Exploring the applicability and limitations of international human rights law to the protection of transgender persons: a case study on detention

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Declaration

I certify that this thesis I have presented for examination for PhD degree of the University of Essex is solely my work other then where I have indicated that it is the work of others.

This thesis is dedicated to the memory of:

my cousin Tamro Asanishvili

who was brutally tortured and murdered

on 27 September 1990 in Georgia

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Summary of the thesis

This thesis explores and analyses the applicability and limitations of human rights law as it applies to transgender persons. As such limitations are most evident in a strictly sex segregated spaces, the thesis proposes a case study on detention to illustrate potential conflict between the binary models of the sexes, gender fluidity and application of international human rights law to those with transgender or non-binary gender identity. For this, the thesis reviews international human rights law sources, queer theory literature and transgender and non-binary gender studies.

This research examines the issues of transgender and non-binary identities and their recognition in law, including developments in international human rights law and the recognition of transgender identities in human rights instruments. The thesis considers issues such as underlying principles of human rights, and substantive rights applicable to transgender persons while surveying the national jurisprudences to assemble and fully examine the available models of transgender recognition in law.

The case study on detention analyzes the lived experiences of transgender prisoners and their life stories. It examines the international standards on the treatment of transgender prisoners and their human rights. The scope and applicable framework of protection is also discussed, considering the tension between binary nature of prisons and transgender persons' non-binary gender.

Overall, this thesis initiates a discussion about the binary/non-binary dichotomy in the prison context and asks a series of questions as to how transgender and non-binary gender identities can be accommodated in the prison context. It concludes with a number of recommendations for a deeper understanding of sex/gender and prison dichotomy both in theory and practice. The thesis also offers practical recommendations to international human rights mechanisms to provide specific guidelines on the application of human rights law to transgender and other non-binary gender prisoners.

Abbreviations and Acronyms

L - Lesbian
G - Gay
B - Bisexual
T - Transgender
I - Intersex
Q - Queer
LGBTIQ – Lesbian, Gay, Bisexual, Transgender, Intersex, Queer
SOGI – Sexual Orientation and Gender Identity

UN – United Nations
UNGA - United Nations General Assembly
ECOSOC - UN Economic and Social Council
OHCHR – Office of the High Commissioner for Human Rights
HRC – Human Rights Council
OAS- Organisation of American States
OIC - Organization of the Islamic Conference
CoE - Council of Europe

UPR – Universal Periodic Review
SP - Special Procedures
SR – Special Rapporteurs
UN Independent Expert on SOGI – The United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

HRCttee - Human Rights Committee
CESCR - Committee on Economic, Social and Cultural Rights
CEDAW – Committee on the Elimination of all Forms of Discrimination Against Women
CRC Committee -
CAT Committee
SPT - Prevention of Torture
NPM - National Preventive Mechanism

ECtHR – European Court of Human Rights
IACtHR - Inter-American Court of Human Rights
African Court – African Court on Human and Peoples Rights
ACHPR - African Commission on Human and Peoples' Rights

UDHR – Universal Declaration on Human Rights
ICCPR – International Covenant on Civil and Political Rights
ICESCR – International Covenant on Economic Social and Cultural Rights
CAT – The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OPCAT – Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICEDAW - International Convention on the Elimination of all Forms of Discrimination Against Women

CRC - Convention on the Rights of the Child

ECHR – European Convention on Human Rights
ACHR - Arab Charter on Human Rights
Banjul Charter - African Charter on Human and Peoples' Rights

SMR – UN Standard Minimum Rules for the Treatment of Prisoners
Bangkok Rules – UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders
Luanda Guidelines - Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa
Robben Island Guidelines - Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa
EPR - European Prison Rules

NGOs - Non-governmental organization

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Introduction

In the spring of 2013, the world was shaken by the news that a US Army officer had leaked hundreds of thousands of classified documents to Wikileaks.[1] Chelsea Elizabeth Manning – then known by the name on her birth certificate, Bradley Edward Manning – was found guilty of 20 counts, six of them under the Espionage Act.[2] However, rather than her actions and convictions, it was her identity and its implications for her punishment that ensured that Chelsea Manning would be more than an overnight sensation.

The day after her conviction in August 2013, Manning came out as transgender, becoming the world's most famous transgender prisoner. On the *Today* morning talk show, she was quoted as saying, 'As I transition into this next phase of my life, I want everyone to know the real me. I am Chelsea Manning. I am a female. Given the way that I feel, and have felt since childhood, I want to begin hormone therapy as soon as possible'.[3]

Manning spent almost four years in prison before being pardoned by President Obama in January 2017 and finally released on 17 May 2017. The denial of gender expression, solitary confinement, continuous verbal and other abuse, and attempted suicides that characterized her time in prison encapsulate the struggle for protection under the law and the particular challenges that detention poses in cases of non-binary identity.

[1] Adam Gabbatt, '"I am Chelsea Manning" says jailed soldier formerly known as Bradley', *Guardian* (New York, 22 August 2013).
[2] ibid.
[3] ibid.

Not all societies recognize the term 'transgender' in law. However, gender fluidity and non-binary identities exist in most societies. In some countries, a third gender has been elevated to the level of protection in the law,[4] and in others, terms such as *hijra*, *waria* or *kathoey* have been coined to refer to non-binary identities in relevant local contexts.[5] Regardless of the local terms for gender non-conforming people, the transgender community in most countries remains among the most invisible and marginalized groups and faces daily violence and abuse at the hands of both state and society.

The lived experience of gender non-conforming people, including in prisons, was absent from research for a long time. Thus, the experiences of transgender people were not documented or studied as a specific discipline. Indeed, while more general aspects of gender and sex were part of wider feminist and later post-structural feminist and queer theories, studies within these theories had their specific purpose and did not instigate active mobilization for transgender citizenship and rights, based on either non-binary or transgender identities.

The largely hidden and neglected development characterizes the standing of transgender studies today – somewhat reconciled with queer and feminist theories and in constant tension with the law. The notion of non-binary gender continues to unsettle the long established normative boundaries of sex and gender. Transgender persons do not fit

[4] *Pant v Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD) (Nepal).; Also *Khaki v Rawalpindi*, Supreme Court of Pakistan, 2009, Petition No. 43/2009 (Pakistan).

[5] See for example, Vanja Hamzic, 'The Case Of Queer Muslims: Sexual Orientation And Gender Identity In International Human Rights Law And Muslim Legal And Social Ethos' (2011) 11 Human Rights Law Review; Laura Grenfell, 'Making Sex: Law's Narratives Of Sex, Gender And Identity' (2003) 23 Legal Studies.; Boyce Bret, 'Sexuality and Gender Identity under the Constitution of India' (2015) 18 Journal of Gender, Race and Justice.

within the existing model of human rights law. The inherent limitations of the law and its binary character make it difficult for those outside the boundaries to fit in. Often, however, those limitations are ascribed to transgender people themselves and their inflexibility, inability and even unwillingness to comply with the structure of the law.

The silence of international human rights law on lesbian, gay, bisexual, intersex and queer people (LGBTIQ) people mirrors the invisibility of people with non-conforming sexuality or gender, such as LGBTIQ people throughout history. This is not surprising when one considers that in the 1940s and 1950s, when many international human rights treaties still in force were being drafted, gay and lesbian people were criminalized in most parts of the world. This translated into their absence from the protection framework that was unfolding.[6] Since the adoption of the international bill of rights in the 1950s and 1960s, LGBTIQ persons have fought a long battle, resulting only in 2016 in the partial victory of a dedicated UN mandate – the Independent Expert on Discrimination based on Sexual Orientation and Gender Identity (UN Independent Expert on SOGI).[7] A decades-long taboo on sexual orientation and gender identity debates within the UN was broken, but not without a struggle. Countries that remain hostile to LGBTIQ rights fought to the very end at the United Nations General Assembly (UNGA) to block the creation of the mandate, including using their leverage to restrict financial support for the mandate.[8]

[6] Holning Lau, 'Sexual Orientation: Testing the Universality of International Human Rights Law' (2004), 71 The University of Chicago Law Review.
[7] UNHRC Res 32/2 (2016) UN Doc A/HRC/RES/32/2.
[8] ILGA and ARC International, 'Compilation of The Adoption of The 2016 SOGI Resolution' (ILGA and ARC International 2016) <http://ilga.org/downloads/SOGI_Resolution_Vote_compilation.pdf> accessed 11 December 2016.; Also, Munira Ali, Lorna McGregor, Daragh Murray, Patricia Palacios Zuloaga, Sir Nigel Rodley, Clara Sandoval, Ahmed Shaheed, 'SOGI Mandate Passes Third Committee Hurdle' <https://www.ejiltalk.org/sogi-mandate-passes-third-committee-hurdle/> accessed 9 December 2016.

Sexual orientation and gender identity rights continue to be a divisive theme for many states, as was demonstrated during the appointment process. Some 76 states that criminalize LGBTIQ people in law and practice continue to actively oppose the development of international human rights law to protect LGBTIQ persons. Such opposition to LGBTIQ people's rights has retarded the process of sexual orientation and gender identity norm emergence within the international sphere and created a void, or a virtual absence of protection under the framework of human rights law, leaving LGBTIQ people unprotected and exposed to violence with impunity.

Some understanding and protection have been developed in relation to lesbian and gay identities, but the current normative landscape constructed by states is not well suited to people with non-binary gender identities. A one-size-fits-all approach has not worked for transgender people. First, such an approach categorizes transgender people as part of a 'sexual minority' and disregards specific aspects of transgender identity. Second, the invisibility of transgender and non-binary genders results in the absence of protection mechanisms in the law. Third, and most importantly, the one-size-fits-all often does not provide for gender recognition in law. Moreover, such an approach lacks linkages between recognition of protection and recognition in law, which has clear negative implications for transgender communities. This thesis analyses the challenges posed by both these protection frames and explores the possibility of a combined approach. Without such an approach (and without their meaningful participation in policy design), transgender people remain particularly vulnerable to violence, both in society and on the part of the state.

Transgender people can be particularly vulnerable in a context where gender-binary norms are forcefully imposed, and safeguards are either absent or limited for the protection of non-binary gender persons. Detention is such a context.

Limitations of international human rights law, including its applicability in protecting transgender persons, are well illustrated in the story of Chelsea Manning, which neatly captures the multifaceted challenges faced by transgender and non-binary people in prisons. Manning's experience in detention, briefly described above, encapsulates the theoretical and practical challenges faced by transgender and non-binary people in prisons. Her case further magnifies the limitations of human rights law in its application in the prison context.

This thesis seeks to understand the ways in which transgender rights protection in society in general has been/is/can be applied, theoretically and practically, in relation to detention.

The core question of this thesis is how human rights law applies – or how international human rights law has been applied – to the protection of transgender persons, particularly when they are detained, and the limitations of the existing frames of protection. To address that question, this thesis will focus first on understanding the international human rights protection mechanisms for transgender people. It will also analyse specific rights of transgender persons under international human rights law, reviewing the available

literature on the issue. The thesis will also discuss the prison context as a space, with a clear demonstration of non-binary genders transgressing strict binary models of sex (male, female.) By concentrating on transgender persons, this thesis will attempt to challenge the heteronormative nature of prisons and the penal environment's rigidity in accommodating fluid genders.

This thesis will examine the issues of sex and gender and their biological/social constructions, including through the lenses of queer theory and international human rights law; legal models of transgender recognition; and the application of international human rights law through each of these models. It will also study the progression of transgender rights in international human rights law and its application to the prison context and will provide critical analysis on the issue. It will consider the rights to which transgender persons are entitled, both in society and in prisons, to allow comparative analysis.

The historical and theoretical context is provided in this thesis by an analysis of transgender theory, as well as the legal theoretical framework on the rights of transgender persons, practices of gender legal recognition and philosophies of sex and gender comprehension in prison settings. The scope and interplay of the applicable legal frameworks are also discussed in relation to prisoners' rights broadly and specifically focusing on transgender prisoners' rights.

This thesis proposes a framework for answering legal questions about transgender persons in society and in prisons in particular, identifying a series of cross-cutting factors. It examines the existing frames of protection in society and prisons and juxtaposes them. The paper concludes with possible explanations for some of the trends towards the recognition of ever-greater rights of transgender prisoners.

Transgender identities and law

Legal gender recognition of those who identify with an opposite or non-binary gender has been the most contested feature of queer theory. The emergence of 'transgenderism' and 'transsexualism' as political identities has demonstrated the apparent paradox of building (fixed) identity upon the impossibility of any (fixed) identity.[9] It is indeed in this context that two theories on gender emerged: the essentialist theory, which suggests that the gender assigned at birth is biological and cannot be changed, pointing to the immutability of sex; and the social constructionist theory, which suggests that gender is a socially constructed category and may be different from the biologically assigned sex.[10]

Throughout the short history of transgender theory and studies, different models of transgender citizenship have been adopted. These models have provided a framework in which transgender and other non-binary people have been able to access their human rights and freedoms, albeit with limitations. The biological, medical and gender self-

[9] Michele Grigolo, 'Sexualities And The ECHR: Introducing The Universal Sexual Legal Subject' (2003) 14 (5) European Journal of International Law.
[10] Matthew Gayle, 'Female By Operation Of Law: Feminist Jurisprudence And The Legal Imposition Of Sex' (2006) 12 William and Mary Journal of Women and Law, 737.

determination models that are available in different societies provide different levels of protection in the law and remain debated in the theory for their apparent limitations. The first two in particular – the biological and medical models of transgender recognition – are largely based on the sex-versus-gender discourse, whereas the third category – the gender self-determination model of transgender recognition – very much focuses on the perceived gender of the individual concerned.

The biological model suggests that gender should be determined by a person's biology.[11] This means that a person's sex and gender are identical and any variation from those established norms would be understood as unnatural and deviant.[12] Similarly, the medical model seeks strict conformity with biological sex and the only way it allows a deviation is to define gender non-conformity as a condition that should be treated through medical science.[13] Once the sex is corrected, the medical model aligns itself with the biological model, in that sex and gender become identical again. From the perspective of the protection of transgender rights, the biological model fundamentally disregards the transgender concept, as it considers gender-crossing fraudulent and improper behaviour.[14] On the other hand, the medical model accepts transgression, but captures such a possibility under the medical deviance framework through which legal redress for transgender persons is made possible. Furthermore, the medical model allowed medical science to become heavily involved in the legal decision-making with regards to changing and legally recognising persons' newly acquired genital organs.

[11] Corbett v Corbett [1970] 2 All ER 33.
[12] James J. Hughes, 'Beyond The Medical Model Of Gender Dysphoria To Morphological Self-Determination' [2006] Lahey Clinic Medical Ethics Journal.
[13] Chapter 2.
[14] Chapter 2.

Supporters of the medical model argue that this model has helped transgender persons from an early stage to acquire social acceptance.[15] For a long time, it was also understood as the only way through which transgender persons could access human rights. This assumption developed an over-reliance on medical evidence for the recognition of transgender citizenship and encouraged activism against such interference.[16] The 10th and most recent version of the World Health Organization's (WHO) International Classification of Diseases and Related Health Problems (ICD) contains a code for 'gender identity disorder' that includes concepts of 'transsexualism', dual-role transvestism, other gender identity disorders, and gender incongruence.[17] Because the term 'disorder' is at the centre of the classification, the ICD-10 has been challenged by transgender groups[18] and some human rights mechanisms have been pulling away from supporting the model too.[19]

A third model is an alternative to both the biological and the medical models – a way of recognising non-binary identities. This model allows the 'self-determination' of a gender. This model is also referred to as a 'reformist' model that aspires to reform old notions of sex and gender through which transgender citizenship can be realized.[20] Under the 'reformist' model, 'gender is recognized as a fundamental aspect of human life, which

[15] Hughes (n 12).
[16] See for example Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (1st edn, Taylor and Francis 2006). Paisley Currah, Richard M. Juang, and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006).
[17] Drescher J, Cohen-Kettenis P, Winter S. 'Minding the body: situating gender identity diagnoses in the ICD-11' [2012] Int Rev Psychiatry, 24(6).
[18] Transgender Europe, 'Position on the revision of the ICD 10' (2013) TGEU; Also, World Health Organization, 'The ICD-10 Classification of Mental and Behavioural Disorders Diagnostic criteria for research' (1993) World Health Organization.
[19] See for example *A.P., Garson et Nicot v France* App no *79885/12, 52471/13 et 52596/13 (*ECtHR 6 April 2017).; Also Jens T. Theilen, 'Depathologisation of Transgenderism and International Human Rights Law' [2014] 14 Human Rights Law Review 1–16
[20] Andrew N. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies Of Law* (Cavendish Publishing 2002) 57.

every person has the capacity and inherent right to control'.[21] The gender self-determination model aspires to rely on the basic acceptance and recognition of what its advocates assert is the essence of a human being – dignity and personhood.

Historically, the first two models – biological and medical – of transgender recognition have been widely employed in the legal context, including in legislation and court decisions. The third model, on the other hand, is emplematic of constant tension between the law and the queer understanding of gender. Law (by nature), as understood in queer theory, requires the use of rigid forms of identity or fixed categories, while gender, being socially constructed, undermines the rigid foundation of the law. Nevertheless, recent legal developments in a few countries have shown judicial and legal policy advancements in recognising the gender self-determination model. Legal reforms undertaken in countries including Argentina, Denmark, Malta and Ireland, among others, have provided an opportunity for transgender people to have their gender legally recognized without medical intervention.[22] The 'third gender' has also been recognized by the Supreme Court of Nepal, which, founding its reasoning on international human rights law and jurisprudence from other jurisdictions, concluded the 'third gender' had a right to be recognized in law.[23]

[21] Hughes (n 12).
[22] Transgender Europe, 'Argentina'S Gender Identity Law As Approved By The Senate Of Argentina' (2012) <http://tgeu.org/argentina-gender-identity-law/> accessed 10 August 2015.; Amnesty International, 'Denmark Takes Key Step Towards Destigmatizing Transgender People' (2016) <https://www.amnesty.org/en/latest/news/2016/05/denmark-transgender-decision/> accessed 19 October 2016.; Transgender Europe, 'Malta Adopts Ground-Breaking Trans And Intersex Law' (2015) <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/> accessed 3 May 2015.; Transgender Equality Network Ireland, 'Legal Gender Recognition In Ireland' (2016) <http://www.teni.ie/page.aspx?contentid=586> accessed 9 December 2016.
[23] *Pant v Nepal* (n 4)

Transgender rights and prisons

While it is important to recognize the limitations, one should also acknowledge the progress made on the recognition of SOGI rights internationally through soft-law mechanisms. Indeed, the appointment of the UN mandate holder on SOGI marks a key shift in international human rights law towards LGBTIQ people generally, representing the worldwide recognition of sexual orientation and gender identity rights. Shifting attitudes towards transgender people are also evident through the progress in countries' legal reforms that include gender self-determination as a key priority and attempts to eradicate discrimination on the grounds of sexual orientation and gender identity by adopting laws against discrimination.

Similar debates, however, have yet to be intensified in the context of prisons, where, although some progress has been made, the area remains under-researched. The general protection framework has over the last few years developed safeguard mechanisms for LGBTIQ prisoners, but progress in this area and the application of human rights law has been slower due to difficulties associated with prison policies and governance generally.

Indeed, broadly speaking, the expansion in the recognition of transgender identities has had very little impact on the way prison systems treat transgender prisoners in individual countries. In fact, the way in which transgender prisoners are treated is determined by how they are treated and protected in the law of that particular society. A brief survey of policies shows that even in countries where the gender self-determination model has been

adopted, similar policy changes have not been incorporated into the prison context. This means that even if some countries have managed to bring queer theory and law together for the protection of transgender persons, in the prison context this still proves challenging. In particular, issues of transgender prisoners' housing and access to basic rights, including the means of gender expression, the right to health and freedom from ill-treatment. remain debated. It is clear that even where a gender-determination model is adopted at national level, a degree of confusion is still common among authorities over how to treat transgender individuals in society, but it is heightened by prison policies, structures and institutions that further marginalize those already in situations of vulnerability.

International human rights law provides a rich jurisprudence on the issues of the detention of men, women and children. The core human rights instruments of the UN, as well as regional standards from Africa, the Americas and Europe, also provide broad opportunities for the protection of human rights of people in detention. In Asian and Islamic texts on human rights, protection mechanisms are also legislated. There is now a more robust system of international monitoring mechanisms over prisons too (the Optional Protocol to the Convention Against Torture (OPCAT), the Sub-committee for the Prevention of Torture (SPT), the European Committee on the Prevention of Torture (CPT)), in some cases linked with national-level mechanisms (the National Preventative Mechanism (NPM)). However, in addition to other limitations inherent in such mechanisms, almost all the instruments refer to the binary model of the sexes (men versus women), leaving the concept of gender under-explored. (One such example is

indeed the inclusion of gender as opposed to traditional term 'sex' in the list of non-discrimination grounds). International human rights law does not yet offer sufficient guidance for non-binary genders in the prison context. In fact, prisons are among the only environment where where international human rights law becomes unable to extend the protection mechanisms beyond the binary systems. The resulting greater invisibility of transgender people, including prisoners, contributes to an absence of data and general knowledge on sexual diversity in the prison context, making the 'sexual minorities' group even more vulnerable to the effects of ignorance, including violence, expressed both in law and in practice.

Establishing international legal norms is an extensive process that requires complex approaches not only from individual countries and alliances of countries, but also from the affected and interested groups themselves. Making changes to already established norms has proved particularly challenging in the context of sexual orientation and gender identity. The LGBTIQ community is small, isolated, fragile and under threat almost by definition. The history of the development of international human rights law shows the immense difficulty of negotiating human rights treaties with the member states of the UN or other regional inter-governmental organizations. While it is not the purpose of this research to propose any specific standard on the SOGI rights in society and prisons, it is very much aimed at understanding and reflecting on the protection frameworks, both in society and in places of detention. The case of transgender rights is a good example to demonstrate the limitations of international human rights law and the amendments needed to enable it to accommodate non-binary identities. Hence an analysis of the

concept of gender in the social sciences, detention and international law will be provided.

Terminology used in this thesis

This thesis surveys literature from different time periods, from the beginning of the 20th century to present day. During this period, covering almost a century, terms and references in relation to transgender people have developed and changed drastically. Terms that were pivotal and illustrated breakthroughs in the medical or sociological sciences in the early 20th century are now considered stigmatising and out-dated, and new terms have been introduced to more accurately reflect gender identity or expression. Even during the lifetime of this thesis, which commenced in 2013, there has been a dramatic shift in the application of terms in queer theory, transgender studies and, most importantly, in international human rights law. The field of transgender studies is rather dynamic, with its philosophy of embracing the diversity of identities and self-perception of gender. Fixed terms can, and do, constrain people to categories, which may prevent them from moving across identities and genders. Hence, the terms in the field are living and evolving on a regular basis.

To accurately reflect the developments in the fields of queer and transgender theory and human rights law, this thesis employs a number of terms. While not all societies around the world recognize the term ‘transgender’, the literature has shown a rich culture of ‘the other’ gender. This thesis does not intend to analyse all variations of non-binary gender, but it does examine the terms that have accompanied the progression of transgender

identities in the context of international human rights law. This thesis will provide the historical background of the terms 'transsexual' and 'transgender', as well as the current discourse on non-binary identities. In this thesis, terms such as 'transgender' and 'non-binary gender' will be used to describe gender non-conforming people. In places where term 'transsexual' is used, it either expresses the view of the original author or refers to the period of time when that term was actively used (i.e. the period of the biological and medical models of gender recognition in law). In those cases, the term 'transsexual' will be used in quotation marks.

This thesis examines gender identity and transgender people's rights. It therefore mainly analyses the theories around gender identity and recognition. It does not specifically discuss sexual orientation or sexuality in the rights context. However, due to the intrinsically intertwined nature of the concepts of sexual orientation and gender identity, the thesis will make reference to sexual orientation when necessary and as relevant for the thesis. For historical reasons, sexual orientation has progressed much further than gender-identity rights. Therefore, the thesis will only refer to sexual orientation when relevant in the context of gender identity. Sexual orientation is understood to refer to 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.'[24] While gender identity is understood to refer to 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body

[24] Yogyakarta Principles - Principles On The Application Of International Human Rights Law In Relation To Sexual Orientation And Gender Identity ('Yogyakarta Principles', 2006) <http://www.yogyakartaprinciples.org/principles-en> accessed 11 January 2014.

(which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.'[25] When mentioned together, 'sexual orientation and gender identity' will be referred to as 'SOGI' rights.

The term 'gender non-conforming' will be used to refer to people whose gender expression is different from conventional expectations of masculinity and femininity.[26] Not all gender non-conforming people identify as transgender; nor are all transgender people gender non-conforming. Terms such as 'gender-queer', 'gender-fluid' and 'non-binary' describe a person who identifies not with the male/female binary but somewhere outside or between.[27] Those terms will be used to describe non-conformity and non-congruence with the imposed binary framework of sex and gender.

Other terms referring to individuals will be also used. These include 'lesbians' – women who sexually, physically and romantically feel attracted to individuals of the same gender;[28] 'gay' – men who sexually, physically and romantically feel attracted to individuals of the same gender;[29] 'bisexual' – individuals who sexually, physically and romantically feel attracted to individuals of more than one gender;[30] and 'transgender' – an umbrella term for people whose gender identity and/or gender expression differs from

[25] ibid.
[26] GLAAD Media Reference Guide - Transgender' (GLAAD, 2017) <http://www.glaad.org/reference/transgender> accessed 16 September 2016.
[27] ibid.
[28] Yogyakarta Principles, 2006.
[29] ibid.
[30] ibid.

what is typically associated with the sex they were assigned at birth.[31] People under the 'transgender' umbrella may describe themselves using one or more of a wide variety of terms, including 'transgender'.[32] Though this thesis does not focus on intersex people, it will make references to them in some places; therefore, it is important to stipulate that intersex people are those born with physical sex characteristics that do not fit medical norms for female or male bodies or, as defined earlier, 'Intersex people are born with physical, hormonal or genetic features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male'.[33] Another such term used in the thesis, though does not specifically focus on it, is 'queer', which is used in two ways. One is to refer to people who are not heterosexual. The other refers to those who do not see themselves as belonging to the socially accepted binary categories of sexual orientation and gender identity; rather, queer people see both the spectrum and identities as fluid.[34] To save space, abbreviations will also be used: LGBTIQ – for 'lesbian, gay, transgender, bisexual, intersex and queer' – when referring to individuals' rights, and SOGI – for 'sexual orientation or gender identity' – when referring to those rights in law. This thesis also employs term 'sexual minority' or 'sexual minorities' referring a collective group of LGBTIQ groups. This term is used in places where literature is vague about specific identities of the various groups. The presumption in those cases is made that literature or standards apply to all 'sexual minorities'.

[31] ibid.
[32] 'GLAAD Media Reference Guide – Transgender' (note 26).
[33] Munira Ali, Lorna McGregor, Daragh Murray, Patricia Palacios Zuloaga, Sir Nigel Rodley, Clara Sandoval, Ahmed Shaheed (n 8).
[34] ARC International, IBAHRI, ILGA, 'Sexual Orientation, Gender Identity And Expression, And Sex Characteristics At The Universal Periodic Review' (ARC International, IBAHRI, ILGA 2016).

Different legal terms are also used to reflect different types of detention, including police arrest, military, immigration, psychiatric, criminal justice (a category that includes police detention, pre-trial, remand) and post-trial detention. Each of these legal terms has a specific meaning and individuals who fall under each category enjoy specific rights. In this thesis, when referring to 'prisons', 'criminal justice detention', 'closed spaces' or 'institutions', these are to be understood only as places where individuals are housed after conviction, and consequently 'prisoner' or 'detainee' to persons who are serving sentences. Despite many similarities between prisons and some of the other institutions mentioned above, this thesis does not analyse any other closed institutions, but only prisons as defined above.

Structure of the thesis

Part I of the thesis, consisting of the first two chapters, addresses theoretical questions on queer theory and the law. Chapter One surveys the concept of transgender as an identitarian and political phenomenon. It focuses on understanding the positioning of transgender theory and its origins and relations with wider queer and feminist theories. This chapter also provides an analysis of sexual diversity in the prison context and an understanding of transgender and queer concept in prisons. The two main stages of transgender analysis – deviance theory and invisibility – are described to lay the ground for a discussion of sexuality in prisons.

Chapter Two addresses the question of transgender recognition in law. It explores the variations of the concept of transgender citizenship in policy and law and analyses three models of legal recognition of transgender identities: first, the application of transgender theory to law resulting in the biological model; second, the relationship between medical science, transgender theory and the law, forming the model of medical recognition of transgender identity; and third and most recently, the gender self-determination model adopted thus far by a handful of countries. The gender self-determination model challenges strict binary identities (i.e., the other two models) and creates a space in which travel through fixed genders is a possibility. Chapter Two will offer further analysis of gender self-determination and its harmonization with the law.

Part II of the thesis, comprising Chapters Three and Four, continues to analyse transgender citizenship and states' obligation to provide access to rights and freedoms on an equal basis. Chapter Three asks whether there are or should be specific rights for transgender persons and, if so, what rights, or whether instead principles of human rights are the core upon which the protection of transgender persons should be based. Chapter Three takes the obligation of respect for human dignity, equality and non-discrimination as the gateway to consideration of a wide range of rights for transgender persons, including the right to privacy, medical care and the right to be recognized before the law.

Chapter Four surveys international human rights law, focusing on UN jurisprudence and regional human rights mechanisms (where progress has been made in advancing human rights law in relation to transgender rights), in order to understand the relationship

between transgender rights and international human rights law. It examines the journey towards wider SOGI rights within the UN human rights mechanisms and suggests that these rights are inherently part of the international human rights framework. The chapter analyses the UN Human Rights Council (HRC) debates on the recent SOGI norm making. Four resolutions adopted by the Council and the appointment of the UN mandate holder on discrimination on the basis of SOGI will also be analysed.

Chapters Five and Six, which constitute Part III of the thesis, examine the concepts of transgender and other non-binary identities in the prison context. Chapter Five will provide a narrative analysis of the lived experiences of transgender prisoners, and it seeks to position transgender and non-binary persons (as the principal group of people undermining the binary model of the sexes) in prison. Significant consideration here is given to the standards for treatment of prisoners and how they are applied to transgender prisoners. This chapter will offer an overview of the journey of transgender prisoners, from entering a prison through their struggles during their incarceration, to demonstrate contemporary manifestations of their lived experiences, change that has occurred over time, and the impact of that change on the rights of transgender prisoners.

Chapter Six of the thesis is the principal part of the case study, which demonstrates a constant tension between non-binary identities and binary structures, laws and systems. While the first four chapters set the theoretical and legal context around transgender citizenship, Chapter Six attempts to apply that analysis to international human rights law, treatment of prisoners and detention. It argues that the advancement in the recognition of

gender self-determination in the law on the one hand, and the advancement of prison reforms on the other, have had a limited impact on the global prison policy-making process in the context of transgender prisoners. This chapter analyses existing alternative frames of transgender rights protection and examines whether the same frames are applicable to the prison context. It further examines the available options in which non-binary identities are dealt with in modern prison policies and examines transgender prisoners and situations of vulnerability. Chapter Six ends with the conclusion that, although protection frames might be similar in society and prisons if gender self-determination means a constant transgression of the heteronormative axis of sex, the realization of self-determination in the prison context is currently impossible, which also means that the right to gender self-determination in prison is indeed questionable. This, however, does not minimize or render infeasible the important need for the underlying principles of human rights law to be applied to transgender prisoners.

This thesis concludes by suggesting several explanations for the trend in recent history towards the recognition of rights for transgender prisoners and their treatment. Among the questions identified for further study are (1) whether the development in general human rights law in recognising SOGI rights has been matched by corresponding changes in the area of prison policies and, most importantly, in state practices, and (2) whether the development of the law will maintain this progressive trajectory in the future.

PART ONE

Chapter I

Transgender and Non-binary Identities

1. Introduction

Throughout history, transgender identity has been shunted around and cut through with a surgical scalpel. Rejection of non-binary identities, criminalization of wider 'sexual minority' groups and pathologization of transgender people have influenced transgender theory as it is understood today. While the concept of transgender identity has grown gradually in multiple disciplines, including sociological, feminist, medical and legal theories, it only started to form into a theory in its own right towards the end of the 20th century. Indeed, the fluidity of gender has existed in many cultures and societies over the centuries; however, capturing such fluidity within the framework of a specific term or concept has been a challenge for many researchers and authors.[35]

In post-structuralist theory, the binary gender identifier has been mostly examined in the context of transgender people,[36] commonly identified as a group that transgresses gender and sex categories. The view held by social constructionists on gender largely opposes the essentialist view of transgenderism. Namely, the social constructionists suggest that gender is a socially constructed category and may be different from the biologically

[35] See for example, Gilbert Herdt (Ed), *Third Sex, Third Genders:* Beyond Sexual Dimorphis, in culture and History (Published by Zone Books 1996).
[36] James McGrath, 'Are you a Boy or a Girl? Show me your real ID' (2009) 9 Nevada Law Journal.

assigned sex,[37] whereas the essentialist view holds that the gender assigned at birth is biological and cannot be changed.[38]

While such long-held view on the immutability of sex has affected legal and policy developments for decades, feminist, queer and, lately, transgender theories have been attempting to unpack the concepts of gender and sex. Transgender theory in particular has been interested in understanding non-binary gender identities through the lived experiences of transgender individuals. Such experiences play a crucial role in this thesis as it examines the application of international human rights to transgender persons and the limitations of the law itself in doing so.

This chapter provides an examination of the foundations of sex and gender. In particular, it explores the binary character of law and sex in feminist and post-structural feminist theories. These theories indeed pioneered transgender research throughout the second half of the 20th century. Therefore, understanding the conundrum of the different terms, their origins and the influence of transgender studies development will serve as an introduction to the wider analysis of the application of international human rights law to non-binary identities. While the chapter does not focus on the concept of heteronormativity, it argues that 'heteronormative gendering of spaces creates a kind of gender tyranny that regulates gender non-conformists and especially transgendered

[37] Susan Hurley 'Sex and the social construction of gender: can feminism and evolutionary psychology be reconciled?' in Jude Browne (Eds.) *The future of gender* (Cambridge University Press, 2007).
[38] Wendy O'Brien, 'Can International Human Rights Law Accommodate Bodily Diversity?' (2015) 15 (1) *Human Rights Law Review*.

people.'[39] Judith Butler's 'performativity theory' is further employed to illustrate how fluidity of genders upset fixed gender categories. Examination of these categories is important as the thesis continues to build and provides further analysis on the limitations of the law, not only in recognising transgender citizenship, but also in providing access to the enjoyment of their rights and freedoms.

This chapter offers a discussion of the relationship between transgender studies and feminist and queer theories. While acknowledging the tension introduced by non-binary categories for fixed identities, this chapter seeks common ground between those disciplines. This effort proves difficult, however, as the chapter evolves. For example, if non-binary identities are fluid, it means they oppose any kind of fixed categories. This can further mean that transgender or non-binary identities by nature undermine any identity, and specifically feminist studies, which are grounded in fixed categories. These tensions are discussed and analysed with a view to providing an understanding of the limitations of theory, which may or may not have had an impact on the establishment of the specific laws and protection guarantees for non-binary groups.

An absence of theory on gender identity throughout the 20th century has meant that other disciplines, such as criminal justice, also have not paid much attention to issues of gender identity in the prison context. Any deviation from the sex assigned at birth, as well as same-sex sexual contact among consenting adults, was considered a criminal act in most

[39] Petra L. Doan, Why Question Planning Assumptios and Practices About Queer Spaces in Petra L. Doan (Eds) *Queerying Planning: Challenging Heteronormative Assumptions and Reframing Planning Practice (*Taylor & Francis Group, 2011.; Also, Petra L. Doan, The tyranny of gendered spaces – reflections from beyond the gender dichotomy (2010), 17:5, 635-654 *Gender, Place & Culture.*

countries throughout the first half of the 20th century. Therefore, little or no progress was made in studying same-sex or gender variations in the prison context. To illustrate this neglect, this chapter will outline the invisibility and deviant phases of transgender prisoners. It will provide an analysis of prison sexuality. It is hoped that such a study will set a solid theoretical ground for illustrating the boundaries of the law when it comes to its application to non-binary gender identities both in society and in prison.

2. Transsexualism and Transgenderism as Identitarian Categories

Transgender, transsexual, transvestite, trans*, gay drag, butch lesbian, queer, native American *berdache*, Indian *hijra*, Indonesian *waria*, Thai *kathoey*, Brazilian *travesti*, Arabian *xanith*, Polynesian *mahu*, Maori *whakawahine* and others, all refer to individuals who violate imposed binary gender and sex systems.[40] These different terms signify cultural particularities within which non-binary gender persons live. Over the years, a greater congruence has been sought to develop a single term that would capture the experiences of all people with variant gender. This and the next chapter show, however, that such attempts have failed and that capturing gender variance within a single identity has been impossible, particularly from a legal perspective.[41] Indeed, transgender identities capture the varying experiences that people have in reflecting transgender embodiment. This can be a space created by three, four or more gender lines. Among many independent or unpredictably related gender categories is a model of gender in

[40] Paisley Currah, 'Gender Pluralism under the Transgender Umbrella' in 'Transgender rights', Paisley Currah, Richard M. Juang, Shannon Price Minter (Eds.), '*Transgender rights'* (The University of Minnesota Press, 2006) 16.
[41] ibid.

which each gender term has its own axis in space.[42] That was the view of Eve Sedgwick, who inspired other writers by describing gender variance as a 'gender galaxy'.[43]

Notwithstanding such variance of gender in different societies, terms such as 'transsexual' and 'transgender' have played an important role in advancing non-binary gender to date. The two terms formed at different stages in the historical journey of gender incongruence, with specific meanings in their context. A quick study of both concepts is necessary to situate both terms within this thesis. A common feature will nevertheless be identified between these terms to build the later problematization of the transgender identity concept.

2.1. The history of the 'transsexualism'

The term 'transsexual' was coined by a medical professional in the early 1950s. Historic records show that Dr Harry Benjamin, a physician and endocrinologist from New York, US, in 1953 gave the name 'transsexual' to a problem he called 'gender confusion'.[44] Benjamin described the 'transsexual's' situation as 'seemingly ineradicable and an intensely painful conviction held by certain men and women that their physical and emotional makeup had been mismatched and that they are somehow women trapped in men's bodies or vice versa'.[45] In order to match the 'emotional makeup' of one's understanding of gender to one's sex, the term 'transsexual' was used to refer to those

[42] Eve Kosofsky Sedgwick, Epistemology Of The Closet (University of California Press, 1990) 32-34.
[43] Gordene Olga MacKenzie, *Transgender Nation: The Gender Movement in the USA* (University of Wisconsin Press, Bowling Green Ohio, 1994).
[44] Harry Benjamin, *The Transsexual Phenomenon* (Originally published by The Julian Press, Inc. Publishers, New York (1966) p. 11.
[45] Richard Ekins and Dave King (eds), *Blending Genders: Social Aspects Of Cross-Dressing And Sex Changing* (1st edn, Routledge 1995) 235.

requesting a sex change. Over time, the term 'transsexual' was used not just to refer to those who changed their biologically assigned sex but also to distinguish them from transvestites, who merely cross-dressed.[46] This differentiation was significant for Benjamin, who argued that his patients 'were miserable in their original assigned genders'.[47] Benjamin further argued that, by altering their bodies with hormones and surgery, he was allowing them to live as members of the other sex, hence 'helping the transsexual community'.[48] In his view, if a person with 'gender confusion' syndrome did not wish to undergo surgical sex change, he or she was not a true 'transsexual'.[49]

Various theorists offered definitions of 'transsexual' indicating that 'transsexuals' are persons with one anatomical sex, yet have an overwhelming belief that they are representatives of the opposite sex.[50] A male 'transsexual' expresses that belief as being 'a woman trapped in a male body' and a female 'transsexual' as being 'a man trapped in a female body'.[51] Accordingly, the 'transsexual' is a person in whom there is an incongruence between the anatomical sex and gender. Transgender theorists, such as Susan Stryker, also offer similar definitions of 'transsexual'.[52] Stryker, while explaining the differences between the terms, writes that 'a *transvestite* was somebody who episodically changed into the clothes of the so-called "other sex", and a "transsexual" was somebody who permanently changed genitals in order to claim membership in a

[46] ibid.
[47] Benjamin (n 44) 27.
[48] Benjamin (n 44).; Also, Dallas Denny, 'Transgender communities in the United States in the late Twentieth Century' in Paisley Currah, Richard M. Juang, Shannon Price Minter (Eds.), *'Transgender rights'* (University of Minnesota Press 2006) 175.
[49] Benjamin (n 44).
[50] Juliet Bourke, 'Transsexualism - The Legal, Psychologicaland Medical Consequences Of Sex Reassignment Surger' (1994) 6. Current Issues in Criminal Justice 275.
[51] ibid.
[52] Susan Stryker, '(De)Subjugated Knowledges: An Introduction to Transgender Studies' in Susan Stryker and Stephen Whittle (Eds), *The Transgender Studies Reader (*Routledge 2006) 4.

gender other than the one assigned at birth'.[53]

The concept of 'transsexuality' was further developed and researched by German sexologist Magnus Hirschfeld,[54] who in 1931 allegedly conducted the first reported sex-change operation and attempted to explain the phenomenon.[55] Despite this, sex change procedures were not widely known until Christine (George) Jorgensen's much-publicized surgery in Denmark in 1952.[56] Jorgensen's case became one of the first recorded sex-change cases in history.[57] Despite such individual cases sporadically reported in the first half of 20th century, the concept of gender and sex remained largely underdeveloped.

Nevertheless, these cases brought the idea of sex change into the public eye. As surgical interventions became more common, the focus shifted towards treatment, or rather to correcting the 'physical error' of transgender people who, as Benjamin described,[58]were 'trapped in the wrong body'. 'Treating' people through medical intervention (such as hormone therapy and surgery) turned 'transsexuality' into a medical condition, which could only be treated through medical intervention. The early terms of 'transsexual' and 'transsexualism' retained the 'intermediate sex' connotations, as they specifically related to biological sex change.[59] They pointed to a state of being in between two sexes.[60] This is indeed interesting and indicative, because in the early literature, the term 'transgender'

[53] ibid.
[54] Hirschfeld (1868-1935) founded the 'Journal of Sexual Science' (Zeitschrift for Sexual Wissenschaft) in 1913 and the closely related Institute for Sexual Science in Berlin in 1919 to research transsexuality. Friedemann Pfäfflin, 'Sex Reassignment, Harry Benjamin, and Some European Roots' (1997) 1 (2) Int. J. Transgenderism
[55] Ekins and King (n 45) 100.
[56] Ekins and King (n 45) 100.
[57] Benjamin (n 44) 12.
[58] Benjamin (n 44) 12.
[59] Ekins and King (n 45) p. 117.
[60] Ekins and King (n 45) p. 117.

is absent, which indicates firstly that the concept of gender was not developed by feminist theorists and, more importantly, that the term 'transsexuality' was a concern for the medical community, which was 'correcting' gender non-conformity by offering surgical sex change.

Forcing people into the framework of 'transsexuality' meant that people were 'corrected' in order to 'disappear' and blend into heteronormative society either as men or as women.[61] Early 20th-century literature shows that those who underwent sex-change surgery were trained to fit into a new identity – not as a trans-person or as non-binary, but as a man or a woman, a heteronormative category.[62] Describing that oppressive aspect of early medical treatment in the USA, activists noted:

> transsexuals are encouraged to lie about their transsexual status. They are to define themselves as men or women, not transsexual men and women. Individuals are encouraged to invent personal histories on their chosen genders; female-to-male transsexuals, for example should speak about their lives as little boys.[63]

The isolation of the term 'transsexual' within medical science gave way to a 'transsexual' identity invented by medical professionals. This had a profoundly negative impact on transgender people, who were trapped in the 'heterosexist legacy', resulting in outrage in the transgender community.

With the introduction of fixed sex categories and genders, term such as

[61] Currah, Juang and Minter (n 16).
[62] Stuart F. Chen-Hayes and Viviane K. Namaste, 'Invisible Lives: The Erasure Of Transsexual And Transgendered People' (2002) 31 Contemporary Sociology.
[63] Shannon Price Minter, 'Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion' in Paisley Currah, Richard Juang and Shannon Price Minter (eds.) *Transgender Rights* (University Of Minnesota Press 2006) 152.

'heteronormativity' and 'heteronorm' emerged. In literature, heteronormativity is understood as a discourse where women and men are seen as polar opposites, and whose characteristics exclude each other.[64] At the same time, 'heterosexual matrix, gender and heteronormativity work to construct men and women as two distinct classes of people.'[65] In this thesis, the concept of heteronormativity is used to demonstrate how sexualities and gender identities are expressed, organized and structured that does not necessarily fit the normative sex and gender systems.[66]

The establishment of an identity-based movement for rights claims will be discussed further in Chapters One and Two. What is important to highlight here is that even today the term 'transsexual' remains strictly embodied in medical literature. 'Transsexuals' who had changed their sex were thus forced to blend into one or other of the sexes and did not have much basis on which to mobilize, let alone demand political rights and freedoms. This proved problematic, however, as many transgender people did not necessarily wish to identify themselves as heterosexual men or women, but rather wanted to express themselves in a preferred gender. Incensed at the forceful attempt to position transgender persons as strictly heterosexual men or women, transgender commentator Whittle has countered that 'a trans person might be a butch, or a camp, a transgender or a transsexual, a male to female or female to male or a cross-dresser; they might in some parts of the world consider themselves a lady boy, *katoey*, or even the reclaimed Maori

[64] Heiko Motschenbacher, *Language, Gender and Sexual Identity: Poststructuralist perspectives* (John Benjamins Publishing Company, 2010) 39.
[65] ibid.
[66] Marcus Herz and Thomas Johansson, 'The Normativity of the Concept of Heteronormativity' (2015) 62:8 Journal of Homosexuality

identities *whakawahine* or *wakatane*'.[67] What this meant is that over time, the term 'transsexual' became associated with oppression and medical interference, with strict connotations of wanting to belong to the other sex. This, however, seemed far from the truth of the actual lives of transgender people, who only wanted to live in their desired gender, without much external intervention. As the 'oppression' against 'transsexuals' continued in the medical establishment, members of the transgender community started to develop identity terms that opposed medical interference. Soon, 'transgender' became a grassroots term, a term of empowerment and political activism.[68] As Stryker defines it, 'a *transgender* was somebody who permanently changed social gender through the public presentation of self, without recourse to genital transformation'. [69] Such a definition creates further differences that go beyond the 'transsexual' and 'transgender' concepts and will be discussed below. Before focusing on that issue, however, it is important to understand the emergence of 'transgender' as a concept and an identity.

2.2. The history of transgender identity

The emergence of the term 'transgender' can be linked to the development of the concept of gender as a social construct, detaching sex and gender as identical and established binary categories. The concept of transgender has remained an evolving one in sociological, anthropological, feminist and legal literature.[70] And, as it evolves, the definition of transgender seeks to encompass gender queer, cross-dressers, and

[67] Stryker and Whittle (n 16) XI.
[68] Currah (n 40) 3-25.
[69] Stryker (n 52) 4.
[70] Gretchen P. Kenagy, 'Transgender Health: Findings From Two Needs Assessment Studies In Philadelphia' (2005) 30 Health & Social Work.

'transsexuals,'[71] celebrating all transgender persons who by any means transgress binary gender norms.[72] Such a varied definition of transgender is closely linked to the notion of 'gender queer' which rejects the binary gender system, thus freely mixing and matching gendered behaviours and characteristics associated with men and women.[73]

Though the term 'transgender' was first used in the 1980s by Virginia Prince, a Southern Californian advocate for freedom of gender expression, its meaning as a political identitarian umbrella term came from a pamphlet by Leslie Feinberg, 'Transgender Liberation: A Movement Whose Time has Come'.[74] The term has since been used as an overarching term to describe people who, in one way or another, cross or transcend sex and gender boundaries, whether or not they undergo a medical sex change. Having emerged through the transgender community itself, the term has carried a political meaning of liberation for the transgender movement. In the words of Stryker, the term 'transgender' is a 'pangender' umbrella 'encompassing transsexuals, drag queens, butches, hermaphrodites, cross-dressers, masculine women, effeminate men, sissies, tomboys, and anybody else willing to be interpolated by the term who felt compelled to answer the call to mobilization.'[75] The term 'transgender' has evolved to refer to all identities or practices that cross over or move between or otherwise question socially constructed sex/gender boundaries.[76] Such a definition accommodates persons with any gender identity and provides a flexible understanding of one's gender. It is probably the

[71] Jami Kathleen Taylor, 'Transgender Identities and Public Policy in the United States: The Relevance for Public Administration' (2007) 39 Administration and Society.; Also, Paisley Currah and Shanon Price Minter, *Transgender Equality: a handbook for activists and policymakers (*National Centre for Lesbian Rights, and the National Gay and Lesbian Task Force Policy Institute, 2000)
[72] See Paisley Currah, Richard Juang and Shannon Price Minter *(n 16),* Stryker and Whittle (n 16).
[73] Taylor (n 71).
[74] Leslie Feinberg, *Transgender Liberation: A Movement Whose Time Has Come* (first published 1992, in Stryker and Whittle (Eds) Transgender Studies Reader 2006) 205-220.
[75] Stryker (n 52) 4–6
[76] Currah (n 40), Ekins and King (n 45)

reason why popular advocacy literature uses the term 'transgender' as an 'umbrella term to describe people who ... have gender identities, expressions, or behaviours not traditionally associated with their birth sex'.[77]

Despite the comprehensive social nature of the definition of 'transgender', critics argue that, while useful in many contexts, the term lacks inclusiveness and is imprecise in some cases.[78] This could be especially true in legal theory, in which the fluid nature of the term has been contested.[79] Others also argue that, although progressive, the definition of transgender remains controversial and needs more clarity in order to provide full enjoyment of human rights and freedoms via international human rights law and gender identity.[80] Whether the absence of standards on the protection of the rights of transgender people is due to an unclear definition of 'transgender' or gender identity is discussed in the next two chapters.

As the term evolved, some transgender authors started to argue that 'transgender' had become a burden with its 'share of hurdles'[81] or that the term was now a huge and imprecise container for gender identities.[82] The term included any possible variation of gender, as well as sexual identities. Such a widening of the definition itself had an impact on some transgender writers, who argued that broadening the definition might have weakened the transgender identity, 'especially when transgender rights become identical

[77] Tyler Brown, 'The Dangers of Overbroad Transgender Legislation, Case Law, and Policy in Education: California's AB 1266 Dismisses Concerns about Student Safety and Privacy,' (2014) 2 BYU Educ. & L.J.; Also, Currah and Minter (n 71)
[78] Currah, Juang and Minter (n 16) XVI.; Also, Riki Wilchins, *Queer Theory, Gender Theory* (1st edn, Alyson Books 2004) 27
[79] *Corbett v Corbett* (n 11)
[80] Maya Sabatello, 'Advancing Transgender Family Rights Through Science: A Proposal For An Alternative Framework' (2011) 33 Human Rights Quarterly.
[81] Wilchins (n 78) 27
[82] Grigolo (n 9)

to transsexual rights, if not the same'.[83] In the absence of legal recognition of these identities, such a division created a further divide in the transgender community, indicating further dissidence among queer and transgender activists and theorists.

For example, Riki Wilchins argues that much of the advocacy for transgender rights has focused on hate crimes against 'transsexuals', access to hormones and surgery, name-change laws, insurance reimbursement and changes to birth certificates.[84] Wilchins argues that under the banner of 'transgender', advocates and activists have focused mostly on human rights challenges that are less associated with gender, and more about a fixed categorization of the sexes.[85] And indeed, in a society where rights belong to identities, having an identity is important for transgender people too, in order to claim political status and human rights. But Wilchins does not stop there. She further argues that gender identity, because it is a fixed identity, ignores gender expression.[86] Wilchins's point reveals the tension within LGBTIQ groups at that time. What is important from her argument, however, is the clear difference that existed in the understanding of 'transsexual' and transgender persons based on identity categories. Hence, gender expression as it is understood now was not associated with a 'clean' identity, which was trying to fit within heteronormative societal structures. Indeed, that artificial differentiation between categories proved counter-productive for community mobilization aimed at achieving recognition in law.

[83] Wilchins (n 78) 27
[84] Wilchins (n 78) 27
[85] Wilchins (n 78)
[86] Wilchins (n 78)

And if 'gender identity' tends to privilege notions of a clear, coherent and unitary identity over conceptions of blurred identifications[87], then the dominant dualist model of gender identity in most societies is at odds with social research documenting 'third genders'.[88] Moreover, some authors also note that gender identity, unless a 'transsexual' person is post-operative, remains biologically based.[89] This claim can serve as a justification for refusing recognition of a person's gender identity without surgical sex change.

Indeed, the term 'transgender' emerged to counter-balance the impact of the application of medical science to gender-variant people, forcing them to conform to the heteronormative categories of gender. At the same time, the concept of 'transgender' still implies some kind of identity, association with either of the two genders or sexes –hence the criticism from scholars who hold the view that the fluid nature of transgender means no static identities.[90]

[87] Witchayanee Ocha and Barbara Earth, 'Identity Diversification Among Transgender Sex Workers In Thailand's Sex Tourism Industry' (2013) 16 Sexualities.
[88] ibid.
[89] Phillip Tahmindjis, 'Sexuality And International Human Rights Law' (2005) 48 Journal of Homosexuality.
[90] See for example, Alex Harris, 'Non-Binary Gender Concepts And The Evolving Legal Treatment Of UK Transsexed Individuals: A Practical Consideration Of The Possibilities Of Butler'' (2013) 13 (6) Journal of International Women's Studies.; Celia Kitzinger, 'Intersexuality: Deconstructing The Sex/Gender Binary' (1999) 9 Feminism and Psychology.; L.K. Langley, 'Self-Determination In A Gender Fundamentalist State: Toward Legal Liberation Of Transgender Identities' (2006) 12 Texas Journal on Civil Liberties and Civil Rights.; Judith Lorber, 'Beyond The Binaries: Depolarizing The Categories Of Sex, Sexuality, And Gender' (1996) 66 (2) Sociological Inquiry.; Sharon Elaine Preves, 'Negotiating The Constraints Of Gender Binarism: Intersexuals' Challenge To Gender Categorization' (2000) 48 (3) Current Sociology.; Christina Richards and others, 'Non-Binary Or Genderqueer Genders' (2016) 28 International Review of Psychiatry.; Tam Sanger, 'Trans Governmentality: The Production And Regulation Of Gendered Subjectivities' (2008) 17 (1) Journal of Gender Studies.; Dean Spade, 'Resisting Medicine, Re/Modelling Gender' (2003) 18 Berkeley Women's Law Journal. Dean Spade, 'Compliance is gendered: Struggling for gender self-determination in a hostile economy' in Paisley Currah, Richard Juang, Shannon Minter, (eds) 'Transgender Rights' (University Of Minnesota Press 2006).

2.3. The emerging identities of non-binary gender

Over the years, strict gender norms have yielded to a relaxation of gender boundaries, to meet the needs of all transgender persons. Even more so, it allows gender plurality, in which, as argued by Surya Monro, post-structuralism can be utilized to understand the construction of gender and analyse social structure.[91] Gender self-determination, argues Monro, calls for a social structuring based on the principles of equality, diversity and the right to self-determination.[92] Building on Monro's arguments, Stephen Whittle notes that 'the presumption that has been made by most academic writers in the area is that I and people like me are demanding that we be legally recognized in the gender role in which we live'.[93] Whittle challenges the construction of gender and applies Kate Bornstein to his analysis of the concept of gender fluidity. He asserts that there are rules to gender but that rules can be broken; ambiguity does exist and how we provide for that ambiguity matters; and that even more than ambiguity, there is fluidity.[94] Further citing Bornstein, Whittle claims that gender fluidity recognizes no borders or rules of gender, and that fluidity provides for any number of genders.[95] Thus, he concludes, to be fluid in one's gender challenges the oppressive process of gender and the power processes that use gender to maintain power structures.[96]

Indeed, as Bornstein argues, the transgender person as a gender outlaw calls into question the gendered system on which people and societies base major aspects of their lives.

[91] Surya Monro, 'Theorizing Transgender Diversity: Towards A Social Model Of Health' (2000) 15 Sexual and Relationship Therapy.
[92] ibid.
[93] Stephen Whittle, *Respect And Equality: Transsexual And Transgender Rights* (1st edn, Cavendish 2002) 2.
[94] ibid 73.
[95] Ibid 73.
[96] Ibid 73.

Bornstein offers a view of real-life gender fluidity: a refusal to be categorized by the limited gender roles that are imposed, however without willingness to be invisible.[97] What does this mean in today's legal culture? Here, Bornstein rejects the idea of a third sex, and instead seeks to create a third space, a space outside of gender.[98] Here, the problems with the legal construct or, more specifically, with heteronomativity, begin. Whittle challenges the law by asking 'is there any reason whatsoever to have a gendered basis to law?'[99] He acknowledges the need for acknowledgment of 'sex' in certain circumstances through law, but argues that this is not dependent upon how that people identify or portray their gender.[100] Whittle seeks to employ a gender self-determination argument that could challenge the theoretical institutionalization of the heteronormativity of both concepts – sex and gender. He goes further in his criticism on the function of the law, in particular as it relates to transgender people, and notes that the vision of the law is to provide a fair and just context in which people can simply live. However, he has observed, the function of 'placing socially responsible citizens outside a legal framework continues to illustrate that the law continues to be an antiquated, moralistic tool based upon conservative understandings that lack vision'.[101]

Whittle's reasoning is influenced by post-structuralist theory and queer analysis of gender. Yet, what is important in his writings is the deconstruction of the law from a gender perspective. He takes a specific position to criticize the function of the law in the context of the protection of transgender citizenship and argues that, as it stands, the law

[97] ibid 78.
[98] ibid 78.
[99] ibid 78.
[100] ibid 78.
[101] ibid 79.

does not provide such a space. Indeed, Whittle's analysis of a deconstruction of the law to allow space for gender self-determination and gender fluidity is widely supported by transgender legal scholars. Dean Spade, for example, has argued:

> attorneys working for trans equality have to skate this delicate line, de-medicalizing legal approaches to gender identity where we can, educating medical providers on how to provide medical services to gender transgressive people in ways that respect and encourage individual expression rather than conformity to binary gender, and also fighting for increased access to medical care for all people.[102]

Here, Spade, who practises law as well as working in academia, attempts to strike a fine balance between what is in the best interest of the client at a particular time and how to move forward in advocating for a gender self-determination model.

Like Spade and Whittle, Monro also calls for a space for gender in legal discourse. This in fact resonates with Bornstein's idea of a space outside gender categories, but most importantly goes beyond structures and categories of identities to allow for a non-binary understanding of gender – an understanding that most severely challenges the binary character of the law. In discussing gender pluralism, Monro analyses mainstream models of citizenship to argue that in order to obtain rights and freedoms for gender-variant people, these models of citizenship can be an important catalyst. Monro further borrows Turner and Hamilton's definition of citizenship, noting, 'Citizenship can be defined as a collection of rights and duties determining socio-political membership, and providing access to resources and benefits.'[103] She then employs examples of citizenship such as (1) civic republicanism, (2) liberalism and (3) communitarianism to develop various

[102] Spade (2003) (n 90)
[103] Surya Monro, Gender Politics: Citizenship, Activism And Sexual Diversity (Pluto 2005) 148.

models of transgender citizenship.[104] Monro is well aware of the limitations and difficulties that each of these models of citizenship carry for developing models of transgender citizenship given the limitations of mainstream approaches, in particular the overall tendency to place in the foreground certain types of (non-transgender) subjects and to overlook structural change that would support equality.[105]

Monro further analyses Plummer's notion of intimate citizenship, as well as Evan's sexual citizenship with its emphasis on self-determination and its concern with multiple, overlapping discourses relevant to transgender citizenships, and states that equality and gender self-determination are the most important elements for achieving transgender citizenship.[106] These aspects are crucial to understanding the various frames offered by international human rights law.

Transgender studies have evolved in a most dynamic way. Fixed identities have been countered by fluid identities, while binary gender norms have been challenged by non-binary gender identities. Not much academic contribution has been made so far to situate such identities in the 'transsexual'/transgender dichotomy. However, it is largely understood that non-binary identities oppose categorization of gender and seek respect for gender fluidity. In contemporary social and cultural theory, the notion of 'identity' as complete and straightforward is challenged not only in transgender, queer and feminist studies, but also in other disciplines. For example, Matthew Waites, in his critique of gender identity and sexual orientation, relies on Stuart Hall's arguments to focus on

[104] ibid 165.
[105] Ibid 165.
[106] ibid 147-165.

processes of 'identification' rather than 'identity' in order to grasp the always-incomplete process of relating subjectivity to social identity through a process he calls 'articulation.'[107] This echoes Butler's argument with regards to the discursive formation of gender identities. As Butler famously stated, 'identity is performatively constituted by the very 'expressions' that are said to be its results,'[108] – meaning that, despite the final result of such performativity (i.e. that the gender is real), this outcome is only possible due to the power that is exercised through discourse.[109]

This chapter attempts to provide an analysis of the post-structuralist theory of gender and its application to transgender studies. The effort aims to provide a better understanding of the transgender and 'transsexual' dichotomy, their origins in feminist and queer theory and relations with those disciplines, which have determined the current state of the international protection framework for transgender people's rights.

3. Post-Structuralism: Understanding Transgender Through the Prism of Queer Theory

Teresa de Lauretis first advocated the term 'queer' in 1991, and she charged it with the responsibility of countering the masculinist bias latent in that naturalized and seemingly gender-sensitive phrase, 'lesbian and gay'.[110] Since then, queer theory has developed

[107] Matthew Waites, 'Critique of Sexual Orientation And Gender Identity in Human Rights Discourse: Global Queer Politics Beyond The Yogyakarta Principles' (2009) 15 Contemporary Politics.
[108] Judith Butler, *Gender Trouble: Feministm and the subversion of identity* (Routledge 1990) 25.
[109] See for example Butler (n 108).;, Ken Plummer, *Telling Sexual Stories*,(1st edn, Routledge 1995).; Jeffrey Weeks, *Invented Moralities: Sexual Values in an Age of Uncertainty* (Columbia University Press 1995).
[110] Teresa De Lauretis, 'Queer Theory: Lesbian And Gay Sexualities: An Introduction' (1991) 3 A Journal of Feminist Cultural Studies.

through the writings of Butler, Sedgwick and others who have fiercely challenged feminist theorists over the subjects of gender and sexuality.

The first seeds of queer theory can be found in postmodernism and post-structuralism, which developed in the 1970s and 1980s. Postmodernist and post-structuralist concepts are regarded as something after, something beyond what has already been experienced or accomplished.[111] To avoid ambiguity, early structuralist theorists, such as Louis Althusser, Sigmund Freud, Jacques Lacan and Ferninand de Saussure, laid the groundwork for the post-structuralist context. Reacting to the structuralism, Michel Foucault deeply engaged with post-structuralism theory to denaturalise the dominant understandings of sexual identity.[112] Foucault, in his work *The History of Sexuality*, developed a theory of sexual discourse based on the argument that such discourse decides what is acceptable and unacceptable.[113] Foucault further argued that sexual discourse generates the belief that heterosexuality and homosexuality are the only options, in which one is acceptable and the other unacceptable. He further argued that individuals are subject to regulatory practices (discursively constituted), and mainly defined by medical parameters (positing itself as a science, medicine holds dominance over knowledge).[114] Foucault showed how sexology as a medical science affected the construction of novel subjectivities through what he called typologization and interiorization.[115] Considering homosexuality as one of the forms of sexuality, he asserted, 'it [homosexuality] was transposed from the practice of sodomy onto a kind of

[111] Max H Kirsch, *Queer Theory And Social Change* (1st edn, Routledge 2000) 20.
[112] Annamarie Jagose, *Queer Theory: An Introduction* (New York University Press 1996) 79.
[113] Michel Foucault, *The History of Sexuality, Volume 1* (English translation, Pantheon Books 1978).
[114] ibid 63-73.
[115] Ibid 65-66

interior androgyny, a hermaphrodism of the soul'.[116] Foucault's point about subjectivity and medical science is important in the context of transsexuality and medical science, which will be discussed in Chapter Two. However, what is important to highlight here is Foucault's wider project on power, in which he attempts to unpack the relationships between socially constructed subjects and social institutions. In such work, he argues that sexuality (socially constructed through discourse) is a disciplinary technique that provides power.[117]

Indeed, postmodernism and post-structuralism are organized around destabilization through deconstruction.[118] And it is evident that in order for feminists to fight against fixed categories, they needed both deconstruction and reconstruction, destabilizing meaning.[119] It was Jacques Derrida, the French philosopher and post-structural theorist, who introduced the new practice called deconstruction, to help accomplish decentring.[120] This marked a new era of postmodernism and post-structuralism in which gender was defined as a system of meanings and symbols, along with the rules, privileges and punishments pertaining to their use for power and sexuality (masculinity and femininity, strength and vulnerability, action and passivity, dominance and submission).[121]

Foucault's concept of repressive power in discursive regimes of truth, and Derrida's theory of deconstruction and notions of iterability, may have been the starting point for

[116] ibid 43
[117] ibid 156
[118] Kirsch (n 111) 40
[119] Nancy Fraser, *Unruly Practices: Power, Discourse And Gender In Contemporary Social Theory* (University of Minnesota Press 1989) 156
[120] Inerted in Riki Wilchins (n 78) 33.
[121] ibid.

