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Article

Contestations of Transgender Rights and/in the Strasbourg Court

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Abstract
Transgender rights are a highly contested issue, upsetting the 'normal' ordering of society. In Europe, transgender persons continue to suffer discrimination and harassment, and their rights are contested time and again. Eventually they can turn to the European Court of Human Rights (the Court) in Strasbourg. In such politically sensitive matters, how do judges in Strasbourg decide? Do they set European norms bolstering transgender rights, or do they refrain from interference in state affairs? Testing expectations based on rational and sociological institutionalism, this article analyses all 33 Court cases on transgender issues since 1980. As a judge's low score on trans rights in their home country does not mean that they vote against trans rights, and as judges do no defend their home country but vote with the 'pro-state' or 'pro-trans' majority, rationalist expectations were not confirmed. Sociological institutionalist processes of widening and narrowing tell us more about the hesitant and uneven strengthening of transgender rights, if within the limits of binary thinking as regards the transgender body, marriage and family.

Keywords
European Court of Human Rights; gender identity; human rights; transgender

Issue
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1. Introduction

Time and again, transgender rights are contested. Carried by a wave of radical right populism, conservative nationalism and religious fundamentalism, hate speech against, and discrimination of, transgender people are perceived to once again be on the increase in Europe (ILGA-Europe, 2020, p. 7). When they are slighted by a state, transgender people can turn to Strasbourg's European Court of Human Rights (hereafter the Court), which enforces the human rights codified in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the Convention). All 47 of the current member states of the Council of Europe have adopted the Convention. Although it does not mention transgender rights specifically, some articles clearly are relevant, such as respect for private and family life (Article 8). Since its inception in 1959, the Court has delivered over 21,600 judgments, and in 84 percent it found at least one violation of the Convention (European Court of Human Rights, 2019, p. 3). While this high percentage of judgments criticising state behaviour sounds hopeful for people whose rights have been violated, the balance is far less favourable in transgender cases. In 33 judgments, the Court found violations in only 39 percent (calculation based on HUDOC, n.d.; see Tables 1 and 2 for details).

Given continuing contestations of trans rights, do the Court's judges set European norms bolstering transgender rights, or do they defend state sovereignty in such politically sensitive matters? This question is the focus of this article. Former president of the Court Wildhaber warned that: "If we are perceived as catering too much to the government, scholars and practitioners will criticise us" (as cited in Bruinsma & Parmentier, 2003, p. 186). High-ranked politicians in several countries, including The Netherlands, Poland, Russia, Turkey and the UK, have complained that the Court promotes 'alien' European

norms without due consideration for national specificities (Amos, 2017; Mälksoo, 2016; Oomen, 2016; Swirc, 2017). Yet former judge Tulkens is quoted deploring that: "The raison d'état is more present here than I would have thought possible" (Bruinsma, 2006, p. 41). Contestations hence pit national sovereignty and judicial autonomy against each other. In legal terms, this question regards the balance between judicial restraint (inter alia, judges confirming a government's margin of appreciation) and judicial activism (judges widening interpretations to bolster political and societal change; de Waele & van der Vleuten, 2011).

As a political scientist, I frame the question as a puzzle involving rational and sociological institutionalism: To what extent do judges defend national norms and, indirectly, state interests, and to what extent do they act as European norm setters? Scholars disagree (see Amos, 2017). Some argue that opinions converge to a European norm in the Court (Arold, 2007a, 2007b), confirming sociological institutionalist expectations (Checkel, 2005). Others expect judges to cast their votes strategically, depending on perceived state interests (Garrett, Keleman, & Schulz, 1998). Clearing up this argument is the academic contribution this article aims to make. In addition, it presents the first analysis of all transgender cases decided by the Court between 1980 and 2020 from a political science perspective. The following section elaborates the institutionalist approaches. Next, I present the methodology. The empirical part presents the data concerning the judgments and judges involved.

2. Theoretical Framework

The Court has been praised as 'the crown jewel' of the international system for the protection of civil and political liberties (Helfer, 2008, p. 159). It has been studied by political scientists, who have focussed inter alia on the politics of judicial appointments (Voeten, 2008) and patterns of (non-)compliance by member states (Panke, 2020). Building on their work, this article explores to what extent judges bolster political and societal progress concerning transgender rights. I use two institutionalist approaches which explain outcomes as constrained and enabled by formal and informal institution: rationalist and sociological institutionalism.

Rationalist institutionalism assumes that actors, whether judges or governments, will act based on an assessment of their interests (Garrett et al., 1998). Their behaviour can hence be understood as guided by strategic calculations, in the sense of an assessment of what would strengthen or weaken their position materially and ideationally (see van der Vleuten, 2005). In that light, judicial behaviour can be explained based on judges' strategic interest. As 'agents' simultaneously embedded in a domestic and a European context, they will aim to avoid tensions with their 'principal,' i.e., the government that nominated them. Governments will prefer the status quo on transgender rights over costly changes to their legislation, unless societal mobilisation is such that the status quo becomes too costly and thus unattractive (van der Vleuten, 2005). Transgender norms are salient enough to engender high political and societal 'costs,' because they touch upon core state issues as marriage, family and the basic ordering of society into two stable categories of man and woman. In the rationalist view, judges will take into account their government's preferences and grant it a large margin of appreciation, because the Court's legitimacy depends on the member states accepting its decisions. In sum, rational institutionalism expects that: 1) Judges from countries where transgender rights are relatively poorly developed will support a narrow interpretation of European human rights, even more so when their home country is concerned; and 2) judges from countries where transgender rights are relatively well-developed will support a broad interpretation of European human rights.

Sociological institutionalism takes a different approach, not based on an individualist logic of consequences but on a logic of appropriateness. This logic departs from the understanding that individuals base their behaviour on an interpretation of their environment, and its written and unwritten rules. Sociological institutionalism sees European institutions as sites of socialisation, "insulated settings where social pressure [by the 'principal'] is absent or deflected" (Checkel, 2005, p. 806). This would enable actors to learn new, European norms that differ from the ones 'at home.'

