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The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights

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THE ACCEPTED TRANSSEXUAL AND THE ABSENT TRANSGENDER: A QUEER READING OF THE REGULATION OF SEX/GENDER BY THE EUROPEAN COURT OF HUMAN RIGHTS

DAMIAN A. GONZALEZ-SALZBERG*

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INTRODUCTION

Is it a boy or a girl? Almost automatically after birth, every newly born person is gendered. In fact, the sex/gender of the newborn acts as a pre-requisite for his/her recognition as a human being. As argued by Judith Butler, the sex/gender of a person acts as the ontological basis for his/her body to become intelligibly human.¹ In turn, individuals who do not appear to be “properly” gendered have their own humanity put into question.²

One of the sources of the sex/gender regulatory system that discursively transforms observed genitalia into sex/gender is the law.³ The law plays an essential role in the regulation of individuals’ identities, which certainly includes their sexes/genders.⁴ Every person is constructed by the law as a legal woman or a legal man,⁵ and this

1. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* xxiii (10th ed. 1999) [hereinafter BUTLER, *GENDER TROUBLE*].

2. See, e.g., JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* 7–8 (1993) [hereinafter BUTLER, *BODIES THAT MATTER*] (pointing out how the construction of gender operates “through *exclusionary* means, such that the human is not only produced over and against the inhuman, but through a set of foreclosures, radical erasures, that are, strictly speaking, refused the possibility of cultural articulation”).

3. See Carol Smart, *Law’s Power, the Sexed Body, and Feminist Discourse*, 17 J.L. & SOC’Y 194, 204 (1990) (explaining that certain discourses are constantly drawn into a dualistic frame of reference whereby the concept woman is meaningful only so long as there is a concept of man against which it can be formulated, and that law is one of the discourses which constantly reproduces self-evident and natural women in a sexualized and subjugated form).

4. CAROL SMART, *FEMINISM AND THE POWER OF LAW* 6, 162 (1989) [hereinafter SMART, *FEMINISM AND THE POWER OF LAW*] (exploring the interplay between the law and alternative societal realities); CARL STYCHIN, *LAW’S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE* 156 (1995) (pointing out that although both law and legal sexual identities are social constructions, this does not negate the fact that both are invested with meaning which gives rise to material consequences).

5. See, e.g., SMART, *FEMINISM AND THE POWER OF LAW*, *supra* note 4, at 93 (explaining the various ways in which women have been categorized differently under the law because of their biological distinctiveness); KATHERINE O’DONOVAN, *SEXUAL DIVISIONS IN THE LAW* 59 (1985) (noting that one of the first questions asked when a child is born is whether that baby is a male or female, and arguing the answer to that question will affect the baby’s future goals, behavior, identity, personality, emotions, sexuality and gender role).

legally imposed sex/gender is the first assumption of a person's identity. Indeed, the legal attribution of a sex/gender to a person has the value of a truth that is, at the same time, read in and imposed on the body. As asked and answered by Michel Foucault in his introduction to "Herculine Barbin":

Do we truly need a true sex? With a persistence that borders on stubbornness, modern Western societies have answered in the affirmative. They have obstinately brought into play this question of a "true sex" in an order of things where one might have imagined that all that counted was the reality of the body and the intensity of its pleasures.⁶

Furthermore, the law's sex/gender system is not only mandatory, but is also conceived in terms of an oppositional man/woman binary. These two sexes/genders are conceived as ontologically opposite; therefore, belonging to one of the sexes/genders implies being excluded from the other. In fact, the law can only comprehend its subjects as legally sexed/gendered in a binary manner, problematizing every individual that does not fit properly within the binary understanding of these categories.⁷ This article is about the problematization of the bodies that do not fit the normalizing sex/gender model.

The article will resort to queer theory as a methodological tool for analyzing legal discourse. Queer theory works within a post-structuralist understanding of identities that contests their stability, challenging not only the fixity of categories such as sex, gender and sexuality, but also the traditional construction of these characteristics as opposed binaries.⁸ In particular, Butler's work will be used for its understanding of the link between sex and gender and the possibility of imagining identities that transcend the binary understanding of sex/gender.⁹

6. MICHEL FOUCAULT, *HERCULINE BARBIN: BEING THE RECENTLY DISCOVERED MEMOIRS OF A NINETEENTH-CENTURY FRENCH HERMAPHRODITE* vii (1980).

7. See O'DONOVAN, *supra* note 5, at 61 (arguing that certain variations in characteristics that define biological distinctiveness, such as the amount of estrogen or testosterone present in the body varying from person to person, make binary gender categorization under the law difficult).

8. See ANNAMARIE JAGOSE, *QUEER THEORY* 3 (1980); STYCHIN, *supra* note 4, at 141, 145; JEFFREY WEEKS, *THE LANGUAGE OF SEXUALITY* 146 (2011).

9. See *generally* BUTLER, *GENDER TROUBLE*, *supra* note 1, at 10 ("When the

Since the early 1970s it has become usual within feminist theory to distinguish between the categories of *sex* and *gender*.¹⁰ While sex was understood in terms of biological differences, regarding genitalia and procreative functions, gender was considered to be a cultural creation that refers to a differential social classification between men and women.¹¹ However, queer theory proposes a different understanding of the sex/gender dynamics.¹² From a *queer* perspective, both sex and gender should be understood as cultural constructions.¹³ In fact, what might prove to be the case is that the distinction between sex and gender is no distinction at all.¹⁴ Sex can be understood to be gender, since the sex/gender attributed to individuals is always culturally created.¹⁵ Yet more, Butler affirmed that the cultural character of gender and sex, coupled with the absence of a needed causal relation between both notions, suggested that the binary conceptions of gender and sex are actually unnecessary.¹⁶ Since neither sex nor gender is a pre-discursive notion that is fixed on the individuals, both notions could be re-conceived outside the limited categorical binary manner in which they exist.¹⁷ Therefore, following Butler, this article will not distinguish the concepts *sex* and *gender* and it will dare to envision a queer existence beyond the binary understanding of sex/gender identities.

constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that *man* and *masculine* might just as easily signify a female body as a male one, and *woman* and *feminine* a male body as easily as a female one.”); BUTLER, *BODIES THAT MATTER*, *supra* note 2, at 1.

10. Stevi Jackson, *Theorizing Gender and Sexuality*, in CONTEMPORARY FEMINIST THEORIES 131, 132–33 (Stevi Jackson & Jackie Jones eds., 1998).

11. See ANN OAKLEY, *SEX, GENDER, AND SOCIETY* 16 (1972); Jackson, *supra* note 10, at 133 (arguing that concepts such as masculinity and femininity are defined not by biology, but by cultural attributes which are acquired through becoming a man or a woman in a particular society at a particular time).

12. See, e.g., Jackson, *supra* note 10, at 131 (noting that although gender and sexuality are among feminisms most central concepts, there is no consensus on how to define them or how to theorize their interrelationship).

13. See CHRISTINE DELPHY, *CLOSE TO HOME: A MATERIALIST ANALYSIS OF WOMEN’S OPPRESSION* 144 (1984) (arguing that oppression spawned a gender construct which then seized on a socially meaningless anatomical difference to create the socially significant category of sex).

14. BUTLER, *GENDER TROUBLE*, *supra* note 1, at 6–7.

15. *Id.*

16. *Id.*

17. *Id.* at 11.

The article will focus on existing challenges to the binary understanding of legally sexed/gendered bodies, which offer only two possible classifications: men and women. This categorical model of fixed dualistic genders is challenged by the existence of those who do not neatly fit on one side of the binary: specifically, the transsexual and the transgender subjects. In particular, the article will deal with the normalizing power the European Court of Human Rights exercises over sex.¹⁸ The selection of this Court as the focus of this paper is not arbitrary; the Court is the human rights monitoring body that has dealt with the largest number of cases concerning *trans* rights.¹⁹

The terminology used in the article will follow the definitions offered by Stephen Whittle;²⁰ therefore, the terms *trans*, *transsexual*, and *transgender* will have precise meanings. The term *trans* will be used as an umbrella concept, to refer to every person who does not perceive their gender identity as the same as the one they were socially expected to fulfill as a result of their sex designation at birth. The term *transgender* will be used to refer to those individuals who live, or desire to live, a part of their life performing a gender role that does not follow the socially expected one that is allegedly correlative to the sex assigned to them at birth. Lastly, the term *transsexual* will be used to refer to those individuals who intend to undergo, are undergoing, or have undergone a sex-reassignment process.