Butler to start developing the concept of gender performativity.[122] In fact, Butler, who is regarded as one of the founders of queer theory, writes that the term 'queer' 'will be revised, dispelled, rendered obsolete to the extent that it yields to the demands which resist the term precisely because of the exclusions by which it is mobilized.'[123] In other words, the term 'queer' is constantly revised by yielding to demands that resist the term. Building on social constructionism and the deconstruction of bodies offered by Foucault and Derrida, Butler asserts that queer theory promotes the self as an alternative to wider social interaction.[124] She argues that 'if the term queer is to be a site of a collective contestation, the point of departure for a set of historical reflections and future imaginings, it will have no remain that which is, in the present, never fully owned, but always and only redeployed, twisted, queered from a prior usage and in the direction of urgent and expanding political purposes'[125]. Some authors also argue that 'queer' describes those gestures or analytical models that dramatize incoherencies in the allegedly stable relations between chromosomal sex [sex as a fixed category], gender [social construction] and sexual desire [sexual orientation].[126]

For David Halperin, like Butler, queer is a way of pointing ahead without knowing for certain what to point at. Halperin describes queer as a horizon of possibility whose precise extent and heterogenous scope cannot in principle be delimited in advance. He further explains that queer is always an identity under construction, a site of permanent

[122] Harris (n 90)
[123] Judith Butler, *Bodies That Matter: On The Discursive Limits Of Sex* (Routledge 2014) 229.
[124] ibid 228.
[125] ibid 229.
[126] See for example, Michael O'Rourke and Noreen Giffney (Eds), *The Ashgate Research Companion To Queer Theory* (Ashgate Publishing Group 2009).; Brett Beemyn and Mickey Eliason (Eds), Queer Studies (New York University Press 1996).; Teresa De Lauretis, 'Queer Theory: Lesbian And Gay Sexualities: An Introduction' (1991) 3 A Journal of Feminist Cultural Studies.

becoming: 'utopic in its negativity, curving endlessly toward a realisation that its realisation remains impossible'[127]. Despite his fascination with queer theory, Halperin contended that it [queer theory] had no 'essence'.[128] In his book *Saint Foucault: Towards a Gay Hagiography*, he wrote 'queer is by definition whatever is at odds with the normal, the legitimate, the dominant. There is nothing in particular to which it necessarily refers. It is an identity without an essence'[129] that does not designate a class of already objectified pathologies or perversions.[130] Relying on Warner, he also remarks that fundamental indeterminacy makes queer a difficult object of study. Queer remains an ever ambiguous, always relational, 'largely intuitive and half-articulate theory'.[131] Alan McKee, however, contends that 'queer is not an entirely empty signifier. It does have meanings and positional claims that are shared and recognized'.[132]

3.1. Gender performativity theory

Developing and building on what Foucault started, Butler notes that by defining heterosexuality and homosexuality on the grounds of sexual attraction for one or the other sex, sexual orientation and sex/gender positions become inextricably intertwined.[133] Butler rejected essentialist notions of sexual determination, arguing instead that bodies are forcibly produced through discourse.[134] For a better understanding of the sociological structure of SOGI, she divided critics into two categories, essentialists and

[127] David M. Halperin, *Saint Foucault: Towards a Gay Hagiography* (1st edn, Oxford University Press 1995) 62.
[128] ibid.
[129] ibid.
[130] ibid.
[131] Michael Warner, 'From Queer To Eternity: An Army Of Theorists Cannot Fail' (1992) 37 VLS-Village Voice Supplement, 18-19.
[132] Alan McKee, 'Resistance In Hopeles': Assimilating Queer Theory' (1999) 9 Social Semiotics.
[133] See for example Butler (n 108), Butler (n 123).
[134] Butler (n 108)146.

constructionists:[135] essentialists being those who adhere strictly to the biological sex binary, and constructionists those who argue that gender is a socially constructed category that is fluid in nature.[136]

Butler argued that heterosexuality is naturalized by the performative repetition of normative gender identities. She has asserted that any 'gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being.'[137] In her initial publication ,*Gender Trouble*, Butler built on the repetitiveness of the performance of gender to argue gender as a performative category. She wrote, 'the cultural matrix through which gender identity has become intelligible requires that certain kinds of "identities" cannot "exist" – that is, those in which gender does not follow from sex and those in which the practices of desire do not "follow" from either sex or gender.'[138] Butler rejects the authenticity of gender, stating that there is no 'core' that produces the reassuring signs of gender. She articulates that instead 'there is no gender identity behind the expressions of gender' and that '[i]dentity is performatively constituted by the very "expressions" that are said to be its results'.[139] Here Butler differentiates between the expression, or performance of gender, and performativity of gender. To argue for the performative nature of gender, she employs the example of drag, when the performance of drag plays upon the distinction between the anatomy of the performer and the gender

[135] Butler (n 108) X-XI.
[136] See for example Simone De Beauvoir, *The Second Sex* (1949).; Simon de Beauvoir's theory on gender ''one is not born, but rather becomes, a woman'. The Same point was argued by Zimermmen and West in stating that one could learn how to 'do' gender; Candace West and Don H. Zimmerman, 'Doing Gender', (1987) 1 (2) Gender and Society, 125-151.
[137] Butler (n 108) 33
[138] Butler (n 108) 17.
[139] Butler (n 108) 25.

that is being performed.[140] She outlines three contingent dimensions of significant corporeality: anatomical sex, gender identity and gender performance.[141] On the latter she writes 'in imitating gender, drag implicitly reveals the imitative structure of gender itself'.[142]

The concept of gender performativity has encountered severe criticism from feminist authors. It seems, however, that many critics misread the concept. Critics of constructionism included Epstein, who argued that 'constructionism has no theory of the intrapsychic and is unable to specify the ways in which desire comes to be structured over the course of people's lives'.[143]

Elizabeth Grosz disputed gender performativity on the grounds that 'gender must be understood as a kind of overlay on a pre-established foundation of sex'.[144] When commenting on gender, Grosz conceptualizes it in a way that has positioned gender and sex in a spherical relationship with each other, and suggests that Butler's account of performativity should have focused on the instability of sex, to make the performativity project stronger. She further adds: 'the force of her [Butler's] already powerful arguments would I believe be strengthened if, instead of the play generated by a term somehow beyond the dimension of sex itself, in the order of gender, she focused on the instabilities of sex itself, of bodies themselves'.[145]

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[140] ibid.
[141] Butler (n 108) 137.
[142] ibid.
[143] Epstein quoted in Kirsch (n 111) 53
[144] Elizabeth Grosz, 'Experimental desire: Rethinking queer subjectivity' in Joan Copjec (Eds.), *Supposing the Subject* (Verso 1994) 133-57).
[145] ibid.

It is true that Butler does not focus on distinguishing sex and gender. Instead, as Annamarie Jagose highlights, she prioritizes gender. However, Butler does not [as Grosz suggests] mobilize it in opposition to a more foundational sense of sex. On the contrary, Butler explicitly questions such a reification of sex: if the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all.[146]

The gender performativity project met with criticism not only from feminist theorists, but also from transgender scholars and activists such as Susan Stryker and Paisley Currah. Stryker, for example, noted that there is a possibility for a misconception that 'trans people who often suffered a great deal to actualize for others the reality of their gender identities, the idea that gender was just a game of sorts, with a wardrobe full of possible gender costumes to be put on or taken off at will, felt galling'.[147] However, she aligned herself with the performativity project Butler developed and stated, 'the implication of this argument is that transgender genders are as real as any others, and they are achieved in the same fundamental way'.[148] While commenting on the gender performativity concept, Currah also noted that the relation between sex and gender is reversed: biological sex characteristics are cast as aspects of gender and largely mutable ones.[149] It is also often misunderstood that it is gender identity, and often even expressions of

[146] Jagose (n 112) 90.
[147] Susan Stryker, *Transgender History* (Seal Press 2008) 142.
[148] ibid.
[149] Currah (n 40) 19.

gender identity, that is described as unchangeable, set and formed at an early age.[150]

To clear up the confusion over the understanding of performativity theory, Butler returned to it later in *Undoing Gender*, to argue that gender and sexuality are too often perceived as isolated subjects for study – gender as a feminist subject, and sexuality as a matter for queer theory.[151] For Butler, such a categorization should not take place, as gender cannot be reducible to hierarchical heterosexuality.[152] To support her argument, Butler cites that gender is internally unstable and transgendered lives are evidence of such a breakdown. Any line that causally creates a distinction between sexuality and gender is artificial and cannot withstand the fluid nature of transgressive genders.[153] Such contextualization of gender attracted more criticism from both feminist and queer theorists, with many stating that situating sexuality within the feminist movement seemed uncharacteristic for the movement due to the connotation that the term 'sexuality' carried. The next few sections will examine the relationship between these concepts.

3.2 Queer theory and feminism

The queer project encountered immense criticism, mostly from feminist authors. Despite this, the historical circumstances in which the term has evolved have maintained its

[150] ibid.
[151] Judith Butler, *Undoing Gender* (Routledge 2004) 2-16
[152] ibid 53.
[153] ibid 54.

affiliation with anti-homophobic politics.[154] Feminist scholars such as Rosalind Pollack Petchesky argued that feminism should be understood as a theoretical revolution in terms of how words such as art, culture, woman, subjectivity, politics and so forth are understood. But feminism does not imply a unified field of theory, political position or perspective.[155] In fact, feminism as a way of liberation is open to various projects of critical theory, although maybe with not much capacity to provide space for those theories to progress. Rubin opposed this idea, arguing that feminism does not have a capacity to subject sexuality as its own and instead called for more fundamental studies of sexualities.[156]

Gayle Rubin analysed the social construction of sex hierarchies and the consequent demonizing of non-normative sexualities.[157] In her writings, Rubin concluded that 'gender affects the operation of the sexual system, and the sexual system has had gender-specific manifestations'.[158] Indeed, that effort to bring clarity between feminism and queer studies – and even more, to consider queer theory as a principal ground for sexuality studies – was aimed at clarifying that to expect feminism to theorize sexuality is to disadvantage both: feminist conceptual tools were developed to detect and analyse gender-based hierarchies. Rubin noted that, as issues become less those of gender and more those of sexuality, feminist analysis becomes misleading and often irrelevant; feminist thought simply lacks angles of vision that can fully encompass the social

[154] As quoted in Jagose (n 112) 114.
[155] Rosalind Pollack Petchesky, 'Sexual Rights: Inventing a Concept, Mapping an International Practice', in Richard Parker, Regina Maria Barbosa and Peter Aggleton (Eds), *Framing The Sexual Subject: The Politics of Gender, Sexuality, and Power* (University of California Press 2000) 81-103.
[156] Jagose (n 112) 112.
[157] Gayle S. Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carol S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* (Routledge & K Paul 1984) 267-319.
[158] ibid.

organization of sexuality.[159] Similarly, Sedgwick distinguished these two categories, indicating that a critique of sexual oppression could only enrich feminism. Sedgwick argued that 'there is always at least the potential for an analytic distance between gender and sexuality';[160] hence, the 'ultimate definitional appeal in any gender-based analysis must necessarily be to the diacritical frontier between different genders'.[161] Sedgwick argued that queer theory mostly employs denaturalization as its primary strategy. It confounds the categories that license sexual normativity; it differs from its predecessor by avoiding the delusion that its project is to uncover or invent some free, natural and primordial sexuality.[162]

Biddy Martin suggests that instead of separating the two, they should be linked. The queer examinations of feminism are mutually productive, though she warns about being cautious on the occasions when 'anti-foundational celebrations of queerness rely on their own projections of fixity, constraint, or subjection onto a fixed ground, often onto feminism or the female body, in relation to which queer sexualities become figural, performative, playful, and fun'.[163] Butler similarly emphasizes the distinctive but dynamically interactive character of gender and sexuality when she writes, 'surely it is as unacceptable to insist that relations of sexual subordination determine gender position as it is to separate radically forms of sexuality from the workings of gender norms'.[164]

Queer theory has encountered strong criticism. This has come largely from feminist

[159] ibid.
[160] Kosofsky Sedgwick (n 42) 28-29.
[161] Kosofsky Sedgwick (n 42) 31.
[162] Kosofsky Sedgwick (n 42) 98.
[163] As quoted in Kosofsky Sedgwick (n 42)123.
[164] Butler (n 123) 239

writers, some of whose arguments are analysed above. Others have also commented that if the point of queer critique is to develop critical frameworks that can disrupt and rewrite the countless ways the human potential for sensual pleasure is socially produced as sex, then maybe there needs to be a way to address the historicity of pleasure in all of its complexity, including its relation to gender.[165]

In criticising queer theory, Max Kirsch argues that queerness has no inherent historical or social context. Therefore, he argues, the question should be asked to whom it belongs and what it represents.[166] Kirsch misses the point that all queer authors widely acknowledge, which is queer theory's fundamental roots in feminist and postmodern, post-structural theory. Instead he continues criticising 'queer' as being produced by social relations, hence containing only the attributes of existing social relations.[167] He believes that 'queer' attempts to dissolve sexuality and annuls the basis for sexual identity, precluding a confrontation with a morality that dictates sexual correctness, affirming some practices while stigmatizing others.[168] Here again, it seems that Kirsch employs moral imperatives to argue for sexual correctness [which he seems to advocate] and claims that queer affirms stigmatizing practices. However, he fails to explain what these stigmatizing practices are and who are the victims of stigmatization. Despite this, Kirsch carries on criticising it for its ignorance of the reproductive rights community.[169]

[165] Jagose (n 112) 124
[166] Kirsch (n 111) 97.
[167] ibid.
[168] Kirsch (n 111) 92.
[169] Kirsch (n 111) 118.

Counter to Kirsch's claims, queer theory suggests that any study of sexuality must be attentive to the feminist analysis within which queer studies, as well as gender and sexuality studies, originated. Nevertheless, some authors still accuse queer theorists of undermining the feminist project. For example, Sheila Jeffreys insists that the imperative to separate the analytical axis of sex from that of gender amounts to an indifference and imperviousness to feminism. Moreover, she argues that a call to study gender and sexuality as distinct but 'inextricable' categories does not establish 'the study of sexuality [as] a field of inquiry quite separate from and impervious to feminist theory'.[170]

In her 1980 essay 'Compulsory Heterosexuality and Lesbian Existence', radical feminist Adrienne Rich highlighted the socially and economically constructed nature of heterosexuality and denaturalized heterosexual relations. Rich drew a link between heterosexuality as a social institution and the oppression of women, challenging the assumption that most women are innately heterosexual. She suggested that heterosexuality may not be a preference at all, but something that has had to be imposed, managed, organized, propagandized and maintained by force.[171] Rich's critique, however, focused on challenging binaries as restricting our ability to determine the meaning and place of sexuality. She argued, 'we have been stalled in a maze of false dichotomies which prevents our apprehending the institution of heterosexuality as a whole: "good" versus "bad" marriages; "marriage for love" versus arranged marriage,

[170] Jagose (112) 122.
[171] Adrienne Cecile Rich, 'Compulsory Heterosexuality And Lesbian Existence (1980)' (2003) 15 (3) Journal of Women's History.

"liberated" sex versus prostitution; heterosexual intercourse versus rape; Liebeschmerz versus humiliation and dependency'.[172]

3.3. Feminist theory and transgender

Feminist theory has long established the ethical and legal basis for gender equality. Scholars also argue that feminist theory would establish inclusion of transgender persons in non-discrimination legislation.[173] However, as transgender critics note, transgender protection under existing standards of gender equality legislation has failed because transgender people are seen as 'examples of sexual deviants, in the same way that homosexuals were cast as gender inverts'.[174] The marginalization of transgender persons within the feminism movement was particularly due to the so-called Trans-Exclusionary Radical Feminists (TERFs), who openly and aggressively acted against transgender women, further reinforcing the essentialist theory of sex and gender.[175] While TERFs were a fraction of a group of radical feminists, their antagonism and radical standing against transgender persons has had a lasting effect on how the transgender community was integrated into the wider feminist movement (in particular, the second and third wave). For example, David Evans comments that feminist hostility to the transvestite is obviously a matter of the gender directions of both, respectively, away and towards the conventionally feminine. Evans adopts Sue O'Sullivan's argument and notes that the 'transvestite separates [feminine] symbols from the woman and incorporates them into

[172] ibid.
[173] Currah, Juang and Minter (n 16) XV.
[174] ibid.
[175] See for example TERFs writing, such as: Sheila Jeffreys, 'Transgender Activism A Lesbian Feminist Perspective' (1997) 1 Journal of Lesbian Studies 1997.; Sheila Jeffreys, *Gender Hurts (*1 edn Routledge 2014*).,* Janice G. Raymond, *The Transsexual Empire: The Making of the She-Male* (Beacon Press 1979).

his [transvestite's] personality. Thus the transvestite uses feminine symbols to liberate himself from his sex-role stereotype, just as the feminist uses masculine symbols to liberate herself'.[176] Other transgender theorists also comment on the conflict. In supporting the queer theorists, Sandy Stone also calls the feminist resistance to queer theory 'the rage of radical feminist theories'.[177] Stone's *The Empire Strikes Back: A Posttranssexual Manifesto* was very much a response to the feminist resistance to emerging transgender studies and in particular authors like Janice Raymond, who had publicly decried transgender people in *The Transsexual Empire*.[178]

Major criticism from feminist groups revolved around the question of whether feminist efforts to end the marginalization, exploitation and oppression of all women would be extended to trans women as well. In this regard, transgender activists and scholars largely saw themselves as a bridge between the feminist and the lesbian, gay and bisexual movement. Some authors even argued that the aim of the transgender rights movement should be to go beyond the term 'gender' in order to close the significant chaos created by the institutional separation between LGB and women's rights advocacy.[179] While commenting on transgender relationships with other identity groups, Currah noted that, due to their alienation from feminists, the transgender movement became more affiliated with the LGB movement, especially in the 1960s and 1970s.[180]

[176] David Evans, *Sexual Citizenship: The Material Construction Of Sexualities* (1st edn, Taylor and Francis 1993) 173
[177] Sandy Stone, 'The Empire strikes back: a Posttranssexual Manifesto', in Julia Epstein and Kristina Straub (Eds), *Body Guards* (Routledge 1991) 280– 304.
[178] ibid.
[179] Currah, Juang and Minter (n 16) XV.
[180] ibid.

While a radical wing of feminists saw transgender (women's) identity as a threat to the essentialist agenda they were pursuing to focus on the body in order to combat violence against women, wider groups of feminists were more welcoming. This is particularly true of the writings of second-wave feminists such as Simone de Beauvoir, who famously stated, 'one is not born but becomes a woman,' fundamentally questioning the essentialist theory of sex and gender.[181] More recently, Ken Plummer in *Sexual Citizenship* reports that there are people within the transgender movement 'who celebrate the core features of gender (they do not see themselves as 'trans'; they really are the other gender), while others delight in the ambiguities of gender – of gender blending and gender performance'.[182] For Plummer, such fluidity of gender causes problems for 'categories, boundaries and identities', but for transgender people, Plummer argues, 'gender is absolutely not a fixed identity and thus cannot have any citizenship rights attached to it, unless we regard gender as some kind of "trans-identity" with rights and obligations now attaching to shifting identities'.[183] Plummer asserts that rights are attached to identities, and good citizenship is a formula in which people fit within heteronormative boundaries (male or female).[184] And indeed, he asks, 'how to deal with those who would transgress ideals of good citizenship? Transgressors do not want to fit in and be part of the civic order. They want to violate borders and boundaries. They do not wish to be normal.'[185]

[181] Simone de Beauvoir (n 136) 267
[182] Kenneth Plummer, *Intimate Citizenship* (McGill-Queen's University Press 2003) 54.
[183] ibid.
[184] ibid 55.
[185] Ibid 54-55.

It is evident that the questions Plummer poses are broader and exceed the theoretical conundrum between radical feminist groups and the wider feminist and transgender movements. In particular, Diane Richardson notes, 'globally we are witnessing gay and lesbian movements (and sometimes bi, sometimes transgender) that demand equal rights with heterosexuals.'[186]

Overall, the feminist movement has been at the core of queer theory and has thus helped to advance SOGI rights, as will be seen in Chapters Three and Four of the thesis. The intersectionality between feminist and transgender studies is further explored through queer studies (developed by third-wave feminists). Indeed, in a majority of contemporary writings, transgender persons (in particular, transgender women) are better integrated within mainstream feminism.[187] In this regard, some authors argue that feminism has a 'specific content that relates to transsexuals' but that the theory of feminism is applicable to all women.[188]

Feminism and its relationship with transgender studies is a vast topic and encompasses many different areas of studies, particularly in relation to the lived experiences of women and transgender persons and their intersections. What is important to highlight in the context of this thesis, however, is that, as Butler noted, feminism has been part of the new social movements that challenge normative restrictions on gender and sexuality. With the emergence of 'new gender politics', encompassing feminist, queer, antiracist,

[186] Diane Richardson, *Re-thinking Sexuality*, (1st edn, Sage Publications, 2000) 9
187 See for example, Sally Hines, 'Feminism' (2014) 1 TSQ: Transgender Studies Quarterly.; Emi Koyama, 'Transfeminist Manifesto' in Rory Dicker and Alison Piepmeier (Eds), Catching a Wave: Reclaiming Feminism for the Twenty-First Century (Northeastern University Press 2003).; Butler (n 104, 119, 147).
[188] Robert J. Hill, 'Menacing Feminism, Educating Sisters,' Adult Education Research Conference (2000).

trans, and intersex groups, the feminist movement has come share much common ground in terms of overall political goals.[189] More will be said on the interactions between queer theory and transgender studies below.

3.4. Queer theory and transgender studies

Queer theory undoubtedly did emerge through feminism, but, as noted above, some factions of the feminist movement were not ready to accommodate gender variance specifically as it related to transgender people. As Jagose noted, queer theory has focused on mismatches between sex, gender and desire and predominantly focused on gay concerns.[190] In recent years, however, Jagose has argued that 'queer' became an umbrella term for a coalition of culturally marginal sexual self-identifications. Queer has also lent itself to being described in a nascent theoretical model, which has developed out of more traditional lesbian and gay studies.[191] In *Queer Theory,* Jagose concludes that the queer agenda is indeed marked by a refusal to naturalize the interworkings of gender and desire to the extent that the categories 'lesbian' and 'gay' do. But this is not to say that queer is committed to the extinction of those marginalized groups.[192] Quite the opposite: in its broadest usages queer describes not only lesbian and gay, but also – and not exhaustively – 'transsexual', transgender and bisexual individuals.[193]

Queer theory, while largely focusing on the social construction of gender and questioning

[189] Butler (n 151) 28.
[190] Jagose (n 112) 9.
[191] ibid.
[192] Jagose (n 112)126.
[193] Jagose (n 112) 112.

the conditions in which opposing genders are produced, has also become a major element of so-called 'third-wave' feminism, which studies the deconstruction and intersectionality between other areas of study.[194] Both deconstruction and intersectional analysis are important tools for transgender studies and have been widely incorporated into the analysis of transgender lived experiences. This relates in particular to transgender persons from racial minority, class and poor economic backgrounds. Transgender persons from those backgrounds have been more vulnerable to social exclusion and discrimination, as well as violence.[195] Tools of deconstruction and intersectionality allow analysis of intersecting identities and related systems of social power or discrimination.[196]

In fact, queer theory has been understood to be the most welcoming academic space for transgender and other 'sexual minorities' since its emergence. Some criticism, however, was made at the early stages of development, which reflected disagreements over identities, mirroring conflicts between essentialists and social constructionists. For example, the transgender activist and scholar Viviane Namaste criticized 'queer theory' (mainly focusing on gender identity) for generating 'erasure and contempt for transsexual people.'[197] She writes that 'queer theory' has shown very little concern for those who identify and live as drag queens, 'transsexual' and/or transgender.[198] There seems to be a missed opportunity here, as Namaste might be misunderstanding the notion of queer,

[194] See for example Angelia R. Wilson (Eds), *Situating Intersectionality: Politics, Policy, and Power (Palgrave Macmillan 2013).*
[195] See for example, Don Kulick, *Travesti* (The University of Chicago 1998).; Witchayanee Ocha and Barbara Earth (n 87).; Andrea Nichols, 'Dance Ponnaya, Dance! Police Abuses Against Transgender Sex Workers In Sri Lanka' (2010) 5 Feminist Criminology.
[196] Kimberle Crenshaw, 'Mapping The Margins: Intersectionality, Identity Politics, And Violence Against Women Of Color' (1991) 43 Stanford Law Review.
[197] Viviane K Namaste, *Invisible Lives* (University of Chicago Press 2000) 24
[198] ibid 205

arguing that even though it [queer theory] focuses on liberation in the transgression of gender codes, it does not address abuse and violations experienced by 'transsexual' individuals.[199] She further asserts that transgender persons represent the dominant and more privileged group whose theoretical and political perspectives are based on a gay/lesbian queer framework that is anathema to most 'transsexuals'.[200] In her view, 'the majority of transsexuals do not make sense of their lives in lesbian/gay terms, and they have little interest in questions of identity or in the cultural analysis of gender.'[201] In *Sex Change, Social Change*, Namaste claims to be 'taking a controversial stand against queer readings of transsexuality and against the focus on identity that has been important to queer, feminist, and even some transgender theorists'.[202] Thus, queer and/or trans feminist theorists such as Butler, Halberstam, Bornstein and Stone might be accused of misappropriating 'transsexual' identities and using them as tools to serve their own projects of criticising the sex/gender binary. In fact, Butler was regarded an 'elitist theorist' who was unwilling to concern herself with what happens outside the academy.[203]

Some other critics, such as Phillips, argued that queer theory attempts to represent not only gays and lesbians, but also transgenderists and even heterosexuals as 'straight-identified queers', etc.[204] They further argue that it has the effect not only of effacing the specific political identities, needs and agendas of these various groups, but, in doing so,

[199] Viviane K Namaste, Sex Change, Social Change: Reflections On Identity, Institutions, And Imperialism (Women's Press 2005) 206
[200] ibid 9-23.
[201] Ibid 9-23.
[202] Ibid 9-23.
[203] Jeffreys and Nussbaum as quoted in Janice McLaughlin, 'The Return of the Material Cycles of Theoretical Fashion in Diane Richardson, Janice McLaughlin and Mark E Casey (eds), Intersections Between Feminist And Queer Theory (Malgrave mcmillan 2006) 59-77.
[204] Jagose (n 112) 112.

queer has produced a new closet, as any specific self-identification as either gay or lesbian (predicated upon same-sex practices) is disavowed.[205]

As queer becomes a 'zone of possibilities' always inflected by a sense of potentiality,[206] it gradually starts focusing on topics such as cross-dressing, hermaphroditism, gender ambiguity and gender corrective surgery.[207] This indeed makes transgender a direct subject of queer theory.[208] However, questions as to why transgender people emerged as a visible self-identified constituency at a particular point in queer history remain debated.[209] Despite this, it seems that 'T' has finally made it into the 'alphabet soup' to produce LGBTIQ. [210] Theorists and activists also underline the importance of inclusiveness, with Matt Coles, a leading gay activist and attorney in the US, commenting,

> to be sure, there are differences between gay people and transgendered people; but our commonalities far outweigh our differences; often it is nearly impossible to distinguish between discrimination based on gender identity (transgender) and sexual orientation (Lesbian, Gay, Bisexual), because so much of it turns on ideas of how men and women should act.'[211]

In the words of Riki Wilchins, 'saying the transgender movement is not part of the gay movement is like saying water is not part of the earth'.[212]

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[205] Jagose (n 112) 112.
[206] Jagose (n 112) 3.
[207] Jagose (n 112) 7-8.
[208] Minter (n 63) 143.
[209] Minter (n 63) 143.
[210] Loren B. Brown, 'What's in a Name? Examining the Creation and Use of Sexual Orientation and Gender Identity Labels' (2015) 38 (1) Issues in Religion and Psychotherapy.
[211] Minter (n 63) 159.
[212] Minter (n 63) 147.

Debates over what benefits queer theory offers and whether it is best placed to subject transgender persons and communities to its scrutiny seem long over. Queer theory has played an enormous role in establishing sexuality and identity as separate categories and influenced the formulation of SOGI – a formula that is commonly used in modern academic and practical work, particularly in the law. What further role queer theory can play in advancing SOGI rights remains to be seen as these rights advance further. Further investigation needs to take place as to how queer theory applies in the context of single-sex closed spaces, in particular in prisons.

4. Transgender Studies and Prison Theory

The invisibility of transgender people throughout 20th-century feminist and queer studies meant that disciplines such as prison studies also neglected the problem. Recent research reports that the study of sexuality in prisons has been mostly dismissed, inadequately investigated, and/or negatively portrayed.[213] Consequently, the extant literature on prisoners' sexuality is incomplete.[214] Writing in the late 1990s, Nic Groombridge also noted that almost no mention of lesbians had been made in the feminist criminology writings up to that point [he counted two].[215]

From a criminology perspective, the literature on 'sexual minorities' in prison can be divided into two stages – deviance and invisibility. Each of these stages deserves further

[213] Richard Tewksbury and Angela West, 'Research On Sex In Prison During The Late 1980S And Early 1990's', (2000) 80 The Prison Journal.
[214] Angela Pardue, Bruce A. Arrigo and Daniel S. Murphy, 'Sex And Sexuality In Women'S Prisons' (2011) 91 The Prison Journal.
[215] Nic Groombridge, 'Perverse Criminologies: The Closet of Doctor Lombroso' ((1999) 8 (4) Social and Legal Studies, 531-548

investigation. For the purposes of this thesis, however, only a brief summary is provided on these themes. Current developments in queer criminology are highlighted below to show the progress made to incorporate transgender and other LGBIQ prisoners' lived experiences into criminology, and prison theory in particular.

For a long period of time, criminology understood homosexuality, or deviance from sex assigned at birth as a deviant sexual behaviour. Consequently, LGBTIQ people were regarded as deviants who needed treatment.[216] Few studies conducted at the earlier stages focused on the formation of SOGI in the prison context, claiming that 'abnormal sexual conduct' among prisoners was a 'natural phenomenon.'[217] In the view of Sykes, same-sex relationships in male prisons were caused by the pain of imprisonment.[218] As men's prisons were viewed as spaces of concentrated masculinity,[219] gender non-conformity was seen as 'part of delinquency.'[220] Once the 'deviance era' – now regarded as highly problematic – of criminology research ended, a new and long period of invisibility of LGBTIQ prisoners commenced. Current criminologists observe that LGBTIQ people completely disappeared from the landscape of criminology research and prison studies.[221] The discipline of criminology – rather conservative and rigid by character – did not quite acknowledge queer subjects, which have always been 'nomadic and transnational' by

[216] Jordan Blair Woods, 'Queering Criminology': Overview of the State of the Field (Chapter 2) in Vanessa R Panfil and Dana Peterson, Handbook of LGBT Communities, Crime, And Justice (Springer New York 2014) 15-41.
[217] See for example, Donald Clemmer, *The Prison Community* (Christopher Publishing House 1940).; Lauren E. Gibson and Christopher Hensley, 'The Social Construction Of Sexuality In Prison' (2013) 93 The Prison Journal.
[218] Gresham M Sykes, *The Society Of Captives* (Princeton University Press 1958) 71
[219] Eric A Stanley and Nat Smith (Eds), *Captive Genders* (2nd edn, AK Press 2011) 217.
[220] Lori Girshick, 'Out of Compliance: Masculine-Identified People in Women's prisons' in Eric A. Stanley and Nat Smith (Eds), *Captive Genders: Trans Embodiment and the prison Industrial Complex* (2nd edn, AK Press 2011) 215-234.
[221] Woods (n 216).

nature.[222] This changed later, when perhaps frustration at the ignorance of mainstream criminology theory about SOGI issues prompted a younger generation of criminologists to argue that 'queer criminology' issues, including issues of gender and sexual diversity, were marginalized in criminology research projects.[223] Queer criminology scholars further note that 'the general and traditional heteronormativity of the discipline of criminology, coupled with the reluctance of LGBTIQ people to draw attention to their sexuality, gender or sexual diversity in such studies, often leaves criminologists in a difficult position when seeking to understand the experiences of some LGBTIQ people.'[224]

The new scholarship on queer criminology, which is only just emerging, is trying to unpack legislative structures and other governmental mechanisms.[225] It is integrating the stigmatization, criminalization and rejection of the LGBTIQ community as both victims and offenders into the theory, meaning that contemporary prison studies and criminology are building the capacity to undertake wider research on the lived experiences of transgender and other 'sexual minorities' in detention.[226]

Indeed, queer criminology as a discipline is relatively new and includes few authors who have published on the social construction of gender and sexualities in prisons. They are mostly authors from the United States (US), Canada, Australia and the United Kingdom

[222] Carl F. Stychin, 'A Stranger to its Laws': Sovereign Bodies, Global Sexualities, and Transnational Citizens' (2000) 27 (4) Journal of Law and Society 601-625.
[223] Matthew Ball, Thomas Crofts and Angela Dwyer (Eds.) *Queering Criminology* (kindle edn, Palgrave Macmillan 2016) Chapter 1.
[224] ibid.
[225] ibid.
[226] Carrie L. Buist and Emily Lenning (Eds), *Queer Criminology* (New Directions in Critical Criminology) (kindle edition, Routledge 2016).

(UK), meaning that their writings reflect the specific cultural and socio-political contexts of these countries. Despite this, some thoughts can be generalized to study the trajectory of queer criminology for the purposes of the prison context. American researcher Regina Kunzel has examined sexuality and gender in American prisons. She established deep linkages between sexuality in and outside prisons and argued that, in fact, the construction of sexuality in prisons, particularly same-sex sexuality and desire, is deeply influenced by the construct of a 'modern sexuality'.[227] Kunzel challenges the essentialist and binary framework of distinct sexual types, blurring boundaries, confounding categories, and producing queerness as a primary feature of the prison.[228] She goes on to argue that sexuality in prisons has long been a central part of popular, scholarly and reformist agendas and that sexuality is constitutive of the modern prison, determining the organization and architecture of prisons and relations between prisoners.[229]

Some scholars have argued that various environmental, biological, psychological and sociological factors also influence sexuality in society, and in prison, these factors are further complicated by the experience of incarceration.[230] Applying a socio-psychological argument to prison sex, Benjamin Karpman underscores the violent culture of prisons, the hyper-masculinization of the environment and sexual abuse, recalling that 'when looking into prison life, one should not forget that the physical, moral, social, psychic and sex aspects are all intertwined, mutually and reciprocally affecting each

[227] Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality (*University of Chicago Press 2008) 45-65.
[228] Kunzel (n 227).; Also, Elias Walker Vitulli, 'Queering the Carceral: Intersecting Queer/Trans Studies and Critical Prison Studies', (2013) 19 (1) GLQ: A Journal of Lesbian and Gay Studies, 111-123.
[229] Kunzel (n 227), Vitulli (n 228).
[230] Angela Pardue, Bruce A. Arrigo and Daniel S. Murphy, 'Sex and Sexuality in Women's Prisons: A Preliminary Typological Investigation', (2011) 91 The Prison Journal*,* 279.

other… all these aspects are part of the system that brings a result of brutalising and degradation of criminals, and this is best illustrated in the sex life within these closed settings.'[231] This is an important point when considering the hyper-masculinization of closed institutions that creates a dangerous dynamic within the prison system, often causing inter-prisoner violence, particularly sexual violence and abuse against 'sexual minorities'.

Sexual violence against LGBTIQ prisoners is possibly the most important topic for consideration when analysing the treatment of transgender prisoners. Hensley, for example, argued that the broad consensus in academic literature about sexuality as a social construction means that pre-prison background plays an immense role in inmates' participation in prison sex (whether consensual or coercive).[232] Hensley and Gibson in fact further asserted that sexual orientation was one of the most important risk factors for sexual victimization in prison.[233] Tewksbury and West, in their recent work, also share that the issue of sexuality in prison has been mostly dismissed, inadequately investigated, and/or negatively portrayed,[234] calling for wider research and understanding of prisoners' sexuality.[235]

The scarcity of literature makes it difficult to engage with the debate. However, the revealing nature of the limited findings above calls for further research into the lived

[231] Benjamin Karpman, 'Sex Life in Prison' (1948) 38 Journal of Criminal Law and Criminology, 475.
[232] See for example, Christopher Hensley, Richard Tewksbury and Mary Koscheski, 'Masturbation Uncovered: Autoeroticism In A Female Prison' (2001) 81 The Prison Journal.; Christopher Hensley, Cindy Struckman-Johnsonand Helen M. EignebergI, 'Introduction: The History of Prison Sex Research' (2000) 80 The Prison Journal.
[233] Lauren E. Gibson and Christopher Hensley, 'The Social Construction of Sexuality in Prison' (2013) 93 The Prison Journal.
[234] Tewksbury and West (n 213)
[235] Pardue, Arrigo and Murphy (n 214).

experiences of ‘sexual minorities’ in prisons, as well as sexuality in detention more broadly. For the purpose of this thesis, further accounts of lived experiences of transgender prisoners are provided in Part Three, where a case study on detention is investigated.

5. Conclusions

This chapter has attempted to grasp different gender identities under the term ‘transgender’. The chapter started by establishing the foundations of transgender studies, by offering analysis about the position of transgender theory in practice and its relations with feminist and queer theories, both in society and in prisons. Indeed, in the myriad of gender variations that exist around the world, ‘transsexuality’ as an invention of medical science has changed the trajectory of the mobilization of the transgender community and recognition of gender identity in law. And if ‘transsexuality’ was understood to oppress the most vulnerable and force them into the heteronormative structure of the sexes, the concept of ‘transgender’ ought to be understood as liberating those oppressed, by allowing for gender self-determination.

Gender performativity theory takes a central place in this chapter to substantiate the claim of the social construction of gender developed by post-structural theorists, specifically Foucault, expanded upon by Butler. And while this chapter was able to illustrate the richness of such theoretical argumentation, in particular around transgender identity, it struggled to find the grounds for a similar application in the prison context.

Two main reasons for this, as highlighted in this chapter, are early deviant theory and an extended period of invisibility that seem to have characterized the transgender experience in prisons.

Prison structures are strictly binary systems, based on strict sex segregation. Transgender identities thus create challenges for the system, and reveal the imperfections, and even limitations, of the prison system and the law to protect those with a non-conforming gender. The journey starts a little earlier, however, at a stage of determination and recognition of identity. The challenge this chapter has grappled with remains the fluid nature of transgender and non-binary identities and the rigidity of the law in providing rights and freedoms for those with specific identities.

As this thesis continues to challenge the fundamental aspects of transgender identities, the next chapter offers an overview of available models of legal recognition of transgender identities. It will further provide a critique of the law where relevant, to illustrate the discrepancy in the protection system, or the gaps in the application of protection mechanisms. As the thesis develops, it will analyse the prison structure in the case-study chapter.

Chapter II

Achieving Transgender and Non-binary Gender Recognition in Law

1. Introduction

Each stage of the theoretical development of transgender studies has had its implications for the normative framework in respective societies. In some countries this has been captured in laws that give an official recognition to transgender identities. Yet, the absence of a rigorous analysis of transgender theory and possible tensions with the law have often resulted in compromises between the state, the medical profession and transgender groups. On the one hand, laws are seen as a way of accessing rights and freedoms; on the other hand, they create heteronormative frameworks for transgender people that do not allow for gender fluidity, a core for non-binary identities. Feminist, queer and transgender theories and the developments that have taken place at each stage of their emergence have had considerable influence on the way national laws are shaped and have also carved out ways for transgender people to access rights, freedoms and justice. That interaction of theory and law has also been reflected in different models that recognize transgender identities.

Three legal models of transgender recognition and citizenship can be identified, each corresponding to a theoretical development in the feminist and queer movements. These

are the biological, medical and gender self-determination models.[236] The first two models – biological and medical – are largely based on heteronormative gender and sex discourse, whereas the third model allows for legal recognition of fluid genders. Furthermore, the biological and medical models have been widely employed in the legal context, including in legislation and court decisions. Both have sought strict conformity with the binary framework and followed that any deviation from established heteronormative norms of gender and sex would be understood as unnatural and deviant.[237] From the perspective of the protection of transgender rights, the biological model fundamentally disregards the transgender concept as it considers gender-crossing deviant, unnatural and fraudulent.[238] The medical model, on the other hand, has allowed transgression but through a medical deviance framework, meaning that medical science dictates the legal decision-making with regard to the legal recognition of a person's gender identity.

The third model lies in constant tension between the law and a queer understanding of gender. By nature, law requires fixed identities or categories, while gender, as a socially constructed concept, carries a fluid character that undermines the very essence of fixed categories. Nonetheless, recent legal developments in a few countries have shown that fluid genders can exist within the fixed categories of the law. In fact, judicial and legal policy advancements have enabled gender self-determination to be recognized in a number of countries. Legal reforms in Argentina, Denmark, Malta, Ireland, Norway and

[236] This model is also called a 'reformist' model, which aspires to reform old notions of sex and gender through which transgender citizenship can be realised. See for more Sharpe (n 20)
[237] Hughes (n 12).
[238] Hughes (n 12).

a few other countries provide an opportunity for transgender people to have their gender legally recognized without the obligation of medical intervention. The 'third gender' has also been recognized by the Supreme Court of Nepal, which, on the basis of a wider application of international human rights law and jurisprudence from other jurisdictions, concluded that a 'third gender' has a right to be recognized in law.[239] A similar trend can be observed in India, Bangladesh and Pakistan.

Legal developments corresponding to the theoretical developments of feminist, queer and transgender studies have been concentrated in a few jurisdictions, limiting the possibility of generalizing national or regional laws. The European Court on Human Rights (ECtHR) has played a dominant role in generating international human rights law on the issue. Other international and regional mechanisms, such as the UN, the Inter-American Court on Human Rights (IACtHR) and the African Court on Human and Peoples' Rights (African Court), have taken much longer to respond to the challenges posed by the contestation of transgender people's rights and international human rights law. In particular, almost all the case law that has enabled the progression from a biological to a medical model has been accumulated in the US and the UK. Considering the limitations in the available jurisprudence, this chapter will employ jurisprudence mainly from the UK, the US and the ECtHR to illustrate how legal systems have approached the developments in feminist, queer and transgender theories, and what role the law played in securing rights for transgender persons.

[239] *Pant v Nepal* (n 4).

This chapter examines three different models of transgender recognition in law: biological, medical and gender self-determination. Within each of the models, the chapter will examine the theory on which the model is founded and the legal structure it creates.

Having studied the available jurisprudence on the issue, both national and international, this chapter will highlight the role of medical evidence in recognizing transgender citizenship. More specifically, it will start exploring the essentialist view on sex and gender and its application to the law, forming a biological model of transgender recognition in law. It will go on to critically analyse the medical model and its impact on organizing transgender rights. Under the medical model, this chapter will specifically examine the concept of 'pathologization of gender identity' and provide a brief overview of the WHO's role in addressing the medical model. Towards the end, this chapter will provide an assessment of the gender self-determination model and its legal recognition. It will reflect the recent developments in a number of countries where reforms have taken place to address this issue. The analysis of each model is hoped to contribute to understanding human rights claims of transgender persons in both national and international jurisprudence.

2. Biological Model of Transgender Recognition in Law

The biological model of transgender recognition was based on the notion of sex as an immutable category and was widely applied in transgender persons' cases to dismiss their claims for a gender change. A famous case that best illustrates the challenges this

arrangement posed was *Corbett v Corbett*, the ruling, which was announced in 1971. In that case in the UK, April Ashley, despite transitioning from a biologically male to female sex, was denied recognition in law. In the case, Mr Corbett sought a declaration that his marriage to April Ashley was null and void, on the grounds that Ms Corbett was biologically male and therefore a marriage between two males was not possible.[240]

The judge objected to some of the medical testimony, which suggested that gender identity is a 'psychological factor' and should be included along with biological markers in the determination of the legal sex.[241] Instead, Justice Ormrod concluded that only the most obvious biological characteristics should be dispositive.[242] In other words, Justice Ormrod developed a list of biological factors that in his view, constituted an immutable nature of sex. These included: a. Chromosomal factors; b. Gonadal factors; c. Genital factors; d. Psychological factors; and possibly e. Hormonal/secondary sexual characteristics.[243]

By providing a strict list of elements for a sex category, Justice Ormrod attested that, in the eyes of the court, biological sex was fixed at birth and could not be changed by natural or surgical means, and therefore any operative intervention had to be ignored.[244] No consideration was given to a psychological perception of gender or even to the medical surgery, leaving Ms Corbett in a legal limbo. Indeed, the *Corbett* case set the practice of determining the sex at birth for many decades to come and dozens of court

[240] *Corbett v Corbett* (n 11).
[241] *Corbett v Corbett* (n 11).
[242] *Corbett v Corbett* (n 11).
[243] *Corbett v Corbett* (n 11).; For medical understanding of sex see: John Money and Patricia Tucker, *Sexual Signatures: On Being a Man or a Woman* (Little Brown and Co (Pap) 1976).
[244] Mary Beth Walz, 'Transsexuals and the law' (1979) 5 (2) Journal of Contemporary Law 181.

cases seeking recognition of the acquired gender were turned down subsequently, citing the *Corbett* case as a yardstick for determining sex and gender, dismissing any attempt for gender deviance.[245] Not only did *Corbett* have an impact inside in the UK, but also in other jurisdictions. From thereon, 'transsexual' cases were decided negatively, largely founded on the reasoning in the *Corbett* case.[246] Courts in Australia, Canada, South Africa, Singapore, and the US (in New York, Ohio, Texas, Kansas and Florida) applied the *Corbett* test to assert that 'transsexual' persons could marry only in the gender role that they had been assigned at birth.[247] The ECtHR in multiple cases including *Rees v the UK*, *Cossey v the UK*, and *Sheffield and Horsham v the UK* repeatedly reasoned that such a matter fell under the margin of appreciation of the member states, and hence denied granting rights to transgender persons.

The collision between law and biology, demonstrated in *Corbett v Corbett*, created numerous impediments to achieving transgender citizenship. One is that states have a monopoly on regulating issues such as issuance of identity documents, marriage, access to welfare, custody of children, access to health, and access to sex-segregated facilities.[248] These are all denied to transgender people under the strict heteronormative boundaries of gender, in which the biological model matches gender with the sex of an individual. This also means that, in the area of sex discrimination law, courts for the most

[245] See for example, *Rees v the United Kingdom* no. 9532/81 (ECtHR 10 October 1986).; *Cossey v the United Kingdom*, App No 16/1989/176/232, (ECtHR, 27 September 1990).; *Sheffield and Horsham v the United Kingdom* App no 31-32/1997/815-816/1018-1019 (ECtHR, 30 July 1998).; *Bellinger v Bellinger* and HM Attorney General [2003] UKHL 21.
[246] See Sharpe (n 20).
[247] Julie Greenberg, 'The Roads Less Traveled' in Paisley Currah, Richard M Juang, Shannon Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 65.
[248] Hughes (n 12); also Mr Adam P Romero, Mr Jack E Jackson, Professor Martha Albertson Fineman (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations (*Ashgate Publishing 2013).

part found that discrimination against transgender people was not legally prohibited.[249] For example, in the case of *Ulane v Eastern Airlines* in 1984, the US Court of Appeals for the Seventh Circuit reversed a ruling that had found discrimination, stating that transsexual people are not protected under the sex-discrimination clause as it relates to males and females.[250] The Appeals Court argued that although there was discrimination against the plaintiff, it was not because she presented as a woman, but because she was a 'transsexual' – but that the latter were not a protected category under the law.[251] More specifically, the Court held:

> Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide the case… it is clear that Eastern Airlines did discriminate against Ulane, it was not because she was female, but because Ulane was a transsexual – a biological male who takes female hormones, cross-dresses and has surgically altered parts of her body to make her appear to be a female.[252]

The standing in *Ulane* changed slightly after the consideration of the case of *Price Waterhouse v Hopkins,* where the appellant challenged sex discrimination due to gender stereotyping in the workplace that had led to his dismissal. In that case, the Court singlehandedly decided that gender stereotyping can indeed qualify as sex discrimination.[253] The Court further noted, 'we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype

[249] Currah, (n 40) 20-21.
[250] *Ulane v Eastern Airlines*, 742 F. 2d 1087.
[251] ibid.
[252] ibid.
[253] Paisley Currah and Shannon Minter, 'Unprincipled Exclusions: The struggle to Achieve Judicial and Legislative Equality for Transgender People' (2000) 7 William and Mary Journal of Women and the Law, 37.

associated with their group.'[254] For the purpose of discrimination and gender, that decision has been understood to indicate that the grounds of discrimination may in fact include not just biological sexual identity but also gender identity.[255] In fact, both of those cases (*Ulane* and *Price Waterhouse*) indicate the trouble the judges have had in establishing a case of discrimination in accordance with the explicit terms of the law, regardless of the gender of the complainant. Despite the uncertainty of terms, the records nevertheless indicate that a state court in the US had earlier ruled that gender identity plays an important role in determining sex.[256] Taylor Flynn writes that as early as 1976, a court in New Jersey upheld that a marriage of a 'transsexual' woman (only known as J.T.) was legal, because she was regarded a female in the law.[257] The court in that case seems to have established that, among the many components that determined sex, psychological determination of gender identity was important to harmonize the psychological sex and the anatomical sex with the social sex or gender.[258] Furthermore, the court declared that when the birth anatomy and the gender identity clash, the role of anatomy is simply 'secondary'.[259] In that case it was argued that gender identity was in fact the key determinant of the person's sex. The sex category thus became subordinate to gender identity.

Another case to have departed from *Corbett* was the New York case of *Re Anonymous,* in which the appellant – a male-to-female transgender person – applied to have her birth

[254] *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989).
[255] Kylar w. Broadus 'Employment discrimination protection' in Paisley Currah, Richard M Juang, Shannon Minter (Eds), *Transgender Rights* (University of Minnesota Press 2006) 96-97.
[256] Taylor Flynn, 'The Ties that Don't Bind', in Paisley Currah, Richard M Juang, Shannon Minter (Eds), *Transgender Rights* (University of Minnesota Press 2006) 35.; Also, Andrew Sharpe, 'From functionality to Aesthetics', in Susan Stryker and Stephen Whittle (Eds), *The Transgender Studies Reader (*Routledge 2006) 622.
[257] Flynn (n 256), Sharpe (n 256).
[258] *M.T. v J.T.,* 355 A.2d 204 (N.J. Sup. Ct. 1976)., 205.
[259] ibid.

certificate changed to reflect surgical intervention.[260] The court in that case held that the applicant had to be a female because her anatomy had been brought into conformity with her psychological sex.[261]

Similar developments can be found in other parts of the world that allowed 'transsexual' (strictly post-operative) persons to marry in their self-identified gender. This includes New Zealand,[262] Australia[263] and California in the US.[264] In *Attorney General v Otahuhu Family Court*, the High Court of New Zealand held that, where a person has undergone surgical and medical procedures that have effectively given that person the physical confirmation of a specified sex, no lawful impediment could prevent that person marrying as a person of that sex.[265] Similarly, in *Attorney General v Kevin and Jennifer,* the Full Court of the Family Court of Australia in Sydney declined to follow *Corbett* [the UK domestic case] and stated that 'it would be wrong to identify and define a person's gender simply on the basis of the chromosomes, genitals, and gonads with which they are born. It is the mind as well as the body that determines the sex of an individual'.[266] The Court went further and stated that 'where a person's gender identification differs from his or her biological sex, the psychological perception of gender should in all cases prevail. It would follow that all "transsexuals" would be treated in law according to the sex identification, regardless of whether they had undertaken any medical treatment to make

[260] Sharpe (n 256) 622.
[261] ibid.
[262] *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603.
[263] *Attorney General v Kevin* (2003) 172 F.L.R 300 .
[264] *Kristie Vecchione v Joshua Vecchione*, No. 96D003769 (Cal. Super. Ct. 22 October 1998).
[265] *Attorney General v Otahuhu Family Court* (n 262).
[266] *Attorney General v Kevin* (n 263).

their bodies conform with that identification.'[267] To justify its decision, the Court cited an expert witness's testimony that 'brain or mental sex… [is thought to] explain the persistence of a gender identity in the face of external influences'.[268] The Australian Family Court in Kevin's case reached the conclusion that 'Kevin is and always has been psychologically male' and that hence he was a male.[269]

A slightly different but equally successful case on transgender marriage was decided by the California Supreme Court in 1998. In Orange County, California, the petitioner Kristie Vecchione sought to annul her marriage to her husband, Joshua Vecchione, claiming that Joshua was not a man because he was transgender. She based her claims on arguments that it was a 'same-sex' marriage and thus not recognized under the law.[270] Ms Vecchione further contended that Joshua was not the father of their child, Briana, who was conceived through alternative insemination during their marriage.[271] The Court disagreed, ruling that 'Joshua Vecchione, who the court finds was born a female and has gone through the transgender surgery, is for all marital purposes a male and the nullity requested based on same-sex marriage was denied'.[272] As a consequence of that finding, the judge declared that the 'child born as the result of artificial insemination in a marriage context is the child of that marriage and is the child of the husband and wife'.[273]

Indeed, those cases illustrate the trouble common law courts went through to overturn the

[267] ibid.
[268] ibid.
[269] ibid.
[270] *Kristie Vecchione v Joshua Vecchione* (n 264).
[271] ibid.
[272] ibid.
[273] ibid.

Corbett case. The rejection of the *Corbett* test came gradually, in particular in the UK.[274] The case of *Bellinger v Bellinger,* despite the unsatisfactory decision of the majority, produced a dissenting opinion arguing for the impact of psychological factors on gender.[275]

Of particular interest is the dissenting opinion of Lord Justice Thorpe in the *Bellinger* judgment, who considered that the foundations of the judgment in *Corbett* were no longer secure. He took the view that an 'approach restricted to biological criteria was no longer permissible in the light of scientific, medical and social change'.[276] Lord Justice Thorpe argued that Bellinger's claim lay in the territory of the family justice system, which 'must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognize the right to human dignity and to freedom of choice in the individual's private life. One of the objectives of statutory law reform in this field must be to ensure that the law reacts to and reflects social change… I am strongly of the opinion that there are not sufficiently compelling reasons, having regard to the interests of others affected or, more relevantly, the interests of society as a whole, to deny this appellant legal recognition of her marriage.' [277]

The *Bellinger* case demonstrates the progress in understanding the normative boundaries of gender and sex by the court. Even though the case decided against the appellant, the dissenting opinion that argued for the consideration of 'psychological gender' should be

[274] *Rees v the United Kingdom* (n 245).; *Cossey v the United Kingdom* (n. 245), *Sheffield and Horsham v the United Kingdom* (n 245).; Also, *X, Y and Z v United Kingdom* App no 21830/93 (ECtHR 22 April 1997).
[275] *Bellinger v Bellinger* (n 245).
[276] *Bellinger v Bellinger* (n 245) 155.
[277] *Bellinger v Bellinger* (n 245)160.

regarded as a basis for overturning ECtHR case law only a year later. In a similar claim to *Bellinger* in 2002, the ECtHR decided that member states' 'margin of appreciation' was limited in the case of recognizing transgender persons before the law, thus departing from the biological model.

The biological model of transgender recognition in law clearly limits the enjoyment of rights and freedoms for transgender people. The model has been widely criticized, including by Andrew Sharpe, who writes that 'transgender people represent for the law a challenge to the notion of sex as naturally immutable, and therefore serve to problematize the basis of gendered and heterosexual subjectivities.'[278] Sharpe goes on to argue that the law has a policing function over gender fluidity, which in a number of different contexts, 'deploys pre/post-operative transgender/cross-dresser, transgender/homosexual, natural/unnatural, sexual/non-sexual and sexually functional/dysfunctional dyads as regulatory strategies around bodies'.[279] Sharpe speaks widely to the claims of heteronormative nature of the law and its ability to accommodate genders outside binary systems, and proposes a 'reformist model' of transgender recognition, which is similar to the gender self-determination model, discussed below. The biological model allows the application of the non-discrimination principle. Some court cases, such as *Ulane* in the US, indicate that the person concerned was discriminated against on the basis of transgender identity.

[278] Sharpe (n 20) 4.
[279] Sharpe (n 20) 4.

The biological model frames gender non-conformity as a matter of choice and hence curbs the ability of the courts to characterize the discrimination experienced by transgender persons.[280] As explained by Romeo, by employing the biological model of transgenderism, 'courts characterized that the expression of transgressive gender identities as something that the plaintiffs did, rather than as legitimate expressions of who they were, without any critical consideration of the performative nature of all gender or the societal enforcement of gender norms'.[281] Romeo relies on Butler's gender performativity concept[282] to demonstrate the failure of the law to accommodate gender variance, or non-binary expression of gender. Indeed, this is also demonstrated in the courts' reluctance to articulate the concept of gender in international legal fora, as well as in specific jurisdictions (particularly in the US, the UK and at the ECtHR). For example, the ECtHR until 2002 ruled that the matter of recognition of transgender individuals in the law fell under the margin of appreciation of the member states, even though the Court was aware of the serious human rights violations faced by transgender people.[283] Also it is important to note that despite the *Corbett* effect on judicial practices across the common-law countries,[284] as analysed above, developments show that there has been a great disparity as to how common-law systems approached the issue to transition from a biological model, albeit continuing to reinforce the heteronormativity of gender.

[280] Franklin H. Romeo, 'Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law' (2005) 36 Columbia Human Rights Law Review, 713.
[281] ibid.
[282] Butler (n 108), ('[Gender proves to be performative that is, constituting the identity it is purported to be. In this sense, gender is always a doing....).
[283] *Rees v The United Kingdom* (n 245) 47.; the *Cossey v The United Kingdom* (n 245) 42.; *Sheffield and Horsham v The United Kingdom* (n 245) 60.
[284] Sharpe (n 256) 622.

3. Medical Model of Transgender Recognition in Law

The fact that the 'transgender phenomenon' is largely understood as a subject of medical studies is hardly surprising. Since the 19th century, the transgender phenomenon has been studied by the medical profession.[285] Before the emergence of the terms 'transsexuality' and 'transvestite', the occurrence of 'transgenderism', albeit without being named, was a subject of study in sexology. For example, Sharpe writes that Karl Heinrich Ulrich's work from the late 19h century described the phenomenon of transgenderism without giving it a name.[286] Jay Prosser also states that in the early days of the emergence of 'sexual inversion, sexologists sought to describe not homosexuality but a broad transgender condition of which same-sex desire was but one symptom, and not vice versa'.[287]

Sexologists in the early days widely believed that 'transsexuality' was 'mentally unhealthy'. For example, in 1950, David Cauldwell wrote, 'are transsexuals crazy? One may as well ask whether heterosexuals are crazy. Some are and some are not. Some transsexuals are brilliant. Now and then one may be a borderline genius. Transsexuals are eccentric. Some of them are not of sound mind, but this is true of heterosexuals'.[288] Cauldwell's arguments are still relevant today. His concept of 'psychopathia transexualis' as an independent sexological category was widely researched in relation to the phenomenon of transgenderism. He started using the term 'transsexual' by 1949 to

[285] Sharpe (n 20) 50.
[286] Sharpe (n 20) 183.
[287] Jay Prosser, *Second Skins: The Body Narratives of Transsexuality,* (Columbia University Press 1998) 138.
[288] David Oliver Cauldwell, *Questions and Answers on the Sex Life and Sexual Problems of Trans-sexuals: Trans-sexuals are Individuals who are Physically of One Sex and Apparently Psychologically of the Opposite Sex: Trans-sexuals Include Heterosexuals, Homosexuals, Bisexuals and Others : a Large Element of Transvestites (* Haldeman-Julius Publications, 1950).

refer to 'individuals who wish to be members of the sex to which they do not properly belong and who desired surgery to alter their physical characteristics to resemble those of the opposite sex'.[289] Earlier, in 1931, Dr Felix Abraham reported in the medical literature that surgical conversion of a man to a woman had been accomplished.[290] At the same time, the early stages of medical theory defined 'transsexualism' as a cerebral (specifically, a temporal-lobe) pathology, a cytogenetic disorder, an enzyme defect and a neurohormonal disorder.[291] And despite the fact that a medical definition of 'transsexuality' had been developing for years to incorporate hormonal aspects of brain structures and sex, it remained overall under strict medical scrutiny.

Despite his contribution to the development of the transgender phenomena, Cauldwell strongly opposed possible 'sex change surgery' on a mixture of ethical[292] and practical grounds – it cannot, he argued, make a 'real' member of the opposite sex.[293] Such belief indeed puts Cauldwell in opposition to Benjamin, who strongly believed in sex change via medical intervention, for the sake of transgender people. Both Cauldwell and Benjamin, though different in their approaches to the transgender phenomenon, had an immense impact on developing and conceptualizing the medical model of transgender recognition in law, which until now continues to impact the ways in which the transgender concept is understood.

[289] David Oliver Cauldwell, 'Psychopathia transexualis', (1949) 16 *Sexology,* 274-280.
[290] Zowie Davy, *Recognizing Transsexuals: Personal, Political and Medicolegal Embodiment* (Ashgate publishing 2011) 18.
[291] Inserted in Sharpe (n 20) 28.
[292] David Oliver Cauldwell, *Is 'sex change' ethical?* ((1955) 22 *Sexology*, 108-112.
[293] Sharpe (n 20) 26.

Both Cauldwell's and Benjamin's work has been further embodied in the law and has strongly involved medical science in the decision-making on legal recognition of transgender persons. Even more so, Benjamin developed detailed guidelines on 'gender identity disorder' positing that those who suffered from 'gender dysphoria' or 'gender identity disorder' by no means all fitted the classic picture of the 'transsexual', although they all shared the fact that they 'were intensely and abidingly uncomfortable in their anatomic and genetic sex and their assigned gender'.[294] Procedures introduced in the 1950s to diagnose transgender persons are still very much guidelines for the medical community. This also had the impact of heavily medicalizing 'transgenderism' and 'transsexualism'. International institutions such as the WHO-ICD, as well as national psychiatric associations such as the American Psychiatric Association (*Diagnostic and Statistical Manual of Mental Disorders* (DSM)), also incorporate some of the elements of 'transsexuality' in their classification systems and further contribute to depathologization of transgender communities.

3.1. Medical science and the law: legal recognition of gender change

The medical model of legal recognition of transgender identities has in fact become a standard test for courts around the world. Medical evidence is understood to be the most reliable in litigation on the basis of which courts grant a person the right to change their identity documents, or to be recognized in the law. With very few exceptions, most countries will require a person to provide a medical certificate as evidence of gender

[294] Ekins and King (n 45) 126.

identity disorder when making an application for legal recognition of their gender. The courts, domestic or international, heavily rely on medical evidence to attest to a person's sex change. One such case is *Goodwin*, which not only revolutionized the ECtHR's approach to transgender recognition but also transitioned European and possibly international jurisprudence too from the biological to the medical model of recognition.

Christine Goodwin, born in the UK in 1937, was a post-operative male-to-female transgender person. In the mid-1960s, she was diagnosed as a 'transsexual'. Although she married a woman and they had four children, her conviction was that her 'brain sex' did not fit her body. From that time until 1984, she dressed as a man for work but as a woman in her free time. In January 1985, the applicant began treatment in earnest, attending appointments once every three months, which included regular consultations with a psychiatrist as well as, on occasion, a psychologist. She was prescribed hormone therapy and began attending grooming classes and voice training. Since that time, she has lived fully as a woman. In October 1986, she underwent surgery to shorten her vocal chords. In August 1987, she was accepted on the waiting list for gender re-assignment surgery, which took place in 1990 at a National Health Service (NHS) hospital.[295]

Ms Goodwin was denied retirement at the age of 60 (the retirement age for women in the UK at the time) and was requested to make her pension contributions until she reached 65, which was the age of retirement for men in April 2002.[296] She had to choose between revealing her birth certificate and forgoing certain advantages, which were conditional

[295] *Christine Goodwin v The United Kingdom* App no 28957/95 (ECtHR, 11 July 2002).
[296] ibid (6).

upon her producing her birth certificate.[297] Goodwin was denied marriage to a male person since, in the eyes of the law, she remained a male (under section 11(b) of the Matrimonial Causes Act 1973 of the UK, which applied at that time, any marriage where the parties were not respectively male and female was void).[298] This test was very much based on the case of *Corbett v Corbett*, decided earlier in 1970s. Moreover, Ms Goodwin was not allowed to change her birth certificate from male to female as the determination of sex in the UK law exclusively used biological criteria (chromosomal, gonadal and genital), as developed by Justice Ormrod in *Corbett v Corbett*. The only case where an amendment was allowed in a birth certificate was if an error had been made when the birth was registered. No error was 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.[299] This further meant that even though the state-funded NHS system provided surgical intervention, it did not provide the means for legal recognition. Those 'transsexuals' who changed their sex continued to be recorded for social-security, national-insurance and employment purposes as being of the sex recorded at birth.[300] In short, the state had created a legal gap, in which transgender people were not able to access their rights.

In discussing the *Goodwin* case, the ECtHR derived its recent reasoning in *Sheffield and Horsham v the UK.*[301] It considered the third-party submissions highlighting the comparative studies from other jurisdictions, especially with similar legal systems. For

[297] ibid (6).
[298] ibid (12).
[299] Ibid (12).
[300] ibid (13)
[301] *Sheffield and Horsham v the United Kingdom* (n 245) para 35.

example, there had been statutory recognition of gender reassignment in Singapore.[302] The literature also indicates a similar pattern of recognition in Canada, South Africa, Israel, Australia, New Zealand and all except two of the states of the US.[303] The Court in particular highlighted the cases from New Zealand and Australia where the 'transsexuals'' assigned sex was recognized for the purposes of validating their marriages.[304]

Goodwin mainly argued against the fact that she was not allowed to marry in her newly assigned sex, which violated her right to private life under Article 8 of the European Convention on Human Rights (ECHR). Article 8 was the only clause that allowed transgender rights claims at the ECtHR. The Court considered a number of applications on this matter, where it maintained that the issue of surgical intervention and legal recognition of post-operative 'transsexuals' came under the margin of appreciation of the member states.[305] The Court argued on deriving from its own jurisprudence 'in the interests of legal certainty, foreseeability and equality before the law.'[306] Applying the living instrument argument of the ECtHR further allowed the Court to respond to the

[302] Francisco Forrest Martin, Stephen J. Schnably, Richard Wilson, Jonathan Simon, Mark Tushnet, *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* (1st edn, Cambridge University Press 2011) 702.
[303] ibid.
[304] , Mr Justice Chisholm held:
... Because the words 'man' and 'woman' have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage. That is, it cannot be said as a matter of law that the question in a particular case will be determined by applying a single criterion, or limited list of criteria. Thus it is wrong to say that a person's sex depends on any single factor, such as chromosomes or genital sex; or some limited range of factors, such as the state of the person's gonads, chromosomes or genitals (whether at birth or at some other time). Similarly, it would be wrong in law to say that the question can be resolved by reference solely to the person's psychological state, or by identifying the person's 'brain sex'.
To determine a person's sex for the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she was brought up and the person's attitude to it; the person's self-perception as a man or a woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex re-assignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage...
[305] *Rees v the United Kingdom* (n 245).; *Cossey v the United Kingdom* (n 245).; *X, Y and Z v the United Kingdom* (n 274).; *Sheffield and Horsham v the United Kingdom* (n 245).
[306] *Goodwin v the United Kingdom* (n 295) para 74.

changing conditions within the respondent State and within Contracting States generally.[307]

Having established its position, the Court further articulated its reliance on the role of medicine in Goodwin's case as a 'transsexual' person. It continued to observe that 'the applicant, registered at birth as male, has undergone gender re-assignment surgery and lives in society as a female. However, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as, *inter alia*, in the area of pensions and retirement age…. However as she is employed in her gender identity as a female, she has had to obtain an exemption certificate which allows the payments from her employer to stop while she continues to make such payments herself'.[308] The ECtHR further notes that 'the applicant's gender re-assignment was carried out by the NHS, which recognizes the condition of gender dysphoria… Nonetheless, the gender re-assignment which is lawfully provided, is not met with full recognition within the law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has had to undergo'.[309] The Court, however, called the UK government's actions illogical as it had provided a state-funded operation, yet refused 'to recognize the legal implications of the result to which the treatment leads'. [310]

[307] ibid. para 30.
[308] ibid. para. 31.
[309] ibid. para 32.
[310] ibid. para 32.