Checkel (2005) identifies different mechanisms that induce agents to adopt new norms: "The key is the agents knowing what is socially accepted in a given setting or community" (p. 804). Agents will then behave accordingly because of so-called social sanctioning, a certain coercion to conform to the group in order to avoid being shamed. Some scholars argue that this peer pressure results in a trend "of unanimity and thereby homogeneity, which then proposes a claim towards European convergence" (Arold, 2007a, p. 320). In this view, judges do not want to be lone dissenters in the Court's 'splendid isolation' in Strasbourg (Voeten, 2008). In a perfect depiction of a social-sanctioning mechanism, Judge Rozakis describes his own experience as follows:

> Judges feel themselves assessed by their colleagues, they create their self-image in the eyes of their colleagues, and they run the risk of losing their respectability in their immediate environment if they pay too much attention to the interests of their home country. (As cited in Bruinsma, 2008, p. 38)

Another mechanism is social learning (Checkel, 2005, p. 812), when agents actively accept community norms as 'the right thing to do' and are willing to reshape their interests based on new arguments learned through deliberations and persuasion. When concepts and rights contained in the European Convention are reinterpreted in these deliberations in order to cover new issues,

such as the position of transgender persons, this can amount to 'widening' interpretations. The Court prides itself on its 'living instrument approach' (Amos, 2017, p. 21), which expresses the principle that the Convention is interpreted in the light of present-day conditions, and that it evolves through the interpretations of the Court. Sociological institutionalism hence expects that induced by social sanctioning and/or social learning, judges will articulate a broad interpretation of European trans rights.

Before turning to the methodological section, I will briefly present the institutional setting of the Court. The Court evaluates complaints by individuals against their government they deem in violation of the 1950 Convention or one of its protocols. Since 1998, all citizens of Council of Europe member states can appeal directly to the Court when they have no domestic legal remedies left. Cases are taken by a Chamber of three to seven judges, including the judge from the country involved in the case. Used in controversial or important cases, the Grand Chamber numbers 17 judges or more, including the national judge. The other judges are appointed by lot (European Court of Human Rights, 2020, Chapter V).

The principle of national representation is enshrined in the rules of the Court in different ways (European Court of Human Rights, 2020). Every member state of the Council of Europe is entitled to have one judge. It proposes three candidates, and the Parliamentary Assembly of the Council of Europe elects the judge from this list. Judges serve nine years. Procedurally, the 'national judge' plays a specific role because they act as gatekeeper for cases that concern their country. As rapporteur they make a recommendation on the admissibility of this case to a committee of three judges. If the rapporteur suggests dismissing the case and the other judges on the committee support the rapporteur, the case is dismissed without a decision on its merits. In the second stage, the 'national judge' is always included in the Chamber which decides the case.

3. Methodology

A search of the Court's database, HUDOC, resulted in 44 cases concerning transgender rights, of which 11 are still pending (last checked July 18, 2020). This leaves 33 cases for analysis. Transgender cases predominately concern alleged violations of a small number of articles from the Convention, particularly Article 8 on the right to respect for private and family life, Article 12 on the right to marry, and Article 14 on the prohibition of discrimination.

Rationalist expectations were checked by assessing the situation for transgender persons in all member states over time. For the period between 2011 and 2020, I used information from the annual Rainbow Europe Country Index compiled by ILGA Europe, a non-governmental organisation which promotes equality and human rights for LGBTI people (ILGA-Europe, 2011–2020). The Rainbow index' country scores could not be used, however, as they have been calculated differently over the years, the indicators are weighed based on changing and perhaps political considerations, and they cover lesbian, gay and intersex rights as well. I have therefore selected 14 indicators from the index which refer to legal standards regarding transgender people: is persecution because of gender identity recognised in asylum law; are hate speech and violence against transgender people recognised in criminal law; does discrimination law address gender identity; can transgender people legally marry a person of the other gender; is there a procedure for legal gender recognition, and which conditions apply (divorce, medical mental diagnosis, surgery, sterilisation). For each indicator, I scored 0 (legislation absent at national level) or 1 (legislation present at national level), resulting in annual scores per country between 0 and 14.

Of course, legislation does not fully capture daily life in a country, but it does offer a relatively straightforward yardstick. Rational institutionalism would expect judges from low-scoring countries to deliver narrow, status-quo judgements, while judges from high-scoring countries would deliver pro-transgender judgements. Unfortunately, a similar calculation is not possible for years before 2011. The pioneering report by Whittle, Turner, Combs, and Rhodes (2008) has too many 'unknowns' and does not cover all countries involved. Other excellent overviews (Hammarberg, 2009; Van den Brink & Dunne, 2018) discuss the legal situation in countries at a given point in time. For the early years, therefore, I can only offer some examples.

Sociological institutionalist expectations were tested by analysing the separate opinions attached to Court decisions. Separate opinions present the arguments of judges who, in a concurring opinion, give an additional explanation on their vote, while in a dissenting opinion they explain why they disagree with the majority. All opinions were checked for instances of persuasion, widening and narrowing.

4. Transgender Cases before the Court

In 1976, Belgian lawyer Daniel van Oosterwijck, called Danielle at birth, lodged the first transgender case with the Court. He wanted to change the gender status in his birth certificate, but Belgian law had no provision to do so. The Court declared his request inadmissible, because he had not exhausted domestic remedies (*Van Oosterwijck v. Belgium*, 1976, p. 14). Nine years later, Mark Rees (Brenda at birth) submitted a similar request. The Court found no violation of his right to respect for private life (Article 8 of the Convention). Although Rees lost his case, his action in Strasbourg resulted in ample media attention and the birth of a trans rights advocacy group, Press for Change. *Rees v. the UK* (1986) also sparked a political campaign by UK Member of Parliament Alex Carlile, which would eventually result in

the UK's Gender Recognition Act in 2004 (Rees, 2009). Only in 2002 would the Court stop defending the British government's position (*Goodwin v. UK*, 2002).

