broad categories of such positive obligations from the ECtHR’s case law:¹⁸⁹⁹

- A duty to put in place a legal framework which provides effective protection for Convention rights;
- A duty to prevent breaches of Convention rights;
- A duty to provide information and advice relevant to a breach of Convention rights;
- A duty to respond to breaches of Convention rights;

¹⁸⁹⁷ G. WEBBER and P. YOWELL, “Introduction: Securing Human Rights through Legislation” in G. WEBBER, P. YOWELL, R. EKINS, M. KOPCKE, B.W. MILLER, F.J. URBINA (eds.), *Legislated Rights: Securing Human Rights through Legislation*, Cambridge, Cambridge University Press, 2018, p. 17.

¹⁸⁹⁸ L. LAVRYSEN, *Human rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, Antwerp, Intersentia, 2016, p. 2-3. See also K. MÖLLER, *The Global Model of Constitutional Rights*, Oxford, Oxford University Press, 2012, p. 5. See in this regard also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 107.

¹⁸⁹⁹ K. STARMER, “Positive Obligations under the Convention” in J. LOWELL and J. COOPER (eds.), *Understanding Human Rights Principles*, Portland, Hart Publishing, 2001, p. 146-147.

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- A duty to provide resources to individuals to prevent breaches of their Convention rights.

LAVRYSEN also mapped the ECtHR's case law on positive obligations on the basis of three broad analytical categories: substantive vs. procedural obligations, horizontal vs. vertical obligations and positive obligations requiring the putting in place of an adequate legal and administrative framework and those requiring the taking of ad hoc measures.¹⁹⁰⁰ In any case, the existence of positive State obligations to ensure the effective enjoyment, protection and fulfilment of human rights is well established in European human rights law.

The Belgian Constitutional Court and other courts have accepted the direct applicability of some constitutional rights in the horizontal relation between individuals,¹⁹⁰¹ such as the right to equality (Articles 10-11) and the freedom of association (Article 27).¹⁹⁰² Moreover, mirroring the rulings on positive obligations of the Strasbourg Court, the Constitutional Court has also 'read in' positive obligations for the State in various provisions of Title II of the Belgian Constitution,¹⁹⁰³ as a form of indirect horizontal effect of constitutional rights.¹⁹⁰⁴ For instance, with regard to the right to respect for private life, the Constitutional Court has repeatedly held that "Article 22, first paragraph, of the Constitution and Article 8 ECHR [...] generate a positive obligation for the government to take measures that guarantee an effective respect for private and family life, even in the sphere of horizontal relations".¹⁹⁰⁵ From Article

¹⁹⁰⁰ L. LAVRYSEN, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Antwerp, Intersentia, 2016, p. 120.

¹⁹⁰¹ J. VANDE LANOTTE, G. GOEDERTIER et al., *Belgisch Publiekrecht. Deel 1* [Belgian Public Law. Part 1], Bruges, die Keure, 2015, p. 271.

¹⁹⁰² A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook of Belgian Constitutional Law], Mechelen, Wolters Kluwer, 2011, p. 76-77.

¹⁹⁰³ Either read together with an analogous provision of the ECHR or not.

¹⁹⁰⁴ A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook of Belgian Constitutional Law], Mechelen, Wolters Kluwer, 2011, p. 802.

¹⁹⁰⁵ Own translation. See for instance, Grondwettelijk Hof [Constitutional Court] (Belgium), 24 September 2015, 126/2015, B.4.1; 3 February 2016, 18/2016, B.5.2; 2 June 2016, 84/2016, B.5.1; 25 May 2016, 77/2016, B.4.1. See in this regard also D. BIJNENS, D. FRANSEN, S.

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22bis of the Constitution and Article 3 ECHR, it deduced a positive obligation for the State to adopt measures in order to protect the physical integrity of children.¹⁹⁰⁶

Next to the obvious negative obligations that a right to autonomy regarding sexual identity would generate, attention should therefore also be given to its positive dimension. As MARSHALL holds, “there is a need to deal with securing the necessary opportunities and means to enable people to exercise effectively the freedom to express and develop their personalities”.¹⁹⁰⁷ In this regard, it needs to be pointed out that this new fundamental right could be qualified as being part of so-called ‘emancipation rights’, which are intended to correct a legacy of structural discrimination of specific groups and to provide the members of those groups equal opportunities and equal enjoyment of their human rights.¹⁹⁰⁸ Despite its universal applicability,¹⁹⁰⁹ it seems clear that the fundamental right would especially benefit individuals who do not conform to social and legal normative assumptions regarding their sex (characteristics), sexual orientation and/or gender (identity/expression) and who belong to a group that has suffered structural human rights violations throughout history. According to BREMS, one of the crucial features of emancipation rights is that their substantive and sustainable realisation not only takes place within the vertical relations between the individual and the State, but that they also present some of their

POTARGENT, J. THEUNIS, “De toetsing aan de grondrechten door het Grondwettelijk Hof. Overzicht van rechtspraak 2016 [Review of fundamental rights by the Constitutional Court. The case law of 2016]”, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2018, p. 136.

¹⁹⁰⁶ Grondwettelijk Hof [Constitutional Court] (Belgium) 29 October 2015, 153/2015, B.13 and B.17.2. See in this regard also D. BIJNENS, S. POTARGENT, J. THEUNIS, “De toetsing aan de grondrechten door het Grondwettelijk Hof. Overzicht van rechtspraak van 2015 [Review of fundamental rights by the Constitutional Court. The case law of 2015]”, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2017, p. 157.

¹⁹⁰⁷ J. MARSHALL, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 205.

¹⁹⁰⁸ Notion derived from E. BREMS, “Lessons for children’s rights from women’s rights? Emancipation rights as a distinct category of human rights” in E. BREMS, E. DESMET, W. VANDENHOLE (eds.), *Children’s Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?*, London, Routledge, 2017, p. 94-95.

¹⁹⁰⁹ See *infra* p. 506.

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challenges within the horizontal relations between individuals.¹⁹¹⁰ In other words, a substantive and sustainable realisation of a fundamental right to autonomy regarding sexual identity would rely on the implementation of the State's positive obligation to bring about cultural change regarding the conceptualisation of sex, sexual orientation and gender (identity/expression) in law and society. Indeed, in order to effectively realise emancipation rights, private individuals need not only to change their actions and expressions, but also their way of thinking,¹⁹¹¹ so that they respect the rights of people who are (actually or seemingly) different from themselves and see the types of harm that were previously invisible to them.¹⁹¹² The task of naming and contesting stereotypes is not a simple one, because it involves the explicit challenge of what is socially deeply ingrained as normal or natural.¹⁹¹³ Nevertheless, as BREMS points out, since societies and cultures are constantly changing, there appears to be no inherent reason why law-induced social change that improves respect for human rights would threaten society's integrity or identity.¹⁹¹⁴

The qualification of the right to autonomy regarding sexual identity as an emancipation right that generates positive obligations also affects the margin for the State to rely on an incremental approach to secure its effective

¹⁹¹⁰ E. BREMS, "Lessons for children's rights from women's rights? Emancipation rights as a distinct category of human rights" in E. BREMS, E. DESMET, W. VANDENHOLE (eds.), *Children's Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?*, London, Routledge, 2017, p. 95.

¹⁹¹¹ Ibid., p. 95. See in this regard also E. BREMS and A. TIMMER, "Introduction" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 4.

¹⁹¹² E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p.21. See also E. BREMS, "Lessons for children's rights from women's rights? Emancipation rights as a distinct category of human rights" in E. BREMS, E. DESMET, W. VANDENHOLE (eds.), *Children's Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?*, London, Routledge, 2017, p. 101.

¹⁹¹³ L. PERONI and A. TIMMER, "Gender Stereotyping in Domestic Violence Cases. An Analysis of the European Court of Human Rights' Jurisprudence" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 49.

¹⁹¹⁴ E. BREMS, "Accommodating Diversity in International Human Rights: Legal Techniques" in P. MEERTS (ed.), *Culture and International Law*, The Hague, Hague University Press, p. 63-81.

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realisation ('progressive realisation'). Although it may not be expected that the introduction of the fundamental right would result in an overnight transformation of the legal system and society,¹⁹¹⁵ it may be argued that the State would not be able to use mere cultural perceptions or cultural patterns of behaviour as an excuse for slow or even stagnant progress on emancipation rights.¹⁹¹⁶ The recognition of a need for incrementalism in order to allow for social change to occur in a somewhat *natural* way, denies the very essence of the emancipation right, i.e. the obligation for the State to actively generate change. In other words, the State may not rely on the persistent presence of harmful stereotypes which the emancipation right proclaims a violation of fundamental rights, to justify the need for gradual, natural progress.¹⁹¹⁷ The excuse of cultural resistance is only acceptable when the State can show that bias or resistance remains, despite its having undertaken significant efforts to overcome it.¹⁹¹⁸ Nevertheless, incrementalism as a legal strategy does not appear to be impossible, yet depends on the concrete objectives that the authorities are pursuing. When, for instance, the State uses instruments that limit autonomy regarding sexual identity, yet are explicitly based on and recognise the pursuit of eliminating structural oppression or discrimination of sexual minorities, an incremental approach is acceptable. Although these measures would still result in an interference with personal autonomy, their justification would lie in the protection of historically oppressed groups against bias or hate in society, instead of in the acceptance that the majority's opinions and behaviour can only gradually change.

¹⁹¹⁵ E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 95. See in this regard also H. LAU, "Rewriting Schalk and Kopf: shifting the locus of deference" in E. BREMS (ed.), *Diversity and European Human Rights. Rewriting Judgments of the ECtHR*, Cambridge, Cambridge University Press, 2015, p. 254.

¹⁹¹⁶ E. BREMS, "Lessons for children's rights from women's rights? Emancipation rights as a distinct category of human rights" in E. BREMS, E. DESMET, W. VANDENHOLE (eds.), *Children's Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?*, London, Routledge, 2017, p. 100. See in this regard also E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 20.

¹⁹¹⁷ A more nuanced opinion is presented by E. BREMS, "Accommodating Diversity in International Human Rights: Legal Techniques" in P. MEERTS (ed.), *Culture and International Law*, The Hague, Hague University Press, p. 63-81.

¹⁹¹⁸ Ibid.

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An example may provide clarity. It was established in Chapter IV that a full implementation of the right to personal autonomy regarding gender (identity) in law would lead to the abolition of compulsory and public official gender (identity) registration. In other words, one of the negative obligations resulting from the introduction of the aforementioned constitutional right to autonomy regarding a person's sexual identity would be ending the registration of gender (identity) as we know it. However, if the same constitutional right to autonomy would be approached from its positive dimensions, registration of gender (identity) could also be instrumental for the government to tackle the prevalence of transphobia in society. In this regard, it was stated in Chapter IV that the long-term abolition of official gender (identity) registration under the State's negative obligations might have to be accompanied by (positive) interim measures in order to protect the interests of transgender persons who face transphobic events of gender policing, resulting in their need to substantiate their self-identified gender (identity).¹⁹¹⁹ Moreover, in a legal system and society that are embedded in stereotypical constructions of sexual identity, acquiring legal recognition of one's social reality could arguably be of particular symbolic and affirmative importance to the non-conforming person concerned. An acceptable incremental approach therefore does not serve to protect the interests of the majority to see change happen slowly, yet serves to protect the interests of sexual minorities whose rights might still be violated because of the persistence of harmful stereotypes in society.