In order to substantiate its reasoning, the Court also explored the medical condition of 'transsexuality'. Relying on the research available, the ECtHR stated that 'there are no conclusive findings as to the cause of 'transsexualism' and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain'.[311] It went on to assert a growing acceptance of findings of sexual differences in the brain that are determined pre-natally.[312]The Court also considered that 'transsexualism' has wide international recognition as a medical condition for which treatment is provided in order to afford relief, both discussed earlier.

The Court employed medical research on 'transsexuality' to argue that, while a 'transsexual' cannot acquire all the biological characteristics of the assigned sex, 'with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element…. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals'.[313] The Court also argued that there was an emerging consensus within the Council of Europe (CoE) and elsewhere (specifically, in Australia and New Zealand) already providing legal recognition following gender re-assignment and stated that sex, in the context of a 'transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of the marriage.[314] The Court explained its previous position on the margin of appreciation and standing in 1980s transgender rights cases. It

[311] ibid para 35.
[312] Ibid para 35.
[313] ibid para 36.
[314] ibid para 38.

noted that very little common ground existed between states then and not many states in fact permitted sex change.[315]

In the view of the ECtHR, a common understanding on changing gender and acceptance has grown over the years.[316] The Court noted that, as this matter was too important for general jurisprudence to fall under the margin of appreciation, there were no significant factors of public interest to weigh against the interest of the individual applicant in obtaining legal recognition of her gender re-assignment. Hence the Court reached the conclusion that the 'fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to a private life in breach of Article 8 of the Convention'.[317]

The *Goodwin* case was revolutionary in achieving the right to legal recognition of transgender persons with gender re-assignment surgery. However, as seen in the reasoning of the ECtHR, it still remained heavily reliant on medical evidence (including the standards of the WHO and national guidelines for the treatment of transgenderism).

In subsequent cases, the ECtHR continued to call on states to provide medical and legal measures for the recognition of gender identity. It further means that the Court has become ever keener to apply existing international human rights norms to transgender persons. For the Court, Article 8 on the right to private life became a gateway for transgender persons to seek protection for various breaches of their rights. For example,

[315] ibid. para 37.
[316] ibid. para 41.
[317] ibid. para 44.

in *L v Lithuania*, the claimant was seeking gender-reassignment surgery. Even though Lithuanian law recognizes the right to change not only gender but also civil status (paragraphs 25, 27, and 29), there was a gap – because no law exists in the country regulating full gender-reassignment surgery. Consequently, the applicant found himself in the intermediate position of a pre-operative transsexual, having undergone partial surgery, with certain important civil status documents having been changed. However, even when the applicant undergoes full surgery, his personal code will not be amended and, therefore, in some significant situations for his private life, such as employment opportunities or travelling abroad, he remains a woman.[318] Having found a violation of Article 8 of the ECHR, the Court found that the circumstances of the case revealed a limited legislative gap in gender-reassignment surgery that left the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity.[319]

Similarly, in *YY v Turkey*, the applicant complained about the infringement of the right to respect for private life (Article 8), on the grounds that he had not been allowed to undertake gender-reassignment surgery.[320] The applicant was repeatedly denied surgery on the grounds that there was not enough medical evidence that he could live as a male person. Medical reports issued by the İnönü University Medical Centre indicated that, despite the fact that the person had a 'transsexual constitution' and 'sex change was necessary for his mental health, he was still able to procreate (in his feminine nature),'[321]

[318] *L v Lithuania* App no. 27527/03 (ECtHR, 11 September 2007) para 19-21.
[319] ibid. para 59.
[320] *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015), para 3.
[321] ibid. para 24.

contrary to Turkish law for sex change surgery, which requires that a person should be unable to procreate if such surgery is requested.[322] In other words, full sterilization is required for those who want to have a gender change recognized in law.

In this case, the ECtHR was able to consider developments that took place since the *Goodwin* case in 2002, namely the resolutions by the Parliamentary Assembly of the CoE[323] and the recommendations of the Committee of Ministers of the CoE.[324] While assessing the member states' legal practices, the Court found that the infertility criteria were in fact a requirement under the law in Turkey.[325] In order to establish whether Article 8 was in breach, the Court scrutinized the criteria for access to general gender-reassignment treatment (e.g., hormone therapy), which included diagnosis of 'gender dysphoria' or 'gender identity disorder'. The ECtHR established that 'while approaches vary from state to state as to the requirements for legal recognition of the preferred gender and procedure governing access to gender-reassignment treatment, it seems that some laws are confusing the legal recognition of the preferred gender, and the procedure governing access to gender-reassignment treatment'.[326] In this case, the ECtHR relied on the *Goodwin* test to find Turkey in breach of Article 8 for not providing the applicant (YY) with access to sex change surgery. In applying Article 8, the Court explained that

> while Article 8 of the Convention cannot be interpreted as guaranteeing an unconditional right to gender-reassignment surgery, it has previously held that

[322] ibid.
[323] On 12 September 1989 the European Parliament adopted a resolution by which the Member States were invited to adopt provisions recognizing the right of transsexuals to change sex by endocrinological treatment, plastic surgery and aesthetic treatments and in particular to ensure their legal recognition, that is to say the first name change and rectification of sex in the birth certificate and identity papers.
[324] Committee of Ministers of the Council of Europe, Recommendation CM / Rec (2010).
[325] *Y.Y. v Turkey* (n 322) para 35.
[326] *Y.Y. v Turkey* (n 322) para 41.

> transgenderism is recognised internationally as a medical condition which warrants treatment to assist the persons concerned (Christine Goodwin).[327]

Here the Court goes even a step further and amalgamates 'medical condition' with Article 8 to guarantee or authorize treatments including surgeries such as gender reassignment'.[328] The Court took a few more steps to advance the application of human rights norms and rejected the practice developed by the Turkish government to request sterilization before undergoing sex change surgery, strictly policing the state's margin of appreciation. The Court noted that what was at stake was the freedom to define one's gender identity ('*appartenance sexuelle*'), a crucial component of the right to self-determination.[329]

The ECtHR has progressed its reasoning since. In the recent case of *A.P, Garçon and Nicot v France,*[330] the Court, again relying on Article 8 of the Convention, argued against the obligation to establish the irreversible nature of the change in their appearance (infertility requirement in French law before changing a gender). The Court specifically looked at the medical evidence and infertility test as a pre-requisite for making an application for legal recognition, scrutinizing its case law to hold that requiring a sterilization as a precondition to one's gender identity recognition amounted to a breach of one's right to respect for private life and physical integrity under Article 8 of the Convention.

[327] *Y.Y. v.Turkey* (n 322) para 65.
[328] *Y.Y. v Turkey* (n 322) para 65.
[329] *Y.Y. v Turkey* (n 322) para 101- 102.
[330] *A.P., Garson et Nicot v France* (n 19).

A.P, Garçon and Nicot v France is monumental in that it argued that an infertility requirement (sterilization) for the purposes of gender legal recognition should no longer be a margin of appreciation. To make its case, the Court found that legal recognition of gender self-determination had developed far enough to have become a common practice. Sixteen countries in total within ECtHR jurisdiction have abolished the requirement of sterilization in law.[331] And even though there are about 24 countries in the CoE that still require infertility as a pre-condition for lodging an application for the legal recognition of a transgender person,[332] the Court noted that many of them are currently reconsidering the approaches to the matter.[333] The Court also relied on policy developments in France and elsewhere, indicating a fast-progressing pace of developments,[334] which in the Court's view meant that there was sufficient agreement on the matter between the states to reach the decision.

The Court further argued that forcing transgender persons into being sterilized was tantamount to a breach of the right to respect private life and their physical appearance.[335] Indeed, imposing a legal requirement to undergo full surgical intervention puts individuals in a dilemma: either to undergo a sterilizing operation and renounce the full exercise of their right to respect for their physical integrity and privacy or to renounce recognition of their gender identity and therefore the full exercise of the same

[331] Austria, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Malta, Moldova, the Netherlands, Poland, Portugal, the United Kingdom and Sweden. France (by an Act of 12 October 2016) and Norway (by an Act of 17 June 2016) have since joined the latter group.
[332] Recognition was subject in law to the sterilization of the applicant in twenty-four member States of the Council of Europe: Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Finland, France, Georgia, Greece, Latvia, Lithuania, Luxembourg, Montenegro, Norway, Romania, Serbia, Slovakia, Slovenia, Spain, The former Yugoslav Republic of Macedonia , Switzerland, Turkey and Ukraine.
[333] *A.P., Garson et Nicot c. France* (n 19) para 73.
[334] *A.P., Garson et Nicot c. France* (n 19) para 124.
[335] *A.P., Garson et Nicot c. France* (n 19) para 131.

right. Such reasoning and ECtHR case law allowed the judges to find France in breach of Article 8 of the Convention.

The *A.P, Garçon and Nicot v France* is a landmark case that has yet to see its full impact on law-making and its application to transgender persons, not only within the CoE, but also outside the region it covers. The case articulates that the legal requirement for infertility (sterilization), upon which the medical model is based, to recognize transgender persons in their newly acquired gender should be considered a breach of human rights. Such reasoning gives a wider possibility for adopting a model that is not strictly based on the medical model, but on self-determination of gender. While this has been a gradual development in many parts of the world, the case of *A.P, Garçon and Nicot* has set a new milestone in advancing the right for transgender persons to be recognized in law.

The heavy reliance of the legal system on the medical profession in relation to gender identity has been widely criticized by scholars, both in law and sociology. For example, Tey Meadow observed that medicine produces no singular definition of maleness or femaleness and therefore the courts should not seek corroboration from the medical profession. She criticized the medical profession for its interference in court matters: 'they [the medical profession] enumerate constellations of bodily and psychological indicia and then provide social rationales for why some of gender's indicia matter more than others'.[336] Meadow further argued that the law actively constructs the fabric of the

[336] Tey Meadow, 'A Rose is a Rose: On Producing Legal Gender Classifications' (2010) 24 (6) Gender and Society, 814-837.

gendered body and ties it to relationships with others. While no courts treat gender solely as an elective property of individuals, almost half of the courts allow for movement between gender statuses. The process of legitimation relies most heavily on medical procedures associated with 'treating transsexuality (efforts to surgically and hormonally align the physical and psychological gender of the litigant)'.[337]

Such a merging of the law and medical science produces a relational construct. Non-conformity to particular models of gender roles and sexual preference has been linked to mental disorder since the emergence of a psychiatric classification. Commenting on mental health and human rights, Louise Newman highlights that concepts of gender, sex roles behaviour, sexual difference and sexuality have been central to psychiatric discourse and concepts of mental disorder and that concepts of healthy psychological functioning or normality have been linked to models of gender behaviour and sexuality, assuming that gender conformity is intrinsic to mental health.[338] She further argues that psychiatry as a discipline has been implicated in the explicit and implicit use of its theory to pathologize and stigmatize individuals with gender and sexual variance, and continues to be involved in mediating access to certain medical interventions such as 'sex-reassignment procedures' for 'transsexual' individuals.[339] In fact, the approach that gender conformity is intrinsic to mental health has been a leitmotif for the entire history of the medical model. Cauldwell, Benjamin and others who conducted early research on the issue all used the same argument of mental health. In fact, the WHO, which is the

[337] ibid. 823.
[338] Louise Newman, 'Sex and Gender, biology, culture and the expression of gender' in Michael Dudley, Derrick Silove, and Fran Gale (Eds), *Mental Health and Human Rights: Vision, Praxis, and Courage* (Oxford University Press. 2012) 496.
[339] ibid.

global institution that determines the classification of diseases and can have an impact on the possible end of the medical model, has also struggled with this notion. Although the WHO declassified homosexuality as a disease in the 1990s, it retains the language in reference to 'transsexuality'.[340] One of the reasons this matters is that the WHO classification tool is used as evidence for claims in support of a medical model of transgender recognition. A quick glance is necessary to understand its role in transgender medical policy-making and opportunities for the depathologization of transgender persons.

3.2. World Health Organization: the ICD and pathologization of transgender people

The WHO-ICD[341] considers 'gender dysphoria' and/or 'gender identity disorder' as illnesses. The American Psychiatric Association changed the name of 'gender identity disorder' to 'gender dysphoria',[342] although such a diagnosis remains a major condition for a sex change surgery. The concepts of 'gender dysphoria' and 'gender identity disorder' appeared in the medical and social literature in the mid-1990s and quickly became established as a dominant category in the medical literature for diagnosing transgender persons.[343]

[340] Asia Pacific Transgender Network, 'Understanding the ICD: Its History, Organisation, and Engaging Asia and the Pacific in the Revision Process', 22 October 2016
[341] World Health Organization, *International Statistical Classification of Diseases and related Health Problems (ICD-10)*, WHO. available at http://www.who.int/classifications/apps/icd/icd10; See also definition of 'Gender Identity Disorder' of the American Psychiatric Association: www.psychiatry.org/File%20Library/.../DSM/DSM-5/DSM-5-TOC.pdf; accessed on 3 October 2014
[342] Diagnostic and Statistical Manual of Mental Disorders (DSM) of the American Psychiatric Association (APA), DSM-5 Classification, www.psychiatry.org/File%20Library/.../DSM/DSM-5/DSM-5-TOC.pdf; accessed on 3 October 2014
[343] See Ekins and King (n 45).

'Gender dysphoria' is the term used to describe those suffering from a conflicting gender identity. The term was coined by Norman Fisk in 1973 for the purpose of capturing fully the diverse group of persons requesting sex-reassignment surgery.[344] He also tried to reflect the fact that applications for sex reassignment came from a variety of persons, by no means all of whom fitted the classic picture of the 'transsexual'.[345] Indeed, as Andrew Sharpe argues, the introduction of the language of gender dysphoria gave expression to a more liberal and pragmatic approach, already adopted in practice by some clinicians to requests for sex-reassignment surgery.[346] At the same time, Sharpe shares King's criticism that the new terminology shifted the emphasis from sexuality to gender.[347] Even if the language change positively impacted on access to sex-reassignment surgery, it to some extent also produced negative discursive effects. In his seminal book *Transgender Jurisprudence*, Sharpe asserts 'while the term "transsexualism" has a relation to ontology, where sex-reassignment surgery might be viewed as a route to the realization of being, the language of gender dysphoria serves to translate desire into need and disorder'.[348]

Once the new terms were introduced, changes were made in the classification systems. For example, in the revised 1994 version of the US DSM-IV, the word 'transsexualism' was replaced by 'gender identity disorder', which signified a person who has a strong cross-gender identification and who suffers from gender dysphoria.[349] Earlier, soon after the terms were first coined in the 1970s, they were adopted by the founding committee of

[344] As inserted in Sharpe (n 20).
[345] As inserted Ekins and King (n 45) 105-111.
[346] Sharpe (n 20).
[347] ibid.
[348] Sharpe (n 20) 30.
[349] Asia Pacific Transgender Network (n 342).

the Harry Benjamin International Gender Dysphoria Association and by the American Psychiatric Association (APA) in 1979.

According to Bonnie and Vern Bullough, the definition of 'gender dysphoria' was revised and simplified in the revised DSM third edition in 1987. The essential criteria for the diagnosis were 'a) persistent discomfort and a sense of inappropriateness about one's assigned sex; b) persistent preoccupation for at least two years with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex and c) the person has reached puberty'.[350]

The DSM was revised again in the 1990s (i.e., DSM-IV) and it was proposed to change the definition of gender disorders, including 'transsexualism' to make it less dependent on surgical interventions. In addition, more careful attention was paid to appropriately defining gender dysphoria in both males and females.[351]

The WHO revision process of the ICD-10 is in progress, with the aim of adopting a new ICD-11 in 2018 at the GA of the WHO.[352] Therefore, current transgender activism and advocacy is focused on the removal of trans-specific categories from the 'Mental, behavioural and neurodevelopmental disorders' chapter of the ICD-10 and the inclusion of a trans-specific category in the 'Conditions related to sexual health' chapter in the

[350] Vern L. Bullough and Bonnie Bullough, *Cross Dressing, Sex, and Gender* (University of Pennsylvania Press 1993) 260.
[351] ibid.
[352] World Health Organization, *'The 11th Revision of the International Classification of Diseases (ICD-11) is due by 2018!' WHO. At* http://www.who.int/classifications/icd/revision/en/ accessed 2 December 2016.

ICD-11 beta draft.[353] This is particularly important as the current ICD-10 still contains 'gender dysphoria' as an illness on the list,[354] which is used by the authorities to ask transgender persons for medical evidence of their 'illness', should they identify as non-binary or desire to undergo a surgical sex change.

The new draft publication includes two new categories proposed by the WHO Working Group: 'Gender incongruence of adolescence and adulthood' and 'Gender incongruence of childhood'. It is important to note here that this terminology change is intended to provide stigma-free definitions. But activists argue that, by adopting a language of gender incongruence, the WHO will dispose of the term 'gender identity disorder'. As defined under the draft, both categories are part of a new draft of ICD-11: Chapter 17 'Conditions related to sexual health'. The so-called beta draft will be voted on at the WHO assembly in 2018.[355] Critics worry, however, that even if there is a consensus among professionals on removing transgender diagnoses from the 'Mental, behavioural or neurodevelopmental disorders' chapter in the ICD-11, it is still likely that this will not happen. The proposed changes in the draft ICD-11 still must be endorsed by the states at the World Health Assembly in May 2018.[356] And there are a number of 'hostile'

[353] World Health Organization (ICD-10) (n 343).
[354] International Statistical Classification of Diseases and Related Health Problems 10th Revision contained list of diseases associated with transgender persons: Transsexualism (F 64.0), Dual – Role Transvestism (F 64.1), Gender Identity of Childhood (F 64.2), Other Gender Identity Disorders (F 64.8), Gender Identity Disorder, unspecified (F 64.9), Fetishistic Transvestism (F 65.1) Sexual Maturation Disorder (F 66.0), Egodystonic Sexual Orientation (F 66.1), Sexual Relationship Disorder (F 66.2), Other Psychosexual Development Disorders (F 66.8) and Psychosexual Development Disorder, Unspecified (F 66.9); as a result of open consultations and professional debates, the mental and behavioural disorders (which used to be section F in the ICD 10) the category 'gender identity disorders' has been removed from the list, though some of them are still maintained (See ICD 10 here: http://apps.who.int/classifications/icd10/browse/2010/en#/F60-F69 accessed on 3 October, 2014
[355] Important to note that these dates keep changing; it was supposed to be 2015, than 2017 and now 2018
[356] Transgender Europe, 'Critique and Alternative Proposal to the 'Gender Incongruence of Childhood' Category in ICD-11' (TGEU April 4-6, 2013) at: https://globaltransaction.files.wordpress.com/2012/03/critique-and-alternative-proposal-to-the-_gender-incongruence-of-childhood_-category-in-icd-11.pdf accessed on 3 November 2014.

countries that might try to block the ICD-11. Therefore, it remains essential to continue mobilization of transgender community against pathologization.

3.3. Criticism and depathologization movement

While some still argue that medical treatment of 'transsexual' persons is the right way [easily achievable and regulated in law], others oppose ethical aspects of heavy medicalization and the labelling of transgender persons as mentally ill. Jennifer Levi and Bennett Klein contend that the medical model of transgender recognition perpetuates the stigma and social prejudice associated with the disability, because it treats the individual as deficient and inherently inferior because she falls below the arbitrary physiological standard that delineates social acceptance, which can only be normalized and incorporated into society through a medical cure.[357] Similarly, arguing against the medical model, David Evans highlights that gender identity clinics treating 'transsexuals' are presented as monitoring the efficacy of their patients' script-learning and pre-performance skills in the presentation of un-contentious stereotypical cross-gender styles, which are ultimately fake because of the biological anomaly.[358] Evans further comments that walking, speaking and dressing skills are rigorously rehearsed in these clinics: 'Dr Reid… asks pre-operative "transsexuals" to try and live in the opposite role for at least a year before embarking on any irreversible procedures'.[359] In his view,

[357] Jennifer L Levi and Bennett Klein, 'Pursuing Protection for Transgender People Through Disability Laws', in in 'Transgender rights', Paisley Currah, Richard M. Juang, Shannon Price Minter (Eds.), 'Transgender rights' (The University of Minnesota Press, 2006) 78.
[358] Evans (n 176) 180.
[359] Evans (n 176) 180.

> whether "transsexuals" are "discovered" or "constructed" by the clinicians they approach or to whom they are referred is a moot point, but in a sense it is also irrelevant in that 'transsexualism' as a social construct establishes its existence for those who develop an extensive negotiation with the category as a means of giving themselves a sex/gender/sexual identity.[360]

Opponents of transgender pathologization argue that labelling 'gender identity disorder' as a mental illness is 'a double-edged sword: while it allows access to hormone therapy, it does so by describing transgender individuals as somehow sick or infirm',[361] and 'this description is at odds with the transgender community's conceptualization of itself'.[362] Queer theorist Butler has also argued against the medical model of 'treating transsexuals'. She writes that the design and structure of the 'gender identity disorder' diagnosis creates a paradoxical situation in which it is possible to say that the diagnosis intensifies the very suffering that requires alleviation.[363] In particular, Butler refers to social stigma, associated healthcare fees and violence experienced by transgender people while going through the 'imposed way' of medical intervention for changing sex.

There are also supporters of the medical model. Prosser, for example, emphasizes the 'transsexual's' need to live not in the borderland but 'in a home of his own, on one side or the other of that border'. The incongruence that dissociates the self from its body, argued Prosser, makes the transgender community the ultimate subject of pathology.[364] Furthermore, with his concept of 'politics of home', Prosser describes the 'transsexual's'

[360] Evans (n 176) 187.
[361] Susan S. Bendlin, 'Gender Dysphoria In The Jailhouse: A Constitutional Right To Hormone Therapy?' (2013) 61 Cleveland State Law Review. 957.
[362] ibid.
[363] Judith Butler, 'Doing Justice to Someone: Sex Reassignment and Allegories of Transsexuality' (2001) 7(4) GLQ: A Journal of Lesbian and Gay Studies, 621-636.
[364] Jay Prosser, 'Exceptional Locations: Transsexual Travelogues', in Kate More and Stephen Whittle (eds), *Reclaiming Genders* (1st edn Bloomsbury Academic 2000).; also Aeyal Gross, 'Gender Outlaws Before the Law: The Courts of the Borderland', (2009) 32 Harvard Journal of Law and Gender.

need ‘to pass’ in the new gender identity for success as signifying the correlation between gender identity and social identity.[365] ‘Post-transsexuality’, he claims, ‘forgoes in advance what has yet to be gained, namely, recognition of the new gender identity and the right to make a home in that identity’.[366] Radical feminist Janice Raymond, who wrote in opposition to a transgender community, states that ‘without [medicine’s] sovereign intervention, transsexualism would not be a reality’.[367] She calls the medical model a ‘remedy’ for treating ‘transsexualism’.[368] In her writings, Raymond attempts to underline the importance of the medical model of ‘transsexuality’ by noting ‘it is only because transsexualism is widely accepted as a condition requiring psychiatric and medical intervention in effect as a disease or disease-like that the social and political questions surrounding transsexualism are not primary’.[369] What this means is that the medical model has been used as a way for transgender persons to access rights and freedoms. The tension between having access to rights and freedoms through the pathological framework and no access to rights still divides the transgender community, even as they continue to fight over the recognition of their identity.

The medical model creates an environment where not only international human rights law itself seems limited in recognizing transgender persons, but also one in which the condition of a heteronormative structure of gender is imposed but with no human rights protection in place. The pathologization of the gender identity still seems to prevent the possibilities for a full recognition of transgender persons in international human rights

[365] Prosser (n 366), Gross (n 366).
[366] Prosser (n 366), Gross (n 366).
[367] Evans (n 176) 180., Raymond (n 175) XV.
[368] Raymond (n 175) 112.
[369] Raymond (n 175) XVI.

law, hence providing meaningful protection. Jens Theilen explores the concept of depathologization of transgender persons through international human rights law and argues that even though those two subjects at first glance look dissimilar and unrelated, international law has a great deal to offer the depathologization of transsexuality, that is 'to annul the gender dysphoria clause from the books'.[370] This could also help to widen the applicability of international human rights law to transgender persons. While acknowledging the limitations of law, Theilen argues that international human rights law has the power to deconstruct the pathological character of 'transsexuality' under the WHO medical guidelines and offer a wider and more humane approach to recognizing transgender persons.

Theilen argues that only a limited number of human rights mechanisms have engaged with transgender depathologization as a substantive human rights issue and takes the opposing view from the one developed under earlier ECtHR case law. She departs from the medical model and bases her arguments on the fact that pathologization 'may become an obstacle to the full enjoyment of human rights by transgender people'.[371] For example, the Committee on Economic, Social and Cultural Rights, which monitors implementation of the International Covenant on Economic, Social and Cultural Rights, in its concluding observations to Germany wrote that 'with concern that transsexual and inter-sexed persons are often considered to be persons with mental illness and that the State Party's policies, legislative or otherwise, have led to discrimination against these persons as well

[370] Theilen (n 19).
[371] Council of Europe: Human Rights and Gender Identity, CommDH/IssuePaper (2009)2.

as to violations of their sexual and reproductive health rights'.[372] Indeed, within the context of the right to health, there should be room for developing a right to depathologization for transgender persons, which will have to correlate with the States' obligations to respect, protect and fulfil.[373] However, the right to health should not be understood in narrow terms, as only in relation to sex change. A broad understanding of the right to health should be used as defined under international human rights law. On this, while trying to find common ground between transgender depathologization in the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR) and the ways in which the WHO has dealt with the issue, Theilen argues that the right to depathologization should also be a part of gender identity as understood under the Yogyakarta Principles and further enshrined in the human rights treaties.

The reasoning and vision set out by Theilen in her article are not idle. Some elements of the deconstruction of the pathologization of transgenderism have already been implemented in a few countries. However, insofar as the medical conditions remain a mandatory requirement for gender recognition at a medical, sociological or legal level, transgender persons will continue to face stigma, rejection and denial of rights, including the very essence of being – a right to personhood enshrined in the Universal Declaration of Human Rights (UDHR). In fact, what she is proposing is how gender self-determination understands gender identity – an important element that needs to develop further in order to allow transgender persons to achieve full recognition in law.

[372] Committee on Covenant on Economic, Social and Cultural Rights: Concluding Observations on Germany, UN Doc E/C.12/DEU/CO/5 (20 May 2011) para 26.; Theilen (n 19).
[373] Theilen (n 19).

4. Gender Self-determination Model of Transgender Recognition in Law

Although a relatively new concept, many authors attempted to explore gender self-determination in the late 20th century. The self-determination of gender – for the purposes of this thesis also called the 'gender self-determination model' – found its application in legal systems as early as a decade ago. In *re Blue Diamond Society*, the Supreme Court of Nepal in 2008 found that laws and practices that discriminated against 'sexual minorities' and third-gender people were unconstitutional.[374] The decision of the Supreme Court specifically focused on the 'third gender' – *metis* – who were targeted by police and others for their non-conforming gender expression and identity.[375] And because the *metis* were routinely denied citizenship cards, they did not have access to the range of entitlements and benefits that such cards provided.[376] As the case analysis reveals, this case was about citizenship in its most basic sense. *Metis* were not recognized as citizens of Nepal. The Supreme Court emphasized the universality of all human rights, with regard to which the Court heavily relied on international human rights law, UN jurisprudence and the Yogyakarta Principles,[377] and ordered that *metis* be given identity cards that reflected their 'third gender' and that protections against discrimination on the basis of gender identity and non-discrimination be enshrined in the new constitution. As citizens of Nepal, people of the third gender are entitled to all rights protected by the constitution and international law and, as the Court established, it was the 'responsibility

[374] *Pant v Nepal* (n 4).
[375] *Pant v Nepal* (n 4).
[376] *Pant v Nepal* (n 4).
[377] *Pant v Nepal* (n 4).

of the State to create the appropriate environment and make legal provisions accordingly for the enjoyment of such rights'.[378]

The new constitution of Nepal, adopted in 2015, includes a specific provision under Part 2, Article 12 that 'the person who is entitled to the citizenship of Nepal by descent may obtain the citizenship certificate of Nepal from the name of his/her mother or father along with gender identity'.[379] Though this was enacted eight years after the Supreme Court judgment, it should be considered a success in achieving recognition of gender self-determination via a court ruling in which medical evidence for the change of sex, or determination of sex (based on the person's biology) was deemed irrelevant.[380] The Nepalese government has introduced a new passport regime with 'O' gender in recognition of a third-gender citizenship.[381] In the words of The Diamond Blue Society, which litigated the case, 'In the community, where many transgender people identify as a third gender, an "O" passport will make a huge difference'.[382]

The Nepalese case is ground-breaking and a long-overdue achievement that demonstrates that self-identification can and should be the sole factor in obtaining legal documents for what individuals consider their right gender. A number of states of various legal fora and political structures subsequently have adopted similar practices, with several countries in the region following the Nepalese example in granting certain rights to transgender

[378] *Pant v Nepal* (n 4).
[379] Draft of the Constitution of Nepal (2015), Unofficial English Translation by International IDEA, At http://www.inseconline.org/linkedfile/Bill%20Of%20Constitution%202015%20Sept.pdf accessed on 4 December 2014.
[380] ibid.
[381] Kyle Knight 'Nepal's Third Gender Passport Blazes Trails', At https://www.hrw.org/news/2015/10/26/nepals-third-gender-passport-blazes-trails, accessed 7 November 2015.
[382] UNAIDS, 'Opinion: What the new "O" passport category means to transgender people in Nepal', 13 April 2015. At https://unaids-ap.org/2015/08/13/opinion-what-the-new-o-passport-category-means-to-transgender-people-in-nepal/ accessed on 25 April 2015.

people. Bangladesh, India and Pakistan now legally recognize more than two genders in some way.[383] For example, in 2009, the Supreme Court of Pakistan called for a third-gender category to be recognized,[384] while in Bangladesh, the cabinet issued a 2013 decree recognizing *hijras* as their own legal gender.[385] In 2014, India's Supreme Court issued an expansive judgment recognizing a third gender, affirming the right of every person to choose his or her gender.[386] In addition, a Delhi High Court ruling in October 2015 outlined an intrinsic link between the right to legal gender recognition and other rights, depicting the clear applicability of human rights law to transgender persons. In that case, affirming a 19-year-old transgender man's right to recourse against harassment by his parents and the police, Justice Siddharth Mridul wrote:

'gender identity and sexual orientation are fundamental to the right of self-determination, dignity and freedom. These freedoms lie at the heart of personal autonomy and freedom of individuals. A transgender [person's] sense or experience of gender is integral to their core personality and sense of being. Insofar as I understand the law, everyone has a fundamental right to be recognized in his or her chosen gender'.[387]

Argentina broke ground in 2012 with a law now considered a 'gold standard' for legal gender recognition.[388] Argentina's Gender Identity Law provides that 'anyone over the age of 18 can choose their gender identity, undergo gender reassignment, and revise official documents without any prior judicial or medical approval'.[389] The law has widened the scope also to allow children to do so with the consent of their legal representatives or through court summary proceedings.

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[383] Night (n 383).
[384] *Khaki v Rawalpindi (*n 4).
[385] Human Rights Watch, 'Bangladesh: Gender Recognition Process Spurs Abuse', 23 December 2016, HRW.
[386] Human Rights Watch, World Report 2016: Events of 2015, 2016.; Also, *National Legal Services Authority v Union of India and Others* (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013).
[387] *National Legal Services Authority v Union of India and Others* (n 389).
[388] Argentina: Gender Identity Law as approved by the Senate of Argentina, May 8, 2012. At http://tgeu.org/argentina-gender-identity-law/ accessed on 5 January 2014.
[389] ibid.

According to the Human Rights Watch 2016 World Report, in the last three or four years, four more countries – Colombia, Denmark, Ireland and Malta – have explicitly eliminated significant barriers to legal gender recognition.[390] Sixteen countries in Europe have some kind of procedure that allows gender legal recognition without a legal requirement for infertility (forced sterilization) in some form.[391] The legal environment in these countries allows transgender persons to change their gender marker on documents simply by filing the appropriate forms.[392]

While those countries have sought the best solutions to enable gender self-determination in their local legal cultures and political structures, all of them have one thing in common, namely a complete rejection of the pathologization of transgenderism and an embracing of the principles of respect for dignity and equality of a person.[393] The laws in those countries set new standards on legal gender recognition,[394] setting examples for other countries as to which model to choose.

The gender self-determination model now in place in many countries around the world is indeed based on a queer analysis of gender. It rejects the medical model of transgender recognition and allows a wider transgender citizenship, not limited to sex change. That recognition widens the scope of transgender rights – and LGBTIQ rights more broadly –

[390] Kyle Knight and Neela Ghoshal, 'Rights in Transition: *Making Legal Recognition for Transgender People a Global Priority*' (Human Rights Watch 2016). At https://www.hrw.org/world-report/2016/rights-in-transition. Accessed on 3 April 2016.
[391] ibid.
[392] ibid.
[393] Press Release, International Day of Action for Trans Depathologization 2015, STP, International Campaign Stop Trans Pathologization.
[394] ibid

including marital rights, employment rights and other rights. Despite such achievements however, it remains to be seen how that change can be reflected in the implementation of gender self-determination.

5. Conclusions

While still a foundation for the thesis, this chapter attempted to provide a brief analysis as to how queer theory and transgender studies are applied in different legal models. Indeed, each model examined in this chapter faces limitations in its approach to transgender legal recognition. These limitations are not only due to the ill-suited structure and heteronormative nature of the law, but also to the scarcely developed theoretical foundation for the application of such law to non-binary gender.

Each of the models that recognize transgender identity has evolved logically and corresponded to developments in feminist, queer and transgender theory. If the biological model determines gender by relying on a person's biology, rendering any deviation from established norms unnatural and deviant,[395] the medical model seeks strict conformity with the biological sex and the only way it allows a deviation from this rule is to define gender non-conformity as a medical condition. From the perspective of the protection of transgender rights, the biological model fundamentally disregards the transgender concept because it considers gender-crossing deviant, unnatural and fraudulent.[396] On the other hand, the medical model allows transgression, but it is through the deviance

[395] Hughes (n 12).
[396] Hughes (n 12).

framework that legal redress for transgender persons is made possible. In the medical model, medical science becomes heavily involved in legal decision-making on changing and legally recognizing persons' newly acquired genital organs. Both of those models have been largely deemed as not respecting the integrity and inner self of the person. Yet the medical model has helped transgender persons to access therapy and social acceptance.[397] In fact, as outlined above, for a long time, medical evidence (surgery) was the only way through which transgender persons could achieve some forms of realization of their human rights. However, that recognition has come with a compromise as to what are the specific rights that are realized under such model. Forgoing one right to obtain another does not fit within the international human rights framework and indicates the need for reform, either of the framework or of the recognition model. The model chosen in the international community and the transgender community, however, is to adjust the framework of human rights protection to accommodate fluid genders, which would mean broadening the application of human rights law to include all of them.

The 'reformist' model as a way of recognizing gender self-determination has been widely debated as the best fit for the recognition of transgender persons before the law, as well as with the wider protection framework of transgender persons.[398] And while this model aspires to the basic acceptance and recognition of the very essence of a human being – dignity and personhood – it embraces both the biological and the medical models. It also suggests that 'gender is recognized as a fundamental aspect of human life, which every

[397] Hughes (n 12).
[398] Sharpe (n 20) 58-89.

person has the capacity and inherent right to control'.[399] This model too is not without flaws, which will be further explored (particularly in the prison context) in the thesis.

The application of these three different models has further highlighted the benefits of each system, but also the limitations of each in securing the protection of human rights and freedoms. In places where transgender people are still forced into the heteronormative structures of society and law, they will continue to present a challenge and therefore serve to problematize the basis of gendered and heterosexual subjectivities. Before these challenges and limitations are examined in Chapter Four, the thesis will continue to explore the international recognition of transgender identities in the next chapter. As seen so far, some international mechanisms, particularly the ECtHR and the UN human rights bodies, have played a significant role in establishing jurisprudence under each of the models of transgender recognition. In each of the models, international human rights law has been applied to protect transgender individuals and provide guarantees. The journey has not been easy, however. Just as the formation of transgender studies was characterized by tensions with feminist and queer studies, its recognition under international human rights law has also encountered difficulties. The next chapter will look specifically at transgender and non-binary gender recognition, and its formation under the human rights framework.

[399] Hughes (n 12).

PART TWO

Chapter III

Applying the International Human Rights Law Framework to Transgender and Non-binary Identities

1. Introduction

Human rights claims for transgender persons have been characterized by constant tensions, whether internal within the wider 'sexual minority' group or external with medical science and legal theory. Challenges to achieving identity-specific recognition in international human rights law, as a gateway for access to a range of human rights and freedoms, are not isolated. The International Bill of Human Rights remains silent on SOGI rights. In fact, for a long time, 'sexual minorities' did not share the mainstream human rights protection that other groups, such as racial and religious minorities, enjoyed in the post-World War II era.[400] This is hardly surprising since in the 1950s and 1960s – when the seminal human rights treaties were being debated, drafted, and adopted – LGBTIQ individuals were barely visible in the domestic realm and all but invisible on the international stage, despite having been one of the groups persecuted during the Holocaust.[401]

[400] For example, some of the specific norms related to racial, ethnic or religious minorities are contained in Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965) as well as the ICCPR (1966) itself, which in Article 27 reads that 'in those states in which ethnic religious or linguistic minorities exist, persons belonging to such minoritis shall not be denied the right, in community with the other members of their group to enjoy their own culture, to profess and practise their own religion or to use their own language'.

[401] Xavier B. Lutchmie Persad, 'An Expanding Human Rights Corpus: Sexual Minority Rights As International Human Rights' (2014) 20 Cardozo Journal of Law and Gender, 337–369.

Despite the absence of LGBTIQ-specific norms, international human rights law is not created independently of general developments at the national level or regional mechanisms. The progress in achieving the recognition of LGBTIQ rights since late 20th century has been somewhat reflected in such developments. Yet, politically dominated bodies such as the UN can still be a place for lengthy debates before norms are formulated. Transgender activism, as well as policy and legal developments, at national and regional levels are important predicaments for creating norms within the UN.

Though language specific to transgender rights is absent from the original texts of the international conventions, considerable progress has been made to incorporate it into current standards. Early debates over sex, sexuality and gender via the feminist movement have played a critical role in the formulation of SOGI rights at the UN. Starting in 2011, the UN Human Rights Council (HRC) adopted three major resolutions on SOGI. Other UN agencies, such as treaty-monitoring bodies, the Special Procedures (SPs) mechanisms and the Universal Periodic Review (UPR), regularly address SOGI rights in their general comments, concluding observations, recommendations and thematic reports. The Yogyakarta Principles were drafted and widely endorsed by the UN human rights bodies. The establishment of the first-ever UN mandate on SOGI should also be considered a milestone in the recognition of LGBTIQ rights.

Notwithstanding such progress on SOGI rights in the last decade of UN norm-making, several countries, often acting as a unified group, actively contest the notion of SOGI and

reject the existence of LGBTIQ rights in international human rights law.[402] Those contestations are not new. However, in parallel to the intensification of LGBTIQ mobilization at the UN, opposition has also grown active and aggressive.[403] The latest attempts to block the SOGI-specific mandate are indeed evidence of that.

Political trade-offs regarding the language in policy documents and negotiations have had a lasting effect on the progress of SOGI rights in international human rights law. The analysis provided in this chapter will illuminate the developments and challenges in forming transgender rights norms at the UN. To provide a comprehensive overview of the trajectory of the formulation of transgender rights, this chapter will start by examining gender and sexuality within international human rights law, followed by an analysis of SOGI norms in UN human rights jurisprudence.

This chapter takes a journey through recent UN history to examine how and to what extent human rights law has grown to incorporate transgender rights, their applicability and the limitations. It looks particularly at three major resolutions of the HRC, as well as the Yogyakarta Principles and their role in advancing human rights law for the transgender community. Towards the end, the chapter will analyse recent developments at the UN level, and the creation of the SPs mechanism on SOGI.

[402] International Service for Human Rights, 'Human Rights Monitor Quarterly' (2011)., issue 1, 2, 3, 4 (ISHR); for UN debate records on 2011 SOGI resolution.; See also http://www.un.org/webcast/unhrc/index.asp.,; Summary of discussion of the UN Human Rights Council panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity (7 March 2012) available http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf., accessed on 2 September 2013., For UN debate records on 2014 SOGI resolution: http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/27th-session/watch/ahrc27l.27rev.1-vote-item8-42nd-meeting-27th-regular-session-human-rights-council/3808532204001. Accessed on 3 January 2014.; See also ILGA and Arc International (n 8).

[403] ibid.

2. Getting the UN Talk Gender – The Feminist Activism

While both concepts – sex and gender – are subject to the variations of their infinite manifestations, the law seeks to encompass their expression within singular, fixed categories.[404] Over a number of decades, sex and gender were understood as synonymous terms.[405] Within UN institutions and human rights bodies, sex and gender were either used interchangeably or gender was often used to connote women.[406] Such an understanding of sex and gender also indicates that there was a firm belief in the biological model of the sex/gender dynamic. Thus, it was only logical that international human rights law had to be challenged in international, political and legal forums for its oblivious attitude towards gender and sexuality. With the feminist movement intensifying its women's rights advocacy at the UN,[407] international human rights law also had become responsive to developments in gender and queer theories.

Advocacy for 'sexuality rights' at the UN was only made possible in 1992, when a cycle of UN conferences began in Rio de Janeiro, Brazil.[408] Commenting on the UN Conference in Brazil, Rosalind Petchesky notes that before 1993, the words 'sexuality' or 'sexual' had never appeared in an intergovernmental document at international level, with the notable exception of the 1989 Convention on the Rights of the Child (CRC), in

[404] Tom Dreyfus, 'The 'Half-Invention' of Gender Identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles' (2012) 37 (33) Australian Feminist Law Journal.
[405] Sex and gender were understood as synonymous terms. For example, The CEDAW Committee General Recommendations and other jurisprudence mainly speaks about women as a single sex category, though uses terms such as 'gender'.
[406] Françoise Girard, 'Negotiating Sexual Rights and Sexual Orientation at the UN' in Richard Parker, Rosalind Petchesky and Robert Sember (Eds), *Sex Politics: Reports from the Front Lines*.; http://www.sxpolitics.org/frontlines/book/index.php., accessed on 12 April 2015.; Cossman, Brenda, Gender Performance, 'Sexual Subjects and International Law' (2002) 15 (2) Canadian Journal of Law and Jurisprudence.
[407] Girard (n 406).
[408] First of such conference was a Conference on Environment and Development (Earth Summit).; For more detailed counts on this see: Richard Parker, Rosalind Petchesky and Robert Sember (Eds), *Sex Politics: Reports from the Front lines* (Sexuality Policy Watch 2007).

provisions on protection from sexual exploitation and sexual abuse.[409] UN records show that the word 'gender' had been agreed by governments many times before (as recently as Cairo[410] and Copenhagen[411]), and appeared in dozens of paragraphs in the draft Platform for action.[412] In those cases, however, 'gender' was associated often used interchangeably with 'woman'. Also, gender was hardly regarded as a sexual right. A famous phrase by Petchesky that sexual rights were still the 'newest kid on the block'[413] may not be referring to specific groups only, but to the limitations regarding general sexuality rights in international human rights law. Petchesky further argued for the necessity of negotiations over the terminology of sexuality and rights, as it meant that a new space 'in the human rights lexicon for acknowledgement of diverse sexualities and their legitimate need for expression'[414] could open. The difficulty of such discussions within the channels of international human rights procedures could not be underestimated though.

Of all the key events that took place during the 1980s and early 1990s, the fourth UN World Conference on Women in Beijing (1995) was the most significant milestone in advancing the concept of sexual rights.[415] Even though those rights were discussed in the context of women's sexual and reproductive health, free of coercion, discrimination and violence, the conference also sought to address sexual orientation rights, although no

[409] Petchesky (n 155).
[410] International Conference on Population and Development, Cairo, 1994. At http://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf. accessed on 13 April 2016
[411] World Conference of the United Nations Decade for Women: Equality, Development and Peace Copenhagen (14 to 30 July 1980), At http://www.un.org/womenwatch/daw/beijing/otherconferences/Copenhagen/Copenhagen%20Full%20Optimized.pdf. accessed on 12 April 2016.
[412] For more on this account, See: Richard Parker, Rosalind Petchesky and Robert Sember (eds) *Sex Politics: Reports from the Front lines* (Sexuality Policy Watch 2007).
[413] Petchesky (n 155).
[414] Petchesky (n 15).
[415] Julie Mertus, 'The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US' (2007) 29 Human Rights Quarterly.

agreement was reached.[416] That 'fleeting appearance' of the term "sexual orientation" in the draft document of the Beijing Declaration also allows an observation that a political trade-off was, in fact, taking place over the issues of reproductive rights'.[417] The reference to sexual orientation was taken out of the final document of the conference, again with strong opposition from religious and other traditional-values support groups.[418]

Interestingly, the Beijing Declaration and Platform for Action contained a reference to sexuality while there was still active opposition to the term 'gender'.[419] One explanation for this might have been the fact that the term 'gender' caused controversy.[420] It was understood that the language in the outcome document was designed to eliminate the possibility that gender might refer to socially constructed feminine and masculine roles,[421] hence allowing social constructionism theory into legal and policy fora. For example, the Holy See requested that the term 'gender' be grounded in biological sexual identity, male or female.[422] Due to the Holy See's take on gender, it was impossible to talk about gender identity.[423] As noted by Girard later on, it was clear that representatives of the Holy See were against the inclusion of gender, as they made a direct connection

[416] Fourth World Conference on Women: Action for Equality, Development, and Peace, Beijing Declaration and Platform for Action, UN GAOR, 50th Sess., (1995) UN Doc. A/CONF 177/20, reprinted in Report of the Fourth World Conference on Women (1995) (UNGA, Committee on the Status of Women, 7 October 1995), At: http://www.un.org/womenwatch/daw/beijing/platform. Accessed on 3 November 2013.
[417] Girard (n 406).
[418] Girard (n 406).
[419] Beijing Declaration and Platform for Action, The Fourth World Conference on Women, Beijing 4-15 September 1995.; http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf accessed on 12 April 2016.
[420] Richard Parker, Rosalind Petchenksy and Robert Sember (Eds) *Sex Politics: Reports from the Front Lines*: at http://www.sxpolitics.org/frontlines/book/index.php accessed on 12 April 2015.
[421] Christine A. Bonomo, 'Case Studies in the Advancement of Sexual Orientation Rights and the Role of Developing International Legal Norms: Argentina and Brazil' (2014) 14 Chicago Journal of International Law.
[422] ibid.
[423] Girard (n 406).

with 'transsexuality'.[424] It seems that the term 'gender' was increasingly becoming a source of interest for different groups, making it an overpopulated site for consideration by the states.[425] Because gender has a core role to play in transgender politics and theory, raising the issue of gender in the Beijing context would have been unacceptable for the Holy See.[426]

Even though the conferences described above were specific to women's rights, the very events themselves helped to encourage discussions on gender identity too. This was important because women's human rights have a longer history, more support and a better track record of success than those related to gender identity.[427] However, due to the different agendas pursued by each group, the advocacy advanced by one group was often to the disadvantage of the other group.[428] Another reason for a divide has been the feminist agenda itself, which was strictly based on binary sex separation between women and men.[429] Introducing gender as a social construct and the adoption of such a term in the Beijing declaration could mean undermining the very foundation of sex differentiation that feminists were basing their advocacy arguments on. Maybe this was the reason for clear tensions between feminist and some of the 'sexual minority' groups at the Beijing conference. As reported by some of the participants in the conference, 'in Beijing, feminists and lesbians (and those who overlapped) did not always see eye to eye

[424] Girard (n 406).
[425] Butler (n 108).
[426] Girard (406).
[427] Joke Swiebel and Dennis Van Der Veur, 'Hate Crimes against LGBT Persons and the Policy Response of International Governmental Organisations,' (2009) 27 (4) Netherlands Quarterly of Human Rights, 485-524.
[428] Girard (n 406).
[429] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law, 613.; Hilary Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law' (1994) 25 Studies in Transnational Legal Policy 1; Karen Knop, "Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 Transnational Law and Contemporary Problems 293; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000).; On international human rights more specifically see Karen Engle, 'International Human Rights and Feminism: When Discourses Meet' (1992) 13 Michigan Journal of International Law, 517.

on objectives and tactics. Some sexual-rights activists working on paragraph 96 [the paragraph related to sexuality]' did not approve of the visibility of the Lesbian Caucus, in part because they thought this would jeopardize the negotiations on paragraph 96, but also, in some cases, because of discomfort felt with the issues raised by lesbians.[430] None of those discussions concerned transgender persons or gender identity issues. The advocacy was led by feminist groups whose interest was advancing women's rights by using a heteronormative idea of the sexes.

Despite this, feminist theory and activism in international fora such as the UN made several important inroads for the SOGI rights. These include allowing feminist theory on the separation of the social and the biological, insisting on the difference between what is the product of human ideas, mutable and changeable, and what is the product of biology, stable and relatively unchangeable.[431] The second contribution relates to the first: by separating the social and the biological, the constructed and the innate, feminist theory insisted that gender was not something innate or 'essential' to an individual's identity.[432] In light of this nexus between feminist theory and sexual identity, Zeidan further notes that it is not surprising that at the Beijing Conference, which marked the first substantive discussion of sexual orientation,[433] transgender rights – or specific rights and freedoms in the context of gender identity – were 'off topic', first given the nature of the conference, but also because of the under-developed character of the concept itself.

[430] Girard (n 406)
[431] For example, see Anthony Tirado Chase, 'Human Rights Contestations: Sexual Orientation and Gender Identity', (2016) 20 (6) The International Journal of Human Rights, 703-723.; Jena McGill, 'SOGI....So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations', (2014) 3 (1) Canadian Journal of Human Rights.
[432] Sami Zeidan, 'Irreverent or Irrelevant? The United Nations and Gay Right's, The Record, Oct. 6, 2005, available at http://www.hlrecord.org/media/paper609/news/2005/ 10/06/Opinion/Irreverent.0r.Irrelevant. Accessed on 26 May, 2015).
[433] Sami Zeidan, 'The Limits of Queer Theory in LGBT Litigation and the International Human Rights Discourse,' (2006) 14 Willamette Journal of Law and Dispute Resolution, 73.; Also, Zeidan (n 434)

Women's rights advocacy within UN forums resulted in success in putting violence against women on the international agenda as a human rights issue. Although it strengthened the essentialist view of sex and gender, it also contributed to widening the debates on language, which could later be used to develop inroads for 'sexual minorities' to mobilize around international organizations and form coalitions. Once that space had been created by feminist activists, 'sexual minority' advocates indeed took full advantage of numerous UN meetings, including the 1993 World Conference on Human Rights in Vienna, the 1994 International Conference on Population and Development in Cairo and, most importantly, the 1995 World Conference on Women in Beijing.[434] The rejection of discussions about problems faced by 'sexual minority' groups within the UN also had a political character. This included denial of the UN Economic and Social Council (ECOSOC) status for LGBTIQ organizations and not allowing them to participate in the UN meetings for over 10 years.[435] Regional mechanisms repeated the same practice. For example, in 2010, the African Commission on Human and Peoples' Rights (ACHPR) refused to grant the Coalition of African Lesbians (CAL) observer status, citing that CAL did not promote any of the rights enshrined in the African Charter on Human and Peoples' Rights (the Banjul Charter).[436] A few years later, in 2015, the Commission granted CAL observer status.

[434] Mertus (n 417)

[435] Such denial was made in 1995 and lasted for a number of years for the reasons of contrasting views on the notion of equality based on sexual orientation within the NGO Committee of the Economic and Social Council. See, UN, 'International Gay And Lesbian Association Denied Recommendation For Reinstatement Of Consultative Status With Economic And Social Council' (2002) <http://www.un.org/press/en/2002/NGO455.doc.htm> accessed 21 March 2015., also UN, 'Economic And Social Council Decides Not To Grant Consultative Status To International Lesbian And Gay Association' (2002) <https://www.un.org/press/en/2002/ECOSOC6004.doc.htm> accessed 21 April 2015.

[436] AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 African Human Rights Law Journal 263-281.; also Sibongile Ndashe, 'Seeking The Protection of LGBTI Rights At The African Commission On Human And Peoples' Rights' [2011] 15 Feminist Africa.

3. Achieving Recognition of Transgender and Non-binary Identities at the UN Level: First Attempts

The history of feminist, queer and transgender activism and advocacy are deeply blended and interdependent. Therefore, it is difficult to pinpoint when the term SOGI was first used and whether the context was actually the UN. Sporadic mentions of the terms 'sexual orientation' and 'gender identity' have been described in this chapter. What is important to highlight, however, is the complexity of the term SOGI acquiring a human rights meaning. 'Transsexualism' in fact may have been the concept through which SOGI acquired a human rights meaning. For example, a brief overview of the literature indicates that the first document in the SOGI literature database that mentions SOGI as a term dates back to the conference on 'Transsexualism, medicine and law' that was held in Amsterdam at the Vrije Universiteit on 14-16 April 1993.[437] A note presented by Rothblatt, in 'An American perspective on transgender health law', affirming that the 'sexual orientation and/or gender identification suspect class naturally groups gays, lesbians and transgendered people for the same kinds of reasons that race and ethnicity suspect classes group their constituent possibilities (e.g. Polish, Latin, Asian).'[438] Rothblatt further recommended that each category of SOGI was different, just like racial or ethnic groups.[439]

Indeed, from a human rights perspective, the historic meaning of this note should not be

[437] Transsexualism, medicine and law: proceedings, XXIII Colloquy on European Law, Vrije Universiteit Amsterdam (Netherlands), 14-16 April 1993.
[438] ibid.
[439] ibid.

underestimated. Firstly, it puts the questions in context and identifies 'sexual minority' as an identity group worthy of rights; secondly, the note coins the rights concept for SOGI, which can be adjudicated from a human rights perspective. Despite that, SOGI as a term was not much used in the 1990s. While human rights and sexual orientation was a salient matter for 'sexual minority' groups' advocacy, gender identity was somewhat neglected. The 1990s saw very little, if any, organizing of transgender people around their human rights. Both terms – gender identity and sexual orientation – came back in the late 1990s and early 2000s and the crystallization process started to take place in the 'Geneva periodical parlances involving bodies and minds from many different quarters'.[440]

In fact, much of the earliest work concerning the recognition of human rights for 'sexual minorities' was done within the European system, not the UN or any other regional body.[441] Some UN member states have consistently attempted to work the concerns of 'sexual minorities' into the language of UN documents, and those attempts were routinely plagued with problems.[442] Particular attention will be paid to four major attempts to create a specific SOGI framework within the UN including the failed attempt in 2003 to pass a resolution (though it created a foundation for subsequent successes). With a growing body of the jurisprudence and political support from countries, SOGI rights have achieved a new standard in securing the protection of the rights of

[440] On this, see Richard Parker, Rosalind Petchesky and Robert Sember (Eds), *Sex Politics: Reports from the Front lines* (Sexuality Policy Watch 2007).
[441] Timothy Garvey , 'God V. Gays? The Rights of Sexual Minorities in International Law as Seen Through the Doomed Existence of The Brazilian Resolution' (2010) 28 Denver Journal International Law and Policy, 659.
[442] ibid.

LGBTIQ.[443]

3.1. Building momentum: 1980–2000

The analysis of official UN material in 2000 indicates that the first concept mentioned was in fact sexual orientation. Categories of individuals mentioned also mainly included gay and lesbian persons, with occasional reference to 'transsexuals'. Most often, terms used for the group category was 'sexual minority'. The UN Human Rights Commission adopted a resolution supported by Sweden, which was a followed up by the report of the UN Special Rapporteur (SR) on Extrajudicial, Summary or Arbitrary Executions addressing murders based on sexual orientation.[444] Before that, in 1999, the Committee on the Elimination of Discrimination Against Women (CEDAW), in its concluding observations to Kyrgyzstan, recommended that 'lesbianism' shall 'be reconceptualised as sexual orientation and that penalties for its practice be abolished'.[445] The sexual orientation rights were included in all resolutions on extrajudicial, summary or arbitrary executions (since 2000 with the exception of 2001[446]) adopted by the Human Rights Commission[447] and later the Human Rights Council (referred in this thesis as HRC), with the approval of the UNGA.[448]

[443] Christian Klesse, 'Polyamory: Intimate practice, identity or sexual orientation?' (2014) 17(1/2) Sexualities, 81–99.; Waites (n 107); McGill (n 433).; O'Flaherty and Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 Human Rights Law Review 207; Also, Lau (n 6).
[444] UN HRC Res 2000/31 (2000) (on death penalty) para 6.
[445] UN CEDAW 20th session., Summary record of the 413th meeting (1999) UN Doc. CEDAW/C/SR.413.
[446] UN Economic and Social Council, Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, (2001) UN Doc. E/CN.4/2001/9.
[447] UN HRC Res 2002/36 (2002).; UN HRC Res 2003/53 (2003).; UN HRC Res 2004/37 (2004).; UN HRC Res 2005/34 (2005).
[448] UNGA A/RES/61/173 (2006).; UNGA A/RES/63/182 (2008). ; UNGA A/RES/65/208 (2010).; UNGA A/RES/67/168 (2012).

Sexual orientation as a human rights claim expanded in different human rights areas. In 2002, the UN Human Rights Commission adopted a resolution on the death penalty that criticized capital punishment for non-violent acts, including sexual relations between consenting adults.[449] This resolution was repeated over the years[450] until the sole standing resolution on sexual orientation rights was not proposed in 2003. Clearly, as scholars argue, both thematic resolutions with reference to sexual orientation were very limited, competing against all the other challenges brought to the attention of the UN,[451] but admittedly, those attempts created a foundation to openly discuss sexual orientation rights within the UN and push for a wider protection framework, including for gender identity.

As described above, the gender identity references in UN documents were virtually non-existent in the 1990s and early 2000s. Despite sporadic mention of gender identity in single documents in different jurisdictions, the term did not appear in UN language until the mid-2000s. Even more, the first UN resolution proposed for the protection of 'sexual minorities' did not contain a reference to gender identity, further illustrating the compromise between states and political trade-offs. The journey of gender-identity language into SOGI and the broader human rights framework of the UN is described in Chapter Four.

[449] UN HRC Res 2002/77 (2002).
[450] UN HRC Res 2003/67 (2003).; UN HRC Res 2004/67 (2004).; UN HRC Res 2005/59 (2005).
[451] Dodo Karsay, with Jack Byrne and Lucas Paoli Itaborahy, 'How far has SOGI advocacy come at the UN and where is it heading? Assessing sexual orientation, gender identity and intersex activism and key developments at the UN 2003-2004' (ARC International September 2014).

3.2. The Brazilian Resolution and aftermath: 2000–2008

a. The Brazilian Resolution

A resolution entitled 'Human Rights and Sexual Orientation', proposed by the Brazilian delegation (the Brazilian Resolution) at the 59th session of the UN Commission on Human Rights in 2003, came as a surprise for many, including those countries that have traditionally supported sexual orientation rights.[452] Brazil had given no advance warning to states – even friendly states – that it was going to introduce the resolution. It had indicated, however, that there was some sound language in the UN resolutions clearly referring to sexual orientation rights, and it was time to escalate that work in some form of document.

In the resolution, Brazil simply sought to acknowledge the occurrence of human rights violations based on victim's sexual orientation and to reaffirm that the principles of the international human rights law apply to all individuals, including 'sexual minorities'.[453] The resolution was introduced during the final days of the session, meaning that not enough political support could be gathered or professionals and activists be present to brief friendly state delegations on the subject matter, which would have helped facilitate discussions but also decision-making in support of the proposed resolution.[454] Records indicate that not much discussion was held on the proposed resolution and the definitions included in it, and a large number of states opposed it.[455] For example, it was only

[452] UN HRC, 59th session, 'The resolution on Human rights and sexual orientation' (2003) E/CN.4/2003/L.92.
[453] Garvey (n 443).
[454] UN HRC Summary Records of 61 meeting (2003) E/CN.4/2003/SR.61., para 58-69.; McGill (n 433)
[455] UN HRC Summary Records of 61 meeting (2003) E/CN.4/2003/SR.61.

because of the meaning of the term 'sexual orientation' – or rather the lack of information – that immediately turned the Vatican and the Organization of Islamic Coordination (OIC) against the resolution.[456] Records also show that there was indifference to the subject at that time, and not many supporters could be found among government representatives to pass the resolution.[457] Some countries went even further to argue that the adoption of the proposed resolution would be a violation of human rights.[458] Other delegations called the draft resolution 'inappropriate', alleging that it did not lie within the scope of the UN, and proposed a 'motion of no-action'.[459]

And indeed, the proposed resolution did create a division among member states. Political division and territoriality on thematic issues within the then Human Rights Commission (the Commission) also showed the reluctance of some countries to engage in active political pressure in support of the resolution. For instance, drawing on first-hand interviews with activists, Girard wrote that some governments, including Sweden (which had supported the resolution on extrajudicial, summary and arbitrary executions) and Canada, had felt ownership of the issue, and were not happy to see Brazil taking their leadership role without consultation.[460]A Swedish diplomat stated in a conversation with Girard that 'it's OK to surprise your opponents, but not your allies'.[461] Germany, on the other hand, strongly supported the Brazilian resolution and welcomed the fact that leadership on the issue had come from a country outside the Western bloc.[462] Records

[456] Garvey (n 443)
[457] Garvey (n 443).
[458] UN HRC Summary Records of 61 meeting (2003) E/CN.4/2003/SR.61. para 60.
[459] ibid.
[460] Girard (n 406).
[461] Girard (n 406).
[462] Bonomo (n 423).

show that Germany was unwilling to take over sponsorship of the resolution, fearing that would label the initiative as Western.[463] Interestingly, some Western countries silently opposed the language of the resolution. For instance, records show that, although Ireland aligned itself with the EU against the 'motion of no-action'[464] on the resolution,[465] it opposed the inclusion of gender identity rights.[466] It is not clear, however, whether there were initial discussions among states, or whether Brazil had intended to include gender identity in the resolution. The fact that Ireland traded with the language indicates that there was a discussion among member states; otherwise activists might have pressed for the inclusion of the language in the resolution. Official records show, however, that gender identity was not raised in any further discussions on the Brazilian Resolution. Specific groups mentioned during the debates within the sexual orientation rights framework included 'homosexual' and 'bisexual' persons.[467]

During the preliminary debates on the resolution, some countries boycotted the negotiations. In fact, there was a major backlash around the absence of an official definition of sexual orientation in law, which gave hostile countries grounds to argue against sexual orientation. Three main opposition arguments were put forward against the resolution: first, that the issues of gender and sexuality did not fall within the scope of international human rights; second, that the term sexual orientation was not adequately defined in international law; and last, that religious law prevented them from accepting a

[463] Douglas Sanders, 'The Role of the Yogyakarta Principles' [2008] Sex politics <http://sxpolitics.org/wp-content/uploads/2009/03/yogyakarta-principles-2-douglas-sanders.pdf> accessed 4 January 2014.
[464] No-action motion is a procedural motion provided by Article 2 of Rule 65 of Rules of Procedure of the Functional Commissions of the Economic and Social Council of the United Nations. http://www.ohchr.org/Documents/HRBodies/CHR/RoP.pdf accessed on 12 December 2016.
[465] UN HRC Summary Records of 61 meeting (2003) E/CN.4/2003/SR.61. para 61-62.
[466] UN HRC Summary Records of 61 meeting (2003) E/CN.4/2003/SR.61.
[467] UN HRC Summary Records of 61 meeting (2003) E/CN.4/2003/SR.61. para 65-66.

notion of equality for 'sexual minorities'.[468] On the basis of those three arguments, the 'motion of no-action' was proposed primarily to prevent further discussion of the resolution. The 'motion of no-action' was overcome by 24 to 22, with six abstentions.[469] However, another five amendments to the resolution were proposed. This also meant that the resolution was adjourned to the next session for further debate on the proposed amendments. That vote was won with 26 in favour of adjourning the issue, 21 against, and six abstentions.[470] The voting records show an interesting division of interests and positions of states. For example, some of the Latin American countries (Argentina, Mexico, Costa Rica and Peru) abstained from voting – Argentina in both cases, and the rest during the vote on adjourning the issue. Armenia also abstained from voting in the second case, whereas the Russian Federation, South Africa, Thailand and Cuba, which had abstained during the vote on the 'motion of no-action', voted to adjourn the resolution to the next session in order to delay discussions.[471] It seemed that only Australia, Canada, the European and some Asian countries fully supported the resolution.[472] Despite this, states did not work together to incorporate the proposed changes to the draft resolution, and when such meetings did take place, no consensus was reached (i.e., with Pakistan on behalf of the member states of the Organization of Islamic

[468] Garvey (n 443).
[469] In faviour of the motion: Algeria, Bahrain, Burkina Faso, Cameroon, China, DRC, Gabon, India, Kenya, Libya, Arab Jamairyya, Malaysia, Pakistan, Saudi Arabia, Senegal, Sierra Leone, Sri Lanka, Sudan, Swaziland, Syrian Arab republic, Togo, Uganda, Zimbabwe. Against the motion: Armenia, Australia, Austria, Belgium, Brazil, Canada, Costa Rica, Croatia, France, Germany, Guatemala, Ireland, Japan, Mexico, Paraguay, Peru, Poland, Republic of Korea, Sweden, Ukraine, United Kingdom, United States, Uruguay, Venezuela. Abstaining from the vote: Argentina, Chile, Cuba, Russian Federation, South Africa, Thailand
[470] In favour of adjourning the discussion: Algeria, Bahrain, Burkina Faso, Cameroon, China, DRC, Gabon, India, Kenya, Libya -, Arab Jamairiya, Malaysia, Pakistan, Russian Federation, Saudi Arabia, Senegal, Sierra Leone, South Africa, Sri Lanka, Sudan, Swaziland, Syrian Arab Republic, Thailand, Togo, Uganda, Zimbabwe; against adjourning the issue to a next session: Against motion: Australia, Austria, Belgium, Brazil, Canada, Chile, Croatia, France, Germany, Guatemala, Ireland, Japan, Mexico, Paraguay, Poland, Republic of Korea, Sweden, Ukraine, United Kingdom, United States, Uruguay, Venezuela. Abstaining from the vote: Armenia, Argentina, Cuba, Mexico, Peru, Viet Nam
[471] UN HRC Fifty-ninth session, Summary record of the 63rd meeting (2003) E/CN.4/2003/SR.63., para 64.
[472] ibid.