The article will be divided into six parts. The first part will focus on

18. See *Sheffield & Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58212>; *Goodwin v. United Kingdom*, App. 28957/95, 22 Eur. H.R. Rep. 123, ¶ 100, available at http://www.echr.coe.int/Documents/Reports_Recueil_2002-VI.pdf (explaining that a correction to a birth certificate can only be made in cases where the apparent and genital sex of a child was wrongly identified, or where the biological criteria were not congruent. No error is accepted to exist in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex).

19. See, e.g., *Rees v. United Kingdom*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A) (1986); *Sheffield*, 1998-V Eur. Ct. H.R.; *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep.

20. STEPHEN WHITTLE, RESPECT AND EQUALITY: TRANSSEXUAL AND TRANSGENDER RIGHTS xxii–iii (2002). These definitions do not intend to be anything else than a useful clarification to establish a common understanding of terms, limited to this work. Moreover, it is acknowledged that any given definition would be arbitrary and, most likely, insufficient to describe all possibilities a person can have to construct his/her own identity.

the gendered subject conceived by the European Convention on Human Rights. Parts II and III will analyze how sex has been defined and re-defined by the Court's case law through the years and its consequences concerning *trans* individuals. Part IV will then discuss the value of surgery in the re-definition of sex, and Part V will focus on the current limitations of surgery as a human right. Lastly, Part VI will highlight that certain bodies are still excluded from the understanding of gender of the Court's case law and it will evaluate the potentially *queer* consequences of such exclusion.

I. THE SEXED/GENDERED SUBJECT OF HUMAN RIGHTS

The text of the European Convention on Human Rights portrays the subject of human rights as a gendered person.²¹ Sex is a prohibited ground for discrimination in the enjoyment of the human rights protected by the Convention.²² Moreover, within the context of the Convention the division of individuals based on their sex results in two opposite sexed individuals: man and woman. In the provision that recognizes the human right to marry and to found a family, the Treaty grants such rights to both men and women of marriageable age.²³ The Convention reads, "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."²⁴

It seems implausible to maintain that the purpose of that article is deliberately to exclude from the right to marry those human beings of "marriageable age" who can be classified neither as "men" nor "women." Thus, it is only logical to infer from the article the belief that every individual must fit, or be made to fit, the binary classification of either man or woman. Therefore, the Convention

21. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, art. 12, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention of Human Rights] ("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.").

22. *Id.* at 14. A similar use of the notion of sex is reiterated in Protocol 12, which also prohibits discrimination on the grounds of sex, but this time in the enjoyment of any right granted by national laws. *Id.* at 48–49.

23. European Convention of Human Rights, *supra* note 21, art. 12.

24. *Id.*

understands its subject, the human entitled to the detailed rights, as a gendered person. Conversely, people who do not conform to this strict classification can face problems when turning to the Convention in search of protection of their human rights.

On the other hand, while the Convention conceives the human rights' subject as a binary sexed person, it does not offer a definition of sex or the characteristics needed for a person to be considered a man or a woman. Nor has the Court given a straightforward definition of sex; however, its understanding can be inferred from case law. In particular, the cases concerning *trans* individuals have clarified the Court's understanding of the concepts "gender" and "man/woman" within the legal system of the Convention. In these cases, the challenge posed by *trans* bodies to the assumed understanding of sex forced the Court to define these concepts.²⁵ However, the Court performed an exclusionary use of the transsexual to produce the truth about sex. As will be discussed in Part II, the Court has originally defined sex in opposition to the transsexual. Sex was that which the transsexual could not change about him/herself.

II. THE LEGAL MEANING OF SEX/GENDER

A. THE FIRST TWO DECADES OF SEX IN THREE CASES

Three specific cases established the Court's understanding of sex during the first two decades of dealing with the transsexual body. These cases, all against the United Kingdom, were *Rees*,²⁶ *Cossey*,²⁷ and *Sheffield and Horsham*.²⁸ In the *Rees* case, the applicant was a transsexual man who had undergone a sex-reassignment process, which was paid for by the National Health Service.²⁹ After the process, the applicant got his name changed and his male sex recognized in his

25. *Rees v. United Kingdom*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A), at 6 (1986).

26. *Rees*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A).

27. *Cossey*, 184 Eur. Ct. H.R. (ser. A).

28. *Sheffield & Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58212>. The Court lacked an opportunity to decide a case concerning transsexuals' rights until the 1980's. In the year 1980 the Court issued its first judgment on the subject, but this consisted of a rejection of the claim solely based on procedural reasons. *Van Oosterwijck v. Belgium*, 40 Eur. Ct. H.R. (ser. A) (1980).

29. *Rees*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A), ¶¶ 12–17.

passport. However, his request to amend his birth certificate was refused.³⁰ Moreover, he continued to be considered a legal woman for multiple purposes, such as marriage, pension, and employment.³¹

The context of the *Cossey* decision was very similar to the *Rees* case.³² The applicant was a transsexual woman who had undergone a sex-reassignment process on the National Health Service.³³ After the process, the applicant also legally changed her name and her new sex was recognized in her passport, but her request to amend her birth certificate was refused.³⁴ She continued to be considered a man for the purposes of marriage, which was confirmed when her marriage to a man was annulled.³⁵ Finally, in the *Sheffield and Horsham* case, the applicants were two transsexual women, who had both undergone sex-reassignment processes.³⁶ Once again, they both changed their names, which were recognized in their passports and driver's licenses.³⁷ Nonetheless, they continued to be considered legally men for multiple purposes, such as marriage, employment, social security, and pension.³⁸

The Court's judgments in the three cases were almost identical. The Court rejected the applicants' claims that their birth certificates should be amended to reflect their acquired sex, and that they should be considered as members of the acquired sex for all legal purposes.³⁹ The *Rees* judgment affirmed that the limited level of consensus between the States concerning the legal recognition of the acquired sex of transsexual individuals allowed the United Kingdom a wide margin of appreciation.⁴⁰ Consequently, the State was considered to be free to

30. *Id.*

31. *Id.* ¶ 40.

32. *Cossey*, 184 Eur. Ct. H.R. (ser. A), ¶¶ 10–14.

33. *Id.* ¶ 18.

34. *Id.* ¶ 4.

35. *Id.*

36. *Sheffield & Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011, ¶¶ 12, 21, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58212>.

37. *Id.* ¶¶ 16, 23.

38. *Id.* ¶¶ 32, 68.

39. *Rees v. United Kingdom*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A), ¶ 50 (1986); *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A), ¶ 46 (1990); *Sheffield*, 1998-V Eur. Ct. H.R. ¶ 69.

40. See, e.g., *Rees*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A), ¶ 37 (noting that some states have given transsexuals the option of changing their personal status

decide the extension of the legal recognition offered to transsexual people.⁴¹ The following two judgments, *Cossey* and *Sheffield and Horsham*, followed a similar reasoning, and the Court stated that there were no reasons to justify the departure from *Rees*.⁴²

B. INFERRING THE DEFINITION OF SEX

In none of the mentioned cases did the Court offer its own definition of gender, but it validated the criteria used in the United Kingdom to establish the sex of a person.⁴³ This adopted criterion consisted of the “biological” determination of sex at the time of birth as established in the 1970 British case *Corbett v Corbett*.⁴⁴ The adoption of Justice Ormrod’s definition of sex can be observed in the three discussed cases,⁴⁵ and its use by the Court was also confirmed by Judge Martens’ dissenting opinion in *Cossey*.⁴⁶ Consequently, the Court validated what has been labeled the “biological” understanding of sex.⁴⁷ The criteria’s biological character is easy to observe in the description the Court made of the applicants’ complaint in the *Sheffield and Horsham*

to fit their newly-gained identity, but have made that option subject to conditions of varying strictness and retained reservations).

41. *Id.*

42. *Cossey*, 184 Eur. Ct. H.R. (ser. A), ¶¶ 10–14; *Sheffield*, 1998-V Eur. Ct. H.R. ¶ 69 (displaying a shift in the level of consensus between the judges of the Court through the decisions. While *Rees* was adopted by a twelve to three clear majority, *Cossey* and *Sheffield & Horsham* were decided by a ten to eight and eleven to nine majority, respectively).

43. The European Court of Human Rights has used the terms sex and gender interchangeably. While discussing how the legal sex/gender of individuals was established in domestic law, the Court has referred to the “legal definition of sex” in the *Rees* and *Cossey* cases, and the “definition of gender in domestic law” in the *Sheffield & Horsham* case. See *Rees*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A); *Cossey*, 184 Eur. Ct. H.R. (ser. A); *Sheffield*, 1998-V Eur. Ct. H.R.

