

BODIES OF CITIZENS: CAN A NON-BINARY BODY BE THE SUBJECT OF HUMAN RIGHTS?

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I dedicate this thesis to all the feminists and LGBTI+s of Turkey who defend and fight for their rights in spite of hatred without losing their faith, hope and joy, in other words; who do not have rights but make themselves the subjects of the law.

ABSTRACT

Bodies Of Citizens: Can A Non-Binary Body be the Subject of Human Rights?

This dissertation aims to present a critical assessment on the question of a subjects of human rights by focusing non-binary bodies, specifically transgender and intersex bodies, which do not fit into gendered citizenship categories and investigates how the sovereign makes those non-binary bodies legally absent by categorizing citizenship only in two categories: male and female. By theoretically scrutinising the tension between the universality claim of human rights and the question of the subject of human rights, the dissertation first argues that the subject of human rights is not the human beings but the citizens. Accordingly, locating who are the beneficiaries of citizenship status, it investigates the role of gender and sexuality in identifying and classifying citizens. Determining the citizenship status belongs only to two types of citizens, namely female and male citizens, it argues that non-binaries who do not fit into these given citizenship categories or whose gender is not legally recognized are excluded from citizenship status therefore, from the subject of human rights. The dissertation also analysis the legal standards and practices on legal gender recognition. While it examines the normative framework provided by international and regional human rights law on the legal recognition of gender and various state practices on legal recognition of gender, it simultaneously reveals that state practices not only diverge dramatically from international human rights standards, but also radically diverge from each other. Lastly, drawing on theoretical frameworks by Hannah Arendt, Carl Schmitt, Giorgio Agamben, and Michel Foucault, it offers the reader a novel theoretical path to follow on the relationship between legal recognition of gender, right to have rights and the subject of human rights, and argues that the sovereign “who decides the exception” does also decide that only certain bodies come to be recognized as a person thus, unrecognized bodies are excluded from having right to have rights and subject of human rights. Accordingly, the dissertation concludes that citizenship is not the only requirement for being the subject of human rights: a national can be still ‘abandoned in the bare life’ by the sovereign decision since the question of the subject of human rights goes beyond citizenship, indeed, it is a question of gendered citizenship.

Keywords: Universality of human rights, the subject of human rights, citizenship, legal recognition of gender, sovereign decision, right to have rights, biopower, bare life, gendered citizenship.

ÖZETÇE

Vatandaşların Bedenleri: İkilik Dışı Beden İnsan Haklarının Öznesi Olabilir mi?

Bu tez, toplumsal cinsiyete dayalı vatandaşlık kategorilerine uymayan ikilik dışı bedenlere, özellikle de trans ve interseks bedenlere odaklanarak insan haklarının öznesi sorusu üzerine eleştirel bir değerlendirme sunmayı amaçlamakta ve egemenin vatandaşlığı kadın ve erkek olmak üzere yalnızca iki kategoriye ayırarak ikili olmayan bedenleri nasıl hukuken görünmez kıldığını araştırmaktadır. İnsan haklarının evrenselliği iddiası ile insan haklarının öznesi sorunu arasındaki gerilimi teorik olarak inceleyen tez, ilk olarak, insan haklarının öznesinin insanlar değil vatandaşlar olduğunu iddia etmektedir. Akabinde vatandaşın kim olduğunu tespit etmeye çalışan tez, vatandaşların tanımlanması ve sınıflandırılmasında toplumsal cinsiyet ve cinselliğin rolünü irdelemekte ve vatandaşlık statüsünün yalnızca kadın ve erkek vatandaş olmak üzere iki tür vatandaşlık kategorisi için geçerli olduğunu tespit etmektedir. Teorik incelemesini uygulama ile birlikte ele almayı amaçlayan tez, cinsiyetin hukuki tanınmasına ilişkin insan hakları standartlarını ve devlet uygulamalarını da analiz etmektedir. Bu kapsamda cinsiyetin hukuki tanınmasına ilişkin uluslararası insan hakları hukukunun sağladığı normatif çerçeveyi ve çeşitli devlet uygulamalarını inceleyen tez, devlet uygulamalarının yalnızca uluslararası insan hakları standartlarına aykırı olmakla kalmayıp, kendi içinde de oldukça önemli ölçüde farklılık gösterdiğini ortaya koymaktadır. Devlet uygulamalarındaki radikal aykırılık ve farklılaşmanın sebebini Arendt, Schmitt, Agamben ve Foucault'nun kuramlarından yararlanarak tartışan tez, "istisnaya karar veren" egemenin aynı zamanda vatandaşların bedenlerinin cinsiyetlendirilmesine ve sadece belirli bedenlerin vatandaş olarak tanınmasına da karar verdiğini, dolayısıyla hukuki tanımadan dışlanan bedenlerin haklara sahip olma hakkından ve insan haklarının öznesi olmaktan dışlandığını savunmaktadır. Nihayetinde tez, insan haklarının öznesi olmak için tek şartın vatandaşlık olmadığı sonucuna varmaktadır: bir vatandaş, verili cinsiyet kategorilerine uymadığında ya da uymayı reddettiğinde egemen kararlar hala 'çıplak hayata terk edilebilir', nitekim insan haklarının öznesinin vatandaşlığı, cinsiyetlendirilmiş bir vatandaşlıktır.

Anahtar Kelimeler: İnsan haklarının evrenselliği, insan haklarının öznesi, vatandaşlık, cinsiyetin hukuki tanınması, egemen karar, haklara sahip olma hakkı, biyoiktidar, çıplak hayat, cinsiyetlendirilmiş vatandaşlık.

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I dedicate this thesis to all the feminists and LGBTI+ people of Turkey who defend and fight for their rights in the face of hatred without losing their faith, hope and joy, in other words; who do not have rights but make themselves the subjects of the law.

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Chapter 1

INTRODUCTION

1.1. Introduction

I would like to start with an anecdote: When I mentioned my desire to pursue an academic career in international human rights law and legal theories to the partners of the law firm where I worked during my mandatory legal internship in Istanbul, they smiled and suggested that I should instead work in the field of animal rights, in which case I would at least be working in animal shelters. Today, I am still not sure what the motive behind this mediocre sense of humour was; or if they were being sarcastic or serious, but either way, it was clear that they were pointing out that bothering with human rights and legal theory was worthless and useless.

The intellectual scepticism about human rights is not new or surprising, though; the central idea of human rights as something that all human beings have, even without any specific legislation, is seen by many as foundationally dubious. Apart from intellectual scepticism, today, the international human rights law regime, despite its multibillion-dollar budgets, institutionalized mechanisms, courts, experts, and bureaucracy all over the world, has failed to deliver on its promise of a free and equal life worthy of human dignity. I am perhaps more aware than anyone else of the deep gap between what is promised and what actually happens concerning human rights, because not only as a lawyer, but also as a feminist and LGBTI+ activist, I live right on the very edge of this deep gap many times in my daily life.

On the one hand, I experienced very well as an activist that the human rights discourse really opened up the possibility of gains, because human rights gave us a huge opportunity to publicise our demands, to share them with more people and to legitimise them, thus it was never a tool that we could give up. So what had to be done was nothing else but to eliminate the gap between the promise and practice.

However, as I started to study human rights law, I realised that this gap is far from being closed, on the contrary, this gap is inherent to human rights by its very nature. In this sense, understanding the history, structure, construction, possibilities, tools, capacities and legitimacy of human rights law might be the last thing a human rights activist wants to do: human rights are based on a paradox.

Understanding this paradox made me realize that the problem is not a deficiency in practice. This is because the sovereign-centred construction of human rights, far from presenting these deficiencies as exceptions, is built upon them. Thus, studies that focused solely on practical problems revolving around for instance, how human rights jurisprudence was developed in regional courts or how it was adapted into domestic law, do not have the capacity to present an effective tool for realising the promise of human rights. Indeed, I am a feminist in a country that withdrew from a human rights treaty on combating violence against women in a night¹ and was merely "named and shamed" as a result. What is worse is that the constitution of my country is indeed a relatively progressive and libertarian constitution which the provisions enshrined in international human rights law are mostly codified.

Therefore, as a human rights activist who closely examined deficiencies in the human rights practices, I strongly believe that the conceptual doubts must be satisfactorily cleaned by theoretical air first and foremost, if the idea of human rights is to command reasoned loyalty. This is precisely why the need for theory is urgent and crucial, especially in human rights law. In this sense, maybe it is true that "there is nothing more practical than a good theory."²

1.2. Research Aim

This research aims to present a critical assessment of the question of the subject of human rights by focusing on non-binary bodies, specifically transgender and intersex bodies, which do not fit into gendered citizenship categories, and investigates how the sovereign makes those non-binary bodies legally absent by categorizing citizenship only in two categories: male and female. Thus, the thesis theoretically scrutinizes the tension between the universality of human

¹ At the midnight of the 20th of March 2021, Turkey announced their withdrawal from the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the Convention also known as "the Istanbul Convention", since it was opened to signature in Istanbul in 2011, when Turkey held the Chairmanship of the Council of Europe.

² Kurt Lewin, *Selected Theoretical Papers*, LONDON: TAVISTOCK, 169 (1952).

rights and the subject of human rights, with a specific focus on the gendered aspect of citizenship.

1.3. Main Structure and the Argument of the Thesis

The first chapter of the thesis starts with an introduction, which gives an overall picture of the thesis and presents the research aim, the structure, research questions and methodology of the thesis.

The Chapter 2 titled “Who Is the Subject of Human Rights?” explores one of the major questions in human rights: whether human rights are universal and apply to all human beings, and accordingly, whether there is a specific subject of human rights. While discussing the state-centred structure of international law, it argues that that human rights are not the rights of human beings but the rights of citizens.

Having established that human rights have a subject and that this subject is citizens, the thesis continues with the Chapter 3 titled “Who is Citizen?” examining the question of who the citizen is. Here, it analysis the means of identification and classification in order to be legally recognized and investigates the role of gender and sexuality in identifying and classifying citizens. Asserting that the state categorizes citizens through their bodies only in two categories: as men and women, the thesis argues that non-binary bodies which do not fit into the state’s given categories or whose gender is not legally recognized are excluded from citizenship status.

The Chapter 4 titled “Legal gender recognition” presents the legal standards and practices on legal gender recognition. While it examines the normative framework provided by international and regional human rights law on the legal recognition of gender by referring the recent jurisprudence from courts and the monitoring bodies, it also presents varying state practices from different jurisdictions. By presenting an overall picture of current states’ practices based on similarities and differences on legal recognition, it reveals that state practices not only diverge dramatically from international human rights standards, but also radically diverge from each other.

The thesis then opens a theoretical discussion on the reason for such a divergence in state practices despite the clear framework of international human rights law. Drawing on theoretical frameworks by Hannah Arendt, Carl Schmitt, Giorgio Agamben, and Michel Foucault, the Chapter 5 titled “Abstract Nakedness of Non-Binary Bodies” offers the reader a novel

theoretical path to follow on the relationship between legal recognition of gender, right to have rights and the subject of human rights, and argues that the sovereign 'who decides the exception' does also decide that only certain bodies come to be recognized as a person. Thus, through the sovereign decision, unrecognized bodies are excluded from having right to have rights and subject of human rights. In this sense, the thesis argues that a non-binary body, a body that does not fit into the given citizenship definitions, is the 'abstract nakedness' itself, which the world found nothing sacred in there. Accordingly, the thesis concludes that citizenship is not the only requirement for being the subject of human rights: a national can still be 'abandoned in the bare life' by the sovereign decision, and argues that the question of the subject of human rights goes beyond citizenship, in fact, it is a question of gendered citizenship.

In the Conclusion Chapter, the thesis presents its own unique analysis and position on the research topic, on the basis of the problem it poses and the theoretical path it follows. The thesis reveals that the reason for the radically critical approach it adopts is not to discredit human rights, but rather, the vital need to bridge the gap between the theory and practice of human rights behind. Aiming to offer its own solutions to meet this need, the thesis argues that human rights should be re-imagined beyond the current sovereign state-centred structure, and concludes by offering three modest possibilities for such a re-imagining.

1.4. Main Research Question and Explanatory Sub-questions

The main research question of the thesis is, "How can it be critically assessed human rights theories from the perspective of a non-binary body?"

The thesis aims to answer the following empirical and explanatory sub-questions:

1. On universality : What is the universality of human rights? What is the theoretical justification of the universality of human rights? What are the challenges toward the universality claim of human rights? Is human rights universal? If not, is there a subject of human rights? What are the main theories on the subject of human rights?
2. On citizenship : Who are the beneficiaries of citizenship status? What is the relationship between citizenship status and right-holder status? How is the citizenship status identified? Is there any role of gender in the identification and classification of citizenries? If yes, what is the role of gender in identifying and classifying citizens?

3. On legal gender recognition : What is legal recognition of gender? Why does legal recognition of gender matter -what are the main human rights violations trans and intersex people suffer from? What are the human rights standards in legal recognition of gender? Are the state practices compatible with the human rights standards? If not, how do the practices differ from each other?

4. On bio-politics : What is bio-politics? What are the main theories in bio-politics on the relationship between the human body and human rights? What are the possible theoretical linkages between identification and classification regarding the gender aspect of citizenship status, and Schmitt's decisionism, concept of political and Agamben's state of exception? What are the possible results of refusing forced bodily interventions in seeking citizenship status? Is the idea of universality of human rights eligible for non-binary bodies that refuse the states' forced intervention? If not, what is the role of the bio-politics of the state in seeking citizenship status? Are there any other 'qualifications' beyond citizenship to be the subject of human rights?

1.5. Research Methodology

As discussed briefly so far, the thesis aims to present a critical assessment on the question of subjects of human rights by focusing non-binary bodies, specifically transgender and intersex bodies, which do not fit into gendered citizenship categories. By doing this, the thesis discusses how the sovereign makes those non-binary bodies legally absent and puts them into 'bare-life' by categorizing citizenship only in two categories: male and female.

In order to make such a critical assessment, a multi-disciplinary perspective is required. In this sense, the thesis uses legal theories focusing on human rights, universality, and international law; political philosophy theories focusing on citizenship, sovereignty, and biopolitics as well as gender studies theories focusing queer theories.

The thesis uses mainly Martti Koskenniemi's 'critical legal theory' in conceptualising and analysing the research questions from the perspective of human rights theories. This is mainly because critical legal theory deems international law as a 'political project'³ and affirms the significant role of decisionism in international law-making.

³ Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 THE MODERN LAW REVIEW 1 (2007).

According to Koskeniemi, the structural properties of the international legal system, its language, and its interpretative and argumentative procedures accompanying it, are indeterminate, and cannot determine the outcome of a legal case.⁴ He argues that “there is no space in international law that would be free from decisionism, no aspect of the legal craft that would not involve a choice -that would not be, in this sense, a politics of international law”.⁵ According to him, international law appears to be radically indeterminate since it is nothing more, but nothing less either, than a practice of decision-making that helps shape “a moral-political project”. Because of its radical indeterminacy, the premises on which international law rests can never escape politics or to differentiate law from politics.⁶

Indeed, Koskeniemi’s critical legal theory which affirms that political decision-making is inherent to international law gives a very useful argumentative sphere for the thesis since the thesis mainly argues that with states being the primary units determining access to human rights, it is the body politics of state that appears to influence the shape of human rights concerns.

While theorising the question of the subject of human rights, the thesis aims to create theoretical bridges between political theories of Hannah Arendt, Carl Schmitt, Giorgio Agamben and Michel Foucault. The reason for focusing especially on Arendt, Schmitt and Agamben is that their critical approaches towards (human) rights, and their focus on decisionism in exploring the relationship between law and politics. It is true that Arendt, Schmitt and Agamben have already addressed by several studies on sovereignty, universality as well as biopolitics so far. It is also true that the theoretical links between these theorists have often been discussed in the context of refugee rights, where the boundaries of political membership and the tension between the national and the non-national are most clearly demarcated.⁷ This is mostly because Arendt’s critical theory on human rights and conceptualisation of “right to have rights have” been established based on the fact of refugee flow all over Europe after the Second World War.

⁴ Jean-François Thibault, *Martti Koskeniemi: Indeterminacy*, CRITICAL LEGAL THINKING (Dec. 8, 2017), <https://criticallegalthinking.com/2017/12/08/martti-koskeniemi-indeterminacy/> (last visited Jan 10, 2024).

⁵ MARTTI KOSKENIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 596 (2005).

⁶ *Id.* at 387.

⁷ See for instance, SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (2004).; SEYLA BENHABIB, *DIGNITY IN ADVERSITY: HUMAN RIGHTS IN TROUBLED TIMES* (2013).; Jacques Rancière, *Who Is the Subject of the Rights of Man?*, 103 SOUTH ATLANTIC QUARTERLY (2004).; Margaret Somers, *Genealogies of Citizenship*, MARKETS, STATELESSNES, AND THE RIGHT TO HAVE RIGHTS. LONDON:. CAMBRIDGE (2008).; ALISON KESBY, *THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW* (2012).; MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (2011).

Although Arendt built her theory particularly on the example of refugees, Arendt's conceptualizing of "the right to have rights" not only covers the refugee's example in terms of citizenship but equally attaches to those subjects who are pushed back to the margins of society.⁸ Indeed, very similarly to the exclusion of refugees from rights which are intrinsic to political membership, people who do not fit into binary gender categories of political membership is deprived of the right to have rights. Thus, differently from the current literature, in the thesis, the focus is on exclusion of non-binary bodies which are deprived of legal recognition, thus, of right-holder status. By arguing that being deprived of legal recognition makes the one 'legally absent', the thesis revolves around transgender and intersex persons' deprivation from human rights by sovereign decision shaped by biopolitics, and their abandonment to the 'bare life', as their bodies are deprived from 'right to have rights'.

In establishing its theoretical framework, the thesis uses Hannah Arendt's conceptualisation of "the right to have rights" as the basement. Indeed, Hannah Arendt, as the first theorist who draws our attention to the relationship between citizenship and the subject of rights by harshly criticizing the idea of human rights, provides a perfect starting point for this thesis, which aims to provide a critical assessment on the idea of universality of human rights, thus, argues that there is a "subject" of human rights. The thesis also incorporates Carl Schmitt's theory of sovereignty because of his thorough analysis and holistic argumentation on the relationship between law and politics, and the role of sovereign decision in such relationship. In this context, Giorgio Agamben's contribution is also significant as he has expanded upon Schmitt's conceptualization of sovereign decision-making by incorporating the concept of biopolitics. The reason therefore for focusing Agamben's theory is that the significance he gave to human 'body' itself in theorising the sovereign power. Accordingly, the thesis briefly presents Michel Foucault's conceptualisation on bio-power as well, in order to comprehend Agamben's theoretical path more comprehensively.

Together with legal and political theories, gender studies theories have a central place in the thesis. The thesis adopts queer theory as conceptualised by Judith Butler in approaching the question of the subject of human rights for trans and intersex bodies. The reason to choose it is that queer theory stands against essentialist understandings of 'sex'. According to Judith Butler's queer theory, there are no fixed gender identities. Butler points out that "because there is neither an 'essence' that gender expresses or externalizes nor an objective ideal to which

⁸ Nanda Oudejans, *The Right to Have Rights as the Right to Asylum*, 43 NETH. J. LEGAL. PHIL. 7, 7 (2014).

gender aspires; because gender is not a fact, the various acts of gender creates the idea of gender, and without those acts, there would be no gender at all. Gender is, thus, a construction that regularly conceals its genesis".⁹ Alongside queer theory, post-modern feminist theory is also used, since post-modern feminism enables us to think about deconstruction of given gendered structures including language and law, as well as enables us to see the reality of that personal experiences vary which makes impossible to accept a binary model of gender.

On the other hand, the thesis aims to bring theory and practice together. In order to do that, international human rights standards on legal gender recognition affirmed by international and regional human rights instruments, including reports of independent experts, the case law of the regional human rights courts and recent developments in the monitoring bodies are analysed. In analysing international and national frameworks and practices on legal gender recognition, various advocacy documents including reports, interviews and policy briefs prepared by independent civil society organisations as well as LGBTQI+ activists' personal experiences are also used.

The thesis also presents different state practices on legal gender recognition around the world. The countries chosen for the study are Malaysia, Hungary, Japan, the United Kingdom, Nepal and Argentina. These countries were chosen in order to represent all possible different approaches to legal recognition of gender identity around the world. The selection includes countries known for significant and systematic human rights violations, as well as countries considered to have the most progressive laws and practices in the world. This provides a comprehensive and comparative framework for examining how gender recognition is addressed in the domestic laws of different countries on a global scale. A further consideration in the selection of countries was to ensure geographical diversity around the world. Care was taken to include countries from different regional human rights systems, thus avoiding a Eurocentric perspective that might focus only on "good" or "bad" examples. The choice of countries was informed by country visits and reports from LGBTI+ organizations, as well as United Nations special reports on sexual orientation and gender identity, providing guidance in the selection process. On the basis of similar and differentiated legislation and practices among the selected countries, state practices on the legal recognition of gender identity will be grouped

⁹ Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE JOURNAL 519, 522 (1988).

under three headings: non-recognition and criminalisation, legal recognition only through abusive requirements and legal recognition based on self-determination.

The thesis uses a right-based terminology. What referred by “right-based” is the current terminology used by LGBTI+ activists and right-defenders working in the field. The reason for making such a deliberate choice is the fact that law regarding sexual orientation, gender identity and sexuality develops very slowly, and consequently, it falls behind the socially changing concepts and approaches. More importantly, law itself might be an apparatus of power, which reproduces structural inequalities and discrimination, thus legal terminology might help this function, as it is analysed through this thesis. In this sense, it is important to note that the thesis uses only the term “gender” in a way covering the term “sex”. This is because of the political position deliberately chosen by the author who rejects the false dichotomy that “sex” is based on scientific knowledge, thus it is natural and real; while gender is based on social behaviours and culture, thus hypothetical. The differentiated usage of “sex” and gender enriches such a false dichotomy since what is called scientific knowledge about sexuality is also (politically) constructed, as it will be analysed in Chapter 5 in detail.

Lastly, it is highly significant to remind that “the primary task of critique is not to evaluate whether its objects are morally good or bad, valued highly or demeaned, but to bring into relief the very framework of evaluation itself”.¹⁰ Therefore, the thesis which embraces critiques and challenges against the universality of human rights, does not position itself *against* human rights, nor salutes for the violation of human rights.¹¹ In this sense, *the thesis should not be read as an attempt to discredit human rights*. In fact, it is quite the opposite. The aim is, ultimately, to pour –in Holmes’ terms- some “cynical acid” over the idea of the universality of human rights to see if something of value remains.¹²

Indeed, as Amartya Sen points out very well, the conceptual doubts must be satisfactorily addressed if the idea of human rights is to command reasoned loyalty and establish a secure intellectual standing.¹³ In this sense, it is critically important to see the relationship between the force and appeal of human rights, and their reasoned justification and scrutinized use.¹⁴ It is

¹⁰ Judith Butler, *What Is Critique? An Essay on Foucault’s Virtue*, 220 THE POLITICAL (2002).

¹¹ Marie-Benedicte Dembour, *Critiques*, in INTERNATIONAL HUMAN RIGHTS LAW , 53–55 (D. Moeckli, S. Shah, & S. Sivakumaran eds., 2014).

¹² W. O. Holmes, *The Path of the Law*, Harward, LAW REVIEW, 462 (1897).

¹³ Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHILOSOPHY & PUBLIC AFFAIRS 315, 317 (2004).

¹⁴ *Id.*

precisely for this reason that this thesis concludes by offering three modest possibilities for re-imagining the way of thinking human rights beyond the sovereign state-centred construct.



Chapter 2

WHO IS THE SUBJECT OF HUMAN RIGHTS?

2.1. The Universality of Human Rights

It is assumed that "human rights" refers to timeless and unalterable highest moral standards that cover freedom, equality and justice for every human being due to its very nature. It cannot be said that such an assumption is incorrect; indeed, human rights are not necessarily equivalent but related to justice, democracy, well-being and the common good. Human rights underpin the aspiration to a world where every human being lives free from hunger, violence, oppression, and discrimination, with the benefits of adequate housing, healthcare, education and opportunity.¹⁵

Finding a consensus on what we call human rights or how we define human rights on the universal level has been almost always problematic. While the Western tradition focused on civil and political rights as liberal rights and freedoms, for instance, the socialist concept of human rights is based on collective aspects and social and economic rights or developing countries feature economic development and poverty.¹⁶ Despite such differences, the essence of the concept of human rights suggests that every human being has certain inalienable rights protecting them against state interference and abuse of power.¹⁷

Human rights are the rights held by all human simply because they are part of the human species.¹⁸ It suggests the rights of all human beings, anywhere and anytime. It is "the quality of human being", without any additional qualification.¹⁹ They are rights shared equally by

¹⁵ Navanethem Pillay, *What Are Human Rights For? Three Personal Reflections*, in INTERNATIONAL HUMAN RIGHTS LAW, 4 (Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran ed. 2014).

¹⁶ PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 210–211 (2002).

¹⁷ *Id.* at 209.

¹⁸ MICHELINE ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 3 (2008).

¹⁹ CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 69 (2008).

everyone regardless of gender, race, nationality or economic background: they are universal in content. These are the rights which are not granted by society; on the contrary, people enjoy human rights not by the grace of society and not only because it may be good societal policy to respect them. Instead, human beings are entitled to them.²⁰ Thus, it is reasonable to see that how the Universal Declaration of Human Rights (UDHR), arguably the cornerstone of the international human rights law starts with Article 1:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”²¹

Following this premise, Article 2 states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, 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.” The UDHR serves as a manifesto advocating the universality of human rights²² by recognizing them as inherent and inalienable entitlements of all individuals. The UDHR, thus, asserts that basic human rights are an intrinsic part of humanity and cannot be taken away from individuals, regardless of their origin or status. In essence, it posits that “everyone” as all human beings is a “right holder.”

Before the UDHR, which is a resolution passed by the United Nations General Assembly in 1948, universality of human rights was first signalled by the United Nations Charter in 1945, the founding treaty of the United Nations. In the very first Article of the United Nations Charter, “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” is listed among the goals of the United Nations.²³ Similarly, Article 55 points out that “the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”²⁴

²⁰ LOUIS HENKIN, *The Universality of the Concept of Human Rights*, 506 ANN. AM. ACAD. POL. SOC. SCI. 10, 11 (1989)

²¹ Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) [hereinafter UDHR]

²² Rosalyn Higgins, *The Continuing Universality of the Universal Declaration* (Baehr, P.R., Senders M. & Flinterman, C., Eds.), in INNOVATION AND INSPIRATION: FIFTY YEARS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 17 (1999).

²³ United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI. [hereinafter the UN Charter]

²⁴ *Id.*

The universality of human rights as a fundamental principle placed in the heart of human rights discourse is reaffirmed by all the other human rights covenants on the international level, following the UN Charter of 1945 and the UDHR of 1948. In 1965, the International Convention on the Elimination of All Forms of Racial Discrimination referred to the UDHR proclaiming that “all human beings are born free and equal in dignity and rights” in its Preamble.²⁵

In 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) followed the same approach. In their Preamble, both Covenants recognize that “the equal and inalienable rights of all members of the human family derive from the inherent dignity of the human person.”²⁶ Similarly, in Article 2, which is common in both Covenants, state parties are obliged to ensure the rights stipulated in the Covenants “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁷ Accordingly, both ICCPR and ICESCR use universal language. For instance, while ICCPR uses ‘every human being’ in Article 6, ‘everyone’ in Articles 9, 12, 24, 3, 5, 16, 17, 18, 19, and 22, ‘all persons’ in Articles 10, 14, 26, ‘anyone’ in 6 and 9 and ‘no one’ in Articles 6, 7, 11, 15, and 17; ICESCR refers to “everyone”’s rights in Articles 6, 7, 8, 9, 11, 12, 13 and 15.

In 1984, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) recognizes “the equal and inalienable rights of all members of the human family which derives from the inherent dignity of the human person” in its Preamble.²⁸ In 1989, the Convention on the Rights of the Child reaffirms “the inherent dignity and of the equal and inalienable rights of all members of the human family” in its Preamble and uses the universalist language as well.²⁹ The Convention on the Rights of the Child uses, for instance, “every child” in Articles 6, 26, 27, 28, 37 and 40, “all children” in Articles 24 and 28 or “no child” in Articles

²⁵ International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 December 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965)

²⁶ The International Covenant on Civil and Political Rights, *adopted* 16 December 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]

The International Covenant on Economic, Social and Cultural Rights, *adopted* 16 December 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR]

²⁷ *Id.*

²⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 December 1984, U.N. GAOR, G.A. Res. 39/46, 39th Sess. U.N. Doc. A/RES/44/144 (1984) [hereinafter CAT]

²⁹ Convention on the Rights of the Child, *adopted* 10 November 1989, U.N. GAOR, 44th Sess., U.N. Doc. 44/25, (1989)

16, 24, 37 and 40. Even the Convention on the Rights of Persons with Disabilities which is deemed as “a major departure from the ‘everyone philosophy’”³⁰ because it aims to protect a specific group of people, reaffirms “the inherent dignity and worth and the equal and inalienable rights of all members of the human family”, furthermore, recognizes “the universality and indivisibility ... of all human rights” in its Preamble.³¹

Alongside the United Nation level, the universalist idea on human rights is enshrined also in the regional instruments for the protection of human rights. Notably, preambles to these regional instruments refer to concepts such as “equality, freedom or dignity” and use foundational or essentialist language. While the European Convention on Human Rights Declaration (ECHR) affirms to secure “the universal and effective recognition and observance of the (human) Rights”,³² the African Charter on Human and Peoples’ Rights recognizes that “freedom, equality, justice and dignity are essential objectives” and “the fundamental human rights stem from the attitudes of human beings, which justifies their international protection”.³³ Among them, probably the strongest emphasize is seen in the American Convention on Human Rights. The American Convention on Human Rights stipulates in its preamble that “the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they, therefore, justify international protection”.³⁴

The concept of universality of human rights has also been included in virtually all national constitutions.³⁵ The compliance of national constitutions with international human rights norms and standards is consistently promoted by the UN, particularly in constitution making process.³⁶ Although the methods of how human rights principles and standards are to be reflected in constitutions varies, the agreement upon including some universalist concepts of

³⁰ TOMUSCHAT, *supra* note 19 at 70.

³¹ Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, U.N. GAOR, 61th Sess., U.N. Doc. A/RES/61/106, (2006)

³² The European Convention for the Protection of Human Rights and Fundamental Freedoms, concluded 4 Nov. 1950, ETS No. 5 [hereinafter the European Convention or ECHR]

³³ The African Charter on Human and Peoples' Rights, *adopted* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter African Charter]

³⁴ The American Convention on Human Rights, *adopted* 22 November 1969, O.A.S. Official Rec. OEA/ser. L/V/11. 23, doc. 21, rev. 6 (1979). [hereinafter American Convention]

³⁵ HENKIN, *supra* note 20 at 13.

³⁶ UN Secretary-General Norul Mohamed Rashid, *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes*, UNITED NATIONS AND THE RULE OF LAW, <https://www.un.org/ruleoflaw/blog/document/guidance-note-of-the-secretary-general-united-nations-assistance-to-constitution-making-processes/> (last visited Apr 18, 2022).

human rights like dignity or equality seems almost the same worldwide. For instance, the preamble of the Venezuelan constitution refers to the “universal and indivisible guarantee of human rights”,³⁷ and in the very first article, the El Salvador constitution recognizes “the human person as the origin and the end of the activity of the State”.³⁸ Indeed, human rights discourse often appears as a value or a motive in constitutions regardless of how the types of government adopted differ from each other.

For instance, according to the data of the Comparative Constitutions Project, the concept of “human dignity” or “dignity of man” is included in 158 constitutions that are in force in the world.³⁹ While it appears in preambles like in the constitutions of Egypt, Hungary, Iran or Poland⁴⁰; human dignity is referred as a foundational value or characteristic of the state as it is in the constitutions of Portugal, Ukraine, Spain or Zimbabwe.⁴¹ Furthermore, the concept of human dignity has a constitutive character in some domestic legal systems as well as jurisprudence. The best-known example is the German constitution, the Basic Law. Due to its historical background, human dignity has a prominent role in the German Basic Law.⁴² Article 1 of the Basic Law states that “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”⁴³ Indeed, human dignity has been described as “the highest value of the constitution”⁴⁴ by the Federal Constitutional Court of Germany emphasising “the priority of human dignity against the power of the state”.⁴⁵

On the other hand, although many constitutions worldwide have a universalistic tone regarding human rights, a detailed analysis shows that “human rights language operates as a general symbolic narrative rather than a set of explicit specific legal formulations”.⁴⁶ Research by Beck, Drori & Meyer founds that the proportion of rights phrases that explicitly reference human

³⁷ Constitution of Venezuela (Bolivarian Republic) of 1999 with Amendments through 2009, available at https://www.constituteproject.org/constitution/Venezuela_2009.pdf

³⁸ Constitution of the Republic Of El Salvador of 1983 with Amendments through 2003, available at <https://constitutionnet.org/sites/default/files/El%20Salvador%20Constitution.pdf>

³⁹ See the website www.constituteproject.org Elkins, Zachary, Tom Ginsburg, James Melton. *Constitute: The World's Constitutions to Read, Search, and Compare*.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Matthias Mahlmann, *Human dignity and autonomy in modern constitutional orders*, OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 370, 379 (2012).

⁴³ Constitution of the Federal Republic of Germany of 1949, available at https://www.gesetze-im-internet.de/englisch_gg/

⁴⁴ Federal Constitutional Court (First Senate) 15 January 1958, BVerfGE 7, 198 – Lüth, available at <https://germanlawarchive.iuscomp.org/?p=51>

⁴⁵ *Id.*

⁴⁶ Colin J. Beck, Gili S. Drori & John W. Meyer, *World influences on human rights language in constitutions: A cross-national study*, 27 INT. SOCIOLOG. 483 (2012)

rights is relatively low, averaging 5% across all constitutions.⁴⁷ This suggests that the inclusion of human rights in constitutions is not a primary focus but rather like an “added feature” influenced by the changing global environment.⁴⁸

2.1.1. Defining the Universality of Human Rights

Any discussions on the universality of human rights require an accurate conceptualizing of the term, first. However, it is a challenging task, because the universality of human rights is an “elliptical notion”⁴⁹ as Philip Alston puts it, which differs from author to author and text to text. Recognizing such ambiguity revolving around the universality of human rights itself, it is still possible to identify at least the basic tenors of the notion.

According to the Oxford Learner's Dictionary of Academic English, the term universal has two meanings. At the first level, universal means “done by or involving all the people in the world or in a particular group”.⁵⁰ In other words, universality refers to “generality”,⁵¹ which is the fact to be valid and applicable to all subjects, or in other words, being not limited to a particular subject or thing. Under this understanding “saying that human rights are universal is saying that they are the rights of all persons in the world.”⁵² Thus, universality is a matter of “scope of application”.⁵³

An understanding of universality that perceives universality as generality rejects exclusivism. Accordingly, the idea of universality in relation to human rights can be most clearly traced in the provisions on equality and non-discrimination, which are formulated almost identically in every human rights instrument. For instance, Article 2 of the UDHR of 1948 states that “everyone is entitled to all the rights and freedoms set forth in the Declaration, 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.”⁵⁴ Obviously, recognising non-discrimination only within certain criteria creates a paradox in itself. Thanks to the persistent

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Philip Alston, *The United Nations and the Elliptical Notion of the Universality of Human Rights*, in IS UNIVERSALITY IN JEOPARDY?, 51 (1987).

⁵⁰ The Oxford Learner's Dictionary of Academic English, available at <https://www.oxfordlearnersdictionaries.com/definition/academic/universal>

⁵¹ MARIO PROST, THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW 34 (2012)

⁵² EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 4 (2001).

