

# DISMANTLING OR PERPETUATING GENDER STEREOTYPES. THE CASE OF TRANS RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS' JURISPRUDENCE\*

CAROLINE HANSEN<sup>1</sup>

**Abstract:** The European Court of Human Rights (the Court) considers gender identity a fundamental aspect of the right to respect for private life and has taken important steps towards ensuring that it is implemented in Council of Europe states. The Court has thus held that trans persons cannot be required to undergo sterilisation surgery or treatment to have their gender legally recognised. Yet certain requirements remain. Where the legal recognition of trans persons' gender identity depends on 'verification' by a third-party, there is a risk of having stereotypical visions of gender enforced, against the general aim of dismantling gender stereotypes for all. This paper analyses gender stereotypes in the Court's cases relating to trans persons, and explores alternatives to current systems of legal gender recognition that may aid in dismantling them.

**Keywords:** Gender stereotypes, transgender, European Court of Human Rights, case-law, deregistration.

**Summary:** 1. INTRODUCTION. 2. THE EUROPEAN COURT OF HUMAN RIGHTS' APPROACH TO GENDER IDENTITY. 3. GENDER STEREOTYPES IN THE EUROPEAN COURT OF HUMAN RIGHTS' CASE-LAW. a) *Gender stereotypes in the requirements imposed on applicants.* b) *Gender stereotypes in the language of the judgments.* c) *Gender stereotypes in gender equality cases.* d) *Distinctions in the Court's approach to gender identity and gender equality cases.* 4. POSSIBILITIES FOR ELIMINATION OF GENDER STEREOTYPES FROM CASE-LAW. a) *The Court's anti-stereotyping power.* b) *A role for applicants in the framing of cases?.* c) *Possibilities for change on a systemic level.* i. Depathologisation. ii. Self-determination. iii. Categorical expansion. iv. Deregistration. 5. CONCLUSION.

## 1. INTRODUCTION

The European Court of Human Rights ("the Court" or the "Strasbourg Court") has held that "States may not impose traditional gender roles and gender stereotypes", in the case of *Konstantin Markin v Russia* (2012, para 142). The Court thereby took a firm stance in favour of the elimination of gender stereotypes, which was arguably highly necessary, when following Timmer's argument that "[i]f the Court wants to go to the roots of structural gender discrimination it should dismantle gender stereotypes" (2011, p. 713). It is then interesting to study whether the Court has applied these principles in its own case-law, for persons of all gender identities. Indeed, the Court set out this principle in a case relating to gender equality between women and men. However, when the Court decides on

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<sup>1</sup> European Parliament, Legal service, Trainee (*the contents of this article and its author do not reflect and are not affiliated with the positions of the European Parliament*). Email: caroline.hansen@hotmail.fr.

cases relating to the gender identity of trans<sup>2</sup> persons, it does not tend to demonstrate the same consciousness of gender stereotypes. Where the Court creates distinctions between transgender and cisgender applicants, it enables the application of different standards and expectations.

Stereotypes have been defined by Cook and Cusack as “a generalized view or preconception of attributes or characteristics possessed by, or roles that are or should be performed by, members of a particular group” (2010, p. 9). Though the focus of efforts to dismantle stereotypes tends to be on “harmful gender stereotypes” (*SVP v Bulgaria* 2012, CEDAW Committee, para 9.6) or on “wrongful gender stereotypes” (*RKB v Turkey* 2012, CEDAW Committee, para 8.8), it is argued that gender stereotypes may be harmful in all their forms, even when they do not seem negative (UN OHCHR 2013, pp. 18-19). Indeed, even seemingly positive or innocuous stereotypes have the potential of imposing undue expectations and burdens upon their recipients, who may not conform to these stereotypes. It has also been found that where stereotypes are “statistically sound” generalisations, relying on them may still enhance profiling, and may lead to further marginalisation of certain groups of people (Schauer 2003, pp. 16-17, 187-188). Therefore, if the Court relies or enables reliance on gender stereotypes in its case-law, it may not directly harm the applicants themselves, but it may have negative effects on the applicants’ community as a whole. Where that community is the trans community, it becomes especially important to avoid any further marginalisation, considering the heightened discrimination and violence trans persons are already subjected to as a result of their gender expression (FRA 2014, p. 3).

This paper will therefore analyse whether the European Court of Human Rights has applied its stance against gender stereotypes in cases of gender identity, relating to trans applicants, equally as in cases of gender equality, and how the Court may play a role in the elimination of gender stereotypes from its judgments. This paper will first review the case-law of the Court related to gender identity, and legal gender recognition for trans persons (II). It will then seek to analyse gender stereotypes in the Court’s case law, related both to gender identity and gender equality, to determine whether the Court approaches its applicants differently (III). Lastly, this paper will review various ways in which the Court and its actors may play a role in dismantling gender stereotypes in a manner that is inclusive of trans persons (IV).