44. See *Corbett v. Corbett*, 2 W.L.R. 1306, 1323 (1970) (stating that it is common ground that the “biological sexual constitution of an individual is fixed at birth and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means”).

45. *Rees*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A), ¶¶ 27, 29; *Cossey*, 184 Eur. Ct. H.R. (ser. A), ¶¶ 20, 26; *Sheffield*, 1998-V Eur. Ct. H.R. ¶ 29.

46. See *Cossey*, 184 Eur. Ct. H.R. (ser. A), ¶ 4.3.2 (Martens, J., dissenting) (arguing that the Court does not elucidate the term “biological sex,” but the meaning of that term can be deduced from the judgment).

47. See ANDREW SHARPE, TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW 39 (2002) [hereinafter SHARPE, TRANSGENDER JURISPRUDENCE] (noting that *Corbett* is recognized as the leading case for the biological definition).

case: “the essence of their complaints concerns the continuing insistence by the authorities on the determination of gender according to biological criteria alone and the immutability of the gender information once it is entered on the register of births.”⁴⁸ According to Alex Sharpe, this “biological” criterion is based on the conception that birth is the true moment for the legal determination of a person’s sex.⁴⁹ This determination takes place by the alleged congruence of chromosomes, gonads, and genitals.⁵⁰ However, in the potential case of incongruence between those factors, the observable genitals of the newborn act as the decisive factor.⁵¹ That is to say, the sex of a person is read in his/her body at the moment of birth.

Moreover, this understanding of sex as biological also means that it is immutable. Indeed, the Court insisted on the impossibility of changing sex.⁵² In the *Cossey* case, the Court affirmed that,

The Court has been informed of no significant scientific developments that have occurred in the meantime; in particular, it remains the case—as was not contested by the applicant—that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex.⁵³

In other words, the Court upheld the belief in a biological foundation of sex, which is accepted as the reason for the impossibility of abandoning the assigned gender. Even if genitalia had changed through surgery, that would still not be real enough. The truth about sex lies beyond human modification.

This belief in an immutable biological reality of sex was reiterated in the *Sheffield and Horsham* case, in which the Court stated, “[I]t still remains established that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures.”⁵⁴ The Court’s denial of full legal

48. *Sheffield*, 1998-V Eur. Ct. H.R. ¶ 53.

49. SHARPE, *TRANSGENDER JURISPRUDENCE*, *supra* note 47, at 39.

50. *Id.* at 41–42.

51. *Id.* at 42.

52. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A), ¶ 40 (1990).

53. *Id.*

54. *Sheffield & Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011, ¶ 56, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58212>.

recognition of the acquired sex is certainly consistent with the biological criteria already mentioned. It is impossible to modify one's sex, since sex is conceived as a biological truth that is hidden in the body.

In fact, the Court's case law suffered from the unquestionable Western belief in a true sex, as denounced by Foucault.⁵⁵ The Court seemed to believe in the existence of a true sex of the body,⁵⁶ and this conviction brings together the idea of its immutability, since, if sex could actually be modified, it will no longer be an undeniable truth. Consequently, the Court seemed convinced that sex was a unique biological reality inscribed within the individual, which the law simply recognized on a birth certificate.⁵⁷ This interpretation can be confirmed by the Court's understanding of the relation between sex and transsexuality. During the first twenty years of case law on transsexuality, the Court refused to accept that the transsexual could have truly abandoned the sex attributed by the law at birth.⁵⁸

Furthermore, this understanding that law simply recognizes a pre-existing reality has consequences in and of itself. It is worth emphasizing that the law is not just a discourse that describes reality, but a source of production of truth.⁵⁹ Therefore, the legal discourse recognizing the seeming reality of sex's biologic foundation is itself a source of consolidation of the belief in sex as biology. Only one judge has actually put in evidence that the legal notion of sex does not need to be grounded in biological determinism.⁶⁰ In Judge Van Dijk's opinion, "I cannot see any reason why legal recognition of reassignment of sex requires that biologically there has also been a (complete) reassignment; the law can give an autonomous meaning to the concept of 'sex,' as it does to concepts like 'person,' 'family,' 'home,' 'property,' etc."⁶¹ In other words, the law is free to define and re-define the legal concept of sex, since sex within the law is nothing

55. See FOUCAULT, *supra* note 6, at vii (noting that modern Western societies have persistently advocated for the need of a true sex).

56. *Sheffield*, 1998-V Eur. Ct. H.R. ¶ 56.

57. *Id.*

58. See, e.g., *Rees v. United Kingdom*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A), ¶ 23 (1986) (affirming the notion that changes in a person's birth certificate can only be made in cases of initial clerical error).

59. SHARPE, *TRANSGENDER JURISPRUDENCE*, *supra* note 47, at 39.

60. *Sheffield*, 1998-V Eur. Ct. H.R. ¶ 8 (Van Dijk, J., dissenting).

61. *Id.*

more than a legal category. In fact, the concept of sex itself—even outside the law—could be argued to be nothing more than a cultural construction and, therefore, subject to re-definition.

C. WHO IS THE COURT'S TRANSSEXUAL?

As said before, the legal foundation of the Court's definition of sex was the transsexual, since the Court did not elaborate on a definition of sex until it met the transsexual.⁶² Indeed, the Court understood sex in an oppositional relation to the transsexual: sex is what the transsexual cannot change about him/herself.⁶³ While the Court has never offered an explicit definition of sex, the contrary is true for the transsexual. In the *Rees* case, the Court said that the term transsexual is “usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature.”⁶⁴ That is to say, a transsexual was understood to be a person whose body and mind are positioned on the opposite side of the binary understanding of sex. Since sex was understood in an oppositional manner, a transsexual was conceived as a person who feels the need to cross to the opposite side of the sex binary. However, during the period in which the Court understood sex as an immutable biological category, transsexuality ended up being a legal impossibility.⁶⁵ While sex remained fixed at birth, and unalterable on the birth certificate, the transsexual was not permitted to cross the limit of the sex binary.⁶⁶ Consequently, the Court observed the transsexual's attempt to achieve an “unambiguous identity,” but refused its legal recognition.⁶⁷

The Court produced its truth about transsexuality through the combined use of the powerful discourses of medicine and law.⁶⁸ The

62. *Rees*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A), ¶ 38.

63. *Id.*

64. *Id.*

65. *See, e.g., Sheffield*, 1998-V Eur. Ct. H.R. ¶ 24 (stating that there is not provision under United Kingdom law that allowed for any new information to be inscribed on an original birth certificate).

66. *Id.*

67. *Rees*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A), ¶ 38.

68. *See, e.g., SHARPE, TRANSGENDER JURISPRUDENCE, supra* note 47, at 8 (acknowledging the concept of considering the interplay between medical science

reason for the transsexual's desire to cross the rigid boundary of the sex binary was considered by the Court to be a medical condition.⁶⁹ The Court resorted to medical discourse in order to affirm that medical and surgical treatments were offered to "alleviate" the transsexual "condition," but they failed in granting the biological characteristics of the "opposite" sex.⁷⁰ It was the body of the transsexual that was unable to modify a biological fact.⁷¹ In other words, the Court positioned itself as a mere spectator to the transsexual individual's failure to cross the limit of binary sex. Medical and legal discourses constructed the truth towards which the transsexual's expectations have crashed. Instead of daring to question the legal system that imposed on individuals the need to comply with a gender role that has been forced on them, the Court opted for identifying transsexuality as the problem.⁷² The system appeared as unquestionable and it was the transsexual who failed to fit in, and therefore could not obtain the recognition of his/her sex.

Nevertheless, if the gender reassignment process did not allow the applicants to change the sexes imposed on their birth certificates, one last question remains: what legal significance was attributed to the gender transition? The applicants whose claims the Court refused remained transsexual individuals, for whom the Court recognized certain human rights and rejected others.⁷³ These transsexual individuals were recognized by domestic law as men in certain legal aspects, and as women in others. Consequently, a legal system that established that individuals could only be either men or women forced the transsexual to be both, depending on the legal subject. The law refused to recognize that a person who has undergone a gender

and law with respect to the development of transgender jurisprudence).

69. *Rees*, App. No. 9532/81, 106 Eur. Ct. H.R. (ser. A), ¶ 38; *Sheffield*, 1998-V Eur. Ct. H.R. ¶ 56.