Although it goes beyond the scope of this thesis to list all practical and detailed legal and administrative initiatives that would have to be undertaken under the State's positive obligations, some illustrations may be given. As a very general positive measure, the State would be required to combat stereotypes,¹⁹²⁰ and fight bias and oppressive social constructions concerning

¹⁹¹⁹ See *supra* p. 418.

¹⁹²⁰ See L. PERONI and A. TIMMER, "Gender Stereotyping in Domestic Violence Cases. An Analysis of the European Court of Human Rights' Jurisprudence" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 40. See in this regard also M. DIERCKX, P. MEIER and J. MOTMANS, 'Beyond the Box': A Comprehensive

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sex, sexual orientation and/or gender (identity/expression) through education and through awareness-raising campaigns, targeting both the majority population as well as sexual minorities.¹⁹²¹ Given the aforementioned prevalence of homophobia, transphobia and interphobia in society, particular measures should be taken to prevent such discriminatory behaviour and to enforce criminal law provisions prohibiting hate speech and incitement to hatred. In this regard, the proposed autonomy right would provide for a constitutional basis for the practice of all Belgian governments to jointly adopt an interfederal action plan to combat discrimination and violence of sexual minorities.¹⁹²² Such plans – which contain numerous commitments based on the State’s positive obligations to fight homo-, trans- and interphobic discrimination, opinions and violence – currently have no structural legal basis in Belgian law, which arguably contributed to the delay of four years between the adoption of the last two action plans. Nevertheless, fighting harmful stereotypes in law and society is an effort that also needs to be organised on other, non-legal fronts, such as via popular media.¹⁹²³

Next, specifically with regard to the legal status of persons with variations of sex characteristics and transgender persons, Chapters III and IV already pointed out some of the logical legislative initiatives that would have to complement the introduction of a right to autonomy regarding sexual identity in order to secure its effective realisation and substantive equality of sexual minorities. By way of example, it was argued in the previous chapters that the State needs to adopt:

Study of Sexist, Homophobic, and Transphobic Attitudes Among the Belgian Population”, *DiGeST. Journal of Diversity and Gender Studies* 2017, Vol. 4(1), p. 24.

¹⁹²¹ E. BREMS, “Lessons for children’s rights from women’s rights? Emancipation rights as a distinct category of human rights” in E. BREMS, E. DESMET, W. VANDENHOLE (eds.), *Children’s Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?*, London, Routledge, 2017, p. 100.

¹⁹²² For the 2018-2019 plan, see <https://fedweb.belgium.be/sites/default/files/Actieplan_LGBTI_2018-2019_NL.pdf> (last visited 28 September 2018).

¹⁹²³ L. PERONI and A. TIMMER, “Gender Stereotyping in Domestic Violence Cases. An Analysis of the European Court of Human Rights’ Jurisprudence” in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 40.

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- Legislation banning deferrable treatment on a person's sex characteristics until the person concerned is capable of providing informed consent, autonomously or through the legal representative.¹⁹²⁴ Indeed, as mentioned above, interdisciplinary research has shown that parents are not best placed to make unbiased decisions about their child's sex characteristics, based on their own stereotypical assumptions about biological sex, fears and insufficient medical information. Given the high risks that accompany treatment on sex characteristics, this situation does not protect the child's best interests and endangers its right to personal autonomy.
- Legislation adding 'sex characteristics' to the list of prohibited grounds for differential treatment.¹⁹²⁵ Although this measure could also be seen as a positive obligation resulting from the right to equality/non-discrimination, it goes hand in hand with the other (positive and negative) State obligations necessary to implement the right to personal autonomy of persons with variations of sex characteristics. As argued in Chapter III, a legislative ban on non-consensual, deferrable treatment on a person's sex characteristics, and a conceptually adequate model of official sex registration would increase societal visibility of persons with variations of sex characteristics and could therefore, on short term, potentially expose them to a higher risk of discrimination. Moreover, it was also demonstrated in Chapter III that the vulnerability of persons with variations of sex characteristics to discrimination and abuse in all spheres of life is connected to their non-conformity with persistent stereotypes regarding the binarity of sex and the appearance of 'normal' sex characteristics, which is intrinsically

¹⁹²⁴ See *supra* p. 208 and further. With regard to this positive obligation under human rights law, see also N. ALTHOFF, "Gender Diversity in Law: the German Perspective" in J.M. SCHERPE, A. DUTTA and T. HELMS (eds.), *The Legal Status of Intersex Persons*, Cambridge, Intersentia, 2018, p. 410.

¹⁹²⁵ See *supra* p. 287 and further.

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linked to the scope of the proposed constitutional right to autonomy regarding one's sexual identity.

E. Personal scope

I. (Inclusive) universality of human rights

Although this thesis is built up around the study of the legal position of persons who are non-conforming with regard to their sex (characteristics), sexual orientation and/or gender (identity/expression), any constitutional right to autonomy concerning a person's sexual identity should not be limited to these sexual minorities. One of the risks of limiting the personal scope of the new fundamental right to sexual minorities would be an essentialisation of sex, gender (identity/expression) and sexual orientation, while these notions are very diverse, elastic and therefore internally heterogeneous.¹⁹²⁶ In other words, limiting the right to autonomy over one's sexual identity to sexual minorities could reinforce the idea that only *they* have a sexual identity, since it is not in conformity with normative expectations in society and law.¹⁹²⁷ Opening up the right's scope to *all* persons therefore arguably better reflects the social constructionism behind *all* forms of sex (characteristics), gender (identity/expression) and sexual orientation. Moreover, many persons do not view their sexual identity through the lens of fixed and externally imposed categories, like 'homosexual', 'lesbian', 'transgender' or 'intersex'.¹⁹²⁸ For this reason, despite the aforementioned functional value of specialised rights provisions, it would be virtually impossible to conceptually frame the constitutional provision in an inclusive way while making use of limitations in its scope *ratione personae*. Moreover, it needs to be reminded that not only sexual minorities may find the State's

¹⁹²⁶ F. MEGRET, "The Human Rights of Older Persons: A Growing Challenge", *Human Rights Law Review* 2011, p. 413.

¹⁹²⁷ See in this regard also D. OTTO, "Queering Gender (Identity) in International Law" in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 24.

¹⁹²⁸ J. MERTUS, "Applying the Gatekeeper Model of Human Rights Activism: The U.S.-Based Movement for LGBT Rights" in C. BOB (ed.), *The International Struggle for New Human Rights*, Philadelphia, Penn Press, 2008, p. 65.

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power over a person's sexual identity problematic or a violation of human rights. Cisgender persons might for instance also object to sharing information about their gender (identity) through public documents such as the identity card, international passport or driver's license. In this regard, a constitutional right to autonomy regarding one's sexual identity would also protect their interests. Lastly, rights relating to sex (characteristics), sexual orientation, and gender (identity/expression) are first and foremost universal individual rights that do not depend on membership of a certain defined sexual minority, if such definition would be even possible.¹⁹²⁹

In any case, as BREMS already pointed out, universally formulated and applicable human rights standards do not necessarily prevent taking into account contextual factors or specific circumstances relevant to the lives of human beings of non-dominant groups in society.¹⁹³⁰ By interpreting human rights provisions through the aforementioned lens of inclusive universality, people who do not correspond to the implicit reference point of human rights are brought within the law's scope. It goes without saying that this is especially true for a fundamental right guaranteeing the autonomy of all persons regarding their sexual identity.

II. Application to (cisgender) women and feminist critiques

As a logical consequence of the right's universal personal scope, it would also be applicable to (cisgender) women. As a group, women have suffered from structural discrimination and violence in patriarchal societies across the globe and throughout history. This subordination of women to the interests of men was for a very long time also structurally reflected in law, and was thus State-sponsored. Over the last century, feminist activists and lawmakers have therefore fought for equality between women and men, mostly resulting in formal legal equality. However, it is still questioned whether women have actually obtained substantive equality in society and whether the law has

¹⁹²⁹ See in this regard E. HEINZE, *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 50.

¹⁹³⁰ E. BREMS, "Accommodating Diversity in International Human Rights: Legal Techniques" in P. MEERTS (ed.), *Culture and International Law*, The Hague, Hague Academic Press, 2008, p. 63-81.

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ceased to express or be based on stereotypical narratives of masculinity and femininity.¹⁹³¹ In this regard, it may be argued that a newly created constitutional provision to autonomy regarding a person's gender is also a manifestation of legal feminism and its struggle to upend persisting forms of substantive structural discrimination of women and girls on grounds of gender non-conformity.¹⁹³² Nevertheless, there must be attention for the feminist critique that degendering the legal system, predominantly by abolishing compulsory gender (identity) registration could potentially also endanger the counteracting of existing social, political and economic inequalities, predominantly based on gender (identity/expression/role).¹⁹³³ Indeed, while legal categories based on sex/gender have been used to enforce patriarchal norms in law and society, it is sometimes argued that they also could be used to address persistent inequities along gender lines.¹⁹³⁴

Feminism has had a particularly stormy relationship with transgender activism, and to a lesser extent also with intersex activism. Central to many of past and existing conflicts is the notion of authenticity, i.e. the question of whether trans women can be considered 'true' women.¹⁹³⁵ While so-called

¹⁹³¹ See in this regard also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 990-991.

¹⁹³² See also J. A. CLARKE, "They, Them, and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 917-918. See – albeit implicitly – also K. REINECK, "Running from the gender police: reconceptualizing gender to ensure protection for non-binary people", *Michigan Journal of Gender & Law* 2017, Vol. 24, p. 295-298.

¹⁹³³ P. DUNNE and J. MULDER, "Beyond the Binary: Towards a Third Sex Category in Germany?", *German Law Journal* 2018, Vol. 19, p. 646. See also D. COOPER, "Diversifying, Abolishing, Equalising Gender... Can the Law Do All Three?", <<https://futureoflegalgender.kcl.ac.uk/2018/08/22/diversifying-abolishing-equalising-gender-can-the-law-do-all-three/>> (last visited 13 September 2018); J. A. CLARKE, "They, Them and Theirs", *Harvard Law Review* 2019, Vol. 132, p. 919-920; D. COOPER, "A Very Binary Drama: The Conceptual Struggle for Gender's Future", *Feminists@Law* 2019, Vol. 9(1), p. 22-25.

¹⁹³⁴ P. DUNNE and J. MULDER, "Beyond the Binary: Towards a Third Sex Category in Germany?", *German Law Journal* 2018, Vol. 19, p. 646.

¹⁹³⁵ S. HINES, "The feminist frontier: on trans and feminism", *Journal of Gender Studies* 2017, <<https://doi.org/10.1080/09589236.2017.1411791>> (last visited 31 July 2018), p. 2. See in this regard also L. PORTUONDO, "The Overdue Case against Sex-Segregated Bathrooms", *Yale Journal of Law and Feminism* 2018, Vol. 29, p. 467-468, and the references included therein.

