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**An improved protection for the (mentally ill) trans parent: A queer reading of A.P., Garçon and Nicot v France.**

**Damian A. Gonzalez-Salzberg\***

**Abstract**

The European Court of Human Rights has been deciding cases concerning LGBT rights since the early 1980s. Its case law on trans rights has changed drastically through time, imposing upon the States of the Council of Europe certain minimum standards regarding the legal recognition of gender identity. In its recent judgment from April 2017 the Court laid down a new rule to be adopted by domestic legislation; namely, that the legal recognition of gender transition cannot be made conditional upon pursuing medical or surgical procedures which have (or are likely to have) sterilising effects. This article analyses the judgment from a critical perspective grounded on queer theory, weighting both the positive and the negative elements of the Court's decision.

**Keywords:** European Court of Human Rights, LGBT rights, trans rights, gender recognition, gender transition, queer theory.

**Introduction**

On 6 April 2017 the European Court of Human Rights (hereinafter 'the Court') delivered its judgment on A.P., Garçon and Nicot v France. This is the most recent judgment in a series of cases concerning trans law decided by the Court since the 1980s.<sup>1</sup> During its first two decades

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\* Lecturer in Law, University of Sheffield. I am grateful to my friend and colleague Dr Yin Harn Lee and to the anonymous reviewer for their very helpful comments on an earlier draft.

<sup>1</sup> Within this piece, I follow Stephen Whittle's use of the term 'trans', as an umbrella term to refer to any person who does not perceive their gender identity as the same as was socially expected for them to perceive following

dealing with gender identity, the Court refused to find that States were under an obligation to grant full legal recognition to the gender transition of applicants who brought their claims to Strasbourg. The turning point in the case law was in 2002, when the Court decided that the lack of full recognition of the gender of two trans women who had undergone a gender transition process provided by the State was a violation of the right to respect for their private life.<sup>2</sup> The cases brought to Strasbourg within the last fifteen years have mostly dealt with the State-imposed requirements to be fulfilled by trans individuals for obtaining full legal recognition of their gender. In *A.P., Garçon and Nicot*, the Court revisited its position regarding two of these requirements: sterilisation and, incidentally, genital surgery.

The case involved three trans women who had been denied due recognition of their gender identity in France, as the domestic courts considered that they had not fulfilled the different requirements imposed by the legislation for obtaining the legal recognition of their gender. The Court examined the 2012 French legislation on gender transition in light of the European Convention on Human Rights (hereinafter ‘the Convention’), having to decide whether some of the requirements imposed by said legislation were compatible with the obligations emanating from Article 8. This article establishes that every person has the right to respect for their private life and, therefore, should be free from unjustified interference by a public authority with the exercise of such a right.<sup>3</sup>

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gender classification at birth. Conversely, if I use the term ‘transgender’ or ‘transsexual’ I follow the term used in the specific case to which the reference is made. See: S. Whittle, *Respect and Equality: Transsexual and Transgender Rights* (London: Cavendish, 2002) xxii-xxiii.

<sup>2</sup> *Christine Goodwin v United Kingdom* [GC] (2002) 35 EHRR 18; *I. v United Kingdom* [GC] (2003) 36 EHRR 53.

<sup>3</sup> Even though the legislation had been amended on 12 October 2016, the Court analysed the case under the previous norm, as that was the legal grounds for rejecting the applicants’ claims. The new legislation has adopted a model that still contemplates judicial intervention for legal gender recognition, but no longer requires

While the Court decided to examine the three applications jointly,<sup>4</sup> each of them presented some differences. Ms A.P., the first applicant, had been diagnosed with Harry Benjamin's Syndrome following consultation with medical doctors in France. She decided to undergo genital surgery in Thailand, because she believed that surgery was a required step to obtain legal recognition of her gender in France. Nevertheless, the domestic courts denied her request for gender recognition as she refused to undergo physical and psychological evaluations by an inter-disciplinary medical team. These examinations were imposed by the legislation in order to 'confirm' that, at the time of a request for gender recognition, the applicant should still be medically considered as transsexual (sic) and to corroborate that the applicant's genitalia match those expected in a person of their asserted gender. Before the Strasbourg Court, Ms A.P. complained that the required intrusive examinations by an inter-disciplinary team amounted to a violation of her Convention rights, mainly the right to respect for her private life.