⁵³ *Id.*

⁵⁴ UDHR, *supra* note 21.

efforts and advocacy of human rights activists for decades, it is true that the list of grounds for non-discrimination is becoming more inclusive. For instance, Article 4 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the provisions of the Convention shall be implied without discrimination on any ground such as “sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.”⁵⁵ Consequently, universality of human rights referring generality ensures “all-inclusiveness within the human race”.⁵⁶

The second meaning of the term universal as defined by the Oxford Dictionary is “the true or right at all times and in all places.”⁵⁷ In other words, universality refers to omnipresence,⁵⁸ which means that being present everywhere at the same time. According to this understanding, universality of law implies that law can be encountered everywhere at the same time. Thus, to say that human rights are universal is, first of all, to say that all human beings regardless of where they live, have human rights. Moreover, omnipresence of human rights also indicates that people have always had and will always have these rights, not only at the present time.

The omnipresent character of human rights is visible in the very first article of the UDHR as is stated “All human beings are born free and equal in dignity and rights”. Indeed, it is the omnipresent character of human rights which suggests that all human beings have them, anywhere and anytime, regardless of where and when they are born and live. This is also echoed in the Preamble of the UDHR in which recognizes “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁵⁹

The universality of human rights also refers to “invariability” and “ineluctability” of human rights.⁶⁰ In other words, human rights do not differ from country to country; all people all over the world have the same human rights. In other words, human rights are recognized as the inherent and inalienable entitlements of all people. In this context, human rights are the inherent

⁵⁵ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, concluded 11 May 2011, CETS No. 210

⁵⁶ BREMS, *supra* note 52 at 4.

⁵⁷ The Oxford Learner's Dictionary of Academic English, available at <https://www.oxfordlearnersdictionaries.com/definition/academic/universal>

⁵⁸ MARIO PROST, THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW 34 (2012)

⁵⁹ UDHR, *supra* note 21.

⁶⁰ PROST, *supra* note 51 at 34.

qualities of all human beings rather than the achievements of a group of people.⁶¹ They are inalienable because one cannot stop being human, regardless how they misbehave.⁶²

On the other hand, universality is often treated as a matter of acceptance. From this perspective, universality of human rights is a matter of whether the international human rights treaties are globally accepted or not. According to this formalist point of view called as legal universality⁶³ or international legal universality⁶⁴; human rights are considered universal in the sense that they have been adopted by almost all states in the world. Moreover, it is argued that the universality of human rights is an established “legal reality”⁶⁵ that is “beyond question”⁶⁶, since most of the human rights treaties have been accepted by virtually all states even in cultural, political, regional, and economic diversity of the contemporary world.⁶⁷

2.1.2. *Origins of the Universality of Human Rights*

No matter how it is conceptualised, the fact is that human rights have not always been universal. Until a few decades ago, it was not even easy to imagine a legal order in which states are legally obliged to provide the same legal safeguard for certain categories of rights to all people under their jurisdiction without any distinction. As Bobbio puts wittily, “if someone had told Locke, the champion of the rights to liberty, that all should have right to participate in politics, or even worse, that they had right to paid employment, he would have called it madness.”⁶⁸ Not necessarily going too far as right to work, one may start with a simpler question and rightly ask that how come people suddenly started to ‘born free and equal in dignity and rights’ in 1940s. Thus, it is extremely important to analyse the emergence and historical foundations of the idea of the universality of human rights, first.

It is true that identifying a specific point of departure for the history of the universality of human rights is controversial among both lawyers and historians. This is mostly because scholars from different schools approach the history of human rights in different ways.⁶⁹ Some

⁶¹ JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 2 (2013)

⁶² *Id.* at 28.

⁶³ HENKIN, *supra* note 20 at 13.

⁶⁴ DONNELLY, *supra* note 61 at 94.

⁶⁵ Clarence J. Dias, *The Universality of Human Rights: A Critique*, 103 LOKAYAN BULLETIN 36, 44 (1993).

⁶⁶ DONNELLY, *supra* note 61 at 95.

⁶⁷ *Id.*

⁶⁸ NORBERTO BOBBIO, *THE AGE OF RIGHTS* 18 (1996).

⁶⁹ Marie-Benedicte Dembour, *Where Are the Limits of Human Rights? Four Schools, Four Complementary Visions : A Response to Mireille Delmas-Marty*, in *THE LIMITS OF HUMAN RIGHTS* 345, 352 (2019).

even argue that human rights have no history; that they have always been there and will always be there, as long as humanity exist.⁷⁰ It is true that human rights have many histories,⁷¹ and there are many universalities, so the question of how far back the history of the universality of human rights can be traced depends on what one is looking for.⁷² This study focuses on the history of the claim to universality of international human rights law as enshrined in the first article of the UDHR and then reaffirmed by the other international human rights instruments, meaning that the rights held by all human beings simply because they are human.

The belief that human beings are all part of the same group, or the same “family” may be traced back as far as the idea of separation of humans from gods and animals, long before recorded history.⁷³ Yet, it is the “cosmopolitanism” of the Stoics that can be cited as the main historical and philosophical root of the idea of the universality of human rights. For the Stoics, who coined the term “humanity” for the first time, reason rules the world; since all human beings form part of the same polity because they share reason.⁷⁴ They believed that natural law is the expression of a divine reason which pervades the world and makes human law an aspect of it.⁷⁵ According to Cicero, for instance,

“The true law, is the law of reason, in accordance with nature known to all, unchangeable and imperishable. ... To curtail this law is unholy, to amend it illicit, to repeal it impossible; nor will it be one law in Rome and a different one in Athens, nor otherwise tomorrow than it is today; but one and the same law, eternal and unchangeable will bind all people and all ages.”⁷⁶

However, it should not be overlooked that even the Stoic cosmopolitanism falls short to give a true basis for what we refer to universality of human rights, the belief that the rights owing to human beings by nature of their humanity. Just as the Romans used the term “humanitas” in the Roman Republic to distinguish between “the homo humanus”, the educated Roman, and “homo barbarous”,⁷⁷ the “humanity” of cosmopolitanism of the Stoics itself does not include women, strangers, slaves or children.⁷⁸

⁷⁰ ISHAY, *supra* note 18 at 1–3.

⁷¹ *Id.* at 1.

⁷² BREMS, *supra* note 52 at 17.

⁷³ SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 14 (2012)

⁷⁴ *Id.* at 15.

⁷⁵ COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL THOUGHT AT THE TURN OF THE CENTURY* 50 (2000).

⁷⁶ WJN RUDD, *CICERO: THE REPUBLIC, THE LAWS (TRANSLATION)* 22 (1998).

⁷⁷ DOUZINAS, *supra* note 75 at 186.

⁷⁸ *Id.* at 218.

Along with Stoicism, Christianity is self-evidently universalistic as well.⁷⁹ The term “humanitas” was used quite differently from the Stoics. According to Christian theology, all human beings are equally part of spiritual humanity which was subjected and juxtaposed to deity.⁸⁰ However, Christian universalism is also incapable of providing an accurate basis for the universality of human rights in the contemporary context, since it uses the conceptual or political possibility of human rights only for awarding credit to the religion.⁸¹ Moreover, the fact that the cultural and political implications of Christianity varies greatly from age to age and place to place does not give Christianity a necessary role in the history of the universality of human rights.⁸²

The traditional approach in textbooks tend to start the history of human rights with the Magna Carta of 1215,⁸³ and point out the importance of the documents asserting some individual rights like the English Bill of Rights of 1689, the French Declaration on the Rights of Man and Citizen of 1789, or the US Bill of Rights of 1791 on the domestic plane.⁸⁴ Although the Magna Carta is important in the sense that it proclaimed and secured a some basic protections and liberties for a certain group of individuals against the sovereign and limited the absolute power of the sovereign, its importance in the history of human rights is more than symbolic. Indeed, the Magna Carta had nothing to do with the rights of ordinary people but secured the rights of powerful barons against the king of England.⁸⁵

On the other hand, the “natural rights” doctrine of the Enlightenment, which emerged from a combination of the Stoic universalism and Christian values played an undeniable role in the history of the universality of human rights. The conception of natural rights was primarily constructed by thinkers of the 17th and 18th centuries.⁸⁶ The scientific and intellectual achievements of the 17th century encouraged the belief in natural law and universal order; and during the 18th century, the age of enlightenment and the growing confidence in human reason and the perfection of human affairs led to a more comprehensive expression of this belief.⁸⁷ By the end of the 18th century, thanks to the revolutionary documents such as the American

⁷⁹ MOYN, *supra* note 73 at 15.

⁸⁰ DOUZINAS, *supra* note 75 at 186.

⁸¹ MOYN, *supra* note 73 at 15.

⁸² *Id.* at 16.

⁸³ Ed Bates, *History, in* INTERNATIONAL HUMAN RIGHTS LAW, 16 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran ed. 2014).

⁸⁴ *Id.* at 17–23.

⁸⁵ ISHAY, *supra* note 18 at 85.

⁸⁶ P. ALSTON & R. GOODMAN, INTERNATIONAL HUMAN RIGHTS 490 (2013)

⁸⁷ *Id.*

Declaration of Independence of 1776 and the French Declaration on the Rights of Man and Citizen of 1789, the concept of "man" become the absolute value all over the world.⁸⁸ Indeed, it was the humanism of the Enlightenment which suggests that the human being has a universal essence and that this essence belongs to and is characteristic of each individual, who is the real, empirical subject.⁸⁹ It is therefore argued that the man of the Enlightenment as an abstraction which ignores all the traits and qualities like race, class, sex or age unlike its antecedents, is the man of human rights.⁹⁰

At the end of the eighteenth century, thanks to revolutionary documents such as the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man and Citizen of 1789, the concept of "man" became an absolute value all over the world. Indeed, it was the humanism of the Enlightenment that asserted that the human being has a universal essence and that this essence belongs to and is characteristic of each individual, the real, empirical subject. It is therefore argued that the Enlightenment man, as an abstraction which, unlike its predecessors, disregards all characteristics and qualities such as race, class, gender or age, is the man of human rights.

In the history of the universality of human rights, the French Declaration on the Rights of Man and Citizen of 1789 and the American Declaration of Independence of 1776 are particularly notable, since natural rights theories heavily influenced the creators of these documents. For instance, while the Article 1 of the French Declaration proclaims that “in respect of their rights men are born and remain free and equal”, which was repeated in the UDHR later in 1948, Article 2 states that “the aim of every political association is to preserve the natural and inalienable rights of man. These rights are those of liberty, property, security, and resistance to oppression.”⁹¹ Similarly, the Preamble to the American Declaration of Independence declares that "all men are created equal and are endowed by their Creator with unalienable Rights".⁹²

However, while tracing the universality of human rights in these two revolutionary declarations, the political and historical background in which these declarations emanated from must be acknowledged well. The era in which the revolutionary declarations were issued was

⁸⁸ DOUZINAS, *supra* note 75 at 187.

⁸⁹ LOUIS ALTHUSSER, *FOR MARX* 228–229 (2005).

⁹⁰ DOUZINAS, *supra* note 75 at 187.

⁹¹ France. National Constituent Assembly. (1789) Declaration of the Rights of Man and of the Citizen Adopted by the National Assembly during its Sessions on August 20, 21, 25 and 26, and Approved by the King. Paris: Mondharre & Jean. <https://www.loc.gov/item/2021668069/>.

⁹² Thomas Jefferson, et al, July 4, (1776) Copy of Declaration of Independence, <https://www.loc.gov/item/mtjbib000159/>.

the era in which the modern nation states emerged on the stage of history. The primary aim of these declarations was not to secure the “universal human rights”; the proclaimed rights were not an end in themselves, a means to the reconstruction of the body politic.⁹³ Indeed, the aim of the American documents was a post-colonial liberation from the British empire and the creation of an independent state, while it was overthrowing the monarchical despotism and backward tradition in the French case.⁹⁴

Consequently, although the rights were proclaimed in these Declarations in the name of the universal "man", the beneficiary of the rights was the citizen.⁹⁵ Indeed, Article 3 of the French Declaration states that “the principle of all Sovereignty lies essentially with the nation.”⁹⁶ Similarly, Article 6 states that “the law is the expression of the general will; all citizens have the right to work towards its creation either in person or through their representatives.”⁹⁷ Thus, rather than the direct international assurance of individual rights, there was a search for the guarantee of sub-national citizenship.⁹⁸ In other words, what mattered was the acquisition of some specific citizenship rights (for man)⁹⁹ rather than the demand for some abstract principles.

In fact, the emergence of the universality of human rights as legal rights inherent to all human beings regardless of nationality, started in the 1940s. It is widely argued that it was the horrific experience of the Second World War that brought human rights to the world stage, and that the emergence of human rights law was a response to Hitler and Stalin, the atrocities and barbarities of war and the Holocaust.¹⁰⁰ With the signing of the Charter of the United Nations in 1945 and then the Universal Declaration of Human Rights in 1948; the 1940s are acknowledged as the crucial era of breakthrough of human rights. As Lauterpacht wrote in 1945, human rights

⁹³ JÜRGEN HABERMAS, *THEORY AND PRACTICE* 105 (1988).

⁹⁴ MOYN, *supra* note 73 at 30.

⁹⁵ DOUZINAS, *supra* note 75 at 101.

⁹⁶ Declaration of the Rights of Man and of the Citizen, *supra* note 91.

⁹⁷ *Id.*

⁹⁸ MOYN, *supra* note 73 at 33.

⁹⁹ In fact, the tradition of not accepting anyone other than white men as citizens and rights holders since Ancient Greece continued in the French Revolution and women were sent to the guillotine in their struggle to benefit from the rights granted to men. The rights mentioned in the Declaration are not the rights of human, but “man”, and it is particularly notable that the days following the Revolution were some of the darkest in the history of women in France. In 1912, for example, a jurist was claiming that “a woman is not a null but a non-existent citizen, like an incestuous or same sex marriage”. It was as late as 1944 when women were finally won their right to vote in France. given the vote in France. See, Nicole Arnaud-Due, *Women Entrapped: From Public Non-Existence to Private Protection*, in *WOMEN’S RIGHTS AND THE RIGHTS OF MEN*, 9 (A.J. Arnaud, E. Kingdom ed. 1990).

¹⁰⁰ DOUZINAS, *supra* note 75 at 115.

engendered restrictions on sovereignty more far-reaching in their implications than any yet propounded in the annals of international utopias.¹⁰¹

In respect to the linkage between the idea of universality and human rights, the Universal Declaration of Human Rights is highly significant since it directly links the human rights with the concept of universality through the title of the text. Yet, as Brems pointed out, when the United Nations started working on this document, the title was not "universal" but "international declaration of human rights".¹⁰² The change was made in order to express "the centrality of the individual", but not states.¹⁰³ Consequently, although the history of the concept of universality of human rights can be traced back before the UDHR as mentioned above, it was the declaration of the UDHR that made the concept of universality a crucial aspect of human rights law.

On the other hand, not all lawyers celebrate the 1940s as the born of the universality of human rights. Samuel Moyn, for instance, offers an alternative reading differs from the conventional approaches on the history of human rights. According to Moyn, contrary to the conventional assumptions, there was no widespread Holocaust consciousness in the post-war era.¹⁰⁴ The UDHR or human rights in general could not have been a response to it. More importantly, he adds, no international rights movement emerged at time.¹⁰⁵

In fact, Moyn is not the only one who takes the post-war history of human rights into consideration with great-power realism of wartime decisions together. As Lauren points out, human rights was rapidly used as an ideological weapon in the war of words between East and West.¹⁰⁶ On 10 December 1948, the Universal Declaration of Human Rights was adopted by 48 votes in favour against eight abstention from the six communist states (Byelorussia, Czechoslovakia, Poland, the Soviet Union, Ukraine, and Yugoslavia) as well as Saudi Arabia and South Africa.¹⁰⁷ According to the Yugoslav delegate speaking before the voting, "the Declaration was not based on reality, because it described man as an isolated individual and overlooked the fact that he was also a member of a community".¹⁰⁸

¹⁰¹ HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 14 (2013).

¹⁰² BREMS, *supra* note 52 at 20.

¹⁰³ *Id.*

¹⁰⁴ MOYN, *supra* note 73 at 7.

¹⁰⁵ *Id.*

¹⁰⁶ PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 228 (2013)

¹⁰⁷ Bates, *supra* note 83 at 31.

¹⁰⁸ Voting Record, United Nations Digital Library, U.N. Doc. A/PV.183 (1948) 916., <https://digitallibrary.un.org/record/670964?ln=en>

Moyn draws attention to the fact that the term “human rights” was hardly ever used in English language before the 1940s. And in 1940s, it gained only a modest attraction. However, when it comes to 1977, the year The Nobel Peace Prize was awarded to Amnesty International, it was printed in the New York Times almost five times more often in any previous publication in that publication’s history.¹⁰⁹ Indeed, it took almost 20 years the ICCPR and ICESCR to be opened for signature, and it was late as 1976 when they entered into force when the 35 states parties were ready to ratify them. Until the mid-1970s, the number of cases were decided by the European Court of Human Rights (ECtHR or the European Court) was only seventeen.¹¹⁰

Moyn’s reading waters the myth of the deep global and multicultural origins of the universality of human rights down. He insists that it is inaccurate and depoliticized to argue that human rights were a direct response to the crimes and barbarities of the War.¹¹¹ Contrary, Moyn demonstrates that the inability of the United Nations to protect human rights in such an international system which based on state sovereignty¹¹², and signals the persistence of the nation-state as the incubator for rights claims, where citizenship and rights were always bound up with each other.¹¹³

Human rights came to dominate the political scene only in the 1970s but not in the 1940s, when it began to be used as a source of inspiration for political social movements globally, because other utopias like nationalism or communism had collapsed.¹¹⁴ In the 1970s, people adopted human rights as an attractive and useful moral tool for a social change. Human rights have been “reinvented” thanks to rising social movements and civil society in this period. In this manner, the true key to the history of human rights is the shift from the politics of the state to the morality of the globe.¹¹⁵ The universality of human rights, in fact, was not born within, or affirmed by the United Nations’s or any other inter-state system; rather, it was re-invented by the people who struggle for their rights and was used as a very attractive moral tool against the oppressive governments around the world.

¹⁰⁹ MOYN, *supra* note 73 at 4.

¹¹⁰ STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 35 (2006).

¹¹¹ MOYN, *supra* note 73 at 83.

¹¹² *Id.* at 186.

¹¹³ *Id.* at 212.

¹¹⁴ Dembour, *supra* note 69 at 352.

¹¹⁵ MOYN, *supra* note 73 at 43.

2.1.3. *Justifying the Universality of Human Rights*

Clearly, universality informs the discourse and content of rights in the UDHR and the other basic human rights conventions.¹¹⁶ However, legitimacy requires foundations¹¹⁷, and the justification behind the idea that all human beings have some inherent and inalienable rights everywhere and at all times, simply because they are human, is not sufficiently clear. Indeed, why should we accept that some norms are universal? In other words, what is the justification of the idea of universality of human rights, as affirmed in the UDHR as “kinship in rights”? As Jacques Maritain observed in 1949: “We agree about the rights but on condition that no one asks us why.”¹¹⁸

Most of the basic textbooks on international human rights do not address these questions, or they approach the universalism of human rights from a very limited perspective.¹¹⁹ The reason why no one asks “why” is usually that the universality of human rights is seen as self-justificatory.¹²⁰ Further, it is argued that human rights are “necessarily”¹²¹ or in Leuprecht’s words, “by definition”¹²² universal, because they are the rights that human beings have by virtue of their human nature, so their justification is human nature itself. This perspective approaches the universality of human rights as a “claim”; in this sense, to say “human rights are universal” is, subsequently, to say “human rights *must be* universal”.¹²³ This argumentation, however, is a fallacy simply because it derives an “is” from an “ought” as Besson and Beitz rightly point it out.¹²⁴ Similarly, it is also argued that human rights is itself an irreducible value which is not in need of further justification, or it is justified by reference to another value that does not itself

¹¹⁶ P. ALSTON & R. GOODMAN, INTERNATIONAL HUMAN RIGHTS 489 (2013)

¹¹⁷ Christof Heyns & Magnus Killander, *Universality and the growth of regional systems*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW, 671 (2013).

¹¹⁸ J. MARITAIN, MAN & THE STATE 70 (1954)

¹¹⁹ For instance, see P. ALSTON & R. GOODMAN, INTERNATIONAL HUMAN RIGHTS (2013); OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW (2019); RHONA SMITH, INTERNATIONAL HUMAN RIGHTS LAW (2020). Of course, there are significant exceptions. See for instance ROWAN CRUFT, S. MATTHEW LIAO & MASSIMO RENZO, PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS (2015); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (2013); CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS (2009).

¹²⁰ Samantha Besson, *Justifications*, in INTERNATIONAL HUMAN RIGHTS LAW, 34 (Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran ed. 2014).

¹²¹ Joseph Chan, The Asian Challenge to Universal Human Rights: A Philosophical Appraisal, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA PACIFIC, 25, 28, (J.T.H. TANGH ED., 1995)

¹²² BREMS, *supra* note 52 at 5.

¹²³ *Id.*

¹²⁴ BEITZ, *supra* note 119 at 49.

need justification, such as human dignity or equality.¹²⁵ However, all these arguments approach human rights as a matter of faith, rather than of reason.¹²⁶

Apart from this, most international lawyers tend to understand the universality of human rights almost solely in terms of acceptance.¹²⁷ This formalist perspective as mentioned above, approaches the universality of international human rights law as a question of whether it is valid and accepted by states regardless of their geography or political regime.¹²⁸ For example, the Universal Declaration of Human Rights is considered “universal” because it has been accepted by all states at the level of the United Nations. Similarly, international human rights conventions are considered universal, since they are widely recognized: the Convention on the Rights of the Child currently has 196 states parties, while the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has 189 states parties.¹²⁹ From this point of view, the universality of human rights is solely about to what extent states accept, or in other words, to what extent states sign and ratify them. This is what Louis Henkin calls “legal universalism”,¹³⁰ or what Donnelly calls “international legal universality”¹³¹ as a manner of legal acceptance. According to this perspective, the universality of human rights is justified through the authority of international law.

However, to justify the universality of human rights to the extent that they are recognised by the majority of states is just another fallacy. As explained above, human rights are the rights that are not granted by society; on the contrary, people enjoy human rights not by the favour of society, but by virtue of the fact that people have these rights. In other words, human rights are not universally prescribed because the majority of states recognise them; rather, as the UDHR confirms, states recognise them because human rights are part of human nature 'as it is' and unalterable for every human being.

It seems that theorists who justify the universality of human rights through the authority of international law or in other words, legal acceptance, are confused about what exactly they are

¹²⁵ Besson, *supra* note 120 at 34.

¹²⁶ Michael Ignatieff, *Human rights: the midlife crisis*, 46 N. Y. REV. BOOKS 58–62, (1999).

¹²⁷ See for instance, TOMUSCHAT, *supra* note 19.; ALSTON AND GOODMAN, *supra* note 86 at 489.

¹²⁸ Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT. LAW 265–297 (2009).

¹²⁹ For the full list of states parties to the United Nations human rights treaties see United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last visited Feb 22, 2022).

¹³⁰ HENKIN, *supra* note 20 at 13.

¹³¹ DONNELLY, *supra* note 61 at 94.

justifying: is it human rights *law* or human right as moral or political claims?¹³² These two are different concepts and are constantly misused as if they are interchangeable. Stephen Hopgood illustrates this distinction in a very creative way. He uses the term “human rights” with inner-case initials in referring to human rights as moral and political claims; while he uses the term “Human Rights” with capital-letters, when referring to international human rights law system which is, according to him, “a global structure of laws, courts, norms and organisations which raise money and write reports”.¹³³

It should be noted that justification does not mean explaining, but giving reason for a particular concept. Legal justifications, then, means giving legal reasons, while moral justifications means giving moral reasons. Hence, moral justifications of human rights as moral claims ought to be distinguished from legal justifications of human rights as legal rights.¹³⁴ Nevertheless, any argument about “to be born free and equal in dignity and rights” refers exclusively to a question of morality, so reasoning on the universality of human rights is a special kind of moral reasoning. Legal acceptance might be related to the authority or legitimacy of human rights, but the justifications concerning the authority of human rights should not be confused with moral justifications concerning the content of the legal human rights norms enshrined in human rights treaties.¹³⁵ Consequently, international human rights *law* does not, and cannot, morally justify human rights itself.¹³⁶ In fact, it is quite the opposite. Moral authority of human rights comes *before* the law.¹³⁷

Indeed, legal acceptance may be a useful tool for states to cover up their reluctance to implement human rights in practice most of time. Moreover, as Henkin points out, legal acceptance might be seen as rhetorical or even hypocritical.¹³⁸ Although the Convention on the Rights of the Child is the most widely signed and ratified human rights convention, children are one of the groups whose human rights are most violated. Similarly, 189 countries are currently parties to the Convention on the Elimination of All Forms of Discrimination Against Women, yet there is not even a single country on earth where women are not subjected to at least one form of discrimination. This is true because human rights are predominantly violated at the local level by states themselves. No matter what international human rights documents

¹³² Besson, *supra* note 120 at 35.

¹³³ Stephen Hopgood, *THE ENDTIMES OF HUMAN RIGHTS*, PREFACE VII-IX (2013).

¹³⁴ Besson, *supra* note 120 at 41.

¹³⁵ *Id.* at 38.

¹³⁶ *Id.* at 35.

¹³⁷ Hopgood, *supra* note 133 at 117.

¹³⁸ HENKIN, *supra* note 20 at 13.

say or how many treaties foreign secretaries sign, human rights are violated on the street, in the workplace, campus or at the local police station.¹³⁹

2.2. Challenges to the Universality of Human Rights

As hinted so far, human rights is a highly contested concept, and so is the claim to universality. Before analysing the challenges to and critiques of universality of human rights, the concept of critique needs to be understood, first. The primary task of critique is not to assess whether its objects are good or bad, valued highly or demeaned, but to bring into relief the very framework of evaluation itself.¹⁴⁰ It must be noted that those who embrace critiques and challenges to the universality of human rights are not opposed to human rights, in the sense that their aim is not to call for the supposed binary opposite of human rights, namely, violations of human rights.¹⁴¹ Put another way, it should not be read as an attempt to discredit of human rights. Rather, the aim is to pour, in Holmes' terms, some "cynical acid" over the idea of universality of human rights to see if something of value remains.¹⁴² This is important because every critique in some way points to the gap between the promise that every human being is entitled to a set of fundamental rights and a world where human rights violations abound and many people do not enjoy them.¹⁴³ Indeed, as Amartya Sen points out very well, the conceptual doubts must be satisfactorily addressed if the idea of human rights is to command reasoned loyalty and to establish a secure intellectual standing.¹⁴⁴ In this sense, it is critically important to see the relationship between the force and appeal of human rights, and their reasoned justification and scrutinized use.¹⁴⁵

2.2.1. Different Approaches among Legal Scholars to the Universality of Human Rights

Challenges and critiques to the universality of human rights vary, based on how different schools conceive of human rights, first and foremost. Therefore, before analysing the

¹³⁹ DOUZINAS, *supra* note 75 at 118.

¹⁴⁰ Judith Butler, *What is Critique? An Essay on Foucault's Virtue*, TRANSVERSAL TEXTS (2001) <https://transversal.at/transversal/0806/butler/en>

¹⁴¹ Dembour, *supra* note 11 at 54.

¹⁴² Holmes, *supra* note 12 at 462.

¹⁴³ Dembour, *supra* note 11 at 54.

¹⁴⁴ Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHILOS. PUBLIC AFF. 315–356, 317 (2004).

¹⁴⁵ *Id.*

challenges towards universality of human rights, it is necessary to briefly address the most prominent perspectives on what human rights are. Following Dembour's identification of four schools of thought on what human rights are, "natural scholars" perceive human rights as given, "deliberative scholars" as agreed upon, "protest scholars" as fought for, and "discourse scholars" as talked about.¹⁴⁶ Consequently, each of these schools of thought approaches the issue of the universality of human rights differently depending on how they approach what human rights are.

For natural scholars, human rights derive from nature; their universality is therefore a given.¹⁴⁷ In other words, if human rights are, as is often thought, rights that a person enjoys simply because they are human, then they are "universally" enjoyed by all human beings. If human rights are the rights one has simply because one is a human being, as they usually are thought to be, then they are held "universally," by all human beings.¹⁴⁸ As Henkin's words, "Human rights are inalienable and imprescriptible: they cannot be transferred, forfeited or waived, because they are implied in one's humanity."¹⁴⁹ Thus, far from criticizing it, natural scholars tend to celebrate the universality of human rights.

Protest scholars have also not critically approached to the universality of human rights. They argue that the historical emergence and development of human rights needs to be understood and analysed in the context of social movement struggles against existing power relations and structures.¹⁵⁰ The origins of human rights are people in struggle and communities of resistance.¹⁵¹ For them, the ubiquity of injustice points to the universal relevance of human rights.¹⁵² In other words, protest scholars believe that human rights are universal, because suffering is universal.

Deliberative scholars' approach to the universality of human rights from a relatively critical perspective. Unlike natural scholars, they argue that the universality of human rights is certainly not a given, it is at best a project.¹⁵³ For them, rights do not exist until they are secured

¹⁴⁶ Marie-Benedicte Dembour, *What are Human Rights - Four Schools of Thought*, 32 HUM. RIGHTS Q. 1–20 (2010).

¹⁴⁷ *Id.* at 9.

¹⁴⁸ JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 1 (2013).

¹⁴⁹ LOUIS HENKIN, *THE AGE OF RIGHTS* 2 (1990).

¹⁵⁰ NEIL STAMMERS, *HUMAN RIGHTS AND SOCIAL MOVEMENTS* 2 (2009).

¹⁵¹ UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 6 (2008).

¹⁵² Dembour, *supra* note 146 at 9.

¹⁵³ *Id.*

by the law.¹⁵⁴ As Ignatieff spelled out, there is nothing sacred about human beings, nothing that is entitled to worship or ultimate respect. The fundamental moral commitment required by rights is not to respect, and certainly not to worship. It is a deliberation.¹⁵⁵ In other words, the only criterion for human rights to be universal is the global adoption of the values that human rights express.

Discourse scholars, however, are extremely critical to the universality of human rights. According to them the “so-called” universality of human rights is nothing more than pretence.¹⁵⁶ As best expressed by MacIntyre’s words, “there are no human rights, and belief in them is one with belief in witches and in unicorns. The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and unicorns: every attempt to give good reasons for believing that there are such rights has failed.”¹⁵⁷ They are also very critical towards the natural lawyers. According to them natural school's perspective is intellectually untenable simply because moral forms in human society differs as regards time and space. Furthermore, they argue that natural school’s approach is imperialist and reflects the hegemonic position of both Western legal institutions and the liberal ideology of the global market that sustains them.¹⁵⁸

2.2.2. Marxist, Communitarian and Relativist Perspectives

The position of each one of these four main school of thought on universality of human rights is fragmentated in itself by contributions from other disciplines such as political theory, cultural studies, philosophy, as well as theoretical perspectives, such as feminism. In this context, realist, utilitarian, communitarian, Marxist, cultural relativist, feminist and post-colonial theoretical perspectives are particularly noteworthy for their novel critiques to the universality of human rights.¹⁵⁹ In order not to exceed the scope of the study, not all critiques, but especially the cultural relativist, communitarian and Marxist critiques of universalism will be briefly discussed below, because although the theoretical framework on which they are based is significantly different from each other, all three ultimately converge by pointing to a very

¹⁵⁴ TOM CAMPBELL, *RIGHTS: A CRITICAL INTRODUCTION* 206 (2006).

¹⁵⁵ IGNATIEFF, *supra* note 7 at 83–84.

¹⁵⁶ Dembour, *supra* note 146 at 9.

¹⁵⁷ ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY*, THIRD EDITION 68–69 (2007).

¹⁵⁸ SHANNON SPEED, *RIGHTS IN REBELLION: INDIGENOUS STRUGGLE AND HUMAN RIGHTS IN CHIAPAS* 181 (2008).

¹⁵⁹ MARIE-BÉNÉDICTE DEMBOUR, *WHO BELIEVES IN HUMAN RIGHTS?: REFLECTIONS ON THE EUROPEAN CONVENTION* (2006).

similar deficiency in the claim of universality: the ambiguity and abstractness of the subject of human rights.

Universalism claims that human rights belong to "man". That is, it logically assumes a subject, the "human being", to whom rights are granted. However, there are many problems with this abstract "man" of universality of human rights, from the beginning of the human rights tradition. Indeed, the abstractness of the concept of "man" as the subject of human rights and consequent vagueness of human rights were criticised especially by Marxists and communitarians.

The most extensive and direct expression of Marx's views on rights is to be found in *On the Jewish Question* (1843), in which he rejects the universal, rational, inalienable rights of man.¹⁶⁰ According to Marx, human rights are abstract, unreal, thus, do not exist. This is because he argues that only concrete individuals exist, historically and socially determined and shaped by their class position.¹⁶¹ He argues that abstractness of the subject of human rights sacrifices the concrete identity of person who has a class, gender and ethnic characteristics.¹⁶² For Marx, human rights seem to belong to the abstract universal man, however, in practice they favour the interests of a very concrete person. This person is the individual of capitalism; the possessive white bourgeois male whose right to property is made the cornerstone of all other rights.¹⁶³ The main Marxist critique of the universality of human rights is that human rights essentially express the interests of the bourgeoisie, rather than stipulating the fundamental rights of all men at all times and in all countries.¹⁶⁴

Alongside Marxist critique, communitarian critique of the universality of human rights is also occupies an important place. Although on different sides of the political spectrum, the communitarian critique of the abstractness of the subject of human rights subject is very similar to the Marxist critique. Neither believes that the "man" of rights exists in practice.¹⁶⁵

Communitarians' main critics against the universalism of human rights is that the abstract formulation of human rights makes them unreal and usefulness. Edmund Burke argues that

¹⁶⁰ L. J. Macfarlane, *Marxist Theory and Human Rights*, 17 GOV. OPPOS. 414–428, 414 (1982).

¹⁶¹ Claude Lefort, *Politics and Human Rights*, THE POLITICAL FORMS OF MODERN SOCIETY: BUREAUCRACY, DEMOCRACY, TOTALITARIANISM 239, 66 (1986).

¹⁶² DOUZINAS, *supra* note 75 at 159.

¹⁶³ *Id.* at 100.

¹⁶⁴ Macfarlane, *supra* note 160 at 414.

¹⁶⁵ Marx did not think much about women, as Dembour spells out. See Dembour, *supra* note 11 at 60.

human rights are “metaphysick rights”¹⁶⁶ and abstractness of the subject of human rights is the greatest practical defect of rights.¹⁶⁷ In other words, abstract rights are so removed from the concrete circumstances of the persons who suffer and hurt that they are unable to match their real needs.¹⁶⁸ According to Burke, it is useless to discuss a man's abstract right to food or medicine. “The question is upon the method of procuring and administering rights. In that deliberation I shall always advise to call in the aid of the farmer and the physician, rather than the professor of metaphysics”, he says.¹⁶⁹

On the other hand, Burke stipulates that human nature is socially determined and that each society creates its own type of person. The only real rights are created by a particular history, tradition and culture.¹⁷⁰ Thus, rights are not universal or absolute, they do not belong to abstract human beings but to particular human beings in concrete societies.¹⁷¹ This position is repeated in Joseph de Maistre’ famous quote: “I have met Italians, Russians, Spaniards, Englishmen, Frenchmen, but I do not know man in general.”¹⁷²

In short, both communitarians and Marxists argue that such a “man” of the rights does not exist. The subject of human rights does not exist at all, because it is either too abstract or too concrete to be universal. In both cases, the idea of universality of human rights is diluted by the subject of human rights, who is stuck between abstract human nature and concrete human being.