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'second wave' feminists focussed on the centrality of the (natural) female body for feminist activism, excluding trans women who are still considered to embody male dominance and privilege,¹⁹³⁶ postmodern constructionist theorists like Judith BUTLER, rather depart from the socially constructed basis of not only gender (roles), but also sex and bodies.¹⁹³⁷ According to BUTLER, bodies and bodily differences do matter, but the ways in which they matter are a social phenomenon.¹⁹³⁸ This social constructionism of both sex and gender provided tools for queer theorists to denaturalise sex and gender and to claim that neither sex nor gender exists prior to normative discourses which lead to the exclusion of certain experiences that fall out of the binary normality.¹⁹³⁹ In any case, anti-transgender feminism (so-called Trans-Exclusionary Radical Feminism or 'TERF') still exists, which might be connected to the growing visibility of transgender movements and rapid legal changes and strengthened transgender rights frameworks across the globe.¹⁹⁴⁰

Arguably, feminism and feminist aspirations should not be sceptical of a right to autonomy regarding sexual identity, since it essentially (aims to) overthrow(s) heteronormative patriarchy as a legal principle for *all individuals*, by recognising the prohibition for the law to reinforce social constructions of sexual identity that work oppressively.¹⁹⁴¹ While most

See also D. COOPER, "A Very Binary Drama: The Conceptual Struggle for Gender's Future", *Feminists@Law* 2019, Vol. 9(1), p. 10.

¹⁹³⁶ See in this regard L. FINLAYSON, K. JENKINS, R. WORSDALE, "'I'm not transphobic but...': A feminist case against the feminist case against trans inclusivity", <<https://www.versobooks.com/blogs/4090-i-m-not-transphobic-but-a-feminist-case-against-the-feminist-case-against-trans-inclusivity>> (last visited 19 October 2018).

¹⁹³⁷ S. HINES, "The feminist frontier: on trans and feminism", *Journal of Gender Studies* 2017, <<https://doi.org/10.1080/09589236.2017.1411791>> (last visited 31 July 2018), p. 4.

¹⁹³⁸ J. LORBER, "Using gender to undo gender. A feminist degendering movement", *Feminist Theory* 2000, p. 85.

¹⁹³⁹ D. OTTO, "Queering Gender (Identity) in International Law" in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 24.

¹⁹⁴⁰ S. HINES, "The feminist frontier: on trans and feminism", *Journal of Gender Studies* 2017, <<https://doi.org/10.1080/09589236.2017.1411791>> (last visited 31 July 2018), p. 1.

¹⁹⁴¹ *Ibid.*, p. 4. See also L. PORTUONDO, "The Overdue Case against Sex-Segregated Bathrooms", *Yale Journal of Law and Feminism* 2018, Vol. 29, p. 465-526, and the references included therein. The article argues that sex/gender-segregated facilities such as restrooms

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feminist literature focusses on the question of what – or what does not – constitute(s) femininity and masculinity and the power dimensions and hierarchies that follow from those concepts,¹⁹⁴² this thesis has predominantly addressed the matter of how a person's (legal) sex/gender status is determined and whether this should occur in the first place.¹⁹⁴³ Nevertheless, the latter debate clearly influences the degree to which society is gendered and oppressions continue to exist along gender lines. In this regard, LORBER has stated that feminists should also challenge the structural gendering of law and society, with the long-term goal of doing away with binary gender divisions altogether, next to focussing on the matter of male-female equality.¹⁹⁴⁴ In similar terms, RUBIN has called for the “liberating [of] human personality from the straitjacket of gender”.¹⁹⁴⁵ Indeed, while the status of women in the West has improved enormously in the last century, the situation of formal equality has not been successful of challenging the ubiquitous division of people into two unequally valued categories that

and locker rooms assume and perpetuate harmful stereotypes about women's bodies, sexuality and roles in society which they owe to their subordination in the heteronormative patriarchal society. See also D. ANAGNOSTOU, “Gender equality and parity in European national constitutions” in H. IRVING (ed.), *Constitutions and Gender*, Cheltenham, Edward Elgar Publishing, 2017, p. 273. See also D. COOPER, “Diversifying, Abolishing, Equalising Gender ... Can the Law Do All Three?”, <<https://futureoflegalgender.kcl.ac.uk/2018/08/22/diversifying-abolishing-equalising-gender-can-the-law-do-all-three/>> (last visited 13 September 2018).

¹⁹⁴² See in this regard E. PICARRA, and C. VISSER, “Victor, Victoria or V? A Constitutional Perspective on Transsexuality and Transgenderism”, *South African Journal on Human Rights* 2012, Vol. 28, p. 509.

¹⁹⁴³ See in this sense D. COOPER, “A Very Binary Drama: The Conceptual Struggle for Gender's Future”, *Feminists@Law* 2019, Vol. 9(1), p. 6.

¹⁹⁴⁴ J. LORBER, “Using gender to undo gender. A feminist degendering movement”, *Feminist Theory* 2000, p. 79. See in this regard also M. GRAVEN and M. VAN DEN BRINK, “Trans m/v. Genderdiversiteit, seksegelijkheid en het recht [Trans m/f. Gender diversity, sex equality and the law]”, *Tijdschrift voor Genderstudies* 2008, p. 63; M. VAN DEN BRINK and J. TIGCHELAAR, “M/V en verder. Sekseregistratie door de overheid en de juridische positie van transgenders [M/F and beyond. Sex registration by the government and the legal status of transgender persons]”, <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last visited 17 October 2018), p. 58.

¹⁹⁴⁵ See J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 917.

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continues to undergird reappearing instances of gender inequality.¹⁹⁴⁶ OTTO argues that the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979 did little to change this state of affairs.¹⁹⁴⁷ She holds that “men are the only other gender (identity) recognised in CEDAW, and they primarily serve as the comparator against which women’s (in)equality is to be measured. Paradoxically this arrangement, whereby men’s experience sets the universal standard for everyone, reaffirms the tradition of both gender duality and hierarchy in an instrument that seeks to promote women’s full humanity”.¹⁹⁴⁸ However, OTTO has also attributed a potentially revolutionary power to CEDAW, and especially to Article 5(a), which requires States to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Although the language of Article 5(a) remains firmly rooted in the sex/gender binary, it is argued in the literature that the full recognition of the existence of gender norms and stereotypes should lead to the interpretation of CEDAW as prohibiting all forms of sex/gender discrimination, including those by men and all other genders.¹⁹⁴⁹ In this regard, HOLTMAAT has pointed out the transformative potential of legal feminism, whereby the State’s obligation to fight gender stereotypes should enable everyone to experience their gender (identity) in

¹⁹⁴⁶ J. LORBER, “Using gender to undo gender. A feminist degendering movement”, *Feminist Theory* 2000, p. 80. See in this regard also D. OTTO, “Queering Gender (Identity) in International Law” in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 30. See also S. MONRO and J. VAN DER ROS, “Trans* and gender variant citizenship and the state in Norway”, *Critical Social Policy* 2018, Vol. 38(1), p. 58.

¹⁹⁴⁷ D. OTTO, “Queering Gender (Identity) in International Law” in A. HELLUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 26.

¹⁹⁴⁸ Ibid., p. 26. See with regard to formal sex/gender equality provisions in national constitutions also D. ANAGNOSTOU, “Gender equality and parity in European national constitutions” in H. IRVING (ed.), *Constitutions and Gender*, Cheltenham, Edward Elgar Publishing, 2017, p. 273.

¹⁹⁴⁹ Ibid., p. 27.

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the way they choose, without suffering discriminatory consequences.¹⁹⁵⁰ Indeed, gender stereotypes and fixed role patterns directly affect everyone who renounces heteronormative patriarchy.¹⁹⁵¹ This reading of the objectives of feminism thus closely relates to the aims behind the introduction of a constitutional right to personal autonomy regarding one's sexual identity. In fact, feminist ethics and politics, concerned with issues pertinent to women's autonomy such as the oppression, subordination, abuse and exploitation of women and girls,¹⁹⁵² may be seen as a derivative of the broader constitutional struggle to provide all persons autonomy over their own sexual identity.

The newly created constitutional provision would arguably not directly combat all forms of hardship and injustice that women face in male-dominated societies, such as unequal pay for equal work, so-called 'glass ceilings' in professional contexts, sexual violence or sexist harassment.¹⁹⁵³ Nevertheless, it might "undercut the legitimization of these harmful manifestations of masculinity",¹⁹⁵⁴ since it addresses the existence and persistence of stereotypes that are the root causes of women's subordinate status in society.¹⁹⁵⁵ Moreover, it would not prevent women or men of feeling

¹⁹⁵⁰ R. HOLTMAAT, "The CEDAW: a Holistic Approach to Women's Equality and Freedom" in A. HELLUM and H. SINDING AASEN (eds.), *Women's Human Rights: CEDAW in International, Regional and National Law*, Cambridge, Cambridge University Press, 2013, p. 115-116.

¹⁹⁵¹ R. HOLTMAAT and P. POST, "Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?" in A. HELLUM (ed.), *Human Rights, Sexual Orientation and Gender Identity*, London, Routledge, 2017, p. 49.

¹⁹⁵² M. OSHANA, "A Commitment to Autonomy is a Commitment to Feminism" in A. VELTMAN and M. PIPER (eds.), *Autonomy, Oppression, and Gender*, Oxford, Oxford University Press, 2014, p. 142.

¹⁹⁵³ On the relation between transgender inclusivity and the combat against sexual violence towards women, see L. FINLAYSON, K. JENKINS, R. WORSDALE, "'I'm not transphobic but...': A feminist case against the feminist case against trans inclusivity", <<https://www.versobooks.com/blogs/4090-i-m-not-transphobic-but-a-feminist-case-against-the-feminist-case-against-trans-inclusivity>> (last visited 19 October 2018).

¹⁹⁵⁴ J. LORBER, "Using gender to undo gender. A feminist degendering movement", *Feminist Theory* 2000, p. 90.

¹⁹⁵⁵ See L. PERONI and A. TIMMER, "Gender Stereotyping in Domestic Violence Cases. An Analysis of the European Court of Human Rights' Jurisprudence" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 46. See also on the role of the law in constructing narratives on femininity in society: M. J. FRUG, "A

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female or male, or force women to capitulate to patriarchy. The provision would neither necessarily eliminate affirmative action towards women.¹⁹⁵⁶ As LORBER argues, “diminishment of gender as an organising principle of institutions and everyday life would not turn women into men any more than it would turn men into women. It would rather degenderise the best – and the worst – qualities of people”.¹⁹⁵⁷ OTTO adds that “while the feminist fear of losing precarious spaces that have been carved out for addressing women’s human rights abuses is not without substance, those spaces can be better protected by relinquishing the view of gendered power as always dualistic (m/f) and only ever hierarchically organised in men’s favour (m>f). [...] Instead, gender should be understood queerly as performative, as constituted and made intelligible by regulatory social norms, which govern the naturalisation of bodies and the assumption of sexed identities, while also providing the means of their contestation”.¹⁹⁵⁸ In other words, the introduction of the new constitutional provision would not obstruct the struggle of feminism against male privilege and oppression in society, but foster the principle that all persons have the freedom and autonomy to constitute their own gendered experiences.