70. *See Rees*, App. No. 9532/81, 9 Eur. H.R. 56, ¶ 38; *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 39 (1990); *Sheffield*, 1998-V Eur. Ct. H.R. at 56.

71. *See, e.g., Cossey*, 184 Eur. Ct. H.R. (ser. A), ¶ 40 (arguing that gender reassignment surgery does not result in the acquisition of all the biological traits of the other sex).

72. *See Sheffield*, 1998-V Eur. Ct. H.R. at 59 (finding that the burden is too slight on too few to necessitate change).

73. *See, e.g., Sheffield*, 1998-V Eur. Ct. H.R. ¶¶ 30, 32 (denying transsexuals the right to change their recorded sex on their birth certificate for social security, national insurance, and employment purposes).

reassignment process has definitely crossed the limit of the dichotomy, but forced the person to intermittently cross the frontier depending on the area of his/her legal life s/he is living.

In the *Cossey* case, a dissenting group of judges who actually supported Miss Cossey's claim to have her sex legally recognized referred to her as "[. . .] 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."⁷⁴ This statement was partially true. However, it was not that Miss Cossey fell between the sexes, since she was asking to cross the boundary of the sexes, but it was the Court who made her legally exist between the sexes. It was the Court's refusal to recognize her legal gender which did not allow the transsexual person to cross to the other side of the sex binary. As Sharpe has affirmed, while the law portrays the transsexual body as ambiguous, contradictory, and dissonant, it has been the transsexual body that has shown that what is ambiguous and contradictory is the law.⁷⁵

On the other hand, it is possible to extract some positive elements from this refusal. There certainly is an inadvertent queer twist in the Court's rulings. Indeed, the Court recognized that the binary sexes are not as neat as they are supposed to be and that not everyone can clearly fit on one of the sides.⁷⁶ In other words, the Court acknowledged and validated a queer existence, a denial of neatly belonging to the man/woman binary, in favor of the existence in between the gender categories.⁷⁷ Unfortunately, this was done in cases in which the transsexual applicants were requesting recognition that they belonged to a neat sex category.⁷⁸

Consequently, the transsexual appeared in the Court's case law as a person who unsuccessfully requested recognition of having crossed the boundary between the sexes.⁷⁹ In turn, by refusing to grant the

74. *Cossey*, 184 Eur. Ct. H.R. (ser. A), ¶ 5 (Palm, J., dissenting; Foighel, J., dissenting; Pekkanen, J., dissenting).

75. SHARPE, *TRANSSEXUAL JURISPRUDENCE*, *supra* note 47, at 4.

76. *Id.*

77. *Id.*

78. *See Cossey*, 184 Eur. Ct. H.R. (ser. A), ¶ 5.

79. *See* ANDREW SHARPE, *FOUCAULT'S MONSTERS AND THE CHALLENGE OF THE LAW* 14, 88 (2010) [hereinafter SHARPE, *FOUCAULT'S MONSTERS*] (stating that transsexuals pose problems to the law because they represent a double breach of law

transsexual's claim, the Court opened up a queer path of legal identity, allowing the possibility of actually transcending the fixed binary categories of men and women. However, as the transsexual bodies called into question the assumed stability of sex's binary division, the law needed to re-incorporate these bodies into normalizing sex binaries in order to regulate them.⁸⁰ Part III will show how the Court re-constructed the meaning of both sex and the transsexual subject in order to regulate transsexual bodies. The Court's case law is a clear example of the normalizing power of the law,⁸¹ regulating and re-defining the sex of the applicants. In fact, through the Court's judgments, the law established a new "truth" about the sex of transsexual subjects.

III. RE-CONSTRUCTING THE LEGAL MEANING OF SEX/GENDER

A. THE COURT'S RE-DEFINITION OF SEX

The Court's case law concerning legal sex and the rights of transsexual individuals underwent an important change in 2002, with the *Goodwin* and *I.* cases, both against the United Kingdom.⁸² These cases were about two transsexual women who had undergone gender reassignment processes through the National Health Service.⁸³ They both argued that the lack of full legal recognition of their sex, after undergoing the gender reassignment process, was a violation of their human rights.⁸⁴ In these cases, the Court unanimously decided to abandon its previous case law. The Court affirmed that the applicants were right and that they should enjoy full legal recognition of their sex, which included considering them as women for the purposes of pension, retirement, and marriage, as well as amending their birth

and nature).

80. *Id.*

81. SMART, FEMINISM AND THE POWER OF LAW, *supra* note 4, at 4, 162; STYCHIN, *supra* note 4, at 156.

82. See *Goodwin v. United Kingdom*, App. 28957/95, 22 Eur. H.R. Rep. 123, ¶ 100 (2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx>; *I. v. United Kingdom*, App. No. 25680/94, 36 Eur. H.R. 967 (2002).

83. *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 100; *I.*, App. No. 25680/94, 36 Eur. H.R. at 73, 84.

84. *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 100; *I.*, App. No. 25680/94, 36 Eur. H.R. at 73, 84.

certificates to show their acquired gender.⁸⁵

The victory of *Goodwin and I.* showed that the Court decided to re-define its understanding of legal sex in a manner that incorporates the transsexual who has moved across the binary, as a member of the sex group on the other side of the boundary.⁸⁶ As foreshadowed by Judge Van Dijk in the *Sheffield and Horsham* case,⁸⁷ the law was always capable of re-constructing the legal concept of sex; rather it was the Court itself that refused to take this step until 2002.

Nevertheless, the Court missed another opportunity to fully recognize that the definition of legal sex is a matter of legal, rather than medical, science. The Court decided to modify the legal understanding of gender because medical science did not provide any conclusive criteria.⁸⁸ In the Court's own words, "The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals."⁸⁹ Consequently, the Court reserved for itself the right to re-define its understanding of legal sex in the future, if it considers that medical knowledge has managed to prove what legal sex ought to be.⁹⁰ That is to say, the Court seemed to have sacrificed the ability to construct legal concepts to medicine over the law.

Not surprisingly then, the *Goodwin* and *I.* cases have relied more heavily on medical discourse than their predecessors. These cases could be read as a step further in the medical *pathologization* of transsexuality, where the gender reassignment process is justified as the medically endorsed formula for "relief."⁹¹ In fact, one of the main

85. *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 100; *I.*, App. No. 25680/94, 36 Eur. H.R. at 73, 84.

86. Ralph Sandland, *Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights*, 11 FEMINIST LEGAL STUD. 191, 201 (2003).

87. *See Sheffield & Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58212> (Van Dijk, J., dissenting).

88. *See Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 83.

89. *Id.*

90. *See id.*

91. *See id.* ¶¶ 78, 81; *see also I.*, App. No. 25680/94, 36 Eur. H.R. ¶¶ 58, 61 (finding that the national health service undertook the gender re-assignment surgery in order to treat the recognized condition of gender dysphoria).

reasons for abandoning the “biological” criteria to establish gender is to be found in medical discourse:

[A] test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors—the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender.⁹² Nonetheless, biology is not fully abandoned, and the belief in the existence of a true sex founded on biology keeps appearing in the judgment:

It remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex; the principal unchanging biological aspect of gender identity is the chromosomal element. However, it is not apparent to the Court that the chromosomal element must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals.⁹³

Therefore, the Court preferred to give privilege to another factor in the determination of legal sex, but this was done despite the acknowledgment of a truth of sex that is located in biology.⁹⁴ For the Court, the gender reassignment process does not truly allow the person to acquire his/her gender. It only provides “assimilation” to this acquired gender.⁹⁵ In other words, the transsexual will never cross the “true” limit of the sex binary. S/he will only get very close to the limit—close enough that the law will ignore the “biological truth” and concede a change of sex.

Finally, one of the defining elements for recognizing that Goodwin

92. *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 100; *see I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 80.

93. *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 82; *I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 62.

94. *See Goodwin*, App. No. 28957/95, Eur. Ct. H.R. ¶ 83 (stating that the court was not convinced that science provides a dispositive argument for the determination of legal sex).