Over the years, there are some recurring themes in the cases brought before the Court (see Tables 1 and 2), the most prominent one being legal gender recognition. Initially—as in Rees' case—cases concerned the sheer possibility to have one's birth certificate modified. Later cases concern the conditions set to qualify for gender recognition, most notably the obligations to divorce, to undergo genital surgery and to be permanently sterilised. Other cases regard marriage and parental rights. A last theme is sexual harassment and degrading treatment suffered by transgender sex workers. In 13 cases, transgender applicants won their case, while in 14 cases they lost it. No clear trend is shown over time, as won and lost cases alternate. The next section first examines whether annual country scores correlate with judges' voting behaviour in the Court, then studying how the "national judge" votes and tracing socialisation processes in the Court.

4.1. Conservative Countries, Conservative Judges?

National legislation and societal attitudes regarding transgender people continue to vary strongly between member states (Transgender Europe, 2019). The judges' voting behaviour might reflect these differences. Table 1 shows all 17 transgender cases until 2010 plus the votes cast (listed according to the judges' nationality instead of using their names). A vote aligned with transgender contestation is noted as 'trans,' a vote aligned with state policies is noted as 'state.' As noted above, I have no data to score the state of transgender rights in a country before 2011. Anecdotal evidence, however, suggests that there might be no correlation between national transgender rights and the voting behaviour of judges. In *Rees v. UK* (1986), for instance, the three judges voting in favour of legal gender recognition against the majority came from a forerunner (Denmark) and two laggards (Italy and Switzerland). In *XYZ v. the UK* (1997), minority votes arguing that trans rights were being violated came not only from forerunner Denmark but also from laggards Andorra, Bulgaria and Poland. And although Germany introduced legal gender recognition in 1980, German judges voted against a violation of trans rights in many cases.

For later years, the data allows for calculating the yearly scores of individual countries as regards the situation of transgender rights (see Section 3). Table 2 presents all cases between 2011–2020, with country scores.

For these cases, we found a slightly higher average country score (5.43) for judges who voted in favour of transgender rights than for judges who voted in defence of the state (5.03; Table 2), which is in line with rational-institutionalist expectations. Also, in all cases with minority votes, the average country score for 'pro-trans' voters is higher than for 'pro-state' voters, for instance in *Hämäläinen v. Finland* (2014) and *X v. FYROM* (2019). That said, the number of cases is very limited. Even more troubling for any firm conclusion are the highly diverging scores at the individual level, where judges from high-scoring countries (Estonia, France, Portugal) vote 'no violation,' and judges from low-scoring countries (Armenia, Macedonia, San Marino) vote in defence of trans rights. I conclude that judges seem to vote independently, as their national situation regarding transgender rights cannot explain their voting behaviour.

4.2. My Government, My Vote?

How do judges behave when their own government is under scrutiny? In his quantitative analysis of 7,319 Court cases, Erik Voeten found that "national bias does matter and appears to be greater on politically sensitive issues" (2008, p. 418). When a ruling favours the applicant's country, the judge from that country more often votes with the majority than other judges; and when a ruling goes against 'their' country, they dissent more often (Voeten, 2008, p. 425). Voeten found that career incentives play a role, but also that "judges are subject to increased pressure on controversial cases that directly deal with the security of a country" (2008, p. 428).

For transgender cases, my findings are different. Tables 1 and 2 show how national judges voted, summarised by Table 3. In 14 cases of 27, national judges voted in defence of their home government with the majority in a state-supporting outcome. Sometimes they did so while hesitating. In *Sheffield and Horsham v. UK* (1998) for instance, a pro-state case with a narrow majority of 11–9, national judge Freeland admitted that he cast his vote defending the British state "after much hesitation and even with some reluctance," because "continued inaction on the part of the respondent State, taken together with further developments elsewhere, could well tilt the balance in the other direction" (*Sheffield and Horsham v. UK*, 1998, p. 25). In another case, national judge Ganshof van der Meersch voted with the majority defending the Belgian state, but his 'partially concurring opinion' reveals his doubts; he disagrees with the argument of the majority that the applicant should have appealed in cassation first, as the appeal clearly would be 'doomed to fail' (*Van Oosterwijck v. Belgium*, 1976, p. 19). In a single case, *B v. France* (1992), the national judge staunchly defended his government against the decision of a large "pro-trans" majority.

In the 12 other cases, the national judge voted with the majority in a transgender-rights supporting outcome against their government (Table 3). This was also the case in two recent cases, when national judges voted with the majority in favour of legal gender recognition (*YT v. Bulgaria*, 2020) and legal gender recognition of migrants (*Rana v. Hungary*, 2020). This is all the more striking because of the political situation in these countries. The Bulgarian government has decided against ratifying the Istanbul Convention of the Council of Europe

Table 1. Cases concerning transgender issues including voting behaviour, 1980–2010.