Cooperation).[473] Records show an intensive character of the debates within the Commission where Pakistan tried to rule out the resolution, and, opposing countries, such as Germany, Sweden, Canada and others, supported to maintain the resolution for a vote.[474]

The Brazilian Resolution was deferred twice in the next session and finally withdrawn in 2005.[475]

b. The aftermath

Even though the draft resolution was new to the UN, the issue itself was not new. As illustrated above, the treaty bodies, the SPs and the Commission had all touched on the issue of SOGI rights in the previous years. Hence, it was anticipated that the draft resolution would establish a framework for a comprehensive discussion of sexual orientation rights. At the same time, the resolution was strictly based on existing multilateral instruments, all of which had been adopted by the Commission before 2003.

The Brazilian Resolution did not in any manner create new rights, but merely affirmed that the existing rights framework is intrinsically applicable to all, regardless of sexual orientation.[476] Despite this, authors, activists and supportive states all criticized Brazil for its unexpected and un-collaborative move to propose the resolution without consultations

[473] ibid, para 58-69.
[474] ibid.
[475] UN HRC, Sixtieth session, Summary record of the 52nd meeting (2005) E/CN.4/2004/SR.52.
[476] Paula L. Ettelbrick and Alia Trabucco Zerán, 'The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007–June 2010' (2010) 3 Yogykarta Principles in Action.

on the issue. Garvey, for example, suggests that Brazil's proposal of the resolution was likely to fail because the country should either have waited for international courts and committees to develop a more concrete view of the subject, or made sure that it had enough supporters to pass the resolution.[477] This statement is somewhat justified. Not only was there no solid political and legal support for the protection of the sexual-orientation rights, but there was also little community activism for norm-making. The UN was not a friendly place for LGBTIQ groups in the early 2000s, with LGBTIQ groups continuously denied access to UN meetings. On the other hand, the UN mechanisms had already generated some jurisprudence on the 'sexual minority'. And the overwhelming majority of votes for the resolutions on extrajudicial, summary or arbitrary executions and the death penalty at the UN over the years contained ample ground to consider that countries were ready to take the issue to the next level.

Despite the failure of the Brazilian Resolution, some positive outcomes can be noted. First, it had the effect of 'raising the profile of human rights and sexual orientation' in international governing bodies, which in turn 'helped advance those rights throughout the course'.[478] Second, it not only sparked increased efforts in the LGBTIQ movement to mobilize (even though the resolution did not expressly address gender-identity issues), but also opened up possibilities for supportive governments to introduce numerous similarly themed documents at other UN bodies.[479] And, third, it may have pushed activists, human rights defenders and members of the LGBTIQ community to advocate for the inclusion of gender identity in their advocacy messages.

[477] Bonomo (n 423).
[478] Bonomo (n 423).
[479] Most importantly, the Brazilian resolution was an impetus for creating the working group that drafted the Yogyakarta Principles.

The years after 2003 were marked by multiple statements expressing concern at discrimination based on SOGI and some sixty countries signed at least one statement.[480] In 2005, New Zealand delivered a statement on behalf of a cross-regional group of 33 states.[481] It highlighted that 'over the past decade, several UN human rights treaty bodies had found that sexual orientation should be understood as a status to be protected against discrimination.'[482] New Zealand argued that 'the issue should remain on the agenda of the Commission; and that it was time to break the silence surrounding the question'.[483] In the following year, Norway, on behalf of 54 states, including 18 members of the newly established Council, presented a statement on human rights violations based on SOGI to the HRC.[484] This was the first time that SOGI as a single concept was mentioned at the UN, and an added benefit is that it offered a way for the extension of the application of human rights law to transgender persons. For example, in July 2006, the first World Outgames, held in Montreal, launched the Declaration of Montreal, which was the first attempt to summarize the main demands of the international LGBT movement in the broadest possible terms and explain them in the language used in international organizations.[485] The UN High Commissioner for Human Rights delivered the keynote address at the International Conference on LGBT Human Rights, held in parallel to the World Outgames.[486] By March 2008, the number of supportive countries for what had become the 'annual statement on SOGI' rose to 60, with Slovenia and Argentina making

[480] Ettelbrick and Zerán (n 478).
[481] UN HRC, Sixty-first session, Summary record of the 52nd meeting (2005) E/CN.4/2005/SR.52., para 40-41.
[482] ibid.
[483] UN HRC, Sixtieth session, Summary record of the 52 nd meeting, E/CN.4/2004/SR.52., para 111.
[484] UN HRC, 3rd session, Joint Statement by Ambassador and Permanent Representative of Norway to the UN office in Geneva, (1 December 2006)., http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/ accessed on 1 May 2015
[485] Declaration of Montréal, International Conference on LGBT Human Rights, 1st Outgames, Montreal, 2006., http://www.declarationofmontreal.org/DeclarationofMontreal.pdf., accessed on 2 May 2015
[486] Swiebel and Van Der Veur (n 429)

separate but similar statements.[487] As the mobilization for the LGBTIQ rights continued, in December 2008 Argentina delivered a joint statement at the UNGA on behalf of 66 member States.[488] Both the Secretary-General and the High Commissioner for Human Rights released statements in support of SOGI rights.[489] As explained above, by the time the statement at the UNGA was organized, countries had already started using the term 'SOGI', meaning that active discussions were taking place at UN meetings between state delegations, experts and activists over the inclusion of various groups that came under the 'sexual minority' umbrella. At the same time, the parallel process of drafting the Yogyakarta Principles meant that there was much interaction among academics, diplomats, experts and activists over terminology, which further helped the UN diplomats and staff to understand the reciprocal relationship between human rights and SOGI.[490]

The UNGA statement in December 2008, supported by 66 member states, was a recognition of the developments in regional human rights mechanisms and built its claims on the existing human rights framework. That unification of states revealed the clear choice of political priorities for the UN and for progressive member states. It also underlined the need for better knowledge on SOGI issues among UN member states. The difference between the number of states that supported SOGI rights and those that

[487] Swiebel and Van Der Veur (n 429).
[488] UN GA, Sixty-third session, Letter of the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly, A/63/635 (22 December 2008).
[489] UN Secretary-General, 'Confront Prejudice, Speak Out against Violence, Secretary-General Says at Event on Ending Sanctions Based on Sexual Orientation, Gender Identity', SG/SM/13311-HR/5043 (10 December 2010), http://www.un.org/press/en/2010/sgsm13311.doc.htm., accessed on 1 May 2015.; Also UN General Assembly 63rd session, Address by Ms Navanetham Pillay, UN High Commissioner for Human Rights, on the theme of gender identity, sexual orientation and human rights, (New York 18 December 2008), http://arc-international.net/global-advocacy/sogi-statements/hc-ga-200/., accessed on 1 May 2015.
[490] Yogyakarta Principles are discussed below in this chapter.

opposed them was marginal. For example, 66 states supported the political statement on SOGI rights, while 57 member states supported an alternative joint statement read by Syria that questioned the notion of SOGI.[491] In that statement, states protested that SOGI 'have no legal foundation' and suggested that recognizing those concepts could lead to the 'legitimisation of many deplorable acts, including paedophilia'.[492] Such attacks on the LGBTIQ community were not new. The same argumentation had been used throughout the 1990s when LGBT rights organizations and advocacy activists were in fact denied the opportunity to engage with the UN on those matters.[493]

The UN human rights bodies, including the treaty bodies, the SPs and the Commission (later replaced by the HRC), were also part of the process that worked with the Office of the High Commissioner on Human Rights (OHCHR), academics and other internationally recognized professionals and activists to start the process of interpreting the application of international human rights law to SOGI. That process took several years, however, and was accelerated by a more coordinated and well-structured document: the Yogyakarta Principles, which until now serves as the reference guide for SOGI rights.

4. Yogyakarta Principles (2006)

The absence of a normative background on SOGI issues, and opposition from some

[491] UNGA, Sixty-third session, Note verbale from the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General, A/63/663 (26 December 2008).
[492] ibid.
[493] Alessia Valenza, 'ECOSOC: LGBT voices at the United Nations / ECOSOC Council vote grants consultative status to ILGA' (8 August 2012). At http://ilga.org/ecosoc-lgbt-voices-at-the-united-nations-ecosoc-council-vote-grants-consultative-status-to-ilga/. Accessed on 7 January 2015.

states with regards to the roots of SOGI rights in international human rights law, prepared the ground for the OHCHR to facilitate a series of meetings and workshops with experts and activists, with the aim of linking SOGI rights with international human rights law and providing an interpretation of how the two intersect. As noted by Michael O'Flaherty, 'although ultimately not pursued, the Brazilian resolution on sexual orientation and human rights did raise States' awareness of the issues, and mobilised non-governmental organizations (NGOs) from all regions to engage in UN processes'.[494] Since early 2000, the OHCHR had led the process of consultations among UN experts, academics and activists to draft the principles, which would later become the 'Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity'.[495] Also, in 2005, a coalition of human rights NGOs facilitated by the International Service for Human Rights (ISHR) and the International Commission of Jurists (ICJ) led a series of consultations where a proposal for developing the Principles originated.[496] In addition, a few statements were prepared to help ensure coherent understanding of SOGI rights in international law. For example, as noted above, in 2006, the UN High Commissioner for Human Rights addressed the International Conference on LGBT Rights held in Montreal, Canada, highlighting the need for a more comprehensive articulation of SOGI rights in international human rights law. To further illustrate the importance of state and UN experts' participation in creating jurisprudence on the matter, she stated that '(i)t is precisely in this meeting between the normative work of States and the interpretive

[494] O'Flaherty and Fisher (n 443).
[495] Referred to as the Yogyakarta Principles throughout the thesis.
[496] O'Flaherty and Fisher (n 443).

functions of international expert bodies that a common ground can begin to emerge'.[497] Indeed, at this point it was clear that common language was necessary for advocacy purposes, especially given states' inconsistency in their use of language and reference to SOGI rights.[498] For instance, ARC International observed that particular confusion was caused by the concept of 'gender identity', with some mechanisms and states referencing 'transsexuality' as sexual orientation, and others frankly acknowledging that they did not understand the term.[499] More confusion was caused by the battle of terminology, as some SPs, treaty bodies and states preferred to speak of 'sexual orientation' or 'gender identity', while others spoke of 'lesbians', 'gays', 'transgender' or 'transsexual' people, and still others spoke of 'sexual preference' or 'sexual minorities'.[500] The process of drafting the Yogyakarta Principles in the end served not only as a way of providing an interpretation of the international human rights law, but also of mobilising experts, academics and activists to agree on terms and definitions to bring consistency to SOGI-rights language.

To develop a comprehensive document that would articulate the application of human rights law to SOGI, 29 experts were invited to undertake the drafting of the Principles. Experts came from 25 countries representative of all geographic regions. Most importantly, it involved one former UN High Commissioner for Human Rights (Mary Robinson, also a former head of state, of Ireland); 13 current or former UN human rights special-mechanism office holders or treaty-body members; two serving judges of

[497] O'Flaherty and Fisher (n 443).
[498] O'Flaherty and Fisher (n 443).
[499] ARC International, 'A Place at the Table: Global Advocacy on Sexual Orientation and Gender Identity - And the International Response', November 2006. Inserted in O'Flaherty and Fisher (445).
[500] O'Flaherty and Fisher (n 443).

domestic courts; and a number of academics and activists.[501] The drafting process took over 12 months and was finalized in late 2006 at an international seminar at Gadjah Mada University, in Yogyakarta, Indonesia, on 6-9 November 2006. The Principles were officially launched on March 26, 2007, at the UN headquarters in New York and at the OHCHR in Geneva.[502]

The Yogyakarta Principles consist of 29 principles, each containing a statement of international human rights law, its application to a given situation and an indication of the nature of the state's duty to implement the legal obligation. The Principles are designed to establish a background for the universality of human rights and their application to all persons without discrimination and the right of all people to recognition before the law (Principles 1-3).[503] Principle 11 addresses the fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention, whereas Principles 12-18 provide background for the enjoyment of economic, social and cultural rights.[504] Principles 19 to 21 cover issues such as expression of one's identity and one's sexuality without State interference, based on SOGI, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others.[505] Other rights include asylum from persecution based on SOGI (Principles 22 and 23), and the right to participate in family life, public affairs and cultural life without discrimination based on SOGI (Principles 24 to 26).[506] Principle 27

[501] O'Flaherty and Fisher (n 443).
[502] ARC International Report on the launch of the Yogyakarta Principles., At http://arc-international.net/strengthening-capacity/yogyakarta-principles/report-yp-launch/., accessed on 1 May 2015.
[503] O'Flaherty and Fisher (n 443)
[504] Accessible here: http://www.yogyakartaprinciples.org/principles-en
[505] ibid.
[506] ibid.

specifically recognizes the right to defend and promote human rights without discrimination based on SOGI, and the obligation of states to ensure the protection of human rights defenders working in these areas. Holding rights perpetrators accountable and ensuring remedy for those who face rights violations on the grounds of SOGI is secured in Principles 28 and 29.[507]

The Yogyakarta Principles have become the most influential, yet unofficial, set of human rights standards in developing SOGI norms within international, regional and national fora.[508] They have played an important role in codifying soft law on the issues of SOGI, as well as establishing a generic framework for the application of human rights to LGBTIQ. The high level of representation of experts, academics and grassroots activists gave the Principles both great political weight in terms of impact and lent them to legitimacy of the individuals concerned. As O'Flaherty and Fisher summarized, 'these principles identified a number of different ways in which the rights of lesbian, gay, bisexual and transgender people are protected by international instruments and provided the roadmap on the issues concerned with these groups'.[509]

Even though it has only been just over 10 years since their endorsement, the Yogyakarta Principles have earned their place in national court judgments,[510] regional quasi-judicial

[507] ibid.
[508] O'Flaherty and Fisher (443).
[509] O'Flaherty and Fisher (443).
[510] *Pant v Nepal* (n 4).; *Naz Foundation v Govement of NCT of Delhi* &' diverse people are and have always been entitled to the full enjoyment of all human rights. Others (2009) 160 DLIT277.

bodies and international human rights decisions and standards.[511] The Principles form a non-binding agreement of international law experts who specialize in sexuality and gender-related rights.[512] The UN High Commissioner for Refugees has cited the Principles as evidence of the applicability of international law to SOGI in relation to guidelines for asylum-seeker protection.[513] The definition of gender identity provided in the Yogyakarta Principles was adopted by the Argentinian legislature as the basis for the law on gender identity passed in March 2012.[514] The Yogyakarta Principles were cited by the Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 20 on 'Non-discrimination in economic, social and cultural rights': the Committee recommended that states prohibit discrimination on the grounds of gender identity, using the Yogyakarta Principles' definition of gender identity.[515] Even though the General Comment did not cite a specific principle from the Yogyakarta Principles or any other substantial rights interpretation, the use of this definition by an official UN treaty body highlights the many possible uses of these principles and positions them in a very visible place within the UN.[516]

The Yogyakarta Principles have further advanced and progressed the concept of gender identity. They harmonized the messages of different LGBTIQ groups and activists and unified the transgender-specific cause under gender identity. They also helped the human rights mechanisms within the UN to use the same language in order to advance gender-

[511] For example, the term 'gender identity' as provided in Yogyakarta Principles was added to the Draft OAS Convention against Racism and all Forms of Discrimination and Intolerance at the behest of Brazil, after it adopted the Principles as part of its Brazil Without Homophobia campaign (see at: http://www.oas.org/en/iachr/lgtbi/).
[512] More on this see Sanders (n 465).
[513] United Nations High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (November 21 2008) http://www.unhcr.org/refworld/pdfid/48abd5660.pdf accessed on 8 May 2015
[514] Dreyfus (n 406).
[515] UN ESCR Committee, General Comment No. 20 (art. 2), UN Doc E/C.12/GC/20 (2009) para. 2.
[516] Ettelbrick and Zerán (478).

identity rights. As David Brown highlighted, before the Yogyakarta Principles there was no single mention of the term 'gender identity' in any soft-law instrument or treaty-body opinion, and interpretation of regional instruments was limited to Europe.[517] Since the launch of the Principles, international lawmakers have referenced gender identity with greater frequency.[518] Ten years on, the Yogyakarta Principles are helping to form international law naturally, by virtue of repetition.[519]

Supporters of the Yogyakarta Principles agree that the Principles rest on firm philosophical foundations and tend to draw upon a principled discourse of equality, non-discrimination, and justice.[520] Those who argue for the specific rights for LGBTIQ persons regret, however, that the Principles abandon efforts for special rights and focus instead on the universality of rights.[521] Some criticism is also voiced that the Principles are too generic for the sake of being inclusive of different sex and gender principles, but at the same time offer a normative framework for the 'sexual majority'.[522] The role of the Yogyakarta Principles in developing transgender rights cannot be underestimated. Not only do the Principles provide a definition of gender identity, which specifically covers transgender people, but they also serve to establish fundamental principles on the basis of which individual rights of transgender persons can be claimed.

It is noteworthy that the Yogyakarta Principles are currently being revised under the

[517] David Brown, 'Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles' (2010) 31, Michigan Journal of International Law, 821.
[518] ibid.
[519] ARC International, IBAHRI, ILGA (n 34) 71.
[520] Ryan Richard Thoreson, 'Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name' (2009) 8 Journal of Human Rights, 323–, 2009.
[521] ibid.
[522] ibid.

'Yogyakarta Principles + 10' process.[523] Ten years on from the endorsement, international experts, academics and UN human rights bodies have come together to revise the Principles in accordance with the original Yogyakarta preamble, which provides that the Principles will require reflection on the current state of international human rights law and hence should be revised on a regular basis in order to take into account developments within that law and its application to the particular lives and experiences of persons of diverse SOGI over time and in diverse regions and countries.[524] The updated set of principles will be made public later in 2017.

While it remains to be seen how the Yogyakarta Principles continue to support SOGI rights at the international, regional and national levels, it is also important to consider how much political weight it has developed.[525] SOGI rights language has been consistently incorporated into UN human rights bodies. For example, recent analysis of the Yogyakarta Principles and UN jurisprudence on SOGI shows that out of the 29 Yogyakarta Principles, 12 have received special attention.[526] From this, the top three priority topics addressed via the UN UPR process are those regarding non-discrimination, the right to security and the right to privacy (decriminalization of same-sex relationships).[527] Indeed, it is not surprising to see those principles as top priorities, considering the number of countries that still retain criminalization of same-sex relationships, which affects most LGBTIQ groups. It also shows the importance of the

[523] Pooja Patel and Arvind Narrain, 'The Yogyakarta Principles On Sexual Orientation And Gender Identity: Establishing The Universality Of Human Rights' (2016) <http://www.ypinaction.org/yogyakarta-principles-10/the-yogyakarta-principles-on-sexual-orientation-and-gender-identity-establishing-the-universality-of-human-rights/> accessed 20 September 2016.
[524] Yogyakarta Principles, 2006.
[525] Brown (n 519).
[526] ARC International, IBAHRI, ILGA (n 34) 36.
[527] ARC International, IBAHRI, ILGA (n 34) 36.

underlying principles of human rights as the basis for claiming the enjoyment of other rights. While different human rights bodies within the UN play different roles in creating the protection framework, SOGI has been applied across these agencies.[528] As for the Yogyakarta Principles, they are persistently quoted within the UN human rights mechanisms, acquiring an important status as an international instrument within the UN forum, and have been rapidly assimilated into policymaking. Moreover, the Principles have fostered further debates over SOGI rights within international and regional human rights mechanisms to create a formal structure for rights claims.[529] The Principles also gave way to a new era in gender-identity jurisprudence by offering a consolidated way of interpreting the international human rights law as understood by academics, experts and activists. Through such impacts, the Principles have played a crucial role in furthering the UN norms on SOGI rights since 2006. The section below describes developments relating to the SOGI resolutions, in which the principles were also instrumental.

5. Back to the UN Human Rights Council

5.1. Human Rights Council Resolution #1 – Human Rights, Sexual Orientation and Gender Identity - 2011

A ground-breaking statement put forward by Colombia, presented to the HRC in the March 2011 session on ending violence based on SOGI, was signed by 85 States – the

[528] For example, over the eight years that the UPR review was introduced, 46,584 recommendations were made in total. Of these 1,110 were specific to SOGI, and were made to 158 states that went through the UPR review, representing all regions. At the same time, first UPR cycle had a total of 499 recommendations, cycle two topped for 610 SOGI specific calls. ARC International, IBAHRI, ARC International, IBAHRI, ILGA (n 34) 34-37

[529] Thoreson (n 522)

greatest number to have ever supported a statement of this kind.[530] This was a continuation of the statements made on behalf of 66 States at the UNGA in 2008 and the statement by 54 States back in 2006. Notably, in the 2011 joint statement the signatories came from all regions and also included South Africa. What is important is that despite its progressive constitution [which includes SOGI as a protected ground for discrimination], South Africa had so far not supported initiatives around SOGI at the UN. Furthermore, when voting for the Brazilian Resolution, South Africa abstained from the motion of no-action vote, and supported the adjournment of the draft resolution. However, in this instance, lobbied to support the statement, South Africa tabled a surprise resolution just days before the joint statement was presented.[531]

The proposed resolution initiated the creation of an intergovernmental working group with exclusive competence to discuss 'new concepts' such as sexual orientation, and a mandate to clarify the meaning of sexual orientation in the context of international law.[532] In fact, this proposition could have been a political move. By that time, the Yogyakarta Principles, which contained not only a definition of SOGI but also provided for the application of international human rights law to the concept of SOGI, had already attracted high political popularity.[533] Hence, the resolution contained the same language as the Yogyakarta Principles and included a statement welcoming attention on SOGI issues. The draft also included a request to the OHCHR to continue to address SOGI

[530] International Service for Human Rights, 'Ground-Breaking Statement On Sexual Orientation And Gender Identity By Record Number Of 85 States' (ISHR 2011) <http://www.ishr.ch/news/ground-breaking-statement-sexual-orientation-and-gender-identity-record-number-85-states> accessed 24 September 2013.
[531] International Service for Human Rights, 'Human Rights Council 16th Session: Council Marks Five-Year Anniversary With Notable Success' (ISHR 2011) <https://www.ishr.ch/sites/default/files/article/files/hrmq_issue_2_2011_hr_council.pdf> accessed 9 September 2013.
[532] International Service for Human Rights, 'The Human Rights Monitor Quarterly' (2011) 2 ISHR 5.
[533] See for example, *Pant v Nepal* (n 4).

rights, including preparing a report on the situation of LGBT persons worldwide and calling on states to end criminal sanctions based on LGBTIQ status.[534]

Despite the increased number of supportive statements on SOGI rights, some disapproval, especially from OIC countries, was also noticeable. Pakistan spoke on behalf of the OIC member states and reiterated that it was an attempt 'to shift the focus from the real issues' that the UN was tasked to attend to. The group further contended that notions of SOGI lack legal foundation in any international human rights instrument[535] and therefore that the debates were void. That tit-for-tat approach of statements and counter-statements at the HRC and the UNGA seemed to have hardened the lines between opposing States and had not yielded the desired results. In that context, the initiative by South Africa to create a space for dialogue was seen as a way of moving the substance of the debate forward. Many, however, saw a danger in such a move and subsequently South Africa was persuaded to defer the resolution to the next Council session.

On 9 June 2011, South Africa tabled a historic resolution for consideration by the HRC, entitled 'Human Rights, Sexual Orientation and Gender Identity' (Resolution 17/19). Active support was shown by the Group of Latin American and Caribbean Countries and backed by the Western European and Others Group. However, as in previous instances, when discussing draft resolutions on SOGI, the OIC member states presented an almost unified position, providing a string of explanations for their vote against adoption

[534] UN HRC Res 19 (2011) A/HRC/RES/17/19.
[535] International Service for Human Rights, 'The Human Rights Monitor Quarterly' (2011) 3 ISHR 5.

(including from Pakistan, Saudi Arabia, Bahrain, Bangladesh, Qatar and Mauritania). Indeed, South Africa put itself in a particularly difficult position, as it was isolated from most of the African Group. For example, harsh criticism was expressed from Nigeria (claiming to speak on behalf of the African Group), which stated that 'the resolution fell outside of international human rights principles'.[536] NGOs report that during the informal negotiations on the draft text, this isolation was marked through the absence of almost all of the African Group and the OIC, except Egypt, which engaged in some of the earlier consultations, mainly to express its view that the concepts of SOGI needed defining.[537]

The resolution 17/19 was adopted with 23 votes in favour,[538] 19 against[539] and 3 abstentions.[540] Mauritius, despite its previous criticism of SOGI rights and votes against the Brazilian Resolution, also broke from the African Group by voting in favour, while Burkina Faso, Zambia and China abstained, and Kyrgyzstan was also absent. In explanations after the vote, Mauritius noted that while it respected Nigeria's position on the resolution and its position as a leader of the African Group, in this particular case its own position was 'more nuanced'[541].

The 2011 SOGI resolution was ground breaking. It was the first standard-setting UN document on SOGI. The 2011 resolution also marked an important milestone that

[536] UNGA Report of the Human Rights Council on its seventeenth session (2012) A/HRC/17/2.
[537] ISHR (n 537).; Also, J. Lester Feder, 'The UN's New LGBT Rights Watchdog May Be About To Lose His Job', (*BuzzFeed News* 4 November, 2016)
[538] Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay., UNGA, Report of the Human Rights Council on its seventeenth session, A/HRC/17/2 (24 May 2012) 56
[539] Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal, Uganda., UNGA, Report of the Human Rights Council on its seventeenth session, A/HRC/17/2 (24 May 2012) 56
[540] Burkina Faso, China, Zambia., See UN GA Report of the Human Rights Council on its seventeenth session (2012) A/HRC/17/2. para 56.
[541] ISHR (n 537).

garnered support from countries on all continents.[542] It was followed up by rigorous work by the High Commissioner for Human Rights calling for the repeal of laws criminalizing homosexuality, comprehensive laws against discrimination, and investigations of hate-crime incidents, and other measures to ensure the protection of LGBTIQ rights.[543]

The 2011 resolution was pioneering in the recognition of SOGI rights, but it also set a standard framework for further work by the HRC and wider UN bodies. It gave guidance to the political spectrum of the HRC to review and debate the report on SOGI rights by the OHCHR. The resolution was also standard-setting for the HRC panel discussion in the following year and a baseline for a follow-up study by the High Commissioner. This further meant that a continuum of the work on SOGI would be maintained and even more, as seen, intensified.

Since the adoption of Resolution 17/19, countries that championed the 2011 resolution asserted their lead in statements presented together with allies calling for a 'genuine dialogue' on the subject.[544] However, those that had objected to the existence of the SOGI rights continued to contest possible links between SOGI and international human rights law and the obligations of States.[545]

[542] Ronald Holzhacker, 'Gay Rights are Human Rights': The Framing of New Interpretations of International Human Rights Norms' (2014) International Political Science Association (IPSA) Conference.
[543] ibid.
[544] UN HRC 21st session summary records (2013) A/HRC/21/2.; UN HRC 22nd session summary records (2012) A/HRC/22/2.; UN HRC 23rd session summary records (2013) A/HRC/23/2.; UN HRC report on its twenty-fourth session (2014) A/HRC/24/2.; UN HRC Report on its twenty-fifth session (2014) A/HRC/25/2.; UN HRC Report on its twenty-sixth session (2014) A/HRC/26/2.
[545] ibid.

Even though the HRC saw no other active developments and proposals on SOGI, the issues remained a focus of attention. A series of regional meetings were held in Asia, South America, Africa and Europe with the aim of identifying challenges faced by LGBTIQ persons and discussing the tools for an effective response. A final regional meeting took place in 2013 in Oslo, Norway, where findings from all regional meetings were analysed.[546] The conclusions of the regional convenings showed a need for the UN to create a mechanism that would systematize attention on violations and discrimination against LGBTIQ persons. And while acknowledging that the creation of an expert mechanism on such a sensitive issue would be a great achievement, it was still a politically delicate issue for South Africa, whether it was ready to pursue this goal.[547]

5.2. Human Rights Council Resolution #2 – Human Rights, Sexual Orientation and Gender Identity – 2014

A second SOGI resolution was proposed for adoption at the HRC session in September 2014. This time, a new leadership emerged, with Brazil, Chile, Colombia and Uruguay sponsoring the resolution. The group was determined to ensure a constructive process of consultations, including organising informal consultations and conversations with all stakeholders, including those who had concerns. Despite those attempts, the OIC member states presented seven amendments aimed at undermining the very sense of the resolution. The proposed changes targeted the term SOGI throughout the text of the

[546] Summary of Conclusions on 'Testimonies at the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity (15-16 April 2013)', Oslo, 16 April 2013.; at: http://www.iranti-org.co.za/content/Events/2013/2013-Conference-SOGI/links-sogi/SOGI%20Co-Chairs%20summary.pdf accessed on 2 April 2015

[547] International Service for Human Rights, 'Historic conference on sexual orientation and gender identity raises prospect of a UN mechanism' (26 April 2013).; at http://www.ishr.ch/news/historic-conference-sexual-orientation-and-gender-identity-raises-prospect-un-mechanism., accessed on 1 March 2015.

resolution.[548] All seven of the proposed changes were put to a vote and were voted against.[549] That result was due to the transparent process of negotiations over the resolution by the lead states, which eschewed procedural tactics as a way of blocking the proposed hostile amendments.

The 2014 resolution on Human Rights and SOGI was adopted by a recorded vote of 25 in favour,[550] 14 against,[551] and 7 abstentions.[552] The supporting votes increased by two votes, and most of the support came from states of the Latin American region, the Western group and all states from the Eastern European group, except Russia. There was also increased support from the Asian group, as well as the African group, where only 7 of its 13 member states voted against the resolution, compared with 10 in 2011.[553] At the same time, despite some varied messages, states expressed a readiness to maintain the dialogue, even if they were not ready to commit their support.[554]

The resolution once again acknowledged the work of the OHCHR on 'discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity'.[555] It further requested that the High Commissioner update the report on SOGI. In particular, the resolution asked to explore how

[548] UN HRC - amendments to draft resolution (A/HRC/27/L.27/Rev.1), A/HRC/27/L.46 (25 September 2014); A/HRC/27/L.47 (25 September, 2014), A/HRC/27/L.48 (25 September 2014).; A/HRC/27/L.49 (25 September 2014).; A/HRC/27/L.50 (25 September, 2014).; A/HRC/27/L.51 (25 September 2014).
[549] ibid.
[550] Argentina, Austria, Brazil, Chile, Costa Rica, Cuba, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Romania, South Africa, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Vietnam.
[551] Algeria, Botswana, Côte d'Ivoire, Ethiopia, Gabon, Indonesia, Kenya, Kuwait, Maldives, Morocco, Pakistan, Russian Federation, Saudi Arabia, United Arab Emirates.
[552] Burkina Faso, China, Congo, India, Kazakhstan, Namibia, Sierra Leone.
[553] UN HRC live webcast of A/HRC/27/L.27/Rev.1 Vote Item:8 - 42nd Meeting 27th Regular Session Human Rights Council, http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/27th-session/watch/ahrc27l.27rev.1-vote-item8-42nd-meeting-27th-regular-session-human-rights-council/3808532203001#full-text., Accessed on 13 May 2015.
[554] ibid.
[555] UN HRC Res (2014) A/HRC/27/L.27/Rev.1.

international human rights law could be used as a tool to combat human rights violations based on SOGI.[556] The states' intention of exploring SOGI further shows a clear lack of information, but more importantly, it shows a common interest in further analysis of the ways in which human rights standards and norms could be applied to SOGI. Despite general attention on SOGI, however, the issue of gender identity as a specific topic and in relation to transgender persons, including recognition before the law, received very little or no attention at all.[557] The main focus of the resolution and the advocacy itself was non-discrimination as a common right for all LGBTIQ persons. The same trend continued at next stages of SOGI development at the UN.

5.3. Human Rights Council Resolution #3 –The Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity

For the 32nd session of the HRC in 2016, the Latin American Core Group (Argentina, Brazil, Chile, Colombia, Mexico and Uruguay) officially tabled the new SOGI resolution.[558] The draft text sought to reaffirm the international human rights framework, condemned SOGI-related violence and discrimination, and proposed to create a three-year limited-period mandate on SOGI. The language for the mandate was carefully

[556] UN HRC Res (2011) A/HRC/17/L.9/Rev.1.
[557] More generally on sexuality and human rights, see International Council on Human Rights Policy, 'Sexuality and Human Rights,' (2009) At: http://www.ichrp.org/files/reports/47/137_web.pdf accessed on 13 January 2015.
[558] Sponsored by Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico and Uruguay, and co-sponsored by Albania, Australia, Austria, Belgium, Bolivia (Plurinational State of), Bulgaria, Canada, Croatia, Cyprus, the Czech Republic, Denmark, El Salvador, Finland, France, Germany, Greece, Honduras, Iceland, Ireland, Israel, Liechtenstein, Luxembourg, Malta, Montenegro, New Zealand, Norway, Portugal, Slovenia, Spain, Sweden, Ukraine and the United States of America. Angola, the Netherlands and Paraguay withdrew their original co-sponsorship. Subsequently, the Dominican Republic, Estonia, Guatemala, Italy, Japan, Latvia, Lithuania, Romania, Serbia and Slovakia joined the sponsors.; UN HRC Report on its thirty-second session, Res A/HRC/32/2 (2016) para 169.

chosen to ensure that it caused no controversy during the debates.[559] In other words, despite the HRC's common practice of establishing a SR, in this case an Independent Expert mandate was proposed. The core group also understood that 'hostile states' would be working hard to defeat the resolution. Therefore, the language too would need to be neutral. For instance, at the first unofficial negotiations, Russia had already condemned the resolution as 'complicated, controversial and unacceptable', noting that there was 'no agreement in science or law' on the term SOGI, which lacks support from 'the majority of the world's population'. Russia declared that it was not ready to engage in the drafting process and walked out.[560]

In fact, the proposed draft resolution was built on two previous resolutions from 2011 and 2014. Both resolutions had been adopted by a majority of the HRC with support from all regions. And while those previous resolutions had mandated two reports by the OHCHR, which documented both serious violations and positive developments in all regions of the world, it had highlighted that there the need for a mechanism to bring more systematic attention to the issues.[561] It also seemed in line with the Oslo Conference declaration on the need of SPs mechanism on the SOGI rights. Thus, the core group of countries proposed to create an Independent Expert mandate to assess implementation of existing international human rights law, identify best practices and gaps, raise awareness of violence and discrimination based on SOGI, engage in dialogue and consultation with

[559] Arc International, 'Appointing an Independent Expert on Sexual Orientation and Gender identity: An Analysis of Process, Results and Implications', 13 June – 1 July 2016. At http://arc-international.net/wp-content/uploads/2016/08/HRC32-final-report-EN.pdf. Accessed on 12 September 2016.
[560] UN HRC Res (2016) A/HRC/32/L.2/Rev.1.; ILGA and Arc International (n 8).
[561] High Commissioner's report to the UN HRC on violence and discrimination based on sexual orientation and gender identity, A/HRC/19/41., 15 December 2011.; High Commissioner's report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/29/23, May 2015.

states and other stakeholders and undertake other activities geared towards addressing violence and discrimination on those grounds.[562] Importantly, the core group persistently repeated that the resolution did not seek to create new rights but simply affirmed the applicability of existing human rights standards to those who faced human rights violations because of their SOGI.[563] Indeed, the Yogyakarta Principles served as a baseline standard for this. Over 20 years of treaty-body jurisprudence recognizing intrinsic links between human rights law and SOGI also were used to ensure that the lists of grounds for non-discrimination were not exhaustive, by employing terms such as 'of any kind', 'such as' and 'or other status'.[564] The core group also relied on the increase in support for the issue between the 2011 and the 2014 HRC resolutions, encompassing all regions, which in the view of the core group was indicative of countries' growing acceptance of SOGI rights.

As expected, the opposing group, represented by Pakistan on behalf of the OIC (except Albania), proposed eleven amendments, which meant that the review and the adoption of the resolution would be complicated.[565] Debates saw 29 diverse states making statements about their understanding of SOGI, their notion of the appropriate balance between cultural and religious sensitivities and respect for human rights, and divergent views of the meaning of universality.[566] The HRC session also witnessed government ambassadors struggling to talk about sexuality,[567] which, given the context, made it a

[562] UN HRC Resolution on Protection against violence and discrimination based on sexual orientation and gender identity," (2016) A/HRC/32/L.2/Rev.1.; Also, ILGA and Arc International (n 8).
[563] ILGA and Arc International (n 8).
[564] ILGA and Arc International (n 8).
[565] ILGA and Arc International (n 8).
[566] ILGA and Arc International (n 8).
[567] ILGA and Arc International (n 8).

awkward situation at times. It also highlighted the need for more education on sexuality and human rights among diplomats and those represented in the HRC and other multilateral meetings.

The single resolution involved a series of 17 votes, including a preliminary vote on a 'no-action motion' – a procedural manoeuvre aimed at blocking even discussion of the resolution – brought by Saudi Arabia; then 11 votes on the OIC amendments led by Pakistan;[568] a last attempt to oppose retention of four separate parts of the text (brought by Qatar and the Maldives);[569] and, finally, the vote on the resolution itself.[570] The final draft resolution was adopted with 23 votes for,[571] 18 votes against,[572] and 6 abstentions[573] (Resolution 32/2).[574] The historic vote concluded in the HRC's victory to establish the first UN Independent Expert on SOGI.

The resistance did not stop there, however. In parallel to the OHCHR selecting candidates for the position of UN Independent Expert on SOGI and later approving Professor Vitit Muntarbhorn as the UN Independent Expert on SOGI, [575] the countries in opposition to SOGI were preparing to overturn the historic victory. Though the resolution to appoint Professor Muntarbhorn as the UN Independent Expert was adopted within the HRC without a vote, the African Group, in an unprecedented move, sought to

[568] ILGA and Arc International (n 8).
[569] ILGA and Arc International (n 8).
[570] ILGA and Arc International (n 8).
[571] Albania, Belgium, Bolivia (Plurinational State of), Cuba, Ecuador, El Salvador, France, Georgia, Germany, Latvia, Mexico, Mongolia, Netherlands, Panama, Paraguay, Portugal, Republic of Korea, Slovenia, Switzerland, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, Venezuela (Bolivarian Republic of), Vietnam.
[572] Algeria, Bangladesh, Burundi, China, Congo, Côte d'Ivoire, Ethiopia, Indonesia, Kenya, Kyrgyzstan, Maldives, Morocco, Nigeria, Qatar, Russian Federation, Saudi Arabia, Togo, United Arab Emirates.
[573] Botswana, Ghana, India, Namibia, Philippines, South Africa.
[574] UN HRC (2016) A/HRC/32/2, Thirty-second session, Report of the HRC on its thirty-second session, A/HRC/32/L.2/Rev.1. para 225.
[575] ILGA and Arc International (n 8).

halt the original Resolution 32/2 through a draft resolution at the ECOSOC. The African Group requested to defer consideration of and action on HRC Resolution 32/2 (creation of the UN Independent Expert). This was justified to allow time for further consultations to determine the legal basis upon which the mandate of the SP established therein would be defined.[576] Eight Latin American States introduced a counter-amendment to contest the African Group's proposal.[577] It was successful – but by a tight margin of 7 votes (including 13 African governments that did not support the 'African Group' language opposing the mandate).[578] After the third committee, the African Group tried to block the mandate via the UNGA. Specifically, the representatives of Burkina Faso, speaking on behalf of the African Group, submitted a verbal amendment to block financial support for the UN Independent Expert on SOGI.[579] Mobilization by the states that had supported the SOGI resolution through all the stages (the HRC, the ECOSOC and the UNGA) showed strong opposition to the attempts to undermine the integrity of the HRC.[580] It also helped increase awareness of the importance of the issue and single out countries and publicly shame them for overt attempts to defame the integrity of the international human rights infrastructure. An attempt to block the appointment of the Independent Expert on SOGI

[576] Arc International, "United Nations SOGI mandate safeguarded in face of hostility", 21 November 2016., at http://arc-international.net/united-nations-sogi-mandate-safeguarded-in-face-of-hostility/. Accessed on 30 November 2016.; Also, Munira Ali, Lorna McGregor, Daragh Murray, Patricia Palacios Zuloaga, Sir Nigel Rodley, Clara Sandoval, Ahmed Shaheed (n 8)

[577] ILGALAC, 'Urgent Action Needed: SOGI Independent Expert STILL At Risk!' (2016) <http://ilga-lac.org/en/urgent-action-needed-sogi-independent-expert-still-risk/> accessed 9 January 2017.

[578] ibid.

[579] OHCHR, "Council establishes mandate on protection against violence and discrimination based on sexual orientation and gender identity." At http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20220., Accessed on 8 January 2017.; Arc International, "United Nations SOGI mandate safeguarded in face of hostility", 21 November 2016., at http://arc-international.net/united-nations-sogi-mandate-safeguarded-in-face-of-hostility/. Accessed on 30 November 2016.; Also, Munira Ali, Lorna McGregor, Daragh Murray, Patricia Palacios Zuloaga, Sir Nigel Rodley, Clara Sandoval, Ahmed Shaheed (n 8)

[580] In addition to the state mobilization, 870 organisations around the world came together to show support to the mandate and its work, and regional human rights mechanisms had expressed their support for the Independent Expert work. See at: http://www.ishr.ch/news/lgbti-rights-general-assembly-rejects-attempt-halt-work-uns-new-independent-expert., accessed on 3 January 2017

was defeated at the UNGA by a recorded vote of 84 to 77, with 16 abstentions.[581] Finally, the UNGA's Third Committee (Social, Humanitarian & Cultural Issues), voting 111-2 with 59 abstentions, rejected the proposition to halt the work of the already appointed Independent Expert on SOGI.[582] The final attempts to block the new mandate-holder were made in unprecedented ways for the UN. The opposing countries tried to block financial support for the Independent Expert, a move that had never been seen before. Indeed, the group attempted to stop funding for the mandate as well as for a few other country-specific UN experts (Burundi, Iran, Syria, the Occupied Palestinian Territories and Belarus).[583] The UNGA's Fifth Committee (Administrative & Budgetary) was requested to 'stay out of politics' and concentrate on budgetary issues in compliance with its mandate.[584] With the Fifth Committee rejecting the financial constraints on the mandate, the final battle for the opposing states was lost.

6. Dissecting Transgender Rights Language in the Prism of the SOGI resolutions

The analysis of the three resolutions illustrates clear progress in understanding of the concept of SOGI, as well as problems surrounding the issue. If, for example, in 2011, the proposal was to open dialogues about 'discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity,'[585] in 2014 the HRC was a bit bolder as it made an inquiry about how good practices could be

[581] International Service for Human Rights, 'LGBT rights | Any further attempts to halt work of UN's independent expert must be resisted', 1 December 2016., At http://www.ishr.ch/news/lgbt-rights-any-further-attempts-halt-work-uns-independent-expert-must-be-resisted., accessed on 3 December 2017.
[582] ibid.
[583] International Service for Human Rights, 'UNGA71 | Last minute attempt to choke UN funding for human rights', 22 December, 2016. At http://www.ishr.ch/news/unga71-last-minute-attempt-choke-un-funding-human-rights., accessed on 23 December 2016.
[584] ibid.
[585] UN HRC Human rights, sexual orientation and gender identity (2011) A/HRC/17/L.9/Rev.1.

shared with a view to 'overcoming violence and discrimination, in application of existing international human rights law and standards to SOGI'.[586] In the next step for the 2016 resolution, the HRC went even further to ask the newly appointed UN Independent Expert on SOGI to 'assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity'.[587] All three documents have a common trend, which is exploring the discriminatory laws and practices that affect people's SOGI. A criticism that should be made against the resolutions and the process of getting SOGI rights recognized at the UN is its general approach. While it is important to acknowledge that these resolutions have indeed created a framework in which other human rights bodies then can develop group or theme-specific jurisprudence (e.g., transgender-specific rights), it is also true that such a great (although justified) focus on discrimination has meant that specific aspects of individual sub-groups within the 'sexual minority' category have been somewhat overlooked. Specific rights for sub-groups versus the common human rights framework for the wider LGBTIQ group needs further exploration, which is attempted in the next chapter. However, it is important to note that the HRC resolutions are not considered in isolation. As outlined in this chapter, the specific language contained in the Yogyakarta Principles as well as jurisprudence from the UN human rights mechanisms should be complementary to the framework language proposed by the HRC.

[586] UN HRC Human rights, sexual orientation and gender identity (2014) A/HRC/27/L.27/Rev.1.
[587] UN HRC Resolution on Protection against violence and discrimination based on sexual orientation and gender identity (2016) A/HRC/RES/32/2.

7. Conclusions

The recognition of transgender persons and in particular the establishment of gender identity under international human rights law has been a long process that will continue to develop. The short overview of the UN human rights mechanisms shows that progress has been made towards the recognition of underlying principles of human rights. Although transgender rights are not clearly part of the international human rights frame, they have made some inroads into the system via treaty bodies' recommendations, both concluding observations and some general comments on the treaties, the SPs, and the UPR. The drafting and endorsement of the Yogyakarta Principles have been a milestone in advancing transgender rights, and while this is a progressive move towards recognizing the sub-group-specific and identity-based right for transgender people, it still leaves a concern as to how general human rights apply specifically to transgender people. In the context where most attention is paid to the underlying principles of human rights, which related equally to the wider group of 'sexual minorities', claiming a specific right becomes somewhat challenging, in terms of both establishment and implementation.

With this in mind, what preceded the appointment of the UN Independent Expert on SOGI should never be underestimated. Early feminist activism for norm-creation at the UN, the Brazilian Resolution and years of rejection of LGBTIQ activists created a clear and opportune foundation for advancing SOGI rights within the UN system and beyond. The recent history of transgender people has shown that, despite immense tensions both within the transgender community and other 'sexual minorities', rejection,

medicalization and denial of transgender embodiment, political recognition has been made possible both within the UN and regional mechanisms. Some drawbacks should also be highlighted, however. In particular, a one-size-fits-all approach does not seem to work for individual groups of LGBTIQ community.

This chapter has attempted to illustrate the politics behind the making of gender-identity norms in an international context. It also showed the progression in making wider SOGI rights and advancing normatively – although it must be acknowledged that transgender rights and specific norms related to the subjective experiences of non-binary gender are overshadowed by the wider SOGI rights frameworks. It is hoped, however, that the new process of redrafting the Yogyakarta Principles will shed some light on transgender-specific norms and definitions.

Chapter IV

Examining the Applicability of International Human Rights Law Through the Framework of Human Rights Principles and Substantive Rights

1. Introduction

International human rights protection mechanisms, while still not comprehensive, provide a baseline structure for SOGI rights. Due to the historical journey in which transgender politics developed and obtained access to rights, tensions persist over how international human rights law applies to SOGI, the wider group of LGBTIQ, and more specifically to transgender persons. In the early days of political activism, disagreements within the transgender community and their identitarian position within the wider 'sexual minority' were rather strong, which might have hampered the advancement of transgender rights. At the same time, over the years the collective ask for non-discrimination against 'sexual minorities' did not pay much attention to the identity-specific requirements of transgender groups.[588]

Transgender language, as argued in Chapter Four, did not appear in international human rights law until relatively late. Although relevant transgender-rights language already existed in the 1990s,[589] only in the mid-2000s did international fora such as the UN start differentiating the specific needs and challenges of transgender persons.

[588] Minter (n 63) 143.
[589] For example, see Bill of Gender Rights' in the USA in 1991, Gender Rights agreed in 1996.; Also, Helmut Graupner and Phillip Tahmindjis, *Sexuality And Human Rights* (Routledge 2005).

While international human rights law has been explicitly interpreted to apply to SOGI, and protection frameworks have been extended to LGBTIQ groups, two alternative frames of protection are usually discussed in the context of transgender rights. The first relies on the underlying principles of human rights and looks at LGBTIQ groups as a whole, and the second is interpreted to emphasize specific rights of transgender persons. Chapter Three illustrated the journey of recognizing transgender rights in international standards. It specifically studied three major HRC resolutions adopted in the last six years that provide the grounds for non-discrimination claims. As illustrated in those resolutions, principles of non-discrimination and equality have traditionally been the main framework within which common identities such as 'sexual minorities' or 'sexual orientation' were discussed.[590] Perhaps that one-size-fits-all approach limited transgender groups to collectively organize themselves for a new identity label. It is true that the co-label that transgender groups carried together with the other 'sexual minorities' did not help them much to frame their own. To better understand the general-framework-versus-specific-rights dynamic, this chapter offers further investigation and research into the topic.

Furthermore, the chapter continues to examine the applicability of international human rights law to transgender persons, as well as the tension between underlying principles of human rights and transgender-specific rights. In trying to uncover the limitations of human rights law in providing relevant protection for transgender persons, it will study the principles of equality, dignity and non-discrimination versus specific rights (the right

[590] O'Flaherty and Fisher (443).

to privacy and the right to personhood, in particular) to ascertain the limits and possibilities for the protection of transgender persons' rights.

As with the thesis as a whole, this chapter is limited by not providing insights from transgender and LGBIQ movement on mobilization and advocacy. While recognizing the reductive nature of desk-based research and analysis, the chapter uses the available literature as an opportunity to understand the common normative frame of human rights law and specific rights related to transgender people. By critically analysing the available legal framework and its limitations, as well as the making of transgender specific norms, it is hoped that the chapter will shed some light on the possible advancement on this issue.

This chapter examines the rights specific to transgender persons, particularly gender identity and privacy rights. Due to its intrinsic link with sexual orientation, it will also make reference to sexual orientation where relevant. However, it should in no way be understood that sexual orientation is a subject of the analysis in the thesis or in this particular chapter.

The chapter will also explore the rights of transgender persons under international human rights law and the limitations of such protection, if any. After cementing a foundation for claims by transgender persons in the general human rights protection framework, it will analyse human rights claims in more detail, basing individual rights claims on the underlying principles of human rights: equality, non-discrimination and dignity. This

then will be used to further examine other substantive rights for transgender people. Like the previous chapters, however, this chapter also relies heavily on the case law from the ECtHR and to some extent at the UN. Where available, other regional mechanisms and jurisprudence that highlight the issue of SOGI are also referenced below.

2. Transgender Persons and the 'Sexual Minority' Rights Framework

Categories of 'sexual minorities' have fragmented over time, encompassing new sub-groups or identities. In the early days, transgender groups (as a sexual minority) did not collectively organize to assert a new identity. Rather, as examined in Chapters One and Two, the label emerged from medical discourse.[591] And, as argued in Chapter One, such external interference became the core factor for transgender organization and political activism against the medical profession and more generally for the assertion of their rights and freedoms.[592]

In order for transgender people to obtain rights and freedoms, a step forward was to organize under a minority framework of some sort, as well as to develop their identity. The establishment of such an identity, however, proved to be a difficult process, not only for the transgender communities, but also for feminist and LGBIQ representatives. As noted in Chapter One, some radical feminists hold strong negative opinions about the inclusion or recognition of transgender women in women's and feminist movements.[593] For the transgender community, framing their identity as a minority could bring

[591] Chapter 2.
[592] Chapter 1.
[593] Chapter 1 .

advantages, but framing themselves as a distinct minority under the LGBTIQ umbrella could bring even greater advantages. In this context, the dichotomy between aspiring for 'simply human rights' and for specific 'transgender rights' has earned not only a particular theoretical and practical interest in terms of establishing norms for the protection of transgender people but also in understanding the limitations of such a framework.

The common frame of LGBTIQ, or SOGI, can be both empowering and disempowering for transgender individuals, for example when claiming the right to non-discrimination. Outwardly, such a frame can be helpful for social mobilization under the LGBTIQ umbrella. At the same time, however, it can affect the desire of the sub-group of transgender people to identify themselves in this way. The varying impacts of this frame underscore the fact that the transgender movement has a rich history of identity tensions rooted in conflicts that have divided and sometimes polarized the gay movement from the beginning.[594] Those conflicts largely relate to the essentialist view versus the social-constructionist understanding of sex and gender. As Shannon Minter noted on this, changes in the social meaning of gayness and gender have been blended and theoretical discussions over the relationships among LGBTIQ groups have been a central feature of gay politics.[595] In addition, throughout the 1990s, when the transgender movement was emerging and developing, it was only natural that to ensure the application of the human rights law to all the LGBTIQ categories, no sub-category could be seen on a parallel

[594] Kendall Thomas, 'Are Transgender Rights (In)human Rights?' in Transgender rights', Paisley Currah, Richard M. Juang, Shannon Price Minter (Eds.), 'Transgender rights' (The University of Minnesota Press, 2006).; Also, Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7 (2) Constellations, 323.
[595] Currah and Minter (n 67).

advocacy front. This is well illustrated in writings from the 1990s, in particular on sexual orientation and human rights. Eric Heinze, in his seminal 1995 book *Sexual Orientation – A Human Right: An Essay on International Human Rights Law* outlined sexual orientation rights as fundamental and equally urgent.[596] Although supportive of human rights claims by sub-groups, he believed that for the purpose of human rights law, 'gender identity may be included within (or may supplement) the concept of sexual orientation'. [597] Heinze focused on the general equality and non-discrimination framework for LGBTI, asserting that in the struggle for human rights protection, similarities were more important than differences.[598]

Heinze's approach to gender-identity rights is not unusual if put in context. In the early 1990s, transgender rights had yet to emerge, and human rights discourse was yet to develop. A brief survey of transgender rights cases before the 2000s shows that even claims brought to regional or international human rights bodies did not make clear identity-based statements for transgender rights.[599] Other scholars, such as Robert Wintemute, Laurence Thomas and Michael Levin, and Michael Goodhart took a similar route, arguing that gender identity was part of sexual orientation.[600] Wintemute also proposed a framework that would help to examine sexual-orientation rights, meaning that this would also include transgender rights: a) non-discrimination, b) privacy rights, and

[596] Eric Heinze, *Sexual Orientation: A Human Right, An Essay on International Human Rights Law*, (Martinus Nijhoff Publishers 1995) 21.
[597] ibid.
[598] ibid.
[599] Particularly before the *Goodwin* case in 2002
[600] Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press 1995).; Michael Goodhart, *Human Rights, Politics and Practice*, (OUP 2009) 375.; Laurence Thomas and Michael Levin, *Sexual orientation and human rights* (Rowman & Littlefield Publishers 1999).

c) protection of other rights.[601] Wintemute, however, did not refer to gender-identity rights specifically, leaving room for further interpretation as to where transgender rights would fit under this framework.

The tensions within queer theory and transgender groups are well reflected in writings on human rights and SOGI. For example, some theorists openly opposed transgender-specific rights, noting that transgender people should be advocating for 'simply human rights'.[602] The fact that transgender people are human beings, means that by virtue, they deserve the protections to which all human beings are entitled.[603] While this is an important point and true in relation to all LGBTIQ persons, it also contains an element of the disputed 'one-size-fits-all' approach, spurring debates over the dangers of a common anti-discrimination frame and identity politics within the 'sexual minorities' group.

A group of academics and practitioners that took a different approach from 'one-size-fits-all' in the 2000s found themselves criticizing the 1990s generation of writers. As clearer gender-identity language appeared in academic journals and in material distributed for activism, education on SOGI issues as well as differences and similarities became easier to understand. According to O'Flaherty and Fisher, transgender rights were marginalized more than sexual orientation in the UN debates on human rights.[604] Therefore it was significant to spell out specific transgender rights, grasp the experiences and the diversity

[601] Robert Wintemute (n 595).
[602] Currah and Minter (n 67).
[603] Currah and Minter (n 67).
[604] O'Flaherty and Fisher (n 443).

of transgender people and enable their rights claims to be adjudicated.[605] Those sentiments in fact have proved important in transgender community mobilization. Indubitably, arguments can be made that identity and groups-specific rights claims for transgender persons can be lost if too much focus is made on wider issues of SOGI, or even issues of human rights more broadly. For example, transgender activists argue that in the existing legal regime transgendered people are viewed as 'non-persons, with no right to marry, to work, to use a public bathroom or even to walk down the street in safety'.[606] That assertion stems from the fact that transgender people have sought an identity that is unique to their embodiment and subjective experiences. And if the protection framework for transgender persons does not reflect their social, historical and political identity as they see it, the framework fails to serve the purpose of the protection of their rights and freedoms. Without a connection between the formulation of human rights law and transgender people's lived experiences, identifying difficulties faced by transgender persons without 'strategic transgender human politics', a new framework for protecting transgender people's rights would be impossible.[607] Indeed, transgender experiences can only validate the writings by authors with the purpose of providing a greater protection framework for transgender persons.

Ascertaining identity has meant more for transgender people then just a recognition that does not grant actual rights. By being able to distinguish themselves from a common category of 'sexual minorities' or the LGBTIQ umbrella, transgender communities began to have justifications for specific standards separate from common, underlying principles

[605] O'Flaherty and Fisher (n 443).
[606] Thomas (n 594).
[607] Thomas (n 594).

of human rights mechanisms and policies. A problem that some argue stands in the way of a transgender identitarian agenda, however, is the fixed transgender identity versus non-binary gender discourse. Identities are inherently fixed, which then may become the foundation for citizenship rights claims.[608] In the case of transgender persons, however, this may not always be the case. The problem lies in 'gender identity' as a restrictive concept.[609] Indeed, a clear notion of gender identity as it relates to transgender people will privilege the notions of a clear and coherent identity over concepts of blurred identifications, such as non-binary gender identities.[610] The conflicting nature of transgender identity (fixed categories of transgender identity versus non-binary, fluid genders) has also had a wider impact on the development of international human rights law and the protection frame, which continues to impact how the human rights framework develops, in particular within closed settings. According to Kendall Thomas, to tackle the dilemma of clear gender identities against blurred gender, transgender activism should pursue a complex and sophisticated double strategy.[611] First, it should demand that the state abolish laws regarding gendered forms of being and seek a political order in which they can freely exercise their gender. And second, the strategy should include 'empty space' in the law, which includes writing non-identitarian language into anti-discrimination laws, meaning that such laws apply to all genders. Such laws, he notes, should include any gender, including those with no gender at all.[612] This theory, however, risks the same criticism that can be applied to the general human rights law

[608] David Buckingham, 'Introducing Identity' in David Buckingham *Youth, Identity, and Digital Media* (The MIT Press, 2008) 1–24.; Also Thomas Janoski and Brian Gran, 'Political Citizenship: Foundations of Rights' in Engin F. Isin and Bryan S. Turner (eds) *Handbook of Citizenship Studies* (SAGE 2002).
[609] Thomas (n 594) 311.; Also, Waites (n 103) 137-156.
[610] Thomas (n 594) 320; Brown (n 594) 323.
[611] Thomas (n 594) 320; Brown (n 594) 323.
[612] Brown (n 594) 321.

framework and its application. If the concept of transgender is more than a gender identity, transgender activists should seek transgender-specific rights in addition to common principles that have universal applicability.

There is, however, a fear that if too many rights are granted to sub-groups, it may lead to an overregulation of the identity of transgender people. For example, Wendy Brown notes that the designation of a particular identity category as worthy of rights 'may entail some protection from the most immobilising features of that designation but such rights also reinscribe and regulate the category to which they apply'.[613] This means that a regulatory dimension of identity-based rights emerges to the extent that rights are never deployed freely, but within a discursive, hence normative context, precisely the context in which the identity category is 'iterated and reiterated'.[614] Brown argues that legal theorists concerned with identity categories (not just gender) not only turn to different dimensions of the law, depending on the identity category with which they are concerned, 'but they often figure the law itself in a quite incommensurate way'.[615]

The challenges and complexities attached to gender should not be underestimated, in particular when applying the normative frame of human rights law. For a relatively small, marginalized group such as the transgender community, association with wider groups of LGBIQ can indeed provide wider access to the, albeit more generic, international frame of protection. However, such an association also carries a possibility that, if strongly blended with the wider 'sexual minorities' group, they will no longer be

[613] Brown (n 594) 321.
[614] Brown (n 594) 321.
[615] Brown (n 594) 321.

perceived as a unique group, affected by normative or social frameworks, and thus worthy of rights.

Whether via the common framework of underlying principles, or a specific-rights framework, transgender communities seek normative recognition in international human rights law. Each frame, however, to some extent fails to acknowledge the role and importance of the other. As outlined above, a frame based on underlying principles of human rights fails to consider the specific needs and human rights abuses that transgender people experience. On the other hand, a transgender-specific rights framework seems to prioritize a gender-identity right as a right specific to transgender people, thus missing the opportunity to connect with other rights. The limitations also demonstrate the gaps in law and challenges for global norms to adapt to the subjective embodiment of a particular group. To address these gaps, however, connections should be made between the frameworks. Instead of using the two approaches as opposing concepts, they should be applied together to create a comprehensive protection framework for transgender persons. The next two sub-chapters therefore will look into each of the alternative frames and their limitations as it applies to transgender persons.

3. Transgender People Through the Prism of Underlying Principles of Human Rights Law: Dignity, Equality and Non-discrimination

Equality and non-discrimination, coupled with the concept of dignity, are probably one of the most researched areas of human rights, from moral, philosophical, political and

legal theoretical perspectives.[616] It is not the purpose of this section to go into the ontology of egalitarianism, the roots of *dignitas*[617] or the variations of the concept of equality. For the purposes of this thesis, however, it is still important to establish the foundation upon which the modern legal concepts of equality and non-discrimination are based. This will help to develop linkages between underlying principles of human rights and their application to transgender people.

International law places human dignity, equality and non-discrimination at its heart.[618] These principles are the foundation of the UN charter and the Universal Declaration of Human Rights (UDHR). All three principles that are considered underpinning principles of human rights – dignity, equality and non-discrimination – can be characterized as a kind of *Grundnorm*, a ground of normativity within the human rights system.[619]

The value of equality, dignity and non-discrimination remains core in moral, political and legal philosophy. It is, however, argued that equality is a legal principle of fundamental value. It provides a basis for personal development and individual freedom.[620] The supporters of this argument assert that equality is one of the basic tenets of almost all contemporary moral and political theories, where humans are essentially equal, of equal

[616] For example, see Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 American Journal of International Law 848-54; Stephen Riley, 'Human dignity: comparative and conceptual debates' (2010) International Journal of Law in Context.; Susie Cowen, 'Can Dignity guide South Africa's Equality Jurisprudence?' (2007) 7(2) Human Rights Law Review, 299-329.; Evadne Grant, 'Dignity and Equality' (2007) Human Rights Law Review 299-329.; Hubert Cancik, 'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, De Officiis I, 105-107' in David Kretzmer and Eckart Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Martinus Nijhoff, 2002) 19-27.; Immanuel Kant, *The Moral Law: Groundwork of the Metaphysics of Morals* (first published 1785, Hutchinson 1948) 434–440.; Rex D. Glensy, 'Right to dignity' (2011) 43 Columbia Human Rights Law Review, 65.; Rory O'Connell, 'The role of dignity in equality law: Lessons from Canada and South Africa' (2008) 6 (2) International Journal of Constitutional Law, 267-286.

[617] Oscar Schachter, 'Human Dignity As A Normative Concept' (1983) 77 The American Journal of International Law.

[618] See for example UDHR, Article 1 'All human beings are born free and equal in dignity and rights.' Universal Declaration of Human Rights, 1948, UNGA Res 217A (Ill), UN Doc A/81O at 71 (10 December 1948) ('UDHR')

[619] Riley (n 616).

[620] See for example Louis P. Pojman and Robert Westmoreland (Eds) *Equality* (Oxford University Press , 1997) 1.

worth, and should have this ideal reflected in the economic, social, and political structures of society.[621] Similarly, critics argue that 'dignity as a value and right lacks a sufficiently clear meaning to serve usefully as the dominant conceptual tool'[622] and that it remains a 'value that does not have clear political or moral correlates'.[623] The most frequent inquiries proposed in the context of dignity are in relation to its meaning (right or value) and the relationship between dignity and other rights and value systems.[624] Dignity is understood as a core for a number of normative claims, though it does not itself have a normative character.

Non-discrimination on the other hand is regarded as a normative expression of equality. These two intrinsically linked concepts have had a long-lasting effect on international human rights law. Manfred Nowak argues that, in fact, equality and discrimination are not self-defining concepts and both need interpretation through normative frames. In his commentary, Nowak notes that 'the content and reach of the principles of equality and non-discrimination are not agreed'.[625] He nevertheless examines them in legal theory as a red thread throughout the International Covenant on Civil and Political Rights (ICCPR).[626] Other legal theorists, such as Bertrand Ramcharan, also comment that the principles of equality and non-discrimination are widely acknowledged as forming part of international customary law,[627] and that therefore the concepts should not be

[621] ibid.
[622] Cowen (n 616).
[623] Riley (n 616).
[624] Cowen (n 616).
[625] B.G. Ramcharan, Equality and Nondiscrimination' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, (Columbia University Press 1981) 246-69.
[626] Manfred Nowak, *UN Covenant On Civil And Political Rights. CCPR Commentary* (2nd edn, NP Engel 2005) 600.
[627] Ramcharan (n 625) 249.

separated.[628] Ramcharan, while arguing that equality and non-discrimination constitute part of customary international law, asserts that the principles of equality and non-discrimination are part of international *jus cogens*, peremptory norms, binding on all as superior law.[629] He based his arguments on the interpretations and academic work of authoritative legal institutions such as the International Law Commission and the International Court of Justice, state practice, including pronouncements by international conferences, and authoritative publicists.[630]

The vagueness of the concept of equality and the absence of a strict definition of it as a legal concept have spawned a multiplicity of ideas about the concept. As with the concept of dignity, criticism has been directed at whether equality should be understood as a value or a right that can be adjudicated.[631] In this regard, Jeremy Waldron has argued against equality being a foundation for all rights. In his thesis, he states that 'if there are any human rights, they are presumably to be secured for all humans equally. But that doesn't give us license to say that equality is the foundation of all rights, though again there may be independent arguments to that effect'.[632] Waldron addresses specifically the works of Andrea Dworkin, who argued for 'various conceptions of equality: equality of welfare and equality of resources'.[633] Dworkin argued in particular that equality should serve as a foundational principle.[634] Ramcharan seems to also support this idea by suggesting that 'although equality is implied in the fact that all human beings have the

[628] Ramcharan (n 625) 249.
[629] Ramcharan (n 625) 249.
[630] Ramcharan (n 625) 249.
[631] Nicholas Mark Smith, *Basic Equality and Discrimination Reconciling Theory and Law* (Routledge 2011).
[632] Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' (2013) New York University School of Law, Public Law and Legal Theory Research paper series working paper No. 12-73.
[633] Ronald Dworkin, 'What is Equality? Part 1: Equality of Welfare '(1981) 10 (3) Philosophy and Public Affairs, 185-246.
[634] ibid.

same human rights, the emphasis on equality indicates that it is a right additional to and independent of other specific enumerated rights'[635].