95. *See id.* ¶¶ 78, 100; *see also I.*, App. No. 25680/94, 36 Eur. H.R. ¶¶ 58, 80 (describing the aims of surgery as trying to get “as close an assimilation as possible” to the gender with which the applicant identifies).

and I. have changed their gender is the legal limbo in which the applicants have been living, due to the partial recognition of their acquired sex. The Court affirmed that, “The unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.”⁹⁶ Therefore, the Court seemed to timidly recognize its contribution to the legal ambiguity imposed upon Mr. Rees, Ms. Cossey, Ms. Sheffield, and Ms. Horsham with its previous judgments, and decided not to do the same with Ms. Goodwin and Ms. I.⁹⁷

The consequences flowing from the *Goodwin* and *I.* rulings were multiple. On the one hand, by neatly incorporating the transsexual bodies of Goodwin and I. into the gender system, allowing them to cross the frontier, the Court normalized their bodies.⁹⁸ These naturalized bodies did not pose any more threats to the coherence of the law and its rigid gender system. Conversely, the Court’s suppression of the ambiguity represented by the un-recognized transsexual bodies helped to reinforce the binary character of the gender system. In fact, the queer path opened by the early cases seemed to be getting closed by the Court.

On the other hand, the decision adopted by the Court in *Goodwin* and *I.* proved the performative character of legal and anatomical sex. As Sharpe affirmed, sex is no longer conceived as a biological and permanent characteristic.⁹⁹ Indeed, with the help of surgery, the Court has accepted that the sex of the applicants could be different to that stated on their birth certificates. Even though the Court continued to believe in the existence of an undeniable biological truth,¹⁰⁰ the determination of gender no longer needed to follow strict biological

96. *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 90; *I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 70.

97. *See Goodwin*, App. No. 28957/95, Eur. Ct. H.R. ¶ 91 (recognizing that allowing a transsexual applicant to receive state pension under the rules that apply to women would only be a minimal inconvenience to the rest of society when balanced with the right of transsexuals to live in conformity with their chosen sexual identity).

98. SHARPE, TRANSGENDER JURISPRUDENCE, *supra* note 47, at 14, 109.

99. *Id.* at 80, 194.

100. *See Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 82; *see also I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 62 (finding that the chromosomal element in gender identity is the relative constant biological determinant).

criteria.¹⁰¹

Nevertheless, while the Court has granted transitioned transsexual individuals the recognition they sought, it remained silent regarding the legal limbo to which it is still condemning transgender people, as will be discussed in Part VI. It seems that the Court, relying on medical discourse, will only recognize as normalized those bodies that have followed the prescribed palliative: gender reassignment surgery.¹⁰² On the contrary, those individuals who decide to transition without following the dictates of medicine do not deserve the recognition of the law. Therefore, the path to a queer legal identity was not completely closed. As will be discussed towards the end of this article, the Court has made the transgender subject queerly remain in-between the sexes.

B. WHEN DOES THE SEX BINARY FRONTIER GET CROSSED?

Through the *Goodwin* and *I.* judgments, the Court recognized that the limit between the binary sexes could be legally crossed. Gender is no longer a biological fact fixed at birth, but an amendable human characteristic. However, the Court stated that while the gender reassignment process is the manner to move across the gender binary, it was left for the States to decide when that process has been “properly effected.”¹⁰³

Disregarding the open-ended criteria for establishing the transition, the Court has established the basic requisites. There are three essential elements that the Court has identified for crossing the boundary of the gender binary: medical diagnosis, surgery, and pain.¹⁰⁴ The medical diagnosis of being “pathologically” transsexual is the first essential

101. See *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 100; see also *I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 80 (determining that article 8 of the Convention precludes states from using biological factors to deny legal recognition to transsexuals who have undergone surgery).

102. See *Sandland*, *supra* note 86, at 203 (conveying that the legal rights of transsexuals who have undergone surgery are recognized because the medical community considers transsexuality to be an illness).

103. See *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 103; see also *I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 83.

104. See *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 78 (explaining that it would not be logical to deny recognition of the legal status of transsexuals after a state provides treatment and surgery to alleviate the condition).

element.¹⁰⁵ In the Court's judgment, the diagnosis of "gender dysphoria" is necessary to start the gender reassignment process: "In this case, as in many others, the applicant's gender re-assignment was carried out by the national health service, which recognises the condition of gender dysphoria and provides, *inter alia*, re-assignment by surgery."¹⁰⁶

The second element is surgery, including genital surgery.¹⁰⁷ This appeared as the medical treatment to "alleviate" the "disease." In the Court's words, it is the medical and surgical procedures which actually allow the gender transition: "The medical and surgical acts which in this case rendered the gender re-assignment possible."¹⁰⁸ Consequently, in the eyes of the Court, surgery has become the most essential element for transitioning.¹⁰⁹

Finally, the suffering of pain is presented as the undeniable proof of the authenticity of transsexuality. As Sharpe has affirmed, the law has decided to measure the authenticity of transsexuality through the sacrifices made by the transsexual.¹¹⁰ The sacrifice of the genitalia is

105. It should be highlighted that the understanding of transsexuality as a mental disorder has been recently criticized by other human rights monitoring bodies, such as the Committee on Economic, Social and Cultural Rights and the Commissioner for Human Rights of the Council of Europe. *See* Comm. on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights on Germany, E/C.12/DEU/CO/5, ¶ 26 (May 20, 2011); Comm'r for Human Rights of the Council of Europe Thomas Hammarberg, Issue Paper on Human Rights and Gender Identity, CommDH/IssuePaper, ¶ 3.3 (July 29, 2009) [hereinafter Comm'r Hammarberg Issue Paper].

106. *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 78; *I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 58.

107. It should be mentioned that having sterilizing surgery as a requisite for recognizing a gender transition has been opposed by other human rights monitoring organs, such as the High Commissioner for Human Rights and the Commissioner for Human Rights of the Council of Europe. *See* High Commissioner for Human Rights, Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity, ¶¶ 72, 84.h, A/HRC/19/41 (Nov. 17, 2011) [hereinafter Discriminatory Laws and Practices]; COUNCIL OF EUROPE, DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 13 (2nd. ed. 2011) [hereinafter COUNCIL OF EUROPE].

108. *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 81; *I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 61.

109. *See* *L. v. Lithuania*, App. No. 27527/03, 46 Eur. H.R. Rep. 431, 11 (2007) (explaining that until the applicant undergoes surgery he will be treated as a woman with respect to employment, travel abroad, and other aspects of his personal life).

110. SHARPE, TRANSGENDER JURISPRUDENCE, *supra* note 47, at 84 (explaining

constructed as the final and definitive proof.¹¹¹ The Court has stated that, “given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment.”¹¹²

The relevance the Court gives these requisites proves the centrality of surgery, and genital surgery especially, for crossing the limit between the binary sexes. The following part, therefore, will focus on surgery as the key element for gender transition. In particular, it will analyze what has been labeled as the *genitocentrism*¹¹³ of the law.

IV. THE TRANSSEXUAL CREATION OF SURGERY AND THE LAW

A. SURGERY AS A VEHICLE OF TRUTH: THE GENITOCENTRISM OF THE LAW

To reiterate, since the *Goodwin* and *I.* judgments, gender is no longer determined by an immutable “biological” truth of the body, but it is found in the surgically modified anatomy of the transsexual genitalia.¹¹⁴ It is this surgery that unveils the truth of sex, as the Court has clearly stated in the *L. v. Lithuania*¹¹⁵ and *Nunez v. France*¹¹⁶ cases.¹¹⁷ In *L. v. Lithuania*, the applicant was a pre-operative transsexual man who complained due to the lack of legal regulation of sex-reassignment surgery in Lithuania.¹¹⁸ After having been medically

the Court’s preoccupation with “presurgical facts”).

111. *Id.*, at 108.

112. *Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 81; *I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 61.

113. SHARPE, TRANSSEXUAL JURISPRUDENCE, *supra* note 47, at 39.

114. *See Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 103; *see also I.*, App. No. 25680/94, 36 Eur. H.R. ¶ 83.

115. *L. v. Lithuania*, App. No. 27527/03, 46 Eur. H.R. Rep. 431, 11 (2007).

116. *Nuñez v. France*, App. No. 18367/06, Eur. Ct. H.R. (2008), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87061>.

117. *See L.*, App. No. 27527/03, 46 Eur. H.R. Rep. ¶ 57 (explaining that the applicant would still be treated as a woman in certain aspects of his personal life, unless he completed the full surgery); *Nuñez*, App. No. 18367/06, Eur. Ct. H.R. at 4 (explaining the Court’s acknowledgment of the right to legal recognition of gender reassignment).