The second applicant, Ms Émil[i]e Garçon, was undergoing hormonal treatment when she brought her claim to the domestic courts. Her request was rejected as she did not provide due medical certification of her transsexuality (sic) and, most importantly, she failed to prove that she had undergone a gender transition process that could be considered 'irreversible'. Similarly, the third applicant, Ms Stéphan[i]e Nicot, faced the rejection of her claim because the domestic courts did not consider her gender transition to be irreversible, as she had not undergone genital surgery. Both applicants submitted to the Court that the requirement of sterilisation, as implicitly demanded by the need to have undergone an 'irreversible' transition, was a violation of the right to respect for private life. Ms Garçon also argued that

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the applicant to prove having undergone any type of medical or surgical treatment. See: A.P., Garçon and Nicot v France ECtHR 6 April 2017 at [68].

<sup>4</sup> *ibid* at [82].

the legal requirement of medical certification of mental illness amounted to a further violation of the Convention. Therefore, when the case came to Strasbourg, the Court had to decide whether the piece of domestic legislation that conditioned gender recognition upon intrusive medical examinations, medical diagnosis of a mental disorder, and having undergone an irreversible transition, was compatible with the Convention.<sup>5</sup>

The present article uses queer theory as a theoretical lens to read the case under study. Queer theory offers a post-structural view on identities that contest their stability, challenging the fixity of categories such as sex, gender and sexuality, as well as the traditional construction of these characteristics as opposed binaries.<sup>6</sup> Following the work of Judith Butler, queer theory rejects the traditional distinction between sex and gender, understanding both concepts to be cultural constructions with no causal relation tying them together.<sup>7</sup> It proposes that identities are performatively constructed through the reiteration of acts, opposing the idea of an internal essence of the body that materialises as genders and sexualities.<sup>8</sup> However, these performative identities are not freely chosen by the individual, but are an effect of regulatory systems.<sup>9</sup> Queer theory makes use of Michel Foucault's work to question the techniques of knowledge and power deployed by a normalising society that

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<sup>5</sup> *ibid* at [83]-[85].

<sup>6</sup> A. Jagose, *Queer Theory: An Introduction* (Melbourne: Melbourne University Press, 1996) 3; C. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) 141; J. Weeks, *The Language of Sexuality* (Abingdon: Routledge, 2011) 146.

<sup>7</sup> J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Abingdon: Routledge, 1990) 10-11 and 43-44. Consequently, the article uses the terms 'sex' and 'gender' interchangeably.

<sup>8</sup> N. Sullivan, *A Critical Introduction to Queer Theory* (Edinburgh: Edinburgh University Press, 2006) 89-90; A. Jagose, n 6 above, 90-91.

<sup>9</sup> J. Butler, 'Critically Queer' in S. Phelan (ed), *Playing with Fire: Queer Politics, Queer Theories* (New York: Routledge, 1997) 16.

discursively produces and regulates gender and sexual identities.<sup>10</sup> It problematises established disciplinary regimes that subject the body to permanent surveillance, classifications and social control. A queer standpoint not only celebrates those acts and identities that depart from the norm, but it even opposes the idea of normal behaviour itself.<sup>11</sup> Accordingly, a queer perspective challenges the regulatory systems that put in place a sex/gender model that is binary (there are only two categories available), mandatory (everyone belongs to a category) and largely involuntary (the categories are imposed at birth following pre-established criteria) and which problematises those individuals who reject being fitted into the assigned category.

Moreover, queer theory is characterised by the use of a deconstructive method that enables it to unveil inconsistencies within gender and sexual discourses. Consequently, the analysis of the case is conducted through the use of six deconstructive binaries that can be found in the judgment and that provide the structure of the article.<sup>12</sup> These binaries allow us to analyse different aspects of the judgment, and emphasise how specific issues were raised as dichotomies to be decided by the Court. The binary pairs are: inside/outside, reversible/irreversible, genitocentrism/self-determination, mental disorder/body diversity, surveillance/potential deception, and ‘wrong body’/wrong classification.

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<sup>10</sup> M. Foucault, *The History of Sexuality: An Introduction* (New York: Pantheon Books, 1978) 53-57 and 139-145.

<sup>11</sup> M. Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (Cambridge: Harvard University Press, 2000) xxvii.

<sup>12</sup> For the use of deconstructive binaries as a methodological tool, see: E. Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990) 9–11; C. Stychin, ‘Couplings: Civil Partnership in the United Kingdom’ (2005) 8 *New York City Law Review* 543; D. Gonzalez-Salzberg, ‘The Making of the Court’s Homosexual: A Queer Reading of the European Court of Human Rights’ Case Law on Same-Sex Sexuality’ (2014) 65 *Northern Ireland Legal Quarterly* 371.