On the other hand, criticisms of the universality of human rights often and usually refer to or are associated exclusively with the cultural relativist perspective. According to cultural relativists, human nature is a social product.¹⁷³ For example, between the modal “natures” of men and especially women in modern western and traditional Islamic societies, there are socially determined differences.¹⁷⁴ For cultural relativists, the claim that human rights refer to all humanity across time and space cannot be true. On the contrary, they argue that the sole source of the validity of rights is culture, in other words, that the assumption of rights is

¹⁶⁶ EDMUND BURKE, REFLECTIONS ON THE FRENCH REVOLUTION 61 (1955).

¹⁶⁷ *Id.* at 60.

¹⁶⁸ DOUZINAS, *supra* note 75 at 154.

¹⁶⁹ BURKE, *supra* note 166 at 61.

¹⁷⁰ DOUZINAS, *supra* note 75 at 154.

¹⁷¹ *Id.* at 99.

¹⁷² *Id.*

¹⁷³ Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RIGHTS Q. 400–419, 403 (1984).

¹⁷⁴ *Id.*

culturally determined.¹⁷⁵ Consequently, human rights cannot be derived from a particular culture, because culture is a dynamic process rather than a static homogenous thing.¹⁷⁶

Although cultural relativist critiques are introduced as a real opposition to the universality of human rights, in fact, there is very little difference the difference between the two; both universality and relativism are embedded in immanence. The universality of human rights requires that all cultural and moral norms be historically and territorially unbound, thus, it sees the judgments which derive their legitimacy from local values, are morally suspect. But it is also true that the universalist claim can lead to imperialism, arguing that only it, as the representative of the universal, can understand what morality demands.¹⁷⁷ On the other hand, it is not that difficult to argue that cultural relativism is more dangerous because it can easily become a shield that protects all kind of oppression against those who oppose the oppressiveness of tradition for the sake of the local moral and social values. As Jean-Luc Nancy rightly put it, “the difference between a universalism premised on the essence of man and a relativism premised on the essence of community is small; in their common determination to see man and community as immanent.”¹⁷⁸

In fact, no matter how attractive the very first article of the Universal Declaration of Human Rights (like its predecessor the French Declaration) stating that “all men are born equal in rights and in dignity” may sound, the universality of human rights is ontologically and empirically a very contestable claim. People are not born equal, but completely unequal. An abstract human being becomes a concrete person by their gender, race, colour, nationality, language, religion, property, age or state of health. In Arendt’s words, “we are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights”.¹⁷⁹ Therefore, as argued above, the universalism claim of human rights is indeed just a rational fallacy which tries to derive an “is” from an “ought”.¹⁸⁰

2.2.3. State-Centrism of (the Universality of) Human Rights

¹⁷⁵ *Id.* at 401.

¹⁷⁶ Dembour, *supra* note 11 at 62–63.

¹⁷⁷ DOUZINAS, *supra* note 75 at 136–137.

¹⁷⁸ JEAN-LUC NANCY, *THE INOPERATIVE COMMUNITY* 3 (1991).

¹⁷⁹ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 301 (1973).

¹⁸⁰ See BEITZ, *supra* note 119 at 49.

The most obvious change in the transition from natural rights to human rights was the alteration of their philosophical foundations and institutional sources.¹⁸¹ Both the French and American Declarations were “declarative” in the sense of the source of rights. In other words, the philosophical ground and institutional source of human rights was, in a real sense, the act of literal declaration itself. The rights were “discovered” and declared by the French and American philosophers and statesman.¹⁸²

In fact, history of rights of “man” and then human rights, is the history of the state.¹⁸³ Indeed, declarations proclaimed the universality of rights, but it was the state and its law that established rights. Indeed, linguistic declarations of rights were enshrined in constitutions by the Constituent Assemblies, which became a new kind of legislative power of the modern state. In other words, it was the declarations of rights that authorised the assemblies to legislate rights. As Douzinas points out, “if the declarations ushered in the epoch of the individual, they also launched the age of the state. Human rights and national sovereignty, the two antithetical principles of international law were born together, their contradiction more apparent than real.”¹⁸⁴ Indeed, far from providing justification for “human” claims against the state, assertions of rights have been the fundamental justification for states for at least a century.¹⁸⁵

By 1945, the discourse of human rights was revisited as a response to the atrocities and barbarities of the War and the Holocaust. Enunciators of human rights were no longer divine legislators but international lawmakers and international institutions. As Koskeniemi put it, “moral groundings of rights was not available anymore in the modern and morally agnostic world, thus the meaning of rights has to be exhausted by the content of legal rights that gives them meaning and applicability.”¹⁸⁶ It was the international law, because when lawyers sought to internationalise the human rights project in the middle of the twentieth century, they had no choice but draw on the body of law existing at the global level.¹⁸⁷ It was reasonable at the first sight, because strict protection of state sovereignty was incompatible with a strong stance in favour of human rights, in that human rights deal with issues that are essentially domestic and

¹⁸¹ DOUZINAS, *supra* note 75 at 115.

¹⁸² For more on drafting processes of the both Declarations, see Rett R. Ludwikowski, *The French Declaration of the Rights of Man and Citizen and the American Constitutional Development*, 38 AM. J. COMP. LAW 445–462 (1990)

¹⁸³ MOYN, *supra* note 73 at 22.

¹⁸⁴ DOUZINAS, *supra* note 75 at 102.

¹⁸⁵ MOYN, *supra* note 73 at 27.

¹⁸⁶ MARTTI KOSKENIEMI, *THE POLITICS OF INTERNATIONAL LAW* 156–157 (2011).

¹⁸⁷ Frederic Megret, *Nature of Obligations*, in *INTERNATIONAL HUMAN RIGHTS LAW*, 96 (Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran ed. 2014).

traditionally considered to be part of states' exclusive purview. Thus, it was thought that only public international law could bind states "from above" and change domestic practices.¹⁸⁸ To paraphrase Nietzsche, "if God, the source of natural law, is dead, he has been replaced by international law."¹⁸⁹

But this was the reason why human rights were "death in birth": human rights, which were supposed to protect people against states' atrocities, were left to the mercy of the very same state. By placing rights into the nation-state, it was the universality of human rights that was sacrificed first and foremost. This was the phase in which human rights began to be glorified to the extent of their legal universalisation. But this is an empirical universality¹⁹⁰, based on counting how many states have adopted how many and which treaties, or how many have introduced which reservations or derogations from treaty obligations. When the normative universality of human rights becomes solely a matter of a calculable globalisation, what is at stake is no longer human rights, but the human rights *law*, which revolves around the interests of states, not universal humanity.

The idea of universalism of human rights must be approached by taking into account capabilities and means of human rights law. Human rights law is a branch of public international law. It must be recalled that international law was a law created "by, between and for" states. Its cardinal concept is state sovereignty. Sovereign equality builds on the fact that every member of international society is free to decide on its own ends, and to that extent, they are all equal. Thus, as Koskeniemi puts correctly, the international is created by the sovereign. It exists 'for' states.¹⁹¹ And the typical source of obligations is state voluntarism, that is states are only bound by obligations to which they consent.¹⁹² It is a state-centred norm system.¹⁹³

Consequently, human rights law is state-centrist as well. As a result of state sovereignty, "the obligation to respect and enforce human rights rests on states".¹⁹⁴ On the other hand, states are completely free to sign or not to sign the human rights treaties. They may modify their obligations under human rights treaties by reservations.¹⁹⁵ Moreover, they are free to define the

¹⁸⁸ *Id.* at 96–97.

¹⁸⁹ DOUZINAS, *supra* note 75 at 116.

¹⁹⁰ *Id.* at 117.

¹⁹¹ Martti Koskeniemi, *What Is International Law For?*, in *INTERNATIONAL LAW*, 35 (Malcolm Evans ed. 2014).

¹⁹² Megret, *supra* note 187 at 97.

¹⁹³ GREGOR NOLL, *The Exclusionary Construction of Human Rights in International Law and Political Theory*, 8 (2003).

¹⁹⁴ Megret, *supra* note 187 at 101.

¹⁹⁵ *Id.* at 105.

practical scope of rights by limiting the scope of rights on “legitimate” grounds such as “morality, public order or general welfare” as allowed under human rights treaties.¹⁹⁶ States are also free to suspend some of their obligations under human rights treaties if “a state of emergency requires to do so”.¹⁹⁷ The worst, states may even withdraw from treaties they already signed and even ratified and enforced for years. Besides, the contractual structure of rights forces us into the specifics of treaty law and leaves us with a host of questions stemming from the law of treaties. Is an alleged violation attributable to a state? Is that state bound by a pertinent human rights obligation? How is that obligation to be interpreted and applied?¹⁹⁸ Like any treaty under international law, a human rights treaty is the product of consent between states, hence, legal human rights obligations derive from the representation of the will of nation-states.

Furthermore, even the law-makers of human rights law are states. The law-making belongs to government representatives, diplomats, policy advisers, international civil servants and human rights experts. Rights are drafted and negotiated by experts appointed by states whose main task is to make sure that the usage of every single word in the human rights texts is compatible with the political, economical and social interests of states.¹⁹⁹ However, this is a group with little legitimacy. Inclusion of “non-governmental” organizations (yet not “the people”) was soon countered by the invention of “government-organized non-governmental organizations” (GONGOs). While the property was secured by the very first human rights texts in 1940s, there is still no secure for women’s right to get abortion.

On the other hand, weak enforcement mechanisms secure that national sovereignty is preserved as the core principle. The main method is reporting. States are invited to submit provide

¹⁹⁶ For example, Article 29/2 of the Universal Declaration of Human Rights states that “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

¹⁹⁷ Megret, *supra* note 187 at 113.

¹⁹⁸ NOLL, *supra* note 193 at 8.

¹⁹⁹ For example, while the Paris Agreement on Climate Change proposes developed countries to take the lead in combating climate change, especially in undertaking economy-wide absolute emission reduction targets, it does not impose any obligation on developed countries in this regard due to the deliberate use of 'should' instead of 'shall'. Indeed, although the original text presented in French used mandatory ('shall') language with respect to developed country targets and advisory ('should') language with respect to developing country mitigation, 'shall' was declared as a 'typo' and changed to 'should' by the Secretariat during the heated debate in the room in the final hours due to the 'take it or leave it' threat by the US. It is even argued that the US accepted the Paris Agreement, but never ratified the Kyoto Protocol, because of this provision which imposes no obligations. See more Daniel Bodansky, *Reflections on the Paris Conference*, OPINIO JURIS (Dec. 15, 2015), <https://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference/> (last visited Jan 14, 2024).

periodic or ad hoc reports to international committees created for monitoring purposes on the extent to which they are complying with their treaty obligations.²⁰⁰ Another type reporting is the country based or theme based special reports prepared by "special rapporteurs" appointed by the Human Rights Commission. The second method as a possibility for enforcement is right of petition for individuals before international bodies, where agreed by States.²⁰¹ However, it must be noted that in most cases, monitoring bodies have no authority to issue binding decisions, rather, their decisions are advisory in nature. International courts can investigate complaints by victims of human rights violations, and in a few cases, conduct quasi-judicial proceedings against states. However, even in these few instances, the structure of these courts which consisted of judges appointed by the governments themselves is seemed doubtful and therefore criticized.²⁰² On the other hand, and most importantly, there is no expectation of "absolute uniform implementation" of human rights. Instead, states remain free to choose the measures which they consider appropriate.²⁰³ This is what the European Court of Human Rights describes as the "margin of appreciation" which is the margin that states have in how they implement their obligations taking into account their historical, social, political and legal specificities. So as Douzinas puts it; "the government-operated international human rights law is the best illustration of the poacher turned gamekeeper."²⁰⁴ Indeed, it is true that unless governments are removed from the running of human rights institutions, these will have little legitimacy.²⁰⁵

As a result of this state-based structure and the legal instruments authorised by human rights law itself, it is true that human rights law, which is supposed to protect people against states, is at the mercy of states. Indeed, far from being against the state, it is much more about legitimizing the role of the state. Within this context, for instance, a refugee fleeing an ongoing

²⁰⁰ Megret, *supra* note 187 at 117.

²⁰¹ *Id.*

²⁰² DOUZINAS, *supra* note 75 at 120.

²⁰³ *Sunday Times v UK*, App. No. 6538/74, 2 EHRR 245 (1979-80). para.61.

²⁰⁴ DOUZINAS, *supra* note 75 at 119.

²⁰⁵ On 17th March 2021, feminist organisations from Turkey, namely Women for Women's Human Rights and Women's Coalition organized an international panel called "Imagining an Independent Global Feminist Body: Obstacles & Opportunities" under the 66th session of the Commission of Status of Women. In the concept note prepared for the event, feminists were emphasizing that "hierarchical structure of multilateral bodies, professionalism, language, visa and travel barriers made it harder to establish accountability and develop progressive standards globally. Given the governments' attacks on our rights, it is evident that we need to discuss more on the possibilities for a new independent global feminist body, that will be monitoring the advancements with regards to gender equality which is accessible to all women and girls across the world to ensure accountability." See, the website of Women for Women's Human Rights, <https://kadinininsanhaklari.org/wp-content/uploads/2022/03/Concept-note-CSW-Parallel-Event-A-Global-Independent-Feminist-Body.pdf>

war in their country who believes that they have rights by virtue of being human, may surprisingly find themselves in a legally vulnerable condition as a ‘guest’ or ‘Muslim brother/sister’ in the destination country just because the destination country put a geographical reservation on the refugee convention in order to exclude people coming from a particular part of the world from rights.²⁰⁶ Similarly, women, girls or victims of domestic violence may shockingly find themselves when they woke up in a morning as abandoned from the protection against violence, since their country has withdrawn from a human rights treaty on combatting against gender based and domestic violence.²⁰⁷

Structurally weak monitoring mechanisms are not capable to change to the mere fact that human rights are violated by and within states. People are murdered, tortured and starved by national governments, their national laws, police and institutions. Hence, it is not convincing to present the idea of the universality of human rights placed into state-legislated international codes and state-appointed enforcement mechanisms as the remedy for atrocities ongoing within the states. Moreover the attribution of responsibility to states is further complicated by the involvement of private and sometimes even transnational organisations that perform important state functions, such as border security, or armed forces. Furthermore, because of the indeterminate and vague language of the human rights instruments, the scope of rights is always determined by the interests of states. Even the most basic “trumps” have their own limitations and in case of any conflict between them, balancing is made -unavoidably- within the structure of political deliberation.²⁰⁸

While it is already hard to find anthropological and ontological foundations of universality of human rights from empirical and philosophical grounds, it is almost hopeless to claim universality of human rights -including legal universality- in such a contemporary international order where, as Koskeniemi spells out, “what rights mean and how they are applied is only determined by states.”²⁰⁹ Accordingly, it is not surprising that the biggest defender of the claim

²⁰⁶ Due to the geographical limitation that Turkey put on the 1951 Geneva Convention, only migrants fleeing as a consequence of “events occurring in Europe” can be given refugee status under the 1951 Geneva Convention. In other words, although Turkey is a signatory, the Convention does not apply to refugees from any country outside Europe. Turkey has recently been hosting more than 3 million Syrians who could not have “refugee status” and therefore could not enjoy international legal protection under the Geneva Convention. See <https://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey>

²⁰⁷ At the midnight of the 20th of March 2021, Turkey announced their withdrawal from the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the Convention also known as “the Istanbul Convention”, since it was opened to signature in Istanbul in 2011, when Turkey held the Chairmanship of the Council of Europe.

²⁰⁸ KOSKENIEMI, *supra* note 186 at 160.

²⁰⁹ *Id.* at 153.

of the universality of human rights is still the nation-state. Because as Schmitt cleverly puts it, “Whoever invokes humanity, wants to cheat.”²¹⁰

2.3. *Human Rights or Citizenship Rights?*

To argue that meaning and scope are determined by the state is a direct challenge to the idea of the universality of human rights, because it signals that human rights are not the same for all people, or not the same at all times and in all places. “Human beings are born free and equal in dignity and rights” as long as the state of which they are citizen of it voluntarily accepts to be a party to the human rights treaty which indicates so. Here, there is a direct analogical link between the universality of human rights and the subject of human rights. While this challenge invalidates the idea that human rights are inherent to all human beings regardless of who they are; at the same time, it invokes the idea that human rights have a particular subject. Indeed, by locating rights within the nation-state, not only did divine legislators become sovereign law-makers, but also the rights of a universal human became the rights of a particular human, namely the national citizen.

In fact, from the very beginning of the 18th century, citizen rights were both anti-individualist and anti-universalist.²¹¹ This was crystal clear in the French Declaration. It was already mentioned above that the revolutionary declarations of 18th century were real momentums in the establishment of nation-state both in the American and French examples. The revolutions were founded on the principle of national sovereignty and territory which separates them from other nations. Just as “humanitas” a few hundred years earlier had privileged the free, educated Roman man by excluding women, slaves and children; citizenship of this new type of polity introduced a new type of privileged who was protected by the exclusion of some. The difference, however, was that citizenship shifted the exclusion to the nation.

By introducing the distinction between human being and citizen, the tension between the universal and the local is acknowledged more. While the Article 1 of the French Declaration states that “Men are born and remain free and equal in rights”, Article 3 adds that “The principle of all sovereignty resides essentially in the Nation.” While the Declaration was announcing the rights on behalf of “man”, it was also announcing that only citizens who were part of the nation

²¹⁰ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL: EXPANDED EDITION* 54 (2008).

²¹¹ Mark Goodale, *Human Rights beyond the Double Bind of Sovereignty*, in *THE LIMITS OF HUMAN RIGHTS*, 84 (Bardo Fassbender, Knut Traisbach ed. 2019).

were entitled to these rights. Apparently, it becomes paradoxical “whether the law thereby declared is for French or human, or whether those nations which are not French ought to become French or become human by endowing themselves with Constitutions that conform to the Declaration.”²¹²

Hannah Arendt, one of the few theorists to draw our attention to the relation between the two principles, confirmed the priority that the world of nation states has accorded to citizenship.²¹³ As Arendt saw it clearly, “far from being sources of appeal that transcended state and nation, the rights were at the heart of the construction of the nation state”.²¹⁴ This is exactly why, as Noll correctly states, “As long as the social-contractarian paradigm is hinged on the idea of the state, there are no cogent reasons to grant rights to non-contractarians ‘outside’ the state.”²¹⁵ Human rights are privileges given to citizens. Political membership is the main key to have these privileges. Without membership, thus, rights do make no sense.

When Arendt argued that ‘the very concept of human rights has broken down’²¹⁶, this was because of the perplexities inherent in the notion of human rights claimed by the French Declaration. She argued that the Declaration created a conceptual confusion, and made “philosophically absurd and politically unrealistic claims such as that each man is born with the inalienable right to unemployment insurance or an old age.”²¹⁷ Following Burke’s critique of the universality of human rights, Arendt argued that the abstract man to which the Declaration referred did not seem to exist anywhere.²¹⁸ According to her “from the beginning the paradox involved in the declaration of inalienable human rights was that it reckoned with an “abstract” human being who seemed to exist nowhere, for even savages lived in some kind of a social order.”²¹⁹ Consequently, for Arendt, only rights worthy of the name are citizens’ rights. Indeed, human rights do not even exist, because birth and basic humanity does not come with any attached rights. This is because only rights created and enforced by domestic legal systems give protection to political actors, in other words to citizens.²²⁰

²¹² JEAN-FRANÇOIS LYOTARD, *THE DIFFEREND* 147 (1988).

²¹³ PAULINA TAMBAKAKI, *HUMAN RIGHTS, OR CITIZENSHIP?* 2 (2010).

²¹⁴ MOYN, *supra* note 73 at 12.

²¹⁵ NOLL, *supra* note 193 at 10.

²¹⁶ ARENDT, *supra* note 179 at 299.

²¹⁷ Christoph Menke, *The “Aporias of Human Rights” and the “One Human Right”: Regarding the Coherence of Hannah Arendt’s Argument*, 74 *SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY* 739, 739 (2007).

²¹⁸ ARENDT, *supra* note 179 at 300.

²¹⁹ *Id.* at 291.

²²⁰ COSTAS DOUZINAS, *HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 99 (2007).

According to Menke's reading of Burke and Arendt, human rights are normative demands that abstract from the conditions and forms of the very action by means of which they could be realized. Such an action is the act of legislation.²²¹ One has a right only by means of a law. The rights which we enjoy come 'from within the nation,' so that neither natural law, nor divine command, nor any conception of humanity is needed as a source of law. There are no rights other than those of "an Englishman," which come "from within the English nation" by way of legislation; the "rights of man," thus, do not exist. The "man" of the Rights of Man was a mere abstraction because the only real rights were the rights of citizens, the rights attached to a national community as such.²²²

The paradox here is that the legislator and the legal subjects are the same, namely citizens. Yet, there is a gap between the subject of the statement "we the people legislate norm x" and "we the people ought to obey x".²²³ While the first group consists of the citizens, the second consists of more than citizens, it includes non-nationals like foreigners, migrants and refugees as well as nationals who restrained from polity like mentally disabled people, children, prisoners, transgenders, ethnic minorities and all the internal others. They are the people subjected to the law, but they are not the subjects of the law.

The tension between the universal category of human being and the political category of citizenship, as the citizen/paradox, lies at the heart of human rights. Moreover, the same paradox also appears at the level of international human rights law. In fact, this is a paradox on which international human rights law itself is based.²²⁴ As mentioned above, the lawmakers of human rights law is the "self-appointed representatives of humanity" in Geneva, New York or Strasbourg; while the subject of rights are the concrete human beings all around the world. The state centred structure of human rights law, indeed, makes it almost impossible to attach rights with the subjects of rights. International human rights law not only designates the state as the legislator of rights, but the state is also authorised to provide protection against its own violations of rights. This paradox is best described by Hamacher. Hamacher argues that human rights are paradoxical by definition. Although they are recognised as inalienable, they are in fact defined by national governments:

²²¹ Menke, *supra* note 217 at 742–743.

²²² Rancière, *supra* note 7 at 298.

²²³ DOUZINAS, *supra* note 75 at 104.

²²⁴ Kate Nash, *Human Rights, Global Justice, and the Limits of Law*, in *THE LIMITS OF HUMAN RIGHTS*, 75 (Bardo Fassbender, Knut Traisbach ed. 2019).

“Human rights are made dependent on a particular, that is, alien power to guarantee them, and are thus exposed to the arbitrary will and the special interests of this power. Herein lies the fundamental and unresolvable paradox of human rights.”²²⁵

Making national law the sole protector of rights, and treating foreigners as less human as a result, puts claims for the universalisation of human rights to a difficult test. The nation-state comes into existence through the exclusion of other people and nations. The modern subject achieves their humanity by acquiring political rights of citizenship. The alien does not have rights because they are not part of the state and they are less human because they are not citizen.²²⁶ Put another way, human is citizen;²²⁷ we become human by virtue of citizenship. Consequently, rights of human are, in fact, rights of citizen.

2.4. *Citizenship as 'the Right to Have Rights'*

Once it is understood that human rights are in fact citizenship rights; it becomes easier to understand Arendt's thesis of that the loss of nationality status or citizenship rights means the loss of all rights. For her, when millions of people were forced to leave their home because of the atrocities of the Second World War, they became homeless and stateless. Since they had no government to represent and protect them, they were deprived of not only of their citizenship rights but also of their human rights. Because in the eyes of the state, she argues, those deprived of citizenship have no human rights.²²⁸

Arendt affiliates her theory with the phenomenon of mass refugees during the First and Second World Wars.²²⁹ The reason why she uses the example of migration and refugees to build her theory makes perfect sense. Because as Benhabib puts it, refugees, minorities or stateless persons are special categories created by the nation-state. In a state-centred international law system, one's legal status depends on the protection of the nation-state, as the highest authority which has power to issue the papers necessary for entitlement.²³⁰ Thus, cross-border migration clearly shows the dilemma lies at the heart of state-centred international law: while national

²²⁵ Werner Hamacher, *The Right to Have Rights (Four-and-a-Half Remarks)*, 103 SOUTH ATLANTIC QUARTERLY 349-350, 343 (2004)

²²⁶ DOUZINAS, *supra* note 75 at 106.

²²⁷ Hamacher, *supra* note 225.

²²⁸ ARENDT, *supra* note 179 at 291–297.

²²⁹ *Id.* at 277.

²³⁰ BENHABIB, *supra* note 7 at 54–55.

sovereignty claims reveal on the one side, adherence to universal human rights principles on the other. As Arendt notes, “sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality, and expulsion in international law.”²³¹ Indeed, Arendt was perfectly right to highlight the conflict between universal human rights and sovereignty as the fundamental paradox at the heart of the state-centred international law.²³²

The conceptualisation of “the right to have rights” was introduced by Hannah Arendt in the second part titled “Imperialism” of her famous book “The Origins of Totalitarianism”.²³³ Arendt argues that when millions of human beings were forced to flee across the Europe during the Second World War and became immigrant or stateless, they realized something crucial: the precondition for being a mere human being is first and foremost to be a citizen of a state. Because of the massive denaturalisation occurred during the war, people without passports found themselves with no legal protection and no rights. Arendt describes how the Nazis created the conditions that enabled genocide. German Jews were first stripped of their citizenship, then expelled and rendered stateless. Jews now lost all political affiliation and social identification making them recognisable as fellow human beings.²³⁴

In Arendt’s theory, the idea of human rights is a paradox, because the only rights are the citizenship rights. The loss of citizenship rights, therefore, is equal to the loss of human rights, regardless of what the human rights declarations say.²³⁵ She argues that the “inalienable” human rights are enjoyed only by citizens.²³⁶ For her, human rights, which are supposed to be inalienable, were tested as unenforceable when stateless people appeared who were no longer citizens of any sovereign state.²³⁷ Once they lost their citizenship status, they lost all their rights.

The first thing that they lost was their homes, but the effect of the loss was much greater. With the loss of their homes, they lose “the entire social texture into which they were born and in which they established for themselves a distinct place in the world”.²³⁸ Here, what Arendt is referring to is not a physical space but a political organization. This is followed by the loss of government protection, which implies the loss of legal status.²³⁹ Without the legal status of

²³¹ ARENDT, *supra* note 179 at 278.

²³² BENHABIB, *supra* note 7 at 69.

²³³ ARENDT, *supra* note 179 at 296.

²³⁴ *Id.* at 291-300.

²³⁵ *Id.* at 292.

²³⁶ *Id.* at 279.

²³⁷ *Id.* at 293.

²³⁸ *Id.*

²³⁹ *Id.* at 294.

nationality, the stateless person had nowhere to reside.²⁴⁰ So Arendt insists that problem is not just that they are “deprived of liberty, of equality before the law or freedom of opinion, but, that they no longer belong to any community whatsoever.”²⁴¹ She argues that these people have found themselves out of legality, because the calamity they suffered from is not that they are not equal before the law, but instead, there is no law exist for them.²⁴² As Arendt’s words, they were “the scum of the earth”²⁴³; whom forced to live “either under the law of exception, or under conditions of absolute lawlessness.”²⁴⁴ Indeed, when they lost their home and governmental protection, the things that are at stake are something much more crucial than basic liberties; it is the rights of citizens were at stake. This is what Arendt call “rightlessness”.²⁴⁵ What was being denied was, first and foremost, their “the right to have rights”.

For Arendt, we became aware of the existence of “a right to have rights” when millions of people emerged who had lost and could not regain their rights.²⁴⁶ What she meant by “right to have rights” was a matter of political membership. While analysing the phrase “the right to have rights”, Benhabib remarks “what is invoked here is a moral claim to membership and a certain form of treatment compatible with the claim to membership”.²⁴⁷ In other words, it is the claim to be recognized as a subject of rights. Benhabib says:

“For Arendt such recognition is first and foremost a recognition to ‘membership’, the recognition that one ‘belongs’ to some organized human community. One’s status as a rights-bearing person is contingent upon the recognition of one’s membership.”²⁴⁸

In this sense, the right to have rights is a question of the right to belong to, or exist in a political community. According to Arendt, human rights can only exist if a person is a member of a political community. She strongly protests against the notion that human rights are the rights that all human beings have simply because they are part of the humanity. She argues “the conception of human rights broke down at the very moment when the world confronted with

²⁴⁰ KESBY, *supra* note 7 at 13.

²⁴¹ ARENDT, *supra* note 179 at 294.

²⁴² *Id.* at 295-296.

²⁴³ *Id.*

²⁴⁴ *Id.* at 269.

²⁴⁵ *Id.* at 267.

²⁴⁶ *Id.* at 296–97.

²⁴⁷ BENHABIB, *supra* note 7 at 57.

²⁴⁸ *Id.*

persons who had indeed lost all other qualities and specific relationships, except that they were still human. The world found nothing sacred in the ‘abstract nakedness of being human.’”²⁴⁹ In Arendt's thought, those who lose their citizenship cannot be fully human, because they are “out of legality”²⁵⁰, now, they fall into inhumanity. In other words, to lose membership of a political community is to be expelled from humanity itself. When they have lost all distinctive political qualities, they begin to belong to the human race “in much the same way as animals belong to a specific animal species, called man”.²⁵¹

Apparently, Arendt's conceptualization of ‘right to have rights’ signifies a distinction between human rights and citizens' rights. The only rights which are worthy of the name are, as she argues, not the human's but the citizen's rights. In fact, what Arendt refers to when theorising around the concept of 'the right to have rights' is the paradox of human rights and thus the tension at the heart of the state-centred international legal system. When people lose their citizenship, they find themselves in a state of total obscurity where there is not even a law for them.

On the other hand, it is true to note that international human rights law has been developed to response such tension in decades. Today, it might be argued that the 1951 Geneva Conventions and its Protocol, creation of the UN High Commissioner on Refugees (UNHCR) and most recently the International Criminal Court (ICC) are important developments intended to protect those whose right to have rights has been denied.²⁵² Indeed, international human rights law has evolved to protect migrants regardless of their nationality status and recognises that people should be afforded basic protections and freedoms through international humanitarian law which cannot be suspended even in wartime. Recently, some cosmopolitan theorists proposed a non-state-centred reconceptualization for Arendt's concept of the right to have rights. For example, referring to the evolving system of international human rights law, it is argued that “the right to have rights today means the recognition of the universal status of personhood of each and every human being independently of their citizenship”.²⁵³ Moreover, it is even argued that international human rights (as the way Hopgood uses it as a global structure of laws, courts,

²⁴⁹ ARENDT, *supra* note 179 at 299.

²⁵⁰ *Id.* at 294.

²⁵¹ *Id.* at 302.

²⁵² BENHABIB, *supra* note 7 at 67–68.

²⁵³ SEYLA BENHABIB, *DIGNITY IN ADVERSITY: HUMAN RIGHTS IN TROUBLED TIMES* (2013).

norms and organisations²⁵⁴) today are the rights of those who have no rights, emphasizing that the subject of human rights is a political subject capable to politically act and resist.²⁵⁵

While these arguments are correct to some extent, they still tend to miss the question of the extent to which international human rights can provide protection for those denied the right to have rights within national borders in the current state-centred international law system. Today, it might be true that states do not create stateless individuals through denaturalization, but the nation-state continues to have the power - or, in other words, a wide "margin of appreciation" - to recognise or reject a person as a member or as a person entitled to enjoy rights, by constantly reproducing its own "rightless" and "scums" even for its own nationals through practices of inclusion and exclusion, as will be analysed in more depth below. Moreover, it is also true that in the era of global populism where governments override and threat human rights claiming to speak for "the people", the citizen and the citizen's rights are increasingly gaining momentum against the concepts of pluralism, equality and human rights.²⁵⁶

²⁵⁴ Hopgood, *supra* note 133.

²⁵⁵ Rancière, *supra* note 7 at 298.

²⁵⁶ Kenneth Roth, *The Dangerous Rise of Populism: Global Attacks on Human Rights Values*, JOURNAL OF INTERNATIONAL AFFAIRS 79 (2017)

Chapter 3

WHO IS CITIZEN?

To argue that the subject of human rights is the citizen requires an analysis of who the citizen is. Citizenship emerged simultaneously with the early Greek city-states, polis. The Greek term that we today call citizenship, is the word “politeia”, derived from “polities” (citizens), which in turn is derived from “polis” (city).²⁵⁷ Although rooted in the ancient Greek, citizenship in the modern sense is the product and expression of the modern state.²⁵⁸ The emergence of the nation-state, but particularly the French Revolution is a turning point for citizenship in terms of establishing the link between nationality and citizenship. Today, citizenship has been established as a commonly held status²⁵⁹ in every nation-state around the world.²⁶⁰ On the other hand, it is also a fact that it is a phenomenon with different aspects that has been changing and expanding since Ancient Greece, and therefore it is a highly contested and constantly changing institution.

Citizenship is mostly analysed along three dimensions: legal, political and identity dimension. The legal dimension views citizenship as a legal status that provides citizens civil, political, and social rights. The political dimension sees citizen as an active participant in a society's political systems, in particular as a political agent. Lastly the identity dimension describes citizenship as membership of a political community which provides a source of identity for citizens.²⁶¹

²⁵⁷ PAUL MAGNETTE, *CITIZENSHIP: THE HISTORY OF AN IDEA* (2005).

²⁵⁸ ANDREW LINKLATER, *Citizenship and Sovereignty in the Post-Westphalian State*, 2 *EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS* 77 (1996)

²⁵⁹ DEREK HEATER, *WHAT IS CITIZENSHIP?* 1 (1st edition ed. 1999).

²⁶⁰ Patricia K. Wood & Engin F. Isin, *Citizenship and identity*, *CITIZENSHIP AND IDENTITY*, 5 (1999).

²⁶¹ WILL KYMLICKA & WAYNE NORMAN, *CITIZENSHIP IN DIVERSE SOCIETIES* (2000).

On the other hand, two main traditions come forward in the interpretation of the nature of citizenship in citizenship studies. These are the civic republican tradition emphasizing obligations, and the liberal tradition emphasizing rights.²⁶² Citizenship as an obligation has its roots in the older classical Greek civic republican tradition, which presupposes political participation as a civic duty, while the rights approach derives from the seventeenth-century liberal political tradition.²⁶³ Compared to the republican variant, liberal citizenship which involves a loose relationship to the state is much less demanding from the individual.²⁶⁴ Yet, some authors argue that citizenship has to be understood as a combination of rights and obligations with a set of practices that define the individual's membership in a political community; thus, it is neither a merely sociological nor a legal concept, but a relationship between these two.²⁶⁵ Also, some authors avoid adhering to a single theory and instead envisage a mixed and intersectional theory of citizenship.²⁶⁶ Nevertheless, it is broadly agreed on that it is the liberal form that has prevailed for the last two centuries and still prevails today.²⁶⁷

One of the founding documents of modern citizenship studies and widely regarded as one of the most influential books on theory of citizenship that remains relevant today, is T.H. Marshall's "Citizenship and Social Class"²⁶⁸ written in 1949. In his book, Marshall defines citizenship almost exclusively in terms of the possession of rights. According to Marshall citizenship is essentially a matter of ensuring that everyone is treated "as a full and equal member of society".²⁶⁹ For him, citizenship is about being accepted as a full member of the society.²⁷⁰ In other words, all members of the polity are granted the same set of civil, political, and social rights through the legal status of citizenship. The influence of Marshall's citizenship-as-rights approach was not limited to academia. In the 1958 case of *Trop v. Dulles* concerning the loss of citizenship, the US Supreme Court affirmed that it understood citizenship as 'the right to have rights'.²⁷¹ In the *Trop v. Dulles*, the American Supreme Court stated that the loss of citizenship deprives the person of their status in the national and international political

²⁶² HEATER, *supra* note 259 at 4.