After all, fighting against the devaluation of the ‘feminine’ in society is also of great importance for sexual minorities. The reality of the ‘feminine’ being considered to be of an inferior status in relation to the ‘masculine’, has led to discrimination and violence against males who have rejected stereotypes associated with their assumed sexual identity and have adopted ‘feminine’ views, expressions, sexuality and/or behaviour.¹⁹⁵⁹ And on the other hand, contempt and ridicule is reserved for ‘females’ who show ‘masculine’

postmodern feminist legal manifesto (an unfinished draft)”, *Harvard Law Review* 1992, Vol. 105, p. 1045-1075.

¹⁹⁵⁶ J. A. CLARKE, “They, Them, and Theirs”, *Harvard Law Review* 2019, Vol. 132, p. 951-952.

¹⁹⁵⁷ Ibid., p. 984-985.

¹⁹⁵⁸ D. OTTO, “Queering Gender (Identity) in International Law” in A. HELLMUM (ed.), *Human Rights, Sexual Orientation, and Gender Identity*, London, Routledge, 2017, p. 33.

¹⁹⁵⁹ E. PICARRA, and C. VISSER, “Victor, Victoria or V? A Constitutional Perspective on Transsexuality and Transgenderism”, *South African Journal on Human Rights* 2012, Vol. 28, p. 509.

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characteristics and “who are not only seen to be less than men, but also [...] less than women”.¹⁹⁶⁰

4. Conclusion

The introduction of a new constitutional right to autonomy regarding one’s sexual identity would be both radical and an expression of continuity at the same time. Given the universality of human rights, persons who are non-conforming regarding their sex (characteristics), sexual orientation and/or gender identity have theoretically enjoyed protection of their human rights since the beginning of the (international) human rights movement. However, sexual minorities have only received attention from a human rights perspective since the end of the 20th century. Both historic and current legal practice have shown that the legal status of sexual minorities and the recognition of their right to personal autonomy are incomplete, *inter alia*, due to the perseverance of normative and harmful stereotypes regarding sexual identity. In this sense, the introduction of a right to personal autonomy regarding sexual identity that challenges these normative assumptions would radically change the position of sexual minorities in law and society. After all, as VADE holds, “if one is not recognised as existing by the law, one is not protected by the law”.¹⁹⁶¹

National constitutional provisions still have a clear relevance for the protection of fundamental rights, despite the ever increasing internationalisation of human rights. Not only are national constitutions considered to be a State’s identity card that reflects the population’s fundamental values and aspirations, but they also have a clear pragmatic function. Constitutional provisions provide a mandate to the legislature to adopt legislation that implements fundamental rights, but they also limit the discretionary power of the legislature through procedures of constitutional review. Indeed, a constitutional right to personal autonomy regarding one’s

¹⁹⁶⁰ Ibid., p. 509.

¹⁹⁶¹ D. VADE, “Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People”, *Michigan Journal of Gender and Law* 2005, Vol. 11(2), p. 256.

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sexual identity could provide agency to individuals – especially members of sexual minorities – to challenge legislation and other government measures that are based on and perpetuate harmful stereotypes regarding sexual identity.¹⁹⁶² Moreover, constitutional fundamental rights can be instrumental for the protection of human rights in regional human rights systems, such as the ECHR, since they might add to the development of a consensus regarding certain human rights claims at the international level.

Although a constitutional right to autonomy regarding one's sexual identity would predominantly benefit minorities who have been structurally oppressed on the basis of their sex characteristics, gender (identity and/or expression) and/or sexual orientation, this chapter proved that a generally formulated right would benefit all persons who struggle for societal degendering, including feminists. While it would create the obligation for the State not to enforce or act on stereotypes regarding sexual identity that are harmful and lead to exclusion, important positive obligations would also be deduced from the constitutional provision. In any case, the provision would clearly provide the constitutional basis and (negative and/or positive) obligation for the State to address the gaps in the legal status of persons with variations of sex characteristics and transgender persons that were identified in Chapters III and IV of this thesis.

¹⁹⁶² See in this regard also A. SPERTI, *Constitutional Courts, Gay Rights and Sexual Orientation Equality*, Oxford, Bloomsbury, 2017, p. 2-3. See comparably, with regard to the women's movement, also D. ANAGNOSTOU, "Gender equality and parity in European national constitutions" in H. IRVING (ed.), *Constitutions and Gender*, Cheltenham, Edward Elgar Publishing, 2017, p. 285. See also S. SUTEU, "Gender in Comparative Constitutional Change" in X. CONTIADES and A. FOTIADOU (eds.), *Routledge Handbook on Comparative Constitutional Change*, London, Routledge, 2019 (forthcoming). Also available at <<https://ssrn.com/abstract=3344251>> (last visited 9 April 2019), p. 12.

Chapter VI. General conclusion

This final chapter will present the conclusions that can be drawn from this research (1.) as well as make a suggestion for further research (2.). Doing so first requires a recapitulation of the objectives and research questions behind this thesis. As explained in the introductory Chapter I, the thesis' main theme is whether a legal framework based on (the constitutional recognition of a right to) personal autonomy regarding sex (characteristics), sexual orientation and gender (identity/expression) would enhance the legal status of sexual minorities, i.e. persons who are (socially and legally) non-conforming with regard to their sexual identity. In this regard, it was first critically analysed to what extent the present Belgian legal framework recognises, protects and fulfils the right to personal autonomy of sexual minorities and how gaps in legal protection could be tackled. An important aspect of this objective consisted of questioning the appropriateness of currently used legal terminology. Second, on a normative level, it was studied how the introduction of a constitutional right to personal autonomy regarding a person's sex (characteristics), sexual orientation and gender (identity/expression) could enhance the legal status of sexual minorities and how it could be formulated. As mentioned in Chapter I, these research objectives and questions were addressed through a cross-disciplinary literature study, using Belgium as an illustration of an ethically progressive State with a strong constitutional tradition. The legal analysis was informed by the insights of post-structuralist feminist and queer theories.

Despite positive evolutions since the 1990's, sexual minorities continue to be a marginalised group due to their socially non-conforming sex, gender identity/expression and/or sexual orientation. Data from all over the world – including Belgium – shows that sexual minorities experience high levels of discrimination and verbal, psychological, physical and material violence. Researching how the position of sexual minorities can be improved through legal reform therefore has clear social relevance. Indeed, the question arises whether the law is capable of effectively respecting, protecting and fulfilling

the human rights of socially non-conforming persons if it reinforces or facilitates the continuation of stereotypes in society. Although States may use a variety of legislative, judicial and policy channels to address the rights of sexual minorities, constitutions are important tools, because of their symbolic and legal weight, resistance to reversal in case of changes in the government, and burdensome amendment procedure. Constitutional law thus provides a useful perspective for addressing the issues that sexual minorities face in Belgian law and society.

1. Conclusions of the research

Although there are differences in the extent to which the Belgian legal framework respects, protects and fulfills the right to personal autonomy of persons with variations of sex characteristics, transgender persons and non-heterosexual persons, it is clear that the legal status of all three groups shows gaps due to an incorrect conceptual understanding of the true scope and variety of the human sexual identity. Abolishing stereotypes and normative assumptions concerning the sexual identity of a person in law is therefore crucial to improve the status of persons who are socially non-conforming with regard to their sex (characteristics), gender (identity/expression) and/or sexual orientation. Indeed, this thesis proved that, by failing to correctly conceptually address the situation of sexual minorities, the law fails to respect and protect their autonomy needs. Moreover, this violation of the human rights of sexual minorities also leads to a failure to fully include them within the law's expressive scope. The next sections recapitulate the most important findings of the research, taking into account the structure of this thesis.

A. The necessity of a correct conceptual understanding of sexual identity

Because of the importance of a correct conceptual understanding of sexual identity, Chapter II elaborated on the concepts of 'sex', 'variations of sex characteristics', 'gender identity/expression', 'gender non-conformity' and 'sexual orientation' and the stereotypes that both society and the law attach to them. Moreover, it also addressed the conflation between the elements of a person's sexual identity, showing that incorrect assumptions about the

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binarity of biological sex, the cisnormativity of a person's gender (identity) and the heteronormativity regarding sexual orientation are three interconnected social constructs. On the basis of this conflated model of sexual identity it is presumed that:

- There are only two biological sexes: male and female;
- Males will identify as men, be masculine and be sexually attracted to only females/women;
- Females will identify as women, be feminine and be sexually attracted to men/males.

These normative stereotypes have had – and continue to have – a significant social impact. Through incorrect conceptual understandings of variance in sexual identity, sexual minorities have been pathologised by society and often regarded as mentally disordered. While homosexuality was removed from classifications of mental disorders from the 1980's onwards, gender non-conformity and variations of sex characteristics continue to be conceptualised as medical conditions, and sometimes in need of immediate medical treatment. In this regard, Chapter II showed how social constructions of sex and gender (identity) have formed the justification for the invasive medicalisation of persons (especially young children) born with variations of sex characteristics. Since the middle of the twentieth century, the 'social emergency' of variations of sex characteristics has been translated in a medical treatment model of early, often non-consensual, surgery and hormonal treatment in order to 'protect' the child's future well-being. Nevertheless, interdisciplinary research has shown that almost all forms of sex assigning/normalising treatment are not based on any direct medical necessity and may cause significant trauma and distress. Although it appears that, since the 2010's, standards of care are evolving towards higher levels of protection of personal autonomy, non-consensual sex assigning/normalising treatment still occurs across the globe, including in Belgium.

Although 'sex' and 'gender (identity)' are different concepts, it is clear that they are interrelated and conflated in present society. Indeed, the abovementioned socially constructed binary sex model is complemented by

a gender (identity) construct that attaches normative expectations concerning identity, behaviour and expressions to physical differences between the (binary) sexes. On the basis of this cisnormativity, all persons born with 'typically' male sex characteristics are expected to develop a 'typically' male gender (identity) and gender expression and all persons born with 'typically' female sex characteristics are expected to develop a 'typically' female gender (identity) and gender expression. However, Chapter II demonstrated that gender has to be conceptualised as a spectrum with endless possibilities of variation. Some persons even deny the existence of gender *identity* that belongs to the core of the individual human being. Since the twentieth century, these forms of gender non-conformity have been pathologised by linking them to a psycho-medical diagnosis of transsexuality, gender dysphoria or gender incongruence. Moreover, the focus on (gender affirming) medical treatment as the dominant relief for gender (identity) issues was also translated in the law. Indeed, many legal systems around the world have connected the possibility of legal gender recognition to invasive psycho-medical requirements, such as a diagnosis of transsexuality/gender dysphoria, compulsory gender affirming treatment and compulsory sterility. At the very least, this conflation between appropriate legal accommodation of gender non-conforming persons and appropriate, individualised trans-specific health care has hampered the recognition of the true scope of (binary and non-binary) gender variance as a natural human reality.