## **2. THE EUROPEAN COURT OF HUMAN RIGHTS’ APPROACH TO GENDER IDENTITY**

In the Court’s case-law, ‘gender identity issues’ have been understood to be those relating to trans people (European Court of Human Rights 2021, *Factsheet – Gender Identity Issues*). The Court’s approach to these gender identity issues has greatly evolved over time, reflecting evolutions in society and clearer understandings of the socially

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<sup>2</sup> Trans will be understood as an umbrella term in the context of this paper, encompassing persons of all gender identities who do not correspond to their sex assigned at birth (IACtHR 2017, para 32(h)). This may include transgender women, transgender men, non-binary persons, genderqueer persons, gender fluid persons, agender persons, bigender persons, or any other person identifying with gender diversity.

constructed nature of gender. This brief overview of the Court's case-law as it relates to gender identity will focus on cases relating to legal gender recognition.

The first case dealing with the legal recognition of a trans person's gender was *Rees v UK* in 1986. In this case, a trans man sought to have his gender identity legally recognised, which was refused by UK authorities. The Court held that this refusal did not constitute a violation of the European Convention on Human Rights, highlighting the administrative consequences to the general population (*Rees v UK* (1986) paras 43-44). Referring to the annotation of the birth register to reflect the applicant's gender identity, the Court held that "the change so recorded could not mean the acquisition of all the biological characteristics of the other sex" (para 42(b)). The Court reiterated this approach in its case *Cossey v UK* in 1990.

The Court eventually recognised in the case of *B v France* that trans persons presented a "discrepancy between their legal sex and their apparent sex" (1992, para 59(a)), and consequently put into question the immutability of sex, ordering that the birth certificates of trans persons in France should be amended, as they regularly are for various purposes (1992, para 52). This however distinguished the case from the previous English ones, as it concerned a French specificity, and did therefore not yet set out any general rights relating to legal gender recognition.

Broad recognition of what has since been considered a general 'right to gender identity' occurred in the case of *Goodwin v UK*. In that case, the Court considered the failure to recognise the applicant's gender identity a violation of her right to private life (*Goodwin v UK* 2002, para 93), based on "clear and uncontested evidence of a continuing international trend" towards the legal recognition of the gender identity of "post-operative transsexuals" (2002, para 85).

This right to gender identity has nonetheless remained a conditional right, though requirements have evolved over the years since *Goodwin v UK*. The Court has for instance accepted reliance on the 'divorce requirement', which prevents married trans persons from legally changing their gender unless they have divorced or converted their marriage into a civil partnership, in order to avoid turning what had been considered a heterosexual marriage into a same-sex one, in the states not recognising same-sex marriage yet (*Hämäläinen v Finland* (2014)).

While *Goodwin v UK* had allowed access to legal gender recognition only to trans persons having undergone "gender-reassignment surgery", by referring to the recognition of "post-operative transsexuals" (2002, paras 76, 93), the Court has since reviewed its case-law on the matter. In the 2017 case of *AP, Garçon and Nicot v France*, the Court held that "sterilisation surgery or treatment" could not be relied on as requirements for legal gender recognition of trans persons (2017, paras 131-132). The Court insisted on the "impossible dilemma" that this placed the applicants in. Indeed, under this requirement, applicants were forced to choose between undergoing surgeries or hormonal sterilisation, whether or not those were desired, thus giving up their right to physical integrity, or refusing to undergo sterilising treatment or surgeries, and thus giving up their right to

gender identity (2017, para 132). The Court reiterated this stance in 2021 in the case of *X and Y v Romania* (2021, para 165).

Nonetheless, while *AP, Garçon and Nicot v France* brought much-anticipated changes to the jurisprudence of the Strasbourg Court, in bringing forward the right to gender identity, it has not declared an absolute right to gender identity. The Court has indeed held that a Member State requiring a psychiatric diagnosis of a gender identity disorder does not violate article 8 of the European Convention on Human Rights, ensuring applicants' right to private life (*AP, Garçon and Nicot v France* (2017) para 141). The right to gender identity therefore remains conditional, and subjected to external scrutiny.

### **3. GENDER STEREOTYPES IN THE EUROPEAN COURT OF HUMAN RIGHTS' CASE-LAW**

The Court has made advances in its jurisprudence, ensuring broader applicability of the right to gender identity. But while these improvements have made a difference in the accessibility of legal gender recognition in Member States of the Council of Europe, through lowered requirements, the Court should remain under attentive scrutiny in its approach to trans persons and gender identity rights.

While the Court has highlighted the need to dismantle gender stereotypes, it must be ensured that the Court applies this itself, in the approach it takes to trans applicants. While the approach of the Court to trans persons, in its application of gender stereotypes, could be especially highlighted in comparison with the cases of cisgender persons, such an approach is difficult, due to the lack of specification in cases of whether applicants are cisgender. Therefore, while gender identity cases will explicitly mention the trans identity of the applicants, no cases mention the cisgender identity of applicants. While this information may simply seem irrelevant in judgments, that is not the case where it comes to scrutinising the attitude of the Court, and any potential differences in treatment between cisgender and transgender applicants. Comparisons will therefore be drawn between the approach to applicants in gender identity cases, and applicants in gender equality cases, in order to get as close as possible to an analysis of the differences in approach between transgender and cisgender applicants, where the Court does not provide this information.

#### *a) Gender stereotypes in the requirements imposed on applicants*

Where gender recognition is conditional upon certain requirements, as it is in the Court's case-law, those requirements should be subjected to careful scrutiny.