²⁶³ Ruth Lister, *What is Citizenship?*, in *CITIZENSHIP: FEMINIST PERSPECTIVES* 13, 13 (Ruth Lister & Jo Campling eds., 1997)

²⁶⁴ HEATER, *supra* note 259 at 4.

²⁶⁵ Wood and Isin, *supra* note 260 at 6.

²⁶⁶ Somers, *supra* note 7.

²⁶⁷ Wood and Isin, *supra* note 260 at 6.

²⁶⁸ T.H. MARSHALL & TOM BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS* (Robert Moore ed., 1992).

²⁶⁹ WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 287 (2002).

²⁷⁰ HEATER, *supra* note 259 at 12–13.

²⁷¹ *Trop v. Dulles* 356 US 86,102 (1958) https://www.lawpipe.com/U.S.-Supreme-Court/Trop_v_Dulles.html

community, and therefore the loss of citizenship means the loss of the ‘right to have rights’, adding that it is a more primitive form of punishment than torture.²⁷²

3.1. Citizenship as Identification and Classification

Every nation state in the world today requires one to be identified in order to ensure that they have the right to call themselves "citizen". As Lyon puts, “the very advent of modern forms of citizenship assumes identification.”²⁷³ This is because of the fact that for in the transition from feudary to citizenship, the prerequisite for a person to become a member of the nation claiming sovereignty, in other words, to become a sovereign member, is that the person must first be recognised, that is, identifiable. The identification of the individual is indeed recognised as fundamental for the multiple functioning of the state.²⁷⁴ The demand for identification as the condition of citizenship is, thus, the sovereign demand.²⁷⁵ In order to be governed, first, individuals must first be registered, measured, classified, monitored and if necessary, corrected. Thus, counting, numbering, monitoring and documenting citizens are the most basic mechanisms of governance.

It is indeed true that in modern world, one cannot exercise their rights as a citizen or take advantage of privileges of citizenship, without proper identification. Proper identification is essential to get a job, to receive medical care, to enrol in a school, to travel, to open a bank account and make financial transactions, to communicate, to purchase goods and services, to drive a car or to stay in a hotel. Similarly, without providing a proper identification, one may be refused to access emergency medical intervention, denied access to social security, denied access to education or turned away from a flight. This is because the recognition of an individual as a ‘citizen’ having rights before the state is only possible through identification. In other words, identification is the proof of citizenship.

Identification of citizens is carried out by recording personally identifiable data such as name, surname, date of birth, age, gender, place of residence and, more recently, biometric data. Person is legally recognised mostly through identity cards, birth certificates or passports issued

²⁷² *Id.*

²⁷³ DAVID LYON, IDENTIFYING CITIZENS: ID CARDS AS SURVEILLANCE 5 (2009).

²⁷⁴ JANE CAPLAN, JOHN TORPEY & JOHN C. TORPEY, DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLD 1 (2001).

²⁷⁵ PLAYING THE IDENTITY CARD: SURVEILLANCE, SECURITY AND IDENTIFICATION IN GLOBAL PERSPECTIVE, 28 (Colin J. Bennett & David Lyon eds., 2008).

by national population registration authorities. As the ‘proof of citizenship’, identification is crucial for ensuring rights and benefits provided by citizenship. In this context, a national identity card associating certain data with a specific person, verifies whether that person can, for example, enrol in a school, be seen by a doctor, benefit from social security or enjoy the right to vote.²⁷⁶ Thus, it is identification and recognition make people first ‘legally exist’ as a member of the polity by marking them as citizens who have rights and obligations before the state.

However, identification and recognition always come with “defining, classifying, segregating, separating and selecting”,²⁷⁷ because, by definition, it is all about classification and attachment.²⁷⁸ By establishing or prohibiting membership of a political community, it works as a mechanism of inclusion and exclusion.²⁷⁹ On the one hand it upholds the rights of citizen, on the other hand, it constantly re-affirms who can be counted as a citizen and who cannot.²⁸⁰

Indeed, being born into the nation, and thus being a member of the nation, may not always mean being a "sovereign member" for all people. The distinction between the subjects of law and those who are subjected to law has been mostly maintained through citizenship. In fact, the history of citizenship is the history of inclusion and exclusion; citizenship is always based on practices of inclusion and exclusion.²⁸¹ Indeed, citizenship has historically expanded to include different social groups through various practices of inclusion as a result of enormous struggles for rights, but at the same time systematically excluded some communities and members, from the very beginning.²⁸² Factors like ethnicity, class, ability, gender, sexuality, place of residence had played imported roles effecting people’s ‘multi-layered’²⁸³ citizenship.²⁸⁴ For instance, although the citizen was understood as an equal member of the polis in Ancient Greek,²⁸⁵ citizenship was granted to a limited group. While only free men over the age of

²⁷⁶ LYON, *supra* note 273 at 6.

²⁷⁷ ZYGMUNT BAUMAN, *IDENTITY: CONVERSATIONS WITH BENEDETTO VECCHI* 21 (2004).

²⁷⁸ *PLAYING THE IDENTITY CARD*, *supra* note 275 at 67.

²⁷⁹ Somers, *supra* note 7 at 21.

²⁸⁰ *PLAYING THE IDENTITY CARD*, *supra* note 275 at 11.

²⁸¹ ÉTIENNE BALIBAR, *WE, THE PEOPLE OF EUROPE?: REFLECTIONS ON TRANSNATIONAL CITIZENSHIP* 76 (2009)

²⁸² F. ENGİN İSİN ET AL., *HANDBOOK OF CITIZENSHIP STUDIES* 3 (2002).

²⁸³ Nira Yuval-Davis, *The “Multi-Layered Citizen,”* *INTERNATIONAL FEMINIST JOURNAL OF POLITICS* 119 (1999)

²⁸⁴ NIRA YUVAL-DAVIS, *GENDER & NATION* (2022)

²⁸⁵ Ryan Balot, *Revisiting the Classical Ideal of Citizenship*, in *THE OXFORD HANDBOOK OF CITIZENSHIP*, 26 (Ayelet Shachar et al. eds., 2017)

eighteen whose parents were Athenians were citizens, women, slaves, children and foreigners were excluded from citizenship.²⁸⁶

3.2. *Citizenship as Exclusion of Body and Sexuality*

In this regard, one of the vital aspects influencing one's citizenship has always been the body and sexuality. It is striking to see that the history of citizenship is particularly the history of women's exclusion from citizenship. Throughout history, women were not considered eligible for full membership and neither revolutions nor modernity have brought a citizenship status to women. Women, half of the human population, have been rendered almost invisible in the political conception of the individual.

Which persons are recognizable as citizens and to what extent they enjoy rights and benefits of citizenship have always been gendered since the inception of the notion of citizenship.²⁸⁷ In fact, citizenship is a profoundly gendered construct in itself.²⁸⁸ As feminists explain, this is because of the dichotomy between public and private which is inherent in the design of citizenship as a concept.²⁸⁹ From the ancient Greek, the distinction between public and private sphere played a central role in the design of the political life. Public life was considered as the domain of men, while private sphere was the domain of women and children.

The ancient tradition of excluding women from citizenship continued during the French Revolution. As mentioned in the first chapter, the rights proclaimed by the French Declaration were not human rights, but the rights of "man". Olympe De Gouges, who opposed such deliberate exclusion of women from human rights and announced the "Declaration of the Rights of Woman and Woman Citizen", was sent to the guillotine.²⁹⁰ Even in 1912, a jurist was claiming that "a woman is not a null but a non-existent citizen, like an incestuous or same sex marriage".²⁹¹ It was as late as 1944 when women were finally given the right to vote in France, while it was 1971 in Switzerland.²⁹² In late nineteenth century women Britain and the United

²⁸⁶ *Id.* at 29–30.

²⁸⁷ Leti Volpp, *Feminist, Sexual, and Queer Citizenship*, in THE OXFORD HANDBOOK OF CITIZENSHIP 154, 154 (Ayelet Shachar et al. eds., 2017)

²⁸⁸ Ruth Lister, *Sexual Citizenship*, in HANDBOOK OF CITIZENSHIP STUDIES 191, 203 (2002)

²⁸⁹ *Id.* at 191.

²⁹⁰ NICOLE ARNAUD-DUE, WOMEN ENTRAPPED: FROM PUBLIC NON-EXISTENCE TO PRIVATE PROTECTION, IN WOMEN'S RIGHTS AND THE RIGHTS OF MEN 9 (A.-J. ARNAUD AND E. KINGDOM EDS., 1990).

²⁹¹ *Id.*

²⁹² *Id.*

States, women were not recognised as independent legal subjects and did not have the right to contract or control property.²⁹³ Marital rape and domestic violence were not criminalised until the twentieth century, and they are still not recognized as criminal act still in several nation-state. Even today, in 2024, women's body is not still women's own. Women are deprived from their very basic right to life and right to control their own bodies through abortion in lot of countries including the United States.²⁹⁴ As Balibar puts, "the constitution of a citizenship functioned as a 'men's club'".²⁹⁵

The gendered distinction between public and private spheres correlated with two kinds of claims to social resources: one is based on state, governance and market, the other is based on family, reproduction and care. In other words, the public sphere was characterized as the sphere of individual, self-interest and rights, while the private sphere was characterized as the sphere of dependency, needs and 'selflessness of family'.²⁹⁶ As Volpp stipulates, through the dichotomy between public and private, citizenship "split the human universe into gendered bodily spheres."²⁹⁷

On the other hand, it is true that in both the liberal and republican traditions, the citizen is conceived as an abstract, disembodied, rational individual²⁹⁸ and body and sexuality are neglected in citizenship discourse. The gendered private-public dichotomy associates the disembodied man with reason and the embodied woman with sexuality and the emotions.²⁹⁹ In Phelan's words, "Men are recognized as having body, but it is denied that they 'are' bodies."³⁰⁰ In other words, she argues that their identities are not comprised of their bodies; rather, their bodies are controlled by their minds.³⁰¹ While reason and rationality are glorified; the body (especially female body), sexuality, desires and emotions are excluded from the boundaries of citizenship. Bodies and desires are treated as abject, even inhuman.³⁰²

²⁹³ Volpp, *supra* note 287 at 153.

²⁹⁴ In overturning *Roe v. Wade* in 2022, the U.S. Supreme Court removed nationwide protections for abortion rights. Since then, some states have criminalized abortion while others have strengthened protections. See, *Dobbs v. Jackson Women's Health Organization* 19-1392, 597 US (2022) https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf

²⁹⁵ ÉTIENNE BALIBAR, *CITIZENSHIP* 76 (2015).

²⁹⁶ WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 160–162 (2020).

²⁹⁷ Volpp, *supra* note 287 at 154.

²⁹⁸ Lister, *supra* note 288 at 194.

²⁹⁹ *Id.*

³⁰⁰ SHANE PHELAN, *SEXUAL STRANGERS* 41 (2001)

³⁰¹ *Id.* at 42.

³⁰² NANCY C. M. HARTSOCK, *MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* 177–178 (1985).

However, reproduction is the only exception to this disembodiment. Indeed, reproduction has been the most vital aspect shaping (female) citizenship. Women have been accorded a critical role in the reproduction of nations; they are the mother of future citizens. They are both ‘biological and cultural reproducers’³⁰³, because they were seen as the symbolic “border guards” who carry the honour of the nation as well as transmit its cultural heritage to the next generation.³⁰⁴

Indeed, women have been the ‘reproducers of citizenship’ in terms of their reproductive capability.³⁰⁵ It is precisely for this reason that women who have the capacity to reproduce are valued and celebrated, while women who do not have the capacity to give birth or who do not prefer to give birth have been condemned and demonised by the dominant discourse throughout history.³⁰⁶ Accordingly, only the life of the foetus is valuable, and its existence and survival is always superior to that of the woman. For this reason, in many countries women are still imprisoned for terminating their own pregnancies.

It is important to note that it is not sexuality or the body that is sanctified and glorified, but only reproduction. In fact, the gendered body is subjected to multi-layered rules and regulations to make sure its sexuality is directed only to reproduction.³⁰⁷ Whether women can give birth or not, how many children they can give birth to, what methods they can use, and other issues related to reproductive health such as surrogacy, contraceptive use, sperm donation and banks are strictly regulated. As the ‘border guard’, the duty of female citizen is to protect the ‘genetic pool of the nation from contamination’.³⁰⁸

However, women are not the only group excluded from citizenship. Since any non-reproductive sexual activity is not justified as an act of citizenship, people who are not considered to have a reproductive sexuality, such as persons with disabilities or homosexuals, or those whose reproductive sexuality is restricted, such as children, are also excluded from citizenship. Although the forms of exclusion from citizenship differ between a heterosexual woman and a homosexual man, or between a disabled person and a child, their exclusion has common roots:

³⁰³ Yuval-Davis, *supra* note 283 at 130.

³⁰⁴ *Id.*, 129.

³⁰⁵ Volpp, *supra* note 287 at 160.

³⁰⁶ See for instance, “Turkish president says childless women are ‘deficient, incomplete’”, *The Guardian*, 6 June 2016, <https://www.theguardian.com/world/2016/jun/06/turkish-president-erdogan-childless-women-deficient-incomplete>

³⁰⁷ Yuval-Davis, *supra* note 283 at 123.

³⁰⁸ Nira Yuval-Davis, *Women and the Biological Reproduction of the Nation*, in *GENDER & NATION* 26, (1997)

their bodies and their sexuality. As Young stipulates, these are the groups identified with ‘the body, sexuality and feelings.’³⁰⁹

As those whose sexuality is not seen as reproductive, lesbians, gays and transgenders are also excluded from the construction of nation and nationality. Moreover, they pose a profound threat to the survival of the nation and the nation-state.³¹⁰ They are not biological reproducers, they cannot be the mothers or fathers of future citizens. They are not cultural reproducers either. They owe their existence to the tolerance of politics. In short, both the nation and citizenship are heterosexually constructed. The citizen is in fact neither merely human nor, men as a homogeneous group. It is a specific group of men, usually heterosexual, abled and white men.³¹¹

In fact, it is true that the relation between the term ‘sexual’ and ‘citizenship’ has not been deemed even as relevant in citizenship studies for long. Although citizenship “always lays hold of bodies,”³¹² as Lister argues in the beginning of her essay, the concept of ‘sexual citizenship’ has been dismissed in citizenship studies as an oxymoron.³¹³ Theories of sexual citizenship has been conceptualised through the category of “sexual and bodily rights” that are primarily invoked by women and LGBTI+s. Focusing on non-normative sexualities which have not been underpinned by citizenship, sexual citizenship theorists tend to approach the impact of sexuality in accessing to general rights.³¹⁴ In other words, sexual citizenship treats the exclusion of women and lesbians and gays from citizenship as a practice of exclusion from the public sphere.³¹⁵ These approaches, which analyse exclusion only through the public-private dichotomy, tend to consider the exclusion of ‘sexual minorities’ from citizenship as mostly a matter of (limited) access to citizenship rights.³¹⁶ In this sense, sexual citizenship theorists discussed more on sexual and reproductive autonomy, marriage equality or right to choose sexual partners mostly for lesbians and gays.³¹⁷

³⁰⁹ IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 10 (1990).

³¹⁰ Diane Richardson, *Sexuality and Citizenship*, 32 *SOCIOLOGY* 83, 90 (1998).

³¹¹ Lister, *supra* note 288 at 196.

³¹² Margrit Shildrick, *Sexual Citizenship, Governance and Disability: From Foucault to Deleuze*, *BEYOND CITIZENSHIP? FEMINISM AND THE TRANSFORMATION OF BELONGING* 138 (Sasha Roseneil ed., 2013)

³¹³ Lister, *supra* note 288 at 191.

³¹⁴ Surya Monro & Lorna Warren, *Transgendering Citizenship*, 7 *SEXUALITIES* 345, 348 (2004).

³¹⁵ Wood and Isin, *supra* note 260 at 85.

³¹⁶ Diane Richardson, *Constructing Sexual Citizenship: Theorizing Sexual Rights*, 20 *CRITICAL SOCIAL POLICY* 105 (2000).

³¹⁷ Lister, *supra* note 288 at 199–200.

3.3. *Citizenship as Exclusion from Legal Recognition*

Nevertheless, it is true that sexual citizenship literature is often focused on feminist and lesbian and gay right claims and paid little attention to the exclusion of transgender and intersex people. However, citizenship for intersex and trans people, is about much more than exclusion from public sphere and limited access to rights. Citizenship for intersex and trans people is, first and foremost, a much more existential issue of identification and therefore, legal recognition. In other words, citizenship for trans and intersex people is about to be legally recognised as a person before the law, that is, to be a subject of the rights. In this regard, citizenship for trans and intersex persons is not a matter of unequal access to rights, but instead, a matter of “right to have rights”.

Although Arendt built her theory specifically on the example of refugees, Arendt's theory is not only about stateless people who are deprived of their citizenship status. Arendt's conceptualisation of the 'right to have rights' does not only cover the case of refugees in terms of citizenship, but equally attaches to those subjects who are pushed back to the margins of society.³¹⁸ Indeed, very similarly to exclusion of refugees from rights which are intrinsic to political membership, people who do not fit into citizenship gendered boundaries of political membership are also deprived of the right to have rights.

Given the link between exclusion, full membership and the recognition of a one's citizenship rights, Margaret Somers notes that Arendt's right to have rights should be understood primarily as the right to be fully included in a social and political community.³¹⁹ In other words, it is not any single civil, legal or even social right, but the primary right of recognition, inclusion and membership in political and civil society. She reads recognition as a moral equality that is endowed by full inclusion in a social and political body.

In this regard, Somers divides citizenship into two spheres: *de jure* and *de facto* citizenship.³²⁰ *De jure* (or legal) citizenship is the right to membership of a political body or in other words, the right to be recognized by others as morally equal and a full part of the human community. However, as Somers perfectly states, legal citizenship and formal nation state citizenship may have been necessary, but they are certainly not sufficient to secure basic rights. Without *de*

³¹⁸ Nanda Oudejans, *The Right to Have Rights as the Right to Asylum*, 43 NETH. J. LEGAL. PHIL. 7, 7 (2014)

³¹⁹ Somers, *supra* note 7 at 58.

³²⁰ *Id.* at 25–26.

facto citizenship, possessing formal nation state citizenship alone is inadequate for being recognized as a fully right bearing person.³²¹ Because recognition of rights depends primarily on political membership which is the fundamental right.³²² Therefore, if both de jure and de facto membership does not exist at the same time, citizen cannot exercise any of the civil and political rights which they hold.³²³ Those are the citizens in name only.³²⁴

Indeed, it is true that although nationality remains as a privileged legal status for seeking rights, it is clearly not the only status. A person may be a national in law in terms of having de jure citizenship and yet be politically or legally 'absent' or 'superfluous'.³²⁵ Despite having the formal status of citizenship acquired at birth, one may still be excluded from the recognition of citizenship, as in the case of transgender or intersex people who are denied legal recognition of their gender.

Here Arendt's conceptualisation of the 'right to have rights' provides an excellent theoretical framework to critically approach how citizenship operates as exclusion from legal recognition for non-normative sexualities and non-binary people. As analysed above, since it is legal recognition makes people first 'legally exist' by marking them as citizens who have rights and obligations in the eye of states, legal recognition of their gender is crucial for trans and intersex people in order to first to be exist and recognised as a citizen and consequently to be entitled to citizenship rights.

It is crucial, because the nation-state, which defines, categorises and separates bodies on the basis of their gender assigned by birth, identifies only two categories in there: male and female. In other words, citizens can legally exist only in two categories. Consequently, it means there are only two types of citizens: male citizens and female citizens. Individuals somehow must fit into one of these given classes. When the certain bodies come to be identified and labelled as citizens, 'unidentified' bodies are excluded from citizenship by being denied legal recognition. When they are denied legal gender recognition, they are demonstrably treated as the "scum of the earth" and denied the right to have rights. They are not stateless, on the contrary, they are national and indeed, hold an officially issued identification card. However, the ID card they hold is not capable to make them identifiable and recognizable as a citizen, because they do

³²¹ *Id.* 26.

³²² *Id.* at 6.

³²³ KESBY, *supra* note 7 at 86–87.

³²⁴ *Id.* at 87.

³²⁵ *Id.* at 21.

not fit into one of the given citizenship categories. They are “unidentified” bodies excluded from citizenship.

As Arendt pointed out, the deprivation of an officially recognised identity is identical with the loss of all rights. Thus, following Arendt, the enormous effort made by homeless and stateless refugees to obtain 'at least birth certificates' was a very exact symbol just for to be distinguished from the nameless crowd.³²⁶ Apparently, this enormous effort made by refugees is almost identical to the efforts made by non-binary people in their struggle to obtain a legally recognised identity. Indeed, to be able to correct their IDs and birth certificates, non-binary people are somehow supposed to make a self-sacrifice in some crucial matters and pushed to make choice among their very basic rights. In this regard, it might be their very own ability to make decisions on their body, or ability to fertilize or reproduction, their bodily integrity, their psychological well-being or their marriage needed to be sacrificed.

If such a sacrifice is refused, it will have a simple consequence: denial of legal recognition of the person.. However, as discussed, denial of legal recognition means more than having the true markers on the ID cards or birth certificates. When they are excluded from legal recognition, they are deprived of having right to have rights, because they are not ‘recognizable’ as a member of the political community. As a “non-recognizable” person, they become “rightless”.³²⁷ This is precisely why, legal gender recognition is more than a matter of unequal access to rights. Because in Arendt’s terms, “what they suffered from is not that they are not equal before the law, because there is no law exist for them.”³²⁸ In between citizen and non-citizen, they are “rightless” in Arendt’s words, and their “unrecognizable” body is the true abstract nakedness of being human, in which the world found nothing sacred. Consequently, beyond denial of access to basic rights, what at stake is the social status and very legal existence of the non-binary person as a citizen.

Then, this perfectly brings us back to the question of who the subject of human rights is. It is true that the subject of human rights is the citizen, but it is incomplete. This is because citizenship is gendered and available only in two category; namely, male and female citizenship. When a person is in between these two, or when a person is excluded from legal gender recognition, they are excluded not only from citizenship, but also from the main benefit of citizenship, which is the right to have rights, or in other words, being the subject of human

³²⁶ ARENDT, *supra* note 179 at 287.

³²⁷ *Id.* at 267.

³²⁸ *Id.* 295-296.

rights. Therefore, the subject of human rights is a gendered citizen. However, before discussing how the subject of human rights is gendered, it is necessary to undertake a more detailed analysis of the concept of legal recognition of gender and of relevant human rights law rules and state practice, as is done in the next Chapter.



Chapter 4

LEGAL GENDER RECOGNITION

Although there was a growing body of jurisprudence defining human rights violations suffered by LGBTI+ people, especially in the form of practice related to the United Nations human rights treaties, as well as under the European Convention on Human Rights until early 2000s, there was a gap in law and practice and inconsistent conceptualization and understanding of sexual orientation and gender identity in particular.³²⁹ In 2005, a group of human rights NGOs facilitated by the International Service for Human Rights and the International Commission of Jurists proposed to originate the “Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity” (“the Yogyakarta Principles”) in order to map the human rights violations suffered by LGBTI+s and applicable international human rights law to such violations as well as the nature of the obligation on States for effective implementation of the human rights obligations on non-discrimination based on sexual orientation and gender identity.³³⁰ On 6 to 9 November 2006, a distinguished group of human rights experts including a former UN High Commissioner for Human Rights, UN Special Procedures mandate-holders, members of treaty bodies, judges, academics, and other experts from NGOs met at an international seminar took place in Yogyakarta, Indonesia at Gadjah Mada University and agreed the finalise text of the Yogyakarta Principles, a range of

³²⁹ Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUMAN RIGHTS LAW REVIEW 207, 214–232 (2008).

³³⁰ *Id.* at 233.

international human rights standards and their application to sexual orientation and gender identity (SOGI) issues, unanimously.³³¹³³²

As defined in the Yogyakarta Principles, ‘gender identity’ refers to “each person’s deeply felt internal and individual experience of gender” and is an integral aspect of one’s persona. It is how individuals perceive themselves and what they call themselves, such as female, male, both or neither. Gender identity may or may not correspond with the gender assigned at birth. While people whose gender identities fall outside the male-female binary are referred to as non-binary, people whose gender identity is different from the gender they were assigned at birth are referred to as trans.³³³

Concepts of gender identity or non-binary are not a terminology invented by some small marginal groups of Western activists, nor are they concepts unique to the West. On the contrary, variations of gender identity exist as a fact in long-established cultures and traditions in all regions across the world, even the terms differ. Indeed, the terms of “hijra” as used in Bangladesh, India and Pakistan, or “waria” in Indonesia; “okule and agule” in the Democratic Republic of the Congo and Uganda or “muxe” in Mexico, “fa’afafine” in Samoa; “kathoey” in Thailand and “two-spirit” among indigenous North Americans³³⁴, are some examples of terms used to refer to identities that simply fall outside the male-female binary. As a matter of fact, gender identities other than male and female are increasingly recognized in law and culture in various countries around the world, including Australia, Argentina, Bangladesh, Canada, Chili, Colombia, India, Malta, Nepal, Netherlands, New Zealand, South Africa, Pakistan, Uruguay.³³⁵

While legal and cultural recognition of gender diversity is long established and deeply rooted in several countries, it cannot be denied that the World Health Organization’s (WHO) decision

³³¹ See more about the background of the Yogyakarta Principles at <http://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/> (last visited May 10, 2023).

³³² On 10 Nov. 2017 a panel of experts published additional principles expanding on the original document reflecting developments in international human rights law and practice since the 2006 Principles, The Yogyakarta Principles plus 10. The new document also contains ‘additional state obligations’, related to areas such as torture, asylum, privacy, health and the protection of human rights defenders. The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are available at: www.yogyakartaprinciples.org

³³³ ILGA-Europe, Our glossary, (2022). <https://www.ilga-europe.org/about-us/who-we-are/glossary/> (last visited Dec 11, 2022).

³³⁴ VICTOR MADRIGAL-BORLOZ, *Report of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/73/152, (2018).

³³⁵ See more on the countries legally recognize non-binary or third gender identities at <https://www.equaldex.com/issue/non-binary-gender-recognition> (last visited Dec 11, 2022).

in 2019³³⁶ to remove “gender identity disorder” from the International Statistical Classification of Diseases and Related Health Problems (ICD)³³⁷, had a great impact on the recognition of gender diversity at the global level. Indeed, until 2018, trans categories have been included in the chapter on “mental and behavioural disorders” of the ICD. As a result of the constant efforts and struggle of the LGBTI+ movement and human rights experts to de-pathologize trans identities, in the 11th edition of the ICD, gender identity-related health issues has been redefined by replacing outdated diagnostic categories like “transsexualism” and “gender identity disorder of children” with “gender incongruence of adolescence and adulthood”. This revision should be indeed noted as a remarkable -albeit late- development, as it reflects current knowledge that gender diverse identities are not conditions of mental illness and refutes the misconception of gender diversity as a pathology. Such reclassification is intended to be used to facilitate access to legal gender recognition by preventing a diagnosis being assigned to trans people who do not seek gender-affirming medical treatment or any kind of bodily change.³³⁸

4.1. Definition and Significance of Legal Gender Recognition

Legal gender recognition (or legal recognition of gender identity) can be briefly defined as the official recognition of a person’s gender identity before the law. More specifically, legal gender recognition is understood as the legal recognition of a person’s gender identity, including name, sex/gender marker and other gender-related information, which may be reflected in surnames, social security numbers/personal identification numbers, titles etc., in public registries, records, identification documents such as identity cards, passports or driving licences and other similar documents like educational certificates.³³⁹

Legal recognition of gender identity is one of the most essential elements for a person to enjoy full and equal citizenship.³⁴⁰ It is about being a subject of rights to the extent that a person fits

³³⁶ World Health Organization, International Classification of Diseases, Eleventh Revision (ICD-11), 2019/2021, <https://icd.who.int/browse11/l-m/en> (last visited Dec 11, 2022).

³³⁷ See more on the “gender incongruence and transgender health in the ICD” at <https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd> (last visited Dec 11, 2022).

³³⁸ VICTOR MADRIGAL-BORLOZ A/73/152, *supra* note 334 at para. 13.

³³⁹ Council of Europe, *Report on Legal Gender Recognition in Europe. First Thematic Implementation Review Report on Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual orientation or Gender Identity*, June 2022, <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3> (last visited Dec 11, 2022).

³⁴⁰ P. DUNNE ET AL., COMPARATIVE LEGAL REVIEW OF GENDER RECOGNITION LAWS: ACROSS THE COMMONWEALTH 8 (2019).

into citizenship boxes designed by state, or not. While the lack of legal recognition of gender identity means an absolute denial of a person's status as a subject of rights³⁴¹, it is also true that when states deny to legal recognition to trans identities, what they are doing is messaging a sense of who is a proper citizen.³⁴² Thus, legal gender recognition is first and foremost a matter of "the right to have rights" and citizenship. In this context, legal systems that do not allow the legal recognition of gender identity, by registering the person with a gender other than the one in which they lived in, render them almost invisible politically, socially or legally. Legal gender recognition, therefore, is a question of legal existence, and recognition as a subject of human rights, first and foremost.

The legal gender recognition is closely linked to the recognition of the free development of the personality, dignity and freedom. As affirmed by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court"), personal autonomy and right to identity as the right of persons to be recognized as unique and distinguishable from others, are at the core of rights and freedoms,³⁴³ and include the freely exteriorization of one's persona and the development of choices about their own life, interests, beliefs and values.³⁴⁴ As one of the most fundamental aspects of self-determination, dignity and liberty, each person's self-determined gender identity is a fundamental part of their free and autonomous choice in relation to roles, feelings, forms of expressions and behaviours³⁴⁵, and an integral and defining component of their personality.³⁴⁶ Here, the obligation of the State is to respect dignity, liberty and the components of personality of each person.

Legal recognition of gender is also greatly important for the enjoyment of fundamental rights and freedoms, in particular protection from torture, ill-treatment, violence and discrimination.³⁴⁷ Well-documented reports reveal that trans people are at high risk of being exposed to physical, sexual or psychological forms of transphobic violence,³⁴⁸ and in many

³⁴¹ Gender Identity, and Equality and Non-Discrimination of Same Sex Couples. (Arts. 1(1), 3, 7, 11(2), 13, 17, 18, and 24 American Convention on Human Rights), Advisory Opinion OC-24/17. Inter-Am. Ct. H.R. (ser. A) No. 24, para 103, (Nov. 24, 2017)

³⁴² VICTOR MADRIGAL-BORLOZ A/73/152, *supra* note 334 at para. 21.

³⁴³ IACHR OC-24/17, *supra* note 341 at para 90-91.

³⁴⁴ *Id.* at para 91.

³⁴⁵ VICTOR MADRIGAL-BORLOZ A/73/152, *supra* note 334 at para. 21.

³⁴⁶ The Yogyakarta Principles, *supra* note 331, Principle 3.

³⁴⁷ United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23, (4 May 2015).

³⁴⁸ *Id.* at para. 20-40.

cases, perpetrators act out of hatred and prejudice against gender identity of the victims.³⁴⁹ Transphobic violence is rooted in gender norms, stereotypes and unequal power dynamics³⁵⁰, threatens the most basic human rights of trans people, particularly the right to life, all corners of the world, and as a result of the legal reflection of gendered norms and stereotypes, perpetrators are protected under systematic shield of impunity through negligent investigations and prosecutions, and almost non-existent convictions.³⁵¹

Trans people are sometimes systematically targeted and killed by criminal gangs³⁵², in the name of so-called "honour killings" or "social cleansing"³⁵³ or subjected to torture and inhuman treatment through arbitrary detention and abduction,³⁵⁴ subjected to forced and abusive medical interventions including anal testing³⁵⁵ to determine whether they are trans³⁵⁶, or even subjected to death penalty in countries where same-sex behaviour is criminalised.³⁵⁷ Trans people are also victims of so-called "conversion therapies"³⁵⁸ or "corrective rapes"³⁵⁹ which is intended to punish them or, to "heal" or "change" their gender identity.

³⁴⁹ Karel Blondeel et al., *Violence motivated by perception of sexual orientation and gender identity: a systematic review*, 96 BULL WORLD HEALTH ORGAN 29 (2018).

³⁵⁰ United Nations Development Programme, *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions*, (2016). <https://www.undp.org/asia-pacific/publications/promoting-and-protecting-human-rights-relation-sexual-orientation-gender-identity-and-sex-characteristics-manual-national> (last visited Dec 11, 2022)

³⁵¹ VICTOR MADRIGAL-BORLOZ, *Report of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/38/43, (2018). para. 33.

³⁵² AMNESTY INTERNATIONAL, *Americas: "No safe place": Salvadorans, Guatemalans and Hondurans seeking asylum in Mexico based on their sexual orientation and/or gender identity*, (2017) <https://www.amnesty.org/en/documents/amr01/7258/2017/en/> (last visited Dec 11, 2022).

³⁵³ RASHIDA MANJOO, *Report of the Special Rapporteur on violence against women, its causes and consequences*, A/HRC/20/16, (2012). para. 72.

³⁵⁴ *Chechnya LGBT: Dozens 'detained in new gay purge'*, BBC NEWS, (Jan. 14, 2019) <https://www.bbc.com/news/world-europe-46871801> (last visited Dec 11, 2022)

³⁵⁵ Forced anal examinations where doctor or other health personnel insert their fingers or other objects into the anus of a person to, have been reported in Cameroon, Egypt, Kenya, Lebanon, Tunisia, Turkmenistan, Uganda, the United Republic of Tanzania and Zambia. See, VICTOR MADRIGAL-BORLOZ, A/HRC/38/43, *supra* note 351, para.28-29.

³⁵⁶ HUMAN RIGHTS WATCH, *Global Medical Body Condemns Forced Anal Exams*, (2017), <https://www.hrw.org/news/2017/10/17/global-medical-body-condemns-forced-anal-exams> (last visited Dec 11, 2022).

³⁵⁷ AGNES CALLAMARD, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings*, A/HRC/35/23, (2017). para. 45.

³⁵⁸ "Conversion therapy" is used as an umbrella term to describe interventions of a wide-ranging nature, all of which are premised on the belief that a person's sexual orientation and gender identity, including gender expression, can and should be changed. See; VICTOR MADRIGAL-BORLOZ, *Practices of so-called "conversion therapy"*, A/HRC/44/52, (2020).

³⁵⁹ Reportedly, practices of so-called "corrective rape" against lesbian, bisexual and trans women exist in all regions of the world including in India, Nigeria and South Africa and against gay and trans men in settings such as Kenya. See, VICTOR MADRIGAL-BORLOZ, *Practices of so-called "conversion therapy"*, A/HRC/44/52, (2020) para. 39.

Lack of legal gender recognition acts as a gateway to broader discrimination and makes trans people particularly vulnerable to human rights violations.³⁶⁰ Indeed, legal gender recognition is closely linked to entitlements in relation to health, education, housing, access to social security and employment, simply because all these entitlements are realised by the state through the identification of the individuals.³⁶¹ When their gender identity is not legally recognized, trans people suffer from the denial of the right to health, education, work, access to housing and social security, as well as the rights to freedom of expression, peaceful assembly and association, and the right to freedom of movement.³⁶² Legal gender recognition is much more crucial in case of emergency situations like disasters or humanitarian crises, in seeking access to emergency services and protection measures.³⁶³

Legal gender recognition is also essential for trans people to be able to participate freely and fully in society and lead a life of dignity and respect.³⁶⁴ The discrimination and exclusion they experience is exacerbated when they are asked to present an identity document, which does not reflect their gender identity. Just because their ID cards do not reflect their true self, lots of trans people experience struggles in their daily life, for instance even when collecting a parcel from the post office, applying for a job, opening a bank account, or boarding a train, where identification documents are increasingly required.