As is the case with gender (identity), interdisciplinary research has shown that human sexuality, sexual preferences and orientation are as varied and numerous as there are individual human beings. Sexuality can therefore not be confined to categories such as 'heterosexuality', 'homosexuality' or 'bisexuality'. Nevertheless, non-heterosexual persons remain a socially marginalised group, since they fail to correspond to normative expectations regarding sexuality and sexual preferences. Indeed, up until today, through heteronormative institutions, mechanisms and conceptions, heterosexuality is often regarded as the only natural form of sexuality, leading to a privileged position in society. In this regard, Chapter II pointed out that the persistent heteronormativity of society is at the roots of many (harmful) stereotypes

regarding variations of sex characteristics and gender variance. It was shown that one of the reasons for non-consensual sex ‘normalising’ treatment of children born with variations of sex characteristics is the enabling of heterosexual penetrative sex. Moreover, heteronormative assumptions regarding a person’s sexual preference and sexual life are strongly interconnected with normative expectations regarding that person’s gender (identity), gender expression and gender role. For instance, transgender persons who show a combination of both ‘masculine’ and ‘feminine’ features, are often presumed to be homosexual, i.e. deviant of the heteronorm.

B. The Belgian legal system fails to fully protect the right to personal autonomy of persons with variations of sex characteristics

Chapter III of this thesis researched the legal status of persons with variations of sex characteristics, from the perspective of the protection of their right to personal autonomy. Three topics were selected for extensive study: the matter of so-called sex assigning/normalising medical treatment, the official sex registration system and the legal instruments to combat discrimination on the basis of sex characteristics. In this regard, it became immediately clear that the Belgian legal system does not spend much attention on the specific situation of persons with variations of sex characteristics, and by not doing so, violates their right to personal autonomy.

1. Sex assigning/normalising treatment of persons with variations of sex characteristics

As mentioned above, persons with variations of sex characteristics have been, and continue to be subjected to invasive surgeries and hormonal treatment on their sex characteristics in order to align them with persistent stereotypes regarding the binarity of biological sex. These stereotypes are complemented by normative expectations regarding the aesthetics of sex characteristics (especially genitalia), the necessity of congruence between sex and gender (identity) for the individual well-being, and the future heterosexual activities of the person concerned. Treatment often occurs during early childhood and is mostly based on speculation, informed by indecisive medical research,

gender stereotypes and bias among medical practitioners and parents. Considering the child's young age, most forms of treatment are based on the parents' informed consent, which is a normal application of the legal representation of minors.

The Belgian legal system has not been able to effectively prevent a violation of the right to personal autonomy of persons with variations of sex characteristics. The federal Act concerning the rights of the patient makes uses of criteria that enable substituting the opinion of the person born with variations of sex characteristics for the parent's opinion, without any justification based on medical necessity. Indeed, precisely because of the child's young age and the severity of the proposed treatment and its consequences, the opinion of the legal representative has clear legal priority over the child's own opinion, despite – in most cases – the lack of any convincing reason for medical intervention. However, research has shown that parents are often not fitted to make unbiased decisions about their child's sex characteristics, based on their own assumptions, fears and insufficient medical information. Given the high risks that accompany treatment on sex characteristics, this situation does not protect the child's best interests and violates its right to personal autonomy.

Chapter III also proposed a legislative solution: Belgium should legally ban deferrable, non-consensual treatment on the sex characteristics of a minor who is not (yet) able to provide informed consent autonomously or through the legal representative, but maintain the possibility to perform treatment in exceptional circumstances on the basis of explicit, formal agreement between the legal representative and an interdisciplinary team. Until the person concerned can provide informed consent, these exceptional circumstances cannot amount to social reasons, such as cosmetics, avoiding social stigma or enabling penetrative heterosexual activities. Aside from a legal provision to stop non-consensual, medically unnecessary treatment on a person's sex characteristics, the reasons underlying these acts should also be challenged through various legislative, administrative and other measures tackling harmful stereotypes concerning sex and gender in society.

II. Official sex registration

It is clear that a legal ban on non-consensual, medically unnecessary treatment on a person's sex characteristics would lead to a higher (though natural) visibility of variations of sex characteristics. However, Belgian law, and especially the model of official sex registration currently strongly expresses binary sex normativity. Although there are no legal provisions in this regard, the legal system self-evidently assumes the existence of only two sexes, i.e. 'male' and 'female'. Despite the possibility in Article 48 (previously Article 57, 1°) of the Civil Code to delay the registration of a person's sex during three months if that person's sex cannot easily be established, Belgian law eventually forces all persons with variations of sex characteristics in one of the binary boxes. However, it remains to be seen how much longer this binary sex normativity will remain, since the Constitutional Court suggested in its ruling on the 2017 Gender Recognition Act that the legislature could introduce one or more categories for sex/gender registration *at birth*, in order to respect the individual right to personal autonomy.

Moreover, it was established in Chapter III that this recorded binary sex, which is usually based on a superficial check of a new-born child's genitalia by a medical professional, is predominantly used for matters relating to that person's gender (identity). In other words, not only does the legal sex marker not fully reflect the natural human variations in biological sex, but also the usage of a person's official sex marker is tainted by a basic conflation between sex and gender (identity) on the basis of cisnormative stereotypes. This finding is corroborated by the possibility to have one's recorded sex amended in the light of one's gender (identity) solely on the basis of gender self-determination, which was introduced by the 2017 Gender Recognition Act. If a person chooses to amend their official sex marker in the light of their gender (identity) without also undergoing treatment on their sex characteristics, the official sex marker becomes impertinent to guarantee the achievement of one of its dominant sex-related aims, i.e. the collection of public health information to enable government policies, such as preventive cancer screenings.

In order to include persons with variations of sex characteristics in the model of sex registration, and to avoid any conceptual conflation leading to impertinent government performance, Chapter III proposed a clear separation between 'sex' and 'gender (identity)' in the official registration framework. A deconflated model of sex registration should, considering the potential usage of information concerning biological sex, be based on a medical statement after birth, or whenever a person chooses to undergo treatment on their sex characteristics. Although compulsory sex registration on the basis of a medical statement interferes with a person's right to personal autonomy, it is not disproportionate in the light of the legitimate aim mentioned in the previous paragraph. Indeed, sex registration through a model of self-declaration in order to preserve a person's self-determination, could impede its biological truthfulness and therefore its functionality. Moreover, given the potential functionalities of biological sex, which are not identity related, sex registration could be undone of categories such as 'male', 'female' or 'X' and be shielded from public access.

III. Discrimination on the basis of sex characteristics

Although there is a lack of official data, interdisciplinary research clearly links experiences of discrimination to the social response to variations of sex characteristics. In this regard, it may be assumed that a legal ban on the non-consensual, medically unnecessary sex assigning/normalising treatment, as well as a deconflated model of official sex registration, could increase the visibility of persons with variations of sex characteristics in society, making the group potentially more vulnerable to discrimination. Interestingly, Chapter III established that only a handful of countries world-wide have addressed the situation of persons with variations of sex characteristics in their legal anti-discrimination framework.

There appears to be no strict legal necessity to add a separate ground 'sex characteristics' to current Belgian non-discrimination legislation. Indeed, the ground 'sex' could be interpreted as also including 'variations of sex characteristics'. Nevertheless, Chapter III showed that there is a societal need to do so. Failing to explicitly acknowledge that discrimination occurs on the

grounds of a person's sex characteristics, e.g. because of an actual or perceived incongruence between them, disavows the root cause of rights abuses for persons with variations of sex characteristics. Moreover, explicitly adding 'sex characteristics' as an interpretation of 'sex' in anti-discrimination legislation, would not be contrary to the Belgian legal tradition. Most legislatures already explicitly included 'gender identity', 'gender expression' and/or 'sex reassignment' within the protective scope of the notion 'sex' in anti-discrimination legislation. In any case, the introduction of a new discrimination ground should be complemented by an overall commitment by the legal system to conceptualise 'sex' in conformity with the non-binary reality that includes all individuals, instead of the dichotomous 'male'/'female' categories that only include a dominant group.

C. The Belgian legal system fails to fully protect the right to personal autonomy of transgender persons

Chapter IV of this thesis dealt with the study of the legal status of transgender persons in Belgium, from the perspective of the protection of their right to personal autonomy. Focus was given to the legal framework concerning the legal recognition of a person's actual gender (identity), which was profoundly reformed by the 2017 Gender Recognition Act. Although Belgian law now enables changing one's official sex marker on the basis of gender self-determination, and therefore without having to comply with invasive medical requirements, it still encapsulates the official sex/gender registration model in a broader legal framework that is characterised by persistent and harmful stereotypes regarding gender (identity) in general and gender non-conformity in particular. Moreover, the 2017 Gender Recognition Act did not profoundly overhaul the State's quasi monopoly to set the boundaries for the determination, recognition and administration of gender (identity), both regarding the initial registration at birth and in the procedure of legal gender recognition. In any case, Chapter IV clearly demonstrated that the Belgian official sex/gender registration system has evolved from a system that registers biological sex to a system that registers a person's (assumed or actual) gender (identity). Nevertheless, the gender registration framework

will be again reformed in the near future, since the Constitutional Court struck down several provisions that discriminated non-binary and gender fluid persons, in light of their right to gender self-determination.

According to the case law of the European Court of Human Rights, every person has the right to self-determine their gender (identity), as well as the right to have that gender (identity) recognised by the law. However, the Court allows a wide margin of appreciation concerning the conditions that the State may connect to this procedure of legal gender recognition. In this regard, considering its insufficient conceptual understanding of gender (identity) and gender variance, as well as its adherence to a binary conceptualisation of sex and gender, the Court continues to allow requirements such as a psycho-medical diagnosis and compulsory gender affirming treatment. Nevertheless, Chapter IV showed that there is a(n) (emerging) right to full depathologisation of transgender identities under international and European human rights law. This emerging right was also recognised by the Belgian government and legislature during the parliamentary proceedings preceding the adoption of the 2017 Gender Recognition Act. Despite the government's commitment to its international human rights obligations, the Gender Recognition Act remained laced with harmful stereotypes, simultaneously leading to over- and under-inclusiveness. Not only did strongly paternalising conditions such as the intervention by the Public Prosecutor and the principled irreversibility of a change of registered sex, lead to the exclusion of gender fluid persons, they also expressed the legislatures's continuing belief that there is something 'abnormal' with gender variance. Moreover, the lack of any conceptual demarcation between 'sex' and 'gender (identity)' before, within and after the procedure of legal recognition maintained the law's cisnormativity and actually reversed it. Indeed, until they make use of the procedure of legal gender recognition, all persons will be assumed to have a gender (identity) that is in conformity with their sex characteristics. After legal gender recognition, a person will be assumed to have a body that is in conformity with the registered gender, which is not necessarily the case. Lastly, the Act did not recognise any form of non-binary gender (identity), excluding a significant group of individuals from the law's protective and

expressive scope. In June 2019 the Belgian Constitutional Court effectively improved the protection of the right to autonomy of transgender persons by finding the principled irreversibility of legal gender recognition and the absence of any form of non-binary gender recognition in the 2017 Gender Recognition Act a violation of the right to equality *ex* Articles 10-11 of the Constitution, read together with Article 8 ECHR and Article 22 of the Constitution. According to the Court, the federal legislature has now the clear mandate to break the sex/gender binary in Belgian law, either by introducing one or more new categories in the registration framework, or by eliminating sex and gender (identity) as elements of the individual civil status. Gender fluid persons will now also have the possibility to change their registered 'sex' as many times as they deem necessary, on the basis of the same administrative procedure.