Case	Topic	Case #, Year decision	Vote and result	Nationality of judges voting aligned with state policies	Nationality of judges voting aligned with trans contestation
Van Oosterwijck v. Belgium	Legal recognition	7654/76, 1980	13–4 inadm. state	Be*-Cy-F-Ice-Ire-It-Mlt-NL-No-Port-Sp-Swe-UK	Au-Gr-Lux-Tk
Rees v. UK	Legal recognition	9532/81, 1986	12–3 state	Au, Fr, Ger, Ice, Ire, Lux, NL, No, Port, Swe, Tur, UK*	Dk, It, Swi
Cossey v. UK	Marriage	10843/84, 1990	10–8 state	Au, Fr, Ger, Ice, Ire, Mlt, No, Sp, Tur, UK*	Dk, Fin, It, Lcht, Lux, NL, Swe, Swi
B v. France	Marriage	13343/87, 1992	15–6 trans	Au, Cy, Fr*, Gr, Port, Sp	Fin, Ger, Hu, Ice, Ire, It, Lcht, Lux, Mlt, NL, San M, Swe, Swi, Tur, UK
XYZ v. UK	Family	21830/93, 1997	14–6 state	Au, Bel, Cz, Est, Fr, Ger, Gr, Hu, Lat, Lit, Lux, No, Port, UK*	And, Bul, Dk, Ice, It, Po
Sheffield and Horsham v. UK	Legal recognition	22985/93, 1998	11–9 state	Au, Bel, Cy, Cz, Gr, Lit, Mol, Port, Sp, Ukr, UK*	And, Ger, Ice, Lux, NL, Po, Ro, Swe, Swi
Goodwin v. UK	Legal recognition	28957/95, 2002	17–0 trans		Alb, Bel, Cro, Cz, Fr, Geo, Hu, Ire, Lcht, Lux, No, San M, Swe, Swi, Tur, Ukr, UK*
I v. UK	Legal recognition	25680/94, 2002	17–0 trans		[same as Goodwin]
Van Kück v. Germany	Surgery	35968/97, 2003	4–3 trans	Ire, No, Port	Ger*, Slove, Swi, Tur
Grant v. UK	Legal recognition	32570/03, 2006	7–0 trans		Alb, And, B&H, Fin, Mlt, Slovk, UK*
Parry v. UK	Marriage	42971/05, 2006	7–0 state	And, B&H, Fin, Mold, Po, Slovk, UK*	
R and F v. UK	Marriage	35748/05, 2006	7–0 state	Alb, And, B&H, Mlt, Mold, Po, UK*	
L v. Lithuania	Surgery	27527/03, 2007	6–1 trans	Swe	Fr, Geor, Hu, Lit*, Serb, Tur
Guerrero Castillo v. Italy	Legal recognition	39432/06, 2007	7–0 inadm. state	Be-Geo-Hu-It*-Port-SanM-Tur	
Nunez v. France	Legal recognition	18367/06, 2008	7–0 inadm. state	Cz-Dk-Fr*-Ger-Mac-Mo-Ukr	
Schlumpf v. Switzerland	Medical costs	29002/06, 2009	5–2 trans	Cro, No	Azer, Cy, Gr, Lux, Swi*
P.V. v. Spain	Family	35159/09, 2010	7–0 state	And, Arm, NL, Ro, Slove, Sp*, Swe	

Notes: * National judges.

to combat violence against women, inter alia because it believes that would increase the likelihood of young people identifying as transgender (Hervey, 2018). As regards Hungary, Orbán's anti-migration stance is well-known, and just two months before the Court's ruling, the Hungarian Parliament voted in favour of a bill that outlaws Legal Gender Recognition for transgender people (Transgender Europe, 2020).

Table 2. Votes in cases concerning transgender issues, 2011–2020.

Case	Topic	Case #, Year	Vote and result	Country scores of judges voting aligned with state policies	Average	Country scores of judges voting aligned w/trans contestation	Average
P v. Portugal	Legal recognition	56027/09, 2011	Strike-out (domestic law had changed in the meantime)				
Halat v. Turkey	Ill-treatment	23607/08, 2011	5-2 state	Ser, Tur* 4; Ice, Swi 5; Port 9	5.40	It 4; Bel 7	5.50
Cassar v. Malta	Marriage	36982/11, 2013	Strike-out (domestic law had changed in the meantime)				
Hämäläinen v. Finland	Marriage	37359/09, 2014	14-3 state	And, B&H, Mon 0; Lcht, Lit 1; Azer 2; It, Lat 4; Fin*, Lux 5; Fr, Gr, Mold 6; No 8	3.43	Swi 5; Hu 8; Bel 10	7.66
YY v. Turkey	Sterilisation	14793/08, 2015	7-0 trans			Lit 2; It, Tur* 3; Swi 4; Mont 6; Ice 9; Bel 10	5.29
X v. Turkey	Medical errors	24727/12, 2017	Inadmissible (domestic remedies not exhausted)				
D.Ç. v. Turkey	Surgery	10684/13, 2017	Inadmissible (domestic remedies not exhausted)				
A.P., Garcon & Nicot v. France	Sterilising treatment	79885/12, 2017	6-1 trans	Lcht 1	1.00	Azer 2; Bul 3; B&H, Lat 5; Ger 10, Fr* 11	6.0
S.V. v. Italy	Legal recog.	55216/08, 2018	7-0 trans			SanM 0; Arm 1; Cz 4; It* 6; Cro 9; Fin 10; Gr 12	6.0
X v. FYROM	Legal recog.	29683/16, 2019	5-2 trans	Cz 4; Po 5	4.50	SMar 0; Mac* 1; UK 8; Fin 10; Gr 12	6.2
PO v. Russia	Legal recog.	52516/13, 2019	Strike-out (Court has received no response to its letter)				
P v. Ukraine	Legal recog.	40296/16, 2019	Inadm. state	Geor, Lat 4; Ukr* 6; Au, Ire 9; Ger 10; Fr 13	7.86		
Solmaz v. Turkey	Ill-treatment	49373/17, 2019	Inadm. state	Mont 5; Est 8; No 11	8.00		
RL v. Russia	Legal recog.	36253/13, 2020	Strike-out (Court has received no response to its letter)				
YT v. Bulgaria	Legal recog.	41701/16, 2020	7-0 trans			Azer, Bulg* 0; Lat 3; Geo 4; Ukr 5; Ire 9; Ger 10	4.43
Rana v. Hungary	Legal recog. migrant	40888/17, 2020	3-0 trans			Lcht 1; Hu* 2; Ser 4	2.33
				Average	5.03		5.43

Notes: * National judges.

Table 3. Voting behaviour of national judges.

	Decision national judge aligned with state policies	Decision national judge aligned with trans contestation
Decision court aligned with state policies	14	0
Decision court aligned with trans contestation	1	12

In sum, the dominant pattern is not one of judges defending their government, but of national judges joining the majority. This pattern confirms Voeten's finding that 'judges have a strong and significant preference for not being lone dissenters' (2008, p. 428) and seems to hint at the strong impact of socialisation processes.