### **Inside/outside (the Convention)**

The inside/outside binary has been largely used within queer theory as presenting the original dichotomy, since every opposite pair emulates the inside or outside dynamic.<sup>13</sup> The law also follows this binary character, which allows the classification of every conduct as lawful/unlawful. For the purpose of this analysis the inside/outside examination performed by the Court is also the first legal examination of the merits of a case, as it establishes whether the substantial claims fit within the framework of the Convention. On this occasion, the Court had to decide whether the applicants' claims fitted inside the scope of the right to respect for private life. The answer was affirmative. The Court highlighted that its jurisprudence had already recognised that the right to respect for private life protects a diversity of interests, including the gender identity of individuals.<sup>14</sup>

It clarified that while its case law had mostly dealt with trans individuals who had undergone a gender transition process provided by the national health system of the State, this certainly did not mean that:

...the issue of the legal recognition of the gender identity of transgender individuals who have not undergone a gender reassignment treatment approved by the authorities, or those who do not wish to follow such a treatment, is outside of the scope of article 8.<sup>15</sup>

That is to say, not only did the present applications fit inside the scope of the Convention, but the Court also seemed willing to deal with future cases regarding the gender identity of trans

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<sup>13</sup> D. Fuss (ed), *Inside/Out: Lesbian Theories, Gay Theories* (New York: Routledge, 1991) 1.

<sup>14</sup> A.P., *Garçon and Nicot v France* n 3 above, at [93]-[96].

<sup>15</sup> Own translation from the original French: 'On ne saurait toutefois en déduire que la question de la reconnaissance légale de l'identité sexuelle des personnes transgenres qui n'ont pas subi un traitement de réassignation sexuelle agréé par les autorités ou qui ne souhaitent pas subir un tel traitement échappe au champ d'application de l'article 8 de la Convention.' A.P., *Garçon and Nicot v France* n 3 above, at [94].

people who do not fit the traditional conception of transsexuality so far discussed in its jurisprudence. In fact, the Court clarified that the Convention's protection is not restricted to trans individuals who pursue gender transition through surgical and hormonal means, thereby rejecting a universalising view of the trans community in which gender identity is necessarily linked to achieving gender characteristics through medicalised paths.<sup>16</sup>

Moreover, within this step, the Court identified the main question to be answered in the judgment: did the legislation in force at the time breach France's positive obligations to protect the gender identity of the applicants? As mentioned above, the three requirements whose compatibility with the Convention was under question were the proof of irreversibility of the gender transition, the need for a medical diagnosis, and the requirement of undergoing medical examinations, which are discussed in the following sections.

### **Reversible/Irreversible ('transformation')**

Ms Garçon and Ms Nicot both claimed that the legislation requesting the 'irreversible character of the transformation of the appearance'<sup>17</sup> of those who demanded the legal recognition of their gender was imposing the requirement of sterilisation. Therefore, the Court had to analyse the dichotomous position in which the applicants had been placed having to choose between the legal recognition of their gender and the possibility of starting or continuing a biological family. This was not the first time that the Court had to decide on the familial character of trans individuals. Twenty years before this case, it ruled that a State

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<sup>16</sup> C. Richie, 'Lessons from Queer Bioethics: A Response to Timothy F. Murphy' (2016) 30 *Bioethics* 365, 366.

<sup>17</sup> Own translation from the original French: 'caractère irréversible de la transformation de [l']apparence.' A.P., *Garçon and Nicot v France* n 3 above, at [83].



was under no obligation to recognise a trans man as the father of his child, since he was not the biological father.<sup>18</sup>

Moreover, in a judgment issued in 2015, the Court dealt with a specific issue concerning sterilisation of trans individuals, when it analysed Turkish legislation that imposed sterilisation as a requirement in order to be entitled to undergo gender reassignment.<sup>19</sup> However, the only clear rule laid down by the Court in that judgment was that sterilisation could not be a requirement for authorising a gender transition process. It avoided offering a straightforward opinion regarding whether sterilisation could ever be a requirement for the legal recognition of gender, especially if it was a consequence of compulsory surgery. This was a question the Court had to finally answer in the present case.

On this occasion, the Court clarified that the starting point of the analysis was to presume that the ‘irreversible’ character of the transformation meant that either sterilising surgery or a medical treatment very likely to cause sterilisation was requested by the authorities.<sup>20</sup> It then went on to set the degree of discretion allowed to States on this topic.<sup>21</sup> It stated that, on the one hand, the case dealt with fundamental aspects of the private life of individuals, those of gender identity and of sterilisation.<sup>22</sup> On the other hand, there were public interest issues at stake, such as the inability of individuals to freely amend their civil status and the reliability and coherence of civil registers.<sup>23</sup> Nonetheless, the Court clarified that in reaching a fair balance between the interests under discussion, the State only had a

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<sup>18</sup> X, Y and Z v the United Kingdom (1997) 24 EHRR 143 at [52].