As established in *AP, Garçon and Nicot v France*, the Court enables gender recognition to be dependent on a psychiatric diagnosis. This approach is referred to as the pathologisation of trans persons, where legal gender recognition is made conditional upon "a diagnosis of gender dysphoria, gender identity disorder or transsexualism" (van den Brink and Dunne 2018, p. 63).

This approach enshrines in the case-law the belief that trans persons require external validation of their identity for it to be genuine. The Court takes this view

in noting that a psychiatric diagnosis “is aimed at safeguarding the interests of the persons concerned in that it is designed in any event to ensure that they do not embark unadvisedly on the process of legally changing their identity” (*AP, Garçon and Nicot v France* (2017) para 141). The Court therefore takes a paternalistic approach to trans persons’ rights, implying a lack of autonomy and responsibility in making major decisions for oneself.

Furthermore, psychiatric diagnoses of gender identity disorders have been recognised to be unreliable for lack of legitimate external tests, with criteria relying on gender stereotypes (Transgender Europe et al. 2017, para 21). A past version of the Diagnostic and Statistical Manual, the DSM-IV-TR of 2000, relied on highly stereotyped factors to diagnose a gender identity disorder. Some diagnostic characteristics are described by Spade as “stereotypically gender inappropriate behavior” (Spade 2003, p. 24). Indeed, they included, for young boys, preferring “traditionally feminine activities” and playing with girls, liking dolls, and avoiding brutal or aggressive activities. The opposite characteristics were relied on for the diagnosis of young girls. The DSM-IV-TR itself specifies that there exists no specific diagnostic test for gender identity disorders. Consequently, by accepting States’ reliance on the diagnosis of gender identity disorder, the Court effectively endorsed the use of unreliable, illegitimate, and highly stereotyped diagnostic tests. The Court accepted the criteria of a diagnosis of a gender identity disorder without adequate scrutiny into the implications of such a test.

The Court can therefore be said to have perpetuated gender stereotypes and reliance on them in medical and judiciary fields. This application of stereotypes in the medical field has serious consequences for trans persons who need a gender identity disorder diagnosis to fully exercise their rights, receive legal recognition, or qualify for desired medical care. Indeed, such a system forces trans persons to simplify complex identities into stereotyped conceptions of gender identity. Spade criticises that “[t]he medical approach to our gender identities forces us to rigidly conform ourselves to medical providers’ opinions about what “real masculinity” and “real femininity” mean, and to produce narratives of struggle around those identities that mirror the diagnostic criteria of GID [gender identity disorder]” (Spade 2003, pp. 28-29). While acknowledging that some trans persons do fit those narratives and stereotypes, Spade condemns the “medical gatekeeping” which follows from forced hyper-masculinity and hyper-femininity (Spade 2003, p. 28). Such requirements take away from the agency of trans persons in determining their own gender identity, and further stereotype their identities. Furthermore, by allowing the reliance on gender stereotypes to effectively determine gender identity, the Court is implicitly accepting such stereotypes when it comes to trans people, though it had purported to eliminate such stereotypes (*Konstantin Markin v Russia* (2012), para 142).

While ‘gender identity disorder’ has been removed from following DSMs sections on mental disorders, the use of the words by the Court still carries the pathologising and stigmatising weight associated with them originally. Reliance by the Court on this requirement therefore remains deeply problematic, and forces trans persons into narrow and stereotyped conceptions of gender.

b) *Gender stereotypes in the language of the judgments*

While the criteria accepted by the Court set a precedent of judicial acceptance of stereotypes, the language used by the Court also carries a significant weight. The Court, through its language, has the power to convey and entrench outdated and stereotyped conceptions of gender, but it also holds great power to instigate change and inclusion.

Judgments relating to the gender identity of applicants reference multiple types of gender stereotypes. For instance, these judgments regularly convey gender stereotypes related to the social behaviour of applicants. These mentions take the form of a judgment highlighting that the applicant “behave[d] like a boy”, in *YY v Turkey* (2015, para 9), or “always behaved like a girl”, in *AP, Garçon and Nicot v France* (2017, para 8), or “began from adolescence to behave like a boy in his way of dressing and his social relations”, in *X and Y v Romania* (2021, paras 4, 34). By failing to address the link created between social behaviour and gender identity, the Court allows the perpetuation of gender stereotypes according to which girls and women, and boys and men, must act in certain ways depending on their gender identity, in order to fit in.

While gendered norms of behaviour can be seen in the Court’s judgments, it is also frequent to see stereotypes related to the gender expression of applicants appear. For instance, applicants are often presented in relation to their physical appearance. In *AP, Garçon and Nicot v France*, it is mentioned that the first applicant’s “physical appearance has always been very feminine” (2017, para 8), while the second “dressed as a woman and was perceived by others as a woman” (2017, para 35), while in *X and Y v Romania* it is noted that the applicant started to “behave like a boy in his way of dressing” (2021, paras 4, 34). Such references to physical appearance and attire perpetuate a strong link between gender identity and gender expression, and maintain expectations of stereotypical masculinity and femininity to fit into the boxes of gender. While many applicants might match social expectations of gender conformity, and gender expression may reinforce social recognition, such assimilations of gender identity and gender expression can cause great harm.