4.3. Processes of Persuasion

Looking at Table 1, the Court's decision in *Goodwin v. UK* (2002) on legal gender recognition clearly constituted a breakthrough. In previous cases, the Court had supported the British government, but in *Goodwin v. UK* (2002) it decided that transgender human rights were being violated. One could argue that Nicolas Bratza, the British judge, had finally been persuaded by his colleagues and voted accordingly. Yet, one could also argue that judge Bratza brought his profile as human rights lawyer to Strasbourg, as opposed to his predecessor Freeland, who spent decades in British diplomatic service. In some other cases, the judges' professional or political background also better explains their vote than their home country's score (see also Arold, 2007b; Voeten, 2008, p. 431). Judge De Meyer, for instance, also acted as adviser to the Belgian Christian-Democrats, which seems in line with his distinctly conservative views (*Sheffield and Horsham v. UK*, 1998, p. 23; *XYZ v. UK*, 1997, p. 19).

In many cases, separate opinions reflect the frustrations of judges who were unable to convince the majority. These do not describe much in the way of persuasion, even literally: In *Cossey v. UK* (1990), the judges who had previously dissented in *Rees v. UK* (1986) declared themselves "no more persuaded now than we were then" (*Cossey v. UK*, 1990, p. 16). In a lengthy dissenting opinion in *Cossey v. UK* (1990), Judge Martens tried to persuade his colleagues that the court had been wrong in *Rees v. UK* (1986) and should review its decision. In the next trans case, *B v. France* (1992), Martens was pleased to note that "several of my colleagues now share that opinion" (p. 47). Six judges indeed had changed their views from pro-state to pro-trans, but three of them would vote pro-state again in the subsequent case, so it cannot be confirmed that they really shared his opinion.

Zooming in on arguments instead of judges, we can see how discourses are in the end dominated by wide interpretations rather than narrow ones. The focus is on four recurring issues: the margin of appreciation, the knowledgeable individual, transgender bodies, and transgender relations.

4.4. The Margin of Appreciation

The legal argument of a 'margin of appreciation' awarded to governments, especially in politicised issues, plays a key role in all cases. If judges behave as European norm setters, they should strongly dispute claims supporting a wide margin of appreciation. In *Cossey v. UK* (1990), Macdonald and Spielman protest that "although the principle of the States' wide margin of appreciation was at a pinch acceptable in the *Rees v. UK* (1986) case, this is no longer true today" (p. 17). Eight years later, the dissent was even more outspoken. In vain, judges protested that British law was out of sync with societal developments, and that states' margin of appreciation could not justify "policies which lead inevitably to embarrassing and hurtful intrusions into the private lives of such [transgender] persons" (*Sheffield and Horsham v. UK*, 1998, p. 29). Other judges vehemently opposed any widening in transgender cases, arguing that: "Situations which depart from the normal and natural order of things must not give rise to aberrations in the field of fundamental rights" (judges De Meyer, Valticos and Morenilla in *Sheffield and Horsham v. UK*, 1998, p. 23). In *Goodwin v. UK* (2002), four years later, the Court stated unanimously that:

> 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 could no longer be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. (p. 26)

Clearly, the Strasbourg legal community had lost its patience with the British government and finally defined a European standard, which laggards had to comply with too.

Opinions diverged as to the meaning of the margin of appreciation itself. While (pro-state) judge Morenilla already defined a positive obligation as a form of widening, (pro-trans) judge Martens wanted to narrow the margin of appreciation to the states' decision of how to implement a Court ruling instead of the Court's decision on the matter at hand (*Cossey v. UK,* 1990, p. 23). And while judge Pinheiro Farinha argued that the Court does not have the right to grant new rights to individuals (*B v. France*, 1992, p. 30), judge Martens defended the opposite position and argued that the Court should develop new common standards precisely because:

> In such a larger, diversified community the development of common standards may well prove the best, if not the only way of achieving the Court's professed aim of ensuring that the Convention remains a living instrument to be interpreted so as to reflect societal changes and to remain in line with present-day conditions. (*Cossey v. UK*, 1990, p. 24)

The question continues to resurface. Most recently, in 2019, judges Pejchal and Wojtyczek protested that "the letter of the Convention is the impassable frontier" and that it "is incompatible with the mandate of a judicial body to trigger or amplify societal changes by way of an 'evolutive interpretation' of the Convention" (*X v. FYROM*, 2019, p. 19). Interestingly, this narrow view has become the minority view (2–5 votes). Over time, the living-instrument approach seems to have side-lined the margin of appreciation in transgender cases on legal recognition.

4.5. The Knowledgeable Individual

While the European Convention aims to protect the individual against the state, the individual tends to be narrowly defined as the knowledgeable, responsible individual, and for a long time the Court excluded transgender persons from that category. They were deemed incapable of assessing the consequences of their actions, undergoing irreversible surgical interventions without due reflection. Judge Matscher contended that the initiative to have an operation outside France was taken "lightly, as it seems" (*B v. France*, 1992, p. 29), and judge Pinheiro Farinha feared "the trivialisation of irreversible surgical operations" (*B v. France*, 1992, p. 30). The Court treated them with compassion as a "small and tragic group of fellow-men" (Martens, as cited in *Cossey v. UK,* 1990, p. 19), "deserving as they are of the Court's sympathy" (Freeland, as cited in *Sheffield and Horsham v. UK*, 1998, p. 25).

In contrast, the judges' language suggests they know exactly what transgender people should do: Judge Pettiti warns that 'many cases of true or false transsexual applicants correspond to psychiatric states which should be treated by psychiatry only, so as not to risk disaster' (*B v. France*, 1992, p. 34). Judges also seem to know best how a trans person should feel: "Like any other human being, a transsexual must come to terms with his past. He has no need to be ashamed of having wanted to change sex" (De Meyer, Valticos, & Morenilla, as cited in *Sheffield and Horsham v. UK*, 1998, p. 24); "[applicant should have waited before undergoing surgery] The suffering and feelings of frustration caused by a further delay of six months cannot therefore be regarded as unbearable" (Vajić and Jebens, as cited in *Schlumpf v. Switzerland*, 2009, p. 31); "It is not shown that her family life within the meaning of Article 8 would be somehow affected by her change of gender (Ziemele, as cited in *Hämäläinen v. Finland*, 2014, p. 29).