As will be analysed in more detail below, even in the majority of states where legal recognition of gender identity is allowed, trans people are still subjected to violence and inhuman treatment due to coercive and abusive legal requirements for recognition. In order to be legally recognized before the law, trans people are regularly forced to undergo abusive, involuntary and discriminatory procedures.³⁶⁵ When states do recognize the gender identity of trans people, they impose abusive requirements for such recognition that further violate human rights when a change of gender or name is sought in official records: forced, coerced or otherwise involuntary sterilization; medical procedures such as surgery and hormonal therapies; to medical diagnosis, involuntary psychiatric evaluations or other procedures such as third-party consent for adults, forced divorce or age restrictions. All these procedures are often heavily

³⁶⁰ DUNNE ET AL., *supra* note 340 at 8.

³⁶¹ VICTOR MADRIGAL-BORLOZ, A/73/152, *supra* note 334 at para. 22.

³⁶² VICTOR MADRIGAL-BORLOZ, A/HRC/38/43, *supra* note 351 at para.43

³⁶³ *Id.*

³⁶⁴ Richard Köhler, Alecs Recher & Julia Ehrt, *Legal Gender Recognition in Europe*, TRANSGENDER EUROPE, 6 (2013).

³⁶⁵ United Nations High Commissioner for Human Rights, A/HRC/29/23, *supra* note 347 at para. 54.

bureaucratic, complicated, not transparent, not accessible for free and takes years in a way destroying the person's future and put them into an ambiguous limbo.

Given the social and economic exclusion of trans people from the society in addition to the discrimination and violence they faced systematically, the lack of legal gender recognition prevents trans people from making long-term life plans, and ultimately negatively affects their mental health and well-being.³⁶⁶ Recent research reveals that almost 3 in every 4 young trans persons experienced anxiety or depression, while 4 in 5 had self-harm, and almost 1 in 2 attempted suicide.³⁶⁷

4.2. Human Rights Law Framework on Legal Gender Recognition

The provisions of international human rights law are fully applicable to all persons, as the very idea of human rights affirms that “all human beings are born free and equal in dignity and rights”. All people, including trans people, are entitled to enjoy the rights and freedoms protected by international human rights law guided by the principles of universality and non-discrimination.³⁶⁸ The principles of equality and non-discrimination in international human rights law undoubtedly apply equally to trans people. In this sense, whether or not gender identity is specifically listed in the prohibited grounds of discrimination in the international human rights instrument, the prohibition of discrimination on the basis of ‘other status’ includes gender identity as well, just as age or disability status, since the prohibited grounds of discrimination are not exhaustive.³⁶⁹

On the other hand, it is true that the framework of states' obligations to provide legal recognition of gender identity has become much more crystallised through the progress in the international human rights law mechanism in recent years. Through progressive developments such as the establishment of the mandate of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity at the United

³⁶⁶ Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL BULL 674, 675 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932/> (last visited Dec 12, 2022).

³⁶⁷ PENELOPE STRAUSS ET AL., *Trans pathways: the mental health experiences and care pathways of trans young people*, (2017), <https://apo.org.au/node/116241> (last visited Dec 12, 2022).

³⁶⁸ United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41, (17 Nov 2011) para. 5-6.

³⁶⁹ *Id.* para. 7

Nations level in 2016, as well as intersectional interpretations by regional human rights courts in recent years, legal gender recognition and gender identity related issues have increasingly become one of the central aspects of anti-discrimination law that states can no longer easily ignore. The human rights law framework both in international and regional level, as well as national legislations and practices on legal gender recognition, will be presented in more detail in the following sections.

4.2.1. International Human Rights Law Framework

Legal recognition of gender identity is directly linked to the right to recognition before the law, as first affirmed in Article 6 of the Universal Declaration of Human Rights which states “everyone has the right to recognition everywhere as a person before the law”.³⁷⁰ Subsequently, the right to recognition as a person before the law is reaffirmed in Article 16 of the International Covenant on Civil and Political Rights³⁷¹ and other international human rights treaties such as, Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women³⁷², Article 8 of the Convention on the Rights of the Child³⁷³ and Article 12 of the Convention on the Rights of Persons with Disabilities.³⁷⁴ Each person's self-identified gender identity is an integral part of their personality, and trans people, like everyone else, have the right to have their gender identity officially recognized before the law. In addition to the right to be recognized as a person before the law, legal gender recognition is closely linked to the other fundamental rights and freedoms.

In its Concluding Observations on the third periodic reports of Ireland in 2008³⁷⁵ and Serbia in 2017³⁷⁶, the Human Rights Committee, in expressing concern about the lack of arrangements granting legal gender recognition, held that not allowing the legal gender recognition, or

³⁷⁰ UDHR, *supra* note 21.

³⁷¹ ICCPR, *supra* note 26.

³⁷² The Convention on the Elimination of All Forms of Discrimination against Women, *adopted* 18 December 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980), U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

³⁷³ The Convention on the Rights of the Child, *supra* note 29.

³⁷⁴ The Convention on the Rights of Persons with Disabilities, *supra* note 31.

³⁷⁵ United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Concluding Observations of the Human Rights Committee - Ireland*, CCPR/C/IRL/CO/3, (30 July 2008) para. 8

³⁷⁶ United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Concluding Observations of the Human Rights Committee - Serbia*, CCPR/C/SRB/CO/3, (10 April 2017) para. 12-13.

allowing it only on the condition of a compulsory forced medical interventions, is a violation of Article 16 of the ICCPR, as well as the prohibition of discrimination (Article 26), torture and ill-treatment (Article 7), and the right to respect for private life (Article 17).

Prohibition of discrimination based on gender identity

As stated in the well-known Articles 1 and 2 of the Universal Declaration of Human Rights, "all human beings are born free and equal in dignity and rights" and "everyone is entitled to all the rights and freedoms set forth in the Declaration, 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". Although "gender identity" is not explicitly mentioned in Article 2 of the UDHR, it is clear that discrimination based on gender identity too is also prohibited by international human rights law. Indeed, there is a consensus among the UN human rights treaty bodies, UN Special procedures, and the UN High Commissioner for Human Rights on that gender identity is among the protected grounds under anti-discrimination law.

Indeed, it has been consistently reaffirmed by the United Nations bodies that gender identity, like race, sex, colour or religion, is a prohibited ground for discrimination. In this regard, in 2008 the Committee against Torture (CAT) emphasized that gender identity is recognized as one of the prohibited grounds of discrimination. In its General Comment No. 2 on the implementation of Article 2, the CAT affirms that "the protection of certain minority or marginalized individuals or populations who are particularly at risk of torture is part of the obligation to prevent torture or ill-treatment. States Parties shall ensure that their laws are in practice applied to all persons, regardless of ..., gender, sexual orientation, transgender identity, ... or any other status with respect to the obligations arising under the Convention. States parties should, therefore, ensure the protection of members of groups at particular risk of being subjected to torture by fully prosecuting and punishing all acts of violence and abuse against such persons and by ensuring the implementation of other positive measures of prevention and protection."³⁷⁷ Similarly, in 2009, gender identity was recognized by the Committee on Economic, Social and Cultural Rights (CESCR) as among the prohibited grounds of discrimination. In its General Comment No. 20 on non-discrimination in economic, social, and cultural rights, the CESCR affirmed that 'other status' as recognized in Article 2(2) of the

³⁷⁷ The Committee against Torture, *General comment No. 2 on the implementation of Article 2 by States parties*, CAT/C/GC/2, (24 January 2008), para. 21

ICESCR includes sexual orientation and gender identity too, and therefore it cannot constitute a barrier to the enjoyment of rights.³⁷⁸ States' obligation to recognise, prohibit, and adopt policies and programmes to eliminate intersectional forms of discrimination, including, on the basis of gender identity was also recalled by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in 2010.³⁷⁹

Finally, in its 'historic'³⁸⁰ resolution in 2011, the United Nations Human Rights Council very clearly affirmed that discrimination based on gender identity is prohibited recalling the principle of universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind.³⁸¹ The Human Rights Council resolution is of great importance as a starting point for the future efforts to combat discrimination and violence based on gender identity at the global level in the field of human rights. In its 2011 resolution, the Human Rights Council expressed very first time its "grave concerns" regarding the acts of violence and discrimination committed against individuals because of their sexual orientation and gender identity. Accordingly, the Council requested the United Nations High Commissioner for Human Rights to prepare a study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity. The Human Rights Council also decided to hold a panel discussion on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.³⁸²

As requested by the Human Rights Council in its resolution HRC/17/19, the Office of the United Nations High Commissioner for Human Rights (OHCHR) presented their report on violence and discriminatory laws and practices against persons based on sexual orientation and gender identity to the Council on 17th of November 2011.³⁸³ In this report, which is the first

³⁷⁸ The Committee on Economic, Social and Cultural Rights, *General comment No. 20 on non-discrimination in economic, social, and cultural rights*, E/C.12/GC/20, (10 June 2009), para. 32

³⁷⁹ The Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, (16 December 2010), para. 18

³⁸⁰ 'Historic decision: Council passes first-ever resolution on sexual orientation & gender identity', INTERNATIONAL SERVICE FOR HUMAN RIGHTS, (17 June 2011) <https://ishr.ch/latest-updates/historic-decision-council-passes-first-ever-resolution-sexual-orientation-gender-identity/> (last visited Dec 13, 2022).

³⁸¹ United Nations Human Rights Council, *Human rights, sexual orientation and gender identity*, A/HRC/RES/17/19, (14 July 2011).

³⁸² *Id.*

³⁸³ United Nations High Commissioner for Human Rights, A/HRC/19/41, *supra* note 368.

comprehensive study prepared at the United Nations level on human rights violations arising from discrimination based on sexual orientation and gender identity, legal recognition of gender identity has been included under the heading of "discriminatory practices".

Obligation to ensure legal gender recognition

The OHCHR's report found that in many countries, transgender persons are unable to obtain legal recognition of their preferred gender, including a change of gender marker and first name on government issued identity documents, which creates practical difficulties in many areas such as applying for jobs, housing, accessing social assistance and bank loans, or traveling abroad. Noting that in some states like Australia, India, Nepal, Pakistan, Portugal, the United Kingdom and Uruguay, it is easier for transgender and intersex persons to obtain legal recognition or to have a gender marker other than male or female on official records, the report emphasized that many countries that recognize gender identity often require sterilization surgeries as a condition of recognition, and some states also require that the person be unmarried, implying mandatory divorce in cases where the person is married.³⁸⁴

Under the "Conclusions and Recommendations" section, the High Commissioner for Human Rights recommended States to facilitate legal gender recognition and establish provisions for the reissuance of relevant identity documents accordingly, without violating other human rights.³⁸⁵ Thus, with its 2011 report, the High Commissioner's Office thus gave the first signal, albeit implicitly, that abusive requirements as a precondition of legal recognition of gender will be interpreted as human rights violations at the level of the United Nations.

The report prepared by the Commissioner's Office in 2011 has created a very strong basis and advocacy tool for LGBTI+ rights advocates working in the field of legal recognition of gender and it opened the path for further positive steps towards the elimination of discriminatory laws and practices as preconditions of legal gender recognition. In 2014, several UN bodies namely OHCHR, UN Women, the Joint United Nations Programme on HIV/AIDS (UNAIDS), United Nations Development Programme (UNDP), United Nations Population Fund (UNFPA), United Nations Children's Fund (UNICEF) and WHO released an interagency statement titled

³⁸⁴ *Id.* para. 71-72.

³⁸⁵ *Id.* para. 84/h.

“Eliminating Forced, Coercive and Otherwise Involuntary Sterilization”.³⁸⁶ Although the interagency statement focuses not only on trans and intersex people but also on women, women living with HIV, indigenous and ethnic minorities as well as persons with disabilities; it is still essential for legal gender recognition since it highlights that in many countries, transgender and often also intersex people are required to undergo involuntary sterilization surgeries and these sterilization requirements are contrary to respect for bodily integrity, self-determination and human dignity, and perpetuate discrimination against transgender and intersex people.³⁸⁷

In October 2014, the Human Rights Council requested the High Commissioner to update their 2011 report with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards.³⁸⁸ Following the Council's request, the Office of the High Commissioner for Human Rights updated its 2011 report in May 2015 with positive developments from around the world.³⁸⁹ Noting that transgender persons are generally still unable to obtain legal recognition of their preferred gender³⁹⁰, the report noted that Argentina, Denmark and Malta enacted new laws allowing transgender people to obtain legal recognition of their gender identity on the basis of self-determination, while Australia, the Netherlands and Sweden removed abusive sterilization, forced treatment and divorce requirements.³⁹¹ The report also included that Nepal and Bangladesh created a legal “third gender” category, and new passport policies in Australia and New Zealand allow individuals to choose male, female or indeterminate gender markers, as positive developments.³⁹²

Another notable finding regarding legal gender recognition came from the Committee on the Elimination of Discrimination against Women, in November 2014. In its concluding observations on the seventh periodic report of Belgium, the CEDAW Committee shared their concern on the observation of that transgender women in Belgium need to undergo a lengthy and burdensome procedure and are required to undergo a psychiatric assessment and

³⁸⁶ WORLD HEALTH ORGANIZATION, ELIMINATING FORCED, COERCIVE AND OTHERWISE INVOLUNTARY STERILIZATION: AN INTERAGENCY STATEMENT, OHCHR, UN WOMEN, UNAIDS, UNDP, UNFPA, UNICEF AND WHO (2014), <https://apps.who.int/iris/handle/10665/112848> (last visited Dec 13, 2022).

³⁸⁷ *Id.* 7-8.

³⁸⁸ United Nations Human Rights Council, *Human rights, sexual orientation and gender identity*, A/HRC/RES/27/32, (2 October 2014).

³⁸⁹ United Nations High Commissioner for Human Rights, A/HRC/29/23, *supra* note 347.

³⁹⁰ *Id.* para.69.

³⁹¹ *Id.* para.73.

³⁹² *Id.*

compulsory sterilization or surgery to obtain legal gender recognition.³⁹³ Consequently, the CEDAW Committee recommended Belgium;

“to lighten the procedural burden for transgender women to obtain legal gender recognition by making the procedure more expeditious, transparent and accessible and to amend current laws and practices, in particular the law on transsexuality, to abolish the requirements for a psychiatric assessment, sterilization and surgery for transgender women who wish to obtain legal gender recognition.”³⁹⁴

Consequently, in 2014, the CEDAW Committee for the first time stated unequivocally that not only forced sterilisation and surgery, but also psychological assessments as a prerequisite for legal recognition of gender identity are human rights violations that must be abolished.

This framework was reiterated by the UN High Commissioner for Human Rights in 2016. Under the campaign “UN Free & Equal” launched by the Office of the United Nations High Commissioner for Human Rights³⁹⁵, in 2016, OHCHR published a report titled “Living Free And Equal : What States Are Doing To Tackle Violence And Discrimination Against Lesbian, Gay, Bisexual, Transgender And Intersex People analysing the current situation on LGBTI+ rights around the world and providing a guideline that clarify states’ obligations related LGBTI+ rights.³⁹⁶ In this guideline, the UN High Commissioner for Human Rights sets out a very solid framework for legal gender recognition as follows:

“States should provide a straightforward administrative process to officially recognize the self-identified gender identity and name of transgender persons through a simple declaration without such requirements as medical certification or diagnosis, surgery or medical treatment, divorce or sterilization. This process should include the ability to obtain new official documents reflecting self-identified gender, first name, gender marker and appearance. State officials should receive training on respectful, non-discriminatory treatment of transgender persons – even in cases in which they have not obtained legal recognition of their gender identity,

³⁹³ Committee on the Elimination of Discrimination against Women, *Concluding observations on the seventh periodic report of Belgium*, CEDAW/C/BEL/CO/7, (14 November 2014).

³⁹⁴ *Id.* para. 44-45.

³⁹⁵ UN Free & Equal is a global UN public information campaign aimed at promoting equal rights and fair treatment of LGBTI people launched by the Office of the United Nations High Commissioner for Human Rights Equal in July 2013. See more on the UN Free & Equal at <https://www.unfe.org/> (last visited Dec 22, 2022)

³⁹⁶ UN Office of the High Commissioner for Human Rights, *Living free and equal : What States Are Doing To Tackle Violence And Discrimination Against Lesbian, Gay, Bisexual, Transgender And Intersex People*, (2016), <https://digitallibrary.un.org/record/3974377> (last visited Dec 22, 2022).

particularly when accessing public services, in contact with law enforcement officials, and in detention. Legislation should allow for recognition of non-binary gender identities. Minors should have access to recognition of their gender identity. Safeguards for minors should not be discriminatory or disproportionate, and should respect the rights enshrined in the Convention on the Rights of the Child.”³⁹⁷

Within the same year, the Human Rights Council adopted the Resolution 32/2, which is one of the most important milestones in the combatting against discrimination based on sexual orientation and gender identity in international human rights law.³⁹⁸ In this narrowly adopted resolution, the Human Rights Council “strongly condemned” discrimination on the grounds of sexual orientation and gender identity and decided to appoint an Independent Expert on protection against discrimination and violence on the grounds of sexual orientation and gender identity (SOGI Expert).³⁹⁹ With 23 countries voting in favour, 18 against and 6 abstentions, the Resolution 32/2 established a new special international procedure to combat against violence and discrimination based on sexual orientation and gender identity, and called on all States Parties to cooperate at the highest level, in particular by providing information and documentation for the annual reports to be prepared by the Independent Expert.⁴⁰⁰

The road to this historic resolution was paved by the submission to the Council of a draft led by seven Latin American countries namely Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico and Uruguay and sponsored by 41 other countries, including European countries and the United States.⁴⁰¹ 628 civil society organizations from 151 countries expressed their full support for the draft text⁴⁰² and a strong public advocacy was carried out especially through social media campaigns (#SOGIexpertNOW).

The historic voting debate was highly heated and lasted over 3 hours. Members of the Organization of Islamic Cooperation and Russia, in particular, spend intense efforts to block the resolution. Before the voting, Saudi Arabia backed by the Organization of Islamic

³⁹⁷ *Id.* at 121.

³⁹⁸ United Nations Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/RES/32/2. (30 June 2016).

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ UN Passes Historic Resolution to Establish Independent SOGI Expert | Heinrich Böll Stiftung, HEINRICH-BÖLL-STIFTUNG, <https://www.boell.de/en/2016/07/26/un-passes-historic-resolution-establish-independent-sogi-expert> (last visited Dec 13, 2022).

⁴⁰² See, “628 NGOs from 151 countries call for a SOGI Independent Expert at the UN”, https://ilga.org/downloads/HRC32_Global_Call_SOGI_Independent_Expert.pdf (last visited Dec 13, 2022).

Cooperation, Pakistan and Bangladesh, requested a “no action” motion to remove the resolution from the agenda arguing that the proposed resolution was “deeply divisive” and it fails to recognise cultural differences. However, the “no-action” motion was rejected by majority of the Human Rights Council.⁴⁰³

The Organization of Islamic Cooperation except Albania also proposed a group of amendments on several parts of the resolution.⁴⁰⁴ The amendments proposed were basically suggesting that first, to remove “sexual orientation and gender identity” from the resolution, arguing that “these are not internationally agreed languages”; second, to add paragraphs emphasizing respect for traditional values and principles on national sovereignty arguing that “universality of human rights does not mean the imposition of certain so-called human rights concepts or ideas imposed from the point of view of another party, when those ran counter to some beliefs” and third, to prevent the creation of the mandate on SOGI arguing that “this mandate would just lead to a waste of the resources of the United Nations because it would have unclear terms of reference”.⁴⁰⁵ While the first and the last group of suggestions were failed to reach majority, the second group amendments were adopted.⁴⁰⁶

Nevertheless, after a highly heated debates session lasting over 3 hours, the Resolution 32/2 was adopted by the Human Rights Council with 18 votes against, 23 votes in favour and 6 abstentions.⁴⁰⁷ 18 countries, mostly members of the Organization of Islamic Cooperation, and China and Russia, opposed the draft on the basis of cultural relativism arguments, criticizing that the draft did not take into account the religious, cultural, political and traditional sensitivities of countries, and that the terms "sexual orientation" and "gender identity" invented a new category that did not exist in international human rights law.⁴⁰⁸

⁴⁰³ Council establishes mandate on protection against violence and discrimination based on sexual orientation and gender identity, OHCHR, press release, 30 June 2016 <https://www.ohchr.org/en/press-releases/2016/06/council-establishes-mandate-protection-against-violence-and-discrimination> (last visited May 11, 2023).

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ Voting in favour of the resolution (23): Albania, Belgium, Bolivia, Cuba, Ecuador, El Salvador, France, Georgia, Germany, Latvia, Macedonia, Mexico, Mongolia, Netherlands, Panama, Paraguay, Portugal, Republic of Korea, Slovenia, Switzerland, United Kingdom, Venezuela, Vietnam.

Voting against the resolution (18): Algeria, Bangladesh, Burundi, China, Congo, Cote d'Ivoire, Ethiopia, Indonesia, Kenya, Kyrgyzstan, Maldives, Morocco, Nigeria, Qatar, Russia, Saudi Arabia, Togo, United Arab Emirates.

Abstaining on the resolution (6): Botswana, Ghana, India, Namibia, Philippines, South Africa.

⁴⁰⁸ UN Passes Historic Resolution to Establish Independent SOGI Expert | Heinrich Böll Stiftung, *supra* note 401.

It is important to note that even though the Resolution 32/2 was adopted by the Human Rights Council in June 2016, efforts to block the creation of the Independent Expert on SOGI continued at the level of General Assembly even months later. Indeed, at the 71st Session of the UN General Assembly in December 2016, the opponent countries -this time including the African Group- had submitted a proposal to postpone the Resolution 32/2 of the Human Rights Council at General Assembly emphasizing the “subsidiary nature” of the Human Rights Council and arguing that “the terms sexual orientation and gender identity were not enshrined in international law.”⁴⁰⁹ The opponent countries, mostly the members of the Organization of Islamic Cooperation, the African Group, and a couple of other countries including Russia also stated that they would not recognize the Mandate and cooperate with it. After an intense debate mostly revolved around the independency, legitimacy and power of the Human Rights Council, the proposal to postpone the Human Rights Council’s Resolution 32/2 was rejected by the General Assembly.⁴¹⁰

UN Special Mandate on Protection from Violence and Discrimination based on SOGI

The creation of a new Special Procedure on sexual orientation and gender identity marked a new era in the fight against discrimination based on sexual orientation and gender identity in the international human rights law. With the thematic reports to be prepared annually by the Independent Expert, discrimination and violence based on sexual orientation and gender identity have begun to be systematically and comprehensively recorded and it has become possible to access up-to-date data-based information both globally and at the country level.

The first SOGI Independent Expert, Vitit Muntarbhorn, submitted his first report to the Human Rights Council in April 2017.⁴¹¹ In the first report which has a different methodology and limited scope compared to the reports presented in the following years, Muntarbhorn identified six underpinnings for the mandate on protection from violence and discrimination based on sexual orientation and gender identity, namely decriminalization of consensual same-sex relations, effective anti-discrimination measures, legal recognition of gender identity,

⁴⁰⁹ Intense Debate, Close Voting as Gender Identity, Sexual Orientation, Digital-age Privacy Take Centre Stage in Third Committee | UN Press, <https://press.un.org/en/2016/gashc4191.doc.htm> (last visited May 11, 2023).

⁴¹⁰ *Id.*

⁴¹¹ VITIT MUNTARBHORN, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/35/36, (19 April 2017).

destigmatization linked with depathologization, sociocultural inclusion and promotion of education and empathy.

In the report, the legal recognition of gender is addressed in only one paragraph.⁴¹² In this context, the report states that trans people are not able to have legal gender recognition in many countries and lack of legal recognition leads to violence, lifelong abuses and discrimination. The report also covers that trans people are forced to undergo gender reassignment surgery and other medical procedures, such as psychological assessment, conversion therapy, sterilization as well as divorce by noting that the process has bureaucratic hurdles and difficulties in accessing medical care, such as hormone treatment, as well as in accessing the wherewithal of life, such as education, housing, a decent standard of living and employment.⁴¹³ Finally, the report points out -not “recommends” though- “the need to move towards legal recognition of self-defined gender identity without coercive methods.”⁴¹⁴

Although appointed for a three-year term, Vitit Muntarbhorn has resigned in 2017 after just one year in his office citing ill health and caring responsibilities.⁴¹⁵ Following the resignation, Victor Madrigal-Borloz has been appointed by the UN Human Rights Council as the new SOGI Independent Expert.⁴¹⁶ In his first report to the Council in May 2018, Madrigal-Borloz set out a general framework on discrimination based on sexual orientation and gender, pointed out the prejudices underlying discrimination, emphasized that discrimination is reproduced with impunity and discriminatory laws and practices, and made recommendations to states on steps to be taken to combat discrimination.⁴¹⁷ While the report does not include a comprehensive perspective on the legal gender recognition, it provides a detailed picture of human rights violations and difficulties faced by trans people resulting from the inconsistency between civil registration records and one’s gender identity.

In this regard, Madrigal-Borloz’s report identifies that inaccurate or inadequate identity documents can lead to greater levels of violence and extortion, exclusion from school and the official labour market, housing, health and access to other social services, and ability to cross

⁴¹² *Id.* para.57.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ See the Vitit Muntarbhorn’s Resignation Letter dated 8 September 2017, <https://apcom.org/wp-content/uploads/2017/09/IE-SOGIE-Resignation-Letter.pdf>

⁴¹⁶ HUMAN RIGHTS COUNCIL, Press Release, *Human Rights Council elects Vojislav Šuc of Slovenia as its President for 2018*, (04 DECEMBER 2017), <https://www.ohchr.org/en/press-releases/2017/12/human-rights-council-elects-vojislav-suc-slovenia-its-president-2018> (last visited Dec 14, 2022).

⁴¹⁷ VICTOR MADRIGAL-BORLOZ, A/HRC/38/43, *supra* note 351

borders.⁴¹⁸ It also draws attention to that in times of emergencies, such as natural disasters or a humanitarian crisis, the lack of gender-affirming identity documents may even have a greater impact, for example when seeking access to emergency care, services and protection measures.⁴¹⁹ The report is of great importance for the legal recognition of gender, as it provides a general but yet solid framework for gender recognition laws. Indeed, under the recommendations section, the Independent Expert recommends that States ensure that gender recognition procedures are "prompt, transparent and accessible, free from abusive conditions and respect the principle of free and informed choice and personal integrity".⁴²⁰

The milestone in the crystallisation of the international human rights framework on the legal recognition of gender identity is the SOGI Independent Expert's report numbered 73/152, submitted to the General Assembly in 2018.⁴²¹ This is because the Independent Expert devoted his report to two main underpinnings: the process of abandoning the classification of certain forms of gender as a pathology (de-pathologization) and the full scope of the duty of the State to respect and promote respect of gender recognition as a component of identity. In this report, the SOGI expert Madrigal-Borloz first establishes the relation between the lack of legal gender recognition and violence, discrimination and other human rights violations trans people faced with, then summarizes the non-discrimination obligations of states under international human rights law and presents different national legislation and practices around the world, and finally lists his recommendations for states on legal gender recognition. The report is also significant since it addresses children's and adolescents' right to legal recognition of gender identity for the very first time and makes recommendations to states to ensure legal recognition of the gender identity for trans child and adolescents taking into account the principle of the best interests of the child and the rights enshrined in the Convention on the Rights of the Child.⁴²²

Under the recommendations section, the Independent Expert "urges" states to "eliminate abusive requirements as prerequisites for change of name or gender, including forced, coercive or otherwise involuntary sterilization; medical procedures related to transition, including surgeries and hormonal therapies; undergoing medical diagnosis, psychological appraisals or other medical or psychosocial procedures or treatment; requirements relating to economic status; health; marital, family or parental status, immigration status; criminal record and any

⁴¹⁸ *Id.*, para. 43.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*, para. 98.

⁴²¹ VICTOR MADRIGAL-BORLOZ A/73/152, *supra* note 334.

⁴²² *Id.*

third-party opinion.”⁴²³ In other words, the report emphasizes that any kind of abusive requirements as precondition for legal gender recognition should be abolished. On the other hand, the report does not focus only on the coercive and abusive requirements but also notes that seemingly neutral requirements may also have potential or actual disproportionate effects, therefore, states should also examine such seemingly neutral requirements, in the light of the realities of the trans populations in each given context.⁴²⁴

The Report 73/152 provides a framework for legal gender recognition legislations and practices by considering the best practices globally. According to the report, legal gender recognition should:

- Be based on self-determination by the applicant,
- Be a simple administrative process,
- Be confidential,
- Be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing,
- Acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman” and offer a multiplicity of gender marker options,
- Be accessible and, to the extent possible, cost-free.⁴²⁵

The Report also address in detail one of the most "controversial" issues, the right of children to legal recognition of their gender, and makes a series of recommendations to States in this regard by giving best practices examples from Argentina and Chili.⁴²⁶ In this regard, the Independent Expert “urges” states to “enact recognition systems for the gender identity of trans and gender-diverse children, taking into account the best interests of the child as a primary consideration and respect for the child’s right to express views, as well as the recognition to the autonomy and decisional power of children of a certain age in other areas in line with the Convention on the Rights of the Child.”⁴²⁷

⁴²³ *Id.* para. 81/b

⁴²⁴ *Id.* para. 81/e

⁴²⁵ *Id.* para. 81/d

⁴²⁶ *Id.* para. 66

⁴²⁷ *Id.* para. 81/a

Another crucial aspect of the report is that it does establish the link between the collection and display of certain data of trans people and violence and discrimination they have been subjected to, by critically approaching the necessity of exhibition of certain data such as gender markers on the identification documents. Indeed, in his report the Independent Expert devoted a special section titled “Data and official documentation” on the issue and noted that the manifestation of certain data reflected in identification cards, driving licences and passports has some fundamental consequences for the enjoyment of the basic human rights.⁴²⁸ Most importantly, the Independent Expert pointed out that “legal systems must, on an ongoing basis, carefully review the reasoning behind the gathering and exhibition of certain data, and the rules governing data management, which must include separate considerations for the need to gather and the need to exhibit.”⁴²⁹ The mandate holder recommend states to refrain from gathering and exhibiting data without a legitimate, proportionate and necessary purpose and ensure that, when data must be collected, it should be done on the basis of self-determination, while respecting privacy and confidentiality of the trans person.⁴³⁰ In this regard, it is indeed a revolutionary interpretation that the Independent Expert expressed he has “significant doubts as to the real need for the pervasive exhibition of gender markers in official and non-official documentation.”⁴³¹

Following year in 2019, the mandate holder Madrigal-Borloz analysed this issue in a much more detailed way and devoted his annual report to the issue of data collection and management and its relevance with particularly violence and discrimination based on sexual orientation and gender identity.⁴³² Although the Report does not directly focuses on legal gender recognition, it is still significant since it affirms that gender identity is categorically a sensitive data just as religion or ethnicity, thus should be defined in official identity documents on the basis of self-identification and not by imputation or assignment.⁴³³ The report also outlines the human rights-based approach in data collection and management. In this regard, the Independent Expert recommends states to always respect the principles of ‘do no harm’, self-determination, privacy

⁴²⁸ *Id.* para. 36-38

⁴²⁹ *Id.* para. 37

⁴³⁰ *Id.* para. 81/c

⁴³¹ *Id.* para. 35

⁴³² VICTOR MADRIGAL-BORLOZ, *Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity*, A/HRC/41/45, (14 May 2019)

⁴³³ *Id.* para. 49

and confidentiality, lawful use, participation, right to information, transparency and accountability.⁴³⁴

Lastly in his annual report in 2021, the Independent Expert reiterates his recommendations which are built upon the framework provided by the OHCHR in 2016⁴³⁵ on legal recognition of gender identity.⁴³⁶ In this regard, states are recommended to provide access to legal recognition of gender identity which

- Is based on self-determination by the applicant;
- Is a simple administrative process;
- Is not connected with abusive requirements, such as medical certification, surgery, treatment, sterilization or divorce;
- Includes the acknowledgement and recognition of non-binary identities in their full diversity and specificity;
- Ensures that minors have access to recognition of their gender identity.⁴³⁷

These criteria on legal recognition of gender identity have now become the commonly agreed criteria by at the United Nations level. Indeed, the CEDAW Committee recommended several times, but firstly in 2014 as stated above⁴³⁸ that “requirements regarding legal gender recognition should be abolished consistently with the rights of transgender women to bodily integrity, autonomy and self-determination”⁴³⁹, legal recognition of gender identity should be “expeditious, transparent and accessible”⁴⁴⁰, and as well as free or “reimbursed later”⁴⁴¹.

The same framework has been adopted by the Human Rights Committee as well. In several periodic reviews of states, the Human Rights Committee recommended states to eliminate abusive requirements for legal gender recognition, including mandatory sterilization and

⁴³⁴ *Id.* para. 80

⁴³⁵ Living Free & Equal, *supra* note 396.

⁴³⁶ VICTOR MADRIGAL-BORLOZ, *The law of inclusion*, A/HRC/47/27, (3 June 2021)

⁴³⁷ *Id.* para. 91

⁴³⁸ See *supra* note 393.

⁴³⁹ The Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, CEDAW/C/AUS/CO/8, (25 July 2018), para. 50

⁴⁴⁰ The Committee on the Elimination of Discrimination against Women, *Concluding observations on the fourth periodic report of Kyrgyzstan*, CEDAW/C/KGZ/CO/4, (11 March 2015), para. 34

⁴⁴¹ The Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined fourth and fifth periodic reports of Switzerland*, CEDAW/C/CHE/CO/4-5, (25 November 2016), para.

psychiatric diagnosis⁴⁴², and to provide effectively a quick, transparent and accessible gender recognition procedure based on self-identification by the applicant.⁴⁴³

Similarly, the Committee against Torture recommends states to “take the necessary measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal recognition of the gender identity of transgender persons.”⁴⁴⁴ Subsequently, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has indicated that abusive pre-requirements of legal gender recognition are rooted in discrimination on the basis gender identity, violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture.⁴⁴⁵

Indeed, today, international human rights bodies including the UN Human Rights Committee, the CEDAW Committee and the Committee against Torture alongside UN Human Rights Special Procedures Mechanisms have a clear consensus on that legal gender recognition is a fundamental human right to which states are obliged to provide access to it in a manner consistent with other fundamental rights. In this regard, international human rights law bodies made it clear that legal gender recognition must be based on self-identification and eliminated from abusive pre-requirements including forced medical interventions, and psychological evaluation tests, and must be quick, transparent and accessible for all, including minors.