International human rights law has codified equality, dignity and non-discrimination. The prohibition of discrimination in Article 2(1) of UDHR serves as a basis for the obligation of states parties to ensure the rights of the two covenants that stemmed from the UDHR, without distinction, in particular, of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[636] Equality, dignity and non-discrimination constitute the dominant themes of the ICCPR. Equality is also implied in that the rights recognised by the covenant are rights of all human beings equally.[637] Article 2 of the ICCPR requires that state parties respect and ensure the rights recognised in the covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,[638] whereas Article 26 ensures a general right of equality, including a prohibition of discrimination and an obligation to take active measures against discrimination.[639] Those provisions are repeated in regional human rights conventions, which mostly provide an accessory prohibition of discrimination.[640] Both Articles 2 and 26 of the Covenant are referenced interchangeably to refer to equality, equality before the

[635] Ramcharan (n 625) 253.
[636] Nowak (n 626) 45.
[637] Ramcharan (625).
[638] Ramcharan (625) 256.
[639] Nowak (n 626) 45.
[640] See for example, African Charter on Human and People's Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 ('African Charter on Human Rights').; OAS Inter-American Convention on Human Rights, Inter-American Specialized Conference on Human Rights, San José, Costa Rica, OAS NO. 36, 22 November 1969 ('Inter-American Convention on Human Rights')., Arab Charter for Human Rights, League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 International Human Rights Report 893 (2005), *entered into force* March 15, 2008**. ('**Arab Charter on Human Rights**'),** and European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended, entered into force 3 September 1953) ('European Convention on Human Rights') all contain provisions of non-discrimination.

law, equality before the courts, equal protection of the law, equality of the sexes, non-discrimination and non-distinction. [641]

Regional human rights mechanisms all emphasize the principles of non-discrimination, equality and dignity. Article 24 of the Inter-American Convention on Human Rights (IACHR), for example, emphasizes that '[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.'[642] Article 10 of the same convention outlines that '[e]veryone has the right to have his honor respected and his dignity recognized.'[643] Notably, the Banjul Charter requires 'strict equality of all persons before the law' and 'respect of the dignity inherent in a human being and to the recognition of his legal status.'[644] The CoE inserts a specific article on non-discrimination in the ECHR, stating that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'[645] The Arab Charter on Human Rights (ACHR) too outlines principles of equality, non-discrimination and dignity as a common ground for the document.[646]

All of the regional human rights bodies, including the CoE, the Organization of American States (OAS) and the African Union, have recognized SOGI rights. The CoE

[641] Ramcharan (625) 251.
[642] Inter-American Convention on Human Rights, Article 24.
[643] Inter-American Convention on Human Rights, Article 10.
[644] African Charter on Human Rights, Article 5.
[645] European Convention on Human Rights, Article 14.
[646] Arab Charter for Human Rights, Article 2.

now regularly adopts resolutions addressing discrimination on the basis of SOGI.[647] In particular, the Recommendations of the Committee of Ministers on measures to combat discrimination on grounds of SOGI CM/Rec(2010)5 serves as a standard in various areas of SOGI rights. Other bodies, such as the OAS, have also adopted multiple resolutions to address discrimination against LGBTIQ people.[648] The ACHPR also adopted a resolution to emphasize non-discrimination principle in protecting SOGI rights.[649]

Core principles – dignity, equality and non-discrimination – and their contestation have been best demonstrated in the SOGI-rights framework. In fact, there has been a gradual trend towards recognition of freedom from state interference in sexual conduct and non-discrimination based on sexual orientation.[650] Laurence Helfer suggests that the core component to ensuring equal protection and non-discrimination would be the right 'to develop one's personality and dignity'.[651] Helfer himself, writing in 1985, made an important connection between sexual orientation and human rights, expanding sexual orientation rights into the mainstream human rights discourse by applying a language of 'personality', 'dignity', and 'equal protection'. Again, historical context becomes important in this case because gender identity – and transgender rights more specifically – were not subjects of discussion in the mid-1980s.

[647] See for example, CoE Committee of Minsters, Recommendation CM/Rec(2010)5.
[648] OAS has been adopting resolutions yearly since 2008. See, OAS Res AG/RES. 2887 (XLVI-O/16), (2016).; OAS Res AG/RES. 2863 (XLIV-O/14) (2014).; OAS Res AG/RES. 2807 (XLIII-0/13) (2013).; OAS Res AG/RES. 2721 (XLII-O/12) (2012).; OAS Res AG/RES. 2653 (XLI-O/11) (2011).; OAS Res AG/RES. 2600 (XL-O/10) (2010).; OAS Res AG/RES. 2504 (XXXIX-O/09) (2009).; OAS Res AG/RES. 2435 (XXXVIII-O/08) (2008).
[649] African Commission on Human and Peoples' Rights: Res 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (2014).
[650] Aaron Xavier Fellmeth, 'State regulation of sexuality in International Human Rights Law and Theory' (2009) 50 William and Mary Law Review, 797.
[651] Douglas L. Donoho, 'Relativism Versus Universalism in Human Rights: The Search Right and Cultural Relativism' (1985) 25 Virginia Journal of International Law, 869.

A number of human rights scholars recognize dignity, equality and a non-discrimination clause as the gateway for rights claims.[652] Further argumentation is made that just because the International Bill of Human Rights does not mention SOGI, it does not necessarily mean that LGBTIQ people are not protected from discrimination under international human rights law[653] or that no freestanding rights to equality exist in addition to those explicitly listed.[654] Both Michael Thomas and Jack Donnelly provide the human rights frame for claiming rights, as well as creating a ground for developing other freestanding rights.[655] Donnelly placed issues of sexual orientation and human rights within the subjective experiences of the individuals' concerns and asserted that 'sexual minorities are in many ways no more analogous to women than they are to religious minorities. Although involving issues of sex and gender, and although women and homosexuals share many similar experiences of victimization, 'sexual minorities' also suffer in systematically different ways from women.'[656] Through that positioning as a 'sexual minority' group, Donnelly is able to develop a human rights framework via the minority-rights protection angle and already tested strategy for claiming non-discrimination. In doing so, Donnelly argues that in order to have a robust system of protection, it is important to provide an explicit list of the prohibited grounds of discrimination on SOGI.[657] He then calls for a commitment to the overriding objective of 'all human rights for all' to widen the scope of protection.[658]

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[652] ibid.
[653] Michael Thomas, 'Teetering On The Brink Of Equality: Sexual Orientation And International Constitutional Protection' (1997) 17 (2) Boston College Third World Law Journal. 365.
[654] Sophie M. Clavier, 'Objection Overruled: The Binding Nature Of The International Norm Prohibiting Discrimination Against Homosexual And Transgendered Individuals' (2011) 35 Fordham International Law Journal.
[655] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2003) 274-292.
[656] ibid.
[657] ibid.
[658] Ibid.

Donnelly proposes that a possible avenue for the inclusion of LGBTIQ persons under the equality and non-discrimination framework of the ICCPR, is Article 2 of the Covenant, and in particular the prohibition of discrimination on the grounds of 'other status' and 'sex'. Despite the limitations that the ICCPR might have, he suggests the 'interpretative incorporation of gay rights to be read as "sex" in Article 2 and to include sexual orientation'.[659] An example of this was given by the UN Human Rights Committee (HRCttee): in the first-ever sexual orientation and human rights case, it found a violation on the grounds of non-discrimination.[660] In fact, in applying the ICCPR non-discrimination framework to sexual orientation, the Committee took a disputed action. Although a 'clever and provocative' move by the Committee to find Australia in breach of Article 2 of the covenant, it provided no grounds for such a finding.[661] Conversely, such an interpretation of Article 2 of the ICCPR was not intended, especially at the time of drafting the provision, and second, that this is an interpretation that is not a widely held view even in legally advanced European countries.[662] While it was important to advance such rights within mainstream human rights law, it was largely seen as a disconnected from the spirit of Article 2 at its *travaux préparatoires*. Indeed, the Committee, without elaboration, simply stated, 'that in its view the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation',[663] inviting criticism for lack of depth and analysis on sex and sexual orientation, or other related issues.[664] However, as will be observed in the following chapters, international bodies often avoid such detailed definition of terms, leaving much room for interpretation by

[659] ibid.
[660] *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).
[661] ibid.
[662] Donnelly (n 655) 220.
[663] Donnelly (n 655).
[664] *Toonen v Australia* (n 660).

individual states. This is rather evident in the gender-identity and prison context, which will be discussed later and in particular in Chapters Five and Six. Following the *Toonen* case, the Committee reviewed a number of other cases on non-discrimination. These include *Young v Australia* and *X v Colombia*, both concerning discrimination on the grounds of sex or sexual orientation.[665]

The IACtHR has reviewed a few cases related to discrimination on the grounds of sexual orientation (*sexual minority status* – original emphasis). The first case within the Inter-American system to substantively address discrimination based on sexual minority status is *Atala v Chile*.[666] The Court found that a lesbian mother and judge, who was stripped of custody of her three daughters by the Supreme Court of Chile, had her rights violated. Specifically, the IACtHR found that the right to equality, together with the article on non-discrimination, and the right to private life of the IACHR had been violated.[667] Its ruling stated that 'a right guaranteed to all persons cannot be denied or restricted under any circumstances based on their sexual orientation. Doing so contravenes Article 1(1) of the American Convention.'[668] Two other cases against Colombia were considered at the IACtHR, which looked at sexual orientation as a ground for non-discrimination. In both cases – *Angel Alberto Duque v Colombia* and *Duque v Colombia* – the IACtHR examined complaints that surviving partners of same-sex relationships were denied a survivor's pension on account of their sexual orientation. The Court in both cases found

[665] *Young v Australia,* communication No. 941/2000 (2003) and *X v Colombia* , communication No. (2009) 1361/2005.
[666] *Atala Riffo and Niñas v Chile (Atala Riffo and Daughters v Chile)*, Merits, Reparations and Costs, Judgment of February 24 2012 (2012); accessed form http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf on 24 January 2015.
[667] ibid.
[668] Persad (n 401).

Colombia in breach of the principle of equality and non-discrimination.[669] It explained that the exclusion of same-sex couples from the right to a survivors' pension under the Colombian legislation applicable at the time of the facts (2002) had been discriminatory on the basis of sexual orientation.[670]

Possibly one of the landmark decisions on the issue of equality, non-discrimination and sexual orientation are the cases of *National Coalition for Gay and Lesbian Equality v Minister for Home Affairs* and *Satchwell v President of the Republic of South Africa,* both brought to the Constitutional Court of South Africa.[671] While both cases concerned discrimination on the basis of status, the Constitutional Court in both cases found that unmarried couples are equivalent to married couples, when the laws are inherently discriminatory.[672] In the latter case, the South African Court also looked at an earlier case from Canada, *Miron v Trudel*, which was considered by the Supreme Court of Canada in 1995, which had held marital status to be an analogous ground protected from discrimination.[673] In a similar claim in the case of *Egan v Canada*, the Supreme Court of Canada reviewed the exclusion of same-sex relationships from the common-law definition of marriage. Deciding the case in favour of same-sex couples' access to pension benefits equal to those of married couples, the Court concluded that sexual orientation was an 'analogous ground' to the other grounds covered by Section 15 of

[669] *Angel Alberto Duque v Colombia*., Report No. 5/14 (2 April 2014).; *Duque v Colombia* ((Preliminary Exceptions, Merits, Reparations and Costs) (26 February 2016, Series C No. 310).
[670] ibid.
[671] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999)**;** *Satchwell v President of the Republic of South Africa and Another* (CCT48/02) [2003] ZACC 2; 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) (17 March 2003).
[672] In *National Coalition for Gay and Lesbian Equality v Minister for Home Affairs (n 666)*, the judge said that the Aliens Control Act unfairly discriminated on the grounds of sexual orientation and marital status, by omitting to extend the benefits it conferred on spouses to permanent same-sex life partners; equally, in *Satchwell v President of the Republic of South Africa and Another (n 666)*, the court held that because same-sex couples were unable to marry legally in South Africa, conjugal approximations of legal marriage were the only life partnerships available to same-sex couples.
[673] *Miron v Trudel* [1995] 2 S.C.R. 418 (Canada).

the Charter (equality before the law).[674]

Some setbacks have also been seen in upholding the underlying principles. In *Kanane* (a case from Botswana*)* and *Banana* (Zimbabwe), the courts rejected the claim that there had been a violation of the principle of non-discrimination. The constitutions of both countries provide non-discrimination as a basic guarantee for human rights, as well as containing a list of prohibited grounds. In *Kanane*, the Court of Appeal asserted that public interest should be a factor when considering the legislation, in particular when such legislation reflects a public concern. Falling back on 'public concern', the Botswana Court of Appeal rejected the claim. A rather appalling paragraph contained in the Court's reasoning is that '[g]ay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution.'[675] On the other hand, in the *Banana* case, while also rejecting the claim, the Supreme Court of Zimbabwe rejected the idea of non-discrimination, claiming that the constitution guaranteed protection from arbitrary search and had 'nothing whatever to do with whether or not consensual sodomy is a crime'.[676]

The case of *Kenneth Suratt and Others v Attorney General*, reviewed by the Court of Appeal of Trinidad and Tobago, took the equality and non-discrimination discussion to another level. In fact the issue in question was the Equal Opportunity Act, which was argued as unconstitutional in several respects and for the purposes of SOGI rights, because it explicitly excluded sexual orientation from the prohibited grounds of

[674] *Egan v Canada* [1995] 2 S.C.R. 513 (Canada).
[675] *Utjiwa Kanane v The State* 2003 (2) BLR 67 (CA) (Botswana).
[676] *Banana v State* [2000] 4 LRC 621 (*Zimbabwe*).

discrimination.[677] The Court argued that because the act explicitly excluded sexual orientation from its definition of 'sex' (a prohibited ground for discrimination), it was unconstitutional.[678] In that case, the Court seemed to have looked at *Vriend v Alberta*, in which the Supreme Court of Canada reviewed the case of a college laboratory instructor, dismissed from job because of his homosexuality.[679] That Court reviewed the constitutionality of the Alberta Individual Rights Protection Act, which did not include sexual orientation as a protected ground, and held that the act was not in compliance with the Canadian Charter of Rights and Freedoms' equality clause.[680]

Indeed, discrimination takes place in different areas of life, and the case law that has been produced so far reflects that. What is important is that in almost all cases where non-discrimination is argued in sexual-orientation cases, it is applied in conjunction with substantive rights. It is also noteworthy that in most of the non-discrimination cases, an issue in question is sexual orientation. There are in fact few cases that reflect on gender identity and a non-discrimination clause specifically. For example, the well-known case of *Sunil Babu Pant and Others v Nepal Government and Others* specifically argued for the third gender while looking for recognition of transgender individuals as a third gender. The group also argued that the law prohibited discrimination on the basis of SOGI specifically, and remedies are provided by the state.[681] The Supreme Court of Nepal considered a much broader issue than possibly any other national court had done on this matter. The Court looked at whether LGBTIQ people were entitled to

[677] *Kenneth Suratt v* The Attorney General of Trinidad and Tobago [2008] UKPC 38.
[678] ibid.
[679] *Vriend v Alberta* [1998] 1 S.C.R. 493 (Canada).
[680] ibid.
[681] *Pant v Nepal (n 4)*.

constitutional and international human rights. In reviewing the case, the Court conducted a broader comparative analysis of the legislation and the case law available at that time, including the newly endorsed Yogyakarta Principles, to arrive at its conclusion. The Supreme Court in its judgment relied heavily on international standards and jurisprudence to find that transgender people did indeed face violence, stigmatization and discrimination,[682] and hence extended the protection framework of equality and non-discrimination to homosexuals and third-gender people.[683] The *Sunil Babu Pant and Others v Nepal Government and Others* case has had a great impact in expanding the rights of transgender persons, both in the region and internationally. It also became the very first case to recognize the rights of transgender people and allow their access to human rights under a gender self-determination framework, as discussed in Chapter Two.[684]

Another case that was recently decided from the Supreme Court of Nepal deserves to be highlighted here. In it, the Court looked at citizenship rights in the constitution of Nepal and held that it would be against human rights not to provide citizenship on the basis of identity.[685] In practice, this means that the government of Nepal will be obligated to develop specific laws regulating the granting of citizenship on the basis of gender, and to create an atmosphere for gender and 'sexual minorities' at the local level. In the petition, advocate Hari Phuyal and former Attorney-General Sujan Pant pleaded on behalf of the plaintiff. Together with the *Sunil Babu Pant* case, the latest developments in Nepal create

[682] *Pant v Nepal (n 4)*.
[683] *Pant v Nepal (n 4)*.
[684] Chapter 2.
[685] Madhav Dulal, 'New Jurisprudence in Citizenship: LGBTI can change their name and identity' (Pahichan 17 September 2017). At http://pahichan.com/now-lgbti-can-change-their-name-and-identity-in-citizenship/ accessed on 17 September 2017.

an exciting and an opportune legal environment for the realization of transgender rights.

Similarly, in a recent case from India, *National Legal Services Authority v Union of India and Others*,[686] non-discrimination against transgender persons (the term 'transgender' was defined by the Supreme Court broadly to include *hijras*, eunuchs, *kothis* and *aravanis*) was considered. While the case is very similar in nature to the previous case from Nepal, the Supreme Court of India also looked at the historic injustice against transgender people. The Court examined the existing legislation in the country to hold that, due to the absence of specific legislation protecting transgender people, the community faced discrimination in various areas of life. For this, the Court found the 'necessity to follow the international Conventions to which India is a party and to give due respect to other non-binding international Conventions and principles'.[687] The Court further referenced the Yogyakarta Principles and their relevance in application of human rights law to transgender persons. In holding the Indian government accountable, the Court ruled that 'Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature' and that '[t]ransgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender'.[688] The ruling in this case, *National Legal Services Authority v Union of India and Others*, together with that from an earlier case of *Naz Foundation v*

[686] *National Legal Services Authority v Union of India and Others* (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013).
[687] ibid.
[688] ibid.

Government of NCT of Delhi and Others,[689] create a strong ground for non-discrimination claims for SOGI. In another case on gender modification on identity documents, Mexico's Supreme Court of Justice held that protection had to be granted to a 'transsexual' and ordered that a new birth certificate be granted to him. Moreover, the Court underlined that the constitutional principle of non-discrimination and protection of human dignity had to be preserved.[690] Subsequently, in 2004 Mexico City amended its Civil Code to permit an individual to change the name and gender on their birth certificate.[691] Specifically, the Mexico City Civil Code was amended to allow modification of a person's birth certificate. Later in 2014, Mexico City also passed a law to permit transgender individuals to legally change their gender without a court order.[692]

Over the years, the meaning of non-discrimination has changed. That is particularly noticeable in the context of SOGI. If, for example, in early legal standards and cases no explicit mention of the concept of non-discrimination on the basis of SOGI as a prohibited ground is found, over the period under review, the use of the phrase 'other status' has become common. It indeed reflects the fact that the nature of discrimination has changed over time. 'Other status' grounds have become of a 'comparable nature to the expressly recognised grounds'.[693] For example, the CESCR has argued that the 'other ground' reflects on both the nature of discrimination as an act and on the covenant as a

[689] *Naz Foundation v Government of NCT of New Delhi and Others*, Writ Petition No. 7455/2001.
[690] Human Rights Watch, 'Important International Jurisprudence Concerning LGBT Rights' 29 May 2009.; at https://www.hrw.org/news/2009/05/25/important-international-jurisprudence-concerning-lgbt-rights#_National_Courts accessed on 9 March 2014.
[691] Austrian Red Cross, Mexico: Sexual orientation and gender identity (SOGI): COI Compilation, May 2017.
[692] ibid.
[693] UN ESCR Committee, General Comment No. 20 (n 515).

living instrument that is able to accommodate emerging challenges.[694] Some human rights mechanisms have also adopted specific language to ensure more openness to the protection of SOGI. The UN Committee Against Torture (CAT Committee) in its General Comment 2, while trying to reinforce the principle of non-discrimination towards LGBTIQ persons, specifically includes the language of 'gender', 'sexual orientation' and 'transgender identity.'[695] SOGI has progressively been added to the list of prohibited grounds by treaty bodies through their jurisprudence. Almost all treaty bodies and SPs mechanisms now include a non-discrimination clause in their recommendations in relation to SOGI.[696] For example, the CESCR has issued General Comment on the 'Right to sexual and reproductive health', 'Non-discrimination in economic, social and cultural rights', the 'Right to Social Security', the 'Right to Water', the 'Right to the highest attainable standard of health' and the 'Right to Work', all including reference to SOGI. Similarly, the CRC Committee has redrafted the commentary on the 'Right of the child to freedom from all forms of violence', 'Adolescent health and development in the context of the Convention on the Rights of the Child' and 'HIV/AIDS and the rights of the child' so that all now have some reference to the rights of LGBTIQ persons.[697] The CEDAW has also issued either general comments or concluding observations and reports that specifically outline protection frames for lesbian and transgender women.[698]

Such a wide recognition and acknowledgement of SOGI means that the treaty bodies

[694] UN ESCR Committee, General Comment No. 20 (n 515).
[695] UN CAT, General Comment No. 2 (Article 2) (2008) UN Doc CAT/C/GC/2., para. 21.
[696] See for example, UN CESCR, General Comment No 22 (Art 12) (2016) UN Doc E/C.12/GC/22.
[697] UN CEDAW, General Recommendation No 28 (Art 2) (2010) UN Doc CEDAW/C/GC/28.; para 18.; UN CEDAW, General recommendation No 27 (2010) UN Doc CEDAW/C/2010/47/GC.1. para 13.
[698] ibid.

have started to explicitly include the prohibited grounds of SOGI in the interpretation and implementation of the treaty they monitor. If in the early 2000s there was hardly a report by the SPs mechanisms containing LGBTIQ-related issues, nearly all reports now contain narrative on violations against LGBTIQ people. For example, at the latest (35th) session of the UN HRC in June 2017, up to 22 reports were received from various UN SRs that included the language of non-discrimination and SOGI.[699]

Establishing non-discrimination in regional human rights mechanisms has also taken time. The ECtHR, despite having ruled in the *Dudgeon* case (discussed in more detail below) that the applicant's right to private life had been violated, noted that, because it had found a breach of Article 8 (right to private life), it was unnecessary to consider the non-discrimination clause.[700] It took another 18 years for the ECtHR to establish that a difference in treatment based on sexual orientation was a violation of the applicant's rights under the non-discrimination clause. In the case of *Salgueiro da Silva Mouta v Portugal*, the ECtHR found a breach of the claimant's right to non-discrimination in conjunction with violation claims under privacy rights.[701]

Application of the non-discrimination clause to transgender persons was litigated slightly later. It was not until 2010 that the ECtHR issued a judgment – in *PV v Spain* – where it stated that 'transsexuals are entitled to the enjoyment of human rights, which are enshrined in the Convention without discrimination'.[702] In that case, however, the Court

[699] ILGA World, 'Email newsletter on "Analysis of UN Human Rights Council"', June 2017.
[700] Case of *Dudgeon v The United Kingdom (Application no. 7525/76),* 22 October 1981.
[701] *Salgueiro Da Silva Mouta v. Portugal* App no 33290/96 (ECtHR 21 December 1999).
[702] *PV v Spain* App no 38305/97 (ECtHR, 14 November 2000) para 31.

linked 'transsexuality' to *dysphorie sexuelle*, once again highlighting a heavy reliance on the medical model of transgender and 'transsexual' concepts.[703] More recently, however, without lengthy reasoning, the ECtHR clarified explicitly that all transgender people are protected on the grounds of gender identity too. In another case against Georgia, in 2015, the Court further reiterated that the prohibition of discrimination under Article 14 of the ECHR duly covers questions related to SOGI,[704] expanding the prohibited grounds for discrimination to include the protection of LGBTIQ persons.

On a few occasions, however, courts have also found a breach of dignity in cases of LGBTIQ persons. In 2010, the High Court of Uganda reviewed the case of *Kasha Jacqueline, David Kato Kisule and Onziema Patience v Rolling Stone Ltd and Giles Muhame*, where the applicants were contesting the state's conduct as interfering in their private lives in breach of their rights to human dignity and protection from inhumane treatment.[705] After some deliberation, the Court found that the applicants' right to human dignity and protection from inhumane treatment was threatened, thereby representing a violation of the country's constitution.[706] Another similar case considered earlier by the High Court was a claim of *Mukasa and Oyo v Attorney General, High Court of Uganda at Kampala*.[707] In that case, the Court ruled that the police and government officials had breached the constitutional rights of the appellant. The High Court relied on international standards and norms to argue for the grounds of underlying principles of human rights

[703] ibid.
[704] *Identoba v Georgia* App no 73235/12 (ECtHR, 12 May 2015).
[705] *Kasha Jacqueline, David Kato Kisule and Onziema Patience v Rolling Stone Ltd and Giles Muhame*, High Court of Uganda at Kampala (30 December 2010).
[706] ibid.
[707] *Mukasa and Oyo v Attorney General*, High Court of Uganda at Kampala (22 December 2008).

and their applicability in the case. Both of those cases concerned LGBTIQ activists in Uganda and their public activism for SOGI rights.

Possibly one of the most recent rulings linking dignity, equality and non-discrimination is in the case of *Caleb Orozco v AG of Belize*.[708] The claimant challenged section 53 of the 1981 Criminal Code of Belize, which read that 'every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years'. Finding the clause unconstitutional, the Supreme Court of Belize accepted the claims on almost all points and affirmed the protection grounds for SOGI to guarantee human dignity, right to privacy, right to freedom from discrimination, freedom of expression and the equal protection of the law.[709]

Those cases illustrate intrinsic links between the principles, but also as to how important they are in obtaining justice for those whose rights are violated. With the increased awareness of the issues of non-discrimination and SOGI, as well as legislative changes around the world to accommodate SOGI, case law asserting SOGI as a prohibited ground of discrimination is increasing. At the same time, the number of countries that recognize SOGI in their constitutions has also risen. At least 10 countries have constitutions that include SOGI as a protected ground.[710] It is also interesting to note that all three principles – dignity, equality and non-discrimination – have best been served in conjunction with substantive rights, particularly the right to private life. In other words,

[708] *Caleb Orozco v AG of Belize*, Supreme Court Claim No. 668 of 2010.
[709] ibid.
[710] Raub, Amy, Adèle Cassola, Isabel Latz, and Jody Heymann, 'Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions' (2016) 18 Yale Journal of Law and Feminism, 149-69.

underlying principles and substantive rights have had a mutually reinforcing effect in advancing SOGI rights, which further addresses the limitations imposed by the common principles versus specific-rights discourse. The rest of this chapter provides analysis of two specific rights that are argued to be specific for transgender persons.

4. Transgender Specific Rights

4.1. Are there really transgender-specific rights?

The question that is raised sometimes in relation to SOGI rights are new ones that fall outside the remit of the existing human rights framework. In fact, such was the position of hostile countries at the UN level too that used the argument to oppose SOGI resolutions at the HRC and even more, attempted to undermine already established mandate of the Independent Expert on SOGI.

This thesis has so far argued that there are transgender-specific rights, which are not a new set of rights instead are existing ones that need specific attention for transgender and other LGBIQ groups due to the historic oppression and abuse they have experienced. Specifically, for transgender persons, it includes their right to gender identity and recognition before the law. Like any other individuals, transgender persons are entitled to rights and freedoms enshrined in the International Bill of Human Rights and regional human rights instruments. Therefore, only those specific rights that are most discussed in the context of transgender persons are addressed in this thesis.

4.2. Gender identity and right to be recognized before law (right to personhood)

The right to identity includes the right to self-determination and the right to define one's own gender identity, as well as to express such identity. Gender identity as a right as understood today was first defined under the Yogyakarta Principles, which provide that

> gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[711]

Earlier, in 1996, a statement on the International Bill of Gender Rights was adopted at the International Conference on Transgender Law and Employment Policy asserting that 'gender identity was a fundamental right that allow individuals to define, and redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role'.[712] Paragraph 2 of the same document provides that 'given the right to define one's own gender identity, all human beings have the corresponding right to free expression of their self-defined gender identity'.[713] Internal experience, embodiment, identity and personhood repeatedly appear in the definition of gender identity.

In a philosophical tradition, identity can be defined as the connectedness of the general

[711] Introduction to Conference of International Legal Scholars, Yogyakarta, London., Nov. 6-9, 2006.
[712] International Bill of Gender Rights, 4 July 1996, Houston, Texas, USA. Available from http://www.transgenderlegal.com/ibgr.htm. accessed on 3 October 2014.
[713] ibid.

and the individual, that is, as sameness under discontinuous conditions.[714] Some scholars argue that the first conceptual application of term 'identity' occurred at the beginning of the nineteenth century. In *Presentation of My System of Philosophy*, Friedrich Schelling first conceptualized his system of 'absolute identity', which he further developed in later work.[715] Friedemann Pfäfflin argues that it is Schelling's work on identity with which 'he laid the foundation for identity to become a central *epistemological concept* of the modern history of philosophy'.[716]

Charles Taylor, in writing about personhood and personal identity, argued that every individual defines him or herself.[717] He wrote:

> I define who I am by defining where I speak from, in the family tree, in the social space, in the geography of social statuses and functions, in my intimate relations with the ones I love, and also crucially in the space of moral and spiritual orientation within which my most important defining relations are lived out.[718]

Taylor further provided two conceptions of persons, both of which share the ordinary notion of a person, defined by certain capacities:

> a person is an agent who has a sense of self, of his/her own life, who can evaluate it, and make choices about it. This is the basis of respect we owe persons… The central import of all this for our moral thinking is reflected in the fact that these capacities form an important part of what we should respect and nourish in human beings.[719]

Perhaps that understanding of personhood and its centrality to the UDHR served as a foundation for the arguments put forward by Heinze in his essay, 'Sexual Orientation – A

[714] Friedemann Pfäfflin, 'Remarks on the History of the Terms Identity and Gender Identity' (2011) 13 (1) International Journal of Transgenderism, 13-25.
[715] ibid.
[716] ibid.
[717] ibid.
[718] Charles Taylor, Sources of the Self: The Making of the Modern Identity, (Harvard University Press 1989) 27.
[719] Charles Taylor, 'The Concept of a Person', Philosophical Papers. Volume 1. (Cambridge University Press, 1985) 100.

Human Right', for a specific right to personhood in the context of sexual orientation. Heinze argued that human dignity, identity and personhood were indeed the core of sexuality and sexual orientation.[720] To qualify his argument, Heinze asked whether personhood itself implied the inner capacity of individual dignity and identity. If sexuality is not simply a part of the person, neatly divisible from the rest, nor merely a chimerical charade of fantasies or desires, but fundamental to individual existence, or more simply, fundamental to human existence,[721], does it not mean that sexuality, SOGI are core elements of personhood?

Personhood has long been a central principle of human rights. The UDHR makes a reference to human beings – 'all human beings are born free and equal in dignity and rights'.[722] To make a concept of personhood a human rights argument for legal purposes, Jens David Ohlin in his paper 'Is the Concept of the Person Necessary for Human Rights?' identifies three basic classes of arguments: 1) personhood as synonymous with biological human beings (*naturalistic* argument); 2) person in a *non-naturalistic* sense; and 3) personhood as a signal to the conclusion of an argument (*normative* use).[723] Although those three arguments do not necessarily exhaust all possible uses for the concept, they do nonetheless cover the vast majority of human rights claims about persons. Indeed, this further means that personhood is in fact a bundle of rights, entitlements, privileges, obligations and duties that are distributed to different types of

[720] Heinze (n 596).160-161.
[721] ibid.
[722] UDHR, Article 1.
[723] Jens David Ohlin, 'Is the Concept of the Person Necessary for Human Rights?' (2005). Cornell Law Faculty Publications, 434.

legal persons in different ways.[724] Furthermore, personification does not necessarily entail the same collection of rights, privileges and entitlements, or the same sort of capacities, for each person recognized.[725]

Gender-identity recognition in law has attracted attention since activists and transgender persons themselves have managed to achieve some recognition either at the national or international level. Legal recognition of individuals is enshrined under international human rights law and legal personhood is considered the 'benchmark' for the distribution of rights and entitlements in civil law.[726] In this respect, recognition of legal personality is linked to the prohibition of discrimination, which is necessary for the possession of human rights. It also shall serve as a precursor to legal capacity.[727]

The right to be recognized before the law is set out in core international human rights treaties.[728] Article 16 of the ICCPR provides that all human beings have the basic human right to be recognized as a person before the law.[729] According to this provision, everyone shall be granted the 'capacity to be a person before the law'. In other words, this means that anyone recognized in the law is a potential bearer of legal rights and obligations. As noted by Fernando Volio, legal personality is a crucial aspect of expressing oneself freely. In the words of Volio, legal personality

> distinguishes one man from others and permits him to assert his essential dignity

[724] Saru M. Matambanadzo, 'Embodying Vulnerability: A Feminist Theory Of The Person' (2012) 20 Duke Journal of Gender Law and Policy.
[725] ibid.
[726] ibid.
[727] Nowak (n 626) 369.
[728] UDHR Article 6.; ICCPR, Article 16.; CEDAW, Article 15.; CRC, Article 8.; American Convention on Human Rights, Article 3.; and African Charter on Human Rights, Article. 5.
[729] The French text states, '*Chacun a droit à la reconnaissance en tous lieux de sa personnalité juridique'*.
In Spanish, the Article reads, '*Todo ser humano tiene derecho, en todas partes, al reconocimiento de su personalidad jurídica'*.

> *erga omnes*. It concentrates the attention of the legal order upon each human being. It gives to the essential dignity of the human being reality in law. Without it, man would not be truly free, for he would be subject to injustice and injury without legal remedy.[730]

At the regional level, this right is enshrined in Article 3 of the IACHR[731] and in Article 5 of the Banjul Charter.[732] The right to be recognized before the law was not included in the European instruments, however. In particular, the ECHR does not contain such wording, nor does it explicitly mention the right to personhood, as it seemed 'unnecessary' to specify the wording when such 'could be deduced from other articles in the Convention'.[733] The impact of that approach by the ECHR on the interpretation of the Convention and both the right to privacy and personhood are discussed below. It is clear from the *travaux préparatoires* of the ECHR, however, that personhood was understood as a core to the right to private life.[734]

Article 16 of the ICCPR, on the other hand, stipulates that 'everyone' has the right to have his or her status and capacity recognized in the legal order.[735] Everyone, 'a person', with status and capacity in the legal order – each has rights and assumes obligations. At the same time, the capacity of human beings to be persons before the law begins at birth and terminates at death.[736] In addition, an important term in Article 16 is 'recognition'.

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[730] Fernando Volio, Legal Personality, Privacy, and the Family, in L. Henkin (Eds.), The International Bill of Rights: The Covenant on Civil and Political Rights (Columbia University Press 1981) 186.
[731] Inter-American Convention on Human Rights, Article 3 (Right to Juridical Personality): Every person has the right to recognition as a person before the law.
[732] African Charter on Human Rights, Article 5: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status (…).
[733] Nowak (n 626) 369.
[734] European Commission of Human Rights, Preparatory Work on Article 8 of the European Convention on Human Rights, DH (56) 12., Strasbourg, 9 August 1956. At http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf. Accessed on 13 March 2015.
[735] ICCPR, Article 16.
[736] Nowak observes that the duty set forth in Article 24 (2) ICCPR to register every child immediately after birth plays an essential role in the recognition and protection of legal personality. See, Nowak (n 626) 372.

As Volio notes, this term was used to reinforce the right set out in that provision by stressing that the right should be 'recognized' as a fundamental human right rather than 'conceded' by virtue of the covenant.[737] The use of the term 'everywhere' was also the subject of debate during the *travaux préparatoires*. According to Volio, the inclusion of the term 'everywhere' meant that 'a state party cannot deny the right of "personhood" under Article 16 even to persons not subject to its jurisdiction'.[738] By explicitly affirming the right to personhood and application of such right without a restriction on jurisdiction, it is clear that the *travaux préparatoires* focused on emphasising the fundamentality of this right, as well as the importance for States to observe and monitor it.

The HRCttee has not used Article 16 of the ICCPR in the context of gender identity, or SOGI more generally.[739] So far, the Committee has established the usefulness of Article 16 in the context of forced disappearance, and has discussed the right to recognition before the law in conjunction with the prohibition of torture, the right to liberty and security of person, arbitrary arrest and detention and respect for the inherent dignity of the human person. In this context, the Committee seems to have argued that Article 16 of the ICCPR is concerned when the state authorities intentionally remove a person from the protection of the law for a prolonged period of time if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her

[737] Volio (730) 188.
[738] Volio (730) 189.; Also, according to Nowak, the use of the term 'everywhere' 'does not permit the conclusion that by way of Article 16 the States parties assumed obligations regarding international co-operation going beyond the territorial scope of application set out in Article 2(1)' (Nowak (n 626) 371).
[739] For an analysis of the jurisprudence of the Human Rights Committee under this provision, see S. Joseph, J. Schultz and M. Castan, op. cit., pp. 300 ff. and M. Novak, op. cit., pp. 373 ff. Several reasons have been adduced to explain the lack of jurisprudence under this provision. Some commentators note that Article 16 is limited in scope, and the right it establishes overlaps with other rights that have been more prevalent in the case law of the HRC, such as freedom from discrimination (Articles 2, 3 and 26) or the right to a fair trial (Article 14). Other commentators suggest that the silence of the HRC could even indicate that this right is no longer breached on a common basis, though they recognize that "that may be wishful thinking" (S. Joseph, J. Schultz and M. Castan, op. cit., p. 302).

relatives to obtain access to potentially effective remedies, including judicial remedies have been systematically impeded.[740] The HRCttee notes that, due to the circumstances in which disappeared persons are placed, i.e. deprivation of their capacity to exercise entitlements under law as a direct consequence of the actions of the state, it must be interpreted as a refusal to recognize such victims as persons before the law.[741] Indeed, enforced disappearance is a theme that requires research in its own right and this thesis does not aim to analyse the subject. However, what is important to note is the HRCttee's approach to the interpretation of Article 16. Since the *Grioua* case in 2003, the Committee has applied the same interpretation of Article 16 in other case law. In that regard, the Committee questioned state interference in the exercise of the right to personhood before the law and analysed the obligation of the state to withhold from interference in the enjoyment of the rights enshrined in the ICCPR.[742] For the purposes of recognising the person before the law, however, there still seems to be a room for further interpretation. In other words, while the HRCttee has made links between Article 16 and other rights under the ICCPR, it still has not addressed the core question of the right to recognition before the law. There are questions about having recognition before the law in the first place, as well as who may or may not have recognition and on what basis. Those aspects of Article 16 as it particularly relates to transgender persons' recognition before the law remain unaddressed.

[740] *Messaouda Grioua Nee Atamna and Mohamed Crioua v Algeria*, (2007) UN Doc. CCPR/C/90/1327/2004.
[741] ibid.
[742] *Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche v Algeria*, Communication No. 1328/2004 (2007) UN Doc. CCPR/C/90/D/1328/2004..; *Zohra Madoui v Algeria*, communication No. 1495/2006 (2008) UN Doc. CCPR/C/94/D/1495/2006.; *Hisham Abushaala v Lybia*, Communication No. 1913/2009 (2013) UN Doc. CCPR/C/107/D/1913/2009.

The right to recognition before the law is a core to forming human dignity. Manfred Nowak suggests that Article 16 should in fact be considered as the core of the ICCPR, due to its systematic and intrinsic connection to all the other provisions of the covenant.[743] This further means that, in order to have access to the rights under the ICCPR, one must first have his/her capacity as a person recognized before the law, which starts from birth.[744] Nowak further asserts 'without this right, the individual could be degraded to a mere legal object, where he or she would no longer be a person in the legal sense and thus be deprived of all other rights, including the right to life'.[745] Applying this criticism to the HRCttee, it becomes clear that it [the Committee] must address the issue to ensure the close of the gap in the legal interpretation. Nowak's interpretation is perhaps most relevant for transgender persons too, who are often denied legal recognition of their gender. If the 'right to recognition before the law' allows the individual to be recognized as a person in the legal order, and such recognition is a necessary pre-requisite to all other rights, having gender identity recognized before the law to allow transgender persons to become fully subjects of the legal order is a foundation to materialize the rights and freedoms in full capacity.[746]

The difficulty, however, of adjudicating Article 16 of the ICCPR in relation to transgender persons' legal gender recognition lies in the fact that no cases have been brought to the HRCttee under this particular claim. No scholarship so far seems to have argued that gender legal recognition should be discussed under Article 16 (recognition

[743] Nowak (n 626) 372.
[744] Nowak (n 626) 372.
[745] Nowak (n 626) 369.
[746] Nowak (n 626) 369.

before the law). It seems that the question that should be asked here is whether such reluctance is related to the 'gender versus sex' discourse, or perhaps whether the fact that international human rights treaties are still based on binary models of the sexes means that human rights mechanisms are still not ready to address the right to the legal gender-identity recognition of transgender persons.

The UN treaty bodies have not so far specifically looked at the case of the right to gender identity under the right to personhood provision. As outlined in this chapter, the primary body to do so would have been the HRCttee, which has yet to develop its thinking on the issue. And even though there have not been individual communications on this particular issue, the Committee seems to have improved in including the terminology in its communication with states.[747] In the regional mechanisms, however, due to the fact that the ECHR does not have the same article as other human rights treaties, a different dimension for recognising a gender identity right has been adopted. In the African context, the language of recognition before the law is somewhat overlooked, both within the text of the charter and in the interpretation of the norm (Article 5). The IACtHR has attempted to address the issue. However, it took the route of substantive rights under privacy provisions to arrive at its final judgment.[748] The ECtHR, on the other hand, has championed the application of the right to gender identity in its reasoning. Despite the fact that the ECHR does not contain specific wording on recognition before the law or

[747] International Lesbian, Gay, Bisexual, Trans and Intersex Association: Nolan H, *United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics 2015* (Geneva: ILGA, September 2016)

[748] See, for instance, Inter-American Court on Human Rights, Case of *Ángel Alberto Duque v Colombia*. Judgment of February 26, 2016. Series C No. 310.; also Inter-American Court on Human Rights, Case of *Karen Atala Riffo and daughters v Chile* (Merits, Reparations and Costs). Judgment of February 24, 2012. Series C No. 239

right to personhood, the convention has been interpreted widely to include that right under the privacy rights.

4.3. The right to privacy and transgender

The most successful legal claim for transgender rights has been the right to private life, or privacy rights as they are commonly referred to. Before analysing the case law, however, it is important to provide a short overview of the theory on the right to private life. In philosophical discourse, privacy is divided into two areas: consequentialist and deontological theories of privacy.[749] The former views privacy as an instrumental value in the pursuit of certain social goods, though it does not recognize the individual's interest in privacy.[750] The latter theory states that privacy merits protection because of its nature. It is seen as necessary for the protection of the innate human values of dignity and autonomy.[751] Possibly the closest argument of privacy and personhood was made by Beate Rossler, who argues that privacy has some function of protecting an autonomous life.[752] Similarly, Alan Westin suggests that 'privacy is the voluntary and temporary withdrawal of a person from the general society through physical and psychological means.'[753] This can be interpreted as meaning that individuals are capable and able to determine for themselves when, how and to what extent information about them is

[749] Carolyn Doyle and Mirko Bagaric, 'The Right to Privacy: Appealing, but Flawed' (2005) 9 (1) The International Journal of Human Rights.
[750] Oliver Diggelmann and Maria Nicole Cleis 'How The Right To Privacy Became A Human Right' (2014) 14 Human Rights Law Review.
[751] ibid.
[752] Beate Rossler, *The Value of Privacy*, (Polity Press 2004).
[753] Alan F. Westin, *Privacy and Freedom* (Athenum 1967) xvi, 487.

communicated to others.[754] Such an interpretation indeed makes privacy and the inner-self (personhood) profoundly connected terms.

There are various other interpretations put forward by scholars. For example, David Feldman describes the right to privacy as controversial, giving control over the boundaries of the spheres of social existence, a matter of being able to choose where, when, and with whom to cooperate or to withhold cooperation.[755] Other authors speak of the 'poverty of privacy' because of its malleability. Raymond Wacks, for example, argues that what can be properly protected by law in the name of privacy is personal information.[756] Though, such interpretation leaves the necessity for further interpretation of personal information. Relating to Wacks's point, Macklem also suggest that one aspect of privacy is intimacy and while it 'must keep company with liberty in order to have special value, it is also in tension with it'.[757]

Possibly, reflecting on the different interpretations of the term 'privacy', various definitions have been suggested in legal discourse too. The *travaux préparatoires* of Article 17 of the ICCPR also show the matter in question was a subject of heated discussions at the UN.[758] Preliminary discussions during the *travaux préparatoires* also show that the terms 'privacy' and 'private life' were used interchangeably and supposedly as synonyms.[759]

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[754] ibid.
[755] David Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty', (1994) 47 Current Legal Problems.
[756] Raymond Wacks, 'The Poverty of "Privacy"' (1980) 96 Law Quarterly Review 73.
[757] Timothy Macklem, *Independence of Mind* (1st edn, Oxford University Press 2008) 34.
[758] Volio (n 730).
[759] UN Economic and Social Council, Commission on Human Rights, sixth session 'Completion of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles' (1950), UN Doc. E/CN.4/365

The UDHR and the ICCPR established the right to privacy as a norm of international law. The provision on privacy in Article 17 of the ICCPR is worded almost identically to Article 12 of the UDHR.[760] The sole difference between the two norms is that Article 17 of the ICCPR not only prohibits 'arbitrary' interferences with one's privacy and with more specific aspects of the private sphere, but also 'unlawful' ones. More specifically, it states that (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and (2) Everyone has the right to the protection of the law against such interference or attacks.[761] Other regional instruments, to some extent, also recognize the right to private life. For example, Article 8 of the ECHR and Article 11 of the ACHR contain explicit provisions for guaranteeing the right to private life, while the Banjul Charter makes an implicit statement for the protection of privacy under Article 4.[762]

Commenting on Article 17 of the ICCPR, Nowak formulates the idea of privacy by stating that 'the sphere of individual autonomy whose existence and field of action does not touch upon the sphere of liberty of others is what we call privacy'.[763] He notes that 'standing at the centre of the liberal notion of freedom is the human being as autonomous subject who is absolutely sovereign over himself or herself and all of his or her actions that do not interfere with others'.[764] As observed from the *travaux préparatoires*, according to the liberal concept of freedom, this is precisely the point at which the

[760] ICCPR Article 17, UDHR Article 12.
[761] ibid.
[762] African Charter on Human Rights, Article 4: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person'.; Inter- American Convention on Human Rights, Article 11, and ECHR Article 8.
[763] Nowak (n 626) 377.
[764] Nowak (n 626) 377.

absolute protection of individual liberty comes to an end.[765]

SOGI rights are new to the language of human rights law, as noted earlier. Therefore, even though human rights treaties do not explicitly mention SOGI, scholarly articles argue for the necessity of protection measures for SOGI. Nowak, in his commentary on the ICCPR, writes that 'special obligations to fulfil the right to privacy by means of positive action and to protect it against interference by private parties arise in relation to persons deprived of their liberty and other persons in a vulnerable position, such as children… homosexuals and transsexuals'.[766] He further cites the European jurisprudence to argue that 'transsexuals' have a right to legal recognition of their changed identity.[767] Nowak pays particular attention to sexuality under the privacy claim. He discusses broader sexual behaviour concepts in which interference seems permissible when absolutely necessary for the protection of those affected (particularly children).[768] Nowak then relies on ECtHR jurisprudence to argue that states are prohibited from imposing rigid moral restrictions on the private sexual practices of their citizens.[769] No other case can highlight the ECtHR practice on this better than the one below.

a. Sexual orientation: privacy and the non-discrimination clause in **Dudgeon (ECtHR)** ***vs.*** **Toonen (HRCtee)**

Heavy reliance on ECtHR jurisprudence is not coincidental. In fact, the ECtHR was the

[765] Volio (n 730).
[766] Nowak (n 626) 380.
[767] Nowak (n 626) 380.
[768] Nowak (n 626) 380.
[769] Nowak (n 626) 391.

first regional or international institution to issue a decision on the protection of sexual orientation rights claims, in the case of *Dudgeon v UK*. The applicant, Jeffrey Dudgeon, was a 35-year-old shipping clerk who lived in Belfast.[770] In January 1976, police searched Mr. Dudgeon's flat in connection with a drug investigation, found marijuana, and charged another person with drug crimes. During the search, police also discovered and seized personal papers belonging to Dudgeon that described his homosexual activities, and questioned him about his sex life for more than four hours.[771]

The ECtHR undertook a test to establish whether interference in Mr Dudgeon's privacy (questioning about his sex life, searching of his personal belongings) constituted a breach of his right to privacy under Article 8 of the ECHR. In finding that the 'sodomy law' criminalizing consensual homosexual conduct in Northern Ireland violated the privacy rights under Article 8 of the Convention, the Court found that there was no social need to justify 'the risk of harm to vulnerable sections of society' and thus that laws were not necessary.[772] In *Dudgeon v UK*, the ECtHR stated that 'the law should not intervene in matters of private moral conduct more than necessary to preserve public order and to protect citizens against what is injurious and offensive and that there is a sphere of moral conduct which is best left to individual conscience just as if it were equitable to liberty of thought or belief'.[773] By extending the right to privacy to homosexuality, the ECtHR decided not to pursue its reasoning on Article 14 (non-discrimination) of the Convention, despite its having been argued by the claimant.

[770] *Case of Dudgeon v The United Kingdom (n. 695)* para 60.
[771] ibid.
[772] ibid.
[773] ibid. partially dissenting opinion of Judge Walsh, para 11.

Dudgeon v UK was indeed a landmark case in the history of the decriminalization of homosexuality in Northern Ireland. It also set an example for wider ECtHR case law within European regional human rights mechanisms and internationally. Two other cases that followed shortly afterwards and that succeeded in court – *Norris v Ireland*[774] and *Modinos v Cyprus*[775] – were ones in which the ECtHR again ruled on privacy grounds. Interestingly, while the ECtHR in *Dudgeon* did not consider it necessary to also look into Mr Dudgeon's discrimination claims, in *Norris* the Court affirmed that there were not sufficient grounds for the government to maintain laws that are discriminatory against particular groups of people.[776] As outlined above on the non-discrimination point, it was important that the common principles were applied to the substantive provisions of international instruments to better illustrate the negative impacts that the laws in place have had. With the *Dudgeon* case, the ECtHR became the first international body to find the government in breach of the right to private life, opening up new developments in sexual-orientation jurisprudence, both within the regional body and internationally.

Thirteen years later after *Dudgeon*, a similar case, *Toonen v Australia*, was submitted to the HRCttee. The Committee was thus the first international body to apply human rights claims to sexual orientation. The claims came on two grounds: breach of privacy, and equality and non-discrimination. The complainant in *Toonen v Australia* was a gay man who argued that the Tasmanian Criminal Code (Australia), under which consenting sexual contact between adult men in private was an offence, breached the ICCPR with

[774] *Norris v Ireland App No* 10581/83 (ECtHR, 22 October 1988).
[775] *Modinos v Cyprus* App No 7/1992/352/426 (ECtHR, 23 March 1993).
[776] *Norris v Ireland* (n 774).

respect to Article 2 (non-discrimination), Article 17 (privacy rights) and Article 26 (equality before the law).[777] Although it was not the first time that the HRCttee had encountered a case on homosexuality (the Committee had reviewed *Hertzberg v Finland* a year earlier in which it applied a margin of appreciation to argue that this was a national matter),[778] but it was the first time that the Committee issued a historic viewpoint on the criminalization of same-sex activity between consenting adults. The Committee argued that adult consensual sexual activity in private is covered under 'privacy', and that Mr. Toonen was actually and currently affected by the continued existence of the Tasmanian laws.[779] The HRCttee went further to consider and to assert that interference in the author's privacy had taken place, even if the legal provisions had not been enforced for a decade. The Committee concluded that the mere existence of provisions in the law that directly 'interfere' with the author's privacy, already constitutes a breach of rights protected under the ICCPR.[780]

Both the HRCttee and the ECtHR considered cases with similar claims that there was interference in private life and discrimination on the basis of sexual orientation. As the ECtHR preceded the HRCttee in discussing the case, it seems to have set the standard that the Committee followed in finding Australia in breach of the ICCPR.[781] However, while the ECtHR avoided discussing the discrimination clause in the case of *Dudgeon*, considering it unnecessary as it had already found a violation of Article 8, the Committee

[777] Tahmindjis (n 89)..
[778] Tahmindjis (n 89).
[779] *Toonen v Australia* (n 660).
[780] *Toonen v Australia* (n 660) para 8.2.
[781] Wayne Morgan, 'Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' (1992) 14 Australian Year Book of International Law 277

might have considered it an opportunity to expand the protection ground for non-discrimination and stated that sexual orientation was protected under Article 2 of the Covenant under 'sex' ground. More specifically, the Committee held that the reference to 'sex' in Article 2(1) of the covenant (which provides that the rights in the covenant should be granted to everyone without distinction of any kind such as race, sex, religion, etc.) must be read as including sexual orientation.[782] Although the two cases concerned similar claims with regard to sexual-orientation rights in particular contexts, both had an immense effect in developing and expanding international human rights jurisprudence further, both within the CoE and internationally. Both cases were expanded to accommodate gender-identity rights, which are more specifically discussed below. Indeed, since the HRCttee adopted the observation on *Toonen v Australia*, other treaty bodies and SPs started repeatedly addressing the issue, including urging the states to reform laws criminalizing homosexuality or sexual conduct between consenting adults of the same sex.[783]

There was a long pause in litigating SOGI cases at the UN human rights mechanisms. In fact, almost no case was considered until recently. The HRCttee issued two viewpoints in early 2017, specifically looking at the rights of transgender persons. In both cases the Committee considered Articles 2 and 17 of the ICCPR (non-discrimination in conjunction with the right to private life). These cases, though different in context, had the same emphasis on gender identity rights. Even more, in both cases the plaintiffs

[782] Tahmindjis (n 89).
[783] UN HRC Concluding Observations on Togo (2011) UN Doc CCPR/C/TGO/CO/4, para. 14; UN HRC Concluding Observations on Uzbekistan (2011) UN Doc CCPR/C/UZB/CO/3, para. 22; and Grenada (2011) UN Doc CCPR/C/GRD/CO/1, para. 21. See also the concluding observations of the CEDAW Committee on Uganda (2010) UN Doc CEDAW/C/UGA/CO/7, paras. 43-44.

chose to argue under privacy rights. The case against Australia (*G v Australia*)[784] argued for legal gender recognition, whereas a second case (*MZBM v Denmark*)[785] concerned breach of privacy by making a gender identity public. In the first case, G was a female transgender person who was refused a sex change on her birth certificate unless she had a divorce first. As of now, gender reassignment is lawful in Australia and post-operative transgender individuals are provided with the opportunity to be legally recognized in their reassigned sex and are protected from discrimination on transgender grounds.[786] At the same time, Australia has anti-discrimination legislation that specifically includes sex or gender diversity as grounds for non-discrimination. The complainant [G] in this case argued direct discrimination and state interference in her private life. In the case of *MZBM*, the question was related to the deportation of a transgender woman to Malaysia. Even though she had undergone gender-reassignment surgery (in 2010), she still appeared as a male person on her identification documentation. She experienced aggravated violence in Malaysia, including being stopped and searched frequently by the Malaysian police.[787] The complainant came to Denmark in 2014 to claim asylum. The Committee in both cases explicitly highlighted that Article 17 of the ICCPR ('privacy') protects gender identity, and that Article 26 of the ICCPR (non-discrimination) also protects marital status, gender identity and 'transgender status'.[788] What is important to highlight, however, is the Committee's main findings that the divorce requirement to obtain legal recognition of gender per se is unacceptable. In his view, such a requirement was not based on reasonable and objective criteria in the context of Australia –where the

[784] *G v Australia,* communication No. 2172/2012 (2017) *UN Doc* CCPR/C/119/D/2172/2012.
[785] *M. Z. B. M. v Denmark,* communication No. 2593/2015 (2017) UN Doc CCPR/C/119/D/2593/2015.
[786] *G v Australia* (n 784).
[787] *M.Z.B.M. v Denmark* (n 785).
[788] *G v Australia ., M.Z.B.M. v Denmark* (n 784, 785).

applicant was able to obtain a change of her gender marker in some other documents, including passport; where territorial governments could decide to issue new birth certificates not requiring divorce; and where same-gender marriages concluded abroad could be recognized. In this case, the Committee for the first time found violation of Article 17, in conjunction with Articles 2 and 26 of the ICCPR. Although the Committee did not elaborate much on recognition before the law, that decision does advance legal gender recognition. In the case against Denmark, the Committee did not comment extensively on gender identity and recognition before the law in Malaysia, because the case concerned the complainant's deportation from Denmark, so it was against Denmark. As such, the Committee did not find any violation.

From this analysis, the *G v Australia* case is of particular importance in bridging the provisions of non-discrimination, gender identity and the right to private life. Jurisprudence on the issue of gender identity seems to be further developing under the auspices of privacy. If such developments until now were more prominent at the regional level, and particularly at the ECtHR, this case might be an indication that a similar trend could develop at the HRCttee level. However, if that happens, further theoretical analysis will be necessary to determine the relationship between Articles 17 and 16.

b. Gender identity as right to privacy: the Goodwin test

As stated above, until 2002 privacy rights were mainly developed in the context of sexual orientation, and very little or no reasoning existed in relation to privacy and gender

identity or transgender rights. Cases that were brought before international courts (mainly the ECtHR) were related to 'transsexual' persons' rights and mostly in relation to the change of legal documentation in order to reflect their new (changed) sex, or denial of other rights.[789] These cases were largely unsuccessful due to the application of a margin of appreciation. The ECtHR did not stop at the sexual-orientation rights claims in *Dudgeon* case in 1981. It expanded to private life to include the right to personhood and personal autonomy.[790] As already outlined above, the ECtHR does not contain the right to be recognized before the law because the drafting experts did not consider it necessary to include such a right in the text. The experts indicated that it was a fundamental principle for all the other rights, and thus there was no need to codify it.[791]

This changed in early 2000, when the ECtHR again pioneered in reviewing a case related to gender identity and further commented on recognising transgender persons' rights in international human rights law. The case of *Goodwin v the UK* concerned Ms Christine Goodwin, who had faced sexual harassment at work during and following her gender re-assignment. She had experienced difficulties concerning her national insurance contributions, as all her legal documentation still identified her as male. Goodwin had been allowed to change her sex through surgery, but was denied legal recognition in her newly acquired gender or the possibility of changing her official identity documents. She complained under Article 8 of the ECHR (the right to private life) and Article 14 (prohibition of discrimination).

[789] *Rees v the United Kingdom (n 245), Cossey v The United Kingdom* (n 245), *X, Y and Z v the United Kingdom* (n 245), *Sheffield and Horsham v the United Kingdom* (n 245).
[790] *Pretty v United Kingdom* App No 2346/02 (ECtHR 29 April 2002).
[791] Volio (n 730).

The Court took a longer way to arrive at a breach of Goodwin's right to privacy. The ECtHR held that states that permit sex-reassignment surgery must treat post-operative 'transsexuals' as if they had changed sex for all legal purposes, including marriage. Overcoming the technical objections of the respondent state, the Court noted, 'the applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed'.[792] The Court argued that a 'transsexual's freedom to define herself/himself according to his/her gender, is one of the most basic essentials of self-determination'.[793] And despite the fact that the right to be recognized before the law [which would have been equivalent to Article 16 of the ICCPR] does not exist under the ECHR, the Court established that the notion of such autonomy not only 'underlies' the right to a private life, but also embodies a different, more expansive, idea of the meaning of private life.[794] Regarding this, the ECtHR noted that

> the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including their right to establish details of their identity as individual human beings... the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded a matter of controversy.[795]

[792] *Goodwin v United Kingdom* (n 295).
[793] Angus Campbell and Heather Lardy**, '**Transsexuals - The ECHR in Transition?' (2003) 53 (3) Northern Ireland Legal Quarterly.
[794] ibid.
[795] Jill Marshall, 'A right to personal autonomy at the European Court of Human Rights' (2008) European Human Rights Law Review.

Following *Goodwin*, two other cases – *Van Kück v Germany*[796] and *Schlumpf v Suisse*[797] – were reviewed by the ECtHR. In *Van Kück*, the applicant was an employee of the German government who sought partial reimbursement from her private health insurance company of the expenses of hormone treatments and gender-reassignment surgery.[798] The applicant was entitled to reimbursement of 'necessary' medical expenses, and her claims were denied on the grounds that the surgery was considered unnecessary in the view of the possibility of the applicant's gender identity disorder being resolved by extensive psychotherapy. On appeal, the German court also accepted the argument that treatments were non-reimbursable because the applicant, by self-administering female hormones without medical supervision, had 'herself deliberately caused the disease [sic]' in violation of the insurance conditions.[799] The applicant argued, *inter alia*, that she had been denied her right to a fair hearing, guaranteed by Article 6(1) of the ECHR, because the German court had arbitrarily required that gender-reassignment surgery [infertility test] be the only possible treatment for her disorder.[800] She also argued that the national court had concluded without evidence that her use of hormone treatments had 'caused' her gender disorder.[801] The decision, she claimed, violated her rights to privacy and self-determination under Article 8 of the ECHR.[802] In that case, the ECtHR ruled that where insurance plans cover 'medically necessary' treatment, gender-reassignment procedures must be included.[803] In a similar insurance claim, in the case of *Schlumpf v Switzerland*, the ECtHR held that the two-year waiting period required before reimbursement of

[796] *Van Kück v Germany* App no 35968/97 (ECtHR, 12 June 2003).
[797] *Schlumpf v Switzerland* App no 29002/06 (ECtHR, 8 January 2009).
[798] *Van Kück v Germany* (n 791).
[799] ibid.
[800] ibid.
[801] ibid.
[802] ibid.
[803] ibid.

gender-change operation costs was too inflexible, as applied to the 67-year-old complainant.[804]

The fact that the ECHR does not contain a right to be recognized before law could have created a legal obstacle for the court to undertake and review the cases related to gender identity. The Court nevertheless found a way to utilize the ECHR as a 'living instrument', which develops over time to accommodate new developments in the region of its jurisdiction. Moreover, due to its wider application and interpretation of Article 8 of the Convention, the Court has managed to extend the protection claims under the Convention to the issues of personal autonomy, personhood and identity claims. Those provisions can also be easily accommodated under Article 16 of the ICCPR, which provides a specific provision on recognizing individuals before the law on equal principles. With the HRCttee issuing a decision on gender-identity claims under the right-to-privacy claims of the ICCPR, it might be that the right to personhood under Article 16 of the ICCPR will not be considered in relation to transgender rights. This, however, could raise questions about the interpretation of the right itself, as well as why complaints do not claim such a right more directly.

Those two specific rights – right to personhood and privacy – of transgender persons prove, however, to be intrinsically intertwined concepts that can neither contest each other or be considered in isolation. The brief survey of the case law and soft law of the human rights bodies also shows that underlying principles of human rights, dignity,

[804] *Schlumpf v Switzerland* (n 792).

equality and non-discrimination are the core that allows the rights claims for transgender persons. Furthermore, what this analysis has also shown is the connection between those principles and their ability to support the adjudication of substantive rights, particularly in the context of privacy rights, as it relates to gender identity. While international standards and norms such as HRC resolutions and the Yogyakarta Principles provide a general framework for the application of human rights to SOGI, limitations seem to persist in the way those norms are interpreted. The conundrum between the right to recognition before the law and the right to private life is one of them. Further restrictions on the application of human rights law to transgender persons in particular will be discussed in the next part of this thesis on a case study on detention.

5. Conclusions

This chapter posed a question on the limitations of protection mechanisms available for transgender persons. The chapter looked at the human rights protection framework in three different clusters: first, to understand the place of transgender rights within the SOGI rights framework; second, to understand the importance and the role of underlying principles of human rights; and third, to look into the concept of transgender-specific rights, in particular gender identity and privacy rights.

A number of observations will be made as this thesis progresses to analyse transgender and legal theories. With the progress of international human rights law, transgender rights seem to be emerging more clearly in the general human rights framework. This is

mostly done in two ways, in the general principles framework and regarding specific rights (which in this case refers to gender identity, which is often understood as the only transgender-specific right). However, both frames lack evidence on how successful they are in upholding transgender rights in practice. The tensions and disagreements within the transgender community over transgender identity and non-binary gender still continue to unsettle the movement in achieving full consensus on access to and realization of human rights. The analysis in this chapter reveals a clear development that the underlying principles of human rights – dignity, equality and non-discrimination – are and will continue to be the core for gender identity rights claims. Those principles should also be considered as the entry to the rights realm. This is evident in most of the claims made by transgender individuals discussed in the chapter. However, having those common principles does not conflict with the idea of specific rights. In fact, the chapter suggests that the most well-developed specific rights that transgender persons have claimed are the right to privacy and gender identity. The right to health, which was not discussed in the chapter but was part of the medical model discussed in Chapter Two, also plays an important role – although that model is the subject of debates among activists and professionals, also addressed in Chapter Two.

While this chapter attempted to conceptualize gender identity as a specific right for transgender persons, it also illustrated how the same concept of identity can be and is understood as part of the right to privacy, both through the right to recognition before the law and the right to privacy that create a complex and intersectional theoretical dimension. This is made clear in the most recent reasonings of the ECtHR and the

HRCttee – the only international human rights bodies so far to have issued judgments on gender identity and privacy in conjunction with equality and non-discrimination claims.