First, this places expectations of gender conformity upon trans persons, leaving out those persons who do not or cannot fit into gendered standards of physical appearance, or who do not wish to conform to stereotypically gendered ways of dressing. Secondly, by including such mentions of gender conformity as validating gender identity, the Court perpetuates stereotypes that physical appearance and attire are determinants of gender identity, where such stereotypes have been fought against in the context of the fight for women’s rights. By relying on outdated ideas of what it means to dress like a woman or a man, such statements undermine decades and centuries of fighting for gender equality, for the rights of women and men to dress and act in ways that go beyond stereotyped expectations. Furthermore, placing value on gender expression comforts the view that gender must be validated by the perception by others, implicitly giving social perception a validating role in legal recognition of gender.

Gender stereotypes may also appear in other insidious ways, notably by reliance on heteronormative standards in judgments. Indeed, in *YY v Turkey*, multiple mentions

are made of the applicant's relationships with women. Such mentions, used in the context of demonstrating a person's gender identity, are harmful. By using the applicant's relationships with women to validate his male gender identity, the belief that heterosexual relationships are the norm is upheld. This perpetuates heteronormative understandings of gender, and invisibilises trans persons who do not identify as heterosexual.

Lastly, in the case of *X v Macedonia*, the Court referred to the applicant as a "pre-operative transsexual" (2019, para 69), implying that trans persons not having undergone surgeries are in a temporary situation, awaiting a final state. This mention made by the Court itself is especially surprising, as this case was preceded by two years by the case of *AP, Garçon and Nicot v France*, in which the Court held that surgical requirements could not be imposed on trans persons for their legal gender recognition, thus confirming that not all trans persons can or wish to undergo surgeries. This reflects the Court's stereotypes regarding the sex characteristics associated with gender, expecting trans persons to conform to cisgender norms.

While the applicants in the cases cited above may have fit into a number of gender stereotypes, and raised a number of these stereotypes themselves in their testimonies, these stereotypes become problematic when they are not questioned. Indeed, if gender stereotypes are to be efficiently dismantled, they must be named and challenged, and they should not be relied on. Though reliance on stereotypes may not have affected the applicants' cases, or positively affected their cases, such mentions of and reliance on gender stereotypes begs the question of how the Court will react when a person who does not fit gender stereotypes seeks legal gender recognition. Moreover, where such stereotypes are unquestioningly set out and relied on in the cases of trans persons, though they have been actively fought against in the context of cisgender persons for many decades, one can wonder whether the Court creates a distinction between cisgender and transgender applicants, in their right to be free from gender stereotypes.

*c) Gender stereotypes in gender equality cases*

The Court held in the case of *Konstantin Markin v Russia* that "States may not impose traditional gender roles and gender stereotypes" (2012, para 142). In its cases relating to gender equality, the Court has made consistent efforts to name and address gender stereotypes, though not all these efforts have been equally successful.

The Court indeed tends to highlight where the Government relies on gender stereotypes in its arguments in gender equality cases. In *Ünal Tekeli v Turkey* (2004), the Government argued that the obligation on married women to take their husband's surname could be justified by the aim of "reflecting family unity through a joint family name" (para 68). The Court pointed out the stereotypes based on gender roles reflected in this view, noting that the tradition of married women taking their husband's surname "derives from the man's primordial role and the woman's secondary role in the family" (para 63), while stating that a joint family name has no bearing on family unity (para 66), and that a joint family name may in any case as well be the wife's surname or a jointly chosen one (para 64).

In *Carvalho Pinto de Sousa Morais v Portugal* (2017), the Portuguese Court had considered that an applicant being 50 years old and having had two children diminished the importance of sex for her (para 16). The Strasbourg Court condemned this approach, and held that by handing down such a judgment, the Portuguese Court had portrayed “female sexuality as being essentially linked to child-bearing purposes” (para 52), which perpetuated stereotypes related to gender roles of women as destined to motherhood, and stereotypes relating to social behaviour around sexuality.

Similarly, in *Jurčić v Croatia* (2021), the Court identified and condemned the stereotypes invoked by the Government, which had contended that the applicant should not have taken up new employment while undergoing IVF treatment. Indeed, the Court held that this “implied that women should not work or seek employment during pregnancy or mere possibility thereof” (para 83), highlighting the stereotype related to gender roles and social behaviour that women’s role as child-bearers should take priority over other roles, and that women could not work while pregnant.

In *Konstantin Markin v Russia* (2012), a policy denied military men the same length of parental leave as military women, which the Court held was “disadvantageous both to women’s careers and to men’s family life” (para 141), highlighting the stereotypes based on gender roles implied in this policy, of women as caretakers and men as breadwinners. The Court further held that “States may not impose traditional gender roles and gender stereotypes” (para 142), highlighting the harm of such a policy.

Nonetheless, the Court did not always identify and condemn the gender stereotypes which appeared in gender equality cases. Indeed, in *Carvalho Pinto de Sousa Morais v Portugal*, despite highlighting some stereotypes, the Court did not explicitly identify or name the stereotypes appearing in the Portuguese Court’s reliance on gender roles in the context of domestic work carried out by the applicant (para 16).