The transgender individual is, hence, an individual in need of the protection of someone who knows what is better for them. To convince their colleagues, 'pro-trans' judges also resort to medical arguments, stating that trans people suffer from gender dysphoria as a recognised medical condition. They also refer to the autonomy of a transgender person in almost standardised wording in several cases (e.g., *Schlumpf v. Switzerland*, 2009, §100; *Van Kück v. Germany,* 2003, §69; *YY v. Turkey*, 2015, §58), but without daring to argue for self-determination in the sense that a person defines their gender identity themselves. Only this step would undo the narrowing of the transgender individual as unknowledgeable and irresponsible.

4.6. Transgender Bodies

The European Convention does not refer to men or women, but to 'everyone' or 'anyone,' with the exception of Article 12 on marriage. 'Everyone' should be protected against sex discrimination, but the Convention ignores that 'everyone' and 'anyone' are gendered beings. Every transgender case thus requires widening the Convention's provisions, as the Convention 'does not guarantee the right to change sex' (Pinheiro Farinha, as cited in *B v. France*, 1992, p. 30). Yet, there is more to it than widening. Judges struggle to come to terms with the transgender body and their notion of what is a woman/man:

> Biologically she is considered not to be a woman. But neither is she a man, after the medical treatment and surgery. She falls somewhere between the sexes. (Palm, as cited in *Cossey v. UK*, 1990, p. 5)

> A sex change does not result in the acquisition of all the biological characteristics of the other sex. While it removes the organs and functions specific to the 'former sex,' it creates, at most, only the appearance of the 'new sex.' (De Meyer, Valticos, & Morenilla, as cited in *Sheffield and Horsham v. UK*, 1998, p. 24)

> Surgical operations do not change the individual's real [sic] sex, but only the outward signs and morphology of sex. (Pinheiro Farinha, as cited in *B v. France*, 1992, p. 30)

Judge Pinheiro Farinha bluntly states: "I do not know the concept of social sex and I do not recognise the right of a person to change sex at will" (*B v. France*, 1992, p. 30). And judges De Meyer, Valticos, and Morenilla maintain the opinion that any legal recognition of sex change is a falsification and amounts to "permitting a husband who has gone to live with another woman to demand that his wife's name on his marriage certificate be replaced by that of his new partner" (*Sheffield and Horsham v. UK*, 1998, p. 23). The Court sticks to biological determinism instead of considering sex a legal category, such as 'fam-

ily' or 'property,' which it can give an autonomous legal meaning (Gonzalez-Salzberg, 2014, p. 807): "The applicant whom I will not refer to in the feminine, [because] even after the hormone treatment and surgical operation which he underwent, [he] continued to show the characteristics of a person of male sex" (Pinheiro Farinha, as cited in *B v. France*, 1992, p. 30).

The Court only defends the right to legal gender recognition (after *Goodwin v. UK*, 2002) for individuals who have completed gender reassignment, including genital surgery. Pre-operative transgender persons are referred to "as being in an 'intermediate' position" (Gonzalez-Salzberg, 2014, p. 825). Some judges even openly display discomfort with non-binary bodies: "One cannot accept dubious hermaphrodites and ambiguous situations….And is there thus not a risk…of seeing as a consequence half-feminised men claiming the right to marry normally constituted men, and then where would the line to be drawn?" (Valticos & Loizou, as cited in *B v. France*, 1992, p. 37).

The requirement of permanent sterilisation for transgender persons as a prior condition for legal gender recognition remains highly contested and is still enforced in 20 member states (Transgender Europe, 2019). In Turkey, permanent sterilisation is even required before getting access to gender reassignment surgery. Dissenting judges in *YY v. Turkey* (2015) question whether states have "a legitimate interest capable of justifying the requirement of permanent infertility"; they make a comparison with the Court's earlier condemnation of the forced sterilisation of women of Roma origin, and would have preferred the Court to widen the application of Article 8 and decide whether the requirement of permanent sterilisation as such is a violation (*YY v. Turkey*, 2015, pp. 24–26). In 2017, in *A.P., Garcon, & Nicot v. France* (2017), the Court finally condemned sterilisation as a required prior condition. However, it still failed to answer the question of which legitimate interest states could have to impose sterilisation on transgender bodies, leaving some judges dissatisfied (*A.P., Garcon, & Nicot v. France*, 2017, pp. 52–59). In sum, the Court has not come up with a purely legal definition of the trans body, preferring to hide behind the medical profession's opinion. This also implies that non-binary bodies fail to be protected by Court reasoning.

4.7. Marriage and Family

According to Article 12, 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right' (European Court of Human Rights, 2013, p. 13). It logically follows from the refusal to recognise sex change that trans persons are not allowed to marry, since the Convention's definition of marriage implies the union of a man and a woman (*Cossey v. UK*, 1990, p. 7). Added to that, many states require married trans persons to divorce first if they want to have their gender reassignment legally recognised. The Court continues to adhere to its heteronormative views (Johnson, 2018).

Already in 1990, dissenting judges asked in vain to widen the concept of marriage, arguing that the draftsmen of the European Convention had traditional marriage in mind, but not the intention to deny transsexuals the right to marry (*Cossey v. UK*, 1990, pp. 27–28). However, the Court does not question the historical and geographic specificity of the concept of marriage (see Kollman & Waites, 2009). Marriage is defended as "an area of life in which the biological sex of a person is of supreme vital importance" and is "universally accepted throughout human history" (*B v. France*, 1992, p. 44). In two cases in 2006, the Court referred approvingly to a British court decision which stipulated that "marriage could only be between a woman and a man, determined on genital, gonadal and chromosomal factors, and should not take into account the party's psychological beliefs" (*Parry v. UK*, 2006, p. 5; *R&F v. UK,* 2006, p. 5). The Court admits that this requirement clearly puts F. 'in a quandary—she must, invidiously, sacrifice her gender or her marriage' (*R&F v. UK*, 2006, p. 12; same sentence in *Parry v. UK*, 2006, p. 10) but considered this proportionate. Eight years later, in *Hämäläinen v. Finland* (2014), dissenting judges asked in vain to widen the meaning of Article 12 to the right 'to remain married'; they argue that 'it is an oversimplification' to treat the relationship between a trans woman and her wife as a homosexual relationship (p. 38). The Court, however, sticks to the opinion that states have a legitimate interest in protecting traditional marriage. Today, 26 of the 47 member states still require a transgender person to divorce in order to obtain legal gender recognition (ILGA-Europe, 2020).