PART THREE

Chapter V

Lived Experiences of Transgender Persons in the Places of Detention

1. Introduction

The last few years in the LGBTIQ movement have been characterised by rapid progress in the application of human rights law to SOGI. The establishment of the first ever UN Independent Expert on SOGI in 2016, and a handful of judgments by the human rights bodies indicate slow but apparent progress in reflecting the transgender lived experiences in the policy and law. There has been a gradual recognition of a gender self-determination model of transgender legal recognition, with over 10 countries now supporting it. However, the number of countries that retain laws criminalizing LGBTIQ people is still high, at 76, as reported by the High Commissioner for Human Rights.[805] The medical model of the transgender legal recognition in law also has a large number of country supporters, however with international standards, including the WHO-ICD reform and recommendations, this might change in the near future.

The area where the application of human rights law has lagged behind regards the places of detention.[806] If the lived experiences of transgender persons have been evidently reflected in progress made from the biological model of transgender recognition (effectively, a deliberate deprivation of the right to personhood) to medical and to the

[805] UN HRC Report of the Office of the United Nations High Commissioner for Human Rights (2010) UN Doc. A/HRC/29/23.
[806] Places of detention is any place under state jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2375 UNTS 237, entered into force 22 June 2006 ('OPCAT'), Article 4.

gender self-determination models with respective jurisprudence and advancement of policies, the same has not taken place in the context of detention. Some attempts have been made to apply prison standards to transgender and non-binary gender prisoners, though due to the complex nature of containing fluid genders in single-sex spaces, these attempts have had little impact as to how prison systems operate in relation to transgender prisoners. Tensions between the fixed categories of sex and gender in the prison context and the fluid nature of transgender embodiment is also one of the major intersections where violations of transgender prisoners' rights originate from.

Prisons typically are characterised by rigid, strict structures, which makes it challenging both for the law to regulate specific groups in prisons, particularly if the group's identity undermines a core characteristic of prisons (e.g., isolation of the sexes), and also for the state authorities to implement such policies in practice.[807] In the words of a transgender prisoner, 'prisons are bastions of "a one size fits all"… where any ideology sexuality or sexual identity that deviates from the prison system's cultural norms is heavily suppressed'. [808]

Indeed, no blueprint exists as to how to treat transgender prisoners. With the history of 'deviance' and 'invisibility', not only the transgender but also all 'sexual minority' categories have been left out of specific safeguard measures in detention, as also argued in Chapters Three and Four. Though different models outlined in Chapter Two have enabled transgender groups to claim the protection of their rights and freedoms, progress

[807] Kunzel (n 227).
[808] Sarah Jane Baker, Transgender Behind Prison Walls (kindle edn, Waterside Press Ltd 2017) section 1.

and application of these models in the prison context have been limited. Analysis of legal recognition models in the prison context provides some useful insight on the limitations of the application of human rights law in the prison context in safeguarding transgender prisoners.

The experiences of transgender prisoners magnify the specific normative gaps in policy and impact of such policies on transgender persons. In prison systems, transgender people are often stripped of their basic rights and are left to the mercy of other prisoners or the prison staff, both of whom can be the first source of violence. Decisions on housing transgender prisoners, including allocation and segregation, prolonged terms, medical treatment, general prison conditions and ability to express one's gender are among the most critical of the many rights at risk. These experiences and challenges faced by transgender prisoners are coupled with common stigma, a personal struggle against the binary models of the sexes, and heightened inter-personal violence.

This chapter aims to analyse the lived experiences of transgender prisoners that challenge the norms of human rights law and their application to their experiences. By narrating the lived experiences of transgender prisoners, it will unlock the theory and practice. It will start by providing an overview of the statistical data on transgender prisoners, and continue with illustrations of their lives in prisons, with a step-by-step analysis of the challenges faced. This chapter seeks to demonstrate the lived experiences from both women's and men's prisons, thus reflecting the experiences of both male and female transgender prisoners. However, due to the lack of literature on the experiences of

transgender men in prisons, this chapter employs more examples from the transgender women's perspective. Where it was possible to obtain literature about transgender men, the challenges faced by transgender men prisoners are highlighted too.

2. Data and Numbers on Transgender Prisoners

Chapter One, under the heading of transgender studies in prisons, highlighted the intersections between transgender studies and prison theory. Both the deviance and the invisibility stages outlined earlier have had a huge impact on how the transgender experiences (or wider 'sexual minority') are narrated in theory and practice. Little data exist as to the number of transgender persons in most individual prisons and broader prison systems. The absence of numbers (and thus stories) about transgender prisoners is then used to justify the absence of law or policies. In other words, no numbers mean no data, no data mean no life stories of transgender prisoners, and no stories mean the absence of the problem, and if there is no problem in practice, there is no need for policies and laws to apply. This is, however, a flawed approach when it comes to the transgender prisoners and their lived experiences in incarceration. In particular, even a brief survey of the criminology and sexology literature from the early 20th century makes it clear that the problem of 'sexual minorities' in prisons existed, though was hardly acknowledged.[809] Such limited visibility or ignorance of the existence of transgender prisoners leads to low numbers being reported, and this also leads to either

[809] Clemmer (n 212), Sykes (n 213).

ignoring their problems or their problems being enmeshed with wider human rights concerns that exist in prison systems.

In recent years a growing visibility of transgender prisoners in some countries (for example, UK and the US) has elicited policy changes including in data gathrering. The countries have started to publish data on the numbers of non-binary gender persons housed in their places of detention. For example, in the UK it has been suggested that one in four prisons in England and Wales are holding transgender inmates.[810] In 2017, the UK prison services reported that there were 70 inmates living in, or presenting in, a 'gender different to their sex assigned at birth.'[811] In the US, a study from 2009 showed that approximately 750 prisoners across the country's prison system identified as transgender.[812] In Thailand, out of around 300,000 prisoners, more than 6,000 are registered as 'sexual minorities'.[813] In mid-2016, it was reported that there were 150 'homosexuals' imprisoned in Brazil.[814]

It is not a common practice for prison services to collect information on LGBTIQ prisoners. Monitoring and documenting the implementation of SOGI rights in prison is a difficult task. These mechanisms have been further criticised for being 'crude' and

[810] Josh Halliday, 'Transgender Woman Found Dead In Cell At Doncaster Prison' *The Guardian* (2017) <https://www.theguardian.com/society/2017/jan/05/transgender-woman-jenny-swift-found-dead-at-doncaster-prison> accessed 11 January 2017.
[811] ibid.
[812] Esinam Agbemenu, 'Medical Transgressions in America's Prisons: Defending Transgender Prisoners' Access to Transition-Related Care' (2015) 30 (1) Columbia Journal of Gender and Law.
[813] Drake King, 'Thailand Separates LGBT Inmates, Considers Segregated Prison' *Associated Press* (2017). <https://www.apnews.com/0c40ce9544b2457594f9cc5b8a8b3270> accessed 30 January 2017.
[814] Kevin Wong, 'Brazil Fights For LGBT Inmates' Safety, Opens First Gay Prison' *Sputnik news* (2017) <https://sputniknews.com/latam/201608251044628953-brazil-gay-prisons/> accessed 31 August 2016.

'ineffective'.[815] For example, Robinson argues that the application of crude binary systems makes everything turn on whether the inmate can convince the prison administration as to his or her identity[816] and argues that such policies can make transgender prisoners more vulnerable to violence and abuse. Other researchers argue that the lack of information about 'sexual minority' prisoners is not simply a product of institutional indifference or neglect, but a much deeper and a more institutional discrimination, which starts before a person gets into a prison.[817]

It is not always safe for prisoners to disclose their gender identity as transgender and gender non-conforming people. Lamble argues that gender incongruence remains over-policed and over-imprisoned in many jurisdictions though not reported.[818] Indeed, Lamble is right to argue that the monitoring and forcing people in respective gender groups starts outside the prison walls. Transgender people, not conforming to strict binary identities, face discrimination in various areas of their lives: housing and employment, bullying in schools, estrangement from family, street harassment and hate-based violence. These factors greatly increase the risks of social exclusion, economic insecurity and criminalization and make transgender persons more vulnerable to violence.[819] Lamble's point is reinforced by the accounts of transgender prisoners, who argue that prisons are 'full of people who have been punished since the day they were born'.[820] In other words, Lamble questions the legitimacy of the justice system, which

[815] Peter Dunn, 'Slipping Off The Equalities Agenda? Work With LGBT Prisoners' (2013) 206 Prison Service Journal.; Russell K. Robinson, 'Masculinity As Prison: Sexual Identity, Race, And Incarceration' (2011) 99 California Law Review.
[816] Robinson (n 815).
[817] Sarah Lamble, 'Rethinking Gendered Prison Policies: Impacts On Transgender Prisoners' [2012] ECAN Bulletin.
[818] ibid.
[819] ibid.
[820] Baker (n 808).

captures the most vulnerable even outside prisons, such as those living in extreme poverty and who experience extreme forms of violence including institutional violence and societal stigma. Fearing further violence, it can often be the case that transgender prisoners hide their identities to spare themselves from attacks. Non-binary identities do not allow the production of rigid statistics; rather, it encourages dynamism and inter-changeability of gender and expression, making it difficult to produce counts of people including in the prison context.

In the absence of precise or even approximate data, what is important is the acknowledgement of the presence of such people in prisons, which can be a first step towards putting appropriate safeguards in place for the humane treatment of transgender prisoners. At the same time, it is important to look at the challenges and types of violations transgender prisoners face in closed environments to understand the challenges faced by non-binary persons in heteronormative prison systems. For this, understanding of the lives of transgender prisoners is required.

3. Lived Experiences of Transgender Prisoners

Academic literature on transgender prisoners' experiences is very limited and is dominated mainly by North American scholarship.[821] Though there has been some research on transgender prisoners published by non-governmental organisations,[822] the

[821] Dunn (n 811).
[822] Nicola Carr, Siobhan McAlister and Tanya Serisier, 'Out on the Inside: The Rights, Experiences and Needs of LGBT People in Prison' (February 02, 2016). Irish Penal Reform Trust.; Human Rights Watch, 'No Escape: Male Rape In U.S. Prisons' (Human Rights Watch 2001) <https://www.hrw.org/legacy/reports/2001/prison/report.html> accessed 5 February 2014.; The Sylvia Rivera

overall picture remains limited. Some information is available from a small number of countries that have also started addressing the issues of transgender prisoners, namely the UK,[823] Canada[824] and Malta,[825] but the vast majority of existing literature comes from the US. It is impossible to generalize from that context, since the US has unique characteristics in its particular type of criminal justice system with high-profile issues of race and gender as well as problems such as mass incarceration and hyper-violence.[826] This means that there is a great need for further research into transgender prisoners' experiences of prisons in a wider variety of contexts.[827]

Limited available data shows that transgender people have faced a broad range of harmful situations, ranging from the potentially fatal to subtler and 'quotidian ignominies'. [828] Within the criminal justice system, these experiences are often exacerbated by violence. Transgender or non-binary identity makes this group more susceptible to harm, both inter-prisoner and from prison officials.[829] Prisons by default restrict transgender people from expressing their gender identity.[830] Even more, the binary character of prisons means that during the decision-making process, transgender prisoners are forced into two alternative sex/gender expressions only: male or female.

Law Project, '"It's War In Here": A Report On The Treatment Of Transgender And Intersex People In New York State Men's Prisons' (The Sylvia Rivera Law Project 2007).

[823] UK Ministry of Justice, 'Review on the Care and Management of Transgender Offenders' (November 2016), at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566828/transgender-review-findings-web.PDF. Accessed on 1 Dcember 2016.

[824] Adam Salandra, 'Canada's Justin Trudeau Says Transgender Inmates Will Be Housed Based On Gender Identity - "Trans rights are human rights".' 17 January 2017; at http://www.newnownext.com/trudeau-trans-inmates/01/2017/. Accessed on 23 January 2017

[825] Transgender Europe, 'Malta Prison Policy (August 2016), at http://tgeu.org/malta-prison-policy-august-2016/. Accessed on 1 September 2016.; Ulrika Westerlund and Richard Köhler, 'Human Rights and Gender Identity: Best Practice Catalogue', (2nd revised, TGEU 2017) 24 <http://tgeu.org/human-rights-gender-identity-best-practice-catalogue/> accessed 28 February 2017

[826] Kunzel (n 227).

[827] Carr, McAlister and Serisier (n 822)

[828] Darren Rosenblum, '"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism' (2000) 6 Michigan Journal of Gender and Law, 499.

[829] ibid.

[830] Lamble (n 817)

When no other choice is presented to non-binary individuals, a forceful enforcement of biological model of gender becomes inevitable. This means that while in prison, institutional policies and practices will limit or erase aspects of transgender life and deny opportunities for gender expression.[831]

The use of improper pronouns is significant to transgender inmates and is part of their personhood. Therefore, such treatment in the prison system can violate one's dignity.[832] On this, queer theorists argue that violent enforcement of gender norms can be understood as breaches of the principles of dignity. Such actions might include: a) taking away the ability of imprisoned people, who are often marginalised in multiple ways, to self-determine their dress; b) forcing imprisoned people to adhere to dominant social norms through dress, even when they deeply object; c) using the full weight of the criminal legal system to punish those who refuse to adhere to those norms; and d) using dress that does not match dominant norms as a form of punishment and humiliation.[833] Problems related to dress code are commonly faced by transgender prisoners, particularly in situations when such policies are designed at a lower level and are often a discretionary power of the individual prison administration.

The underlying presumption is that ill-treatment of transgender prisoners for expressing their gender begins as soon as the person enters the prison facility.[834] Such ill-treatment

[831] Lamble, (n 817), Carr, McAlister and Serisier (n 822)
[832] Sydney Scott, 'One Is Not Born, But Becomes A Woman": A Fourteenth Amendment Argument In Support Of Housing Male-To-Female Transgender Inmates In Female Facilities.' (2013) 15 Journal of Constitutional Law.
[833] Arkles, Gabriel, 'Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress' (2012) 87 New York University Law Review.
[834] Silpa Maruri, 'Hormone Therapy For Inmates: A Metonym For Transgender Rights' (2011) 20 (3) Send to Cornell J Law Public Policy.

is either physical or psychological. For example, in the US context, discrimination against transgender persons is often effectuated by using incorrect pronouns to refer to transgender inmates, performing unnecessary searches for the purpose of exposing transgender inmates' genitalia and denying gender-appropriate clothing and grooming items.[835] This suggests that for transgender prisoners, it is often at their first arrival at the places of detention and during subsequent decisions about their allocation to prisons that are the most crucial in locating the origins and sources of further violence and ill-treatment.

A wider range of problems has been recorded in other jurisdictions. In the UK, for example, prison regulations of clothing and grooming standards are entirely fitted with binary sex models. These standards in practice do not take into account diverse genders transgender persons have.[836] Many suffer verbal abuse and are treated as pariahs.[837] Prisoners are not allowed to wear long hair (particularly in male prisons) and have no or restricted access to some types of clothing, specifically trousers and skirts, underwear and/or bra (specifically for transgender women). These rules disproportionately affect transgender women prisoners. The bra restriction is particularly noteworthy, as transgender women often have developed breast tissue through surgery or hormone treatment. Taking such negligence into account, a court in the UK has called such practice 'harassment' and 'indignity'. In particular, the Court in a case of *R (on the*

[835] ibid.
[836] *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491.; Also, R (on the application of AB) v Secretary of State for Justice and another [2009] EWHC 2220 (Admin), [2009] All ER (D) 28 (Sep) .
[837] Baker (n 808).

application of Green) v Secretary of State for Justice, concerning transgender prisoner's rights, stated that:

> this form of harassment is the kind of ongoing indignity that can lead to more significant issues down the line… Some health problems can result from women being denied bras **...** [and the lack of bras], in a number of cases, sexual harassment.[838]

In addition to the physical pain caused by inappropriate clothing, many transgender inmates suffer psychological trauma from being unable to express their gender identity adequately.[839]

Considering prison life, practices of deliberately calling inmates by incorrect names or titles can be insignificant. Yet such practices reflect the level of undignified treatment of prisoners in general, and their meaning can be amplified according to how much such expression, pronounce and names mean to individuals, including transgender persons. In the words of Maruri, 'the use of improper pronouns is significant to transgender inmates, and some can be willing to risk punishment to demand recognition of their gender identity',[840] meaning that calling correct pronounce, and names reinforces their identity, and, as a result, is of high importance and core to their being. General issues of treatment of prisoners and specific experiences related to gender expression, inter-prisoner violence, medical care and other issues of transgender prisoners' concern is organised in three main themes in this chapter: (1) violence, (2) protective custody, (3) medical treatment. By illustrating the extent of human rights violations against transgender

[838] *R (on the application of Green) v Secretary of State for Justice* (n 832).; Also, *R (on the application of AB) v Secretary of State for Justice* (n 832).
[839] Scott (n 828).
[840] Scott (n 828).

persons in prisons and narrating the lived experiences of transgender prisoners this chapter will provide an insight into transgender prisoners lives during their incarceration.

3.1. Violence

Prisons are often characterized by violence and widespread sexual abuse (including rape) of those who appear weak and feminine, particularly in male prisons. While transgender persons, as well as other 'sexual minorities', are not the only people vulnerable to sexual victimization in prisons (particularly in male prisons), their vulnerability is compounded by additional risks related to their appearance and being. Furthermore, deprivation of liberty and unequal power relations between the state and those imprisoned, engender vulnerability to torture and other ill-treatment.[841] Automatically assigning the place of LGBTIQ persons in the prison sexual hierarchy, as well as the absence of any safeguards in place, makes them almost automatic targets for such abuse.[842] Furthermore, research on excessively masculine nature of the prison environment also means that anyone feminine in such a system will be susceptible to sexual assault, particularly rape.[843] For example, reports from UN experts including from the 1990s show that transgender women are 'punished' for transgressing gender barriers or for challenging predominant conceptions of gender roles.[844] Some authors also argue that in the prison sexual hierarchy, the act of rape – forcing a weaker prisoner into the sexually passive role – is

[841] UNGA Interim Report of the Special Rapporteur on Torture (2009) UN Doc. A/64/215, para 39, 47.
[842] Sharon Dolovic, 'Strategic Segregation in the Modern Prison' (2011) 48 American Criminology Law Review 1
[843] Don Sabo, Terry Kupers and Willie London (eds), *Prison Masculinities* (Temple University Press 2001).; David S Cohen, 'Keeping Men Men and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity' (2010) 33 Harvard Journal of law and gender
[844] UNGA Report of the Special Rapporteur on Torture (2001) UN Doc. A/56/156, para 17., UN Committee against Torture, Concluding observations on USA, UN Doc. CAT/C/USA/CO/2 (25 July 2006), para 32.

itself the moment of gender redefinition (the point at which that person is 'turned out' and becomes newly classified as female). Building on this, Dolovic notes that in the case of gay men and transgender women in male prisons, there is no need for any moment of gender redefinition, since in the hypermasculine culture of prisons, gay men and trans women in male prisons are regarded as female by definition and are thus automatic targets for sexual assault.[845]

Violence, and specifically sexual violence against transgender persons, has been detected in multifaceted forms: inter-prisoner, when fellow prisoners exercise domineering power over the weak and sexually abuse them, or from the prison administration, which can include forced anal[846] or vaginal examinations[847] to 'prove' the homosexuality of a person in question[848] or when conducting searches including 'strip searches' on prisoners both at arrival and during the imprisonment. Ill-treatment inflicted on transgender prisoners is varied. For example, a transgender woman prisoner describes her first encounter with a prison and the humiliation she experienced during the initial intake process as follows:

> When I arrived at the reception center... I stepped off the bus and was strip-searched in front of two guards and about a dozen male inmates. A sergeant yelled, "Look at the tits on that one! Those are the best-looking tits I've ever seen on a man". He pointed me out to a six-foot, three-inch inmate and said to him, "You like that one, don't you? I'm going to put you in a cell with that one." Another sergeant called me "tits" and "titty man". ... While the rest of my group

[845] Dolovic (n 837).
[846] UNGA Report of the Special Rapporteur on Torture (2001) UN Doc. A/56/156, para 17-25.; Report of Working Group of Arbitrary Detention (2011) UN Doc. A/ HRC/16/47/Add.1., para 28.; See also 9th Annual Report of the UN CAT Report of the Subcommittee on the Prevention of Torture (2016) UN Doc. CAT/OP/C/57/4, para 61.; also see UN HRC Report of the Office of the United Nations High Commissioner for Human Rights (2011) UN Doc A/HRC/19/41, para 37. UNHRC Report of the Special Rapporteur on Torture (2013) UN Doc A/HRC/22/53, para 79.
[847] The court held that 'finger vaginal examination, conducted abruptly and simultaneously by several persons, constituted a form of rape and torture.; See *Miguel Castro-Castro Prison v Peru* Petition No 11,015 and 11,769, (Inter-American Court 2006) para 312.
[848] Report of Working Group of Arbitrary Detention (2011) UN Doc. A/ HRC/16/47/Add.1., para 28.; See also 9th Annual Report of the UN CAT Report of the Subcommittee on the Prevention of Torture (2016) UN Doc. CAT/OP/C/57/4, para 61.

> went through the intake process, I was left sitting on a bench until the afternoon so that all the other intake inmates could see me.[849]

As noted above, prisons can be generally masculine and violent places with a particular impact on transgender persons.[850] Reflecting on being imprisoned as transgender prisoners, Sarah Jane Baker, who transitioned while in prison notes:

> Being a transgender in our macho prison system is no soft option, some of us, … face ridicule, attack and discrimination on a daily basis. I am saddened that what rights we do have are seen as privileges, rather than a humane and civilised way of treating some of the most vulnerable inmates within our penal system. We face prejudice not only from other inmates but also prison staff, who find it difficult to treat prisoners as individuals. It is easier to manage prisoners by treating them all the same, making no allowances for those who are transgender, disabled or mentally ill.[851]

This is an important point, particularly when arguing for a specific approach to the transgender prisoners to ensure safeguard mechanisms in place. Notably, Baker also singles out other vulnerable groups that often become victims of the 'one size fits all' approach.

The experiences that prisoners have often can be similar. Experiences of transgender prisoners, however, can be particularly daunting given the particular vulnerability that they experience. To put it in the words of a transgender prisoner, it is not easy to live in a prison 'where a third of prisoners seem to think I should be killed, a third want to have sex with me, and the remaining third feel comfortable enough to threaten and verbally

[849] Stop Prisoner Rape, 'In the Shadows: Sexual Violence in U.S. Detention Facilities' - an Alternative NGO Report Prepared for the 36th Session of the UN Committee Against Torture, 2006.
[850] Baker (n 808).
[851] ibid.

abuse me in full view and hearing of prison staff.'[852] Indeed, this quote sums up the general treatment transgender persons expect in prisons, as well as their perceptions of states' involvement in inflicting ill-treatment onto them. Such a hostile environment, coupled with the invisibility and absence of information of the transgender prisoners often leads to the ignorance of their rights, both in law and policy and also at the level of implementation.

The SPs mechanisms have reported the plight and extreme vulnerability of transgender women who are most often imprisoned in male detention facilities since late 1999.[853] For example, the UNSR on Independence of Judges and Lawyers noted that putting a transgender person into a prison opposite to his or her gender means 'further victimization of transgender persons in detention, as well as lesbian and gay prisoners.'[854] The available human rights literature suggests that rape and sexual abuse in the prison context are often committed by other inmates, which raises an issue of risk assessment. The risk assessment, whether either for an individual or group related, is often an area that is overlooked in many prisons. This failure has its negative consequences for the general prison population but more specifically for transgender persons. This thesis does not focus on this issue exclusively, but its importance should be highlighted for consideration. For example, on the issue of risk assessment in prisons, the UNSR on Torture suggested that 'consideration should be given to the protection of LGBTIQ detainees, who can be at risk of physical and sexual abuse if placed within the

[852] ibid.
[853] UNGA Human Rights Council, Interim report of the Special Rapporteur on the independence of judges and lawyers (2011) A/66/289, para 81.
[854] Ibid 102.

general prison population.'[855] The SR further noted that efforts should be made to avoid placing transgender prisoners in situations where there is a high risk of torture and ill-treatment. In particular, it suggested that 'any decision in relation to the placement of LGBTIQ detainees within a place of detention should avoid further marginalizing them within the prison community or rendering them at further risk of torture or other ill-treatment'.[856]

Despite sporadically reported incidents of sexual abuse against LGBTIQ persons, accessing the statistics on prison rape and sexual abuse is notoriously difficult, as many such instances go unrecorded. Reporting sexual violence cases often means risking lives in extremely violent prison settings, and is associated with shame and social stigma. It also means more visibility for the inmate, thus exposing themselves to further violence. Many prisoners may choose not to report such violent incidents due to concerns for their own safety. Despite this, a few individual prisons have attempted to generate local numbers, which can give an indication as to the extent of the abuse. It is important, however, to avoid generalisation of this data due to its homogenous nature and primary relevance to particular prisons in the US. A 2007 study conducted in the California prison system found that '67 percent of inmates who identified as LGBTIQ reported having been sexually assaulted by another inmate during their incarceration, a rate that was 15 times higher than the inmate population overall'.[857] As already noted above, the gruesome practice of sexual violence against transgender women prisoners, in particular,

[855] UNGA Report of the Special Rapporteur on Torture (2010) UN Doc. A/HRC/13/39/Add.5, para 231.; UNGA Report of the Special Rapporteur on Torture (2001) UN Doc. A/56/156, para 23.
[856] UNGA Report of the Special Rapporteur on Torture on Jamaica (2010) UN Doc. A/HRC/16/52/Add.3, para 47.
[857] Dolovic (n 837).

has been a focus of reporting by a number of UN SPs mechanisms. In 2011, the UNSR on Violence Against Women reported on a case in El Salvador in which a transgender woman was housed in a male-only prison and detained in a cell with gang members. She was raped repeatedly, sometimes with the complicity of prison officials.[858]

Despite the paucity of empirical data, researchers have compiled countless accounts of transgender prisoners experiencing sexual attacks, coercive sex, harassment, and forced prostitution at the hands of prison staff and fellow inmates. A letter sent by a transgender prisoner pleading for help reads:

> It's war in here.... I'm raped on a daily basis, I've made complaint after complaint, but no response. No success. I'm scared to push forward with my complaints against officers for beating me up and raping me. I was in full restraints when the correctional officers assaulted me. Then after they said I assaulted them. All the officers say is "I didn't do it". The Inspector General said officers have a right to do that to me. That I'm just a man and shouldn't be dressing like this.[859]

The stories presented here are specific to the context and individuals who gave the testimonies. However, they do represent the overall trend of violence reported by 'sexual minorities', both in and outside of prisons. The egregious nature of ill-treatment deserves further and more in-depth investigation of the phenomenon and its implications on transgender persons.

To avoid sexual abuse and rape between inmates and particularly LGBTIQ persons, often the only option is to place them ether in solitary confinement or administrative

[858] UNHRC, Report of the Special Rapporteur on Violence Against Women, on El Salvador (2011) UN Doc. A/HRC/17/26/Add.2., para 28-29.
[859] Sylvia Rivera Law Project (n 822).

segregation as special categories or vulnerable prisoners. This potentially leads to another set of problems and human rights violations, which has been scarcely addressed in international human rights law. Security risks often overshadow individual rights of prisoners, and paradoxically, in the case of transgender prisoners, often such 'security measures' are applied in their best interest to protect them from abuse.

3.2. Protective custody

The prison authorities often argue that gender identity and expression, as well as sexual orientation, are the core that makes transgender, non-binary and 'sexual minority' prisoners targets of sexual abuse. Even more, often such beliefs serve as one of the grounds for state justification to use solitary confinement as a way of protecting vulnerable detainees.[860] Accordingly, transgender prisoners, as well as other LGBIQ persons in detention, often end up in 'protective custody'.[861] Prison administrations justify this by saying that in these situations only two choices are available – to place transgender prisoners with prisoners of their birth sex, which can put them at risk of violence[862] or place them under protection. Often the decision is made in favour of the latter option.[863] The problem, however, remains in the definition of 'protective custody'. This is particularly important due to its practical resemblance to solitary confinement. A brief survey of transgender prisoners' testimonies show how often 'protective custody is

[860] For example, Sharon Shalev identifies five main categories for which solitary confinement is applied: To punish an individual (as part of the judicially imposed sentence or as disciplinary regime); To protect vulnerable individuals; To facilitate prison management of certain individuals; To protect or promote national security; To facilitate pre-charge or pretrial investigations.
[861] UNGA Interim Report of the Special Rapporteur on torture (2011) UN Doc. A/66/268., para 69.; Also see UNGA Report of the Special Rapporteur on Torture (2001) UN Doc. A/56/156, 64.
[862] Report of the Special Rapporteur on Violence Against Women (2011) UN Doc. A/HRC/17/26/Add.2., para 28-29.; UNGA Report of the Special Rapporteur on Torture (2001) UN Doc. A/56/156, 66.
[863] UNHRC Report of the UN Special Rapporteur Torture (2016) A/HRC/31/57, para 35.; Darren Rosenblum (n 824)

used as a euphemism for solitary confinement'.[864] A transgender prisoner described her experience in protective custody during her testimony:

> I was placed in protective custody, which at this facility basically meant solitary confinement. I spent my days in a small cell with no water, magazines, or programming. I was rarely taken to the yard for recreation, and my pleas for water and something to read or occupy my time with usually went ignored. The officer who guarded the unit would pretend not to hear me. This is cruel treatment that I don't think anyone should have to experience, especially not someone who has already been victimized repeatedly.[865]

Another research from the US indicates that while in protective custody, a transgender inmate is often on lock-down for 23 hours a day in a small cell and is cut off from recreation, educational opportunities, employment opportunities, worship services, and all forms of human contact, as highlighted above.[866] Tarzwell, for example, argues that 'protective segregation' often differs little from punitive segregation or solitary confinement. She also notes that at best, segregated prisoners are removed from the companionship of other prisoners, denied access to many prison programs, confined to smaller cells and limited time in exercise yards, and are further stigmatized.[867]

In this thesis, protective custody is treated the same as solitary confinement due to their resemblance, but also because of how individuals experience these two measures – in one case as a disciplinary, in another case as a protection, though both with similar effects. This thesis will attempt to illustrate the impact of solitary confinement in order to underline the severity of isolation, which is what protective custody also entails.

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[864] Scott (n 827) .
[865] National Prison Rape Elimination Commission Testimony of Mayra Soto, Just Detention International (2006). at http://wwwjustdetention.org/en/NPREC/ esmeraldasoto.aspx accessed on 4 May 2014.
[866] Scott (n 828).
[867] Sydney Tarzwell, 'The Gender Lines Are Marked With Razor Wire: Addressing State Prison Policies And Practices For The Management Of Transgender Prisoners' (2006) 38 Columbia Human Rights Law Review.

The issue of solitary confinement cannot be analysed in detail in this chapter and it requires a further examination both in theory and practice. The legal definition of solitary confinement and analyses of international instruments on this issue are discussed in the next chapter, but it is pertinent to provide experiences of transgender prisoners who end up in 'protective custody'.

Prison authorities exercise discretionary power to impose solitary confinement. The decision as to whether to allocate a prisoner to 'protective custody' is discretionary too. Because transgender prisoners are often viewed as disobeying the rules of single-sex space and unwritten rules of prison culture, it is also seen that such discretionary power is used to punish those who show 'deviant' behaviour from the norm. For example, this is how a transgender prisoner describes the experience of transitioning inside the prison: 'For the first three or four years I was locked up, I didn't really have any problems at all—no write-ups, no bad incidents with staff or inmates… as soon as I came out [as trans], everything started going downhill.'[868] In another case, a prison psychologist describes the case of a prisoner who was trying to transition while the prison: 'she (a transgender woman prisoner) was removed from her trustee job as a librarian and confined to the vulnerable prisoner unit, banged up for 23 hours a day, because the authorities claimed they could not guarantee her safety.'[869]

[868] Aviva Stahl, 'The Shocking, Painful Trauma Of Being A Trans Prisoner In Solitary Confinement' Broadly (2016) <https://broadly.vice.com/en_us/article/qkgq97/the-shocking-painful-trauma-of-being-a-trans-prisoner-in-solitary-confinement> accessed 23 January 2016.
[869] Baker (n 808).

Despite the harrowing nature of solitary confinement, transgender and other LGBIQ prisoners disproportionately experience the effects of it. Transgender prisoners are housed in solitary often as a default, mainly to 'protect them from violence' from the general population.[870] Although such decisions are made in the 'best interest' of transgender persons, in practice they work against them. LGBTIQ people in 'protective custody' experience the same mental health deterioration that typically characterizes solitary confinement, impact that makes it equal to ill-treatment.[871] For example, while in 'protective custody', transgender prisoners are treated as prisoners under disciplinary punishment: locked-down for 23 hours a day in a small cell and cut off from recreation, educational opportunities, employment opportunities, worship services, and all forms of human contact.[872] They may also be denied access to programmes and medically necessary healthcare, and are at increased risk of assault and harassment from officers.[873] Having witnessed such ill-treatment and inhumane conditions of detention in which 'sexual minorities' were housed, the UNSR on Torture stated that the unacceptable conditions of separate cells in which 'vulnerable groups such as gay, lesbian and transgender persons were held'[874] were highly likely to have constituted torture and other ill treatment. If 'protective custody' entails the description of solitary confinement, and many testimonies surveyed for this thesis shows it does, a conclusion can be made that by subjecting 'sexual minorities' to so called 'protective custody' they are in fact without procedural guarantees and safeguards are placed in solitary confinement. This also means that even though theoretically protective custody is designed for the protection of

[870] See for example, *DiMarco v Wyoming Dept. of Corrections*, 473 F.3d 1334 (10th Cir. 2007), USA
[871] Sharon Shalev, 'A Sourcebook On Solitary Confinement' [2008] SSRN Electronic Journal.
[872] DiMarco v Wyoming Dept. of Corrections (n 865)
[873] Sylvia Rivera Law Project (n 822).; Also Carr, McAlister and Serisier (n 822)
[874] UN HRC Report of the Special Rapporteur on Torture on Greece (2011) A/HRC/16/52/Add.4.

transgender prisoners, in reality it strips them of all the rights they could access in prisons, and subjects them to ill-treatment as stated by the UNSR on Torture.

Solitary confinement as a disciplinary punishment is contained in prison regulations and rigorous official procedures are applied to its implementation. Protective custody lacks such procedures. The power to impose such a measure is often discretionary to the local prison governors, meaning that such measures bypass the policies and standards on solitary confinement. Moreover, some international standards and instruments suggest that such measures can indeed be used for protective reasons and in the best interests of transgender and other 'sexual minority' prisoners.[875] Hence, 'protective measures' often last for months or even a year, during which time the prisoner is stripped of all rights, and without human contact, or contact with the outside world. For example, research from the US suggests that '85 percent of nearly 1,200 LGBTIQ prisoner respondents had spent time in solitary confinement. Almost half of them had been placed in the 'box' for two years or more.[876]

The compounded example below magnifies the extent of abuses faced by transgender prisoners when isolated from the rest of the population. Though written in 1984, this story from the 'Experiences of a Transsexual Prisoner' interview still resonates with prison practices in many countries today as they relate to transgender prisoners:

[875] Council of Europe: CPT 21st General Report (2011), CPT/Inf(2011)28-part2, para 53-63., Also see, European Prison Rules, Council of Europe, Res 73(5) of the Committee of Ministers (19 January 1973), revised in 1987, Committee of Ministers of the Council of Europe, Rec R(87)3 (12 February 1987) ("European Prison Rules 1987") and Revised European Prison Rules, 2006, Committee of Ministers of the Council of Europe, Rec(2006)2 (11 January 2006) (European Prison Rules 2006) 60.
[876] Aviva Stahl (n 864) ; Jason Lydon, Kamaria Carrington, Hana Low, Reed Miller and Mahsa Yazdy, 'Black and Pink' (2015). At http://www.blackandpink.org/wp-content/upLoads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015..pdf Accessed 1 March 2016.

> The first day was very hard. I was at Bathurst only 12 months because of not being able to understand me. They kept me in what they called the Back Yard where no-one else could see me, and this kind of treatment I couldn't stand because I was by myself. It was a yard 20 by 10; I was there all day and back to my cell at night time. I had no company and it actually drove me mad, so I became a little suicidal. I told them if they didn't shift me I would probably end up a lunatic or something. And eventually I ended up attacking one of their prison officers, and was given 28 days for assault.[877]

Such experiences of transgender prisoners indicate that no international standard is applied when considering 'protective custody' measures for the transgender prisoners.

The absence of specifically worded safeguards has meant putting transgender prisoners in and out of safeguards, but more specifically in the legal limbo where protection is and is not available at the same time. Furthermore, decision-making practices by the prison administration do not consider the needs of individual transgender prisoners. The lack of guidance and wide discretionary powers of the local prison administration to 'handle' the gender expression of prisoners serves as a precursor for the abuse, violence and direct discrimination of the transgender prison population.

3.3. Medical treatment

Earlier in this thesis, the medical treatment of transgender persons and the medical model of transgender recognition was discussed alongside issues surrounding health of transgender persons and the WHO-ICD classification. A traditional framework of medical care for transgender persons consists of three elements: hormone therapy, a

[877] Chris Sanderson, 'Experiences of a Transsexual Prisoner' (1984) 9 Legal Service Bulletin 183, 184. Quoted in Keep me Safe From Harm.

period of time living as the opposite gender, and sex-reassignment surgery. Human rights law asserts that healthcare should be equal to the care available in society – often referred to as equality of care.[878] The transgender theory and lived experiences of non-binary people have shown that not all transgender and/or non-binary persons desire to transgress permanently from one gender to another, which is an expected understanding that can present a dilemma to the prison administration health system at different levels: resources and the intellectual capacity to deal with the issue.

A major concern for many transgender prisoners is whether appropriate health care can be provided while incarcerated. Often decisions about the medical treatment of transgender persons are based on whether the person is in the process of hormonal treatment already, or would like to initiate such treatment in the prison system, whether the person was already 'living like the opposite sex', or would like to initiate such practice in the prison, and finally, whether the person was about to undergo surgery, or would like to initiate such surgery in the prison system. In practice, such a right is often contested in national courts and it has been argued that the denial of hormone therapy, as well as the denial of gender confirmation surgery, amounts to deliberate indifference to the medical needs of transgender inmates.[879] At the same time, prison reality varies from what is available as an equal standard for all, and particularly when it comes to transgender persons.

[878] Rick Lines, From equivalence of standards to equivalence of objectives: The entitlement of prisoners to health care standards higher than those outside prisons' (2006) 2 (4) International Journal of Prisoner Health.; Stefan Enggist, Lars Møller, Gauden Galea and Caroline Udesen (eds), Prison and Health (World Health Organization 2014).
[879] Maruri (n 834).

A testimony of a transgender prisoner from Israel outlines problems of healthcare in prisons:

> Most prisons do not provide hormones, and some go to great lengths to avoid providing any treatment to transsexual inmates. Most transsexual inmates are not receiving appropriate medical and psychological care. Many repeatedly seek medical treatment, often for years, while enduring administrative harassment and difficult court battles in the pursuit of basic medical and civil rights. Prisons that do provide frequently have policies, which allow for the treatment of those who were treated prior to incarceration, but fail to address the medical needs of those who develop GID during incarceration or who have no documented proof of their pre-incarceration transsexualism. Officials often claim that only those inmates who were diagnosed with Gender Identity Disorder and placed on hormones before incarceration are eligible for hormones in prison. They sometimes maintain that the prison does not afford the opportunity for the real life experience... conveniently ignoring the fact that many MTF transsexual inmates consistently maintain their female identity year after year in an all-male facility.[880]

A long history of pathologization of transgender persons and communities has meant that medical care has earned the meaning of more than just the health of transgender people. In some cases, it is even part of identity. The refusal of prison administrations to provide hormonal treatment may result in multiple violations, including leading to the person's death. A recent case from the UK, HMP Doncaster in South Yorkshire, highlighted a deep-rooted problem that medical services in prisons have when it came to the provision of the right treatment for transgender persons. Jenny Swift was a male to female transgender person who was sentenced to imprisonment. The media reported that she had asked 'to be placed in a women's prison and had become miserable, sad and ill after being refused female hormones in HMP Doncaster'. She was found dead in her cell within five weeks from her placement in a male prison. She had been taking female

[880] Gianna Israel, 'Transsexual Inmates Treatment Issues' (2002) 97 Transgender Tapestry 1, 4., inserted in Richard Edney, 'To Keep Me Safe From Harm? Transgender Prisoners And The Experience Of Imprisonment' (2004) 9 Deakin Law Review.

hormones for three years before imprisonment as part of her transitioning; however, once in prison she was refused this treatment.[881] A next of kin had described the suffering Jenny Swift went through since she was denied hormone treatment in prison:

> She [Jenny Swift] kept asking for the hormones and they said she would get them but she never did. I phoned up and explained that she needed them too... Jenny said that not having them was making her legs shake, making her feel sad and ill – she said it was like coming off drugs. It made her miserable… She had been trying her best to keep her feminine side but she mentioned in prison that she could feel the testosterone in her body and she felt sick. It was making her cringe inside.[882]

The lack of attention to medical care for transgender prisoners also has led to some individuals castrating themselves,[883] as well as creating an opening of the black market for hormone trade in prisons, thereby making transgender prisoners more vulnerable and exposed to violence.[884] In Ireland, recent research found that delays in, or the denial of, appropriate treatment for transgender prisoners was common and even the withholding of medications as a form of disciplinary sanction was also practised. Such behaviour suggested an approach that considered gender-related treatment as a luxury or a privilege rather than a right and necessity.[885]

A recent publication by transgender prisoners depicting their personal stories, shows how desperate some of the accounts are and deserve attention:

> I carried out bilateral orchiectomy upon myself (the removal of both testicles in other words, complete self-castration). The self-administered medical procedure that I performed upon my own body was only done after extensive research. It was not an act of brutal self-harm that was random or driven by any personality

[881] Halliday (n 805).
[882] ibid.
[883] Tarzwell (n 862) .
[884] See for example Travis Wright Colopy, 'Setting Gender Identity Free: Expanding Treatment For Transsexual Inmates' (2012) 22 Health Matrix.
[885] Carr, McAlister, Siobhan (n 817) 20.

> disorder or narcissist trait. I don't regret performing bilateral orchiectomy upon my own body. At the time and in a dark place, I believed rightly or wrongly that with the system denying me a diagnosis and treatment my only option was to sit in my cell and use a prison razor to perform the operation upon myself.[886]

The CoE Commissioner on Human Rights report in 2009 found that transgender people in prison faced periods of time without hormone therapy, which may have resulted in a long time without treatment and could cause serious health problems, such as the development of osteoporosis in 'transsexual' men, and irreversible physiological changes taking place such as the development of baldness in 'transsexual' women.[887] The Commissioner also highlighted general problems such as difficulties for transsexual people in accessing assessment, hormone therapies, or surgery, noting that many prisons or prison systems feel they do not have the facilities to manage 'transsexual' prisoners, or in some cases they (transgender prisoners) are seen as forgoing their (transgender prisoners) right to such treatments because of their conviction.[888]

Such ignorance of transgender medical care in prisons is not new. The absence of the best medical practices or practice guidelines and the lack of quality supervision all have been historic features of transgender people's lives in prison environments. However, to have a fuller understanding of the modern concept of non-binary gender in the prison context and the suffering of transgender prisoners, one should look into the rarely documented experiences of gender fluidity in early prisons as well as analyse the concepts of sex, gender and sexuality in the prison context.

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[886] Baker (n 808).
[887] Council of Europe Commissioner for Human Rights, CommDH/IssuePaper(2009)2, Human rights and gender identity (29 July 2009).
[888] ibid.

4. Conclusions

By illustrating transgender persons' lives in the prison environment and providing personal accounts, this chapter attempted to unveil the nature of egregious violations that take place in closed institutions against transgender prisoners. These lived experiences highlight a particular vulnerability of transgender prisoners.

Indeed, as argued earlier, abuse is not unique to transgender prisoners, and prisons are not favourable places for any people. However, the intensity of violations and the systematic nature of negligence against not only the transgender but wider 'sexual minority' groups indicate that there are specific reasons as to why transgender people are targets of violent behaviour, or why these people are outlaws when it comes to the protection mechanisms in detention.

To further explore the limitations of the available framework of protection mechanisms in the prison context, the next chapter will explore the general human rights norms applicable to prisons. Tensions between the social construction of gender and the binary nature of prisons reinforced by gender identity–based claims for human rights will be further addressed to analyse the limitations of such an approach in the prison context.

Chapter VI

The Treatment of Transgender Prisoners Under International Human Rights Law: Addressing Limitations

1. Introduction

The previous chapters provided theoretical and legal background on the applicability and limitations of international human rights law to the protection of transgender persons, briefly surveyed the progression of the law and policy to accommodate fluid genders, and described and analysed norms of international human rights law. This, in particular, concerns with the legal recognition of non-binary genders and possible limitations of international human rights law in providing a relevant protection frame.

This chapter draws on the preceding chapters to examine the models of legal recognition of transgender identity in the prison context while applying the protection frameworks developed under international human rights law discussed in Chapters Three and Four. It suggests that while prisons are characterised by strict binary models of the sexes, the underlying principles of human rights cut across the various rights and could serve as an overall framework for developing the safeguards for transgender prisoners. In assessing the limitations in the application of human rights law to transgender prisoners, this chapter pays particular attention as to how non-binary genders can be accommodated in the prison context as well as examining the available options for that. Furthermore, it

serves as a space for comparative analysis for the application and limitations of human rights standards and norms, both outside and inside closed institutions.

To address the issues, this chapter will start by examining the current international human rights law framework by surveying the common standards of human rights protection and how they apply to transgender prisoners. It will then employ the same structure as in Chapter Five to have a closer look at the underlying principles of human rights: equality, non-discrimination and dignity. While reflecting on the substantive rights, privacy and right to personhood will be analysed in this chapter to bring a new dimension into the discussion.

In search of some answers about international legal obligations in relation to the treatment of transgender prisoners, this chapter surveys the limitations of the application of current human rights framework to non-binary genders in strictly single-sex institutions.

2. Treatment of Transgender Prisoners Under International Human Rights Law

2.1. Relevant international human rights instruments

Civilised legal systems recognise that all human beings have certain basic rights. This means that prisoners too are entitled to human rights. Some rights, however, can be restricted due to the restrictive nature of the detention, in which cases such restrictions

are outlined in the law.[889] During the 20th century, the international protection of human rights increased dramatically. Within the last few decades too, international human rights law developed with particular relevance to the treatment of prisoners, including safeguards from torture and other cruel, inhumane treatment or punishment (torture and other ill-treatment).[890] These safeguards are developed with particular relevance and equal treatment for all, including for transgender and non-binary persons.

A number of international human rights conventions have addressed the treatment of detainees in the penal system. The bill of rights provides core human rights standards, including in the context of criminal justice. The general human rights norms of these instruments were already discussed in Chapters Three and Four, and therefore only important highlights relevant to prisons will be made here. In particular, the ICCPR is of particular relevance for persons who are deprived of their liberty as it prohibits torture and other ill-treatment under Article 7 and provides wider protection guarantees in criminal proceedings. The ICCPR in Article 9 guarantees *inter alia* the right to liberty and security of persons, and Article 10 deals specifically with the treatment of persons deprived of their liberty.[891] The ICCPR has created a comprehensive normative framework for the prohibition of torture and other ill-treatment. In particular, it seeks to ensure the application of basic principles of human rights in the prison context including equality, non-discrimination and respect for the inherent dignity of the human being.[892] Moreover, the HRCttee has interpreted Article 10 (humane conditions of detention) as

[889] Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy* (Oxford University Press, 2009) 66
[890] Nigel Rodley with Matt Pollard, *The Treatment of Prisoners under International Law* (3 edn, Oxford University Press 2011) 5
[891] UNGA, the International Covenant on Civil and Political Rights, resolution 2200A (XXI), 16 December 1966 Art. 10.
[892] Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126.

the main provision through which UN soft law standards can be applied in the prison context. The Committee has consistently encouraged countries to apply the relevant UN standards to the treatment of prisoners to ensure the protection of prisoners and detainees against torture and other ill-treatment.[893]

Specific declarations and treaties started to develop within the UN from the early 1970s, culminating in the adoption of the Declaration on the Protection of All Persons from Torture and Other Ill-treatment. The Declaration on the 'Protection of All Persons Being Subjected to Torture or Other Cruel Inhumane or Degrading Treatment or Punishment' was adopted in 1975, and was later codified as the UN Convention on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (the CAT).[894]

Other instruments that are of a general human rights nature but have a relevance to the humane treatment of prisoners include the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[895] the Convention on the Elimination of All Forms of Discrimination against Women (ICEDAW),[896] the Convention on the Rights of the Child (CRC),[897] and relatively recent instruments, such as International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[898] the International Convention for the Protection of All Persons from

[893] UN Committee on Human Rights, 'General Comment No. 21 on Article 10 (Humane treatment of persons deprived of their liberty)' (1992) UN Doc. Doc. HRI/GEN/1/Rev.1. para 5.
[894] UN Convention Against Torture or Other Cruel Inhumane or Degrading Treatment or Punishment, 1984.
[895] UNGA International Convention on the Elimination of All Forms of Racial Discrimination, 1965.
[896] UNGA Convention on the Elimination of All Forms of Discrimination against Women 1979.
[897] UNGA Convention on the Rights of the Child, 1989.
[898] UNGA International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990.

Enforced Disappearance[899] and the Convention on the Rights of Persons with Disabilities.[900]

Regional human rights instruments that also have a direct relevance to the protection of human rights of prisoners and humane treatment standards include the Banjul Charter,[901] the Inter-American Convention on Human Rights (IACHR),[902] the Inter-American Convention to Prevent and Punish Torture,[903] the Inter-American Convention on Forced Disappearance of Persons,[904] and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.[905] In the European context, the human rights instruments included the European Convention on Human Rights (ECHR) and[906] the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[907] The Arab Charter on Human Rights (Articles 14, 20-21) applies to the countries of OIC.[908]

Other developments were also recorded, including the emergence of multiple human rights monitoring mechanisms under the treaties noted above, as well as the development of new jurisprudence on human rights. The first authoritative General Comments of the HRCttee on the scope of the provisions on prisons in the 1980s also opened up the

[899] UN GA, International Convention for the Protection of All Persons from Enforced Disappearance, 2006.
[900] UN GA International Convention on the Rights of Persons with Disabilities, 2006.
[901] African Charter on Human Rights, Articles 2-7
[902] Inter-American Convention on Human Rights, Articles 4-5, 7-8.
[903] The Inter-American Convention to Prevent and Punish Torture, 1985, entered into force on 28 February 1987, and as of 9 April 2002 had 16 States parties.
[904] The Inter-American Convention on Forced Disappearance of Persons was adopted by the General Assembly of the OAS in 1994 and entered into force on 28 March 1996. As of 9 April 2002 it had ten States parties.
[905] OAS Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), 9 June 1994 (Entered into force 5 March 1995).
[906] European Convention on Human Rights, Articles 2-3, 5-6.
[907] The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment59 was adopted in 1987 and entered into force on 1 February 1989.
[908] Arab Charter on Human Rights, Articles 14, 20-21.

opportunity to develop specific jurisprudence on the substantive rights enshrined in the Convention. The UN treaty bodies established under the conventions, particularly the CAT Committee, the CEDAW, and the CRC Committee, all contributed to the development of group-specific human rights jurisprudence in the prison context. SPs mechanisms also started developing in the early 1980s. Namely, the Working Group on Enforced Disappearances was introduced in 1980 and the UNSR on Summary or Arbitrary Executions was established in 1982. The UNSR on Torture was also established in 1985, and since it has helped to bring the issues of the prevention of torture and other ill-treatment to light. The Optional Protocol to the Convention Against Torture (OPCAT) was adopted later, in 2002, to assist in preventing torture and other ill-treatment both from an international and national perspective.[909] The OPCAT established a two-level prevention mechanism, the Subcommittee for the Prevention of Torture (SPT) and the National Preventive Mechanism (NPM) at country levels.[910] Although this thesis does not consider monitoring mechanisms and public monitoring bodies, their importance in preventing torture and other ill-treatment should be highlighted. In particular, the SPT has recently issued reports that describe the challenges of transgender prisoners and recommendations.[911] Similarly, regional bodies, namely the CoE, also established a prison monitoring body – the CPT, under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment – which conducts prison monitoring visits with the aim to prevent torture and other ill-treatment

[909] Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2375 UNTS 237, entered into force 22 June 2006 (OPCAT).
[910] ibid.
[911] UN CAT 8th and 9th reports of the Subcommittee on Prevention of Torture (2015, 2016) UN Doc. CAT/C/54/2, UN Doc. UN Doc. CAT/C/57/4.

in all places of detention.[912] The Inter-American Commission on Human Rights has also adopted a Convention to Prevent and Punish Torture and created the mandate of the Rapporteur to allow prison monitoring.[913] The ACHPR also has established a special mandate on prisons and conditions of detentions and regularly issues recommendations on various areas of prison life.[914] In addition, a Committee for the Prevention of Torture was created within the ACHPR to specifically promote the Robben Island Guidelines.[915] These guidelines carry historic importance, as they were the first regional standard to prohibit and prevent torture (adopted by the ACHPR in 2002).

Other international standards, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[916] and the Basic Principles for the Treatment of Prisoners[917] together with the long-standing UN Standard Minimum Rules (SMR), create specific norms as to how international human rights law shall be applied to prisons.[918] Gradually, new prison standards were also developed to address specific groups of detainees, including children, and women. First, the UN Standard

[912] European Committee on the Prevention of Torture at http://www.coe.int/en/web/cpt, accessed 9 November 2015.
[913] Inter-American Human Rights Commisison, Rapporteur on the Rights of Persons Deprived of Liberty. More at: http://www.oas.org/en/iachr/pdl/mandate/composition.asp accessed 3 April 206.
[914] See for example mandate of the Special Rapporeur on Prisons and Conditions of Detention. More at http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention/ Accessed on 8 March 2015.
[915] Guidelines and Measures for the Prohibition and the Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa 2002, Organisation of African Unity, (2002) ('Robben Island Guidelines').
[916] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).
[917] Basic Principles for the Treatment of Prisoners, 1990, UNGA Res 45/111, annex, UN Doc A/RES/45/111 (14 December 1990) ('Basic Principles for the Treatment of Prisoners').
[918] Standard Minimum Rules for the Treatment of Prisoners, approved by the United Nations Economic and Social Council Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Revised in 2015 UNGA 70/175 ('the Nelson Mandela Rules').; The SMR has been used to set out the baseline for prison management with fundamental considerations of human rights protection. The SMR were adopted at the very first UN Congress on the Prevention of Crime and Treatment of Offenders in 1955. The original version of the SMR was amended slightly in 1957, and contained rules on registering the prisoners (rule 7), separation of categories of prisoners (rule 8), accommodation of prisoners (rules 9-14), personal hygiene (rules 15-16), clothing and bedding (rules 17-19), food (rule 20), exercise and sport (rule 21), medical services (rules – 22-26), discipline and punishment (rules 27-34), instruments of restraint (rules 33-34), information to and complaints by prisoners (rules 35-36), contact with the outside world (rules 37-39), access to books (rule 40), religion (rules 41-42), retention of prisoner's property (43), notification of death, illness, transfer, etc. (rule 44), removal of prisoners (rule 45), institutional personnel (rules 46-54), and inspection (rule 55). The SMR also encompasses rules on treatment specific categories. These include dealing with prisoners under sentence (rules 56-81), 'insane and mentally abnormal prisoners' (82-83), prisoners under arrest or awaiting trial (rules 84-93), and civil prisoners (rule 94).

Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)[919] were adopted in 1985, and more recently, the UNGA adopted Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).[920] While both of these instruments aimed at protecting specific groups under international human rights law, the Bangkok Rules for the first time brought the gender element into the international standards of criminal justice and human rights with specific focus on gender specific treatment of women prisoners.

At the regional level, these standards are complemented by region-specific prison standards. In Europe, European Prison Rules (EPR) created a foundation for the treatment of prisoners,[921] in the Americas, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.[922] The ACHPR also recently adopted the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), which spell out the importance of gender identity and the need for special measures to avoid discrimination in prisons.[923]

The Bangkok Rules and Beijing Rules provide group-specific norms for women and juveniles, respectively. These instruments and the SMR in particular have played a significant role in establishing basic standards for the treatment of prisoners in custodial

[919] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') Adopted by General Assembly resolution 40/33 of 29 November 1985.
[920] UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, negotiated within the UN Commission on Crime Prevention and Criminal Justice and adopted by the UN General Assembly on 21 December 2010 (A/RES/65/229) (Bangkok Rules).
[921] European Prison Rules (2006).
[922] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008).
[923] The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) were adopted by the African Commission on Human and Peoples' Rights (the Commission) during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014 (Luanda Guidelines). 30.

settings and have acted as a roadmap in setting up prison policies and the protection of the rights of prisoners,[924] with an impact on developing safeguards for the detainees. When the SMR were drafted and adopted in the 1950s, the gender aspect was not taken into consideration, nor were LGBTIQ prisoners included in the discussion (as noted in Chapter One). The SMR lasted for over 50 years as standard-setting guidelines without amendments and were largely incorporated into the jurisprudence of the UN human rights mechanisms. A few adjustments were made in the human rights law to accommodate gender in the prison system, focusing on the rights and specific needs of women in prisons. In 2010, when the Bangkok Rules were adopted by UNGA, they were conceived as supplementary to the SMR. This means that these rules, in addition to the minimum standard of treatment for general prison population, also provide specific guarantees and norms for women prisoners according to their needs. It is important to highlight that such a binary approach to standards on the treatment of prisoners is understood to have contributed to reinforcing the binary understanding of gender in international law.

Perhaps not surprisingly, the outdated nature of the SMR was often criticized, eventually leading to its revision between 2010 - 2015.[925] The process of drafting the update of the SMR is outside the scope of this thesis, although it is important to highlight the main

[924] The history of designing the SMR began before 20th century. Nonetheless, critics note that relatively early effort was made to articulate guidelines for the treatment of prisoners in 1870, with the 'Declaration of Principles' outlined at the inaugural National Congress on Penitentiary and Reformatory Discipline. International meetings to discuss penal developments were held 'quinquennially' or every five years, since 1885, sponsored by the UN predecessor League of Nations and the International Penal and Penitentiary Commission (IPPC). The SMR as the principles of prison reform were promulgated in 1926 by the IPPC and subsequently revised in 1933 and 1951. The latest version of the principles was then presented to the UN for further revision. (Todd R. Clear and George F. Cole, American Correction 24 (6th ed. 2003); Edward M. Peters, 'Prison Before the Prison: The Ancient and Medieval Worlds' in Norval Morris and David J. Rothman (eds), The Oxford History of the Prison: The Practice of Punishment in Western Society (1998).

[925] See for example, UNGA Res 67/188 on Standard Minimum Rules for the Treatment of Prisoners, UN Doc. A/RES/67/188 (2012)

developments of the revision process. Between 2010 and 2015, four inter-governmental expert group meetings took place, which collectively focused on updating the selected themes.[926] The revision concerned the following areas of prison life: legislating the underlying principles of human rights, including respect for prisoners' inherent dignity and value as human beings; medical and health services; disciplinary action and punishment, including the role of medical staff, solitary confinement and reduction of diet; investigation of all deaths in custody, as well as any signs or allegations of torture or inhuman or degrading treatment or punishment of prisoners; protection and special needs of vulnerable groups deprived of their liberty; the right of access to legal representation; complaints and independent inspection; the replacement of outdated terminology; training of relevant staff to implement the SMR; and special consideration to be given to the prisoners with disabilities.[927] The updated rules were approved by the UNGA in December 2015 and were named after Nelson Mandela ('Nelson Mandela Rules').[928]

Yet although these new safeguards are applicable to transgender persons, the review process was once again characterised by gender-binary debates on a strict division of discussions about men and women prisoners.[929] Despite some encouragement of states to consider the question of 'sexual minorities' in the new rules for the treatment of

[926] It is important to note that, during the preparatory meeting in Santa Domingo, lesbian, gay or transgender persons were discussed under the framework of vulnerable categories in prisons alongside with women, young persons and older persons, foreign nationals, those who are ill and those from minority groups. It was also particularly noted that these are the 'special categories' of prisoners that need specific safeguards to ensure that the pain of their imprisonment is not increased. Para 34, Report on the High Level Expert Group Meeting on the United Nations Standard Minimum Rules for the treatment of prisoners held in Santo Domingo from 3 to 5 August 2011, https://www.unodc.org/documents/justice-and-prison-reform/Reports/Report_High_Level_EGM_Santo_Domingo_3-5_August_2011_English.pdf accessed 3 March 2014.

[927] Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012 (16 February 2012), UN Doc UNODC/CCPCJ/EG.6/2012/1. : https://documents-dds-ny.un.org/doc/UNDOC/GEN/V12/509/54/PDF/V1250954.pdf?OpenElement.

[928] ibid.

[929] UN Commission on Crime Prevention and Criminal Justice: Notes and comments on the Standard Minimum Rules for the Treatment of Prisoners (2012) E/CN.15/2012/CRP.1.,11. At: https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_21/E-CN15-2012-CRP1/E-CN15-2012-CRP1_E.pdf; accessed on 2 March 2016

prisoners, it seemed politically sensitive for states to even debate the issue.[930] For example, records show that China strongly opposed the acknowledgement of SOGI in the revision. China further explained its position by stating that the revision process had to 'respect the practices and provisions of countries in that regard.'[931] It also contended that mentioning LGBTIQ persons as vulnerable population alongside foreign prisoners would make the list over-prescriptive.[932] China was outweighed by a number of countries supporting the explicit language in the new treatment standards for prisoners. Countries such as Norway, Brazil and South Africa[933] specifically recommended inclusion of the language of Yogyakarta Principle 9 to address the special needs of vulnerable groups deprived of their liberty, particularly LGBTIQ prisoners.[934] In addition, Finland,[935] Norway,[936] Brazil,[937] Mexico,[938] South Africa,[939] Romania,[940] and Germany[941] made

[930] See for example, the "Background Note" drafted by the UN Office on Drugs and Crime (UNODC) for preparatory expert meetings, listed Yogyakarta Principles as a newly developed standard.; Background note, Open-Ended Intergovernmental Expert Group Meeting on the UN Standards Minimum Rules for the Treatment of Prisoners, Vienna, 31 January-2 February 2012; available from https://www.unodc.org/documents/justice-and-prison-reform/AGMs/Background_note.pdf; accessed on 5 April 2016.
[931] Response of the Governemnt of China (2016) UN Doc. CU 2013/129/DO/JS, UNODC/CCPCJ/EG.6/2014/Gov.19, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/CHINA-E-VMTG.pdf, accessed from 3 April 2016.
[932] Response of the Government of China (2013) UN Doc. CU 2013/129/DO/JS, UNODC/CCPCJ/EG.6/2014/Gov.19, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/CHINA-E-VMTG.pdf, accessed from 3 April 2016.
[933] Response of the Government of South Africa (2013) UN Doc. CU 2013/129/DO/JS, UNODC/CCPCJ/EG.6/2014/Gov.17, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/SOUTH-AFRICA-VMTG.pdf, accessed on 4 April 2016.
[934] Response of the Government of Norway (2013) UN Doc. CU 2013/129/DO/JS, UNODC/CCPCJ/EG.6/2014/Gov.8, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/NORWAY-VMTG.pdf; accessed on 4 April 2016.
[935] Finland comments on SMR (2013) UN Doc. UNODC/CCPCJ/EG.6/2014/Gov.7, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/FINLAND-VMTG.pdf.
[936] Response of the Government of Norway (2013) UN Doc. CU 2013/129/DO/JS, UNODC/CCPCJ/EG.6/2014/Gov.8. At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/NORWAY-VMTG.pdf; accessed on 4 April 2016.
[937] Response of the Government of Brazil (2013) CU 2013/129/DO/JS, UNODC/CCPCJ/EG.6/2014/Gov.12, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/BRAZIL-E-VMTG.pdf; accessed on 7 April 2016.
[938] Response of the Government of Mexico (2013) UN Doc. CU 2013/129/DO/JS, UNODC/CCPCJ/EG.6/2014/Gov.16, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/MEXICO-E-VMTG.pdf, accessed on 4 April 2016.
[939] Response of the Government of South Africa (2013) CU 2013/129/DO/JS, UNODC/CCPCJ/EG.6/2014/Gov.17, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/SOUTH-AFRICA-VMTG.pdf, accessed on 4 April 2016.
[940] Response of the Government of Romania (2013) UN Doc. CU 2013/129/DO/JS, UNODC/CCPCJ/EG.6/2014/Gov.30, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/ROMANIA-VMTG.pdf, accessed on 6 April 2016.

specific calls for including SOGI as a prohibited ground for discrimination in prisons.[942] Despite these active attempts, a compromise was made against including the language of SOGI or LGBTIQ persons as a specific group under the Nelson Mandela Rules. However, to conclude whether international standards on prisons can be specifically applied to the transgender prisoners' experiences, it is useful to consider the wider context in which the discussions described above took place, as well as what other human rights bodies have considered so far. Moreover, although this thesis does not analyse the implementation of these standards in practice, the reality is that much of the general prison standards remain unimplemented in many countries. As this chapter continues to provide analysis of the application of the broader human rights safeguards to transgender prisoners, it is important to note that there are different implicit ways in which 'sexual minorities' have been incorporated into the revised SMR. Among them are prohibited grounds of discrimination that include a non-exhaustive list of grounds, as well as basic principles of human rights and Rule 7(a), which speaks about unique gender. However, to specifically examine the standards on the treatment of transgender prisoners, a closer look at the human rights mechanisms is needed. In particular, the international human rights bodies shall devote a significant amount of time and energy to develop jurisprudence on transgender prisoners' rights and recommended standards for consideration. Following the themes of the lived experiences of transgender prisoners in

[941] See German Position Paper on the Revision of the UN Standard Minimum Rules on the Treatment of Prisoners (2014) UN Doc. UNODC/CCPCJ/EG.6/2014/Gov.33, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/GERMANY.pdf; accessed on 4 April 2016.

[942] Later on, another joint statement was made by Argentina, Brasil, South Africa, Uruguay, United States of America and Venezuela to include sexual orientation and gender identity as a prohibited ground for discrimination. Commission on Crime Prevention and Criminal Justice, 22nd session, 22-26 April 2013: Proposal of the Governments of Argentina, Brazil, South Africa, Uruguay, United States of America and Venezuela (2013) UN Doc. E/CN.15/2013/CRP.6, At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/ECN15-2013-CRP6_e_.pdf; accessed on 7 April 2016.