<sup>19</sup> Y.Y. v Turkey ECtHR 10 March 2015.

<sup>20</sup> A.P., Garçon and Nicot v France n 3 above, at [120].

<sup>21</sup> For a discussion on the complexity of the doctrine of the ‘margin of appreciation’ developed by the Court, see: G. Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 Oxford Journal of Legal Studies 705.

<sup>22</sup> A.P., Garçon and Nicot v France n 3 above, at [123].

<sup>23</sup> *ibid* at [122].

narrow margin of appreciation. This was the case notwithstanding the lack of European consensus on the matter, because there existed a European trend towards abandoning the requirement of sterilisation for recognising the gender identity of trans individuals.<sup>24</sup> In support of its position, the Court mentioned that the requirement of sterilisation had been heavily criticised as a human rights violation by different international bodies, such as the Commissioner for Human Rights of the Council of Europe, the Parliamentary Assembly of the Council of Europe, the United Nations Special Rapporteur on Torture, and other United Nations agencies.<sup>25</sup>

Taking into consideration all those factors, the Court concluded that the ‘irreversibility’ of the transition requested by the legislation at the time was a violation of the right to respect for the applicants’ private life because it imposed either surgical sterilisation or a medical treatment likely to lead to sterilisation.<sup>26</sup> In other words, the applicants should have not been requested to become sterile women in order to obtain full legal recognition of their gender. On the contrary, the Court implicitly acknowledged that prospective female fathers are bearers of rights under the Convention, as the legal recognition of their gender cannot be made dependent on sacrificing their reproductive capacities. Thus, the Court showed its willingness to revisit the discussion on the familial character of trans individuals in future cases.

### **Genitocentrism/self-determination**

The relationship between the legal recognition of gender transition and individuals’ genitalia has changed through time in the Court’s jurisprudence. As mentioned above, a shifting

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<sup>24</sup> *ibid* at [124].

<sup>25</sup> *ibid* at [125].

<sup>26</sup> *ibid* at [135].

moment in the case law was in 2002 when the Court finally ruled that the Convention imposed upon States the obligation to recognise the gender identity of trans individuals. This jurisprudential shift came together with a change in the criterion used to determine whether a person had transitioned gender. Alex Sharpe explains that the criterion used by the courts in order to determine what sex/gender is and, therefore, whether (and when) it has changed, has followed different models.<sup>27</sup> It is possible to see that the Court's earlier case law on transsexuality followed a biological model according to which a person's gender was considered to be a biological fact which could not be changed, since: '...gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex'.<sup>28</sup> Therefore, an individual's genitalia did not necessarily match their legal gender, as the Court did not consider States to be bound by the Convention to recognise gender transition.

In 2002 this understanding of immutable biological gender was abandoned in favour of an anatomical model in which gender was to be found in the surgically modified anatomy of the post-operative trans person.<sup>29</sup> The Court allowed States to impose genital surgery as a requirement for obtaining gender recognition,<sup>30</sup> disclosing what Sharpe has labelled the genitocentrism of the law;<sup>31</sup> namely, the idea that gender is determined by the presence of

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<sup>27</sup> A. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish, 2002) 139 and 142.

<sup>28</sup> *Cossey v the United Kingdom* (1991) 13 EHRR 622 at [40].

<sup>29</sup> D. Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2014) 29 *American University International Law Review* 797, 817.

<sup>30</sup> *L. v Lithuania* (2008) 46 EHRR 22; *Nunez v France* (dec) ECtHR 27 April 2006.

<sup>31</sup> A. Sharpe, n 27 above, 9 and 39.

specific functioning genitalia.<sup>32</sup> In fact, the Court seemed to assume that genital surgery was the required culmination of the gender transition process.<sup>33</sup>

Nevertheless, as a consequence of its finding regarding sterilisation in *A.P., Garçon and Nicot*, the Court has now implicitly rejected this model. Although the focus of the judgment was on the issue of sterilisation, and not on genital surgery, the examination of the former had clear consequences on the latter. As discussed above, the Court ruled that gender recognition cannot be subject to procedures, either surgical or medical, that cause sterility. Given that genital surgery can be considered a sterilising procedure, it follows that it cannot be used any longer as a requirement to be fulfilled in order to obtain the legal recognition of gender transition.

This specific point of the judgment could be interpreted as a monumental shift in the Court's case law: the expected congruence between genitalia and gender cannot be imposed by law. Indeed, the Court recognised that not every trans person can -or even wishes to- go through a gender reassignment process that leads (or is likely to lead) to sterility.<sup>34</sup> While some trans people will desire to undergo genital surgery, others will not. However, one's position towards genital surgery should not determine gender recognition. Thus, the Court overcame its previous obsession with genitalia -the genitocentrism of its (case) law.