Similarly to marriage, the concept of family in Article 8 on the respect for private and family life is not elaborated in the Convention, but judges systematically narrow it to a constellation of woman as mother, man as father, and their biological children. As judge Walsh stated: "It would be the height of absurdity to describe a father as having become his own child's mother or aunt as it would be to describe a mother as having become her own child's father or uncle" (*B v. France*, 1992, p. 44).

Judge De Meyer claimed that "it is self-evident that a person who is manifestly not the father of a child has no right to be recognised as her father," and there "is only 'the appearances' of 'family ties' between trans man X and child Z" (*XYZ v. UK*, 1997, p. 19). Judge Petitti even claimed that "not all transsexuals have the same aptitude for family life as a non-transsexual" (*XYZ v. UK*, 1997, p. 17), and to substantiate the claim, he refers to a popular-scientific publication written by himself (Pettiti, 1992). In vain, judges Gotchev and Makarczyk argued that this is family life and should be recognised as such (*XYZ v. UK*, 1997, p. 26). Another dissenter asked to widen the concept using the analogy of the father as "the partner of a mother who gives birth to a child as a result of AID [artificial insemination by donor]" (Thór Vilhjámsson, as cited in *XYZ v. UK*, 1997, p. 23). In trans-

gender cases, judges have narrowed, not widened the concept of family.

5. Conclusions

Transgender rights remain a highly contested issue, upsetting the 'normal,' binary ordering of society. Transphobia and hate speech are on the rise in Europe. To find out to what extent the Court in Strasbourg acts as a guardian of trans human rights and bolsters progressive European norms, and to what extent it refrains from criticising governments who do not respect trans rights, I formulated expectations based on rational institutionalism regarding the extent to which judges will vote according to the state of trans rights in their home country; and based on sociological institutionalism regarding widening norms in the socialising environment of the Court.

Analysing all trans cases (1980–2020), I did not find a correlation between judges' votes and the situation of trans rights in their country. For 10 cases since 2011, Court Chambers giving a pro-trans ruling had a slightly higher average country score than Chambers giving a pro-state ruling. That said, at the individual level this correlation did not hold, as judges from low-scoring countries, including (South-)Eastern European ones, sometimes support trans rights, while judges from high-scoring countries, including Western European ones, sometimes defend the state. With one exception, 'national' judges never defended their home country against the view of a majority. They joined the majority, whether pro-state or pro-trans. In sum, rationalist expectations were not confirmed.

An analysis of the separate opinions showed that, over time, widening and narrowing processes have taken place regarding several aspects of transgender cases. Importantly, the margin of appreciation was narrowed over time, reducing the space for conservative governments to deal with transgender issues the way they see fit. However, the Court continues to struggle to acknowledge the transgender individual as being autonomous, knowledgeable and responsible, and still has not acknowledged their right to self-determination. Norms concerning the transgender body have been widened over time, but remain within the limits of binary, medical thinking. An exception to patterns of gradual widening is the Court's persistently narrow definition of marriage and family. Given the very piecemeal, incomplete and hesitant widening processes, sociological institutionalist expectations have been met to the extent that the Court indeed seems a site of socialisation, albeit one unable overcome the strong convictions judges bring to Strasbourg.

What do these findings imply for pending cases involving countries such as Georgia, Romania, Russia and Turkey, where trans people are very vulnerable and governments seem receptive to transphobic beliefs? As judges have not given in to a backlash in their home and other countries, and as widening has resulted in a stable body of pro-trans judgments, my findings point at some European norm setting, which might be good news for the transgender community. On the dark side, for populist and conservative supporters of state sovereignty, the margin of appreciation's side-lining in transgender cases confirms their criticisms of the Court, which might endanger its legitimacy and, hence, its long-term effectiveness.

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References

Amos, M. (2017). The value of the European Court of Human Rights to the United Kingdom. *The European Journal of International Law*, *28*(3), 763–785.

A. P., Garcon & Nicot v. France, Reports 2017 (ECHR, 6 April 2017).

Arold, N. (2007a). The European Court of Human Rights as an example of convergence. *Nordic Journal of International Law*, *76*(2-3), 305–322.

Arold, N. (2007b). *The legal culture of the European Court of Human Rights*. The Hague: Martinus Nijhoff Publishers.

B v. France, Reports A232-C (ECHR, 25 March 1992).

Bruinsma, F. J. (2006). Judicial identities in the European Court of Human Rights. In A. van Hoek, A. M. Hol, O. Jansen, P. Rijpkema, & R. Widdershoven (Eds.), *Multilevel governance in enforcement and adjudication* (pp. 203−240). Cambridge: Intersentia.

Bruinsma, F. J. (2008). The room at the top: Separate opinions in the grand chambers of the ECHR (1998–2006). *Ancilla Iuris*, *2008*, 32−43.

Bruinsma, F. J., & Parmentier, S. (2003). Interview with Mr. Luzius Wildhaber, President of the ECHR. *Netherlands Quarterly of Human Rights*, *21*(2), 185–201.

Checkel, J. T. (2005). International institutions and socialization in Europe: Introduction and framework. *International Organization*, *59*(4), 801–826.

Cossey v. UK, Reports A184 (ECHR, 27 September 1990).

de Waele, H., & van der Vleuten, A. (2011). Judicial activism in the European Court of Justice: The case of LGBT rights. *Michigan State Journal of International Law*, *19*, 639–664.