4.2.2. Regional Human Rights Law Framework

The European system

The European Court of Human Rights incorporated gender identity in its jurisprudence first in 1992, in relation to privacy and family life under the Article 8 of the European Convention on Human Rights; namely the right to respect for private and family life, home and correspondence.⁴⁴⁶ According to the European Court of Human Rights, the concept of ‘private

⁴⁴² Human Rights Committee, *Concluding observations on the fourth periodic report of Czechia*, CCPR/C/CZE/CO/4, (6 December 2019), para. 13

⁴⁴³ Human Rights Committee, *Concluding observations on the fifth periodic report of Uzbekistan*, CCPR/C/UZB/CO/5, (1 May 2020), para. 11

⁴⁴⁴ Committee against Torture, *Concluding observations on the fifth periodic report of China with respect to Hong Kong, China*, CAT/C/CHN-HKG/CO/5, (3 February 2016) para. 29

⁴⁴⁵ JUAN E. MÉNDEZ, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/31/57, (5 January 2016), para.49

⁴⁴⁶ European Court of Human Rights, *B. v. France*, application no. 13343/87, 63 (1992)

life' is a broad concept which covers the physical and psychological integrity of a person, including the person's sexual life.⁴⁴⁷ Furthermore, the concept of 'private life' does also cover aspects of a person's physical and social identity.⁴⁴⁸ In this context, the European Court confirmed several times that gender identity as one of the most intimate aspects of a person's private life a component of personal identity⁴⁴⁹, falls within the personal sphere protected by the right to respect for private and family life, home and correspondence under Article 8.⁴⁵⁰

Since the European Convention on Human Rights is considered as a 'living instrument' to be interpreted in the light of evolving circumstances, ECtHR's case law regarding legal gender recognition has developed in years. In this regard, it is possible to note that the European Court of Human Rights' case law on legal recognition of gender identity is divided into two parts, as it was before and after the Court's 2002 judgment in *Christine Goodwin v. the United Kingdom*.⁴⁵¹

The Court's first judgment on the legal recognition of gender identity was the *Rees v. United Kingdom* in 1986.⁴⁵² In this case, the trans applicant who suffered from inability to amend their birth certificate argued that there was no legal or administrative mechanism for recognition of their gender identity in the United Kingdom and that such a lack of legal gender recognition therefore constituted a violation of Article 8 of the Convention, namely the right to respect for private and family life. The European Court of Human Rights held that there had been no violation of Article 8 by stating that the changes demanded by the applicant would have involved a fundamental change in the system of maintaining the register of births and would have had important administrative consequences and imposed new duties on the rest of the population.⁴⁵³

Until 2002, the ECtHR maintained the same narrow perspective in similar applications before it,⁴⁵⁴ by noting that "there is no generally shared approach among the Contracting States and

⁴⁴⁷ European Court of Human Rights, *X and Y v. the Netherlands*, application no. 8978/80, 22 (1985)

⁴⁴⁸ European Court of Human Rights, *Y.Y v. Turkey*, application no. 14793/08, 56 (2015)

⁴⁴⁹ European Court of Human Rights, *Van Kück v. Germany*, application no. 35968/97, 69-73 (2003)

⁴⁵⁰ *B. v. France*, *supra* note 430 at 63. Also see European Court of Human Rights, *Sousa Goucha v. Portugal*, application no. 70434/12, 27 (2016).

⁴⁵¹ European Court of Human Rights, *Christine Goodwin v. the United Kingdom*, application no. 28957/95, (2002)

⁴⁵² European Court of Human Rights, *Rees v. United Kingdom*, application no. 9532/81, (1986)

⁴⁵³ *Id.* para. 42-46.

⁴⁵⁴ European Court of Human Rights, *Cossey v. United Kingdom*, application no. 10843/84, (1990); European Court of Human Rights, *Sheffield and Horsham v The United Kingdom*, application no. 22985/93 & 23390/94, (1998).

the issue continues raising complex scientific, legal, moral and social issues.”⁴⁵⁵ On the other hand, the ECtHR also stated that this area is needed to be kept under review by the States Parties, in particular with regard to scientific and social developments⁴⁵⁶, even if it has not yet found a violation at that time.

Finally, in 2002, in the *Goodwin v. the United Kingdom*, the Court reversed its earlier findings and held that the lack of legal recognition of the applicant's gender identity constituted a violation of Article 8 of the Convention.⁴⁵⁷ The ECtHR based such departure on clear and undisputed evidence of a continuing international trend towards legal gender recognition, thus lack of recognition was no longer fall within the margin of appreciation of states.⁴⁵⁸ The Court found a violation of Article 8 by emphasizing that “there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment” thus, “the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant.”⁴⁵⁹ Through the *Goodwin* judgment in 2002, the Court departed from its previous jurisprudence and held that states have an obligation (a positive obligation under Article 8) to implement gender recognition by amending their civil-status records, and has continued to develop its jurisprudence in similar direction in the applications brought before it over the years.

Indeed, the ECtHR has examined several cases concerning legal gender recognition and has required states to take measures to ensure legal gender recognition and protection under Article 8 of the Convention. However, until 2017, the ECtHR considered the issue only in relation to the possibility of making necessary changes, including to the name, gender marker and other gender-related information on birth certificates and other identity documents, for persons who have already undergone some gender reassignment surgery and similar medical procedures. In other words, on several occasions the Court held that states are required to “implement the recognition of the gender change in post-operative trans person” on legal documents⁴⁶⁰, but did

⁴⁵⁵ European Court of Human Rights, *Sheffield and Horsham v The United Kingdom*, application no. 22985/93 & 23390/94, 58 (1998)

⁴⁵⁶ *Id.* para. 60.

⁴⁵⁷ *Christine Goodwin v. the United Kingdom*, *supra* note 451.

⁴⁵⁸ *Id.* 93.

⁴⁵⁹ *Id.*

⁴⁶⁰ See for instance, European Court of Human Rights, *Van Kück v. Germany*, application no. 35968/97, (2003); European Court of Human Rights, *Grant v. the United Kingdom*, application no. 32570/03, (2006); European Court of Human Rights, *L. v. Lithuania*, application no. 27527/03, (2008).

not examine the legality of abusive forced interventions such as forced sterilisation or psychological evaluations as prerequisite of legal gender recognition.

Finally in the *A.P., Garçon and Nicot v. France* decision in 2017, the European Court of Human Rights ruled that making the legal recognition of gender identity conditional on compulsory sterilization or similar surgeries is also a violation of the right to respect for private life.⁴⁶¹ The case was concerned three trans applicants who wished to change their gender markers and forenames on their birth certificates but were not allowed to do so since the French legal system requires applicants to fulfil the criterion that the acceptance of the request to change the gender on the birth certificate is subject to the criterion that the “change in the person's appearance is irreversible”. The ECtHR noted, firstly, that such criterion means an undergoing operation or medical treatment involving a high probability of sterility. Then, the Court considered that making recognition of the sexual identity of transgender persons conditional on an operation or sterilisation surgery “amounted to making the full exercise of one’s right to respect for private life conditional on relinquishing full exercise of the right to respect for one’s physical integrity”. Consequently, the Court held that “law making recognition of the gender identity of transgender persons conditional on sterilisation surgery or on treatment which, on account of its nature and intensity, entailed a very high probability of sterility, amounted to a failure by the respondent State to fulfil its positive obligation to secure their right to respect for their private lives.”⁴⁶² In this way, the European Court of Human Rights confirmed that the requirement of forced sterilisation as a precondition for legal gender recognition is also a violation of the ECHR. However, unlike the sterilisation condition, the Court held that the requirement to obtain a prior psychiatric diagnosis was not considered to have a direct impact on the physical integrity of an individual, and therefore psychiatric assessments and tests as a precondition for legal gender recognition did not constitute a violation of the ECHR.⁴⁶³

In the process leading up to the *A.P., Garçon and Nicot* judgement, the Resolution numbered 2048 adopted by the Parliamentary Assembly of the Council of Europe in 2015 should also be emphasized.⁴⁶⁴ In the Resolution 2048 adopted by the Parliamentary Assembly of the Council of Europe in April 2015, the Parliamentary Assembly draws attention to the violations of

⁴⁶¹ European Court of Human Rights, *A.P., Garçon and Nicot v. France*, application nos. 79885/12, 52471/13 and 52596/13, (2017).

⁴⁶² *Id.* para. 131-135.

⁴⁶³ *Id.* para. 139-144.

⁴⁶⁴ The Parliamentary Assembly of the Council of Europe, *Discrimination against transgender people in Europe*, Res. 2048/2015, (22 April 2015) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736> (last visited Jan, 3 2023)

fundamental rights that trans people face when applying for legal gender recognition; noting that such procedures often require sterilisation, divorce, a diagnosis of mental illness, surgical interventions and other medical treatments as preconditions as well as administrative burdens and additional requirements which make recognition procedures cumbersome. The Parliamentary Assembly also points out that a large number of European countries still have no provision on gender recognition at all.⁴⁶⁵ Consequently, the Parliamentary Assembly of the Council of Europe has called on member states to:

- Develop quick, transparent and accessible procedures, based on self-determination, and make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record;
- Abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws
- Remove any restrictions on the right of transgender people to remain in an existing marriage upon recognition of their gender; ensure that spouses or children do not lose certain rights;
- Consider including a third gender option in identity documents for those who seek it, and
- Ensure that the best interests of the child are a primary consideration in all decisions concerning children.⁴⁶⁶

Thus, the consensus reached at the level of the United Nations on the framework for legal recognition of gender identity was also endorsed by the Parliamentary Assembly of the Council of Europe in 2015. However, it should be noted that Resolution 2048 is neither the only nor the first legal instrument on legal recognition of gender identity at the level of the Council of Europe. Indeed, the Council of Europe has adopted a number of recommendations that include the legal recognition of gender identity. In 2009, the Commissioner for Human Rights of the Council of Europe published an issue paper titled "Human Rights and Gender Identity" expressing that forced medical interventions such as sterilisation or hormonal treatment as requirements of legal gender recognition "clearly run counter to the respect for the physical

⁴⁶⁵ *Id.* 3.

⁴⁶⁶ *Id.* 6.2.

integrity of the person”.⁴⁶⁷ One year later, in 2010, the Committee of Ministers of the Council of Europe adopted a landmark recommendation on combatting discrimination on grounds of sexual orientation or gender identity.⁴⁶⁸ In this regard, the Committee of Ministers recommended states to “take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment” and “regularly review prior requirements for legal recognition in order to remove abusive requirements.”⁴⁶⁹ It was followed by the Resolution 1728 adopted by the Parliamentary Assembly of the Council of Europe in April 2010.⁴⁷⁰ Consequently, the Parliamentary Assembly called on states to ensure legal gender recognition “without any prior obligation to undergo sterilisation or other medical procedures such as gender reassignment surgery and hormonal therapy”.⁴⁷¹

In 2013 the Parliamentary Assembly further adopted Resolution 1945 titled entitled “Putting an End to Coerced Sterilisations and Castrations”.⁴⁷² Although it did not specifically address coerced sterilisation as a pre-requirement of legal gender recognition, Resolution 1945 is still crucial since it condemns coerced sterilisation “for any reason” in a very clear terms. Indeed, through the Resolution 1945, the Parliamentary Assembly “urged” states to “revise their laws and policies as necessary to ensure that no one can be coerced into sterilisation or castration in any way for any reason” by noting in a very strict way that “neither forced nor coerced sterilisations or castrations can be legitimated in any way in the 21st century – they must stop”.⁴⁷³

Indeed, just as the ECtHR departed from its previous case-law by relying on international trend towards legal gender recognition in the *Goodwin v. the United Kingdom* in 2002, “in the *AP, Garçon and Nicot v. France* in 2017, the Court took into account the growing international consensus on that compulsory sterilization is a violation of human rights.”⁴⁷⁴ In this context, the

⁴⁶⁷ The Commissioner for Human Rights of the Council of Europe, *Human rights and gender identity*, CommDH/IssuePaper(2009)2, 8 (2009).

⁴⁶⁸ The Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, CM/Rec(2010)5, (31 March 2010) <https://www.coe.int/en/web/sogi/rec-2010-5> (last visited Jan, 3 2023)

⁴⁶⁹ *Id.* 20-21.

⁴⁷⁰ The Parliamentary Assembly of the Council of Europe, *Discrimination on the basis of sexual orientation and gender identity*, 1728 (2010), (29 April 2010) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736> (last visited Jan, 3 2023)

⁴⁷¹ *Id.* 16.11.2.

⁴⁷² The Parliamentary Assembly of the Council of Europe, *Putting an end to coerced sterilisations and castrations*, Res. 1945 (2013), (26 June 2013) <https://pace.coe.int/en/files/19984> (last visited Jan, 3 2023)

⁴⁷³ *Id.* 7.1.

⁴⁷⁴ *A.P., Garçon and Nicot v. France*, *supra* note 461 at 73-81.

Court noted that numerous European and international institutional actors including 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 Cruel, Inhuman or Degrading Treatment or Punishment, the World Health Organisation, the United Nations Children's Fund, the United Nations High Commissioner for Human Rights and the OHCHR, UN Women, UNAIDS, the United Nations Development Programme and the United Nations Population Fund have adopted a very clear position in favour of abolishing the sterility criterion, which they consider as a violation of fundamental rights.⁴⁷⁵

Following the AP, *Garçon and Nicot v. France*, the ECtHR affirmed in several cases that states are required to ensure “quick, transparent and accessible procedures” for legal gender recognition. For instance, the Court considered that the applicant's inability to obtain a change of forename for an unreasonable period of time or unclear procedures which were not clearly set out in laws or unforeseeable laws regarding legal gender recognition constitutes a breach of Article 8, in 2021.⁴⁷⁶

Finally, in its *X. and Y. v. Romania* judgement in 2021, the ECtHR considered that the refusal to legally recognise the applicants' gender reassignment in the absence of surgery, had amounted to an unjustified interference with their right to respect for their private life.⁴⁷⁷ In other words, the Court held that any involuntary gender reassignment as a condition of legal gender recognition, whether or not it necessarily amounts to coercive sterilisation, constitutes a violation of Article 8. In this case, the Court observed in particular that “the national courts had presented the applicants, who did not wish to undergo, with an impossible dilemma: either they had to undergo the surgery against their better judgment – and forego full exercise of their right to respect for their physical integrity – or they had to forego recognition of their gender identity, which also came within the scope of respect for private life.”⁴⁷⁸

The Inter-American system

Gender identity and legal recognition of gender identity are well recognised and protected in the Inter-American system. As clearly affirmed by the Inter-American Court of Human Rights (IACtHR), gender identity is one of the protected statuses against discrimination under the

⁴⁷⁵ *Id.* para. 125.

⁴⁷⁶ European Court of Human Rights, *S.V. v. Italy*, application no. 55216/08, (2018); European Court of Human Rights, *Y.T. v. Bulgaria*, application no. 41701/16, (2020).

⁴⁷⁷ European Court of Human Rights, *X. and Y. v. Romania*, application nos. 2145/16 and 20607/16, (2021).

⁴⁷⁸ *Id.* para. 165

American Convention on Human Rights.⁴⁷⁹ Firstly in 2008, the Organization of American States (OAS) General Assembly adopted nine resolutions concerning human rights, sexual orientation and gender identity.⁴⁸⁰ While none of these resolutions directly included legal recognition of gender, they are nonetheless significant because they systematically recognised and condemned discrimination and violence against LGBTI+ people at the level of the OAS.

In November 2017, the Inter-American Court of Human Rights delivered a very important advisory opinion reflecting its progressive perspective on LGBTI+ rights, including legal gender recognition. Through a question brought to the attention of the Inter-American Court of Human Rights regarding legal gender recognition by the Republic of Costa Rica, the IACtHR declared that right to legal recognition of self-identified gender identity is protected by the American Convention on Human Rights under the provisions that ensure the free development of the personality, the right to privacy, the recognition of juridical personality, and the right to a name.⁴⁸¹ In this almost revolutionary opinion, the IACtHR stressed that “gender identity is not a concept that should be systematically associated with physical transformations ... because transgender persons construct their identity regardless of medical treatment or surgery.”⁴⁸² Subsequently, the Court adds that “... the procedure for name change, change of the photograph and rectification of the reference to gender in records and on identity documents cannot require supporting evidence of total or partial surgery, hormonal therapy, sterilization, or bodily changes in order to grant the request or to prove the gender identity in question, because this could be contrary to the right to personal integrity...”⁴⁸³ Consequently, the Inter-American Court of Human Rights recommended that legal gender recognition should be:

- Be based on self-identity, self-perceived gender identity;
- Be based on free and informed consent of the applicant without involving requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing;

⁴⁷⁹ Inter-American Court of Human Rights, *Case of Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Ser. C No. 239.

⁴⁸⁰ See the Organization of American States General Assembly Resolutions on human rights, sexual orientation and gender identity at <https://www.oas.org/en/iachr/lgtbi/links/Default.asp> (last visited Jan, 3 2023)

⁴⁸¹ Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, Advisory Opinion OC-24/17, Requested by the Republic of Costa Rica 115 (24 November 2017)

⁴⁸² *Id.* para. 145.

⁴⁸³ *Id.* para. 146.

- Be confidential, and the changes, corrections or amendments to the records and on the identity documents should not reflect the changes made based on the gender identity;
- Be prompt, insofar as possible, cost-free, and
- Not require evidence of surgery and/or hormonal therapy.⁴⁸⁴

Following the Court's opinion OC-24/17, the Inter-American Commission on Human Rights (IACHR) issued a detailed report titled “Recognition of the Rights of LGBTI Persons” in 2018.⁴⁸⁵ In this 137-pages report, the Inter-American Commission identified the main challenges LGBTI+ people faced with, gave an analysis considering international and Inter-American human rights instruments and provided recommendations to states. Regarding legal gender recognition in particular, the Inter-American Commission reaffirmed the importance of protecting gender identity as it means the free expression of personality and reiterated the IACtHR’ framework to establish a “fast, accessible and transparent process for the legal recognition of gender identity based on the free will of the individual, without any mandatory conditions.”⁴⁸⁶

The African system

Finally, in the African system, the African Commission on Human and Peoples’ Rights adopted the Resolution 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, in May 2014.⁴⁸⁷ The Resolution 275 is essential for the African human rights system since it affirmed that gender identity is a ground for protection from violence and other human rights violations including discrimination, under the African Charter. Following the Resolution 275, it is true that the African Commission on Human and Peoples’ Rights has started to include several references to sexual orientation and gender identity in its interpretations of the African Charter. In this regard, for instance, in the General Comment No.4 on torture in 2017, the African Commission on Human and Peoples’ Rights expressed that anyone can be a victim of sexual

⁴⁸⁴ *Id.* para. 160.

⁴⁸⁵ Inter-American Commission on Human Rights, “Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas” OEA/Ser.L/V/II.170, Doc. 184, (7 December 2018)

⁴⁸⁶ *Id.* para. 95.

⁴⁸⁷ The African Commission on Human and Peoples’ Rights, *275 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*, ACHPR/Res.275(LV)2014, the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights in Luanda, Angola, (2014) <https://www.achpr.org/sessions/resolutions?id=322> (last visited Jan, 3 2023)

or gender-based violence that amounts to torture or ill-treatment regardless their gender, sexual orientation or gender identity, since the list of protected grounds of discrimination is non-exhaustive.⁴⁸⁸

As can be seen, although the European system has an older and more comprehensive jurisprudence on the legal recognition of gender than other regions, it would not be wrong to say that it is still acting cautiously and taking small steps in this regard. Indeed, while Europe has repeatedly and systematically established that the legal recognition of gender is a human right, it has not yet declared all abusive preconditions categorically unlawful. Inter-American system, however, takes a much more progressive position on legal recognition of gender identity, since it considers self-identification is sufficient for legal recognition of gender identity, including for minors, and all other preconditions are therefore unlawful. It should be also noted that both the Inter-American Court and the Inter-American Commission have truly internalised the fight against discrimination based on gender identity and pioneered the human rights jurisprudence and literature, especially at the UN level, with their progressive interpretations on this issue.

On the other hand, it is not wrong to say that African system is in need of a true internalisation and progress regarding legal gender recognition. Although gender identity is included as a protected ground of discrimination as of 2014, it is a matter of concern that in 2022 the African Commission on Human and Peoples' Rights denied observer status to three human rights organisations on the grounds that “sexual orientation is not an expressly recognized right or freedom under the African Charter” and is “contrary to the virtues of African values”.⁴⁸⁹

4.3. State Practices on Legal Gender Recognition

Despite the international consensus in the process of obtaining gender recognition based on self-identification without any abusive requirements, and significant progress in both international and regional human rights mechanisms, state practices and procedures around the

⁴⁸⁸ The African Commission on Human and Peoples' Rights, *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights in Banjul, The Gambia, (2017), para. 19-20.

<https://www.achpr.org/legalinstruments/detail?id=60> (last visited Jan, 3 2023)

⁴⁸⁹ Statement on African Commission's Rejection of Observer Status Applications by Three Human Rights Organizations | Human Rights Watch, (Dec. 16, 2022), <https://www.hrw.org/news/2022/12/16/statement-african-commissions-rejection-observer-status-applications-three-human>

world vary and still reflect deep rooted hatred and denial towards trans people. In the Europe and Central Asia alone, legal gender recognition is not allowed in 14 of 54 countries, while 22 countries require forced medical interventions including sterilisation as a prerequisite for legal gender recognition.⁴⁹⁰

This section examines different national laws and practices regarding the legal recognition of gender identity. The countries chosen for the study are Malaysia, Hungary, Japan, the United Kingdom, Nepal and Argentina. These countries were chosen in order to represent all possible different approaches to legal recognition of gender identity around the world. The selection includes countries known for significant and systematic human rights violations, as well as countries considered to have the most progressive laws and practices in the world. This provides a comprehensive and comparative framework for examining how gender recognition is addressed in the domestic laws of different countries on a global scale. A further consideration in the selection of countries was to ensure geographical diversity around the world. Care was taken to include countries from different regional human rights systems, thus avoiding a Eurocentric perspective that might focus only on “good” or “bad” examples.

The choice of countries was informed by country visits and reports from LGBTI+ organizations, as well as United Nations special reports on sexual orientation and gender identity, providing guidance in the selection process. On the basis of similar and differentiated legislation and practices among the selected countries, state practices on the legal recognition of gender identity will be grouped under three headings: non-recognition and criminalisation, legal recognition only through abusive requirements and legal recognition based on self-determination.

4.3.1. Non-Recognition and/or Criminalisation of Gender Identity

Malaysia

Malaysia is a parliamentary democracy based on a federal constitutional monarchy with a written Constitution. The country has federal laws, which originate from the fully elected Malaysian Parliament and apply throughout the country, as well as state laws which apply only

⁴⁹⁰ See the TGEU (2023) Trans Rights Map Europe & Central Asia 2023.
<https://transrightsmat.tgeu.org/home/legal-gender-recognition/cluster-map> (last visited Jan, 6 2024)

in the respective state. It should be noted that Malaysia is not secular country, and its legal system is structured as a dual legal system through civil and Sheria courts.⁴⁹¹ Additionally, there is a “National Fatwa Council” which is entitled to issue fatwas on matters of Sharia law. The National Fatwa Council's fatwas are not legally binding, unless legislated by State Legislative Assemblies.⁴⁹² Malaysia has ratified the Convention on the Rights of the Child, CEDAW, and the Convention on the Rights of Persons with Disabilities, however has not signed the ICCPR or the ICESCR.⁴⁹³ Following the ratification of the CEDAW, the term “gender” has been added to the Article 8 of the Malaysian Constitution, namely the non-discrimination provision.⁴⁹⁴

However, gender identity as well as consensual same-sex conduct is illegal in Malaysia. In the penal code, there are several provisions that are used to arrest and harass trans people, for instance, prohibition of “posing as a woman”, “cross-dressing” or “prostitution” or “having disorderly or indecent behaviour”.⁴⁹⁵ Alongside the criminal law, all state-enacted Islamic laws criminalise trans women based on their gender identity, while some criminalise trans men.⁴⁹⁶ Further, the National Fatwa Committee issued several fatwas indicating that women who have a “masculine appearance or gestures” or a “male sexual instinct” are forbidden in Islam.⁴⁹⁷

As the Human Rights Watch indicated their 2014 report that while there is no law in Malaysia that explicitly prohibits legal gender recognition, changing gender markers on official documents is not possible.⁴⁹⁸ Indeed, according to the Births and Deaths Registration Act, a change of gender marker on national identity cards is not allowed unless there is a mistake or fundamental error identified by the court.⁴⁹⁹

The lack of gender identity in Malaysia must be read in conjunction with the fatwa issued by the National Fatwa Committee in 1982, which declared that gender reassignment surgeries are

⁴⁹¹ LEGAL GENDER RECOGNITION IN MALAYSIA: A LEGAL & POLICY REVIEW IN THE CONTEXT OF HUMAN RIGHTS, Asia Pacific Transgender Network 14–16 (2017). <http://library.nhrc.or.th/ULIB/dublin.php?ID=11208> (last visited Jan 5, 2023).

⁴⁹² *Id.* 44.

⁴⁹³ See the Ratification Status for Malaysia

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN

⁴⁹⁴ Legal gender recognition in Malaysia : A legal & policy review in the context of human rights, *supra* note 491 at 17.

⁴⁹⁵ *Id.* at 30-31.

⁴⁹⁶ *Id.*

⁴⁹⁷ Human Rights Watch, “I’m scared to be a woman”: Human rights abuses against transgender people in Malaysia” 11 (2014) https://www.hrw.org/sites/default/files/reports/malaysia0914_ForUpload.pdf (last visited Jan 5, 2023).

⁴⁹⁸ *Id.* at 55.

⁴⁹⁹ Malaysian Births and Deaths Registration Act 1957, article 27.

<http://library.nhrc.or.th/ULIB/dublin.php?ID=11208> (last visited Jan 5, 2023).

"haram" (forbidden).⁵⁰⁰ In fact, historically, gender reassignment surgeries have historically been performed at the publicly owned University of Malaya Hospital from the 1980s onwards, even for a very small number of cases.⁵⁰¹ When doctors performing gender reassignment surgeries at the Malaya Hospital realised that their post-operative patients were finding it difficult to find employment because their gender was not legally recognised on their identity cards, the doctors began lobbying the National Registry to accept their patients' gender markers.⁵⁰² However, both the surgeries and the lobbying for legal gender recognition had to be halted when the National Fatwa Council heard about the issue and issued a fatwa banning gender reassignment surgeries.⁵⁰³ Although this fatwa is not legally binding, it has since led to the de facto suspension of gender reassignment surgeries and medical interventions in hospitals.⁵⁰⁴

Subsequently, in 2004 the Ipoh High Court ruled that gender markers on identity cards cannot be changed except in the case of an error. In this application, the Court stated that “a positive decision in response to this application would conflict with the spirit and intention of the legislature expressed in the Births and Death Registration Act 1957 and changes of gender marker are not lawful except in the case of an “error””.⁵⁰⁵ Shortly after this judgement, in 2005, the National Fatwa Council issued another fatwa declaring it haram to change the gender marker on official documents.⁵⁰⁶

In addition to the lack of legal recognition of gender identity, sharia law and sharia courts in Malaysia also prohibit gender expression under criminal law. In this context, transgender people in Malaysia face arbitrary arrest and harassment for "dressing/behaving or acting in a masculine manner" or "dressing/behaving or acting in a feminine manner". For example, a

⁵⁰⁰ “I’m scared to be a woman”: Human rights abuses against transgender people in Malaysia”, *supra* note 497 at 3.

⁵⁰¹ *Id.* at 57-58.

⁵⁰² *Id.*

⁵⁰³ *Id.*

⁵⁰⁴ Legal gender recognition in Malaysia : A legal & policy review in the context of human rights, *supra* note 491 at 10.

⁵⁰⁵ University of Toronto, Faculty of Law, “*Malaysia: Country Report for use in refugee claims based on persecution relating to sexual orientation and gender identity*,” (2009) https://ihrp.law.utoronto.ca/utfl_file/count/documents/SOGI/Malaysia_SOGI_2009.pdf (last visited Jan 5, 2023).

⁵⁰⁶ Legal gender recognition in Malaysia : A legal & policy review in the context of human rights, *supra* note 474 at 39.

transgender woman wearing a bra or a transgender man wearing a unisex t-shirt may be arbitrarily detained by Malaysian authorities.⁵⁰⁷

Hungary

Until May 2020, it was possible to obtain legal gender recognition in Hungary, a member state of the European Union. Although Hungary did not have a specific legislation on legal gender recognition, it was possible to change a person's civil status on the basis of an informal practice; through a rectification of the person's civil status on the family register. In this context, applicants were required to submit a medical expert opinion diagnosing "transsexuality" and recommending gender reassignment surgery. However, it is important to note that gender reassignment surgery alone was not a prerequisite for legal recognition. In other words, what was required was the medical expert opinion itself diagnosing "transsexuality" and recommending gender reassignment surgery, but it was not necessary to have undergone gender reassignment surgery in practice. Having received such an expert opinion, the individual could then request the civil registry office to make the necessary corrections to the civil status data. In this context, within eight days of receiving the medical expert opinion in favour of gender reassignment, the registrar of birth records had to be notified to make the necessary corrections. Accordingly, it would complicate the recognition process if the registrar made the necessary changes in the family register on the basis of the notification.⁵⁰⁸

However, reports of the human rights organisations from Hungary state that legal recognition process has been frozen and legal gender recognition applications were rejected especially after 2017, the year where the political mobilisation against gender and LGBTI+ has been substantially accelerated by the Hungary's far-right the governing party, Fidesz.⁵⁰⁹ Indeed, the Fidesz government's anti-gender campaign started with attacks against the Central European University in 2017, on the basis of the gender studies conducted under the University. In 2018, all the gender studies courses in Hungary have been cancelled and the term 'gender' was removed from the curriculum. It was followed by attacks against the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

⁵⁰⁷ I'm scared to be a woman": Human rights abuses against transgender people in Malaysia", *supra* note 497 at 24-25.

⁵⁰⁸ For the relevant legal framework and practice in Hungary before the May 2020; see European Court of Human Rights, *Rana v. Hungary*, application no. 40888/17, (2020), para.14-15.

⁵⁰⁹ The Anti-Gender and Anti-LGBTQI Mobilisation in Hungary and Poland, Research Project by the Political Capital and Projekt: Polska, the Friedrich Naumann Foundation for Freedom, (June 2022)

(the Istanbul Convention) in 2019, alleging that Convention has a hidden agenda which is to abolish the traditional Hungarian family structure.⁵¹⁰

As a continuation of Hungary's far-right governing party's anti-gender policies, on 31 March 2020, the International Transgender Day of Visibility⁵¹¹, deputy prime minister of Hungary proposed a bill which will make legal gender recognition impossible in the country.⁵¹² Accordingly, on 19 May 2020, the Hungarian Parliament voted 133 in favour, 57 opposed, to approve an omnibus bill, one article of which amends the civil registry law, which was used as the basis for legal recognition, by replacing the term of "sex" on the civil registry with "sex assigned at birth".⁵¹³ Since the new law redefines the word "nem," which in Hungarian can mean both "sex" and "gender," to specifically refer to a person's "biological sex based on primary sex characteristics and chromosomes", previous provisions allowing trans people could ask to make necessary corrections regarding their gender and name on official documents have been nullified.⁵¹⁴

Additionally, the new law also adopted a provision announcing that the amendments on the civil registry law will apply to already ongoing proceedings as well, which was resulted with dozens of ongoing applications of trans people who have been waiting for years to have their legal gender recognition were rejected, following the new law entered into force.⁵¹⁵ However, LGBTI+ organisations challenged these rejection decisions before the Constitutional Court, and in 2021, the Constitutional Court ruled that the provision prescribing the application of the new law to ongoing proceedings is unconstitutional,⁵¹⁶ in other way to say, the ban on legal gender recognition could not apply retroactively. Consequently, the Constitutional Court

⁵¹⁰ *Id.*, 8-10

⁵¹¹ Since 2010, each year on March 31, the world observes Transgender Day of Visibility to raise awareness about transgender people. It is a day to celebrate the lives and contributions of trans people, while also drawing attention to the poverty, discrimination, and violence the community faces. See more on <https://www.glaad.org/blog/transgender-day-visibility> (last visited Jan 7, 2023).

⁵¹² Shaun Walker, *Hungary votes to end legal recognition of trans people*, THE GUARDIAN, May 19, 2020, <https://www.theguardian.com/world/2020/may/19/hungary-votes-to-end-legal-recognition-of-trans-people> (last visited Jan 7, 2023).

⁵¹³ *Hungary puts trans and intersex people at risk*, TGEU, ILGA-EUROPE, IGLYO, AND OII EUROPE, Press release (2020), <https://ilga-europe.org/press-release/hungary-rolls-back-legal-protections-puts-trans-intersex-people-at-risk/> (last visited Jan 7, 2023).

⁵¹⁴ *Hungary Ends Legal Recognition for Transgender and Intersex People*, HUMAN RIGHTS WATCH (May 21, 2020), <https://www.hrw.org/news/2020/05/21/hungary-ends-legal-recognition-transgender-and-intersex-people> (last visited Jan 11, 2023).

⁵¹⁵ *Hungarian Constitutional Court: Retroactive prohibition of legal gender recognition unconstitutional*, HÁTTÉR SOCIETY (2021), <https://en.hatter.hu/news/annuled-provision> (last visited Jan 11, 2023).

⁵¹⁶ *Id.*

created two categories of trans people in Hungary: those who applied early enough to pursue legal gender recognition before 2020 and those who did not.⁵¹⁷

Just a few months later, in December 2020, the Ninth Amendment to the Basic Law was adopted, proposing several legislative changes, including provisions on marriage and family, gender identity and the upbringing of children. One of the changes made by the December 2020 amendments was the addition to the constitution of the provision that “Hungary shall protect the right of children to a self-identity corresponding to their sex at birth” to the constitution.⁵¹⁸

Upon the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) requested an opinion from the Venice Commission in February 2021 on such amendments adopted the Hungarian Parliament in December 2020,⁵¹⁹ the Venice Commission recommended ‘repeal or modify’ the amendment “Hungary shall protect the right of children to a self-identity corresponding to their sex at birth” by explaining that it is not compatible with case-law of the ECtHR which recognizes gender identity as a component of personal identity.⁵²⁰

On the other hand, in February 2023, the Hungarian Constitutional Court examined the May 2020 amendments for the first time, upon a petition submitted by a judge arguing that the provision of the Act on Registry Procedures which is amended through May 2020 amendments and makes it impossible to access legal gender recognition violates the Hungarian Constitution (The Fundamental Law).⁵²¹ Nevertheless, the Hungarian Constitutional Court, found the amendments are lawful, arguing that “since the concept of sex at birth is enshrined in the Fundamental Law, its mandatory and unchangeable registration does not constitute a violation of human dignity and the right to respect for private life.”⁵²²

Although the Venice Commission recommended to repeal the amendments prohibiting legal gender recognition, noting that it is incompatible with case-law of the ECtHR and violates

⁵¹⁷ *Id.*

⁵¹⁸ Marton Dunai & Anita Komuves, *Hungary Amends Constitution to Redefine Family, Limits Gay Adoption*, REUTERS, Dec. 15, 2020, <https://www.reuters.com/article/idUSKBN28P1N7/> (last visited Nov 19, 2023).

⁵¹⁹ European Commission For Democracy Through Law (Venice Commission), Council of Europe, Request for opinion – PACE/HUNGARY, 11 February 2021, <https://www.venice.coe.int/webforms/events/?id=3096> (last visited Nov 19, 2023).

⁵²⁰ European Commission For Democracy Through Law (Venice Commission), Hungary, Opinion On The Constitutional Amendments Adopted By The Hungarian Parliament In December 2020, Opinion No. 1035/2021, CDL-AD (2021)029, (2 July 2021) para.33-41

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)029-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)029-e)

⁵²¹ Eszter Polgári & Tamás Dombos, *Ignorance and Evil: The Hungarian Constitutional Court on Legal Gender Recognition for Trans People*, VERFASSUNGSBLOG (2023), <https://verfassungsblog.de/ignorance-and-evil/> (last visited Nov 19, 2023).

⁵²² *Id.*

applicable international human rights norms⁵²³; such law is still in force and legal gender recognition is not legally permitted in Hungary as of February 2024.