Even though the protection of the right to personal autonomy of transgender persons, as well as their inclusion in the legal system, are best served by a total abolition of all forms of gender (identity) registration, it is clear that present societal circumstances still demand some form of State controlled registration, especially in order to protect transgender persons against gender policing, violence and prejudice. In this regard, Chapter IV suggested that – as an intermediate solution – the Belgian legislature should remove all gender information from official identification documents, such as the birth certificate and the identity card, and start issuing a gender pass(port), solely on the basis of a simple, convertible, and voluntary declaration of gender (identity). In order to eliminate all forms of cis- and binary normativity, this gender pass(port) could only be issued when the person concerned is capable of self-identification and should not be limited to any ascriptive categories. Nevertheless, in order to make registration of gender (identity) truly voluntary, the introduction of a gender pass(port) should be complemented by official policies that focus on the centrality of self-declaration of gender (identity) in all circumstances where gender continues to have legal and/or administrative relevance, such as in non-discrimination legislation and litigation.

D. Towards the constitutional protection of the right to personal autonomy regarding sex (characteristics), gender (identity/expression) and sexual orientation

Following the critical analysis of the legal status of persons with variations of sex characteristics and transgender persons, Chapter V of this thesis studied how the introduction of a constitutional fundamental right to personal autonomy regarding a person's sex (characteristics), sexual orientation and gender (identity/expression) could enhance the legal status of sexual minorities and how it could be formulated. Although sex (characteristics), gender (identity/expression) and sexual orientation have been increasingly considered as 'human rights issues' since the 1990's, constitutional provisions that address a person's sexual identity remain very rare around the globe. While scholars have questioned the 'protectability' of all potential human rights claims, national and international legal developments over the last decades have shown that a person's sexual identity (should) fall(s) within the protective scope of fundamental rights, as it is one of the most intimate elements of a person's life and belongs to the most basic essentials of self-determination.

Despite the ever-increasing internationalisation of human rights protection, national constitutional provisions still have a clear relevance for the protection of fundamental rights. First of all, national constitutions symbolically reflect a State's and its population's fundamental values and aspirations. In this regard, the constitution and its fundamental rights catalogue serve to educate the nation, as well as show the outside world the commitments of the democratic State. However, more importantly, national law and domestic procedures of judicial review remain the primary locus for human rights protection, as is for instance evidenced by the subsidiarity principle that is inherent to the ECHR. In this regard, Chapter V pointed out that the introduction of a fundamental right to personal autonomy regarding a person's sexual identity by the Constituent power would provide a mandate to – or even compel – the legislature to adopt measures that improve the legal and social status of sexual minorities. Moreover, the provision would

also create the negative obligation for the State to refrain from expressing or acting on stereotypes and other normative assumptions about a person's sex (characteristics), gender (identity/expression) and/or sexual orientation. In this regard, the new constitutional right would give agency to all non-conforming persons to challenge legislation and other official measures that are based on and perpetuate harmful stereotypes regarding sexual identity. Lastly, national constitutional developments (may) also have clear transboundary effects. Beside the possibility of so-called legal transplants, national constitutional developments could add to the development of a consensus or trend among States regarding the scope of the human rights protection of sexual identity, which is for instance taken into account by the European Court of Human Rights in its application of the rule of deference.

Lastly, Chapter V established that any right to personal autonomy regarding a person's sexual identity should be applicable to *all persons*, as well as include the *entire scope of sexual identity*. Indeed, although sexual minorities would mostly benefit from a fundamental protection of their autonomy rights, sexual identity is relevant to all persons, and especially to those groups who suffer from gendered stereotypes and prejudice. While the constitutional provision would create the obligation for the State not to enforce or act on stereotypes regarding sexual identity that are harmful and lead to legal and social exclusion, important positive obligations would also be generated. A substantive and sustainable realisation of a fundamental right to autonomy regarding sexual identity would rely on the implementation of the State's positive obligation to bring about cultural change regarding the conceptualisation of sex, sexual orientation and gender (identity/expression) in law and society.

2. Suggestion for further research

The normative conclusions of this thesis were formulated *in abstracto*, i.e. without giving a hands-on solution for all legal and practical problems that could emerge during their implementation in the (Belgian) legal system. Indeed, it became clear from the early stages of the research that it was necessary to first address broad, and fundamental conceptual issues,

Chapter VI. General conclusion

considering the perseverance of harmful stereotypes and misunderstandings in law, that ultimately violate the human rights of sexual minorities. Nevertheless, it is necessary to perform further research in order to think through all practical consequences for a legal system that fully recognises each person's right to personal autonomy regarding their sex (characteristics), gender (identity/expression) and sexual orientation. At the very least, the Belgian legal system should be empirically screened in order to identify instances where sexual identity acquires legal relevance. Those instances should then be critically analysed taking into account the conclusions of this thesis. As shown in Chapter V, the right to personal autonomy regarding one's sexual identity does not necessarily mean that sexual identity could never come within the sphere of legislation or government regulation. It means that the State is not allowed to limit a person's most intimate freedoms on the basis of normative assumptions that exclude complex human realities.

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Annexes

1. Act of 22 August 2002 concerning the rights of the patient (extract)

Article 5:

“De patiënt heeft, met eerbiediging van zijn menselijke waardigheid en zijn zelfbeschikking en zonder enig onderscheid op welke grond ook, tegenover de beroepsbeoefenaar recht op kwaliteitsvolle dienstverstrekking die beantwoordt aan zijn behoeften [The patient has, with respect for his human dignity and his self-determination and without any distinction on any ground, in relation to the professional the right to qualitative service delivery that responds to his needs.]”

Article 7:

“§1. De patiënt heeft tegenover de beroepsbeoefenaar recht op alle hem betreffende informatie die nodig is om inzicht te krijgen in zijn gezondheidstoestand en de vermoedelijke evolutie ervan. [The patient has the right in relation to the professional to all information that concerns him that is required to gain an understanding of his health and the presumed evolution thereof.]

§2. De communicatie met de patiënt geschiedt in een duidelijke taal. De patiënt kan erom verzoeken dat de informatie hem schriftelijk wordt bevestigd.[...] [The communication with the patient occurs through clear language. The patient can request to receive a written confirmation of the information.] [...]”

Article 8:

“§ 1. De patiënt heeft het recht om geïnformeerd, voorafgaandelijk en vrij toe te stemmen in iedere tussenkomst van de beroepsbeoefenaar. Deze toestemming wordt uitdrukkelijk gegeven behalve wanneer de beroepsbeoefenaar, na de patiënt

voldoende te hebben geïnformeerd, uit de gedragingen van de patiënt redelijkerwijze diens toestemming kan afleiden. Op verzoek van de patiënt of van de beroepsbeoefenaar en met de instemming van de beroepsbeoefenaar of van de patiënt, wordt de toestemming schriftelijk vastgelegd en toegevoegd aan het patiëntendossier. [The patient has the right to give informed, prior and free consent to each intervention by the professional. This consent is given explicitly, provided when the professional, after sufficiently informing the patient, can reasonably derive the consent from the patient's behaviour. The consent is registered in writing and added to the patient's file, at the request of the patient or the professional and with consent of the professional or the patient.]

§ 2. De inlichtingen die aan de patiënt verstrekt worden, met het oog op het verlenen van diens toestemming bedoeld in § 1, hebben betrekking op het doel, de aard, de graad van urgentie, de duur, de frequentie, de voor de patiënt relevante tegenaanwijzingen, nevenwerkingen en risico's verbonden aan de tussenkomst, de nazorg, de mogelijke alternatieven en de financiële gevolgen. Ze betreffen bovendien de mogelijke gevolgen ingeval van weigering of intrekking van de toestemming, en andere door de patiënt of de beroepsbeoefenaar relevant geachte verduidelijkingen, desgevallend met inbegrip van de wettelijke bepalingen die met betrekking tot een tussenkomst dienen te worden nageleefd. [The information provided to the patient with a view to granting the consent referred to in § 1, relates to the purpose, type, degree of urgency, duration, frequency, counter indications relevant to the patient, side effects and risks associated with the intervention, after-care, the possible alternatives and the financial implications. Moreover, they concern the possible consequences in case of refusal or withdrawal of consent, and other considered relevant clarifications by the patient or the professional, where appropriate

including the legal provisions which must be observed with regard to an intervention.]

§ 3. De in § 1 bedoelde informatie wordt voorafgaandelijk en tijdig verstrekt en onder de voorwaarden en volgens de modaliteiten voorzien in § 2 en § 3 van artikel 7. [The information referred to in § 1 is provided priorly and timely and under the conditions and in accordance with the provisions of § 2 and § 3 of Article 7.]

§ 4. De patiënt heeft het recht om de in § 1 bedoelde toestemming voor een tussenkomst te weigeren of in te trekken. Op verzoek van de patiënt of de beroepsbeoefenaar wordt de weigering of intrekking van de toestemming schriftelijk vastgelegd en toegevoegd aan het patiëntendossier. De weigering of intrekking van de toestemming heeft niet tot gevolg dat het in artikel 5 bedoelde recht op kwaliteitsvolle dienstverstrekking jegens de beroepsbeoefenaar ophoudt te bestaan. Indien de patiënt toen hij nog in staat was de rechten zoals vastgelegd in deze wet uit te oefenen, schriftelijk te kennen heeft gegeven zijn toestemming tot een welomschreven tussenkomst van de beroepsbeoefenaar te weigeren, dient deze weigering te worden geëerbiedigd zolang de patiënt ze niet herroept op een moment dat hij in staat is om zijn rechten zelf uit te oefenen. [The patient has the right to refuse or withdraw consent for an intervention mentioned in § 1. The refusal or withdrawal of consent is registered in writing and added to the patient's file at the request of the patient or the professional. Refusal or withdrawal of consent does not mean that the right to qualitative service delivery provided for in Article 5 against the professional ceases to exist. If the patient, when he was still able to exercise the rights as stipulated in this act, indicated in writing that he refuses to give consent to a defined intervention by the professional, this refusal should be respected as long as the patient does not revoke it on a time when he is able to exercise his rights himself.]