118. *See L.*, App. No. 27527/03, 46 Eur. H.R. Rep. ¶ 37.

diagnosed as transsexual, he underwent hormonal treatment and partial sex-reassignment surgery (breast removal).¹¹⁹ However, the hormonal treatment was discontinued because of the legal uncertainty about the possibility of full sex-reassignment surgery.¹²⁰ Given the “incomplete” stage of his transition, he was not fully recognized as a man by the law.¹²¹ Consequently, the applicant complained against the law, which formally offered recognition of transsexual individuals who have undergone genital surgery, but which at the same time refused to provide such a procedure.¹²² The Court acknowledged that

the applicant finds himself in the intermediate position of a pre-operative transsexual, having undergone partial surgery, with certain important civil-status documents having been changed. However, until he undergoes the full surgery, his personal code will not be amended and, therefore, in certain significant situations in his private life, such as his employment opportunities or travel abroad, he remains a woman.¹²³

The Court did not consider this lack of legal recognition of the sex of the pre-operative transsexual to be problematic.¹²⁴ In other words, the Court considered that the law only needed to recognize the gender revealed by surgery. On the contrary, the Court found a violation of the applicant’s rights due to the fact that the State had not made it possible for him to finish the gender reassignment process.¹²⁵

The Court reaffirmed the belief in genital surgery as the new truth about sex in the *Nunez* case.¹²⁶ In that case, the applicant was a transsexual woman who was undergoing gender transition.¹²⁷ The applicants’ complaint was based on the suffering she was experiencing, due to the lengthy character of the full process coupled with the law’s refusal to grant full recognition of her gender until the transition was finished.¹²⁸ The judgment reads: “the Court does not think it is unreasonable that the State, within its margin of

119. *See id.* ¶ 19.

120. *See id.* ¶ 16.

121. *See id.* ¶¶ 20–21.

122. *See id.* ¶¶ 38–39.

123. *Id.* ¶ 57.

124. *See id.* ¶¶ 57–58.

125. *See id.* ¶¶ 59–60.

126. *Id.*

127. *Id.*

128. *Id.*

appreciation, subordinates the full recognition of the new gender status to the completion of the hormone-surgical process, that is to say to the final surgery.”¹²⁹ Consequently, it could be validly inferred that the Court accepted that the legal recognition of gender can be subjected to the completion of the gender reassignment process, in particular to its final step. The relevance given to genital surgery as the point that allows changing sexes strongly supports Sharpe’s claim of the *genitocentrism* of the law.¹³⁰

B. THE HIDDEN HOMOPHOBIA BEHIND THE GENITOCENTRISM OF THE LAW

The Court has asserted the relevance of genital surgery in order to cross the limit between the sexes. Even though the reasons for making this element the central one are not particularly clear, what it does demonstrate is the link between sex and sexuality. Indeed, transsexuality is constructed as a heterosexual condition. The autobiography that constructs the medical transsexual is a narrative of true belonging to the “opposite” sex and this belonging is proved through heterosexuality.¹³¹ Only straight transsexuals can be recognized as true transsexuals, since the medical discourse imposes heterosexual desire as an indispensable requisite for transsexuality.¹³² The heterosexuality imposed is the sexual desire of a person of the “opposite” sex to the one that will be acquired through gender reassignment.¹³³ The Court has adopted this medical discourse; a proper transsexual can only heterosexually desire a person of the “opposite” sex to that acquired by the transsexual.¹³⁴

129. *Id.* (“La Cour n’estime pas déraisonnable que, dans le cadre de sa marge d’appréciation, l’Etat subordonne sa pleine reconnaissance du nouveau statut à l’achèvement du processus hormono-chirurgical, c’est-à-dire l’intervention chirurgicale finale.”) (translated by author from the original French).

130. SHARPE, TRANSGENDER JURISPRUDENCE, *supra* note 47, at 39.

131. *Id.* at 90; BERNICE HAUSMAN, CHANGING SEX: TRANSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER 147 (Duke University Press 1995); Dean Spade, *Resisting Medicine, Re/modelling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 25 (2003).

132. See Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 280, 292 (Julia Epstein & Kristina Straub eds., 1991); HAUSMAN, *supra* note 131, at 147.

133. SHARPE, TRANSGENDER JURISPRUDENCE, *supra* note 47, at 90.

134. See Sandland, *supra* note 86, at 201, 206 (asserting that the cases *Goodwin* and *I.* demonstrate that the normative sexual identity of our society remains

However, the Court could only conceive the transsexual as heterosexual by abandoning the idea of an immutable sex inscribed on the body. Indeed, the “biological” determination of sex forbade the Court from conceiving the heterosexual narrative of the transsexual in a truly heterosexual manner. For the transsexual to become heterosexual, his/her attained gender needed to become its real sex in the eyes of the Court. In other words, the Court needed to recognize the acquired sex as the “real” sex for the transsexual’s desire to be considered heterosexual when desiring a person of the opposite sex to that acquired.

Only since *Goodwin* and *I.*, and the recognition of the “performative” character of sex, could the Court heterosexualize the transsexual.¹³⁵ In those cases, the Court highlighted the applicants’ heterosexuality.¹³⁶ The Court emphasized, “[t]he applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man.”¹³⁷ This narrative acted as the foundation onto which heterosexuality was re-created. In fact, The Court granted genital surgery the ability to *heterosexualize* the transsexual subject, since only through acquiring the “appropriate” genitalia can the transsexual become heterosexual. As Sharpe explains, “Sex reassignment surgery proceeds on the basis of a reimagined heterosexuality, a heterosexuality uncoupled from its biological referent.”¹³⁸ Consequently, the same surgery that produces sex also produces heterosexual desire. That is to say, the Court allowed the combination of law and surgery the power to produce heterosexuality.¹³⁹

Nevertheless, this legal ability to *heterosexualize* the transsexual individual reveals the law’s secret fear of the homosexual body, the *homophobia of law* in the words of Sharpe.¹⁴⁰ The legal rejection of the homosexual body is the basis for recognizing the transsexual

patriarchal and heterosexual).

135. SHARPE, *TRANSSEXUAL JURISPRUDENCE*, *supra* note 47, at 90.

136. *See Sandland*, *supra* note 86, at 201 (explaining that the court’s view was that a person who lives as a woman would only want to marry a man).

137. *Goodwin v. United Kingdom*, App. 28957/95, 22 Eur. H.R. Rep. 123, ¶ 101 (2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx>; *I. v. United Kingdom*, App. No. 25680/94, 36 Eur. H.R. 967, ¶ 81 (2002).

138. SHARPE, *TRANSSEXUAL JURISPRUDENCE*, *supra* note 47, at 34.

139. *Id.* at 129.

140. *Id.* at 5.

crossing to the other side of the sex binary.¹⁴¹ Therefore, the legal and surgical construction of the transsexual shows the relevance of sexuality - especially homosexuality - in establishing the sex of the transsexual. Given that the recognition of transsexuals' sex is based on their heterosexuality, in turn, homosexuality becomes the grounds of sex. The impulse to deny homosexuality motivates the law to recognize the lack of stability of the limit between binary sexes. By crossing the binary limit, the transsexual makes his/her sexual desire heterosexual. At the same time, this recognition is a clear attempt to erase from the legal imaginary (although not from reality) the possibility of sexually diverse transsexuals, since only straight transsexuals are "true" transsexuals.

To summarize, the surgical *heterosexualization* of the transsexual, validated by the law, helps to prove the "performative" character of both sex and sexuality.¹⁴² Nonetheless, the reality of sex and sexuality is still located in the body. In the case of the transsexual, surgery is legally required for the change of gender and sexuality. In other words, all these notions are founded on the belief in the now anatomical truth of the bodies.¹⁴³

V. IS THERE A HUMAN RIGHT TO UNDERGO A GENDER REASSIGNMENT PROCESS?

Since the gender reassignment process appears to be decisive for the legal recognition of the transsexual, it becomes important to understand whether transsexuals have the right to be provided with such a process. The Court has dealt with access and financing of the gender reassignment process in three cases, *Van Kück v. Germany*,¹⁴⁴ *Schlumpf v. Switzerland*,¹⁴⁵ and the already mentioned *L. v. Lithuania*.¹⁴⁶

141. See Andrew Sharpe, *From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence*, in THE TRANSGENDER STUDIES READER 621, 625 (Susan Stryker and Stephen Whittle eds., 2006).

142. SHARPE, TRANSGENDER JURISPRUDENCE, *supra* note 47, at 81, 94.

143. See FOUCAULT, *supra* note 6, at vii (stating that Western countries have decided that there is a true sex).

144. Van Kück v. Germany, App. No. 35968/97, Eur. Ct. H.R. ¶¶ 8, 12 (2003), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":\["35968/97"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{).