The end of an imposed causal link between anatomy and gender came to reaffirm the performative character of gender. Gender can no longer be naturalised by law as the evident expression of an anatomical feature. Nonetheless, the Court did not embrace a self-determination model either, in which individuals would have the right to decide their gender

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<sup>32</sup> *Ibid* 62.

<sup>33</sup> *D. Gonzalez-Salzberg*, n 29 above, 819.

<sup>34</sup> *A.P., Garçon and Nicot v France* n 3 above, at [126].

free from State-endorsed normalising dictates.<sup>35</sup> Medicine will continue to play a central role in establishing the basis of the legal recognition of gender, as the Court abandoned the anatomical criterion for gender recognition in favour of a purely psychiatric model.

### **Mental disorder/body diversity**

The pathologisation of trans identities remains common practice in medical discourse. Both the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) of the American Psychiatric Association and the World Health Organisation's International Statistical Classification of Diseases and Related Health Problems (ICD-10) continue to consider 'gender dysphoria' and 'transsexualism', respectively, as mental disorders.<sup>36</sup> That is to say, the incongruence between the gender identity of individuals and the legal gender assigned at birth is considered to be pathological. As it is the case with many other judicial bodies,<sup>37</sup> the Court has largely relied on the scientific power of medicine for justifying its decisions in cases concerning trans applicants.<sup>38</sup> This means that it issues judgments that -combining the powerful discourses of both law and medicine- produce an accepted 'truth' about trans identities as pathological.<sup>39</sup>

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<sup>35</sup> Recent legislation from Argentina (2012) and Denmark (2014), for instance, has adopted a self-determination model for amending legal gender. See: Argentine Law 26.743 at <http://www.infoleg.gov.ar/infolegInternet/anexos/195000-199999/197860/norma.htm> (last accessed 1 August 2017); Transgender Europe, 'Denmark Passes Best Legal Gender Recognition Law in Europe' at <http://tgeu.org/denmark-goes-argentina/> (last accessed 1 August 2017).

<sup>36</sup> For a detailed history on the medicalisation of trans identities see: A. Sharpe, n 27 above, chapter II.

<sup>37</sup> *ibid* at [8].

<sup>38</sup> *Christine Goodwin v United Kingdom* [GC] n 2 above, at [78] and [81]; *I. v United Kingdom* [GC] n 2 above, at [58] and [61]; *Van Kück v Germany* (2003) 37 EHRR 51 at [54]; *Schlumpf v Switzerland* ECtHR 8 January 2009 at [57].

<sup>39</sup> A. Sharpe, n 27 above, 8-9; D. Gonzalez-Salzberg, n 29 above, 808.

This acceptance of the pathological grounds of a claim to gender recognition is connected with the second requirement examined by the Court. Ms Garçon argued that the need to prove the ‘truth of [her] transsexuality’,<sup>40</sup> in order to obtain recognition of her gender, infringed the right to respect for her private life. However, the Court rejected her claim. It stated that the need to be medically diagnosed as suffering from a mental disorder could be a valid requirement for allowing gender recognition, given the wide margin of appreciation enjoyed by the States in the area.<sup>41</sup> Even though some twenty paragraphs before the Court had affirmed that the margin of appreciation of States was narrow when dealing with individual’s gender identity, the margin suddenly became wider when it concerned the pathologisation of trans identities.

In order to justify the wide margin of discretion left to the State, the Court provided an accumulation of arguments. It affirmed that the majority of Member States of the Council of Europe require such a diagnosis and also highlighted that other international human rights bodies do not seem to have adopted a strong view on whether the pathologisation of trans identities amounts to a violation of human rights. Most importantly, as it had done in previous judgments, the Court emphasised that medical science continues to view transsexuality as a mental illness.<sup>42</sup> With reference to the ICD-10, the Court reiterated that ‘transsexualism’ remains recognised as a mental disorder.

Nevertheless, these cumulative arguments presented by the Court can be subject to different criticisms. First, it is difficult to understand why the European consensus that was considered rather irrelevant when examining the requirement of sterilisation became

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<sup>40</sup> Own translation from the original French: ‘réalité du syndrome transsexuel’ A.P., *Garçon and Nicot v France* n 3 above, at [83].

<sup>41</sup> *ibid* at [143]-[144].