European Court of Human Rights. (2013). *European Convention on Human Rights*. Strasbourg: European Court of Human Rights. Retrieved from https://www.

echr.coe.int/Documents/Convention_ENG.pdf
European Court of Human Rights. (2019). *Overview ECHR 1950–2018*. Strasbourg: European Court of Human Rights. Retrieved from https://www.echr.coe.int/Documents/Overview_19592018_ENG.pdf
European Court of Human Rights. (2020). *Rules of Court.* Strasbourg: European Court of Human Rights. Retrieved from https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf
Garrett, G., Keleman, D., & Schulz, H. (1998). The European Court of Justice: Master or servant? Legal politics in the European Union. *International Organization*, *52*, 149–170.
Gonzalez-Salzberg, D. A. (2014). 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*, *29*(4), 797–829.
Goodwin v. UK, Reports 2002-VI (ECHR, 11 July 2002).
Hämäläinen v. Finland, Reports 2014-IV (ECHR, 16 July 2014).
Hammarberg, T. (2009). *Issue paper: Human rights and gender identity*. Strasbourg: Council of Europe. Retrieved from https://rm.coe.int/ref/CommDH/IssuePaper(2009)2
Helfer, L. R. (2008). Redesigning the European Court of Human Rights: Embeddedness as a deep structural principle of the European human rights regime. *European Journal of International Law*, *19*(1), 125–159.
Hervey, G. (2018, February 15). Bulgaria backs away from treaty opposing violence against women. *Politico*. Retrieved from https://www.politico.eu/article/bulgaria-istanbul-convention-backs-away-from-treaty-opposing-violence-against-women
HUDOC. (n.d.). Document collection. *HUDOC*. Retrieved from https://hudoc.echr.coe.int
ILGA-Europe. (2011–2020). Rainbow Europe country index. *ILGA-Europe*. Retrieved from https://www.ilga-europe.org/rainboweurope
ILGA-Europe. (2020). *Annual review of the human rights situation of lesbian, gay, bisexual, trans, and intersex people covering the period of January to December 2019*. Brussels: ILGA-Europe. Retrieved from https://www.ilga-europe.org/sites/default/files/Annual%20Review%202020.pdf
Johnson, P. (2018). *Going to Strasbourg: An oral history of sexual orientation discrimination and the European Convention on Human Rights*. Oxford: Oxford University Press.
Kollman, K., & Waites, M. (2009). The global politics of lesbian, gay, bisexual and transgender human rights: An introduction, *Contemporary Politics*, *15*(1), 1–17.
Mälksoo, L. (2016). Russia's constitutional court defies the European Court of Human Rights: Constitutional Court of the Russian Federation judgment of 14 July 2015, No 21П/2015. *European Constitutional Law Review*, *12*(2), 377–395.
Oomen, B. (2016). A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European Court of Human Rights in the Netherlands. *The International Journal of Human Rights*, *20*(3), 407–425.
Panke, D. (2020). The European Court of Human Rights under scrutiny: explaining variation in non-compliance judgments. *Comparative European Politics*, *18*, 151–170.
Parry v. UK, Reports 2006-VX (ECHR, 28 November 2006).
Pettiti, L. E. (1992). *Les transsexuels* [The transsexuals]. Collection Que sais-je. Paris: Presses Universitaires de France.
Rana v. Hungary, ECLI:CE:ECHR:2020:0716JUD004088817 (ECHR, 16 July 2020).
Rees, M. (2009). Profile. *LGBTQ Religious Archives*. Retrieved from https://lgbtqreligiousarchives.org/profiles/mark-rees
Rees v. UK, Reports A106 (ECHR, 17 October 1986).
R & F v. UK, ECLI:CE:ECHR:2006:1128DEC003574805 (ECHR, 28 November 2006).
Schlumpf v. Switzerland, ECLI:CE:ECHR:2009:0108JUD 002900206 (ECHR, 8 January 2009).
Sheffield&Horsham v. UK, Reports 1998-V (ECHR, 30 July 1998).
Swirc, M. (2017). De legitimiteitscrisis van het Hof in Straatsburg: Een dialoog is beter dan foei roepen [The crisis of legitimacy of the Court in Strasbourg: A dialogue is better than shouting shit]. *De Groene Amsterdammer*. Retrieved from https://www.groene.nl/artikel/een-dialoog-is-beter-dan-foei-roepen
Transgender Europe. (2019). Trans rights Europe and Central Asia map & index 2019. *Transgender Europe*. Retrieved from https://tgeu.org/trans-rights-europe-central-asia-map-index-2019
Transgender Europe. (2020). Protect legal gender recognition now. *Transgender Europe*. Retrieved from https://tgeu.org/protect-lgr-now
Van den Brink, M., & Dunne, P. (2018). Trans and intersex equality rights in Europe: A comparative analysis. *European Commission*. Retrieved from https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=638586
van der Vleuten, A. (2005). Pincers and prestige: Explaining the implementation of EU gender equality legislation. *Comparative European Politics*, *3*, 464–488.
Van Kück v. Germany, Reports 2003-VII (ECHR, 12 June 2003).
Van Oosterwijck v. Belgium, Reports A40 (ECHR, 6 November 1980).
Voeten, E. (2008). The impartiality of international judges: Evidence from the European Court of Human Rights. *American Political Science Review*, *102*(4), 417–433.
Whittle, S., Turner, L., Combs, R., & Rhodes, S. (2008). *Transgender EuroStudy: Legal survey and focus on the transgender experience of healthcare.* Brussels: ILGA-Europe. Retrieved from http://www.pfc.org.uk/pdf/eurostudy.pdf

X v FYROM, ECLI:CE:ECHR:2019:0117JUD002968316 (ECHR, 17 January 2019).
XYZ v. UK, Reports 1997-II (ECHR, 22 April 1997).
YT v. Bulgaria, ECLI:CE:ECHR:2020:0709JUD004170116 (ECHR, 9 July 2020).
YY v. Turkey, Reports 2015-I (ECHR, 10 March 2015).

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