Furthermore, in *Khamtokhu and Aksenchik v Russia* (2017), the Government argued that life imprisonment being exclusive to men was not discriminatory, by reason of women’s “special role in society”, which “above all” is “their reproductive function” (para 47), thus perpetuating gender roles by placing women’s value in their potential motherhood. In this case, the Court held that women may be exempted from life imprisonment, as a measure of “public interest” (para 82), thus implicitly condoning the perpetuation of gender stereotypes. The Court simply condemned the stereotype of “male toughness” perpetuated by this rule leaving only men to be sentenced to life imprisonment. This case was nonetheless exceptional, as the Russian Government had stated that a finding of a violation in this case would lead to all groups of offenders risking being sentenced to life imprisonment, rather than improving conditions for all by eliminating life imprisonment. The Court choosing to allow these stereotypes to be perpetuated was therefore ultimately beneficial to the persons most affected by them.

Despite its effort to identify gender stereotypes in cases, the Court is not immune to including stereotypes in its own reasoning. In *Jurčić v Croatia*, the Court stated that “such a decision could only be adopted in respect of women, *since only women could*



*become pregnant*” [emphasis added] (2021, para 70). By portraying women as the only persons capable of becoming pregnant, the Court is invisibilising the many trans men, and non-binary and other gender-diverse persons born with a uterus who may have the ability to become pregnant. This argument of the Court is especially striking in light of its anterior jurisprudence in the case of *AP, Garçon and Nicot v France*, where it held that sterilisation surgery or treatment may not be required for legal gender recognition, thus implying that trans men may have their gender legally recognised, while retaining functioning reproductive systems and the possibility of carrying pregnancies, if they are able and willing to. The Court, by conflating the ability to get pregnant with womanhood, linked womanhood to a biological foundation, in contrast with its previous jurisprudence. It must however be noted that this stereotype, though appearing in the case of a cisgender woman, affects only trans persons. It seems that the Court did not take into consideration trans persons in this case, merely because they were not directly involved.

d) *Distinctions in the Court’s approach to gender identity and gender equality cases*

From these observations, it can be concluded that while the Court does not succeed in highlighting all gender stereotypes mentioned before it either in gender identity or gender equality cases, it consistently fails to address stereotypes where they appear in gender identity cases. While the Court must undoubtedly improve its ability to name and point out gender stereotypes in all cases, it has already made important efforts to do so in gender equality cases, and must now work on achieving the same in gender identity cases, rather than ignoring the harms brought on by reliance on stereotypes in the context of trans persons.

It must also be noted that the stereotypes referred to in gender equality cases and gender identity cases are often different. Gender equality cases tend to contain stereotypes relating to gender roles, whereas gender identity cases tend to focus on gender expression, with both types of cases containing references to stereotypes linked to the social behaviour of applicants. This difference in the types of stereotypes may entail a need for the judges of the Court to become better informed about different types of gender stereotypes, and where those may arise. While gender stereotypes may be referred to in terms of gender roles in some international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW 1981, article 5a), gender stereotypes are an incredibly broad notion, and they show up in a variety of ways.

Lastly, it can be noted that while gender stereotypes appear in judgments relating to both gender identity and gender equality, their sources vary. Indeed, in gender equality cases, stereotypes are most often brought up by the Government or the policies it is defending. However, in gender identity cases, stereotypes often appear in the facts of the judgment, in the testimonies of the applicants’ families for instance, and are thus brought up by the applicants and their lawyers themselves. This distinction may explain why the Court is more inclined to counter stereotypes where they are brought up by the party opposing the applicant, rather than by the applicants

themselves. Nonetheless, naming stereotypes does not have to be done to the detriment of the applicants, but may merely serve as a way for the Court to highlight that reliance on stereotypes is not necessary to the success of an application, where that truly is the case, as it should be.

#### 4. POSSIBILITIES FOR ELIMINATION OF GENDER STEREOTYPES FROM CASE-LAW

To eliminate gender stereotypes from the courts, and from legal gender recognition at large, several alternatives and possibilities exist. Dismantling gender stereotypes will take time and widespread systemic change, but a combination of efforts from various actors may bring about meaningful improvements.

##### *a) The Court's anti-stereotyping power*

While the Court may not hold enough power to entirely dismantle systems of legal gender recognition riddled with gender stereotypes, the Court does have a responsibility to identify and address gender stereotypes when they appear in cases brought before it. As highlighted by Cook and Cusack, naming stereotypes carries a vast power, and ensures that stereotypes are recognised and questioned (2010, pp. 39, 54).

A realistic and immediately available step for the Court to take is therefore the “anti-stereotyping approach”. This approach is defined by Timmer as entailing for the Court not to rely on “harmful (gender) stereotypes in its own reasoning” and to “name gender stereotyping whenever it occurs on a national level and proceed against it as a particularly damaging form of discrimination” (Timmer 2011, p. 717). Through this approach, Timmer proposes to analyse gender stereotypes and the harm they could potentially cause in a comprehensive manner, with the aim of “exposing and contesting the patterns that lead to structural discrimination” (Timmer 2011, p. 725).