<sup>42</sup> *ibid* at [139].

important to widen the margin of appreciation of the State on this new issue. If a trend towards forbidding sterilisation was enough to limit the discretion of States, a similar tendency can be found regarding the depathologisation of trans identities.<sup>43</sup> Similarly, the reference to other international bodies is inaccurate, as many have expressed their strong views against both sterilisation and pathologisation.<sup>44</sup> Lastly, the recourse to medical discourse as the almighty source of answers concerning trans issues remains problematic; especially since the requirements for the legal recognition of gender identity are a matter of law and not of medical science.<sup>45</sup>

In addition, the Court adopted the State's argument that a psychodiagnostic test was in place to help individuals who were not 'truly transgender'<sup>46</sup> from erroneously pursuing an irreversible gender transition process.<sup>47</sup> This position seems based on the traditional medical view that only some trans individuals, those who are diagnosed as 'true' transsexuals, should be allowed to undergo genital surgery.<sup>48</sup> Meanwhile, other trans persons should be banned from accessing such a procedure, as their surgical desire is revealed untrue. Traditionally, this was the case of trans individuals who have experienced sexual genital pleasure or those who

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<sup>43</sup> *ibid* at [68] and [72].

<sup>44</sup> See: United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights on Germany, E/C.12/DEU/CO/5, at [26] (20 May 2011); Commissioner for Human Rights of the Council of Europe, Issue Paper on Human Rights and Gender Identity, CommDH/IssuePaper, at [3.3] (29 July 2009); Inter-American Commission on Human Rights, Violence against LGBTI Persons in the Americas, OAS/Ser.L/V/II.rev.1, at [419] and recommendations 26 (12 November 2015); Parliamentary Assembly of the Council of Europe, Discrimination against Transgender people in Europe, Resolution 2048(2015), at [6.2.2] (22 April 2015).

<sup>45</sup> D. Gonzalez-Salzberg, n 29 above, 812.

<sup>46</sup> In the original French: 'véritablement transgenres' A.P., *Garçon and Nicot v France* n 3 above, at [141].

<sup>47</sup> *ibid* at [141].

<sup>48</sup> A. Sharpe, n 27 above, 28.

might be rendered non-heterosexual through genital surgery.<sup>49</sup> However, it appears rather unnecessary to require people to be certified as mentally ill, in order to protect others from ‘erroneously’ transitioning gender. This medicalised approach creates a three-tier system of mental stability in which the cisgender population is considered to be mentally sound, transsexual individuals are deemed mentally ill, but this is just to protect a third group of people who might be at risk of transitioning into homosexuality. At the very least, the controversial character of this position required further support, if it was to be validated by the Court.

This new endorsement of the pathologisation of trans identities is extremely problematic. It continues to support the understanding of gender in binary terms, rendering abnormal those bodies that do not fit the category in which they have been placed at birth, as well as those others who refuse embracing one of the only two available categories.<sup>50</sup> It also reinforces the regulatory power of medical tools, such as the ICD-10 and the DSM-5, by reifying them as the scientific grounds of judicial decisions, while overlooking the fact that these are evolving texts susceptible to socio-political influences.<sup>51</sup> Moreover, it obstructs queer and trans activism that seeks a paradigm shift in the conceptualisation of variant gender identities, from mental disorders to expressions of body diversity.<sup>52</sup>

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<sup>49</sup> *ibid* 29.

<sup>50</sup> M. Burke, ‘Resisting Pathology: GID and the Contested Terrain of Diagnosis in the Transgender Rights Movement’ in P. J. McGann and D. Hutson (eds) *Sociology of Diagnosis* (Bingley: Emerald Group, 2011) 187 and 192.

<sup>51</sup> A. Daley and N. Mulé, ‘LGBTQs and the DSM-5: A Critical Queer Response’ (2014) 61 *Journal of Homosexuality* 1288, 1295.

<sup>52</sup> A. Suess, K. Espineira and P. Walters, ‘Depathologization’ (2014) 1 *TSQ: Transgender Studies Quarterly* 73, 74.



While the issue of depathologisation remains controversial even within the trans community, where fears about further encumbering access to trans health care has led to a lack of general agreement on the topic,<sup>53</sup> queer politics' stance in favour of the depathologisation of sexual and gendered behaviour is unequivocal.<sup>54</sup> Depathologising trans identities can help raise awareness to the fact that the source of the distress experienced by many trans individuals might not be located in their suffered 'dysphoria', but in a society that is disciplined into embracing gender binarism and stigmatising those who escape the assumed rigid limits of the two sides of the binary.<sup>55</sup>

Overall, after taking an important step towards ending the sterilisation of individuals, the Court decided to stop short of also demanding an end to the pathologisation of trans identities. Under the Convention, trans individuals can still be made to choose between their gender and their official mental health, since in order to obtain the recognition of the former they can be requested to surrender the latter. A queer desire for the celebration of body diversity, trumping the stigma of the pathologisation of non-normative gender expressions,<sup>56</sup> is yet to arrive to the Court's case law.