§ 5. Wanneer in een spoedgeval geen duidelijkheid aanwezig is omtrent de al dan niet voorafgaande wilsuitdrukking van de patiënt of zijn vertegenwoordiger zoals bedoeld in hoofdstuk IV, gebeurt iedere noodzakelijke tussenkomst van de beroepsbeoefenaar onmiddellijk in het belang van de gezondheid van de patiënt. De beroepsbeoefenaar maakt hiervan melding in het in artikel 9 bedoelde patiëntendossier en handelt van zodra dit mogelijk is overeenkomstig de bepalingen van de voorgaande paragrafen. [When in an emergency no clarity exists as to whether or not prior expression of will of the patient or his representative as provided for in Chapter IV has been given, every necessary intervention by the professional immediately happens in the interest of the health of the patient. The professional registers this fact in the medical file referred to in Article 9 and acts as soon as possible under the provisions of the preceding paragraphs.]”

Article 9:

“§ 1. De patiënt heeft ten opzichte van de beroepsbeoefenaar recht op een zorgvuldig bijgehouden en veilig bewaard patiëntendossier. Op verzoek van de patiënt voegt de beroepsbeoefenaar door de patiënt verstrekte documenten toe aan het hem betreffende patiëntendossier. [The patient has with respect to the professional the right to a carefully maintained and safely kept patient file. At the request of the patient the professional adds documents provided by the patient to the patient’s file.]

§ 2. De patiënt heeft recht op inzage in het hem betreffend patiëntendossier. Aan het verzoek van de patiënt tot inzage in het hem betreffend patiëntendossier wordt onverwijld en ten laatste binnen 15 dagen na ontvangst ervan gevolg gegeven. De persoonlijke notities van een beroepsbeoefenaar en gegevens die betrekking hebben op derden zijn van het recht op inzage uitgesloten. Op zijn verzoek kan de patiënt zich laten bijstaan door

of zijn inzagerecht uitoefenen via een door hem aangewezen vertrouwenspersoon. Indien deze laatste een beroepsbeoefenaar is, heeft hij ook inzage in de in het derde lid bedoelde persoonlijke notities. (In dit geval is het verzoek van de patiënt schriftelijk geformuleerd en worden het verzoek en de identiteit van de vertrouwenspersoon opgetekend in of toegevoegd aan het patiëntendossier.) Indien het patiëntendossier een schriftelijke motivering bevat zoals bedoeld in artikel 7, § 4, tweede lid, die nog steeds van toepassing is, oefent de patiënt zijn inzagerecht uit via een door hem aangewezen beroepsbeoefenaar, die ook inzage heeft in de in het derde lid, bedoelde persoonlijke notities. [The patient has the right to access to the file concerning him. Response to the request of the patient to inspect the file concerning him is given without delay and at the latest within 15 days upon reception. The personal notes of a professional and data relating third parties are excluded from the right to inspect. At his request, the patient can be assisted by, or exercise his right of access through a counselor appointed by him. If the latter is a professional, he also has access to the personal records referred to in the third paragraph. (In this case, the patient's request formulated in writing and the request and the identity of the counselor are recorded in or added to the patient file.) If the patient file contains a written statement referred to in Article 7, § 4, second paragraph, which is still applicable, the patient exercises his right of access via a professional designated by him, who also has access to personal notes referred to in the third paragraph.]

§ 3. De patiënt heeft recht op afschrift van het geheel of een gedeelte van het hem betreffend patiëntendossier (...), overeenkomstig de in § 2 bepaalde regels. Ieder afschrift vermeldt dat het strikt persoonlijk en vertrouwelijk is. [...] De beroepsbeoefenaar weigert dit afschrift indien hij over duidelijke aanwijzingen beschikt dat de patiënt onder druk wordt gezet om een afschrift van zijn dossier aan derden mee te delen. [The

patient is entitled to a copy of the whole or part of the patient file concerning him (...) in accordance with § 2. Each copy states that it is strictly personal and confidential. [...]The professional refuses this copy if he has clear evidence that the patient is put under pressure to communicate a copy of his file to third parties.]

§ 4. Na het overlijden van de patiënt hebben de echtgenoot, de wettelijk samenwonende partner, de partner en de bloedverwanten tot en met de tweede graad van de patiënt, via een door de verzoeker aangewezen beroepsbeoefenaar, het in § 2 bedoelde recht op inzage voorzover hun verzoek voldoende gemotiveerd en gespecificeerd is en de patiënt zich hiertegen niet uitdrukkelijk heeft verzet. De aangewezen beroepsbeoefenaar heeft ook inzage in de in § 2, derde lid, bedoelde persoonlijke notities. [After the death of the patient, the spouse, legal partner, the partner and the relatives to the second degree of the patient, through a professional appointed by the applicant, have the right referred to in § 2 to inspect to the extent that their application is sufficiently motivated and is specified and the patient not expressly objected. The designated professional has also access to the personal notes, referred to in § 2, subsection three.]”

Article 12:

“§1. Bij een patiënt die minderjarig is, worden de rechten zoals vastgesteld door deze wet uitgeoefend door de ouders die het gezag over de minderjarige uitoefenen of door zijn voogd. [When the patient is a minor, the rights established by this Act shall be exercised by the parents who exercise custody over the child or by his guardian.]

§2. De patiënt wordt betrokken bij de uitoefening van zijn rechten rekening houdend met zijn leeftijd en maturiteit. De in deze wet opgesomde rechten kunnen door de minderjarige patiënt die tot een redelijke beoordeling van zijn belangen in staat kan worden geacht, zelfstandig worden uitgeoefend. [The patient is involved

in the exercise of his rights considering his age and maturity. The rights listed in this Act can be independently exercised by the minor patient who can be considered capable of making a reasonable assessment of his interests.]”

2. Belgian Civil Code (extracts)

Article 35:

“§1. De persoon die een akte wil laten verbeteren of een ontbrekende akte wil laten vervangen overeenkomstig artikel 27 kan hiertoe een verzoekschrift indienen bij de familierechtbank. [§1. The person who wants a certificate corrected or a missing certificate replaced on the basis of article 27 may petition the family court.]

§2. De griffier van de kamer waar de zaak aan toebedeeld is, zendt het verzoekschrift over aan het openbaar ministerie. [...] [The clerk of the chamber to which the case has been assigned, sends the petition to the public prosecutor’s office. [...]]

§3. De griffier stuurt de gegevens nodig voor de opmaak van de gewijzigde akte overeenkomstig afdeling 6 ten gevolge van de verbetering of voor de opmaak van de vervangende akte via de DABS onmiddellijk naar de bevoegde ambtenaar van de burgerlijke stand en neemt de in kracht van gewijsde gegane rechterlijke beslissing als bijlage op in de DABS [The clerk sends the data necessary for the drafting of the certificate in accordance with section 6 due to the correction or for the replacing certificate via the Database of Civil Certificates to the competent civil registrar without delay and includes the enforceable judicial decision in the database].

De bevoegde ambtenaar van de burgerlijke stand maakt onmiddellijk de gewijzigde akte of akten van de burgerlijke stand ten gevolge van de verbetering of de vervangende akte op [The competent civil registrar drafts the amended civil certificate or

certificates as a result of the correction or the replacing certificate].

Article 43:

“§1. De vader of de meemoeder, en de moeder, of één van hen, doen de geboorteaangifte bij de ambtenaar van de burgerlijke stand van de geboorteplaats, binnen vijftien dagen na de geboorte. Is de laatste dag van die termijn een zaterdag, een zondag of een wettelijke feestdag, dan wordt de termijn verlengd tot de eerstvolgende werkdag. [The father or the co-mother, and the mother, or one of them, declare the birth with the civil registrar of the place of birth within fifteen days after birth If the last day of that period is a Saturday, a Sunday or an official holiday, the period will be prolonged with the next working day.]

”[...]

§4. De ambtenaar van de burgerlijke stand maakte de akte van de geboorte onmiddellijk op [The civil registrar drafts the birth certificate without any delay.]”

Article 44:

“De akte van geboorte vermeldt [The birth certificate mentions]:

1° de geboortedatum, de geboorteplaats, het uur van geboorte, het geslacht, de naam en de voornamen van het kind [...] [the date of birth, the place of birth, the hour of birth, the sex, the name and first names of the child [...]];

[...].”

Article 48:

“Indien het geslacht van een kind onduidelijk is, kunnen de vader of de meemoeder en de moeder, of één van hen, aangifte doen van het geslacht binnen de drie maanden na de geboorte, met voorlegging van een medisch attest [If the sex of the child is unclear, the father or the co-mother and the mother, or one of

them, may register the child's sex within three months after birth, if a medical certificate is presented]"

Former Article 62bis (2007-2017):

"§ 1. Elke Belg of elke in de bevolkingsregisters ingeschreven vreemdeling, die de voortdurende en onomkeerbare innerlijke overtuiging heeft tot het andere geslacht te behoren dan datgene dat is vermeld in de akte van geboorte, en die lichamelijk zodanig aan dat andere geslacht is aangepast als uit medisch oogpunt mogelijk en verantwoord is, kan van die overtuiging aangifte doen bij de ambtenaar van de burgerlijke stand. [Any Belgian or any alien, registered in the civil registers, with the continuous and irreversible inner conviction of belonging to the sex opposite to that which is mentioned in the birth certificate, and who is physically adapted to that other sex as is medically possible and justified, can declare this conviction to the registrar.]

[...]

§ 2. Bij de aangifte overhandigt de betrokkene aan de ambtenaar van de burgerlijke stand een verklaring van de psychiater en de chirurg, in de hoedanigheid van behandelende artsen, waaruit blijkt [During the declaration the person concerned hands to the registrar a statement of the psychiatrist and surgeon, acting as treating physicians, which shows]:

1° dat de betrokkene de voortdurende en onomkeerbare innerlijke overtuiging heeft tot het andere geslacht te behoren dan datgene dat is vermeld in de akte van geboorte [that the person concerned has the continuing and irreversible inner conviction of belonging to the sex opposite to that which is mentioned in the birth certificate];

2° dat de betrokkene een geslachtsaanpassing heeft ondergaan die hem zodanig in overeenstemming heeft gebracht met dat andere geslacht, waartoe betrokkene overtuigd is te behoren, als

dit uit medisch oogpunt mogelijk en verantwoord is [that the person concerned has undergone a sex reassignment that has brought him in accordance with that other sex, to which the person concerned is convinced of belonging to, as much as is medically possible and justified];

3° dat de betrokkene niet meer in staat is om overeenkomstig het vroegere geslacht kinderen te verwekken [That the person concerned is no longer capable of procreation according to the previous sex].

[...]

§ 4. Na deze aangifte maakt de ambtenaar een akte houdende vermelding van het nieuwe geslacht op [After this declaration, the registrar drafts a certificate stating the new sex].

De akte houdende vermelding van het nieuwe geslacht heeft uitwerking vanaf haar inschrijving in het register van de akten van geboorten [The certificate holding the new sex takes effect from its entry in the register of the birth certificates].

Deze inschrijving gebeurt wanneer de ambtenaar van de burgerlijke stand vaststelt dat geen verhaal tegen de akte houdende vermelding van het nieuwe geslacht werd aangetekend en ten vroegste 30 dagen na het verstrijken van de verhaaltermijn [This registration occurs when the registrar establishes that no appeal against the certificate holding the new sex was lodged and at the earliest 30 days after the expiry of the time limit for appeal].