145. Schlumpf v. Switzerland, App. No. 29002/06, Eur. Ct. H.R. ¶ 3 (2009).

146. See discussion *supra* Part IV.A.

In *Van Küick*, the applicant was a transsexual woman who had undergone a sex-reassignment process, which she paid for herself.¹⁴⁷ She argued that her private insurance should partially reimburse the cost of treatment.¹⁴⁸ However, the domestic courts rejected her claim, concluding that she had not proven the necessity of the treatment.¹⁴⁹ The Court's decision was based on its analysis of the compatibility of the domestic courts' rulings with the applicant's rights.¹⁵⁰ The Court objected to the domestic decisions, affirming that it was disproportionate to require a transsexual to prove the necessity of gender reassignment surgery.¹⁵¹

In *Schlumpf*, the applicant was a transsexual woman who had undergone a gender reassignment process and claimed reimbursement from her health insurance company.¹⁵² The company refused the claim and the domestic courts upheld the refusal¹⁵³ on the basis of a jurisprudentially established two-year waiting period for cases of transsexuality before surgery was allowed.¹⁵⁴ This surveillance period allegedly enabled the subject to prove the authenticity of his/her transsexuality.¹⁵⁵ The Court found a violation of the applicants' rights, since the mechanical application of a waiting period was given preference over the possibility of expert medical opinion.¹⁵⁶

Finally, the previously discussed *L. v Lithuania* judgment concerned a transsexual man whose gender reassignment process was discontinued.¹⁵⁷ In this case, the Court did not order the State to provide the applicant with the remaining surgical and medical procedures needed for the transition to be completed.¹⁵⁸ However, it

147. See *Van Küick*, App. No. 35968/97, Eur. Ct. H.R. ¶¶ 8, 12.

148. See *id.* ¶ 12.

149. See *id.* ¶¶ 15, 16.

150. See *id.* ¶ 75 (holding that the applicant was deprived of her right to gender identity and personal development).

151. See *id.* ¶ 56 (determining that gender identity is a cherished and private part of an individual's personal life and forcing a person to prove the need for medical treatment, such as surgery, would place an undue burden on the individual).

152. *Schlumpf v. Switzerland*, App. No. 29002/06, Eur. Ct. H.R. ¶ 3 (2009).

153. *Id.* ¶ 10. ,

154. *Id.* ¶¶ 11, 28.

155. *Id.* ¶ 11.

156. *Id.* ¶¶ 56–57.

157. See *L. v Lithuania*, App. No. 27527/03, 46 Eur. H.R. Rep. 431, ¶¶ 15, 19 (2007).

158. See *id.* ¶ 74 (finding that the claim could be satisfied by remedial legislation

did accept that “[a]s a short-term solution, it may be possible for the applicant to have the remaining operation abroad, financed in whole or in part by the State.”¹⁵⁹ Therefore, the Court only imposed upon the State the obligation to finance, at least partially, the gender reassignment process.

Consequently, the Court has only established very basic standards regarding the accessibility of the gender reassignment process. In the cases against Germany and Switzerland, the Court only analyzed the health insurance companies’ denial of reimbursement for the medical expenses associated with the gender reassignment process, understanding that certain conditions imposed by the domestic authorities were detrimental to the possibility of accessing the gender transition.¹⁶⁰ Specifically, the Court found that the burden imposed on the transsexual to prove the necessity of the medical treatment was disproportionate.¹⁶¹ Likewise, it was unreasonable to impose a rigidly fixed two-year period on every person who wished to undergo a gender reassignment process.¹⁶² While in those cases the Court affirmed that health insurance should cover the expenses of the gender reassignment process, it was only in *L. v. Lithuania* that the Court recognized certain positive obligations upon the States towards facilitating access to the process.¹⁶³

Furthermore, while these judgments have only offered transsexuals limited access to the gender reassignment process, they have clearly reinforced the medicalization of transsexuality.¹⁶⁴ Perhaps because the

or partial financing of a surgery abroad).

159. *See id.* ¶ 58.

160. *Van Kück v. Germany*, App. No. 35968/97, Eur. Ct. H.R. ¶¶ 8, 12 (2003), *available at* [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{“appno”:\[“35968/97”\]};](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{“appno”:[“35968/97”]};) *Schlumpf*, App. No. 29002/06, Eur. Ct. H.R.

161. *Van Kück*, App. No. 35968/97, Eur. Ct. H.R. ¶¶ 56–57.

162. *Schlumpf*, App. No. 29002/06, Eur. Ct. H.R. ¶ 115.

163. On the contrary, the Commissioner for Human Rights of the Council of Europe seems to understand that the Court had already established upon the States the obligation to provide sex-reassignment surgery for transsexual individuals since the *Van Kück* case. Comm’r Hammarberg Issue Paper, *supra* note 105, ¶ 3.3; Discriminatory Laws and Practices, *supra* note 107, ¶¶ 72, 84.h; COUNCIL OF EUROPE, *supra* note 107, at 109.

164. *See* COUNCIL OF EUROPE, *supra* note 107, at 9 (noting that a number of member-states of the Convention fail to provide access to medical treatment for gender reassignment).

cases dealt with the transsexual's need to access medical and surgical technology, they have heavily relied on the medical understanding of transsexuality as pathology in need of surgical alleviation. In fact, the Court based its rejection of the domestic decisions, which have hindered access to surgery or the reimbursement of its costs, on their opposition to medical expertise.¹⁶⁵ As affirmed in *Van Kück*,

The Court, bearing in mind the complexity of assessing the applicant's transsexuality and the need for medical treatment, finds that the Regional Court rightly decided to obtain an expert medical opinion on these questions.¹⁶⁶ In the *Schlumpf* case the assertion was that: . . . the federal Court of insurance took the place of the medical doctors and psychiatrics, while the Court had already established in the past that determining the medical necessity of gender reassignment measures is not a matter of legal definition.¹⁶⁷

On the other hand, while the Court has clearly established the need for undergoing full gender reassignment in order to obtain the legal recognition of the acquired gender, it has so far refused to grant the transsexual the right to access such an essential requisite.¹⁶⁸ Moreover, this refusal has not been based on economic concerns, since the Court affirmed that given the few individuals that desire to undergo the gender reassignment process, the budgetary burden on the State would not be expected to be unduly heavy.¹⁶⁹ To summarize, while the Court has found no obstacles in demanding extreme sacrifices (such as the sacrifice of genitals), it has not granted the transsexual individual a right to surgery.

Nonetheless, maybe asking the Court to order the States to finance the gender transition is not the right question to ask. It might be that the most appropriate question is: why does gender transition need to be subjected to genital surgery at all? The last Part of the article will analyze this question, focusing on how the Court adopted the requisite

165. *Van Kück*, App. No. 35968/97, Eur. Ct. H.R. ¶ 54; *Schlumpf*, App. No. 29002/06, Eur. Ct. H.R. ¶ 57.

166. *Van Kück*, App. No. 35968/97, Eur. Ct. H.R. ¶ 54.

167. *Schlumpf*, App. No. 29002/06, Eur. Ct. H.R. ¶ 57 (“Le Tribunal fédéral des assurances s’est substitué aux médecins et aux psychiatriques, alors que la Cour avait déjà précisé par le passé que la détermination de la nécessité de mesures de conversion sexuelle n’est pas une affaire d’appréciation juridique.”) (translated by author from the original French).

168. *See id.* ¶ 58.

169. *L. v. Lithuania*, App. No. 27527/03, 46 Eur. H.R. Rep. 431, ¶ 59 (2007).

of genital surgery to re-construct the limit of the sex binary after allowing the transsexual to cross it.

VI. THE ACCEPTED TRANSSEXUAL AND THE ABSENT TRANSGENDER

Since the *Goodwin* and *I.* cases in the year 2002, the Court has recognized the gender of (straight) transsexual individuals.¹⁷⁰ However, the Court only considers those individuals who have completed the gender reassignment process to have acquired a new legal sex.¹⁷¹ In the already discussed *L. v. Lithuania* and *Nunez v. France* cases, the Court referred to pre-operative transsexuals as being in an “intermediate position” and it agreed with the States that the recognition of gender could be conditioned on genital surgery.¹⁷² Therefore, the full reassignment process became a necessary condition before the Court will recognize the self-perceived gender, if different from the one imposed at birth. The Court’s early fascination with biology was replaced by its discovered passion for genital surgery. If until 2002 the Court constructed the post-operative transsexual as the “intermediate” sex,¹⁷³ after *Goodwin* and *I.*, the Court placed the pre-operative transsexual in that same “intermediate” sex position.¹⁷⁴

However, requiring genital surgery for gender transition does not only establish a time limitation. It also means that only *trans* individuals who wish to undergo a complete gender reassignment process are entitled to have their sex legally amended. The transgender individual has not yet appeared before the Court requesting recognition of his/her gender. Nevertheless, since the Court has

170. See, e.g., *id.* ¶ 56 (noting that Court precedent interprets Article 8 of the European Human Rights Convention to require legal recognition of post-operative transsexuals’ acquired gender).