For the Court, taking such an anti-stereotyping approach would entail being “continuously critical” and being “interrogative of the underlying social patterns and beliefs” which have led to the situations at hand (Timmer 2011, p. 737). Thereby, the Court may take steps towards uncovering the reasoning behind the presence of gender stereotypes in their cases, whether they appear through the applicants’ own arguments, other actors in the case, or the Court’s judgment itself. In looking at these underlying factors which contribute to the perpetuation of stereotypes, the Court may question its biases and assumptions, and seek to set out jurisprudence which does not perpetuate stereotypes, and even attempts to combat and dismantle them. Such an approach will require the Court to be attentive, by carefully choosing the language of judgments, and analysing the implications of the requirements and principles it sets out. This approach will also require the judges to question their own underlying biases, to adequately “problematise the ‘naturalness’ of stereotypes” (Timmer 2011, p. 737).

Where gender stereotypes are so deeply entrenched in society, it can seem unrealistic to expect judges of the Court to notice them, adequately respond, and eventually dismantle them. Indeed, information on the harmfulness of gender stereotypes, their prevalence, and their insidiousness must be made available to the judges of the Court, to demonstrate the importance

of the issue and its ramifications, and to unlearn biases accumulated over many years. Cook and Cusack have suggested that “[t]raining programs could invite judges to analyze how wrongful gender stereotypes have become embedded in court decisions, and how such stereotypes have been or can be dismantled and remedied” (2010, p. 83). Such training programmes would enable judges, and possibly other jurists contributing to these judgments, to better notice stereotypes, and see the harm that they do, to encourage their effective dismantling.

*b) A role for applicants in the framing of cases?*

As established in section III.d., applicants often tend to raise gender stereotypes themselves. This poses the question of the potential role to be played by the applicants and their lawyers in ridding the Court’s judgments of gender stereotypes.

Spade argues that while one person winning their case may entail increased rights for the group they belong to, it must nonetheless be ensured that the opposite does not occur, where one person’s fight diminishes the rights of the group as a whole (Spade 2003, p. 36). This argument is illustrated by the example of a trans applicant having undergone a medicalised transition, in which case this fact could be instrumentalised in their case, and result in such a medicalised transition becoming a requirement for the obtention of certain rights. This would then be similar to the case of a trans applicant perfectly matching social expectations of gender expression, social behaviour, heteronormativity and conformity to gender roles, which may result in the Court expecting similar features from other trans applicants coming before it.

One part of the solution to such harmful generalisations is therefore the inclusion of trans persons in discussions on the direction taken by the lawyers in their handling of these cases (Spade 2003). Spade believes that including trans persons in these discussions on their cases will increase awareness among lawyers of the great impact of such cases, and a better understanding of the communities affected by these verdicts, whose members may or may not resemble the applicants. Thereby, Spade places a moral obligation upon the applicants and their lawyers to fight not only for themselves, but also for the entire community.

Nonetheless, this approach can also prove problematic. Indeed, while it has not been established whether reliance on stereotypes directly affects the outcome of trans applicants’ cases, these stereotypes may still form part of a “normalisation strategy” (Camma 2020, p. 255), whereby applicants purposefully portray themselves as easily relatable for the judges, who can identify themselves with these individuals and empathise with them. Furthermore, Catto has concluded that while the lack of adherence to gender stereotypes does not harm a person’s case, reliance upon stereotypes can still aid the cases of persons who do conform to them (Catto 2019, para 47). Consequently, expecting applicants who may have the possibility to rely on the judges’ biases to further their cases not to take up this opportunity seems not only unrealistic in many regards, but also deeply unfair. Indeed, trans persons are exposed to numerous legal and social barriers, and suffer from the marginalisation of their community in society. It therefore seems that expecting trans applicants to fight for the entire community, and hold themselves to the high moral

standard of refusing to rely on a potential privilege, entails placing an additional burden upon persons who have already been greatly burdened by a system that excludes and marginalises them.

It is undoubtedly a powerful choice for applicants not to rely on gender stereotypes that they conform to, where those could have appealed to the judges' understandings of gender and played in their favour. However, taking such a stance should be a personal choice, as it may deprive the applicants of an advantage that could have helped their case. The burden of fixing a broken and exclusionary system should ultimately not lie with those who suffer from it, but those who have benefited from it for years and are now in a position to repair the errors of the past.

While the Court may not be well-informed enough to take such stances on its own without input from trans communities, there are ways to encourage the Court to act without potentially jeopardising the cases of individual applicants. For instance, third party interventions in the cases studied in section III did not contain gender stereotypes. Third party interventions represent a way for organisations working for the promotion of rights to advocate for the advancement of rights for all, and the implementation of more just standards. These organisations, contrary to most individual applicants, have a general purpose and greater resources to advocate for larger groups. Their participation may therefore enable the applicants to rely on all arguments available to them, while enabling the Court to be reminded by the interveners that stereotypes should ultimately not play a role in the decision, but rather the right to self-determination of the applicant.

*c) Possibilities for change on a systemic level*

While the Court holds power in its language, and while the burden of dismantling stereotypes should not be borne by the applicants, the Court also has control over the requirements and criteria that it sets out. Though the Court tends to rely on a European consensus or on a clear and continuing international trend (*Goodwin v UK* (2002), para 85) to make major changes to its jurisprudence, it is undoubtedly possible for the Court to gradually implement changes in its case-law and reference current trends in the lead-up to a change in jurisprudence. The following notions may be applied in the shorter or longer term, but all hold the potential of eliminating at least some stereotypes from the Court.