### **Surveillance/potential deception**

The last claim examined by the Court was that of Ms A.P. She argued that having to be subjected to an intrusive medical examination to obtain the legal recognition of her gender amounted to a violation of the right to respect for her private life. The need for this thorough

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<sup>53</sup> *ibid* 75.

<sup>54</sup> S. Whittle, 'Gender Fucking or Fucking Gender' in I. Morland and A. Willox (eds) *Queer Theory* (Basingstoke: Palgrave, 2005) 117; R. Wilchins, *Read my Lips: Sexual Subversion and the End of Gender* (Riverdale: Magnus Books, 1997) 225.

<sup>55</sup> A, Suess, K. Espineira and P. Walters, n 52 above, 74.

<sup>56</sup> M. Burke, n 50 above, 192; A. Daley and N. Mulé, n 51 above, 1307.

medical examination of a person's gender seems to be linked to a more general legal concern about the deceiving character of trans individuals.<sup>57</sup> A concern about trans people concealing some 'truth' about their gender from other members of society provides the State with the authority to place trans bodies under surveillance in order to protect the potential fraud victims. The 2012 legislation allowed France the ability to certify the past, present and future of trans individuals' gender. The past, by requiring the medical diagnosis to allow for gender transition; the present, through the examinations in question; and the future, through the irreversible character of the treatment undergone by those requesting gender recognition.

The Court rejected Ms A.P.'s claim, stating that:

...even if the medical examination ordered imposed a genital exam of the first applicant, the degree of interference with the right to respect for her private life which would have resulted from such an exam should be significantly qualified.<sup>58</sup>

That is to say, the Court understood that the examination would be an interference with the right to respect for her private life, but considered that it did not amount to a violation of the right, given the State's need to oversee the gender transition process.

However, the validation of the applicant's genital exam seems rather inconsistent with the other issues decided in the judgment. According to the Court's finding, the State was not allowed to demand genital surgery as a requirement for gender transition. Gender transition was less a physical matter than a consequence of a mental disorder -as accepted by the Court. Therefore, if States can no longer subject gender recognition to genital surgery due to its sterilising effect, why would they be entitled to force trans individuals to undergo a physical

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<sup>57</sup> A. Sharpe, 'Transgender Marriage and the Legal Obligation to Disclose Gender History' (2012) 75 *Modern Law Review* 33, 43.

<sup>58</sup> Own translation from the original French: '...même si l'expertise médicale ordonnée impliquait un examen de l'intimité génital du premier requérant, l'ampleur de l'ingérence dans l'exercice de son droit au respect de sa vie privée qui en aurait résulté mérite d'être significativement relativisée.' *A.P., Garçon and Nicot v France* n 3 above, at [152].

examination of their genitalia? It certainly lacks consistency to have finally struck down the requirement of genital surgery, but still allow intrusive medical examinations to corroborate the fulfilment of the forbidden requirement.

On the contrary, certain level of coherence can be found if we believe that the State is still entitled to notarise the gender ‘status’ of trans individuals. While not validating genital surgery any longer, the Court at least allows the State to know, and probably even register, the current details of the applicants’ genitalia when requesting gender recognition (the ‘present gender’). Similarly, there is a strong connection between this finding of the Court and the reinforced pathologisation of trans identities: both constitute expressions of a disciplinary regime that places individuals’ bodies under surveillance and social control.

#### **‘Wrong body’/Wrong classification**

When deciding to strike down the requirement of sterilisation contained in the domestic legislation, the Court argued that its phrasing, which read the ‘irreversible character of the transformation of the appearance’,<sup>59</sup> was problematic. It stated that while the term ‘appearance’ seemed to refer to a rather superficial transformation, the ‘irreversible’ character conveyed the idea of a radical change. It affirmed that this was a case of a ‘problematic ambiguity’, since it rendered the requirement quite unclear.<sup>60</sup> The expression used by the Court is peculiar, since it usually finds ambiguity to be problematic in itself. In fact, gender ambiguity has been a key factor in the Court’s case law on gender transition. One of the reasons for establishing that States were under the obligation to grant legal recognition to the gender transition of individuals was the fact that the domestic law of the United Kingdom was treating trans individuals with ambiguity, recognising their avowed gender in some legal

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<sup>59</sup> A.P., *Garçon and Nicot v France* n 3 above, at [116].