Chapter Five, this chapter will continue to offer a critical analysis of the existing standards, their application to transgender prisoners and possible limitations.

2.2. Yogyakarta Principles and treatment of transgender prisoners

The Yogyakarta Principles more broadly were discussed in Chapter Three, where it was highlighted that although these principles are not officially part of the soft or hard law, they occupy a special place in the international human rights standards in applying a general human rights framework to LGBTIQ. Even though they are not officially adopted by the UN bodies, they have been endorsed by a number of UN agencies and have been part of recommendations made by human rights treaty bodies, the SPs Mechanisms and even the UN HRC, including through UPR. Principle 9 particularly deserves to be considered for the purpose of this chapter. That principle will serve as a framework for the application of human rights standards to the treatment of transgender persons in detention.

Principle 9 of the Yogyakarta Principles provides that in order to guarantee the protection of human rights of 'sexual minorities', comprehensive measures should be taken. It outlines specific human rights measures that need to be put in place to guarantee safeguards for the LGBTIQ people in detention: the prevention of torture and other ill-treatment, medical care, issues related to segregation and protective measures and the participation in decision-making on these measures, equality and non-discrimination.

More specifically, the Yogyakarta Principles state that measures for the protection of LGBTIQ persons in prisons should include the:

> prevention of violence, ill-treatment including physical, mental or sexual abuse, adequate access to medical care, information on health and access to therapy including gender-reassignment treatment, participation in decision making regarding the place of detention appropriate to their SOGI, applying protective measures for all prisoners vulnerable to violence or abuse on the basis of their SOGI, and so that such protective measures involve no greater restrictions of their rights, than it is experienced by the general prison population, provision of conjugal visits, where permitted to be granted on equal basis, regardless of the gender of the partner in prison, independent monitoring of detention facilities with particular experience in working in the area of SOGI, and special programmes for awareness raising for prison personnel and all other officials regarding international human rights standards and principles of equality and non-discrimination, including in relation to SOGI.[943]

Notably, the Yogyakarta Principles have been undergoing redrafting in the framework of Yogyakarta Principles + 10 process. The updated rules will be published later in 2017, and it is important to note that the standards established in Principle 9 are unlikely to reduce.

The Yogyakarta Principles are comprehensive in providing the structure as to how to treat LGBTIQ prisoners. While measures listed in Principle 9 are very much part of the international human rights law, the actual application of these measures in practice is still lacking. Moreover, the Yogyakarta Principles were drafted and endorsed in 2006, when no country had adopted the gender self-determination model of transgender recognition, and international forums still had to widen their knowledge on the diversity of gender and sexuality. This means that although these principles create a framework for the treatment of LGBTIQ prisoners, they do not provide a comprehensive view as to how

[943] Yogyakarta Principles (2006) 9.

non-binary genders can be accommodated in the fixed identity-based prison or other places of detention. This latter point is particularly important as increasing numbers of countries adopt a gender self-determination model of transgender legal recognition and the challenges of implementing such a model in the prison also becomes acutely apparent.

3. The Enjoyment of Human Rights and Transgender Persons in Prisons

The HRCttee has interpreted Article 10 (humane treatment) of the ICCPR as 'persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment'.[944] Moreover, the newly adopted General Commentary by HRCttee imposes a positive obligation towards persons who are particularly vulnerable due to their status of imprisonment, thereby providing greater protection for them under the ban on torture and other ill-treatment contained in Article 7 of the ICCPR.[945] Furthermore, the Basic Principles for the Treatment of Prisoners also emphasise:

> all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.[946]

This has been further expanded in the newly updated SMR that for the first time incorporates the principle of respect for dignity and suggests that:

[944] UN Committee on Human Rights, 'General Comment No. 21 on Article 10 (Humane treatment of persons deprived of their liberty)' (1992).
[945] ibid. para 3.
[946] Basic Principles for the Treatment of Prisoners, 5.

> all prisoners shall be treated with respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other ill-treatment, for which no circumstances whatsoever may be invoked as a justification'.[947] In fact, the principle of respect for dignity has become an overarching principle in the revised SMR expanding its application into variety of aspects of prison life.[948]

The group-specific instruments – the Bangkok Rules and the UN Rules for the Protection of Juveniles Deprived of their Liberty – highlight the requirement of treating prisoners with dignity and non-discrimination.

Regional human rights instruments all emphasize the importance of human rights in the prison context. For example, as outlined in the section above on relevant human rights instruments, they continue to have effects subject to the possible restrictions inherent to the deprivation of liberty, although such limitations should not infringe the inherent dignity of a prisoner. To this effect, for example, the EPR state that 'life in prison shall approximate as closely as possible the positive aspects of life in the community'.[949] In addition, the ECtHR also stipulates in its case law that prisoners continue to enjoy all the fundamental rights and freedoms guaranteed under the ECHR, except for the right to liberty, where lawfully imposed detention expressly fell within the scope of Article 5 (right to liberty and security).'[950] Similarly, the IACtHR also has indicated that:

> Deprivation of liberty generally causes, as its unavoidable consequence, the impairment of other human rights, besides the right to personal liberty. However, said impairment of rights arising from the deprivation of liberty or as its collateral

[947] Nelson Mandela Rules (2015) 1.
[948] The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/RES/70/175., 17 December 2015.; Also Huber, McGregor, Rodley, 'Updating the UN Standard Minimum Rules on the Treatment of Prisoners' in For the Sake of Present and Future Generations, (Suzannah Linton, Gerry Simpson, William A. Schabas Eds.), Brill Nijhoff, 2015.; also, Penal Reform International, and Human Rights Centre of the University of Essex: Essex paper 3 Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules, 2017.
[949] European Prison Rules (2006) 5.
[950] *Hirst v The United Kingdom* App no 74025/01 (ECtHR, 6 October 2005).

> effect, must be strictly minimized. Furthermore, the state must ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of surfing inherent in detention, and that given the practical requirements of incarceration; the detainee's health and welfare are adequately warranted.[951]

In addition, the Robben Island Guidelines (more formally, the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa) also urge states to take 'steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards.'[952]

Academic commentators have articulated that the mere fact that prisoners are deprived of their liberty does not mean they are stripped of their fundamental rights and freedoms. Prisoners' rights commentators, such as Nowak and Rodley, both of whom served as UNSRs on Torture, have also argued that prisoners maintain their basic rights and in particular the right to humane treatment.[953] The SR on Torture, Manfred Nowak, in 2009 developed three categories of human rights in prisons, namely: rights, which detainees have forfeited as a result of their lawful deprivation of liberty; relative rights, which may be restricted for justified reasons; and absolute rights, which detainees enjoy in full equality with other human beings.[954] In this construct, absolute rights such as freedom from torture and ill-treatment are discussed alongside relative, or contested, rights under the framework of right to private life in prison, right to gender expression, and right to health.

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[951] IACtHR, *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (n 36) para 86; IAmCtHR, *L6pez-Alvarez v Honduras,* Series No 141 (1 February 2006) paras 104-105; IACtHR, *Case of the "Juvenile Reeducation Institute" v Paraguay* (n 30) para 154-155. Inserted in Laurence Burgorgue-Larsen, Amaya Ubeda de Torres, 'The Inter-American Court of Human Rights: Case Law and Commentary', 490.

[952] Robin Island Guidelines (2002) 33.

[953] Rodley with Pollard (n 890); Nowak (n 626)

[954] UNGA Interim report of the Special Rapporteur on Torture (2009) UN Doc. A/64/215, para 49-60.

Negligence and violence experienced by transgender prisoners mostly take place in a single-sex environment, where no deviation from the binary sex model is allowed. This matches with the description of the biological model of transgender recognition, which as seen in Chapter Two disregards the fluidity of gender. While it is important not to exclude the possibility of such violations taking place in other models of transgender recognition (the medical model, the gender self-determination model), it is important to acknowledge that such a context (biological model of transgender legal recognition) creates susceptible grounds for abuse, including sexual abuse, and other types of violations of human rights. In the words of the CPT 'prisoners who are in a situation of vulnerability... should never be accommodated under material conditions which are inferior to those prevailing on normal location'.[955] This chapter analyses the human rights standards that are most relevant to transgender prisoners and are subject to some limitations.

3.1 The right of transgender prisoners to be treated humanely and with respect to human dignity

The first mention at the UN level of transgender people in prisons was not until early 2000. In 2001, the UNSR on Torture, in his report to the GA, highlighted that LGBTIQ prisoners were denied medical treatment for gender dysphoria, such as hormone therapy,

[955] Council of Europe: CPT Report on the visit to Armenia (2004) CPT/Inf(2004)25, para.74. inserted in Penal Reform International and Essex University Second report of Essex Expert Group on the Review of the Standard Minimum Rules for the Treatment of the Standard Minimum Rules for the Treatment of Prisoners (2014) UN Doc. UNODC/CCPCJ/EG.6/2014/NGO.7. Available from http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/PRI_ESSEX-2nd-paper.pdf. Accessed on 8 April 2016

and that prison violence including sexual violence and rape particularly against 'transsexual' inmates in all men's prisons was common.[956] Although this report did not go into details, it illuminated core challenges in the treatment of the transgender prison community. Since 2001, the UNSR on Torture has reported on human rights abuses against transgender prisoners,[957] consistently arguing that existing human rights standards should be applicable to transgender and other prisoners who are experiencing particular situations of vulnerability in prisons.[958] Indeed, in parallel to trying to link the human rights law with the general SOGI framework, it was important that attention was also paid to the treatment of 'sexual minority' prison population. Chapter Five addressed some of the specific concerns expressed by the UN experts over the treatment of transgender prisoners in particular. To further argue direct applicability of international human rights law and the experiences of LGBTIQ prisoners, the UNSR on Torture asserted that 'members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations'.[959] The UN experts on the prevention of torture have consistently argued that discrimination on grounds of SOGI is the main contributing factor in dehumanising the victim, which is often a necessary pre-condition for torture and other ill-treatment to take place.[960] Dehumanisation as an ill-treatment and wide practices of discrimination against 'sexual minorities' in prisons have encouraged the UNSRs to link dignity and torture in further highlighting the 'sexual minorities' situation of

[956] UNGA Report of the Special Rapporteur on Torture (2001) UN Doc. A/56/156., 21-24.
[957] UNHRC Report of the Special Rapporteur on Torture (2001) E/CN.4/2002/76.; UNHRC Report of the Special Rapporteur on Torture (2001) E/CN.4/2001/66/Add.2.; UN HRC Report of the Special Rapporteur on Torture (2000) E/CN.4/2000/9.; UN HRC Report of the Special Rapporteur on Torture (2003) E/CN.4/2004/56.; UNGA Report of the Special Rapporteur on Torture (2011) A/66/268.
[958] ibid.
[959] UNGA Report of the Special Rapporteur on Torture (2001) UN Doc. A/56/156,; UNGA Interim report of the Special Rapporteur on Torture (2009) UN Doc. A/64/215., para 19.
[960] UNGA Report of the Special Rapporteur on Torture (2001) UN Doc. A/56/156, para 19.

vulnerability in prison facilities, often caused by a strong, and invisible criminal hierarchy.[961]

To further describe prison culture and criminal hierarchy within prisons, as well as the positioning of LGBTIQ prisoners and their right to dignified treatment and non-discrimination, the UNSR on Torture has noted that 'in detention facilities, there is usually a strict hierarchy and those at the bottom of the hierarchy, such as LGBTIQ persons, typically suffer double or triple discrimination'.[962] Indeed, such hierarchical positioning of transgender prisoners further contributes to human rights violations against transgender persons. In other words, being at the bottom of the prison hierarchy can include beatings, sexual assault, isolation and targeted forms of violence, the so-called corrective rape of lesbian women, and the intentional beatings of the breasts and cheekbones of transgender women to burst implants and release toxins.[963] Such targeted ill-treatment against transgender and other 'sexual minority' prisoners prompted UN experts to argue for specific measures for protecting 'the rights and address the specific needs of LGBTIQ prisoners'.[964] At the same time, it was argued that such special measures put in place for the protection of transgender prisoners could not be regarded as discriminatory.[965]

By linking targeted ill-treatment against LGBTIQ prisoners and their heightened vulnerability to abuse and violence, the UNSR on Torture created a framework for not

[961] UNGA Report of the Special Rapporteur on Torture (2001) UN Doc. A/56/156, para 17-25.
[962] UN HRC, Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (2011) UN Doc. A/HRC/19/41, para. 34.
[963] UNCAT 8th annual report of the Subcommittee on Prevention of Torture (2015) CAT/C/54/2.
[964] UNHRC Report of the UN Special Rapporteur Torture (2016) A/HRC/31/57., para 13.
[965] ibid.

only reporting the abuses that are taking place, but also creating grounds for the application of a human rights protection framework in specific situations. At the same time, recommendations for special measures tailored to the vulnerability of transgender and LGBIQ prisoners mean that the SR saw the need to consider 'sexual minorities' a special category that requires special measures of protection.

A number of other UN SPs mechanisms followed the SR on Torture to report on violations of human rights of LGBTIQ persons in detention. Many have been highlighted in Chapter Five. In addition, other UN experts, such as the SR on Extrajudicial, Summary or Arbitrary Executions in early 2002, have highlighted prison violence and inter-prisoner killings in Jamaican prisons based on a 'presumed homosexuality of the victims'.[966] In addition, the UNSR on the Independence of Judges and Lawyers in the report from 2011 emphasized the need to address the plight and extreme vulnerability of transgender women prisoners who, 'in most circumstances, are imprisoned in male detention facilities, even though they identify with the female gender', and recommended that states should consider taking appropriate measures to avert further victimization of transgender persons in detention. [967]

The mandate of the UNSR on Torture, Juan Méndez, has included a focus on the application of SOGI in the prison context. He has argued that there is an apparent gap in the law when it comes to the treatment of 'sexual minorities' in prison. In 2016, the SR called on states to 'develop international jurisprudence on the issues of SOGI in prisons

[966] UN HRC Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (2002) UN Doc. E/CN.4/2002/74, para 42.
[967] UN HRC Report of the Special Rapporteur on the Independence of Judges and Lawyers (2011) UN Doc. A/66/289, para 81.

and LGBTIQ prisoners' rights'.[968] The UNSR is right to argue that the mere application of international human rights law in prisons does not create sufficient guarantees for the protection of human rights of transgender prisoners or the wider LGBIQ groups in prisons.[969] What this meant for the transgender prisoners was that existing safeguards 'failed to address gendered and intersectional lens, to account adequately for the impact of entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and socialized gender stereotypes'.[970] Important in this is his arguments about the heteronormative and homogenous nature of criminal justice systems and their inability and limitations to respond to 'gender and intersectional lens'.[971] Indeed, such an analysis and, even more, the application of queer theory in the international human rights law on prisons, had not been done before. Thus, it is important to understand the new framework that the UNSR proposed. While acknowledging a gap in the protection framework, he noted that 'LGBT persons are at a particular risk of torture and other ill-treatment when deprived of liberty, both within criminal justice systems and other, non-penal settings'.[972] This suggests that not only are there structural and systemic shortcomings in the criminal justice systems, but that these shortcomings also have a particularly negative impact on marginalized groups or groups in particularly vulnerable situations, such as transgender prisoners.

To address the void in the human rights safeguards for transgender and other LGBIQ prisoners, the UNSR developed a framework in which he argued that two indisputable

[968] UN Special Rapporteur on Torture speech at the APT side event on "Torture and ill-treatment of LGBTI persons", 21 March 2016., at https://www.youtube.com/watch?v=EH06O8xGvBc&t=13s., 8 April 2016.
[969] UNHRC Report of the UN Special Rapporteur Torture (2016) A/HRC/31/57., para 5.
[970] ibid.
[971] ibid.
[972] ibid para 13.

principles in international human rights law should be considered when debating the rights of transgender prisoners: the principle of the non-discrimination on the grounds of SOGI and the principle of the prohibition of torture and other ill-treatment. The SR points out that since both of these principles have achieved some degree of non-derogability, they should be applied without distinction. He asserts that a principle of non-discrimination on the grounds of gender is acquiring a status of customary international norm[973] and the prohibition of torture has achieved a jus cogens norm and cannot be derogated.[974] This means that in order to extend the existing human rights protection framework to transgender prisoners, it is important to link these principles and apply them to a specific context (i.e., places of detention).[975]

Application of basic principle of human rights has also been reinforced in the new SMR as outlined above. The updated rules stress the overriding principle to treat prisoners with respect due to their inherent dignity by virtue of being humans. The new Rule 2 also suggests that no discrimination shall be allowed on any grounds, for which the 'prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings.'[976] The SR on Torture suggests that in the case of LGBTIQ, prisoners are such vulnerable categories that they are in need of special consideration to spare them from ill-treatment in the prison.[977]

[973] ibid para 6.; also Juan Méndez - UN Special Rapporteur on Torture speech at the APT side event on 'Torture and ill-treatment of LGBTI persons', 21 March 2016, At https://www.youtube.com/watch?v=EH06O8xGvBc&t=13s., 8 April 2016.
[974] ibid.
[975] ibid.
[976] Nelson Mandela Rules (2015) 2.
[977] See for example latest reports: UN HRC Report of the Special Rapporteur on Torture (2016) UN Doc. A/HRC/31/57.; UN CAT 9th annual report of the Subcommittee on Prevention of Torture (2016) UN Doc. CAT/C/57/4.; UNCAT, 8th annual report of the Subcommittee on Prevention of Torture (2015) UN Doc. CAT/C/54/2.

All three major UN human rights mechanisms – the CAT Committee on Torture, the SR on Torture, and the SPT – have argued that there are direct links between non-discrimination and the prevention of torture and other ill-treatment.[978] As illustrated by the experiences of transgender prisoners highlighted earlier in this thesis, gender stereotypes play a significant role in downplaying the pain and suffering that certain practices inflict on them. To ensure appropriate safeguards in place for the prison context, a torture protection framework must be interpreted against the background of the human rights norms that have been developed to combat discrimination and violence in the context of prisons.[979] This means that, for example, the states that have discriminatory laws in place (e.g., laws that criminalise LGBTIQ persons) – have a heightened responsibility to protect LGBTIQ prisoners due to the fact that it is the laws that lead heighten these groups' vulnerability and their exposure to abusive circumstances.[980] In other words, by criminalising the conduct, specific groups are marginalised through the legal means, which begs to further investigate the question of legitimacy of such imprisonment. The question of legitimacy of imprisoning transgender and other 'sexual minorities' will not be addressed in this thesis. However, it should be noted that such discriminatory laws have a greater impact on the lives of LGBTIQ people, including their marginalisation. Often, LGBTIQ's experience of ill-treatment is a direct consequence of existing legal norms.[981] Moreover, if such discriminatory laws are the legal structure within which 'sexual minorities' are imprisoned, it creates practical barriers for treating these groups humanely.

[978] ibid.
[979] ibid.
[980] UN HRC Report of the Special Rapporteur on Torture (2008) UN Doc. A/HRC/7/3.; UNHRC Report of the UN Special Rapporteur Torture (2016) A/HRC/31/57.
[981] UN CAT 9th annual report of the Subcommittee on Prevention of Torture (2016) UN Doc. CAT/C/57/4.

All three UN torture prevention bodies (the CAT Committee, the SPT, and the SR on Torture) have strongly supported that a general non-discrimination clause should be applied to LGBTIQ prisoners.[982] As outlined above, rather than relying on the basic principles of human rights though, they link non-discrimination with the prohibition of torture and other ill-treatment, both prohibitions that are already in place. The CAT Committee in particular over the years has taken a proactive approach by imposing a positive obligation on states to protect transgender prisoners and other vulnerable individuals from inter-prisoner violence.[983] The SPT also argues that strengthening the protection of people deprived of their liberty and the full respect for their human rights is fundamental for identifying forms of discrimination and the necessary legislative, administrative and judicial measures to address the root causes.[984] The SPT states that

> the principle of equality and non-discrimination not only results in the prohibition of different treatment, but also implies the obligation to establish differentiated measures when those are reasonable, necessary and proportional, precisely in order to guarantee human rights.[985]

The SPT has encouraged states in cases where LGBTIQ persons are deprived of their liberty to identify specific risks and vulnerable situations in order to provide protection in ways that do not leave this group isolated.[986] The CAT Committee, having acknowledged LGBTIQ-specific risks to torture and other ill-treatment as a result of discriminatory practices and attitudes, has also recommended that states take necessary measures to

[982] Concluding observations of the UN Committee against Torture: Bulgaria (2011) UN Doc. CAT/C/BGR/CO/4-5, para 23.
[983] ibid.
[984] UNCAT, 8th annual report of the Subcommittee on Prevention of Torture (2015) UN Doc. CAT/C/54/2, para 60.
[985] ibid. para 59.
[986] UNHRC Report of the Special Rapporteur on Torture (2013) UN Doc A/HRC/22/53., para 76..; UNCAT, 8th annual report of the Subcommittee on Prevention of Torture (2015) UN Doc. CAT/C/54/2., para 67.

eliminate any form of violence or discrimination against detainees based on SOGI.[987] Notably, the UNSR on Torture has suggested that the practice of Brazil to have adopted a national resolution on protecting transgender prisoners against exclusion and isolation should be considered a good practice. The SR further recommended the states to follow such practice.[988]

3.2. Violence

Transgender prisoners' experiences of violence, including interpersonal and state, were discussed in Chapter Five. The same chapter highlighted the forms of violence faced by transgender prisoners, including sexual violence, rape and beating. Here, the legal background and prohibition of these acts will be highlighted with specific linkages to the transgender prisoners and protection of their rights.

Deprivation of liberty, prison conditions and the unequal power relations between the state and those in imprisonment often create vulnerability among prisoners, and often more so among transgender prisoners. Whether sexual harassment (including rape), is committed by a state official or an inmate special emphasis should be given to the circumstances of the victim. This is partly because prisons, as state institutions, are under state control and governance of state officials. While these officials are obliged to maintain the order and humane treatment in prisons, the vulnerability of the victim [prisoner] can be easily exploited. Moreover, vulnerability of imprisonment can be

[987] UNCAT., Concluding Observations of CAT: Armenia (2012) UN Doc. CAT/C/ARM/CO/3 para 19. See also UNCAT, 8th annual report of the Subcommittee on Prevention of Torture (2015) UN Doc. CAT/C/54/2., 61-62, 71-82.
[988] UNCAT, 8th annual report of the Subcommittee on Prevention of Torture (2015) UN Doc. CAT/C/54/2.

heightened by the specific needs and vulnerabilities of the various categories of individuals detained. For some groups, additional risk factors, including sexual orientation and gender identity, can also compound vulnerability to sexual harassment and rape.

In recent years, a number of specific human rights instruments have been adopted that include sexual violence and provide ways to combat it in the prison context. These included the Bangkok Rules, which require that women entering prison should be assessed for mental health care needs and experience of sexual abuse, and be informed of their right to seek redress for sexual abuse or other violence suffered.[989] Rule 31 also provides that 'clear policies and regulations on the conduct of prison staff aimed at providing maximum protection for women prisoners from any gender-based physical or verbal violence, abuse and sexual harassment shall be developed and implemented.'[990] The same is not requested under either the old or a revised SMR.

International human rights law has been interpreted to define sexual abuse and rape as a form of torture. Although explicitly prohibited under international humanitarian law, rape is only implicitly covered by international human rights law.[991] It is only recently that rape and sexual violence started to receive significant international attention, including in the judicial bodies. UN human rights bodies have also considered cases, though mainly in relation to women and not in connection with criminal justice. In addition, in its

[989] Bangkok Rules (2010) 6(b), 6(e) and 7(1).
[990] Bangkok Rules (2010), 31.
[991] Redress, 'Redress for Rape: Using international jurisprudence on rape as a form of torture or other ill-treatment' (2013) 24.

Recommendation 19, the CEDAW also included rape as a prohibited act against women.[992]

As outlined above, rape, by definition, falls under the prohibition of torture and other ill-treatment. States have an obligation to prevent sexual violence in prisons. This includes having a necessary legal and administrative framework in place to control, regulate, investigate and prosecute.[993] In addition to the general prohibition policies in place, the CAT Committee has argued that states are obligated to protect all persons from torture or other ill-treatment regardless of their sexual orientation or transgender identity.[994] The Committee has made numerous calls for actions to eliminate any form of violence or discrimination against detainees based on SOGI in prisons.[995] Evolving from the CAT Committee jurisprudence, the SPT held that specifically in cases of LGBTIQ persons deprived of their liberty, state authorities 'must recognise specific risks, identify those who are in a vulnerable situation and protect them in ways that do not leave them isolated'.[996]

The ECtHR in *Aydin v Turkey* held that rape in custody constituted torture. The Court noted that rape of a detainee by State official is an abhorrent form of ill-treatment. It further noted that State officials, by raping a detainee, had exploited the vulnerability and

[992] UN CEDAW Committee, General Recommendation No. 19: Violence Against Women, 1992.
[993] Redress (n 991)
[994] UN CAT General Comment No. 2: Implementation of Article 2 by States Parties (2008) UN Doc. CAT/C/GC/2. para 21. See also UNHRC Report of the UN Special Rapporteur Torture (2016) A/HRC/31/57., para 6.; UN CAT 9th annual report of the Subcommittee on Prevention of Torture (2016) CAT/C/57/4., 71.
[995] See Concluding Observations of CAT: Armenia (2012) UN Doc. CAT/C/ARM/CO/3, para 19. See also UNHRC Report of the Special Rapporteur on Torture (2013) UN Doc A/HRC/22/53., 61-62, 71-82.
[996] UN CAT 9th annual report of the Subcommittee on Prevention of Torture (2016) CAT/C/57/4, para. 76.

weakened resistance of the victim.[997] The Court also made a note of physical and mental violence inflicted on the claimant and stated that 'rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.'[998] The *Aydin v Turkey* case was ground-breaking in that rape was elevated to the level of torture. A short time earlier, the IACtHR also had found that rape could amount to torture.[999]

Furthermore, in the European context, the ECtHR has found that States have a duty to 'do everything that could reasonably [be] expected . . . to prevent the occurrence of a definite and immediate risk to [a prisoner's] physical integrity, of which [the authorities] knew or should have known'.[1000] More specifically, in the case of rape, the Court has found that states have an obligation under Article 3 of the European Convention to penalize and effectively prosecute any non-consensual sexual act and to enact criminal-law provisions effectively punishing rape and apply them in practice through effective investigation and prosecution.[1001] The IACtHR has also established guidelines on investigating cases of sexual violence. While almost all these cases involve sexual violence against women, the Court has recommended that:

> authorities charged with investigating an act of sexual violence must conduct the investigation with a sense of resolve and in an effective manner, taking into account society's obligation to reject violence against women and the States' obligations to eliminate it and to give victims confidence in the State agencies charged with protecting them.[1002]

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[997] *Aydin v Turkey* App no 57/1996/676/866 (ECtHR, 25 September 1997) para. 83.
[998] ibid.
[999] *Raquel Martí de Mejía v Perú,* Case 10.970, Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 at 157 (IACtHR, 1996).
[1000] *Pantea v Romania* App no 33343/96 (ECtHR 2005) para 189.
[1001] *MC v Bulgaria* App no 39272/98 (ECtHR 2003) para 153, 166, 187.
[1002] *Fernández Ortega et al. v Mexico.* Preliminary Objection, Merits, Reparations and Costs. (IACtHR, 2010) Series C No. 215; I/A Court H.R.*, Case of Rosendo Cantú et al. v Mexico.* Preliminary Objection, Merits, Reparations and Costs. (IACtHR 2010). Series C No. 216. ; https://www.oas.org/en/iachr/women/docs/pdf/WOMEN%20MESOAMERICA%20ENG.pdf

As also highlighted in Chapter Five, another area where sexual violence and harassment is detected is prison searches. Often such searches take place without the prior knowledge of the prisoner, which might also contribute to the increase of the risk of harassment. The new Nelson Mandela Rules addressed the gap in international standards by stating, 'Searches shall be conducted in a manner that is respectful of the inherent human dignity and privacy of the individual being searched, as well as the principles of proportionality, legality and necessity.'[1003] The Nelson Mandela Rules further requires that a search is not used as a way of harassment, intimidation, or an intrusion upon prisoners' privacy. The same provisions are contained in the EPR, which note that prisoners 'shall not be humiliated by the searching process'.[1004] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas also request that body searches are conducted 'with human dignity and respect for fundamental rights', and they forbid 'intrusive vaginal or anal searches'.[1005] In the same vein, Luanda Guidelines prescribe, 'Searches must be carried out in accordance with the law, and in a manner consistent with the inherent dignity of the person and the right to privacy.'[1006]

These standards unequivocally apply to transgender prisoners. However, there has been a disproportionate number of transgender, lesbian and gay prisoners who have complained about sexual harassment or rape during searches and intake. On this, the UNSR on Torture notes that:

[1003] Nelson Mandela Rules (2015) 50.
[1004] European Prison Rules (2006) 54.
[1005] OAS Inter-American Commission on Human Rights Resolution 1/08 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas' (2008) XXI.
[1006] Luanda Guidelines (2014) 3.

> specific policies must be developed in relation to searches, intake and interrogation. Proper screening for all incoming detainees to identify risk of sexual assault will help support procedures and decisions on housing, which should be done on a case-by-case basis and to the extent possible with the informed consent of the detainee.[1007]

International human rights law rarely refers to 'acquiescence' in violence. The CAT Committee in its second General Comment published in November 2007 also provides some explanations. According to the Committee, the terms 'consenting to' or 'acquiescing in' imply state party obligation to prevent violence by non-State actors (this is inter-prisoner violence).[1008] The CAT Committee has used country-specific concluding observations to recommend States preventing the sexual abuse of gay and transgender prisoners and the failure to investigate cases of prisoner rape in a prompt and transparent manner.[1009]

The responsibility of prison officials to provide adequate medical treatment to prisoners has been established in the US. In the case of *Estelle v Gamble*, the US Supreme reviewed a case of deliberate indifference by prison personnel to a prisoner's serious illness or injury, which as argued by the complainant, contravened the Eighth Amendment of the US Constitution (cruel or unusual punishment). The court in this case while rejecting any causal link between the harm inflicted to the prisoner and the actions of the prison staff (court established that complaint was grounded in malpractice, not deliberate indifference), reasoned that prison officials have a legal obligation to be aware

[1007] UN CAT, 9th Annual Report of the Subcommittee on Prevention of Torture (2016) UN Doc. CAT/C/57/4., para. 76.
[1008] UN Committee Against Torture, 'General Comment No. 2: Implementation of Article 2 by States Parties' (2008) UN Doc. CAT/C/GC/2.
[1009] UN Committee against Torture Conclusions and recommendations to the United States (2006) UN Doc. CAT/C/USA/CO/2

of serious medical needs of prisoners and attend them accordingly.[1010] The court concluded

> 'that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain (quoting *Gregg v. Georgia*) regardless such indifference being manifested by prison doctors or prison guards in intentionally denying or delaying access to medical.'[1011]

While with this reasoning the Court imposed an obligation on prison staff to attend the serious medical needs of inmates, it also established a rather narrow scope for accountability of prison staff's 'deliberate indifference' including imposing a burden of proof onto the complainant. The question of 'deliberate indifference' requires further research on its own and exceeds the cope of this thesis, however, it is important to highlight that despite such difficult nature of 'deliberate indifference' test, it has been used to argue for the protection of transgender prisoners' safety. In *Farmer v Brennan*, a young transgender woman named Dean Farmer sued Indiana correctional officers after she was placed in a men's prison and was raped there. The Supreme Court heard Farmer's case and unanimously decided in 1994 that the officers' 'deliberate indifference' to her safety violated the Eighth Amendment (cruel and unusual punishment). It held the state representative is accountable for the inaction, for deliberately not taking action to prevent the abuse.[1012] Based on this, ruling the Supreme Court declared the rape to be torture and other ill-treatment in 1998. Within five years, the US Congress adopted the Prison Rape Elimination Act 2003. In 2012, the US Department of Justice also published a final guidance on the implementation of this

[1010] *Gamble v Estelle* 429 U.S. 97 (1976).
[1011] *Gamble v Estelle* 429 U.S. 97 (1976).
[1012] *Farmer v Brennan* 511 U.S. 825, 829 (1994).

Act.[1013]

To avoid sexual abuse and rape between inmates and particularly against LGBTIQ persons, often the only option used is to place them either in solitary confinement or 'protective custody' as outlined in Chapter Five. The justification found in these cases is the special vulnerability of transgender prisoners. In fact, transgender people are often automatically considered vulnerable, which means that decisions are made for them rather than involving them in the process of decision-making.

3.3. Solitary confinement

Chapter Five described the ways in which protective custody and solitary confinement inflict ill-treatment on transgender prisoners. International standards are scarce on what 'protective custody' means; however, due to its great resemblance to solitary confinement, this chapter will attempt to analyse it. At the same time, as also noted in Chapter Five, despite the fact that such a measure is meant for protection and is called protective custody, at its core it is the same thing as solitary confinement. Hence, these two terms will be used interchangeably. The issue of solitary confinement itself is much broader and cannot be exhausted in this chapter. However, for the purposes of this chapter, solitary confinement vis-à-vis transgender prisoners will be analysed to assess the impact of such 'protective custody'.

[1013] The Prison Rape Elimination Act of 2003 (PREA).; also United States Department of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA), (May 17, 2012)

The definition of solitary confinement has evolved over time. The latest definition, which is adopted in this thesis, is from the latest standards on prisons – the Nelson Mandela Rules, which suggest that 'solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.'[1014] The Nelson Mandela Rules introduced more clarity on the procedure of the solitary confinement and its use. In particular, it regulated the measure from the point of view of disciplinary proceedings. While these new rules are detailed and clear, the regional mechanisms that were adopted a little earlier do not have such rigor. For example, the EPR suggest that such measure should be imposed in exceptional cases and for as short a period as possible.[1015] The Luanda Guidelines also require that the use of solitary confinement is restricted.[1016] The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas also describe that solitary confinement should be used as a last resort and for a limited term.[1017] Because of its harsh nature, the Basic Principles for the Treatment of Prisoners suggested in 1990 that 'Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.'[1018] The Rules for the Protection of Juveniles Deprived of their Liberty strictly prohibit the application of solitary confinement on juvenile prisoners.[1019] The rules indicate that such disciplinary punishment constitutes ill-treatment and may the physical or mental health of the juvenile

[1014] Nelson Mandela Rules (2015) 44.
[1015] European Prison Rules (2006) 60.5.
[1016] European Prison Rules (2006) 25(F).
[1017] Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008) XXII.
[1018] Basic Principles for the Treatment of Prisoners (1990) 7.
[1019] UN GA, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, (1991) UN Doc. A/RES/45/113, 67.

concerned.[1020]

Solitary confinement as a concept is the harshest disciplinary measure that can be imposed on a prisoner. Over time the range and scope of its use have changed. The Istanbul Statement on the Use and Effects of Solitary Confinement outlines four common and lawful uses of this measure: a) as disciplinary punishment; b) to isolate a defendant during criminal investigations; c) as an administrative measure to control particular groups of inmates; and d) as a court-imposed sentence.[1021] This list has grown. The CPT now includes an option of solitary confinement to be used for protection purposes.[1022] At the same time, based on the ECtHR jurisprudence and its own standards, the CPT has developed a formula of five principles to observe in applying the solitary confinement. These are proportionality, lawfulness, accountability, necessity and non-discrimination. These principles can provide an insightful view in to the violations of the rights of transgender prisoners when putting them in to protective custody.

The Nelson Mandela Rules as well as other international standards attempted to subject these measures and their application to a regulatory framework.[1023] The human rights mechanisms try to link solitary confinement with the prohibition of torture and other ill-treatment. In 1992, the HRCttee in its general comment highlighted that prolonged solitary confinement of the detained or imprisoned person might amount to torture and

[1020] ibid.
[1021] As inserted in Sharon Shalev, 'A Sourcebook On Solitary Confinement' [2008] SSRN Electronic Journal.
[1022] Council of Europe: Extract from the 21st General Report of the CPT, (CPT/Inf(2011) 28-part 2): Solitary confinement of prisoners (2011).
[1023] Nelson Mandela Rules (2015) 43-45.

other ill-treatment.[1024] At the same time, in its earlier case law the HRCttee argued that keeping a person in solitary confinement for several months in conditions that failed to respect the inherent dignity of the human-being was a violation of Article 10 of the ICCPR (conditions of detention).[1025] Similarly, in another case concerning solitary confinement, the Committee established the violation of Articles 7 and 10 for holding a complainant in an underground cell and denied the medical attention his condition required.[1026] The Committee further recommended that the use of solitary confinement be abolished, particularly during pre-trial detention, or at least be strictly and specifically regulated by law (maximum duration, etc.) and exercised under judicial supervision, and used only in exceptional circumstances, such as when the safety of persons or property is involved.[1027]

The CPT and the UNSR on Torture both have taken a similar route over the years.[1028] They have made connections between solitary confinement and protective custody to argue for state obligation in ensuring the respect to basic human rights principles and the safeguards for those subjected to protective custody. For example, the UNSR on Torture in his recent report argued that in situations when solitary confinement is applied as a 'protection', authorities have a responsibility to take reasonable measures to prevent and combat violence against lesbian, gay, bisexual and transgender detainees by other

[1024] UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992).
[1025] *T. Gómez de Voituret v Uruguay*, Communication No. 109/1981 (1984) UN Doc. A/39/40; *R. S. Antonaccio v Uruguay*, Communication No. 63/1979 (1981) UN Doc. A/37/40.
[1026] *R. S. Antonaccio v Uruguay*, Communication No. 63/1979 (1981) UN Doc. A/37/40.
[1027] ibid.
[1028] UNGA Interim report of the Special Rapporteur on Torture (2011) UN Doc. A/66/268., para 31.

detainees[1029] and must not solely rely on solitary confinement. The SR emphasized that although special protection for the groups of LGBTIQ prisoners may be necessary and some form of segregation may be used for their safety, their status should not justify limitations on their social regime, access to recreation, reading materials, legal counsel or medical doctors, which often is the case in solitary confinement due to the nature of such a measure.[1030]

Regardless of the reasons for imposing solitary confinement, it [solitary confinement] still has an extremely damaging effect on the mental, somatic and social health of those concerned.[1031] The comparison between solitary confinement and protective custody was made earlier, but it is worth noting that the CPT suggests that the reasons for using solitary as a protection often varies, and depends on, amongst others, the general vulnerability of the person.[1032] The CPT also indicates that once under protective isolation, 'it can be very difficult for a prisoner to come off protection for the rest of the sentence – and maybe even for subsequent sentences.'[1033] Possibly this is the reason why the CPT has stated that 'solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible.'[1034]

The use of solitary confinement for the protection of vulnerable detainees is allowing the

[1029] UNHRC Report of the UN Special Rapporteur Torture (2016) A/HRC/31/57., 35.
[1030] UNGA Interim report of the Special Rapporteur on Torture (2015) A/66/268, para 69.
[1031] Council of Europe: Extract from the 21st General Report of the CPT, (CPT/Inf(2011)28-part 2): Solitary confinement of prisoners (2011). para 53.
[1032] ibid para 56.
[1033] ibid.
[1034] Council of Europe: 2nd General Report on the CPT's Activities (covering the period 1 January to 31 December 1991), CPT/Inf (92) 3, 1992, para 56.

justifications used by the state.[1035] Accordingly, transgender prisoners as well as other LGBIQ persons in detention end up in solitary confinement as a form of protection.[1036] In a situation when only two choices are available – to place transgender prisoners with prisoners of their birth sex, which can put them at risk of violence,[1037] or place them under 'protective custody' – effectively in solitary confinement – the decision is often made in favour of the latter option. Human rights experts argue that measures that appear to be 'protective', particularly such as placement in solitary confinement or administrative segregation, can themselves constitute a violation of the principle of prohibition of torture and other ill-treatment.[1038] Notably, the UNSR on Torture has noted:

> Lesbian, gay, bisexual and transgender individuals are often subjected to solitary confinement as a form of "protective custody". Although segregation of such individuals may be necessary for their safety, lesbian, gay, bisexual and transgender status does not justify limitations on their social regime, e.g., access to recreation, reading materials, legal counsel or medical doctors.[1039]

The choices presented to the local prisons often are inherently limited due to the binary prison laws. Particularly if a protective custody is imposed in a male, single-sex prison, the only realistic options as outlined earlier are either solitary confinement or as part of the general prison population. Questions such as to the alternatives, the nature of the offence committed and legitimacy will also follow to widen the scope of possibilities to contest the imprisonment, however that is beyond the objective of discussion here.

[1035] Sharon Shalev, in total she identifies five main categories for which solitary confinement is applied: To punish an individual (as part of the judicially imposed sentence or as disciplinary regime); To protect vulnerable individuals; To facilitate prison management of certain individuals; To protect or promote national security; To facilitate pre-charge or pretrial investigations.
[1036] UNGA Interim Report of the Special Rapporteur on torture (2011) UN Doc. A/66/268., para 69. See also UN CAT, Ninth Annual Report of the Subcommittee on Prevention of Torture (2016) UN Doc. CAT/C/57/4., 64.
[1037] UNHRC Report of the Special Rapporteur on Violence Against Women (2011) UN Doc. A/HRC/17/26/Add.2. para 28-29. See also UN CAT, Ninth Annual Report of the Subcommittee on Prevention of Torture (2016) UN Doc. CAT/C/57/4., 66.
[1038] UNHRC Report of the UN Special Rapporteur Torture (2016) A/HRC/31/57., 35.
[1039] UNGA Interim report of the Special Rapporteur on Torture (2011) A/66/268., para 69.

The case law on solitary confinement is dominated by justifications of 'special supervision' and 'special protection' and is imposed for long periods. In this regard, the ECtHR has a rich jurisprudence that explains that subhuman prison conditions, repeated transfers from prison to prison, lengthy solitary confinement without having a record on it used as a disciplinary measure could not be justified under 'prisoner requiring special supervision.'[1040] In another case the ECtHR found a breach of Article 3 of the Convention in the case of a mentally disabled person who was handcuffed in solitary confinement and kept in inadequate conditions of detention and medical care. Establishing a violation of Article 3 and noting a special vulnerability of the complainant, the Court stated that handcuffing a mentally disabled prisoner for a period of seven days, without psychiatric justification or medical treatment had to be regarded as constituting inhuman and degrading treatment.[1041] Similarly, to outlaw the lengthy retention of prisoners in the solitary, the HRCttee has found that holding a detainee for one month in a cell where 'rainwater filtered in and one lives in the midst of human excrement' violated the ICCPR (Article 10).[1042] The IACtHR too has stated that prolonged solitary confinement constitutes a form of ill-treatment prohibited under Article 5 of the American Convention on Human Rights.[1043]

Use of solitary confinement as a 'protective custody' was found in breach of freedom from torture and other ill-treatment in conjunction with non-discrimination principle by

[1040] *Khider v France* App no 39364/05 (ECtHR 9 July 2009).
[1041] *Kucheruk v Ukraine* App no 2570/04 (ECtHR, 6 September 2007).
[1042] *Leopoldo Buffo Carballal v Uruguay*, Communication No. 33/1978, U.N. Doc. CCPR/C/OP/1 (1984).
[1043] *Case of Castillo Petruzzi et al. v Peru*, petition (No. 11,319)(IACtHR 30 May 1999).

the ECtHR. In a case *X v Turkey,* a gay man argued that his isolation from the rest of the prison population was discriminatory and amounted to a breach of Article 3 under the Convention. The ECtHR in its decision indicated that solitary confinement of a gay man, while it [solitary confinement] was not being recognised as a punishment, imposed substantial material limitations on the applicant's rights.[1044] The Court held that even though the prison authorities' concerns that the applicant would be at risk of being physically abused if he remained in a standard shared cell are not entirely unfounded, even though those fears made it necessary to take certain safety measures to protect the applicant, they do not suffice to justify a measure totally segregating him from the prison community.[1045] The Court noted that the reason for keeping a prisoner in isolation was his sexuality, and there had therefore been a violation of Article 14 [prohibition of discrimination] taken together with Article 3 [prohibition of torture and other ill-treatment].[1046] This reasoning is a departure from the ECtHR's previous decision in *Stasi v France*, where the Court did not find any violation of the prohibition of inhuman or degrading treatment. The complainant in this case had argued that he was ill-treated by inmates because of his homosexuality. The Court held that the prison authorities could not have been aware of the acts of violence committed against him, therefore there was no 'deliberate indifference' or complicity by prison staff. Thus, the ECtHR established that there was no breach of the Convention.[1047]

The long-term solitary confinement was contested in relation to a transgender prisoner in

[1044] *X v Turkey* App no 24626/09 (ECtHR 9 October 2012) para 42-43.
[1045] ibid. para 51.
[1046] ibid.
[1047] *Stasi v France* App no 25001/07 (ECtHR, 20 October 2011).

the Israeli Supreme Court, where Justices Neal Hendel, Noam Solberg and Salim Joubran decided to take the unique vulnerability of a transgender detainee into consideration.[1048] In particular, following an appeal from a transgender woman, the Court reduced her sentence from 15 months to 10 months, stating that the unusually harsh prison conditions constituted a mitigating factor for a transgender detainee. The Court held that transgender woman would have to serve the sentence in solitary confinement to protect him/her from fellow prisoners.[1049] It further stated that the defendant's situation was unusual, and thereby it was appropriate for additional leniency when it came to [her] sentence.[1050]

A number of issues should be highlighted about this judgment. First, Israel Prisoner Service regulations require transgender prisoners be kept apart from the rest of the prison population to prevent harm to themselves or other prisoners. The defendant therefore appealed to the Supreme Court that such isolation from the rest of the prison population harshened the conditions of his incarceration, and should be taken into consideration during sentencing. Though the term 'solitary confinement' is not used in the appeal or in the judgment, the references to the isolation make it clear that the transgender prisoners seem to be sent to solitary confinement by virtue of being transgender.[1051] Indeed, this raises a bigger question of the Israeli Prison Services' widespread practices in relation to 'sexual minorities' and its compliance with wider torture protection standards, which are beyond the objectives of this thesis. The second point relates to the judgment as a short-

[1048] Revital Hovel, 'Transgender Convicts Deserve Leniency, Supreme Court Says' *Haaretz* (2013). <https://genderidentitywatch.files.wordpress.com/2013/09/transgender-convicts-deserve-leniency-supreme-court-says-national-israel-news-_-haaretz.pdf> accessed 16 April 2015.
[1049] ibid.
[1050] Stuart Winer, 'Supreme Court Rules Leniency For Transgender Prisoner' *Times of Israel* (2013) <http://www.timesofisrael.com/supreme-court-rules-leniency-for-transgender-prisoner/> accessed 6 August 2015.
[1051] Revital Hovel, 'Transgender Convicts Deserve Leniency, Supreme Court Says' *Haaretz* (2013) <https://genderidentitywatch.files.wordpress.com/2013/09/transgender-convicts-deserve-leniency-supreme-court-says-national-israel-news-_-haaretz.pdf> accessed 16 April 2015.

term solution. The Supreme Court originally proposed that the transgender women had to go to female prison. However, the prison services indicated that they do not support the possibility of crossing genders in the prison system that used sex as a category for segregating women and men. Thus, to spare possible violence to the transgender prisoner, the Court came up with a solution to shorten the prison sentence. This 'shortened period' was from 15 months to 10 months in solitary confinement. The Court seems to have deliberately avoided the term 'solitary confinement' to possibly spare the breach of the principle of prohibition of torture and other ill-treatment. It is clear that in the legal infrastructure available to the Court, a short-term solution to the problem was found. However, the decision did not address the likely need for a broader, longer term policy specific transgender prisoners and will likely remain unaddressed for a foreseeable future.

Juxtaposition of the protective custody and the solitary confinement shows an apparent limitation of the law in protecting the rights of transgender prisoners. There is an obvious gap in international human rights law as defining the protective custody. There is enough jurisprudential evidence to argue that solitary confinement cannot be applied as protection, due to its deeply traumatic effects. However, in an environment that is based on a binary understanding of the sexes, the options found in international standards, recommendations or the case law almost automatically suggest some form of segregation of transgender prisoners' because of their vulnerability.[1052] Indeed, as noted above, some

[1052] Inserted in the Submission of the Office of the UN High Commissioner for Human Rights concerning the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (2014) UN Doc. UNODC/CCPCJ/EG.6/2014/INF/3. At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-

form of segregation of detainees in situations of vulnerability for protective purposes can be legitimate, though such a measure should only be used in consultation with the detainee and it should follow a clear protocol, and not constitute punishment or lead to limitations on accessing activities beneficial to prisoners (e.g., access to recreation, reading materials, legal counsel or health care), and should be only undertaken for as short a time as possible.[1053] At the moment such clarity is absent from international standards.

3.4. Right to gender expression

The limitations of international human rights law are evident when considering the right to gender expression. The human rights instruments do not recognise the right to gender expression in lucid terms. In fact, in single-sex prisons, gender expression is rarely discussed. The Nelson Mandela Rules contain a provision stipulating the basics for maintaining a good appearance for men. In particular, Rule 18 states that 'In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be able to shave regularly.'[1054] In relation to clothing, the Nelson Mandela Rules require that prisoners wear suitable clothing, which 'shall in no manner be degrading or humiliating.'[1055] Importantly, the Bangkok Rules that are complementary to the SMR also contain a

2014/OHCR.pdf; accessed on 7 April 2016; Also, UNGA Interim report of the Special Rapporteur on Torture (2011) A/66/268., para. 69.

[1053] Submission of the Office of the UN High Commissioner for Human Rights concerning the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (2014) UN Doc. UNODC/CCPCJ/EG.6/2014/INF/3. At http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/OHCR.pdf; accessed on 7 April 2016.

[1054] Nelson Mandela Rules (2015)19.

[1055] Nelson Mandela Rules (2015)19.

specific provision on personal hygiene, but misses the aspect of 'good appearance'. Specifically, Rule 5 stipulates that 'The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.'

The regional instruments, EPR and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas both emphasise personal hygiene and privacy. The EPR even require prison authorities to provide prisoners with the means of toiletries and general cleaning implements and materials.[1056] The Luanda Guidelines specifically emphasise the hygiene of women and require that care is provided in accordance to respect of dignity.[1057] The CPT has issued a number of recommendations on hygiene and sanitary conditions of prisons, mainly highlighting minimum sanitary and basic hygiene standards.[1058]

There is, however, a clear gap in international standards as to what constitutes gender expression in the prison context. The standards outlined above, either international or regional, have been developed through the heteronormative lens. This means that gender expression in broad terms outside the man and woman dichotomy was never a part of the

[1056] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008) 12.; European Prison Rules (2006) 19.
[1057] Luanda Guidelines (2014) 32.
[1058] Council of Europe: 24th General Report of the CPT (1 August 2013 - 31 December 2014), 21 January 2015, CPT/Inf (2015), para 105.; Council of Europe: 10th General Report of the (covering the period 1 January to 31 December 1999) CPT [CPT/Inf (2000) 13] 3 (2000).; Council of Europe: 9th General Report of the CPT (covering the period 1 January to 31 December 1998) [CPT/Inf (99) 12] 30. (1999); Council of Europe: 2nd General Report of the CPT (covering the period 1 January to 31 December 1991) [CPT/Inf (92) 3] 49 (1992)

discussion. However, the specific hygiene and sanitary standards as seen above are contained in international human rights law.

Of note is that personal hygiene is a part of private life, which is one of the most contested areas as it falls under the relative rights group.[1059] The UNSR on Torture for example comments that 'detainees cannot enjoy the same degree of privacy, including the protection of their family life, sexuality, home and correspondence, as persons living in liberty.'[1060] The SR does not elaborate, however, as to what is meant by limitations on sexuality, or what sexuality in prison might mean in general. In the report, published in 2009, he emphasises that 'the protection of a certain minimum space of privacy is necessary for an individual's autonomy, which is at the heart of human dignity.'[1061]

A brief survey of international instruments here shows that due to the fact that prisons are constructed around single-sex spaces, gender expression or expression of sex is understood rigidly and is therefore strictly monitored. The concepts of individual autonomy and human dignity play an important role when it comes to transgender and non-binary gender expression in prisons.[1062] As argued above, absence of specific norms generally creates a gap in the policy, often addressed at the local, prison level. In practice, however, as also discussed earlier, the research shows widespread use of incorrect pronouns, performing unnecessary searches for the purpose of exposing transgender inmates' genitalia and denying gender-appropriate clothing and grooming

[1059] UNGA Interim report of the Special Rapporteur on Torture (2009) UN Doc. A/64/215.
[1060] ibid. para 52.
[1061] Carr, McAlister and Serisier (n 822), Lamble (n 817) 20.
[1062] Carr, McAlister and Serisier (n 822), Lamble (n 817).

items.[1063] As it is, the right to gender expression is not considered alongside that of placement, including when an individual's gender expression does not match the institutional remit.[1064] The housing and prison allocation is discussed below, but what is important to highlight here is a clear lack of comprehensive knowledge on what gender expression means in closed settings and the need to address the issue.

Despite such an incoherent approach, the right to gender expression is finding an assertion in the human rights law, although slowly. For example, a recent case in the UK specifically considered a transgender person's right to gender expression, dress code, and representation of selfhood through clothing. The case *R (on the application of Green) v Secretary of State for Justice* was brought in a domestic court, where the claimant argued that she was not allowed to express her gender in the prison system.[1065] The appellant contested the prison governor's decision on denying her from accessing hormone treatment, denial to access to wigs (as she was bald), denial to access certain prosthetic devices (the judge stated 'this was designed to aid the intimate appearance of a woman – it is unnecessary to be more graphic than that', avoiding reference to a 'vaginoplasty'), no hair removal products, no separate changing facilities for the gym and no privacy screens, with an expectation that male urinals would be used for drug testing purposes and others.[1066]

In this case, the Court relied heavily on the medical model for transgender recognition,

[1063] Silpa Maruri (n 834)
[1064] Carr, McAlister and Serisier (n 822)
[1065] *R (on the application of Green) v Secretary of State for Justice* (n 831).
[1066] *R (on the application of Green) v Secretary of State for Justice* (n 831).

which the UK had adopted under the 'Gender Recognition Act 2004'.[1067] And despite the fact that the court in this case established that the person concerned was indeed a transgender person, it applied security risks to justify the denial of the claimant's right to selfhood and gender expression. The Court argued that despite the fact that the claimant had a protected characteristic – gender reassignment – the claimant regardless of such a characteristic is, however, male. Therefore, 'the only possible comparator is to a male prisoner who is not undergoing gender reassignment'.[1068] This meant that the Court found no discrimination on the basis of sex. No further continuation of this case has been found.

The case of *R (on the application of Green) v Secretary of State for Justice* highlights a number of points that are important for a discussion in the context of national legal systems. It also exemplifies a wider challenge in recognizing transgender persons in law, whether outside or inside prisons. As argued above, there seems to be a lack of general knowledge on the possible options and how queer theory can be better accommodated in the legal system and in prisons in particular. The judge in the *Green* case was clearly troubled by the encounter of a transgender person with long established binary norms and standards. The tension between the law and queer theory discussed earlier in Chapters One to Four, becomes more evident in the prison system as the prison law is based on strict binary sexed identities.

In countries that have progressive laws, particularly based on the medical model of

[1067] The United Kingdom Gender Recognition Act 2004.
[1068] *R (on the application of Green) v Secretary of State for Justice* (n 831).

transgender legal recognition, deeper issues of the right to personhood seem under-explored. Non-binary gender identity in the strictly regulated identity systems seems a utopian idea that has yet to be developed. This was indeed acknowledged in *R (on the application of Green) v Secretary of State for Justice*, where the judge stated that 'the issues of the present case shall be regulated at a policy level'.[1069] This and other cases (i.e., *AB* case) brought against the HM Prison Service of the UK instigated a reform, including opening up a consultation process with the public. HM Prison and Probation Service published new rules 'Prison Service Instructions' in November 2016, which focus on the participation of transgender prisoners in the decision-making regarding the allocation of transgender prisoners.[1070] Prior to this, the Scottish prison services had published policy guidelines that note, for example: 'People in custody should be allowed access to items such as clothing, prosthetics, chest-binders, hair-pieces/wigs and other equipment needed to facilitate their gender reassignment and express their gender identity.'[1071] Notably, both the UK countrywide and the Scottish prison policies are developed with the binary prison structures in mind. This means that the new policies also are of a heteronormative nature with some consideration towards non-binary gender identities.

Notably, in Malta, after the introduction of a gender self-determination model of transgender legal recognition, a number of transgender prisoners took it to the Court to

[1069] *R (on the application of Green) v Secretary of State for Justice* (n 831).
[1070] See for example, The United Kingdom, Ministry of Justice, the Policy paper on 'The Care and Management of Transgender Offenders' (2016).
[1071] Scottish Prison Services, 'Gender Identity and Gender Reassignment Policy', 12 March 2014, available at http://www.sps.gov.uk/Corporate/Publications/Publication-2561.aspx., accessed on 3 April, 2015

claim that their gender expression was not allowed in prisons.[1072] The Court ordered the government of Malta to produce prison policy on the treatment of transgender prisoners, which was published recently.[1073] The policies put robust policy safeguards in place for the protection of transgender prisoners and suggest that a suitable access to gender expression items or services, necessary for gender expression should be provided to all transgender and non-binary inmates.[1074] As in the case of the UK and Scottish cases, Maltese prison policy is also developed to fit the existing structures.

The right to gender expression is intrinsically intertwined with right to privacy and personal hygiene, but most importantly with self-identity and the right to personhood. This is how transgender and non-binary identities have been argued in courts across the world and analysed in Chapter Four. What is important for the prison context though is to unpack the concept not in isolation, but in connection with other rights of transgender and non-binary gender identified persons, as well as international instruments on human rights and the treatment of prisoners. More attention is also needed from the policy guidance perspective to posit gender expression in the set of rights prescribed for prisoners in general.

3.5. The right to family visitations and contact with the outside world

Visitations and contact with the outside world are generally restricted in prisons as part

[1072] Kim Dalli, 'Transgender inmates sue Home Affairs minister, prisons director', 13 July, 2016, *At: https://www.timesofmalta.com/articles/view/20160713/local/transgender-inmates-sue-home-affairs-minister-prisons-director.618667.* Accessed on 4 August 2016.
[1073] Malta Prison Policy (n 825)
[1074] Malta Prison Policy (n 825).

of limitations imposed on rights to private life.[1075] Contact with the outside world is usually allowed in different forms, mostly via family visits, corresponding via phone or internet, consular contacts if the person is of a foreign nationality and access to information either via print or digital media. In this thesis, only the right to family visitations are discussed as the most relevant aspect of transgender prisoners that is often contested by the local prisons.

The international human rights law is abundantly clear on the importance of family visitation rights for the prisoners. The Nelson Mandela Rules now allow a wider circle of individuals who can pay visits to prisoners. Family and friends can communicate with the person in prison under necessary supervision and at regular intervals. This includes correspondents as well as the physical visits in prisons.[1076] The Nelson Mandela Rules specifically suggest that:

> where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity.[1077]

Similarly, the Bangkok Rules stipulate that women prisoners shall enjoy the right to contact with the outside world equal to men prisoners.[1078] The general framework for this right is also provided in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[1079] and the UN Rules for the Protection of

[1075] Dirk van Zyl Smit and Sonja Snacken (889); Rodley with Pollard (n 890).
[1076] Nelson Mandela Rules (2015) 58, 60, 88, 106, 107.
[1077] Nelson Mandela Rules (2015) 58.
[1078] Bangkok Rules (2010), 27.
[1079] UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) 19.

Juveniles Deprived of their Liberty.[1080] Notably, regional instruments such as EPR,[1081] the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,[1082] the Robben Island Guidelines for the prevention of torture and other cruel, inhuman or degrading treatment or punishment in Africa,[1083] and Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa[1084] all contain specific provisions on the contact with the outside world. Moreover, various torture prevention mechanisms have made specific recommendations on prisoners' communication with the outside world, noting that such practice should be encouraged. In particular, the CPT has noted, 'The concept of family should be interpreted liberally' for the purpose of social integration of prisoners.[1085] This is an important provision for 'sexual minority' in prisons and their social integration.

Almost all international instruments encourage family visits as a means of contact with the outside world. Accordingly, in many parts of the world a practice of family visits is also known as conjugal visits. Such visits often last from a few hours to a day or two depending on the specific regulations in a given jurisdiction aimed at maintaining and strengthening of the family links.[1086]

The right to family visits is a right that is often deprived to transgender or non-binary

[1080] Beijing Rules (1985), 59-61.
[1081] European Prison Rules (2006) 24.
[1082] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008) 18.
[1083] Robben Island Guidelines (2002) 31.
[1084] Luanda Guidelines (2016) 27.
[1085] Council of Europe: Committee for the Prevention of Torture, 24th General Report of the CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1 August 2013 - 31 December 2014), 21 January 2015, CPT/Inf (2015) 1; Also, Extract from the 2nd General Report on the CPT's activities [CPT/Inf (92) 3] 1992.
[1086] See for example, Chesa Boudin, Trevor Stutz and Aaron Littman, 'Prison Visitation Policies: A Fifty-State Survey'(2013) 32 (1) Yale Law and Policy Review, 149.

gender prisoners by virtue of being transgender or non-binary. This is largely related to policies both inside a prison and laws outside, which often criminalize transgender individuals or at least discriminates against them in the civil law (e.g., marriage, non-recognition in law, etc.). Despite the fact that the Yogyakarta Principles recommend that 'conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner,'[1087] the practice shows that 'sexual minorities' in prison face discrimination due to the laws that do not recognize same-sex relationships, marriage or pursue a biological model of transgender legal recognition as analysed in Chapter Two.

Again, transgender and other 'sexual minorities' in prisons are left out of policies that prescribe specific rights for communication with the outside world. The problem often lies with the discretionary nature of decision making by a prison administration at a local level as to who can enjoy the right to a visit. The absence in the policy guidance yet again seems to result in practices that are discriminatory against LGBTIQ persons.

A specific and relatively early case that challenged conjugal visitation rights was in 1999 in Colombia. The Inter-American Commission on Human Rights reviewed a case of *Martha Lucia Alvarez v Colombia in 1999* where the complainant was arguing that she because she was denied visitations because of her homosexuality, her personal integrity, honour and equality were violated. To counteract these arguments, the Colombia government stated that prisons would not allow homosexuals to receive intimate visits, as

[1087] Yogyakarta Principles (2006) 9.

it could affect the prison disciplinary regime. And even though the government acknowledged the discriminatory nature of such a ban, it noted that 'American culture has little tolerance towards homosexual practices in general'.[1088] Even though the case was viewed admissible to the court, it did not progress to the final judgment. Instead, the Commission agreed to oversee negotiations between the Colombian government and Ms. Alvarez and her lawyer in granting conjugal rights for lesbian prisoners. Meanwhile, the Colombia Supreme Court undertook a decision in *Alba Nelly Montoya Castrillión* that depriving lesbian inmates of conjugal visits constitutes a violation of their rights to privacy, freedom from discrimination based on sex, and to equality before the law. Importantly, the Supreme Court of Colombia addressed some of the statements the government had made in 1999 when the Alvarez case was at the Commission. In particular, the judges stated that there was no threat to the prison regime or to the well-being of other inmates or visitors, including children in allowing conjugal visits to lesbian prisoners under the same conditions required for heterosexual visits.[1089]

A similar case was considered a few years later in Argentina, when another lesbian couple complained that conjugal visitation rights were not granted to them. Judge Jose Perez Villalobo at the Federal Oral Court in Cordoba City (Tribunal Oral en lo Criminal Federal No. 5), in granting the right to visitations in prison to the couple, ordered the prison administration to allow the couple the same rights and conditions as offered to the rest of the prison population. The Court further commented that there was no valid security risk of HIV (argued by the prison administration) that should influence

[1088] *Case Martha Lucia Alvarez v Colombia*, (IACtHR 1999) *Alba Nelly Montoya Castrillión* (Expediente No. 66001221000020001-0012-01, October 11 2001).
[1089] ibid.

allowing same-sex couples a visitation right.[1090] Similarly, attempts to appeal the prison policy on conjugal visits in Israel in 2009 resulted in the change of prison services decision to allow conjugal visits for all on equal basis.[1091]

Of course, the right to contact with the outside world is not limited to visits in the prison. However, this is a specific area where the generalist approach of international policies and instruments on the treatment of prisoners seems to omit the interests and rights of transgender and other 'sexual minority' prisoners. Thus, further guidance as in the earlier case of gender expression is important to ensure that the treatment of transgender and other 'sexual minority' prisoners are conducted on equal basis.

3.6. Right to health

Discussion about transgender prisoners' rights to health cannot be taken in isolation from transgender health outside prisons or general prion health. Prison health on its own is a subject of a bigger research and exceeds the aims of this thesis. Only health standards specific to the transgender person's health will be highlighted here.

Pathologization of transgender people under biological and medical models of transgender legal recognition has largely characterised the ways in which discussions about right to health for transgender prisoners are conducted. Chapter Two has shown that the de-pathologization strategy led by transgender activists and human rights groups

[1090] Federal Oral Court No 2 in Cordoba City (Argentina 2005).
[1091] Haaretz, 'Gay Israeli Prisoners Win Right To Conjugal Visits' *Haaretz* (2013) <http://forward.com/news/breaking-news/179785/gay-israeli-prisoners-win-right-to-conjugal-visits/> accessed 30 October 2015.

at the WHO are having a significant impact on the shaping of policy and law in recognising transgender persons in law.[1092]

For the purposes of this chapter, however, it is important to establish the legal grounds for a transgender person's right to health in order to argue for equal access to health in prisons. Internationally, the right to health is recognised by all major international human rights instruments. Article 12 of the International Convention on Economic, Social and Cultural Rights provides that 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'[1093] Similarly, the African Charter,[1094] the Inter-American Convention on Human Rights[1095] and the Arab Charter on Human Rights[1096] all contain specific right to health in the regional context. The European Social Charter also outlines right to health.[1097] Furthermore, the Arab Charter on Human Rights specifically spells out that 'anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.'[1098]

The right to health is translated into all main international instruments on treatment to prisoners. In recent years, in particular with the adoption of Bangkok Rules and the revision of the SMR, general frameworks of right to health in prisons have scaled up significantly. For example, the Nelson Mandela Rules now recognize that

[1092] Chapter Two.
[1093] Rick Lines, 'The right to health of prisoners in international human rights law' (4) International Journal of Prisoner Health 3.
[1094] African Charter on Human Rights, Article 16.
[1095] Inter-American Convention on Human Rights, Article 10.
[1096] Arab Charter on Human Rights, Article 39.
[1097] 1996 Revised European Social Charter, 163 CETS, entered into force 1 July 1999, para 11 of Part I.
[1098] Arab Charter on Human Rights, Article 4.