**i. Depathologisation**

As of the current state of the case-law, the Court follows a pathologising approach to legal gender recognition. Pathologisation, as set out in section III.a, is the approach by which a trans identity is considered an illness (Theilen 2014, p. 328), making legal gender recognition conditional upon “a diagnosis of gender dysphoria, gender identity disorder or transsexualism” (van den Brink and Dunne 2018, p. 63), or even surgical or sterilisation requirements (Cannoot 2019, p. 15). The 2017 case of *A.P., Garçon and Nicot v France*, by allowing the French state to require a psychiatric diagnosis of a gender identity disorder to recognise a trans person's gender identity, upheld such a

pathologising approach. This approach has been largely contested, leading to a movement for depathologisation, understood as the elimination of psycho-medical requirements from legal gender recognition (Cannoot 2019, p. 15).

As set out in section III.a., reliance on a diagnosis of a gender identity disorder reinforces gender stereotypes, through medically unfounded tests relying on gender stereotypes. Depathologisation therefore offers an approach to legal gender recognition which may aid in the elimination of gender stereotypes from case-law, by removing stereotyped and unwarranted diagnoses.

Nonetheless, while depathologisation may enable the elimination of certain gender stereotypes from the assessment leading to legal gender recognition, it does not guarantee that gender stereotypes will be absent from the courts' decisions. In France, where the legislation on legal gender recognition was depathologised in 2016 – a few months before the judgment in *A.P., Garçon and Nicot* was handed down – the Civil Code, in its article 61-5, requires applicants to demonstrate that they present publicly as the claimed sex, are known socially as the claimed sex, or have had their first name legally changed to match the claimed sex. While these requirements are no longer of a psycho-medical nature, they do still require the courts to interpret gender or sex, and how it is defined socially, or what “match[ing] the claimed sex” entails. Gender stereotypes have therefore not been eliminated from the courts, according to Catto, and still appear through these different requirements. French judges, in applying these requirements, have therefore focused on the gender expression of applicants, underscoring their conformity to gender stereotypes in their attire or makeup. Courts have also at times looked to the social behaviour of applicants, highlighting stereotypically masculine jobs, or participation in sports, for instance (Catto 2021, pp. 169, 179).

Therefore, while the elimination of psycho-medical requirements is absolutely essential for the respect of trans persons' autonomy and self-determination, it cannot in itself ensure that gender stereotypes will be kept out of the courts. If gender stereotypes are to be dismantled, depathologisation will not be sufficient individually, and will need to be combined with other approaches for better effectiveness.

## ii. Self-determination

Interestingly, the Court has relied on the “right to self-determination” of applicants (*AP, Garçon and Nicot v France*, para 93), without giving the term the meaning commonly associated with it, but rather interpreting it as a conditional right for trans people to have their gender legally recognised.

The self-determination model, in its academical sense, proposes to enable legal gender recognition through the submission by the applicant of “a statutory declaration affirming that they have a stable connection with the gender in which they wish to be recognised” (van den Brink and Dunne 2018, p. 59). This model thereby entails the depathologisation of legal gender recognition, while also removing other forms of external validation or verification.

The implementation of a self-determination model has received widespread support, notably from the Council of Europe (PACE 2015, Resolution 2048, para 6.2.1.), the human rights experts who set out the Yogyakarta Principles Plus 10 (International Commission of Jurists 2017, principle 31.B.) and the Inter-American Court of Human Rights (IACtHR 2017, paras 127, 129-131). These are all soft law instruments that the Strasbourg Court could draw upon in its future jurisprudence, as there are currently no other international human rights law instruments dealing with the human rights of trans persons (Cannoot 2019, p. 28).

By removing requirements necessitating scrutiny from judges, the self-determination model ensures that gender stereotypes can no longer be applied in the course of legal gender recognition. Nonetheless, while self-determination provides autonomy to applicants in the process of their legal gender recognition, it may not be entirely sufficient in itself, so long as it exists within a binary framework, which remains limiting for many persons.

### **iii. Categorical expansion**

To overcome the limiting nature of the gender binary, it has been proposed to make more gender markers available, beyond 'female' and 'male'. This model is known as categorical expansion. While certain versions of this model make a third gender marker available only for persons presenting a medically certified intersex variation, as is the case in Germany (Cannoot and Decoster 2020, p. 39), other forms intend to broaden the scope of this model. The most relevant type of categorical expansion for the purposes of this research is categorical expansion within a self-determination framework, whereby all persons may choose to self-register as any available gender marker, which exists in California (Holzer 2018, p. 24). Thereby, non-binary persons without intersex variations may choose to self-register as such, and intersex persons may self-register as such without medical requirements. This will however depend on the number and types of gender categories made available under various applications of this model.

However, adding a third gender or a larger number of categories comes with its own set of risks. Though it expands choices beyond the binary, it runs the risk of promoting the notion that categorisation of sex or gender is required, as well as perpetuating the binary as a standard that only few do not fit into (Quinan et al, 2020, p. 2). Fausto-Sterling asserts that "[t]he problem with gender, as we now have it, is the violence - both real and metaphorical - we do by generalizing," and argues that "[n]o woman or man fits the universal gender stereotype" (Fausto-Sterling 2020, p. 111). Following this argument that binary categories are not right for anyone inexorably leads to the question of whether continued reliance on a binary gender system truly makes sense and is beneficial. Nonetheless, Fausto-Sterling also argues that "recognizing a third category does not assure a flexible gender system" (2020, p. 112), which Mak seconds, considering that the creation of an additional category of gender will merely depict those who identify with this new category as outsiders (2012, p. 14). Where additional genders risk being portrayed as abnormal or uncommon, this reinforces a strict 'female / male' binary as the norm, with everyone else being mere exceptions to this norm, rather than reflections of an inflexible system in need of profound reshaping.