<sup>60</sup> *ibid* at [117].

aspects, while treating them as belonging to their assigned gender in others.<sup>61</sup> In the Court's own words: '[t]he unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.'<sup>62</sup> That is to say, the Court found that the lack of a neat fit within binary gender categories was not acceptable under the Convention. As mentioned above, this was the turning point at which the Court decided to abandon the 'biological' model of gender, as determined by chromosomes, to embrace the idea of an anatomical gender unveiled through surgery. This desired congruence between gender and genitalia put an end to the ambiguous legal existence of post-operative trans people in the United Kingdom.

Nonetheless, one of the reasons a queer approach would find to celebrate in the judgment in *A.P., Garçon and Nicot* is that a degree of ambiguity can be discovered once again under the Convention, if so desired. The traditional congruence between genitalia and gender cannot be demanded by State Parties any longer as a requirement for gender recognition. Gender classification that is not dependent on one's genitalia has returned to the Court's jurisprudence, but this time it is not a consequence of the denial of gender recognition, as in the Court's early case law.<sup>63</sup> Now, it can be requested by the applicants.

Even though there are still multiple paths to queer identities that have not yet found a place within the Convention,<sup>64</sup> the recognition of gender identity detached from genitalia might allow applicants to move away from the required narratives of being born in the

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<sup>61</sup> D. Gonzalez-Salzberg, n 29 above, 813-814.

<sup>62</sup> *Christine Goodwin v United Kingdom* [GC] n 2 above, at [78] and [90]; *I. v United Kingdom* [GC] n 2 above, at [58] and [70].

<sup>63</sup> *Rees v the United Kingdom* (1987) 9 EHRR 56; *Cossey v the United Kingdom* n 28 above; *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163.

<sup>64</sup> D. Gonzalez-Salzberg, n 29 above, 827.

‘wrong body’<sup>65</sup> to the (slightly) less problematic claim of having the right body, but suffer from the wrong legal classification. In other words, trans bodies do not need to fit within a predetermined anatomical pattern for demanding gender recognition. Moreover, this opens a path for subversive queer identities to claim protection of their rights under the Convention, such as the family rights of the pregnant man or the female father. However, collaboration from medical discourse will still be required, as the Court continues to allow medical science to act as the gate-keeper of gender recognition.

## **Conclusion**

The Court’s recent judgment in *A.P., Garçon and Nicot v France* was multifaceted, deciding three different issues in very dissimilar manners. On the one hand, the judgment reflects a remarkable change in the Court’s criteria on trans rights. Gender recognition cannot be subject to treatments that are sterilising, or even potentially sterilising if that effect is likely to occur, as this would amount to a violation of the right to respect for private life. This also means that genital surgery, the central element for gender transition according to the last fifteen years of the Court’s jurisprudence, can no longer be a requirement for gender recognition under the Convention system. As a consequence, the domestic legislation concerning gender recognition of 29 of the 47 Member States of the Council of Europe is now in contravention of the Convention.<sup>66</sup> On the other hand, the other two complaints were rejected by the Court. States can retain genital examinations as a requirement for gender recognition, even though this appears to be in contradiction with the finding that States

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<sup>65</sup> B. Hausman, *Changing Sex: Transsexualism, Technology, and the Idea of Gender* (Durham: Duke University Press, 1995) 344; D. Spade, ‘Resisting Medicine, Re/Modelling Gender’ (2003) 18 *Berkeley Women’s Law Journal* 15, 25-26.

<sup>66</sup> *A.P., Garçon and Nicot v France* n 3 above, at [71].

cannot maintain genital surgery as a requirement. At the same time, the pathologisation of trans identities has been left within the margin of appreciation of the States.

It might be difficult to understand why, after opposing sterilisation, the Court decided to validate the pathologisation of trans identities, but it does not come as a complete surprise. The Court's jurisprudence on trans law has been full of apparent trade-offs: you cannot be recognised as the father of your child, but you are (de facto) family;<sup>67</sup> you can marry after transitioning gender, as long as it is heterosexually;<sup>68</sup> your gender identity will be recognised, as soon as you sacrifice your genitalia.<sup>69</sup> Now, you can be a trans parent, as long as you have been diagnosed as mentally ill.<sup>70</sup> While this judgment contains different aspects worthy of (queer) celebration, it also made the on-going pathologisation of trans identities a clear target for the next dispute over trans rights under the Convention.

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<sup>67</sup> X, Y and Z v the United Kingdom n 18 above, at [37].

<sup>68</sup> Christine Goodwin v United Kingdom [GC] n 2 above, at [101] and [104].

<sup>69</sup> L. v Lithuania n 30 above.

<sup>70</sup> A.P., Garçon and Nicot v France n 3 above.