4.3.2. Legal Recognition through Abusive Prerequisites

Japan

Japan is a constitutional monarchy based on the principle of separation of powers.⁵²⁴ The emperor, a historical figure, has only symbolic powers such as the appointment of an elected prime minister and the ratification of international conventions. While the Constitution of Japan guarantees that “all of the people are equal under the law”, it does not include sexual orientation and gender identity as protected grounds of discrimination.⁵²⁵

In Japan, legal gender recognition is only possible if certain preconditions are met, including compulsory medical interventions.⁵²⁶ The process of legal recognition of gender is regulated by the Gender Identity Disorder Special Cases Act, which entered into force in 2004. According to the law, a person seeking legal gender recognition must first receive a diagnosis of "Gender Identity Disorder" from a panel of at least two medical specialists. The person must then apply to the Family Court with a document showing that they have received this diagnosis of "gender identity disorder". Finally, the Family Court examines whether all other conditions specified in the law have been fulfilled and if the other conditions are met, then legally recognizes the applicant's gender identity.⁵²⁷

According to the law, the diagnosis of "gender identity disorder", which is the first condition for legal recognition of gender identity, is received based on 3 criteria:

1. A psychological test based on an oral interview with the person,
2. A biological test that includes a detailed examination of the person's chromosomes, hormones and internal and external genitalia,

⁵²³ European Commission For Democracy Through Law (Venice Commission), Hungary, Opinion On The Compatibility With International Human Rights Standards Of Act LXXIX Amending Certain Acts For The Protection Of Children, Opinion No. 1059/2021, CDL-AD (2021)050, (13 December 2021) para.28-36

⁵²⁴ The Constitution of Japan, (1947)

https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html

⁵²⁵ *Id.*

⁵²⁶ Hiroyuki Taniguchi, *Japan's 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan*, 14, 108–117 (2013).

⁵²⁷ *Id.*

3. A test to determine whether the person's request arises from schizophrenia or other mental illness or a social, cultural or professional reason.⁵²⁸

After having the diagnosis of "gender identity disorder" as a result of such test, the applicant is required to apply to the Family Court. At this stage, the Court will further examine the applicant's request based on whether the applicant fulfils the following criteria:

1. Being 18 years of old or older
2. Not being married
3. Not having children
4. Having a physical form that is "endowed with genitalia that closely resemble the physical form of the opposite gender."⁵²⁹

Clearly, while legal recognition of gender is possible in Japan, it is subject to a complex and ambiguous set of conditions that constitute violations of many fundamental human rights, notably human dignity and bodily integrity. "Biological testing", which involves a detailed examination of a person's chromosomes, hormones, internal and external genitalia, and psychological examinations to determine whether the person's request is due to some form of mental illness, are highly degrading and humiliating treatments that constitute a clear violation of the right to respect for private life. Also, it is reported that the psychological test contains a questionnaire with more than 100 open-ended questions about gender such as "When I was little, everyone told me that I was a" or "If my parents passed away, I would feel". As to the complexity and inaccessibility of the process, a trans person seeking legal recognition reported having to travel to a clinic 520 kilometres from their home for six appointments over two months to undergo psychiatric testing.⁵³⁰ Indeed, reports by human rights organisations reveal that Japan's abusive legal gender recognition framework which pathologizes trans identities as "disorders" and reinforces stigma and prejudice against trans people, has led many trans people in Japan become frustrated even in the beginning of the process.⁵³¹

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ Kyle Knight, "A Really High Hurdle," HUMAN RIGHTS WATCH (2019), <https://www.hrw.org/report/2019/03/19/really-high-hurdle/japans-abusive-transgender-legal-recognition-process> (last visited Jan 6, 2023).

⁵³¹ *Id.*

Furthermore, Japan's legal gender recognition law includes requirements related to marital and parental status as well as age. Contrary to the principle of the best interests of the child as enshrined in international human rights law, failure to legally recognise the gender of children and adolescents in Japan has negative effects on their physical integrity and mental well-being. Also, highly discriminatory requirements, such as not being married and not having children, force those seeking legal recognition to avoid having children at any point in their lives and to remain unmarried or to terminate existing marriages. In other words, transgender people are forced to choose between having children and being legally recognised as the gender they identify with.

Last but definitely not least, Japan requires having “a physical form that is endowed with genitalia that closely resemble the physical form of an alternative gender” as the last stage of the legal recognition process. In practice, this means that the person must be subjected to a series of surgeries and medical interventions, such as mastectomy (removal of breast tissue) or metoidioplasty (surgical creation of a penis). While these medical processes may be preferred by some trans people, it is not the case for all trans people. In fact, these surgeries are highly complex and irreversible medical interventions which have serious health risks. The research reveal that trans people in Japan often do not receive appropriate medical management for complications resulted from these surgeries and they are not under an appropriate medical supervision in these complex medical processes.⁵³²

It is significant to note that until very recently, Japan required that a person be "permanently deprived of the ability to reproduce" in order to be legally recognised.⁵³³ However, in October 2023, Japan's Supreme Court has nulled the law requiring permanent deprivation of the ability to fertility as a prerequisite of legal gender recognition, surprisingly.⁵³⁴

The Court's 2023 decision was surprising, because the forced sterilisation criterion was challenged before the Supreme Court of Japan by an applicant who was denied legal recognition because she had not undergone sterilisation surgery first in 2019. However, in 2019, the Supreme Court of Japan ruled that the sterilisation requirement was constitutional. In its reasoning, the Court reflected its gendered perspective in the clearest possible way in the

⁵³² Naoya Masumori, *Status of sex reassignment surgery for gender identity disorder in Japan*, 19 INTERNATIONAL JOURNAL OF UROLOGY 402, 413 (2012), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1442-2042.2012.02975.x> (last visited Jan 6, 2023).

⁵³³ Taniguchi, *supra* note 526.

⁵³⁴ Victory for Transgender Rights in Japan | Human Rights Watch, (Oct. 25, 2023), <https://www.hrw.org/news/2023/10/25/victory-transgender-rights-japan> (last visited Dec 13, 2023).

following words: “since gender distinctions in society have long been made on the basis of biological sex, rapid changes in social norms regarding gender distinctions that may have a negative impact on society should be avoided”.⁵³⁵

But, only four years later, in October 2023, Japan's Supreme Court has overruled its 2019 judgement and unanimously ruled that forced sterilisation criterion for legal gender recognition is unconstitutional, upon a transwoman applicant's claim that the sterilization requirement violated her rights to pursue happiness and to protection against discrimination.⁵³⁶ In this very new historic judgement in October 2023, The Supreme Court justified its decision by affirming that "people are forced to make a tough choice between surgery and abandoning the decision to change genders". On the other hand, in the same decision, the Court deliberately hesitated to make a decision on the requirement of “having a physical form that is endowed with genitalia that closely resemble the physical form of the opposite gender” and asked the lower court to reevaluate this particular requirement in the case.⁵³⁷ Therefore, even if the sterilisation requirement is abolished in Japan as of October 2023, requirements that essentially amount to coercive medical intervention will remain in place for trans people seeking legal gender recognition.

United Kingdom

Following the ECtHR's frequent infringement decisions against the United Kingdom in relation to legal gender recognition,⁵³⁸ the UK introduced the Gender Recognition Act (GRA) in 2004. The 2004 Gender Recognition Act, which came into force in 2005, provides a mechanism for trans people to amend their official birth certificates without having to undergo medical interventions.⁵³⁹

The Gender Recognition Act established the body called "Gender Recognition Panels" made up of medical and legal experts. These panels are empowered to issue Gender Recognition Certificates (GRCs), which allow applicants to amend their birth records if they meet the requirements set out in the Act. In other words, the Gender Recognition Panels assess whether

⁵³⁵ Japan: Law Requiring Surgery for Legal Change of Gender Ruled Constitutional, LIBRARY OF CONGRESS, WASHINGTON, D.C. 20540 USA, <https://www.loc.gov/item/global-legal-monitor/2019-04-12/japan-law-requiring-surgery-for-legal-change-of-gender-ruled-constitutional/> (last visited Jan 6, 2023).

⁵³⁶ Victory for Transgender Rights in Japan | Human Rights Watch, *supra* note 534.

⁵³⁷ *Id.*

⁵³⁸ See for instance *Christine Goodwin v. The United Kingdom*, *supra* note 435; *Sheffield and Horsham v The United Kingdom*, *supra* note 439; *Cossey v. The United Kingdom*, *supra* note 438.

⁵³⁹ Gender Recognition Act, GRA, 2004, <https://www.legislation.gov.uk/ukpga/2004/7/introduction> (last visited Jan 9, 2023)

the applicant meets the required conditions and accordingly, issue a Gender Recognition Certificate allowing the necessary amendments to be made in the applicant's official identity documents.⁵⁴⁰

To be eligible for the Gender Recognition Certificate, the applicant must fulfil the following criteria:

1. Being 18 years of old or older
2. Having the medical diagnosis of 'gender dysphoria'
3. Providing evidence that they have lived as their preferred gender for at least two years,
4. Proving their intention to live as their preferred gender for the rest of their life.
5. Having spousal consent if the applicant is married.⁵⁴¹

Once the applicant has received the Gender Recognition Certificate, the Registrar General is required to make the necessary amendments to the person's official records.

It is worth noting that the Gender Recognition Act was the first law in the world not to require forced sterilisation for legal gender recognition. However, although the GRA has removed the forced sterilisation criterion, it still requires a diagnosis of psychiatric gender dysphoria as a condition for recognition. In fact, the criterion of a psychiatric diagnosis of gender dysphoria is not a simple process in itself. Rather, the application must include two different reports: one from a registered medical doctor or psychologist working in the field of gender dysphoria, giving details of the diagnosis, and the second from any registered medical doctor. At least one of these reports must include details of any treatment, including gender reassignment surgery, hormone treatment or any other relevant medical treatment that the applicant has undergone, is undergoing, has been prescribed or is planning to undergo.⁵⁴² Such a requirement for a psychiatric diagnosis has been rightly criticised for reinforcing the idea that being a trans person is a mental illness that can be cured.⁵⁴³

Furthermore, the GRA does not allow for the recognition of the gender identity of children and adolescents under the age of 18, contrary to the framework established by international human

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.* Section 4.

⁵⁴² *Id.* Section 3.

⁵⁴³ Have your say on the Gender Recognition Act, Amnesty International UK, (20 Feb 2020) <https://www.amnesty.org.uk/have-your-say-gender-recognition-act> (last visited Jan 9, 2023).

rights law. On the other hand, the requirement that the applicant has to evidence they have lived in their ‘acquired gender’ for two years and that they intend to live as that gender for the rest of their life, seems to be introduced to convince the Panel of the applicant's "sincerity" and "seriousness".

While it is welcomed that the GRA abolished compulsory sterilisation in 2004, it should be noted that it does not offer full "recognition" free from discrimination and violence in all areas of life. For instance, the GRA provides the Church of England priests the right to conscience to refuse certain church services, particularly marriage, to certain people.⁵⁴⁴ In other words, it gives the Church of England the right to make an exception not to "recognize" the gender identity of persons who have obtained the Gender Identity Certificate. Similarly, the GRA grants exceptions for non-governmental institutions in implementing the Gender Recognition Certificate. In other words, it gives discretion to all non-governmental institutions (including universities) to make amendments in their official records, such as diplomas. The GRA also allows single-sex sports institutions and associations to exclude people who obtain gender recognition under the GRA if it is deemed necessary to maintain “fair competition or the safety of the competitors.”⁵⁴⁵

As a result of the campaigns of transgender and LGBTI+ rights defenders drawing attention to the human rights violations caused by the system stipulated by the GRA, especially the psychological diagnosis criterion, and demanding reforms on the GRA, the Government launched a series of research to identify the shortcomings in the implementation of the GRA.⁵⁴⁶ In this context, the Government launched a survey in 2018, gathered inputs from more than 100,000 individuals and organizations, and drafted a report, which was made public in September 2020. Accordingly, between 64% and 83% of respondents indicated that the requirements of the GRA should be abolished or radically changed, and that steps should be taken to make the process more accessible, cheaper and faster.⁵⁴⁷

⁵⁴⁴ Gender Recognition Act, Section 5.

⁵⁴⁵ *Id.* Section 19.

⁵⁴⁶ What does the UK Government announcement on the Gender Recognition Act mean?, STONEWALL (2017), <https://www.stonewall.org.uk/what-does-uk-government-announcement-gender-recognition-act-mean> (last visited Jan 9, 2023).

⁵⁴⁷ United Kingdom Government Equalities Office, “Reform of the Gender Recognition Act – Analysis of consultation responses”, (September 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919890/Analysis_of_responses_Gender_Recognition_Act.pdf (last visited Jan 9, 2023).

However, despite all these extensive research revealing a clear consensus among the British public on the need to remove the requirements of the Gender Recognition Act, the Government announced in September 2020 that the GRA will not be amended and will continue to apply as it is.⁵⁴⁸ In this regard, the Government announced that “the requirements necessary to legally change gender will remain the same, but the process will be modernised” including reducing the application cost.⁵⁴⁹

This radical “u-turn” is mainly explained by the change of government and consequently, the change of policy. In fact, the debates on a possible amendment of the GRA and the consultation process was started under the mandate of the former Prime Minister Theresa May, however, the Prime Minister Boris Johnson, who replaced May after her resignation, made it clear that he had no intention of amending the GRA immediately after taking the office.⁵⁵⁰ Thus, although forced sterilisation and coercive medical interventions for legal recognition of gender identity have been abolished by the GRA in 2004 thanks to the consistent effort of LGBTI+ right defenders in the UK, the country’s practice of subjecting trans people to a range of abusive and discriminatory requirements, including a 'diagnosis of gender dysphoria', is not complied with the international human rights standards yet.

4.3.3. Legal Recognition Based on Self-Identification

Nepal

Nepal has a very turbulent political history, and was mostly ruled by a monarchy until 1951, when the cabinet system of government was introduced. However, over the decades of coups, guerrilla wars and civil wars, the parliament was repeatedly dissolved by the king and finally in 2006, after 19 days of rallies, strikes and mass demonstrations across the country, the king was forced to restore parliament and hand over power to political parties. In 2006, parliament

⁵⁴⁸ United Kingdom Government Equalities Office, Press Release, “Government responds to Gender Recognition Act consultation”, (22 September 2020), <https://www.gov.uk/government/news/government-responds-to-gender-recognition-act-consultation> (last visited Jan 9, 2023).

⁵⁴⁹ Id.

⁵⁵⁰ Boris Johnson “drops plans to let people change gender without medical diagnosis,” THE INDEPENDENT (2020), <https://www.independent.co.uk/news/uk/politics/boris-johnson-transgender-rights-reforms-theresa-may-diagnosis-a9565001.html> (last visited Jan 10, 2023).

began work on an interim constitution limiting the king's powers, and in 2008 the monarchy was overthrown and the Federal Democratic Republic of Nepal was established.⁵⁵¹

The Interim Constitution adopted in 2007 had inclusive and progressive provisions on gender equality. According to the Interim Constitution “the state shall be made inclusive and restructured into a progressive, democratic federal system, in order to bring an end to discrimination based on class, caste, language, gender, culture, religion and region by eliminating the centralised and unitary form of the state”.⁵⁵² Indeed, 2007 was a revolutionary year for LGBTI+ rights in Nepal.

In 2007, the Supreme Court issued a landmark judgement granting fundamental rights to sexual minorities and recognising the "third gender" as a new category entitled to citizenship.⁵⁵³ In its historic *Pant v. Nepal* judgement in 2007, the Supreme Court created another category outside the binary categories of men and women, which it termed the "third gender" (or "other"), stating that "if any law prevents persons of the 'third gender' from exercising the fundamental rights and freedoms enshrined in the Constitution and international human rights treaties ratified by Nepal, such law is arbitrary, unwarranted and discriminatory."⁵⁵⁴

The case was initiated by Sunil Babu Pant who were the founder of the Blue Diamond Society, the first national non-governmental organisation established to advocate for LGBTI+ rights in the country on the basis that discriminatory practices and laws towards LGBTI+s and non-recognition before the law were violating LGBTI+s' self-esteem, dignity and right to life. The case was emphasizing that the Metis community (the term used for the trans people in Nepal) were frequently faced violence and harassment because of the lack of legal recognition of their gender identity.⁵⁵⁵

In its judgement, the Supreme Court first referred to the Yogyakarta Principles and defined sexual orientation and gender identity, as well as lesbian, gay, bisexual, transgender,

⁵⁵¹ DEEPAK THAPA & ALEXANDER RAMSBOTHAM, TWO STEPS FORWARD, ONE STEP BACK: THE NEPAL PEACE PROCESS (2017).

⁵⁵² ANAGHA NEELAKANTAN, ALEXANDER RAMSBOTHAM & DEEPAK THAPA, PEACE, POWER, AND INCLUSIVE CHANGE IN NEPAL 5–6 (2016).

⁵⁵³ Supreme Court of Nepal, *Sunil Babu Pant and Others v. Nepal Government and Others*, Writ. No. 917 of the year 2064 BS (2007 AD). See the full text of judgment in English at <https://www.icj.org/wp-content/uploads/2012/07/Sunil-Babu-Pant-and-Others-v.-Nepal-Government-and-Others-Supreme-Court-of-Nepal.pdf> (last visited Jan 6, 2023)

⁵⁵⁴ *Id.*

⁵⁵⁵ *Sunil Babu Pant and Others/ v. Nepal Government and Others*, Supreme Court of Nepal (21 December 2007), INTERNATIONAL COMMISSION OF JURISTS, <https://www.icj.org/sogicasebook/sunil-babu-pant-and-others-v-nepal-government-and-others-supreme-court-of-nepal-21-december-2007/> (last visited Jan 6, 2023).

homosexual, transsexual and intersexuality. The Court then noted that sexual orientation was a natural phenomenon rather than the “mental or emotional disorder” by further expressing that “fundamental rights of an individual should not be restricted on any grounds such as religion, culture, customs, values and the like”.⁵⁵⁶

Following a detailed analysis of the international human rights framework on equality and non-discrimination based on sexual orientation and gender identity, including the case law of the European Court of Human Rights, the Court emphasised that gender identity is an intrinsic element of the personality that falls entirely within the scope of the right to self-determination, therefore it must be recognised without any medical or psychological intervention, including the consent of third parties.⁵⁵⁷

As a result of this decision, new citizenship cards having a separate column for the third gender were started to be issued.⁵⁵⁸ The government identified over 100 laws which were discriminatory thus needed to be abolished, and also included gender diversity in school curriculum. By 2010, the third option had been added to official immigration documents as well as voter rolls, and in 2015 the Government began issuing passports recognising three genders. Same year, Nepal’s new constitution included gender identity and recognised the right to self-identity.⁵⁵⁹ Sunil Babu Pant, the founder of the Blue Diamond Society and the petitioner of the Pant case, became Asia’s first openly gay national-level elected official.⁵⁶⁰

On the other hand, the term “third gender” or “other”, when considered in Eurocentric terminology, can be seen as a discriminatory and stigmatising term that is far from rights-based and even centred on the male-female binary. Indeed, it is true that the Nepali system does not allow a person to reassign their gender, but instead creates a “third gender category” as an alternative to the male and female categories and recognises applicants only within this category.⁵⁶¹

⁵⁵⁶ Id.

⁵⁵⁷ Id.

⁵⁵⁸ How Did Nepal Become a Global LGBT Rights Beacon?, HUMAN RIGHTS WATCH (2017), <https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon> (last visited Jan 7, 2023).

⁵⁵⁹ Id.

⁵⁶⁰ Jeevan Baniya et al., *Gender and Nepal’s Transition from War* (2017), <https://peacerep.org/publication/gender-and-nepals-transition-from-war/> (last visited Jan 7, 2023).

⁵⁶¹ The intricacy of legal gender recognition in Nepal, MAKE YOUR VOICE COUNT (2020), <https://yvc-asiapacific.org/2020/01/15/the-intricacy-of-legal-gender-recognition-in-nepal/> (last visited Jan 7, 2023).

However, it should be noted that the category of “third gender” or “other” is an inclusive category for people who do not identify in a gender binary, including intersex people. It is also important to recognise the unique social and cultural context of Nepal in terms of gender diversity. As noted at the beginning of the chapter, the concept of gender identity has been expressed in many different terms around the world, based on the unique culture, traditions and social structures of societies, as opposed to the Eurocentric terminology used in human rights law and activism today. In this context, "metis", "kothi" and "hijra" are some of the terms used in Nepal for people whose gender identity does not match their assigned gender.⁵⁶² What these terms have in common is that they cover people who do not identify as male or female, or whose gender identity does not match the gender assigned to them at birth. Therefore, since the category called "third gender" covers this diversity of gender identities, it would not be wrong to say that it overlaps with the terms "trans" or "transgender" used as an umbrella concept in Western-centred terminology. As a matter of fact, while the term “third gender” is used in the Nepali text, the term “transgender” is used in the English translation of the Court’s judgement.

After all, given the fact that legal recognition of gender identity does not require any abusive mandatory requirements such as forced sterilisation, mandatory medical interventions, psychological evaluation or discriminatory criteria such as age or marital status, and the system is based on the principle of self-determination, and it also includes non-binary identities, it must be noted that Nepal’s practice on legal gender recognition is relatively in line with the international human rights framework, compared to most states around the world.

Argentina

Argentina is a federal republic governed by a presidential system. Based on the principle of separation of powers, the legislative power is vested in the Congress and the executive power in the President and judicial power in the Supreme Court of Justice.⁵⁶³

Argentina is the first country in the world to introduce a system of legal recognition of gender identity on the basis of full self-determination, as a result of many years of determined and systematic struggle by LGBTI+ rights defenders. Argentina’s Gender Identity Law ("Ley de

⁵⁶² Sunil Babu Pant and Others/ v. Nepal Government and Others, Supreme Court of Nepal (21 December 2007), *supra* note 555.

⁵⁶³ Argentina's Parliament and other political institutions, Briefing, European Parliamentary Research Service (September 2021) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698047/EPRS_BRI\(2021\)698047_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698047/EPRS_BRI(2021)698047_EN.pdf) (last visited Jan 7, 2023)

identidad de género" in Spanish) has been unanimously adopted in 2012⁵⁶⁴, has led to a paradigm shift in the approach to the legal gender recognition all over the world,⁵⁶⁵ especially in the United Nations.⁵⁶⁶ The law ensures legal recognition of gender identity including minors based on a quick, free, transparent and simple administrative process and self-identification, without any prerequisite such as medical intervention, psychological evaluation or any prior authorisation.

The first article of the Gender Identity Law titled "Right to gender identity" affirms that "Everyone has the right: a) to have his/her gender identity recognised; b) to develop his/her personality freely in accordance with his/her gender identity; c) to be treated in accordance with his/her gender identity and, in particular, to be identified as such by his/her name(s), appearance and gender as recorded in documents proving their identity."⁵⁶⁷ According to the law, anyone can request an amendment to the registered gender, with changes in name and appearance, "whenever they do not correspond with their self-identified gender identity", without any conditions such as gender reassignment surgery, hormone treatments or any other psychological or medical treatment, including age restriction.⁵⁶⁸ In this context, submitting a request for necessary amendments to be made on the birth certificates and a new national identity card is sufficient enough to be legally recognised, without any abusive requirement. Going one step further, Argentina's Gender Identity Law itself explicitly prohibits abusive requirements. According to the law, "in no case shall it be necessary to prove that a surgical procedure, hormonal treatments or any other psychological or medical treatment has taken place."⁵⁶⁹

The Gender Identity Law also provides a robust rights-based approach for minors. According to the law, the same procedure based on making a request applies to children under 18 years of age, but the request must be made through their legal representatives and with the explicit consent of the minor, taking into account the developing capacities and best interests of the child. On the other hand, if the legal representatives refuse to give consent, the minor can still

⁵⁶⁴ The Ley de Genaro, English Translation of Argentina's Gender Identity Law as approved by the Senate of Argentina on May 8, 2012, TGEU, <https://tgeu.org/argentina-gender-identity-law/> (last visited Jan 7, 2023)

⁵⁶⁵ Köhler, Recher, and Ehrh, *supra* note 364 at 49.

⁵⁶⁶ OHCHR-South America welcomes law on gender identity in Argentina, Press Release by the Regional Office of the OHCHR, (25 May, 2012) <http://acnudh.org/wp-content/uploads/2012/08/REGIONAL-NEWSLETTER-January-June-2012.pdf> (last visited Jan 7, 2023)

⁵⁶⁷ The Ley de Genaro, *supra* note 564.

⁵⁶⁸ *Id.* Article 2

⁵⁶⁹ *Id.* Article 4.

"resort to summary proceedings" in which the judge will decide according to the evolving capacities and best interests of the child. During the process, the minor is legally assisted by a children's lawyer.⁵⁷⁰

The law also contains a number of other benefits. In this context, it ensures that the legal recognition process is completely free and confidential. Furthermore, changes to official records will not affect the legal entitlements (such as marital or parental status) that the person had before the changes. On the other hand, under the Article 11 titled "Right to Free Personal Development" the law guarantees access to free health services for transgender people who will be covered by the national health-care plan.⁵⁷¹

The reports prepared by the LGBTI+ civil society in Argentina indicate that the administrative procedure for legal gender recognition is completed in as little as 2-3 weeks⁵⁷² and there have been no case where the request of the person regarding legal recognition was rejected after the law entered into force.⁵⁷³ The reports also reveal that trans people generally report positive changes in their capacity to enjoy their fundamental human rights thanks to the law, especially in areas of education, healthcare, employment, safety, and civil rights⁵⁷⁴, particularly right to vote safely.⁵⁷⁵

In conclusion, although international human rights law obliges states to ensure gender recognition on the basis of self-identification without abusive requirements, state practice on legal recognition of gender identity appears to vary dramatically. As analysed in this chapter, there are three different state practices: non-recognition and/or criminalisation of gender identity; legal gender recognition through abusive requirements, including forced sterilisation; and legal recognition based on self-determination. However, the reason for this radical diversity in state practices around the world is not that international human rights law is inadequate, vague or inconsistent in this regard; on the contrary, international human rights make clear the obligations of the state: to provide an effective, quick, transparent and accessible legal gender recognition process based on the applicant's self-identification. In practice, however, this is not the case for trans people, as shown in detail in this chapter. In practice, there is no universally

⁵⁷⁰ *Id.* Article 5.

⁵⁷¹ *Id.* Article 11.

⁵⁷² Köhler, Recher, and Ehrh, *supra* note 364 at 52.

⁵⁷³ John Ryan, *Gender Identity Laws: The legal status of global sex/gender identity recognition*, VIII (1) LGBTQ POLICY JOURNAL 3, 11 (2018), <https://repositorio.ul.pt/handle/10451/37621?locale=en> (last visited Jan 7, 2023).

⁵⁷⁴ Inés Arístegui et al., *Impact of the Gender Identity Law in Argentinean Transgender Women*, 18 INTERNATIONAL JOURNAL OF TRANSGENDERISM 446 (2017).

⁵⁷⁵ *Id.*

agreed “human right to legal gender recognition”. Therefore, as is shown during this chapter, while some trans people might be killed or convicted to prison, or might be subjected to abusive conditions, including forced medical interventions and had to choose between their gender identity and bodily integrity and mental health, some can easily access to quick and free gender recognition based on self-identification. Therefore, the sole determinant of a person’s legal existence, or in other words, their “right to have rights” is not the international human rights law, but the decision of the state.



Chapter 5

ABSTRACT NAKEDNESS OF NON-BINARY BODIES

5.1. The Power Over the Life and the Body: *“Only Certain Bodies Come to be Identified as Individuals”*

The complex legal arrangements and administrative practices of nation states to conceive, recognize and regulate gender identity discussed in the Chapter 4 in detail, have a relatively recent history. In order to better understand this great interest that leads states to make such complex and comprehensive legal regulations regarding the bodies and gender identities of their citizens and to analyse its source correctly, it is necessary to start with taking a closer look at the concept of "biopolitics" put forward by Michel Foucault.

In October 1974, Michel Foucault gave three lectures on public health at the University of Rio de Janeiro. The first was titled “The Crisis of Medicine or the Crisis of Antimedicine?”, the second “The Birth of Social Medicine”, and the third “The Incorporation of the Hospital into Modern Technology”. It is this second lecture that he uses the concept of biopolitics for the first time in explaining the transformation of social medicine. Indeed in the lecture titled “The Birth of Social Medicine”, Foucault uses the concept of biopolitics for the first time to refer to the effect of the medical intervention at the biological level that started in the eighteenth century while explaining the transformation of the social medicine.⁵⁷⁶

Foucault provides the first comprehensive analysis of biopolitics in the fifth chapter of his book *The History of Sexuality* published in 1976, titled "The Right of Death and Power over Life".⁵⁷⁷ Here, Foucault mentions that “one of the characteristic privileges of sovereign power was “the

⁵⁷⁶ Biopolitics, in *THE CAMBRIDGE FOUCAULT LEXICON* 37, 17 (Leonard Lawlor & John Nale eds., 2014).

⁵⁷⁷ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (VINTAGE) (1990).

right to decide life and death”.⁵⁷⁸ This right can be traced back to the ancient *patria potestas*, the concept in Roman law that granted the father of the Roman family the right to “dispose” of the life of his children and his slaves. In this manner, the father, just as he had the power to grant them life, he also had the authority to take it away. However, this is not an absolute right, but more like a sort of right of rejoinder, exercised as a means of “deduction”, where the sovereign’s very existence was at stake. In case of external threats aiming to overthrow him, the sovereign had the legitimate right to wage war and call his subjects in the defence of the state. Although he did not directly advocate for their death, he possessed the authority to “expose their life,” giving him an “indirect” power over their life and death.⁵⁷⁹

Foucault argues that these mechanisms of power have been transformed over time since the classical age. According to him, “deduction” has tended to be no longer the major form of power but merely one element among others, working to incite, reinforce, control, monitor, optimize and organize the forces under it: a power bent on generating forces, making them grow, and ordering them, rather than one dedicated to impeding them, making them submit, or destroying them.”⁵⁸⁰ Now deduction over death is began to be deduction over life. “Power of death of the sovereign now is manifested as the counterpart of a power that exerts a positive influence on life, that endeavours to administer, optimize, and multiply it, subjecting it to precise controls and comprehensive regulations.”⁵⁸¹ In other words, the ancient right of the sovereign “to take life or let live was replaced by a power to foster life or disallow it to the point of death.”⁵⁸²

It is important to note that the transformation of sovereign power into biopower is the result of some important historical transformations. Together with the increase of industrial and agricultural production and the growing technological, medical and scientific knowledge about the human body in the seventeenth and eighteenth century allowed the sovereign power for a “relative control over life”.⁵⁸³ According to Foucault the power over life evolved in “two basic forms” as of the seventeenth century:

“In concrete terms, starting in the seventeenth century, the power over life evolved in two basic forms. ... One of these centered on the body as a machine: its

⁵⁷⁸ *Id.* at 135.

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.* at 136.

⁵⁸¹ *Id.* at 137.

⁵⁸² *Id.* at 138.

⁵⁸³ THOMAS LEMKE, *BIOPOLITICS* 35 (2011).

disciplining, the optimisation of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility, its integration into systems of efficient and economic controls, ... : an *anatomo-politics of the human body*. The second, ..., focused on the species body, the body imbued with the mechanism of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectation and longevity ...: the *bio-politics of the population*.”⁵⁸⁴

The first form of power over life, which Foucault calls “the anatomo-politics of the human body”, is the power which supervises and controls the individual body emerged in the seventeenth century. This type of power aiming to discipline the body, views the human body as a complex machine that should be “useful” and seeks to increase its economic productivity. On the other hand, the type of power over life what Foucault calls “biopolitics” focuses on not the individual body but body of the population. It refers to the regulation of the population through the implementation of certain regulatory measures aiming to control important life processes. In this way, “the old power of death that symbolized sovereign power was now supplanted by the administration of bodies.”⁵⁸⁵

It is crucial to connect the seventeenth and eighteenth centuries, which were marked by a significant shift in power, with the rise and establishment of capitalism. Indeed, “bio-power was without question an indispensable element in the development of capitalism”.⁵⁸⁶ According to Foucault, growing capitalism needed a new understanding of body and new methods to control the “insertion of bodies into the machinery of production and the adjustment of the phenomena of population to economic processes”⁵⁸⁷ and this would not have been possible without subjugation of bodies and the control of populations by the biopolitics. Capitalism made it crucial to invest in the living body, to utilize it and to exploit its powers for distribution.⁵⁸⁸ Indeed, biopolitics, from the very beginning, was intertwined with an intensified focus on the body, as an object of knowledge and a means to establish power dynamics. Thus, the seventeenth and eighteenth centuries are the periods where our concepts of sex and sexuality were greatly changed as marked by many historians.⁵⁸⁹

⁵⁸⁴ MICHEL FOUCAULT, *supra* note 577 at 139.

⁵⁸⁵ *Id.* at 139–140.

⁵⁸⁶ *Id.* at 140–141.

⁵⁸⁷ *Id.* at 141.

⁵⁸⁸ *Id.*

⁵⁸⁹ ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 7 (2000).

In this setting, sexuality plays a prominent role. According to Foucault, sexuality is one of the most endowed elements in power relations with the greatest instrumentality.⁵⁹⁰ The purpose of utilizing sexuality lies in its capacity to “proliferate, innovate, annex, create and penetrate bodies in an increasingly detailed way and to control populations in an increasingly comprehensive way.”⁵⁹¹ Situated at the “the pivot of two axes between forms of power”⁵⁹², sexuality has a privileged position since its effects are situated on the microlevel of the body and on the macrolevel of a population. While it is important for reproductive purposes, it is also important for the biological processes of a population:

“On the one hand, sexuality was tied to the disciplines of the body: the harnessing, intensification, and distribution of forces, the adjustment and economy of energies. On the other hand, it was applied to the regulation of populations, through all the far-reaching effects of its activity. It fitted in both categories at once, giving rise to infinitesimal surveillances, permanent controls, extremely meticulous orderings of space, indeterminate medical or psychological examinations, to an entire micro-power concerned with the body. But it give rise as well to comprehensive measures, statistical assessments, and interventions aimed at the entire social body or at groups taken as a whole. Sex was a means of access both to the life of the body and the life of the species.”⁵⁹³

Sexuality, as it was at “the pivot of two axes between forms of power” is now a “political issue”⁵⁹⁴ and the boundaries of the political are determined by medicine and medical knowledge in Foucault’s thought. Indeed, medicalisation of bodies and life in general, or “the medical intervention at the biological level”, was the key reference point for Foucault in his conceptualising bio-power, as mentioned before. In fact, throughout in his famous “The Birth of the Clinic” in 1963, before the *History of Sexuality*, Foucault illustrates how the transformations in medical knowledge in the 19th century were closely linked to the redefinition of the social and medical function of the hospital, and relation between medicine and its patients, along with complementary projects of a science of the individual case and a hygienic policing of an entire population.⁵⁹⁵ According to Foucault, “Medicine is no longer a

⁵⁹⁰ MICHEL FOUCAULT, *supra* note 577 at 103.

⁵⁹¹ *Id.* at 107.

⁵⁹² *Id.* at 145.

⁵⁹³ *Id.* at 145-146.

⁵⁹⁴ *Id.* at 145.

⁵⁹⁵ MICHEL FOUCAULT & COLIN GORDON, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* 243 (1st American ed. 1980).

body of techniques for curing ills and of the knowledge that they require, but a knowledge of ‘healthy man’, that is, a study of ‘non-sick man’ and a definition of the ‘model man’.”⁵⁹⁶ In other words, medical knowledge no longer merely determines the distinction between the sick and the healthy, it defines the healthy person as a category. Medicine, “classifying individuals as insane, criminal, or sick”, has played a basic role in regulatory and corrective mechanism of bio-power.⁵⁹⁷

Medical knowledge thus generates the norm, the power of medical knowledge lies in its ability to create norms. The effects of medical knowledge are evident everywhere: in the family, in school, in the factory, in the courts, education or work.⁵⁹⁸ Medical knowledge, as Foucault puts, is a way of perceiving things organised around the norm, “it distinguishes the normal from the abnormal”.⁵⁹⁹ According to Foucault, “The norm becomes the criterion for dividing individuals into segments. ... Medicine, as the preeminent science of the normal and the pathological, becomes ‘the queen of the sciences’.”⁶⁰⁰ It is now “the science of the normality of bodies”.⁶⁰¹

The society where the medicine becomes ‘the preeminent science of the normal and the pathological’, is the society what Foucault calls “the society of normalisation”.⁶⁰² In such a society of normalisation, “the law operates more and more as a norm”.⁶⁰³ Once this society of norms is being formed, medicine has become a general social function: it invests the law; it connects with it; it makes it operational.⁶⁰⁴ The society of normalisation is a society where the power of the law is not regressing but rather becoming integrated into a much more general power. However it is important to note that society of normalisation is not a society where the law fades into the background or tend to disappear⁶⁰⁵, Foucault argues that “sovereignty and disciplinary normalisation are two absolutely integral constituents of the general mechanism of power”.⁶⁰⁶

⁵⁹⁶ MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION* 39–40 (2003).