#### iv. Deregistration

As established in the previous sections, any type of scrutiny or attempt at categorising or controlling gender seems to bear risks. The abolitionist model proposes to do away with those problems, by deregistering gender, through removal of sex or gender markers from identity documents. Indeed, Cannoot and Decoster argue that “the law will never be able to reliably document [gender]” (2020, p. 47), with gender being fluid and socially constructed. The abolitionist model thus prevents gender from being recorded inaccurately where it cannot be encompassed under current registration models. This may for instance prove useful for non-binary persons where states do not offer options for demedicalised recognition of non-binary gender, or genderfluid persons, where rigid registration systems only allow for the recognition of one gender, with insufficient flexibility. The abolitionist model also seeks to remove state control over gender, and to prevent it from continuing to “police its boundaries” (Neuman Wipfler 2016, p. 543).

While the ultimate aim of deregistration is to remove sex and gender markers from official documents altogether, gradual steps will be required to achieve it. Neuman Wipfler proposes to start by eliminating gender markers from birth certificates, contending that children have no need for gender markers, whereas gender markers may impede on the lives of trans and intersex persons (2016, pp., 529, 534-539). Nonetheless, Neuman Wipfler opposes the immediate removal of gender markers on other identification documents, considering such a move unachievable and potentially dangerous at this point in time, as many trans persons rely on their identity documents for social recognition, safety, and access to gender-congruent spaces (2016, pp. 540-542).

The registration of gender represents a prevailing attitude towards gender today, a view of gender that has its roots in habits rather than necessity (Cannoot and Decoster 2020, p. 41). The Council of Europe’s Commissioner for Human Rights has enjoined states to “consider the proportionality of requiring gender markers in official documents” (2015, p. 9), which would require states to put thought into the reasoning behind registering gender and its usefulness.

Though this approach may seem like one for the future, unachievable for the time being, the truth may be very different. The Belgian Constitutional Court, in 2019, declared parts of the Belgian Gender Recognition Act unconstitutional, and proposed several alternatives. One of these suggested alternatives was the suppression of sex or gender registration, on the ground that both the lack of recognition of non-binary persons, as well as the definitive nature of legal gender recognition making fluid gender impossible to legally recognise, were unconstitutional (Belgian Constitutional Court 2019). Such a strong stance taken by the Belgian court provides hope that other courts may follow suit, including the Strasbourg Court, though a European consensus or international trend may be required before the Court follows this route.

## 5. CONCLUSION

The European Court of Human Rights has over recent years improved its approach to the rights of trans persons, by enabling legal gender recognition with lowered requirements, thus ceasing the imposition of stereotypically cisgender bodily characteristics on trans people, thereby arguably broadening its understanding of gender.

Nonetheless, while the Court has recognised more rights for trans persons, it has not reached equality of treatment between trans and cisgender applicants. This paper sought to examine the distinctions that the Court implicitly, and likely unconsciously, makes between trans and cisgender persons. It must be noted that the Court has shown great efforts at naming and attempting to dismantle gender stereotypes in cases relating to gender equality, though these attempts were not always entirely successful. Nonetheless, when it comes to trans applicants, in gender identity cases, the Court has not shown such efforts at dismantling gender stereotypes, and has failed to address any gender stereotypes which were invoked before it. What is more, the Court has on occasion raised gender stereotypes itself, and accepted reliance on stereotyped requirements for the recognition of trans persons' gender.

In doing so, the Court has created an implicit distinction between its trans and cisgender applicants, seeing only cisgender applicants as needing to be freed from the constraints of gender stereotypes, with limiting the fight against stereotypes to a cisgender issue. Additionally, the Court's lack of attention to gender stereotypes arising in gender identity cases may undermine its commitment to the elimination of gender stereotypes. By condemning certain gender stereotypes while accepting others, the Court creates an inconsistency, and conveys the idea that reliance on gender stereotypes can at times be acceptable. For the Court to truly succeed in dismantling gender stereotypes, it must ensure that gender stereotypes are consistently addressed, at all levels, and for all persons.

Where legal gender recognition procedures allow gender stereotypes to play a role, through the criteria set out or the manner in which judges apply the legislation and approach the applicants' identities, it raises the question of whether judges or the state can truly play a decisive role in legal gender recognition, without this role being tainted by gender stereotypes. This paper argues that the only way to remove gender stereotypes from the courtroom is to deregister gender, removing external scrutiny and validation of gender identity. Though the way to deregistration may be long, and the Court may not be prepared or able to take such a radical approach yet, there are many steps to be taken in the meantime. By applying an anti-stereotyping approach and depathologising legal gender recognition, the Court would already take meaningful strides towards equality, and show its willingness to work towards the elimination of gender stereotypes for all in the judiciary.

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