> the provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.[1099]

In addition, Basic Principles for the Treatment of Prisoners,[1100] the Bangkok Rules,[1101] the EPR,[1102] the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,[1103] and the Luanda Guidelines[1104] all emphasise the importance of minimum standard of health in prisons. In addition, Article 6 of the UN Code of Conduct for Law Enforcement Officials requires that law enforcement officials shall ensure the full protection of the health of persons in their custody.[1105] Equal standard of health in and outside prison is required by human rights monitoring mechanisms. The HRCttee, for example, has reviewed a number of cases under Article 10 of the ICCPR and concluded that 'States parties are under an obligation to observe certain minimum standards of detention, which include provision of medical care and treatment.'[1106] The CPT in its recommendations repeatedly emphasise that **'**prisoners should be able to have access to a doctor at any time, irrespective of their detention regime.'[1107] The CESCR in its General Comments stipulates that the countries shall provide equal access to healthcare in prisons.[1108] Moreover, the right to health is one of the most contested rights under Article 3 of the ECHR. The ECtHR has in a number of cases stated that a prisoners 'health and well-being are adequately secured by, among other things, providing him

[1099] Nelson Mandela Rules (2015) 24.
[1100] Basic Principles for the Treatment of Prisoners (1990) 9.
[1101] Bangkok Rules (2010) 12-18.
[1102] European Prison Rules (2006) part 3.
[1103] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008)10
[1104] Luanda Guidelines (2014) 25
[1105] United Nations Code of Conduct for Law Enforcement Officials, 1979, UNGA Res 34/169, (17 December 1979), Article 6.
[1106] *Mikhail Marinich v Belarus*, Comm. No. 1502/2006 (2010) UN Doc. CCPR/C/99/D/1502/2006.
[1107] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), '3rd General Report on the CPT's Activities Covering the Period 1 January to 31 December 1992' [CPT/Inf (93) 12] (1993) para 34.
[1108] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, (2000) E/C.12/2000/4

with the requisite medical assistance.'[1109] The Court has also noted that 'failure to provide requisite medical assistance in detention could be incompatible with Article 3 of the Convention even if it did not lead to a medical emergency or otherwise cause severe or prolonged pain.[1110] Similarly, the IACtHR established the right to health standards in Americas region.[1111] In the minors' case the Court noted that:

> the act of imprisonment carries with it a specific and material commitment to protect the prisoner's human dignity so long as that individual is in the custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights.[1112]

Right to health in prisons is part of overall health standards contained in international human rights instruments. Furthermore, healthcare standards in prisons are required to be equal to the those available outside prisons.[1113] At the same time, due to the particularities of health of transgender or non-binary persons, additional measures might be necessary. For example, as noted in Chapter Five, transgender prisoners often require access to hormone or specialised psychological therapy to which they may or may not have had access when outside prison. If hormone therapy was started prior to imprisonment, it is important to continue on the basis of a general framework of prison health standards.

Generally, transgender health rights have been emphasised by the UN human rights bodies noting that 'the specific health needs of LGBTIQ persons, including hormone and

[1109] *Kudla v Poland* App no 30210/96 (ECtHR, 20 October 2000) para 94.
[1110] *Ashot Harutyunyan v Armenia* App no 34334/04 (ECtHR, 15 June 2010)
[1111] *Cabrera-García and Montiel-Flores v Mexico*. Series C No. 220, Preliminary Objection, Merits, Reparations, and Costs (IACtHR, Judgment of 26 November, 2010). para. 135. In this regard, the Court followed the paragraphs 56, 60, 65, 66 and 76 of the Istanbul Protocol.
[1112] IACHR, 'Special Report on the Human Rights Situation at the Challapalca prison in Peru' (IACHR 2003) para 113.; Also, IACHR, Report No. 41/99, Merits, Minors in Detention (Honduras 1999) para 135.
[1113] See for example Rick Lines (n 1093).

other treatment associated with gender transition for transgender persons'[1114] is important to be provided. However, there still remains a gap as to how transgender prisoners' right to health is interpreted in practice.

The findings of international monitoring bodies reinforce the idea that even in countries where the concept of equality and non-discrimination is relatively well-respected, and provide safeguards against ill-treatment for the protection including in prisons, discrepancy to extend equal and affordable medical care to transgender prisoners remains high. No case on transgender medical care in prisons has been considered by or submitted to the UN human rights treaty bodies so far, and no guidelines exist by international human rights mechanisms and policy bodies on how to organise transgender health in a prison system. It is also important to note that, at the European level, there were two cases admitted by the ECtHR that are yet to be reviewed by the Court. In both cases, *G.G. v Turkey*[1115] and *Bogdanova v Russia,*[1116] the applicants demanded that medical services in prisons be provided (surgery and hormone therapy respectively). In the latter case, however, the applicant additionally argued that the state had an obligation to take measures to address LGBTIQ prisoners' vulnerability in prison. No judgment has been issued on either case at the time of writing this thesis. However, it is expected that when published, these decisions will have a great impact on how the right to health for transgender prisoners is attended in the prison context.

[1114] UN CAT, Ninth Annual Report of the Subcommittee on Prevention of Torture (2016) UN Doc. CAT/C/57/4., para 77; UN HRC Report of the Special Rapporteur on Health (2003) UN Doc. E/CN.4/2003/58, para 60.; UNHRC Report of the Special Rapporteur on Health (2004) UN Doc. E/CN.4/2004/49.; UNHRC Report of the Special Rapporteur on Health (2010) UN Doc A/ HRC/14/20.; UNGA Report of the Special Rapporteur on health (2009) UN Doc. A/64/272.
[1115] *G.G. v Turkey* App No 10684/13 (third party submission by TGEU, ILGA Europe , Kaos, and GL T-Der, 31 March 2013).
[1116] ibid.

In acknowledging the complex nature of transgender health, and arguing for the equality of care, a parallel should be drawn with similar cases reviewed by the ECtHR. Two cases in particular deserve attention; in both, the Court reviewed cases concerning drug user prisoners. The first case was *McGlinchey and others v the UK*,[1117] in which adequate medical care for a heroin addict suffering withdrawal symptoms was discussed. The complainant was sentenced to four months' imprisonment and later in prison manifested heroin-withdrawal symptoms (frequent vomiting, significantly lost weight). Though she was treated by a doctor, her condition worsened after one week in prison. Eventually she was admitted to a hospital, where she died in January 1999. The Court reviewed the case under Article 3 of the Convention and concluded that the prison authorities had failed to comply with their duty to provide her with the requisite medical care, in violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention.[1118] A similar case was reviewed by the ECtHR 13 years later. In *Wenner v Germany,* the complainant was a long-term heroin addict who had been denied drug substitution therapy in prison.[1119] The Court held that there had been a violation of Article 3 of the Convention and emphasised that the authorities, despite their obligation, had failed to provide the applicant with medical treatment, which the therapy was to be considered appropriate. The state also failed to seek the help of specialist medical expert advice and examine available options for treatment.[1120]

[1117] *McGlinchey and Others v the United Kingdom* App no 50390/99 (ECtHR 29 April 2003).
[1118] ibid.
[1119] *Wenner v Germany* App no 62303/13 (ECtHR, 1 September 2016).
[1120] ibid.

Both of these cases are important in that they describe a particular condition of drug dependency. This issue is highly contested as states often refuse to provide treatment for the drug use in the prison environment.[1121] Though transgender prisoners health cannot be directly compared to these two cases described above, these cases should be used as a guidance in deciding the cases of transgender prisoners' right to health. In fact, some national courts have already made similar linkages. For example, in the landmark case *Estelle v Gamble,* which was discussed earlier, the US Supreme Court established a criteria that could be used in courts to argue for transgender prisoners' right to health.[1122] Due to the subjective nature of 'deliberate indifference' test, courts across the US developed unsystematic practices as to what constitutes 'deliberate indifference', and inmates have struggled to prove 'a serious medical need' too. Subsequently, in most of the transgender prisoners' health care cases in the US, the prison administrations argue that treatment that is considered experimental or cosmetic is mostly 'an elective procedure'. [1123] Possibly this was the rationale behind another case, *Kosilek v Maloney*,[1124] where a decision was made against the complainant to access gender-reassignment surgery while in prison. In the case, Michelle Kosilek sued prison officials for not providing sex-reassignment surgery after over a decade of her requests. The complainant had made numerous requests for gender-confirming medical or psychological care, though in vain. While in prison she tried to kill herself and to castrate herself. At first, the Court held that Kosilek had been denied necessary medical care because her rejection was based on a rigid prison policy, not on a doctor's individual

[1121] See for example, UN HRC Report of the Special Rapporteur on Torture on Greece (2011) A/HRC/16/52/Add.4.; UNHRC Report of the Special Rapporteur on the right to Health (2010) A/HRC/14/20.
[1122] *Gamble v Estelle*, 429 U.S. 97 (1976).
[1123] *Gamble v Estelle*, 429 U.S. 97 (1976).
[1124] *Kosilek v Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002).

examination. Although the Court found that Kosilek had not satisfied the 'deliberate indifference' requirement, it ruled that the prison administration had to provide her with relevant care. Kosilek sued again in 2005, complaining that the treatment she was receiving, including psychotherapy, hormone treatment, and laser hair removal, were not enough to relieve her anxiety or depression.[1125] Kosilek's case continued until the Supreme Court decided not to hear the case in 2015 and by default the decision of the US First Circuit Court of Appeals, was upheld.[1126] Kosilek's case raises a wider debate about pathologization of transgender individuals and the state responsibility to provide treatment. These issues were discussed in the medical model of legal recognition of transgender persons. However, for the prison context, state responsibility to provide health for those kept in detention is imperative.[1127]

The failure of governments to address transgender prisoners' right to health by putting a comprehensive policy in place has implications beyond prisons. Indeed, prison health cannot be isolated from broader healthcare concerns in society, particularly when discussing the groups with special health care needs. The provision of health services sufficient to meet these needs is not only a matter of pressing concern for persons in detention, it is also integrally linked to state obligations to fulfil the right to health within the population as a whole. Governments have a further legal and ethical obligation to

[1125] *Kosilek v Spencer*, 740 F.3d 733 (1st Cir. 2014).
[1126] GLAD Legal Advocates ad Defenders, 'U.S. Supreme Court Will Not Hear Case Concerning Medical Care for Transgender Woman in Prison', May 4, 2015.; also *Kosilek v. O'Brien* (formerly Spencer), 135 S. Ct. 2059 (2015).

[1127] See for example, ECtHR, 'the authorities are under an obligation to protect the health of persons deprived of liberty and the lack of appropriate medical care may amount to treatment contrary to article 3' (*Rohde v Denmark* App no 69332/01 (ECtHR, 21 July 2005); *Kudla v Poland App no 30210/96 (* ECtHR, 20 October 2000); *Melnik v Ukraine* App no 72286/01 (ECtHR, 28 March 2006).

provide a standard of health care greater than that available in the community in order to meet an equal outcome of care.[1128]

4. Opportunities and Ways Forward for Achieving the Protection of Transgender Prisoners' Rights

4.1. Vulnerability as a framework for protecting transgender prisoners' rights

a. Concept of vulnerability, human rights and transgender persons

This sub-chapter emphases the concept of vulnerability, which is highly important to the broader group of 'sexual minorities' and to transgender persons in particular. It, however, does not provide a theoretical analysis of the concept itself. The theory of vulnerability is a subject of study that exceeds the objectives of this thesis. Also, in order to establish vulnerability of transgender prisoners, this section looks at the understanding of vulnerability in relation to sexual minorities and transgender persons in general and employs the learning for prison context.

It is argued that human rights are inherently constructed to protect the most vulnerable.[1129] However, as witnessed throughout history, many groups such as women, people of colour, asylum seekers, ethnic minorities and sexual minorities have fallen out of the universal protection framework of human rights.[1130] To address the pitfalls of the universal protection mechanism, group-specific instruments have been designed that can

[1128] Lines (n 1093).
[1129] Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in Martha Fineman and Anna Grear (Eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 147-170.
[1130] Anna Grear, 'Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity' (2017) 16 A Journal of Modern Society and Culture.

also be understood as a continuous critique to the 'abstract universal' and outcome of the 'quazi-disembodiment.'[1131] This criticism is important in the context of transgender and wider 'sexual minority' groups. Indeed, the rationale behind asserting the SOGI rights as part of the international human rights framework is that the existing framework as it stands does not guarantee the meaningful protection of LGBTIQ individuals as also highlighted by the SR on Torture. Chapters Three and Four in this thesis have also tried to address the gap and provided analysis of the gradual shift that has been taking place in human rights law, whether at national, regional or international levels to ensure the development of group-specific norms that can also help strengthen the protection framework. Notably, the framework of vulnerability that has been used in courts for a number of groups to assert the legal framework of human rights protection has not been tested in the context of transgender persons.

The policy documents and UN human rights experts and treaty bodies have emphasised the particular vulnerability of transgender and other LGBIQ persons, but their specific vulnerability has not been examined in the courts. Both the ECtHR and the IACtHR have employed international and regional human rights instruments to argue that the fundamental requirement of respect for human dignity should be guaranteed for lesbian and gay prisoners.[1132] Furthermore, the ECtHR has developed a wide framework of vulnerable categories, including Roma, people with mental disabilities, people living with HIV, and asylum seekers. The Court recently gave a clarification about its application of term vulnerable to a specific individual or a group of people. In particular,

[1131] ibid.
[1132] See for example *X v Turkey*, and *Martha Lucia Alvarez v Colombia* (1999).

in a partly concurring and partly dissenting opinion, one judge stated: 'The concept of a vulnerable group has a specific meaning in the jurisprudence of the Court. True, if a restriction on fundamental rights applies to a particularly vulnerable group in society who have suffered considerable discrimination in the past….'[1133] The judge then continued to list the preconditions that make the group vulnerable and suggests action, noting: 'Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs. Where a group is vulnerable, special consideration should be given to their needs.'[1134] In making a point about the failure of protection of such vulnerable groups, the judge observed:

> Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3.[1135]

The IACtHR has also applied the concept of vulnerability in its case law. It, however, differentiates between vulnerable groups and situations of vulnerability, thereby giving the Court a flexibility in its reasoning.[1136] In a case of *Villagrán Morales and Others v Guatemala*, concerning a group of street children, the Court argued that 'vulnerability of children and their incapacity to personally ensure the respect of their rights' – hence the group were to be recognised as a vulnerable.[1137]

[1133] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), Partly concurring and partly dissenting opinion of Judge Sajo.
[1134] ibid.
[1135] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).
[1136] Mary Beloff and Laura Clérico, 'The Right to Dignified Living Conditions and the Position of Vulnerability in the Jurisprudence of the Inter-American Court' at: https://law.yale.edu/system/files/documents/pdf/SELA14_BeloffClerico_CV_Eng.pdf, accessed on 12 April 2015.
[1137] *Street Children (Villagran-Morales et al.) v Guatemala,* judgment on merits (19 November, 1999) para 184.

The vulnerability framework has been applied to transgender persons and 'sexual minorities' in general to argue for specific protection mechanisms.[1138] However, until recently vulnerability has not been mentioned in the context of LGBTIQ persons - although there had been hints to special measures associated with vulnerability that needed to be applied to achieve protection from discrimination on the grounds of sexual orientation. For example in two recent cases on non-discrimination and sexual orientation, *Kozak v Poland* and *Genderdoc-M v Moldova*, the ECtHR suggested that 'particularly weighty reasons' needed to be advanced before the Court to justify a measure against a homosexual, because such a measure 'operates in this intimate and vulnerable sphere of an individual's private life.'[1139] Another area where the ECtHR attempted the idea of vulnerability specifically in relation to transgender came with *I* and G*oodwin* cases, in both of which the ECtHR found that the legal system had placed 'transsexuals' in an 'anomalous position in which they could experience feelings of vulnerability, humiliation and anxiety.'[1140] However, specific terms such as transgender vulnerability were not employed.

The breakthrough of assigning vulnerability to a group of LGBT came with the ECtHR reviewing a case of a gay asylum seeker from Iran, who was detained in immigration detention facilities in Hungary. In 2014, the complainant, O.M. arrived in Hungary and applied for asylum upon his arrest. He was originally detained by the immigration services, though later on re-arrested by the police due to risks of the applicant escaping

[1138] For example, the initiative for drafting the Yogyakarta Principles was also developed with this spirit.
[1139] *Kozak v Poland* App no 13102/02 (ECtHR, 2 March 2010) para 92.; *Genderdoc-M v Moldova* App no. 9106/06 (ECtHR, 12 June 2012); para 51-52.
[1140] *I v the United Kingdom* App no 25680/94 (ECtHR, 11 July 2002).; *Goodwin v United Kingdom* (n 295).

the country. O.M. then was kept in detention for 58 days. While the Court criticized Hungary for generally not observing the principles on the humane conditions of detention, it paid particular attention to the circumstances of the applicant. The Court went to argue that the complainant was a 'member of a vulnerable group by virtue of belonging to a sexual minority in Iran.'[1141] Although the Court did not elaborate on the concept of vulnerability vis-a-vis 'sexual minority', it has made it clear that vulnerability should have been used as a condition for demanding legal protection for asylum seekers.[1142]

Vulnerability has been also highlighted by the CRC Committee in its General Comment on 'The right of the child to freedom from all forms of violence', which addresses non-discrimination of vulnerable or marginalized groups such as lesbian, gay or transgender persons.[1143] The CESCR in its General Comment on non-discrimination also addressed the concept of marginalization and vulnerability to emphasise the inclusion of LGBTIQ persons under 'the other' prohibited ground for discrimination.[1144] The Committee on the Elimination of Discrimination against Women differing from previous two bodies, employs a concept of vulnerability rather often to underline the disadvantaged position of women vis-à-vis men.[1145] A number of SPs mechanisms have also employed the concept

[1141] *O.M. v Hungary* App no 9912/15 (ECtHR, 5 July 2016) para 53.; also *Alajos Kiss v Hungary App* no 38832/06 ECtHR 20 May 2010) para 42.
[1142] *O.M. v Hungary* App no 9912/15 (ECtHR, 5 July 2016) para 53.
[1143] UN CRC General comment No. 13 (2011): The right of the child to freedom from all forms of violence (2011) CRC/C/GC/13 (The right of the child to freedom from all forms of violence), para 60 and 72(g) (stressing that States parties must address discrimination against vulnerable or marginalized groups of children including children who are lesbian, gay, transgender or transsexual).
[1144] UN CESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2*) (2009) UN Doc. E/C.12/GC/20 para 27.
[1145] See for example UN CEDAW General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19 (2017) CEDAW/C/GC/35.; CEDAW General Recommendations No. 18 on disabled women, adopted at the Tenth Session, (1991) (contained in Document A/46/38), (1991) A/46/38.; UN CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), (1999) A/54/38/Rev.1.

of vulnerability, most recently the UN Independent Expert on SOGI, which emphasized, 'Transgender persons' vulnerability to discrimination and right to equality does not and should not, depend on medical transition.'[1146]

b. Vulnerability and transgender prisoners

Analysis of vulnerability in the prison context slightly differs from how this is understood in society. In literature, places of detention are discussed as places of vulnerability[1147] that require heightened safeguards to protect prisoners from ill-treatment. International standards such as Nelson Mandela Rules state that in order for the principle of non-discrimination to be put in practice, the most vulnerable categories in prison settings should be taken into account.[1148] The Bangkok Rules specifically state that 'women prisoners are one of the vulnerable groups that have specific needs and requirements' and requires that adequate attention is be paid to them due to their particular vulnerability.[1149] The Bangkok Rules emphasise the vulnerability of the group, which is similar to Rule 13 of the EPR, which state, 'Protection for vulnerable groups is not discrimination, nor is treatment that is tailored to the special needs of individual prisoners unacceptable.'[1150] Special attention to 'vulnerable groups' is also required in the Luanda Guidelines[1151] and Principles and Best Practices on the Protection of Persons

[1146] UNGA Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2017) A/72/172, Para 53.; also UN HRC: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2017) A/HRC/35/36.
[1147] *Chember v Russia* App no. 7188/03 (ECtHR, 3 July 2008) para 50; *Sarban v Moldova* App no 3456/05, ECtHR, 4 October 2005) para 77; *Jalloh v Germany* [GC] App no 54810/00 (ECtHR 2006) para 69, and *Mouisel v Franc App* no. 67263/01 (ECtHR 2002) para 40.
[1148] Nelson Mandela Rules (2015) 2.
[1149] Bangkok Rules (2010) 2.
[1150] European Prison Rules (2006) 13.
[1151] Luanda Guidelines (2014, 29-34.

Deprived of Liberty in the Americas, which underlines 'particular situation of vulnerability'[1152] of person deprived of their liberty.[1153] The CAT Committee in its recent General Comment on Effective Remedy for Torture and Ill-treatment (Article 14) specifically emphasises the principle of non-discrimination, among which is listed gender, sexual orientation, and gender identity. The Committee also further notes the 'groups vulnerable on the basis of identities'… and asks to 'exercise sensitivity' towards such groups.[1154] Similarly, the ECtHR in *Florea v Romania* has established the position that in a case where a prisoner complained of overcrowding, poor hygiene conditions, having been forced to share a cell with smokers in the prison hospital and being given a diet unsuited to his various medical conditions, the State had an obligation for 'enhanced protection of vulnerable individuals'.[1155] The Court indicated that the complainant, *Gheorghe Florea* in this case, was regarded vulnerable to ill-treatment and Romania was found in breach of Article 3. In underlining the obligation of the state to protect prisoners from torture and ill-treatment, the Court further requested that prisoners should not be subject to distress or hardship that exceed the level of suffering inherent to their imprisonment.[1156] The ECtHR used the 'particular vulnerability' argument to emphasise protection of specific groups from ill-treatment. For example, in the cases of *Keenan v the UK* and *Price v the UK* the Court found violations of Article 3 due to the unique vulnerabilities of the applicants in question (mental illness and physical disability

[1152] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Preambular Paragraphs.
[1153] As noted above, the Inter-American human rights system seems to have developed its own approach on vulnerability which will not be discussed here, though is important to mention.
[1154] UN CAT, General comment No. 3, CAT/C/GC/3 (2012).
[1155] *Florea v Romania* App No 37186/03 (ECtHR 4 September 2010).
[1156] ibid.

respectively).[1157] The ECtHR established that these specific vulnerabilities heightened the obligation of the state party to provide adequate conditions of confinement (including health services) so as to prevent the occurrence of ill-treatment.[1158] Similarly, the IACtHR established that in relation to children in prison (already regarded category of vulnerable group), it was important that 'the minimal conditions' were established as 'necessary for the preservation of dignity during their stay in detention centers.'[1159]

Reasoning that suffering from torture and other ill-treatment may be aggravated by the marginalization or discrimination of particular individuals or groups of individuals within a society or prisons[1160] means that there need to be safeguards in place. As further highlighted by the CAT Committee, the protection of minority or marginalized individuals or groups should be a core part of the obligation to prevent torture and other ill-treatment.[1161]

Recommendations on how to treat transgender prisoners seem scattered without comprehensive form. This means that, for example, even if there is a recommendation that transgender persons are a vulnerable category and they are more vulnerable when they are in prisons, the policies to regulate such situations still do not reflect the lived

[1157] *Price v the United Kingdom* App no 33394/96, (ECtHR, 0 Jul 2001) 53; *Keenan v the United Kingdom* App no 27229/95 (ECtHR, 4 March 2001) 38.
[1158] In *McGlinchey v United Kingdom* the Court found the failure to provide adequate medical services to an imprisoned heroin user—a failure that resulted in her death was also a violation of Article 3. (*McGlinchey and Others v the United Kingdom* App no 50390/99 (ECtHR, 29 April 2003).
[1159] IACtHR, in the case of *The Institute for the Reeducation of Minors v Paraguay*, cited in article The Right to Dignified Living Conditions and the Position of Vulnerability in the Jurisprudence of the Inter-American Court, Mary Beloff and Laura Clérico.
[1160] UNHRC Report of the UN Special Rapporteur Torture (2016) A/HRC/31/57., 9; UNHRC Report of the Special Rapporteur on Torture (2013) UN Doc. A/HRC/22/53 (2013) para 26.; UN CAT, Ninth Annual Report of the Subcommittee on Prevention of Torture (2016) UN Doc. CAT/C/57/4., 48.
[1161] UN CAT, 'General Comment No. 2: Implementation of Article 2 by States Parties' (2008) UN Doc. CAT/C/GC/2, para 21; *Ximenes-Lopes v Brazil, Inter-American Court* (2006) para 103. See also UNHRC Report of the Special Rapporteur on Torture (2013) UN Doc. A/HRC/22/53.; para 26.

experiences of transgender prisoners, as demonstrated in Chapter Five. What seems important from the analysis of vulnerability and transgender prisoners is the importance of contextual the particular nature of lived experiences of vulnerability. Indeed, such an approach can allow study into the cumulative vulnerabilities and layers of intersectionalities that further affect the experiences of transgender prisoners. And if characteristics of such vulnerability are mobile and flexible as argued in literature and seen in the case law outlined above from European and Americas region, specific links should be made between imprisonment of transgender persons, their vulnerability vis-à-vis the vulnerability of other prisoners and the context in which they are imprisoned.

Vulnerability is applied to argue for either specific norms for protection or mechanisms in place to protect rights of particular person or a group. In the context of prisoners, vulnerability of the group determines the categorization of prisoners. For example, special vulnerability of women and children means that they should be kept separate from male prison population. A vulnerability of people with disabilities means that special measures are taken to address the illness. Often, these people are separated from the prison population and placed in special care units or hospitals respective to their health. In relation to transgender prisoners however, vulnerability is often a foundation for decisions to place them under 'protective custody', which as argued above is a euphemism for solitary confinement. If decisions to isolate transgender prisoners are justified by their vulnerability, it raises questions of whether vulnerability is two-faced and even a double-edged sword too, and whether a different approach should be taken to understand different sides of vulnerability: the group of transgender prisoners and

specific vulnerability that prison environment inherently entails. Answering such questions requires further research through the queer criminology studies discussed in Chapter One, as well as studies into the lived experiences of transgender prisoners, discussed in Chapter Five. To conclude though, it should be noted that the UN human rights bodies, and in particular the CAT Committee and the SR on Torture, have analysed types of vulnerabilities experienced by transgender persons and wider sexual minorities in prisons and have made special recommendations. In particular, both have argued that LGBTIQ prisoners should be included in the design, implementation and evaluation of measures adopted to prevent the use of these practices.[1162] Though not comprehensive, such specific recommendations are important to guide the policies on humane treatment of transgender prisoners.

4.2. Separation of categories of prisoners and transgender rights

In modern prison theory, two major grounds for prison segregation can be identified: sex and age. This sub-chapter only looks at segregation by sex. The assumption of heterosexuality remains one of the basic reasons behind the sex segregation of prisons, as men must be kept from women because men are heterosexual and will seek out sex with women, either consensually or non-consensually.[1163] Such an assumption of heterosexuality plays an important role in forming prison policies that are different for men and women. This also means that sex-based segregation is limiting in protecting the less masculine from the more aggressive and predatory male prisoners in male prisons.

[1162] UN CAT, Ninth Annual Report of the Subcommittee on Prevention of Torture (2016) UN Doc. CAT/C/57/4., para 71.
[1163] Cohen (n 843).

This is particularly true with regards to transgender persons, many of whom display distinct female characteristics, including wearing make-up, dress or long hair and are treated particularly poorly in sex-segregated prisons by both inmates and prison guards.[1164]

Prison segregation may take place at various stages of the imprisonment. However, the most common forms are housing (or the allocation to prisons) and administrative segregation (protective custody or solitary confinement discussed earlier in this chapter). Different categories of prisoners are kept in separate institutions or parts of institutions, taking into account their sex with specific assumptions of male and female, age, criminal record, the legal reason for their detention and the necessities of their treatment. As noted earlier, international principles such as the Nelson Mandela Rules provide special norms on the treatment of each of these groups and their protection.[1165] In particular, Rule 11 stipulates that 'the different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex…' Moreover, it continues to note, 'Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate.'[1166] Principle 19 of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas also prescribes that 'different categories of persons deprived of freedom shall be kept in separate places of

[1164] Cohen (n 843).
[1165] For example, the SMR provides that (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate; (b) Untried prisoners shall be kept separate from convicted prisoners; (c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence; (d) Young prisoners shall be kept separate from adults.
[1166] Nelson Mandela Rules (2015) 11.

deprivation of liberty… taking account of their sex.'[1167] In addition, the EPR also provide, 'in deciding to accommodate prisoners in particular prisons or in particular sections of a prison due account shall be taken of the need to detain… male prisoners separately from females.'[1168] All these standards apply biological-model definitions of men and women and make no specific reference to gender, or non-binary gender identity. The Bangkok Rules and the Beijing Rules also provide special rules on allocation and housing of respective prisoners. The Luanda Guidelines also contain provisions on separation of categories of detainees, though it mainly highlights the context of pre-trial and conviction stages of criminal proceedings.[1169]

There is a new provision in the Nelson Mandela Rules that suggests that information about person's unique identity shall be obtained to determine the gender of a newly arrived person.[1170] In particular, Rule 7 suggests that at the arrival, prison officials shall collect 'precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender.'[1171] This clause is defined to specifically relate to transgender persons. And while this can be a step forward in recognizing transgender and non-binary persons in prisons, it should be treated with caution, as the rules demand that such information is entered into a prisoner's files under the prison management system. While the Nelson Mandela Rules have made a big step toward greater progress in asserting the gender identity concept within international prison standards for the first time in the history, it is also important that such a provision is

[1167] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008) 19.
[1168] European Prison Rules (2006) 18.8
[1169] Luanda Guidelines (2014), 26
[1170] Nelson Mandela Rules (2015) 7
[1171] Nelson Mandela Rules (2015) 7(a)

applied in the best interest of a transgender prisoner concerned. For this, commentary published by the University of Essex on the issue of dignity recommends that this provision [respect for dignity] was specifically included in the Nelson Mandela Rules to protect LGBTIQ prisoners in conjunction with Rule 2 on the prohibition of discrimination based on 'other status'. It suggests that the recording of information about self-perceived gender in Rule 7 should provide an opportunity to facilitate the placement of transgender prisoners to the appropriate facilities, and this should be done without stigmatising LGBTIQ prisoners, discriminating them or imposing disadvantageous conditions on them.[1172] The paper further recommends that prison files don't mention the SOGI of a person unless the person expressly wants such information to appear, in which case, it shall not be used against them.

Risks remain, however, about how to interpret the Nelson Mandela Rules in the best interest of a transgender prisoner when it comes to the implementation of these norms. It is in this context that the Essex group further elaborates that information about gender identity should not be based solely on the biological sex of the persons concerned.[1173] Furthermore, information about person's unique gender should not mean automatic separation of a prisoner or rights being restricted. The Essex group makes a specific reference that 'for transgender people, information contained in the records concerning gender identity should not be based solely on the biological sex of the persons

[1172] Penal Reform International and Essex Human Rights Centre at the University of Essex, 'Initial Guidance On The Interpretation And Implementation Of The UN Nelson Mandela Rules' (Penal Reform International and Essex Human Rights Centre at the University of Essex 2017)

[1173] 'APT Detention Focus' (Association for the Prevention of Torture 2017) <http://www.apt.ch/detention-focus/en/vulnerable_groups/6/> accessed 19 August 2017.; Also, Penal Reform International and Essex Human Rights Centre (n 1172) 31.

concerned' [1174] These recommendations, though authoritative and much needed in defining the Rule 7 of the Nelson Mandela Rules, have a very little standing. Despite this, can be used as an authoritative guidance document in implementing the best practice.

Some reforms have taken place in countries that have adopted the gender self-determination model in general. Despite this, it would be an overstatement to say that these norms are still recent and yet to be implemented in prisons. For example, the Scottish prison service has a transgender custody policy that recognizes gender self-determination.[1175] To fully apply such a declaration in practice, the prison services have issued a policy in which it expects a case management conference that plays a crucial role in determining the transgender persons' placement. The transgender prisoner also enjoys the right to participate in these conferences, also accessible and open for participation from civil society.[1176] In the case of Malta, it fully embraces the gender self-determination model, and attempted to translate these policies into prison policy. It has issued a 'Trans, Gender Variant and Intersex Inmates Policy', which regulates the placement of prisoners, as well as aspects of respect to dignity.[1177] The policy, however, does not clarify if Malta follows the Scottish practice in making decisions with regard to the allocation to prisons via case management conference.[1178]

[1174] Penal Reform International and Essex Human Rights Centre (n 1172).
[1175] Scottish Prison Services (n 1071).
[1176] Ulrika Westerlund and Richard Köhler (n 825).
[1177] Malta Prison Policy (n 825).
[1178] Ulrika Westerlund and Richard Köhler (825).

Most prisons around the world apply a strictly biological sex determinant to house prisoners, automatically placing transgender women in men's prisons and transgender men in women's prisons.[1179] The exceptions are made gradually, as shown above in the case of Malta, the UK including Scotland and some others. Transgender prisoners' sex-based placement draws an arbitrary line over the complex issue of gender identity.[1180] In the binary prison context, it [sex-based placement] can offer a short-term solution of avoiding the question as to what makes someone male or female, however, in the long term, it creates serious safety issues and increases the prison's liability.[1181] Researchers and human rights campaigners have long argued that by adopting such binary, strictly sex-based housing policies in prisons, the government is by de facto harming them because it has a prior knowledge of potential physical harm to them.[1182]

Segregation of transgender inmates may reduce the risk of sexual assault in the short term. However, there are many reasons to reject segregation as a long-term solution to the problems created by genitalia-based classification.[1183] According to empirical research from the US, conditions in protective custody units often do not differ significantly from those in disciplinary segregation units.[1184] Notably, Gabriel Arkles argues that the segregation of transgender inmates is actually counter-productive by causing further violence and unrest.[1185] He contends that by isolating victims of sexual

[1179] Sylvia Rivera Law Project (n 822).
[1180] Benish A. Shah, 'Lost In The Gender Maze: Placement Of Transgender Inmates In The Prison System' (2010) 5 Journal of Race, Gender and Ethnicity.
[1181] ibid.
[1182] Christine Peek, 'Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment' (2004) 44 Santa Clara Law Review 1211.
[1183] ibid.
[1184] ibid.
[1185] Gabriel Arkles, 'Safety And Solidarity Across Gender Lines: Rethinking Segregation Of Transgender People In Detention' (2009) 6 Political and Civil Rights Law Review.

abuse (as transgender prisoners often are) in 'protective custody', prison officials deter other victims of violence from reporting incidents, and are punishing the victims, rather than the perpetrators,[1186] though it might be 'for their own good'.[1187]

Accommodating transgender prisoners in the prison system is possible, however, with the caveat that such non-binary gender will have to align with the binary model of the sexes offered by prisons. Due to the fact that most transgender prisoners will end up in prisons that do not correspond with their self-perceived gender,[1188] transgender prisoners will be held in solitary confinement on 'security' or 'protective custody' grounds as a response to the dilemmas posed by sex-segregation as already examined earlier.[1189] This ultimately means that such practices effectively treat transgender people as 'the problem', rather than addressing the underlying issues in prison or rethinking existing policies around sex-segregation.[1190]

4.3. Ways forward: specialised LGBTIQ prisons and units?

Another type of administrative segregation applied in the prison context is creating units, or special 'wings', for vulnerable prisoners. This is an arrangement that many prison administrations apply to ensure the segregation of 'sexual minority' prisoners from the rest of the prison population, with the aim of safeguarding them from torture and other

[1186] Angela Okamura, 'Equality Behind Bars: Improving The Legal Protections Of Transgender Inmates In The California Prison System' (2011) 8 Hastings Race and Poverty Law Journal.
[1187] ibid.
[1188] Nikko Harada, 'Trans-Literacy within Eighth Amendment Jurisprudence: De/Fusing Gender and Sex' (2006) 36 New Mexico Law Review, 627.
[1189] Lamble (n 817).
[1190] Lamble (n 817).

ill-treatment. Such units are particularly common in male prisons, and measures creating them are understood as being prompted in large part by a need to protect transgender women and gay male prisoners. An American researcher, Russel K. Robinson, conducted a study on so-called K6G, a 'homosexual inmate unit' at the Los Angeles jail in 2010–2011 and came up with the conclusion that K6G prisoners were not adequately protected from 'predators'. He exposed the impact of prison policy with regards to segregation of transgender and gay prisoners: gay men must identify as gay in a public space in prison and to the special board of the prison administration and then satisfactorily answer a series of cultural questions designed to determine whether they really are gay, he wrote.[1191] While segregation from the general prison population to a special wing can be considered as a protective measure (and currently it is overwhelmingly applied in the case of transgender, gay, bisexual prisoners), it is also true that such a policy creates harm for those who are excluded, including vulnerable heterosexual and bisexual men, men who have sex with men but do not embrace the gay identity, and gay-identified men who do not mimic the white, affluent gay culture.[1192] Although writing about American prison culture, like Kunzel, Robinson incorporates some of the criticisms that specifically apply to the American criminal justice and to its prison system in particular when he goes further to argue that the jail's screening process to identify transgender, gay, and bisexual prisoners implicates the right to privacy as it pressures prisoners to 'come out' and further comply with the vision of gay identity prison institutions have put forward.[1193]

Robinson argues that establishing a special unit of this sort within a prison, which visibly

[1191] Robinson (n 815).
[1192] Robinson (n 815).
[1193] Robinson (n 815)

and in the knowledge of the entire prison population screens prisoners' sexuality and forces them into identifying gay or straight, is a clear indication of state enforcement of dominant notions of male identities, including gay identity. In human rights terms, it could also be understood as ill-treatment. Robinson goes further to argue that the segregation policy practiced in the K6G, put in place by a prison administration, reduces the list of possible vulnerability factors down to sexual orientation (more specifically, gay identity) and transgender identity in a narrow, stereotypical fashion and excludes some of the most vulnerable inmates.[1194] This also relates back to the analysis above in relation to vulnerability as a double-edged sword concept that may be used to justify certain types of ill-treatment and in this case isolation of 'sexual minorities'. Robinson raises an important point here. A special arrangement for gay, bisexual, and transgender identities reveals the hegemony among people who often are thought to constitute a singular, cohesive LGBTIQ community. Such treatment in the words of Robinson 'reveals a state culpability in producing homosexuality, with stigma, discrimination and vulnerability.'[1195] This resonates with the argument that segregation of men and women prisoners, though thought to have a protective character for women,[1196] also has been understood to mean that sex segregation is intended to maintain hegemonic masculinity and contribute to the hegemony of men.[1197] This thesis does not argue that separation of categories is not important, but it is worth noting that separation of prisoners is embodied in the vulnerability of specific subjects. For example, women and children as already argued elsewhere in this thesis are commonly separated categories of prisoners due to

[1194] Robinson (n 815).
[1195] Robinson (n 815).
[1196] Ralph Arditi, Frederick Goldberg, M Martha Hartle, John Peters, 'The Sexual Segregation Of American Prisons' (1973) 82 The Yale Law Journal.
[1197] Cohen (n 843).

their special vulnerability. And if the concept of particular vulnerability is the main feature for separation of prisoners, and it is argued that transgender prisoners and wider 'sexual minorities' in prisons do have an inherent and particular vulnerability, their separation from general prison population might be justified. However, this is complicated by various factors. For one thing, transgender or non-binary gender persons do not necessarily meet either of the binary sexes or genders. And if a third gender or non-binary gender penal institutions were established, would still be governed under binary rules and principles aimed at two main biological sexes: men and women. In the current context, when the majority of the world's prisons operate in strictly biological sex model of transgender recognition (see Chapter Two), administrative segregation is often the best alternative to place 'sexual minorities' under the protection but within the general population. Often such measures are regarded the best solution to deter abuse or ill-treatment from other prisons and prison staff. Analysing such segregation from a theoretical perspective, it could represent protection from the hazards of the general population. This however does not exclude the problematic nature of the measure itself.

The idea of 'sexual minority' prisons in fact has been entertained by number of countries so far. The first country to open a special prison to house transgender prisoners only was Italy, in 2010 – a development that occurred despite the obstructive environment for transgender legal recognition in the country, it opened a special prison to house transgender prisoners only.[1198] Other countries in Latin America, Europe and North America have all tried to separate LGBTIQ inmates with varying degrees of success.

[1198] BBC, 'Italy To Open First Prison For Transgender Inmates' *BBC* (2017) <http://news.bbc.co.uk/1/hi/world/europe/8455191.stm> accessed 22 September 2014.

Some forms of such segregation were outlined above. Heightened discrimination and violence against LGBTIQ prisoners also instigated authorities in Thailand to open a new building – a prison on the outskirts of Bangkok to house only LGBTIQ inmates.[1199] Turkey is due to open a new prison of what may be the world's first stand-alone LGBT penitentiary. Interestingly, discussions about the so-called 'pink prison' were spurred by the ECtHR case of *X v Turkey* in which the Court held that solitary confinement for a gay person was not suited and constituted a breach of human rights. As noted in Chapter Five, the prison authorities often force those inmates who may display vague feminine characteristics in male prisons to undergo medical examination, after which they are either subjected to 'medical treatment' or put in isolation.[1200] The Turkish government sees LGBTIQ prisoners as a group that has an inherent vulnerability and a problem; therefore, it decided to build a prison just for LGBTIQ individuals.[1201] Although the original idea was to release such prison in operation by the beginning of 2017, it is unclear whether this has occurred.

It might be misleading to believe that a specific LGBTIQ prison would resolve most or even many problems. A number of considerations should be taken into consideration – for example, international standards on prisoners' allocation to prisons close to their families and access to social and rehabilitation programmes .[1202]

[1199] Daniel Malloy, 'Should LGBT Inmates Have Their Own Prisons?' (2016) <http://www.ozy.com/fast-forward/should-lgbt-inmates-have-their-own-prisons/72150> accessed 21 October 2016.
[1200] Sibel Hurtas, 'Turkey's 'Pink Prison' (2015) <http://www.al-monitor.com/pulse/originals/2015/01/turkey-gay-lesbian-lgbt-special-prison.html#> accessed 3 April 2015.
[1201] ibid.
[1202] ibid.

The state of Ceará on the northeast of Brazil has opened a special prison that accommodates 200 gays, bisexuals and transvestites.[1203] These prisoners reportedly continuously suffered from violence and prejudice in the Brazilian prison system; therefore, separating them in a special prison seemed a way for the government to enable 'sexual minority prisoners' to serve their terms in a separate facility.[1204] The overall group of eligible participants excludes the lesbian category, however, which may reflect the narrative outlined in Chapter Five that women's prisons are not considered dangerous for non-binary genders identity prisoners, creating a combination of hegemony and non-binary environment at the same time. This practice is just one single prison, though, and cannot be generalized for the entire country. In other facilities, Brazil reportedly also has units where it accommodates LGBTIQ prisoners to spare them from potential inter-prisoner violence.

The Brazilian government's explanation about the decision to devote a special prison to gay, bisexual and transgender prisoners is that it is 'because this part of population is usually vulnerable and they are not cared for properly in the framework of the prison system... Typically, the gay, bisexual and transgender population isolates itself from all the other inmates. In prisons, gay, bisexual and transgender often become victims of violence and they are always under threat.'[1205]

[1203] Kevin Wong, 'Brazil Fights For LGBT Inmates' Safety, Opens First Gay Prison' (2017) <https://sputniknews.com/latam/201608251044628953-brazil-gay-prisons/> accessed 31 August 2016.
[1204] ibid.
[1205] ibid.

This motivation of the government emphasises two main points. One is that group vulnerability is a deciding factor in making a decision for separating 'sexual minority' prisoners from general prison population; the second point is that the state almost justifies its decision by saying that these 'sexual minorities' do not mingle with the rest of the prison population, and therefore it is almost natural we separate them. In other words, the state once again sees the 'sexual minority' as a problem to the general prison life and sees isolating them to be a solution.

The states argue that segregated prisons could curb an enormous problem of sexual abuse behind bars, as LGBTIQ inmates tend to suffer higher rates of victimization. While such separation has been presented as a victory for 'gay rights', an offer of refuge for a vulnerable population, there has also been a critique as to how such a separation is conducted and what the motives are. Despite some international well-meaning instruments that stipulate general rules and principles on how to treat transgender and non-binary persons in and out of prisons, often decisions are made at a micro-level of prison management, which often leaves too much room for interpretation. Particularly when a power of decision making on housing, allocation of prisoners and protection or solitary confinement is broadly vested within the prison governor at a micro-level, other mechanisms are important to be put in place to ensure humane treatment of transgender and other 'sexual minority' prisoners.

Segregation if designed and executed in the right order can be the right policy. For this to be true, however, a number of fundamental principles need to be observed for making

decisions, particularly at the initial stages of allocation. Literature suggests that such segregation should be of a voluntary character, meaning that transgender prisoners should choose to be in segregation, as well as consultations to be conducted with the respective transgender prisoners.[1206] The latter is also recommended under Yogyakarta Principle 9, which suggests that the participation of the LGBTIQ person in decision-making about inmates' allocation within the prison institution is fundamental. For this to be applied fully, a particular vulnerability of the transgender prisoner and their risk to the human rights violations and abuses should be taken into account by the decision-making body at the micro level of prison management when making the final decision.[1207]

5. Prison Abolition as a Framework to Challenge the Legitimacy of Transgender Imprisonment

A few queer theorists have argued that instead of addressing issues in the prison system, one should look at alternative measures such as the prison abolitionist movement and what it can offer for the protection of transgender prisoners' rights. Spade, who is a queer theorist and can be considered a leading author on writing on abolitionist and transgender imprisonment, suggests that the abolitionist movement should be a wider agenda for transgender rights and should address egregious violence experienced by transgender people both in the lead up to imprisonment but also in the prison environment. Spade questions the view of working with the prison system with the view of reforming it, and

[1206] Penal Reform International and Essex Human Rights Centre (n 1172) 32.; Also, The United Kingdom, Ministry of Justice, the Policy paper on 'The Care and Management of Transgender Offenders' (2016)
[1207] Penal Reform International and Essex Human Rights Centre at the University of Essex (n 1172) 32.

suggests that the transgender movement should focus on the abolitionist strategies that weaken these binary sex-based institutions.[1208]

Spade relies heavily on traditional abolitionist theory and rightly so questions the legitimacy of the imprisonment of transgender people. He considers that first, it is important to determine whether prison is the right place for them. He then continues to criticise the creation of the special unit K6G in the Los Angeles County Jail[1209] for gay and transgender prisoners ,which in his view will consistently fail to address violence and will, in fact, become new sites for enforcing racialized gender and sexuality norms to the detriment of the most criminalized populations. Spade calls politics and analysis within prison abolition scholarship and activism to start developing solutions that can reduce or eliminate the ill-treatment faced by transgender and non-binary gender prisoners. Spade further argued that the abolition of policing, prisons, jails, and detention should not be just a narrow answer to 'imprisonment' and the abuses that occur within prisons, but also as a challenge to the rule of poverty, violence, racism, alienation, and disconnection that transgender community faces every day. He stated that 'abolition is not just about closing the doors to violent institutions, but also about building up and recovering institutions and practices and relationships that nurture wholeness, self-determination, and transformation.'[1210]

A similar concept of prison abolition has been taken on by younger queer researchers

[1208] Dean Spade, 'The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison"' (2012) 4 The Circuit.; Also, Pascal Emmer, Adrian Lowe, and R. Barrett Marshall, 'This is a Prison, Glitter is Not Allowed: Experiences of Trans and Gender Variant People in Pennsylvania's Prison Systems' (Hearts on a Wire Collective 2011), *at http://www.bentbarsproject.org/sites/default/files/HeartsOnAWire-Prison-Glitter-Not-Allowed.pdf accessed on 5 June 2014*
[1209] Robinson (n 815)
[1210] Spade (n 1208)

who continue to build on Spade's transgender abolitionist theory.[1211] It is still early days, though: such theory has a long way to develop and grow into criminology literature that can be taken up for a discussion. Nevertheless, the prison abolition framework is a useful tool to challenge the underlying issues of transgender imprisonment, including issues of poverty and economic impoverishment, societal and institutional violence against transgender persons, discrimination and stigma which they face in their everyday lives and which are often the underlying reason for their imprisonment. Though this thesis is limited to unpack these intersectional issues, further research is required for conceptualising and addressing these problems.

6. Conclusions

The virtual absence of international standards specifically on the protection of LGBTIQ persons has been long accompanied by a lack of general or theoretical knowledge and the absence of both quantitative and qualitative data on sexual diversity both inside and outside places of detention. The absence of data does not mean that problem do not exist in practice, but quite the contrary – lack of awareness of the problems is often the cause of the abuse and violence against transgender prisoners.

This chapter surveyed the international human rights law to analyse the existing safeguards and their relevance to protecting transgender prisoners. While contestation of binary nature of prisons proves difficult to allow self-gender determination, basic

[1211] Sarah Lamble S. 'Transforming carceral logics: 10 reasons to dismantle the prison industrial complex through Queer/trans Analysis and Action, in Eric A. Stanley and Nat Smith (eds), *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (2nd ed. AK Press 2011).

principles of human rights law coupled with the specific norms, such as the prohibition of torture and others, are seen as the best tools to argue for the application of human rights law to transgender prisoners. The analysis of lived experiences of transgender prisoners vis-à-vis available international human rights law also confirms the intrinsic links between these two. At the same time, the aspects of the vulnerability of transgender prisoners as well as wider 'sexual minority' prisoners should be considered key to advance the arguments for norm specific policies and instruments.

Lack of specific guidance and limitations within the existing legislative context pose opportunities for international lawmakers and civil society activists to address the gaps in human rights norms and standards, although tensions with the self-gender determination in prisons will remain a subject for debate. It is also an issue that has divided states in international debates both on the issues of SOGI rights and the instruments for the treatment of prisoners who have argued against the inclusion of SOGI in the formal normative framework as also outlined in this chapter.

The available safeguards – including separation of categories in prison, whether protective or otherwise – are all based on the heteronormative nature of prisons. Transgender prisoners typically are regarded as vulnerable categories by default and allocated to 'protective custody', which as shown above is understood either as solitary confinement or otherwise in breach of freedom from torture. In fact, as argued, no international body has yet argued that transgender persons are *a priori* vulnerable category that would need to be separated from the rest of the prison population. What is

argued instead is the situational vulnerability and the need for special measures to be put in place to allow appropriate protection.

In the current circumstances neither such vulnerable categorisation is applied, nor is the binary nature of prisons challenged either in policy of practice. This means that even though international human rights law is being applied to secure the rights and freedoms in the context of non-binary genders, in prisons categorisation will continue in practice.

Conclusions

This thesis developed through legal, prison and queer analysis. As this analysis nears to the end, in this brief chapter, it is pertinent to offer some concluding observations, reflecting on the human rights protection frameworks and the legal models of recognising non-binary gender both outside and inside the prison systems. The conclusion particularly looks at the comparison as to how international human rights law has developed to provide protection in and out of prisons. A series of observations follow on how biological, medical and gender self-determination models interplay in the prison context, providing protection safeguards for the transgender prisoners.

This thesis started by exploring the human rights protection framework for transgender persons, the legal recognition of transgender or non-binary identity, and the development of international human rights law. In the case study, this thesis also examined the treatment of transgender prisoners under international human rights instruments. As observed in the introduction, since the early 2000s there has been an overall trend towards the recognition of the history of violence and abuses committed against transgender and other LGBTIQ communities with limitations in some jurisdictions and within international bodies.

The scale of violence against transgender persons, both in and outside prisons, discrimination, and ignorance of their rights in law and by society has spurred the global mobilisation of LGBTIQ persons to demand protection under international human rights

instruments. Such global grassroots movements have helped to increase the awareness on SOGI rights among states and internationally. Some questions, however, remain unanswered or unaddressed. The theoretical and practical mismatches of developments in the area of SOGI rights in international human rights law and transgender and non-binary persons' rights, in particular, have resulted in diverse approaches to the legal recognition of transgender persons' rights and freedoms both in society and in prisons and conflicts with clear binary rights. Still, a unified international framework on SOGI rights is missing. To address some of these gaps, a theoretical foundation was laid out, and legal models for the recognition of transgender identity explored. In particular, three different models of legal recognition of transgender persons in law – the biological model, medical model and gender self-determination models – were identified and discussed to demonstrate the intersection points of queer theory and law as it relates to transgender persons.

Some explanations for some of the gaps in the protection framework are intrinsic to international human rights law. At the time of the drafting of the International Bill of Rights and other human rights instruments, the majority of the countries in the world had LGBTIQ people ostracised and outlawed both through medical and criminal laws. International human rights law developed without specific considerations to non-binary gender, gender identity or transgender. Therefore, making alternations to already established international norms, or advocating for norms that directly relate to the transgender people's experience, has been challenging. Queer theory, and in particular

transgender studies that asserted the rights to personhood and gender identity for transgender persons, emerged in the 1990s and are still developing.

Despite such a complicated journey of development, some steps have been taken internationally and at regional levels to address the gaps and incorporate lived experiences of transgender people into the norm making. First, studies and investigations of human right law both through national norms and international rights framework established that SOGI rights are indeed intrinsic to human rights.[1212] In addition, decades of activism by LGBTIQ groups and human rights advocates have contributed to the establishment of the body of jurisprudence on SOGI rights. For example, three major resolutions by the UN HRC, as well as the establishment of the UN Independent Expert on the SOGI rights, should be regarded a success achieved by such global mobilisation and decades of increasing awareness of the violence faced by LGBTIQ communities, but also their human rights and freedoms. Recent assertions of the UN and other regional human rights bodies on the necessity of the protection of transgender persons' rights in detention has also contributed to advancing and cementing the rights of transgender prisoners. However, the applicability of international human rights law to transgender individuals relies too heavily on the underpinning principles of human rights. Substantive rights, such as the right to personhood, right to privacy and right to medical care (vis-à-vis pathologization) are the main areas of human rights argued.

[1212] Chapters 3-4.

A second general explanation with regards to the journey of the recognition of transgender rights in law relates to the historical dichotomy between feminist and queer studies, both of which are crucial theoretical frameworks for understanding the transgender concept. While the importance of feminist and queer theories cannot be underestimated in developing transgender studies and transgender persons' rights, in particular, a constant tension between queer theory, transgender rights and law persists. The basic premise of the recognition of transgender persons' rights seems to lack full legal protections of transgender persons in many jurisdictions, including at the international level, with WHO still keeping the 'transgenderism' on the ICD list.[1213] Among those challenging the rigid nature of the law, according to Butler's detailed study on gender performativity and queer theory, is a view that instead of sex-based recognition in law, international human rights law, as well as national laws, should in principle have a legal recognition mechanism for those who identify with neither of the sexes, but a specific gender, or non-binary gender. Indeed, an evolution of the law and legal reasoning requires a full determination of a person's gender, including the consideration of multiple factors, such as a person's perception of his/her own gender.[1214] A key challenge to the enforcement of non-binary gender recognition, however, is a heteronormative framework of law, including human rights law. In this context, principles of respect to dignity, equality and non-discrimination are essential to the realisation of non-binary gender as well as to the access of human rights and freedoms. What remains important is to close the gaps between broad protection frameworks and lived experiences of transgender individuals.

[1213] World Health Organization (ICD-10) (n 341).
[1214] Chapter 2.

While some theoretical progress on the recognition of SOGI rights is evident, a political consensus on gender self-determination and non-binary genders in practice remains a distant objective, particularly when it comes to the implementation of the legal recognition of transgender or non-binary gender identities. As outlined above, some 76 countries still criminalise LGBTIQ persons, and many more openly resist the establishment of international standards on SOGI rights, suggesting a clear divide on the issue. The example of mobilised resistance to block the election and appointment of the UN Independent Expert on SOGI at the UN HRC in late 2016 is also a testament of hostile countries trying to undermine the integrity of international human rights law. Although such hostility was overcome at UN HRC and the GA level, it was only by a small margin of votes and with a considerable compromise among negotiating states. Therefore, despite some attempts to harmonize the protection standards via policy changes or judicial remedy, inconsistency as to how these standards are translated into practice varies; hence, the diverse national laws and legal models of transgender recognition in practice.

The existing human rights protection framework has been interpreted to allow claims for the application of gender recognition rights, either under the right to private life or the right to be recognised before the law. Access to other rights that are specific to transgender people, however, seems to either depend on the realisation of these two rights (privacy or the right to be recognised before the law) or can be accessed through the framework of underpinning principles of human rights – equality, non-discrimination

and dignity. This suggests that no new rights of transgender people have been offered. On the contrary, transgender rights are at the very core of the international human rights law.

Legal models of transgender and non-binary gender recognition have taken diverse approaches. For example, the biological model, which is the oldest, does not recognise any deviance from a binary concept of sex or gender. It therefore imposes a strict punishment for transgressing the sex/gender boundaries (i.e., right to personhood, justified societal and structural discrimination, state-orchestrated stigma). These flaws in the law are addressed through the medical model, which permits the transgression between genders with a particular condition attached to it. Transgenderism should be a recognised medical condition, and transgressors should undergo medical intervention to exercise the 'privilege' of belonging to the other sex or gender. In this case, too, sex and gender are understood as identical identitarian notions, and medical science plays a dominant role in enabling a legal recognition of transgender persons. The emerging notion of non-binary gender has unsettled the medical model of legal recognition, questioning the pathologization of transgender communities and its conformity with the biological model. Indeed, the medical model continues to align itself with the biological model by supporting the heteronormative character of the sexes, hence supporting the pathologization of transgender individuals. On the other hand, the gender self-determination model allows legal recognition of the non-binary genders.

International human rights law has also developed through these three models. From the early stages of complete disregard, both at the international and regional levels, a wide margin of appreciation to the states in granting human rights to the transgender persons, to the recognition of gender self-determination, it underwent, and is still undergoing, modifications to achieve the full protection of transgender person's rights. Moreover, with the WHO 2018 summit another milestone in recognising transgender rights will be achieved, as the WHO is expected to remove 'transgenderism' from the ICD books and largely depathologize transgender persons. Human rights and transgender activists believe this will be a full compliance with the core principles of human rights, the UDHR and the Yogyakarta Principles.

As this thesis followed the developments in the prison environment, it is pertinent to make some comparisons between the developments in society and their application to the prison context. On many levels, the case of imprisonment represents the starkest example of the binary character of international human rights law and its potential limitations when applying human rights law to transgender prisoners. A disconnect between these two is common. It occurs even in countries where legal or political reforms have been successful in recognising transgender people in law either via medical or gender self-determination models. A simple transition in the legal recognition models does not automatically translate into the practice of a strict binary system, such as a prison. This is best illustrated in the example of the human rights law debates around SOGI rights within UN HRC and SOGI debates that took place during the drafting of the SMR, the Bangkok Rules and the revision process of the SMR. Even if international human rights

law, including the general comments of the treaty bodies, the concluding observations, the individual country viewpoints, and other recommendations and court judgments have made some progress to extend the protection to transgender prisoners, such discussions have lagged behind when it comes to transgender prisoners. Debates on the revision of the SMR were overshadowed by constant compromises between the states and a concern for the possible lowering of the standards, which has meant that although discussed in the open government negotiations, the SOGI as a wider concept, and the LGBTIQ persons in particular, are absent from Nelson Mandela Rules and the Bangkok Rules – specific instruments that provide standards on the treatment of prisoners. Notably, the Nelson Mandela Rules contain the language of 'unique gender' though it remains to be seen how this translates into the practice.

Prisons continue to function as single-sex spaces, segregated strictly by biological sex recorded on the birth certificate. This means that currently, most prisons are pursuing biological model of transgender recognition, trying to fit the transgender persons into the pre-defined sexes. Underlying principles of human rights, equality, non-discrimination and respect for dignity remain the bases for the treatment of transgender persons in prisons. Humane treatment and protection from ill-treatment, vulnerability and protection from violence as well as housing remain the main intersection points for transgender persons in prison. The prison context creates a particular situation of vulnerability for transgender population that demands heightened attention from the state officials. As the regulations relating to prison conditions are part of domestic legislation, local prison

administration have an obligation to consider individual risks and vulnerabilities of the group in determining the prison conditions in a particular society.[1215]

The analysis of models of recognition in the prison context allows us to pose a question as to whether the current human rights protection framework is applicable to the treatment of transgender prisoners. The gender self-determination model is indeed a challenge for prisons, particularly if the prisons remain single-sex and segregated spaces. This is evident from the policies of those countries that already claim to have adopted the self-determination model of gender legal recognition. This further means that even if the legal gender self-determination model works in society, in the prison context it is forced to fit the heteronormative framework of the system. Hence, whether transgender persons are allocated to special prisons, or allocated to prisons of their self-perceived gender, they [transgender or non-binary persons] will have to fit the heteronormative nature of the prison environment. In such a case, the recognition of self-determination of one's gender for prison context becomes irrelevant because the law prevails within structured and sexed bodies. This relates specifically to prison policies on the separation of categories and housing of transgender prisoners in the prison. However, transgender prisoners' rights that remain unattended, including in the international human rights instruments, are the right to gender expression, legal recognition of vulnerability and what it means in relation to transgender prisoners, 'protective custody' versus solitary confinement, medical care and the wider aspects of prevention of torture and ill-treatment.

[1215] Rodley with Pollard (n 890) 15.

In strictly sex-segregated spaces transgender prisoners do and will continue their struggle to freely express their gender. As it stands now, gender expression for transgender prisoners is an unexplored area by human rights instruments and enforcement mechanisms. In situations where human rights should be applied to all, in reality they are available only for the majority rather than for everyone concerned. As a judge in the *Green* case highlighted, if human rights have no specific application to those concerned, they 'become a pious list of worthy hopes with no practical application'.[1216] In such a case, it remains of utmost importance that specific guidance from the UN and other regional human rights and torture prevention monitoring bodies is provided to help determine how to approach the issue. The urgency is highlighted by the fact that gender expression has wider importance for the recognition of non-binary gender and the selfhood of the person, which should not be underestimated.

Participation at an early stage of decision-making will ensure that transgender offenders are kept fully informed of the processes and have the opportunity to present their views to those in charge of decision-making, as well as understanding the implications of their decisions. However, considering the lack of awareness that often attends the subject of criminal justice systems and the purposes of prisons, such an approach can be difficult to implement. Another difficulty is that prison governance in most countries in the world, and the real invisible hierarchy and informal structure of inmate society, can make a participatory approach difficult to implement. Moreover, any such measure leaves an

[1216] *R (on the application of Green) v Secretary of State for Justice* (n 831).

opportunity for the segregation of transgender or other LGBIQ prisoners from the rest of the prison population.

Prisons, as argued above, are decentralised institutions where governors often enjoy a wide discretion in setting local policies for implementing orders. This often means that they can refuse access to gender-affirming items, or even medical care, based on supposed risk and economic factors, and security and operational factors. Prison governors also make decisions about housing and the segregation of transgender prisoners from the rest of the inmates, often as a form of 'protective measure'. The situations of vulnerability and the high probability that transgender prisoners might be subjected to violence and abuse contributes to the decision to separate them from the rest of the prison population. However, leaving such an area without specific guidance has meant turning 'protective custody' into the 'solitary confinement', often in a discriminatory fashion against transgender prisoners. Providing guidance based on the principles of non-discrimination and prevention of ill-treatment should be a leitmotif in undertaking decisions about putting transgender prisoners in 'protective custody'.

Full conformity between gender self-determination and current prison systems cannot be achieved if these two have no intersecting point. However, to ensure the relative safeguards and protection for transgender prisoners, it is important that international bodies, including the UN torture prevention mechanisms, the UN SR, the CAT Committee and the SPT, as well as regional human rights mechanisms, should take the lead in providing guidance on the specific policies on the treatment of transgender

prisoners and the application of human rights to the specific needs of transgender person in prisons.

So far, queer literature has not provided any guidance on how to implement the gender self-determination model in the prison context. Two options have been identified, although both lack a deeper understanding and have not been supported by research into their applicability to the non-binary gender in prisons. Option one relates to the argument that prisons may need to cease operating as single-space establishments, to allow gender fluidity (or at least some of them, depending on the general prison management and risk assessment procedures). A second option uses an abolitionist approach and suggests that instead of trying to solve the problem from within the context, society as a whole should abolish prisons, or should use them only for really risky people. The first argument brings up a question of the history of the invention of prisons and the philosophical reasoning for separating men and women in closed institutions. More research, however, is needed into the prison abolition movement and its potential use for the benefit of transgender prisoners' rights, as well as the ways in which transgender imprisonment can be challenged. And even if the gender self-determination model is understood to provide the most comprehensive protection of transgender persons and respect to dignity, in the prison context such a model simply seems redundant in the absence of more global changes in prison management such as wider issues of legitimacy of transgender imprisonment and governance of justice systems, which concerns not only transgender prisoners but the ways prisons are governed, structured, planned and utilized.[1217]

[1217] Kunzel (n 227).

These explanations contribute to the development of the body of rules and jurisprudence establishing broader human rights of transgender persons, both outside and inside prisons. This should, however, be considered a success of the LGBTIQ community, which managed to organise as a group to advocate for their recognition in human rights law. The underlying principles of human rights, equality, non-discrimination and dignity played and will continue to play a central role in discourses about application of international human rights law to transgender persons and assertion of basic rules: first, an imperative need of human rights to reach all, and second, an emphasis on general rights with specific considerations of the lived experiences of vulnerable categories of people, in this case transgender individuals.

These features of the application of human rights law to transgender persons also help us to understand the general application of SOGI rights in the prison context, where transgender prisoners retain their ordinary rights, excepting those that are limited under the law. However, non-conformity with the set rules and norms of the sex/gender dichotomy does put transgender and other non-binary prisoners in a precarious situation from the very beginning. At the same time, the limitations of the present research must be acknowledged. The desk-based nature of the research has meant no engaged effort of documenting the implementation of either of the legal models of transgender recognition, nor was any field research conducted to observe the treatment of transgender prisoners in practice. This is not only an important question for further research, but it is also of utmost importance to document and gather evidence on the lived experiences of

transgender persons, both in and outside prisons. It is particularly important in the context of prisons in order to help to draw on the experiences of transgender and other 'sexual minorities' lived experiences for developing specific norms and standards on treatment. The ability then of the international human rights law to accommodate, cut across and apply to the specific experiences of the vulnerable groups while grounded in the principles of human rights and dignity, depends on the resilient actors of the LGBTIQ community and the broader public around the world.

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