171. See *id.*

172. *Id.* ¶¶ 56–57; *Nuñez v. France*, App. No. 18367/06, Eur. Ct. H.R. (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87061>.

173. See *Goodwin v. United Kingdom*, App. 28957/95, 22 Eur. H.R. Rep. 123, ¶ 90 (2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx>; *I. v. United Kingdom*, App. No. 25680/94, 36 Eur. H.R. 967, ¶ 70 (2002) (asserting that intermediate legal recognition for post-operative transsexuals is insufficient).

174. See *L.*, App. No. 27527/03, 46 Eur. H.R. Rep. ¶ 57 (explaining that applicants who have undergone partial surgery are only given intermediate legal recognition of their gender even though Lithuania does not provide suitable medical facilities for full surgical procedures).

already imposed surgery as a condition for sex to all *trans* bodies, the answer to such a claim seems to have been decided. Following the current criteria of the Court, transgender individuals that do not desire to undergo genital surgery will be placed in an “intermediate” legal position and will not be allowed to cross the boundary of the gender binary.¹⁷⁵

As discussed in the Introduction, Foucault started “Herculine Barbin” questioning whether we needed a true sex and asserting that Western societies have persistently answered in the affirmative.¹⁷⁶ The Court, as an institution created to protect the human rights of individuals, has taken for itself another task. It has established itself as the European guardian of the true sex of the West. In fact, as affirmed in Part IV, the Court decided to normalize the body of the post-operative transsexual, who, having completed his/her transition, fits neatly within the binary sexes.¹⁷⁷ Consequently, the Court can be seen as having legally determined that genitalia are the basis of the true sex of the West.

On the other hand, when a tribunal normalizes the body of the post-operative transsexual, the transgender body that refuses the surgical normalization remains in the domain of not-normalized subjects.¹⁷⁸ The challenge posed by the transgender body to the legal binary of the sexes is no longer an external imposition, but it is voluntarily decided by the transgender, in a clear display of his/her refusal to belong to the system of binary sexes. For the Court, the transgender can be refused his/her rights, since s/he has rejected the invitation offered in *Goodwin and I.* to belong to the gender system. Consequently, a transgender person who wishes recognition of having crossed the gender binary, but refuses normalizing surgery, will find his/her claim denied. It could be said that the “capriciousness” and the “arbitrariness” the Court found lacking in the behavior of the normalized transsexual¹⁷⁹

175. *See id.*

176. FOUCAULT, *supra* note 6, at vii.

177. *See L.*, App. No. 27527/03, 46 Eur. H.R. Rep. ¶ 56 (explaining that transsexuals who have undergone full surgery receive state recognition of their gender change).

178. SHARPE, TRANSGENDER JURISPRUDENCE, *supra* note 47, at 101, 103.

179. *See Goodwin v. United Kingdom*, App. 28957/95, 22 Eur. H.R. Rep. 123 ¶ 81 (2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx>; *I. v. United Kingdom*, App. No. 25680/94, 36 Eur. H.R. 967, ¶ 61 (2002) (suggesting that it would be difficult to find that a person's decision to undergo gender re-

appear in the refusal of the transgender to neatly fit within the binary sexes.

Furthermore, as long as genital surgery remains a requisite for moving across the binary, the Court will continue to allow the legal existence of the person that lives in an “intermediate position”, being both man and woman, depending on the subject. This person is also considered not (fully) man or woman in the binary model of opposite sexes. Therefore, in its attempt to normalize the transsexual body, the Court has queered the gender system enough to allow intermittent moves across the boundaries for whoever wants to occupy such a place. Nonetheless, the Court has not yet queered the gender system to the extreme that a person can transcend the binary options. Individuals are still understood as either men or women, even if the belonging to each category is intermittent and temporary.

CONCLUSION

As discussed throughout the article, the Court has defined and re-defined the legal meaning of sex through the years. It has certainly not carried out a queer re-construction of this notion, but it has acknowledged that the meaning of sex can be re-shaped. In fact, the Court has acknowledged its authority to construct and re-construct this legal concept.¹⁸⁰ Nevertheless, retaining a belief in the truth of biology, the Court seems to have left the right to decide the re-definition of sex to medicine.¹⁸¹

The re-construction of the meaning of sex in 2002 has had several implications. Before this re-definition, the Court did not recognize any of the applicants’ acquired genders. From a human rights perspective, the Court’s rulings were unsatisfactory, since they refused to acknowledge a violation of rights. On the other hand, in those early cases the Court inadvertently opened up the possibility of existence beyond the neatly fixed genders. The strong belief in a biological reality of sex led the Court to allow the law to treat transsexual individuals as both men and women, depending on the legal subject. That is to say, the Court understood that certain individuals did not fit

assignment surgery was arbitrary and capricious because of the painfulness of the procedure).

180. *See Goodwin*, App. 28957/95, 22 Eur. H.R. Rep. ¶ 90.

181. *See id.* ¶ 100.

neatly into one of the binary sexes and that the law was supposed to treat them as both men and women. As mentioned before, the main problem with this reasoning was that the non-belonging was imposed on individuals who wanted to belong. However, the validation of non-belonging could be queerly rescued from these rulings.

As to the re-creation of sex in 2002, the Court has been praised for the recognition of transsexuals' rights.¹⁸² Indeed, the Court granted the rights claimed in *Goodwin* and *I.* and crossing the boundary of the binary sexes became an accepted legal fiction. While the Court still believed that there were biological factors that forbid a "real" change of sex, it determined that the transition was good enough to grant it legal value. Furthermore, the rigidity of the gender categories was proven to be more flexible than believed, since the limit between the binary sexes could be crossed.

These judgments had a clear normalizing effect. The recognition of rights and sexes came at the price of reinforcing the binary genders and heterosexuality. After these rulings, transsexual individuals who had fulfilled all the requirements are granted recognition as heterosexual members of the desired sex. Surgery became the tool of transition; therefore, crossing the limit is one-way unless new surgery to undo the previous one could take place. Moreover, those transsexuals who have not yet undergone surgery are still not recognized, but this is portrayed as merely a temporary situation, since *trans* people are conceived as necessarily wishing genital surgery.

Regarding the transgender, s/he has never been acknowledged by the Court.¹⁸³ In fact, the transgender subject, who challenges the imposed causality between genitalia and gender, seems to be unthinkable within the Court's case law. Nonetheless, the Court has inadvertently offered the transgender the possibility to take the place

182. See WHITTLE, *supra* note 20, at xix (discussing the European Court of Human Rights' decisions in *Goodwin* and *I.* that states refusal to change birth certificates or permit them to marry within their changed gender role violated the European Convention on Human Rights).

183. A "transgender" applicant has recently appeared before the Court in the *H.* case (referred to the Grand Chamber). However, the term "transgender" in this case has been given the same meaning as "transsexual" in the previous case-law, and it has not been used in the sense given to the term within this article. *H. v. Finland*, App. No. 37359/09, Eur. Ct. H.R. (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114486>.

that belonged to the transsexual until 2002. The transgender can exist in-between the genders, in an intermediate position of intermittently moving across the sex boundary. This option might not be truly queer enough, in the sense that it does not yet materialize the non-belonging to a gender identity, in a queer way of transcending the binary, but it can be seen as a path to start challenging the binary understanding of gender. If the “intermediate” position is not just the consequence of the rejection of a request to belong to the sex binary, but it is reclaimed as a desired path to challenge an imposed binary existence, it could become a powerful tool to queer stable gender identities.

In fact, what would happen if a transgender individual requests the Court to be recognized as a woman in certain legal aspects, and as a man in others? From the Court’s current criteria concerning pre-operative transsexuals it can be inferred that the Court would actually allow States to treat transgenders in that exact way. However, it would be truly queer of the Court to actually validate – either explicitly or implicitly – such a requested intermediate existence.