De ambtenaar van de burgerlijke stand die de akte houdende vermelding van het nieuwe geslacht opmaakt, is gehouden hiervan binnen drie dagen kennis te geven aan de procureur des Konings bij de rechtbank van eerste aanleg [The registrar who drafts the certificate holding the new sex, must notify within three days the public prosecutor with the tribunal of first instance].

§ 5. De ambtenaar van de burgerlijke stand vermeldt op de kant van de geboorteakte die betrekking heeft op de betrokkene het nieuwe geslacht of geeft kennis van de akte houdende vermelding van het nieuwe geslacht aan de bevoegde ambtenaar van de burgerlijke stand [The registrar indicates the new sex on the side of the person's birth certificate or informs the competent registrar of the certificate holding the new sex].

[...]."

Current Article 135/1 (31/03/2019-...). Before: Article 62bis (2018-2019)

§ 1. Elke meerderjarige of ontvoogde minderjarige Belg of in de bevolkingsregisters ingeschreven vreemdeling die de overtuiging heeft dat het geslacht vermeld in zijn akte van geboorte niet overeenstemt met zijn innerlijk beleefde genderidentiteit kan van die overtuiging aangifte doen bij de ambtenaar van de burgerlijke stand [Every adult or emancipated minor or alien who is registered in the civil registers who has the conviction that the sex mentioned in his birth certificate is not in correspondence with his inner experienced gender identity may declare such conviction to the civil registrar].

[...]

§ 3. Bij de aangifte overhandigt de betrokkene aan de ambtenaar van de burgerlijke stand een door hem ondertekende verklaring, die vermeldt dat hij er al een hele tijd van overtuigd is dat het geslacht vermeld in zijn akte van geboorte niet overeenstemt met zijn innerlijk beleefde genderidentiteit en dat hij de administratieve en juridische gevolgen van een aanpassing van de registratie van het geslacht in zijn akte van geboorte wenst [The person concerned hands over a signed declaration to the civil registrar, which mentions that he has been convinced for a long time that the seks mentioned in his birth certificate is not in congruence with his inner experienced gender identity and that he desires the administrative and legal consequences of an amendment of the registered sex in his birth certificate].

De ambtenaar van de burgerlijke stand wijst de betrokkene op het in beginsel onherroepelijk karakter van de aanpassing van de registratie van het geslacht vermeld in de akte van geboorte¹⁹⁶³, licht deze in over het verdere verloop van de procedure, de administratieve en juridische gevolgen ervan en stelt de in het vijfde lid bedoelde informatiebrochure ter beschikking evenals de contactgegevens van transgenderorganisaties [The civil registrar points out the principled irreversibility of the amendment of the registered sex in the birth certificate, informs the person concerned about the course of the procedure, its administrative and legal consequences, and hands over the information brochure, as well as the contact details of transgender organisations].

De ambtenaar neemt akte van de verklaring, en geeft een ontvangstbewijs af aan de betrokkene [The civil registrar takes note of the declaration, and hands over a receipt note to the person concerned].

De ambtenaar van de burgerlijke stand die akte neemt van de verklaring, geeft hiervan binnen drie dagen kennis aan de procureur des Konings bij de rechtbank van eerste aanleg. [...] [The civil registrar who takes note of the declaration notifies the public prosecutor with the tribunal of first instance].

§ 4. De procureur des Konings kan, binnen drie maanden te rekenen van de datum van het ontvangstbewijs, een negatief advies uitbrengen wegens strijdigheid met de openbare orde [The public prosecutor may give, within three months after the date of the receipt note, negative advice because of conflict with public order].

Bij gebrek aan een negatief advies of in geval van verzending van een attest dat er geen negatief advies wordt uitgebracht bij het verstrijken van de termijn van drie maanden, wordt het advies geacht positief te

¹⁹⁶³ Annulled by the Constitutional Court. See Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019.

zijn [In default of negative advice or in default of advice within three months, the advice is considered to be positive].

§ 5. Ten vroegste drie maanden en ten laatste zes maanden na afgifte van het ontvangstbewijs verschijnt de betrokkene een tweede keer voor de ambtenaar van de burgerlijke stand voor wie de aangifte werd gedaan [Minimum three months and maximum six months after the issue of the receipt, the person concerned appears before the civil registrar for a second time] .

De betrokkene overhandigt hierbij aan de ambtenaar van de burgerlijke stand een ondertekende verklaring die vermeldt dat deze [The person concerned hands over a signed declaration to the civil registrar that mentions that]:

1° er nog steeds van overtuigd is dat het geslacht vermeld in zijn akte van geboorte niet overeenstemt met zijn innerlijk beleefde genderidentiteit [he is still convinced that the sex mentioned in his birth certificate is not incongruence with his inner experienced gender identity] ;

2° zich bewust is van de administratieve en juridische gevolgen die deze aanpassing van de registratie van het geslacht in de akte van geboorte met zich meebrengt [he is aware of the administrative and legal consequences of this amendment of the registered sex in the birth certificate];

3° zich bewust is van het in beginsel onherroepelijke karakter van de aanpassing van de registratie van het geslacht in de akte van geboorte¹⁹⁶⁴ [he is aware of the principled irreversibility of the amendment of the registered sex in the birth certificate].
Bij gebrek aan negatief advies van de procureur des Konings, kan de ambtenaar van de burgerlijke stand de akte van aanpassing van de registratie van het geslacht opmaken en deze verbinden met de andere

¹⁹⁶⁴ Annulled by the Constitutional Court. See Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019.

akten van de burgerlijke stand van de betrokke die zijn geslacht vermelden [In the absence of negative advice by the public prosecutor, the civil registrar can draft the act amending the registered sex and link it to the other civil certificates of the person concerned that mention his sex].

De ambtenaar van de burgerlijke stand weigert de akte van aanpassing van de registratie van het geslacht op te maken bij negatief advies van de procureur des Konings [The civil registrar refuses to draft the act amending the registered sex in case of negative advice by the public prosecutor].

§ 6. De ambtenaar van de burgerlijke stand die weigert een akte van aanpassing van de registratie van het geslacht op te maken, brengt zijn met redenen omklede beslissing en, in voorkomend geval, het negatief advies van de procureur des Konings onverwijld ter kennis van de betrokkene [The civil registrar who refuses to draft the act amending the registered sex, immediately notifies his motivated decision or the negative advice by the public prosecutor to the person concerned].

§ 7. De betrokkene kan tegen de weigering door de ambtenaar van de burgerlijke stand verhaal instellen overeenkomstig artikel 1385duodecies van het Gerechtelijk Wetboek [The person concerned can appeal to the refusal by the civil registrar in accordance with Article 1385duodecies of the Judicial Code].

§ 8. De procureur des Konings vordert de nietigheid van een aanpassing van de registratie van het geslacht in de akte van geboorte wegens strijdigheid met de openbare orde [The public prosecutor requests the nullification of the amendment of the registered sex in the birth certificate because of conflict with public order].

§ 9. De aanpassing van de registratie van het geslacht in de akte van geboorte is in beginsel onherroepelijk [The amendment of the registered sex in the birth certificate is irreversible by principle].

Mits bewijs van uitzonderlijke omstandigheden kan de betrokkene, overeenkomstig de procedure bedoeld in artikel 1385duodecies, §§1 en 3, van het Gerechtelijk Wetboek, de familierechtbank vragen een nieuwe aanpassing van de registratie van het geslacht in de akte van geboorte toe te staan¹⁹⁶⁵ [In case of proven exceptional circumstances, the person concerned may ask the family court, on the basis of the procedure mentioned in Article 1385duodecies, §§ 1 and 3, of the Judicial Code, to approve a new amendment of the registered sex in the birth certificate].

[...]

§ 10. De niet-ontvoogde minderjarige met onderscheidingsvermogen kan vanaf de leeftijd van zestien jaar aangifte doen overeenkomstig dit artikel, mits overhandiging bij de aangifte van een verklaring van een kinder- en jeugdpsychiater die bevestigt dat de betrokkene over voldoende onderscheidingsvermogen beschikt om de voortdurende overtuiging te hebben dat het geslacht vermeld in zijn akte van geboorte niet overeenstemt met zijn innerlijk beleefde genderidentiteit. Bij de aangifte wordt de betrokkene bijgestaan door zijn ouders of zijn wettelijke vertegenwoordiger.

Ingeval deze personen weigeren om de niet-ontvoogde minderjarige bij te staan, kan de minderjarige, bij verzoekschrift ondertekend door hemzelf or zijn advocaat, de familierechtbank verzoeken hem te machtigen om deze handeling met bijstand van een voogd ad hoc te verrichten [The non-emancipated minor with capacity of understanding may as of the age of sixteen make a declaration in compliance with this Article, provided he hands over a statement by a child and adolescent psychiatrist that confirms that the minor concerned has sufficient capacity to have the continuing conviction that the sex registered in his birth certificate is not in congruence with his inner experienced gender identity. During the declaration the minor is assisted by his parents or

¹⁹⁶⁵ Anulled by the Constitutional Court. See Grondwettelijk Hof [Constitutional Court] (Belgium) 19 June 2019, 99/2019.

legal representative. If these persons refuse to assist the minor, the latter may request, through petition signed by himself or by his attorney, the family court to authorise him to be assisted by an ad hoc guardian."

Article 388:

"De minderjarige is de persoon van het mannelijke of vrouwelijke geslacht die de volle leeftijd van (achttien) jaren nog niet bereikt heeft. [The minor is the person of the male or the female sex who has not yet reached the age of (eighteen) years.]"

3. Belgian Judicial Code (extract)

Article 1385duodecies:

*"§1. Bij de familierechtbank worden bij verzoekschrift ingesteld
[At the family court are instituted by petition]:*

1° het verhaal van de betrokkene tegen een weigering van de ambtenaar van de burgerlijke stand om de registratie van het geslacht aan te passen zoals bedoeld in artikel 135/1, § 7, van het Burgerlijk Wetboek [the appeal of the person concerned against the refusal by the civil registrar to amend the registered sex as mentioned in article 135/1, §7 of the Civil Code];

2° het verzoek tot een nieuwe aanpassing van de registratie van het geslacht in de akte van geboorte zoals bedoeld in artikel 135/1, § 9, van het Burgerlijk Wetboek. [the application for a new amendment of the sex registered in the birth certificate as mentioned in article 135/1, § 9 of the Civil Code];

§ 2. Het verhaal bedoeld in § 1, 1° wordt ingesteld binnen zestig dagen te rekenen van de dag van de kennisgeving door de ambtenaar van de burgerlijke stand van de weigering tot opmaak van deze akte. De griffier brengt de ambtenaar van de burgerlijke stand onmiddellijk in kennis van een verhaalprocedure [§2. The appeal mentioned in § 1,1° is instituted within sixty days after the

notification by the civil registrar of the refusal to draft the certificate].

§ 3. Het verzoekschrift wordt ondertekend door de verzoeker of zijn advocaat [§3. The appeal is signed by the applicant or his attorney].”