⁵⁹⁷ FOUCAULT AND GORDON, *supra* note 595 at 62.

⁵⁹⁸ Michel Foucault, *L'extension sociale de la norme*, Interview with P. Wemer, in *Politique Hebdo*, 212, (1976)

⁵⁹⁹ Michel Foucault, *El Poder, Una Bestia Magnifica. Entrevista Con Manuel Osorio*, 238 CUADERNOS PARA EL DIALOGO 29 (1977).

⁶⁰⁰ *L'extension sociale de la norme*, *supra* note 598.

⁶⁰¹ MICHEL FOUCAULT & PAUL RABINOW, *ETHICS: SUBJECTIVITY AND TRUTH* 35 (1997).

⁶⁰² FOUCAULT AND GORDON, *supra* note 595 at 107.

⁶⁰³ MICHEL FOUCAULT, *supra* note 577 at 144.

⁶⁰⁴ *L'extension sociale de la norme*, *supra* note 598.

⁶⁰⁵ MICHEL FOUCAULT, *supra* note 577 at 144.

⁶⁰⁶ FOUCAULT AND GORDON, *supra* note 595 at 108.

Both forms of bio-power, the anatomo-politics of the human body and the biopolitics of the population were operationalised by medical professionals. As Anne Fausto-Sterling puts, while the social scientists began to develop the survey and statistical methods needed to supervise and manage births and mortality, the level of health, and longevity, the role of many science professionals became to optimise and standardise the body's function.⁶⁰⁷ "The disciplinary knowledge developed in medicine especially in embryology, endocrinology, surgery and psychology have encouraged medical experts to attempt to control the very gender of the body."⁶⁰⁸

In such a society of normalisation which "aims to convert bodies into a machinery of reproduction", there ought to be only two boxes: male and female, which are solely distinct based on reproductive ability. To maintain such function, medical practitioners focused primarily on reproductive abilities and genitals, and only a body with ovaries and uterus can come to be defined as female, and only a body with penis and scrotum can come to be defined as male. "The knowledge developed by medicine as the power reproducing the norm, empowers doctors to maintain the mythology of the 'normal' by changing the non-binary bodies to fit, as nearly as possible, into one or the other cubbyhole".⁶⁰⁹

Thus, when presented with a newborn whose body parts were not easily identifiable as male or female, parts were removed by doctors, and plastic was used to create "appropriate" genitalia from the very moment the newborn opened their eyes into life. Or an adult man living with ovaries and uterus or a woman living with a penis and scrotum, had to sacrifice their body in order to be recognized as an individual before the law. By means of bio-power, as the power over life, "bodies that are so unruly as to blur the borders must be controlled".⁶¹⁰ As the Foucault put forwards, it is through the very same power that "certain bodies come to be identified and constituted as individuals and others not."⁶¹¹ Put another way, by means of bio-power, some bodies are qualified as individuals, while some bodies are "(dis)-qualified."⁶¹²

⁶⁰⁷ FAUSTO-STERLING, *supra* note 589 at 7.

⁶⁰⁸ *Id.* at 7–8.

⁶⁰⁹ *Id.* at 8.

⁶¹⁰ *Id.*

⁶¹¹ FOUCAULT AND GORDON, *supra* note 595 at 98.

⁶¹² The phrase "(dis)qualified body" is inspired by, Benjamin J. Muller, *(Dis)Qualified Bodies: Securitization, Citizenship and 'Identity Management'*, 8 CITIZENSHIP STUDIES 279 (2004), <https://doi.org/10.1080/1362102042000257005> (last visited July 26, 2023).

5.2. *Who Decides the Gendering of Bodies? : A Schmittian Reading*

As traced in Foucault's work on biopolitics, sexuality has become a political issue whose boundaries have been determined by medicine and medical knowledge as a result of development of biopower mechanisms in eighteenth and the nineteenth century. In this context, Foucault highlights the central role of medicine and medical knowledge functioning as the regulatory and corrective mechanism of biopower. By focusing on sexuality, medicine and medical knowledge functioned as a tool to optimise and standardize the body, classified bodies as normal and abnormal, and strictly gendered the bodies in order to ensure the reproduction abilities.

While Foucault summarises the process by which the sovereign power becomes biopower, he analyses the concrete ways in which power penetrates the individual's bodies and forms of life by abandoning the traditional approach to sovereignty. Although he does not sharply distinguish between these two⁶¹³, namely the political techniques and biopolitical technologies, the point at which these two faces of power converge remains strangely unclear in Foucault's work.⁶¹⁴ Indeed, Foucault analyses the process the medicine and medical knowledge have developed as a tool of biopower mechanism in gendering bodies, still yet, a question of that how and by whom, the medicine and medical knowledge have been constructed and institutionalised, thus gained the power to be become "the queen of the sciences", remains unclear.

Indeed, this is the "blind spot"⁶¹⁵, or the point "have to be corrected or, at least, completed"⁶¹⁶ in the Foucault's conceptualisation of biopower: "the intersection between the juridical model of power and the biopower model of power."⁶¹⁷ This is precisely what the Italian philosopher Giorgio Agamben concerns in his famous book "Homo Sacer : Sovereign Power and Bare Life" he wrote in 1995. By focusing on such "blind spot" in Foucault's thought, Agamben analyses the intersection between the juridico-institutional and the biopolitical models of power in his work.

Before delving into Agamben's theory of biopower, it is essential to briefly discuss Carl Schmitt's "the concept of political" and "the exception". This is because Agamben is heavily

⁶¹³ FOUCAULT AND GORDON, *supra* note 595 at 108.

⁶¹⁴ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 5–6 (1998).

⁶¹⁵ *Id.* at 6.

⁶¹⁶ *Id.* at 9.

⁶¹⁷ *Id.*

influenced by the German constitutional jurist Carl Schmitt's theories in building his own theoretical path of biopolitics. In this context it is useful to revisit Foucault's thesis that biopower technologies transform sexuality into the political and to undertake a thorough analysis of the characteristics and essence of the concept of the political that Foucault discusses here, from a Schmittian perspective. Basically, this is precisely what Carl Schmitt explored in his classic work "The Concept of the Political", written in 1932.⁶¹⁸

Schmitt argues that the political has its own criteria and distinctions just as that there are categories specific to the fields of religion, economy, moral, or aesthetics, there are categories specific to the field of political. Thus, the concept of the political must be understood through the categories specific to it. According to him "A definition of the political can be obtained only by discovering and defining the specifically political categories. The political has its own criteria which express themselves in a characteristic way, therefore it must rest on its own ultimate distinctions."⁶¹⁹ Mentioning that the distinction in morality is good and evil, in aesthetics is beautiful and ugly, or in economics is profitable and un-profitable, he asks whether there is also a special distinction for the political. His answer is clear: "The specific political distinction to which political actions and motives can be reduced is that between friend and enemy."⁶²⁰ In other words, the political is about decisionism; at its core, a distinction between friend and enemy.

Schmitt argues that "the political is the most intense and extreme antagonism, and every concrete antagonism that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping."⁶²¹ In other words, at the heart of the political it lies the friend-enemy distinction and the decision to be able to make such a distinction. According to him, a relationship is political to the extent that the distinction between friend and enemy can be made. "Every religious, moral, economic, ethical, or other antithesis transforms into a political one if it is sufficiently strong to group human beings effectively according to friend and enemy."⁶²²

However, it is important to note that the enemy should not necessarily be morally evil, aesthetically ugly or not someone to be hated. It is, nevertheless, "the other, the stranger,

⁶¹⁸ SCHMITT, *supra* note 210 at 210.

⁶¹⁹ *Id.* at 25–26.

⁶²⁰ *Id.* at 26.

⁶²¹ *Id.* at 29–30.

⁶²² *Id.* at 37.

existentially something different and alien”.⁶²³ The enemy, as a real and concrete possibility, is a collective of people ‘combating’ against another collective.⁶²⁴ According to him, the political can be appeared from the different antitheses and motives, these can be religious, economic, moral, or ethnic or cultural sense of antitheses. What matter is, however, the ‘intensity’ of a dissociation (or association) of human beings.⁶²⁵ Indeed, any conflict is political as long as it reached the intensity to make a decision about friend and enemy grouping. Nevertheless, Schmitt emphasises that such dissociation does not arise from pure intellectual antitheses. The friend and enemy concepts are not just metaphors or symbols, contrary, they are concrete and real.⁶²⁶ In this regard, Schmitt gives the Marxist class struggle as an example to explain that it becomes political once the decision is made to see the opposing class as a real enemy to combat against, whether through state vs. state warfare or civil wars within a state.⁶²⁷ Because for Schmitt, the concept of an enemy necessitates the possibility of a real ‘combat’. It does not mean a competition, nor pure intellectual controversy, nor symbolic struggles. “The combat is the existential negation of the enemy”⁶²⁸ thus, it directly challenges the physical existence of the enemy.

In this context, gendering human bodies, in other words, grouping human bodies by gendering them, is also political. Indeed, what Foucault points to is precisely this gendering when he argues that sexuality has become political by means of medicine and medical knowledge, functioning as a mechanism of biopower.⁶²⁹ Medicine and medical knowledge have functioned to classify bodies as normal and pathological (abnormal), and sexuality has become political, at the moment it became strong enough to define, and group human beings into gender categories. It is political also from the Schmittian perspective, because the distinction between bodies conforming and not conforming to gender categories is a concrete and real distinction, based on the friend and enemy distinction.

Indeed, it is political, because defining and grouping human bodies into gender boxes presupposes a real combat against those bodies that do not fit into these boxes. Such combat against the non-conforming body is a real one because it systematically challenges their existence and physically destroy them through killing, punishment, violence, confinement,

⁶²³ *Id.* at 27.

⁶²⁴ *Id.* at 28.

⁶²⁵ *Id.* at 38.

⁶²⁶ *Id.* at 28.

⁶²⁷ *Id.* at 37.

⁶²⁸ *Id.* at 33.

⁶²⁹ MICHEL FOUCAULT, *supra* note 577 at 145.

coercion and exclusion. If it is a newborn who is not born with appropriate genitals, they are immediately subjected to forced surgeries to ensure that their newborn body fits into binary categories smoothly. If it is an adult, they are punished with death, or at best, asked to sacrifice their bodily integrity through forced medical interventions, or to give consent to being diagnosed as mentally ill. Thus, the combat is so real and concrete that the non-conforming body is "existentially negated".

As discussed before, Foucault highlighted the central role of medicine and medical knowledge functioning as the regulatory and corrective mechanism of biopower, in classifying individuals as normal and abnormal.⁶³⁰ However, medicine or medical knowledge is certainly not a political entity or mechanism that has its own specific criteria which make it able to express itself in a characteristic way, and thus, has the power to rest on its own ultimate distinctions.⁶³¹ When medical professionals confronted with new-born bodies whose body parts were no easily identifiable, they did not find a rule to apply stems from the "timeless and universal nature of scientific knowledge" on what these bodies mean and how to treat them.⁶³² Instead, "such scientific investigation had involved a process of knowledge construction."⁶³³ Indeed, in their revolutionary book "Sexing the Body", Professor Anne Fausto-Sterling, as a molecular biologist, has shown in all its aspects and in the clearest form how medicine and medical knowledge about sexuality are constructed.⁶³⁴ In this context, it is true that medical knowledge functioned as a tool in gendering bodies, still yet, a question remains unanswered: The question is, who is the decisive on who constructs and institutionalises medical knowledge and uses it as a tool in gendering bodies, or in other words, who makes the decision to define and divide bodies as male and female.

According to Carl Schmitt, it is the sovereign who has the power to make decision about the friend-enemy grouping.⁶³⁵ What Schmitt means by sovereignty is that the power to make determinative decision, which inherently resides within this grouping. Accordingly, for him, the political entity is the decisive entity that has the power to make decisions about the friend-enemy groupings, and this is only the sovereign state.⁶³⁶

⁶³⁰ FOUCAULT AND GORDON, *supra* note 595 at 62.

⁶³¹ See the SCHMITT, *supra* note 210 at 25–26.

⁶³² FAUSTO-STERLING, *supra* note 589 at 9.

⁶³³ *Id.* at 28.

⁶³⁴ FAUSTO-STERLING, *supra* note 589.

⁶³⁵ SCHMITT, *supra* note 210 at 39.

⁶³⁶ *Id.* at 45–46.

In fact, for Schmitt, the essence of the sovereign state is that it has “*jus belli*”, in other words, “the real possibility of deciding in a concrete situation upon the enemy and the ability to fight him with the power emanating from the entity.”⁶³⁷ According to him, this is the “the most enormous power the sovereign state” as the decisive political entity: “the power to wage war and dispose of the lives of men.”⁶³⁸ It has right to demand from its own members to die and to kill enemies. In other words, the sovereign state has full authority over the bodies of its people. What it determines is the people’s very existence. In fact, the essence of the state’s sovereignty is “the monopoly to decide”.⁶³⁹ Then finally, it is the sovereign state who makes the decision on gendering bodies, thus, defines, categorizes and recognizes bodies of its citizens as male and female.

Clearly, such a reading is based on the classical theory of sovereignty which can be traced back to the ancient *patria potestas* in Roman law. However, as presented at the beginning of this chapter, Foucault's analysis of biopolitics marks the development of biopolitical mechanisms in the 17th and 18th centuries as a historical break with the classical understanding of sovereignty. By analysing the function that biopolitical mechanisms acquired in this period, Foucault argues that the classical sovereign is no longer sovereign power and has evolved into 'biopower'.

5.3. *When the Exception Becomes the Rule*

In his well-known book titled the *Homo Sacer: Sovereign Power and Bare Life*, Italian philosopher Giorgio Agamben starts his analysis of biopolitics by examining this crucial historical threshold outlined in Foucault's work.⁶⁴⁰ While Agamben's conceptualisation of biopolitics draws significantly from Foucault in many aspects, he ultimately follows different paths and produces new lines. In this context, Agamben first rejects such a historical break and argues that the history of biopolitics goes back much further.

Agamben begins to his analysis on the Foucault’s conceptualisation of biopower with arguing that it remains unclear in Foucault’s work where the political techniques and biopolitical technologies converge.⁶⁴¹ Agamben explores the intersection between the traditional (juridico-

⁶³⁷ *Id.* at 45.

⁶³⁸ *Id.* at 46.

⁶³⁹ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 13 (2005).

⁶⁴⁰ AGAMBEN, *supra* note 614 at 3–6.

⁶⁴¹ *Id.* at 5.

institutional) and the biopolitical models of power throughout his work on biopolitics.⁶⁴² According to him, it is not possible to separate these two faces of power, moreover, “It can even be said that the production of a biopolitical body is the original activity of sovereign power. In this sense, biopolitics is at least as old as the sovereign exception.”⁶⁴³

Agamben illustrates and concretises his argument that the history of biopolitics, unlike the Foucauldian thesis, goes further back through *Homo Sacer* that is a figure of ancient Roman law.⁶⁴⁴ *Homo sacer* is an obscure figure that has been first appeared in Pompeius Festus’s treaties called ‘On the Significance of Words’, a massive dictionary of Latin believed to be written in the time of Augustus Caesar.⁶⁴⁵ Here, *homo sacer* (sacred man) is described as “the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide.”⁶⁴⁶ This obscure figure who may be killed by anyone but not sacrificed, has two traits which are hardly compatible each other, the unpunishability of his killing and the ban on his sacrifice.⁶⁴⁷ This is a person whom one could kill with impunity, since he was banned from the politico-legal community, and “reduced to the status of his physical existence”.⁶⁴⁸ As a ‘threshold figure’, *homo sacer* effectively blurs the lines between outlaw and citizen.⁶⁴⁹ In this context, the life of *homo sacer*, as what Agamben calls ‘bare life’,⁶⁵⁰⁶⁵¹ is situated at the intersection of a capacity to be killed and yet not sacrificed, outside both human and divine law.⁶⁵² Thus, it is this “zone of indistinction”⁶⁵³ between human and non-human where the bare life resides.

Therefore, Agamben argues the production of bare life is the original activity of sovereign power,⁶⁵⁴ because, what is decided through the production of bare life is “the humanity of living

⁶⁴² *Id.* at 6.

⁶⁴³ *Id.*

⁶⁴⁴ *Id.* at 71.

⁶⁴⁵ John North & Fay Glinister, *Pompeius Festus, Sextus*, in OXFORD RESEARCH ENCYCLOPEDIA OF CLASSICS (2016).

⁶⁴⁶ AGAMBEN, *supra* note 614 at 71.

⁶⁴⁷ *Id.* at 73.

⁶⁴⁸ LEMKE AND TRUMP, *supra* note 583 at 54–55.

⁶⁴⁹ Anthony Downey, *Zones of Indistinction: Giorgio Agamben’s ‘Bare Life’ and the Politics of Aesthetics*, 23 THIRD TEXT 109, 111 (2009).

⁶⁵⁰ AGAMBEN, *supra* note 614 at 8.

⁶⁵¹ Agamben uses the phrase “*nuda vita*” in the original Italian version of the book and his use of the phrase is related to the Greek term *zoe* and Hannah Arendt’s concept of the “naked life” in *The Origins of Totalitarianism*. However, as opposed to the literal Italian translation ‘naked life’ used in the original version of the book, translators and commentators has largely adopted the term ‘bare life’, with the influence of that Walter Benjamin’s use of ‘bare life’ (*bloßes Leben*) in ‘Critique of Violence’. Downey, *supra* note 649.

⁶⁵² AGAMBEN, *supra* note 614 at 73.

⁶⁵³ *Id.* at 83.

⁶⁵⁴ *Id.*

man.”⁶⁵⁵ In other words, bare life proves to be the solid basis of a political body, since it makes the life and death of a human the object of a sovereign decision.⁶⁵⁶ Indeed, this is what Agamben means arguing that history of biopower is old as much as sovereign power. Because, producing the bare life, it is the sovereign, as “who decides on the exception”,⁶⁵⁷ identifies who can be let live and be killed, thus, who deserves to be treated as human and who is excepted from this.

Here it is important to note Agamben's approach to the sovereign decision, as he provides a thorough analysis of the concept of the exception and its relevance to the nature of sovereignty drawing upon Carl Schmitt's theory of sovereignty. According to Agamben, the sovereign decision does not limit itself to make a distinction between the rule and the exception. In fact, while deciding the exception, what the sovereign does decide is not only to distinguish what is included and excluded or what is inside from what is outside,⁶⁵⁸ but the threshold between outside and inside, exclusion and inclusion. In other words, the sovereign, as who decides on the exception, also determines the threshold of indistinction between the rule and exception, the outside and inside, thus, decides the undecidable one. Its decision is to position the undecidable.⁶⁵⁹

Consequently, this threshold of indistinction where the line between friend and enemy, stranger and citizen, legality and illegality and ultimately life and death fatally blurred, is the place where bare life which is constantly subjected to a sovereign decision over life and death is lived.⁶⁶⁰ Hence, this threshold of indistinction is also the place where politics are reproduced through bodies. Then it is precisely why the production of a biopolitical body constitutes the original nucleus of sovereign power, as Agamben argues.⁶⁶¹

Nevertheless, bare life is not an abstract ghost of the ancient times, it still presents in a very concrete form in contemporary politics. In fact, in our age, politics and bare life are so closely intertwined that it is impossible to distinguish them. For Agamben, this is the only reason of that the twentieth-century parliamentary democracies were able to turn into totalitarian states - and vice versa- so rapidly; “biological life had become the ‘politically decisive fact’ in

⁶⁵⁵ *Id.* at 8.

⁶⁵⁶ LEMKE AND TRUMP, *supra* note 583 at 55.

⁶⁵⁷ SCHMITT, *supra* note 639 at 5.

⁶⁵⁸ AGAMBEN, *supra* note 614 at 19.

⁶⁵⁹ *Id.* at 27.

⁶⁶⁰ Downey, *supra* note 649 at 111.

⁶⁶¹ AGAMBEN, *supra* note 614 at 6.

contemporary politics”.⁶⁶² Then, what are the modern “thresholds of indistinction” in today's politics, where we find a reproduction of biopolitics over the body of *homo sacer*?

Agamben's answer to this question is the notion of “camp”, which occupies an important role in his theory as a contemporary mechanism of biopolitics. Agamben sees the camps as a mechanism of biopolitics and wants to show the logic behind it in order to better understand how the contemporary politics function. In other words, he proposes a significantly new definition for the term 'camp' and transforms the camp into a materialization of the state of exception where the law and fact, rule and exception, indistinguishably intertwined.⁶⁶³

According to Agamben, as one of the most crystallised form of places of the contemporary ‘threshold of indistinction’ in which modern-day bare life resides are the concentration camps. Because the camp, is a place where the law is not completely suspended as a result of the state of exception, but rather, exception becomes a permanent arrangement. In other words, the camp is the place in which the state of exception begins to become the rule.⁶⁶⁴ Therefore, in the camps, the line between the law and fact is so blurred and these two are completely intertwined that it is impossible to distinguish between them. Consequently, “whoever entered the camp moved in a zone of indistinction between outside and inside, exception and rule, licit and illicit, in which the very concepts of subjective right and juridical protection no longer made any sense.”⁶⁶⁵

In this sense, Agamben points out that the Jews at the concentration camps under Nazism was a flagrant case of a *homo sacer*, because “their killing constitutes, neither capital punishment nor a sacrifice, but simply the actualization of a mere ‘capacity to be killed’ inherent in the condition of the Jew as such.”⁶⁶⁶ Indeed, what we witness in the camps were the subjects inhabiting a ‘zone of indistinction’ between life and death, law and violence, citizen and refugee, can be killed with impunity yet cannot be sacrificed, because these people were after all beyond the law and legal protection. Indeed, these are the people who possess a solely a physiological life without any political or legal existence before the law.⁶⁶⁷ In this context, the inhabitants of the camps are “stripped of every political status and wholly reduced to bare

⁶⁶² *Id.* at 119–120.

⁶⁶³ LEMKE AND TRUMP, *supra* note 583 at 56.

⁶⁶⁴ AGAMBEN, *supra* note 614 at 168–169.

⁶⁶⁵ *Id.* at 170.

⁶⁶⁶ *Id.* at 114.

⁶⁶⁷ Downey, *supra* note 649 at 114.

life.”⁶⁶⁸ In other words, as Lemke stipulates very sharply, they are people whose “status is reduced to their physical existence” or, a “biomass”: “Although they all are human, they are excluded from the protection of the law. They remain unable to assert a legal claim, and are reduced to the status of “biomass” through the authority of scientific interpretations and definitions.”⁶⁶⁹ They are the ones who are abandoned by the law and exposed and threatened on this threshold of indistinction.

Here it is important to note that, the concept of the camp in Agamben’s theory does not refer or mark a concrete place or historical fact belongs to the past. Rather, Agamben’s camp should be understood as a broader concept which symbolises the threshold in which “bare life” is systematically produced.⁶⁷⁰ Therefore, the camp in his conceptualisation does not only refer to Nazi concentration camps; refugee camps, detention centres, or the zones in international airports in which foreigners asking for refugee status are detained are also equally the camps.⁶⁷¹ As a broader sense, then, “the camp is the space that is opened when the state of exception begins to become the rule”,⁶⁷² hence, it might be occurred anywhere in today’s world that we are still living:

“If this is true that the essence of the camp consists in the materialization of the state of exception and in the subsequent creation of a space in which bare life and the juridical rule enter into a threshold of indistinction, then we must admit that we find ourselves virtually in the presence of a camp every time such a structure is created, independent of the kinds of crime that are committed there and whatever its denomination and specific topography.”⁶⁷³

5.4. *The Abstract Nakedness of Non-Binary Bodies*

In such a contemporary political scene where politics and bare life are so closely intertwined that it is impossible to distinguish them, Agamben argues that bare life moved inside every human life anymore: “it now dwells in the biological body of every living being.”⁶⁷⁴ In today’s

⁶⁶⁸ AGAMBEN, *supra* note 614 at 171.

⁶⁶⁹ LEMKE AND TRUMP, *supra* note 583 at 55.

⁶⁷⁰ *Id.* at 56.

⁶⁷¹ AGAMBEN, *supra* note 614 at 174.

⁶⁷² *Id.* at 168–169.

⁶⁷³ *Id.* at 174.

⁶⁷⁴ *Id.* at 140.

world, there is no one certain figure of *homo sacer*, because, any human being is virtually *homo sacer*”⁶⁷⁵ Such a constant production of bare life needs an ongoing new sovereign decision on the threshold beyond which life is deemed politically relevant and which life is not -even a biomass-. And going back to Schmittian sense of thinking, Agamben argues that every state sets this limit; every state -even the most modern- decides who its *homo sacer* will be.⁶⁷⁶ After all, it is this ability to make such distinction is the hallmark of the sovereign, as the decisive political entity.

5.4.1. Non-Binary Body as the Longest ‘Bare Life’ of Modern Humanity

The *homo sacer* and its bare life of our time or even of modernity if we follow Foucault's biopolitical historiography, is the non-binary and life of the non-binary. Since the time when the medicine and medical knowledge began to rule over bodies as a mechanism of biopolitics and was referred to as "the queen of sciences", the *homo sacer* is no one other than the non-binary person. In this sense, the life of the non-binary body is truly a bare life, which has been subjected to the most continuous and systematic exception in the history of modern humanity.

Indeed, it is not surprising that Agamben focussed on the "body" while constructing his theory through the naked life and always considered the concept of naked life together with the concept of the body. As he points out, the body is always a biopolitical body and a bare life.⁶⁷⁷ Because every body is "marked" by the sovereign on the basis of its quality of being thrown into death. In the modern nation-state, this marking is precisely what is called identification in the state bureaucracy today, which is done through identification methods such as identity cards, birth certificates and similar identification methods that the state issues in defining, categorising and recognising its citizens. Literally, this marking, in the form of identification methods, is nothing but the nationalising, numbering or gendering of the body. The mark of the sovereign is visible in its most physical form, on “the gender marker” on ID cards and other ID documents.

The sovereign marked individuals solely based on reproductive function of their bodies. To maintain the function to reproduction, bodies were categorized and distinguished on the basis of reproductive abilities and genitals, and, accordingly, only a body with ovaries and a uterus

⁶⁷⁵ *Id.* at 115.

⁶⁷⁶ *Id.* at 139.

⁶⁷⁷ *Id.* at 187.

came to be defined as female, while only a body with a penis and scrotum came to be defined as male. While the norm has consisted of bodies conforming to these categories, the non-conforming bodies have been posed to the “abnormal” by being marked as pathology, anomaly, deviance, redundant or useless. Eventually, only certain bodies came to be qualified as individuals, while the rest are “dis-qualified” by the sovereign decision.

However, the categorisation based on gender is more than a mere identification process. Because it is this very process of identification that enables individuals to be “recognised” as existing as members of the political-legal community in the eyes of the sovereign. In other words, individuals are only recognised as members of the political-legal community through identification. Therefore, when the sovereign categorised the bodies, it also categorises the membership of the political-legal community. Accordingly, the members of the political community, namely citizens, can be only recognized within the two categories of membership as defined by the sovereign: male and female citizens. Male citizen has a body with a penis and scrotum and women citizen has a body with ovaries and a uterus. What then happens to those “abnormal” or “disqualified” bodies that are unrecognizable?

When a non-binary body, that is the body outside the binary gender categories decided by the sovereign, does not fall into, or refuses to fall into, these given gender categories, the place where they find themselves is the very threshold of indistinction between woman and man, inside and outside, inclusion and exclusion, citizen and non-citizen. They are neither a man, nor a women. It is this threshold of indistinction in which their bodies become “undecidable”. It is also the same threshold in between the citizen and non-citizen. Indeed, they are not a non-citizen or a complete stranger. Contrary, they hold an official ID card issued by the sovereign. Nevertheless, the ID card they hold in their hand is not capable to make them recognizable. The name written in their ID card is not the name they are called; their gender is not the one indicated as the gender marker in their ID card. They are not the citizen whom the sovereign recognized, their factual and legal existence are indistinguishably intertwined, it is this threshold of indistinction they become “un-recognizable.”

In between the inside and outside, inclusion and exclusion, their life are subjected to both a power over death and absolute abandonment. They are the *homo sacer*, who may be killed but not sacrificed. They can be killed by anyone, and their murder is awarded by impunity or reduction in the sentence. They are abandoned by the protection of law. Yet, they are not allowed to be soldier in the national army, they are exempted or banned from the compulsory

military duty.⁶⁷⁸ Simply because, as the *homo sacer*, they cannot be “sacrificed.” Indeed, they are left to the threshold of indistinction between the friend and the enemy. Because metaphorically but still quite concretely, non-binary body is even excluded from the uniform which makes it possible that the friend and the enemy recognize each other in the war zone.

Thus, the threshold of indistinction between inside and outside, inclusion and exclusion, women and man, citizen and non-citizen is the place where the non-binary body resides. In other words, the non-binary body itself, is the bare life. Hence, it is the place of a man with uterus, a woman with a penis, or an intersex or a non-binary body who are excluded from legal recognition. These bodies are excluded from the political and legal sphere and their “status are reduced to their physical existence.” In this sense, they are not illegal, but “non-legal”. They are “legally absent”.

5.4.2. *Non-Recognition of Gender as ‘the Camp’*

Consequently, the *homo sacer* who has the longest bare life in modern history has been kept in a camp for centuries. This camp is not located in a remote, deserted area, surrounded by fences. On the contrary, it is a camp dwells in our cities and daily life. This camp, as a phenomena that exist independently of space and time as conceptualised by Agamben, is the exclusion from legal recognition, or more precisely, legal non-recognition of gender.

Because as discussed before, recognition is the primary condition of individual’s existing as member of the political-legal community. Exclusion or deny from recognition thus, functions as exclusion of their political and legal existence. Consequently, an individual whose existence is banned from the legal and political sphere through non-recognition can only exist as a physical existence, they are whose “status is reduced to their physical existence.” In this context, non-binary person who is excluded from legal recognition is the person who are stripped of the political status and reduced to bare life. Through non-recognition, they are located in a place where bare life is systematically produced.

Indeed, this camp is the place where a non-binary body resides as long as they are not legally recognized, or are excluded from legal recognition, or they refused to make the sacrifices

⁶⁷⁸ See, Sam Levin, *White House Announces Ban on Transgender People Serving in Military*, THE GUARDIAN, Mar. 24, 2018, <https://www.theguardian.com/us-news/2018/mar/23/donald-trump-transgender-military-ban-white-house-memo> (last visited Aug 7, 2023).

expected by the state for legal recognition. As demonstrated in detail before, what states have done when they do not recognise legal recognition of gender identity by criminalising transgender existence in their penal codes; or do not provide legal recognition in their legal systems at all; or exclude some bodies from legal recognition by limiting the recognition based on age and marital status, is precisely to leave non-binary into the threshold of indistinction for an indefinite period of time. Similarly, it is the same camp in which non-binaries find themselves as the inhabitants of, when they have refused to give consent to abusive compulsory surgeries targeting their genitals and bodily integrity as a whole, or hormone treatments, or psychiatric diagnosis alleging they are mentally ill. It is equally valid for those who choose to live as a man with a uterus, or a women with a penis, or neither a man or women, or with diverse genitals.

Here, it is noteworthy to emphasise that non-recognition of gender is more than a violation of human rights through intimidation, suppression or punishment. In other words, non-recognition of gender is not just an exception in which the sovereign suspends the law. Indeed, non-recognition of gender presents a solid ground of enquiry to grasp the relationship between the norm and exception, thus, accordingly, the nature of sovereignty.

Because, in a Schmittian reading, the distinction made by the sovereign between bodies, that is, between bodies that conform and do not conform to the gender categories, is based on the distinction between friend and enemy; it is real, concrete and requires a real combat presupposes an “existential negation.” As a result of this distinction, the very physical presence of a non-conforming body appears as an exception to the gender categories constructed by means of biopolitics as the norm. Again, drawing upon Schmitt, as the exception, the very physical presence of the body of non-binary person radically challenges and existentially negates the norm, that is given gender categories given.

However, the exception is not totally beyond the norm or it is not absolutely without relation to the norm. Contrary, “the exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule.”⁶⁷⁹ In this context, when the non-binary body, as an exception, is systematically denied from recognition; it is no longer an individual case to be confined, disciplined, banned or punished as a singular, individual exception. Because at the moment that the sovereign decides the exception, what we see is a violation of rights resulting from the

⁶⁷⁹ AGAMBEN, *supra* note 614 at 18.

arbitrary suspension of the law, which has a possibility to be ended or to be compensated. However, when the non-binary body, as an exception, is systematically denied or excluded from recognition, what we see is not a suspension of the law anymore, but rather, a “state of exception” in which the norm and exception becomes to indistinguishably intertwined and the distinction between these two is getting blurred, and thus, the exception begins to become the norm.

Therefore, the camp in which non-binary bodies are kept, is this threshold of indistinction where the bare life is reproduced through non-recognition, systematically. This is why, legal non-recognition is much more than a mere violation of rights, because what is not recognised is the one’s existence as the legal subject. In this regard, as an absolute space of exception, the camp is different from a simple space of confinement, banishment or imprisonment. Because for the inhabitants of the camp, “the plight is not they are oppressed, but that nobody wants to oppress them.”⁶⁸⁰

5.4.3. *Beyond Citizenship: Gendered Citizenship*

In fact, the bare life is the place of ‘the abstract nakedness of being human’ in which as Ranciere pointed out Hannah Arendt found the ‘body’ itself there.⁶⁸¹ As discussed in detail in the first chapter, Arendt used “abstract nakedness” to refer the refugees fleeing over Europe after the Second World War. When these refugees became stateless and lost all their qualities except that being human, they have been deprived of their very basic rights and became ‘right-less’. For her, human rights, which is supposed to be inalienable, proved that it is unenforceable when stateless people appeared who were no longer citizens of any sovereign state. Once they lost their citizenship status, they lost all their rights. As nothing but only a human, they were now ‘the scum of the earth’. Therefore, for Arendt, the idea of human rights was a paradox, because the only rights are the citizenship rights. In this sense, she conceptualised the phrase “the right to have rights”, as a right to be recognized as a member of the political community, thus, recognized as a subject of rights.

In this sense, Arendt’s critique of human rights is today still perfectly relevant for non-binary bodies seeking legal recognition as a subject of human rights. This is because the claim behind

⁶⁸⁰ ARENDT, *supra* note 179 at 296.

⁶⁸¹ Rancière, *supra* note 7.

the legal gender recognition of non-binary people is first and foremost the claim of "the right to have rights". The reason that states' approaches and practices greatly vary although the legal recognition of gender is increasingly defined as a human right, and moreover, as a right recognised through self-identification in international human rights law as presented in detail in the previous chapter, again, can also be read in terms of Arendtian critique of human rights. Indeed, what we see is precisely the same paradox of human rights that Arendt pointed out, because the right to legal recognition which is believed to inherent them just because they are a human being, is in fact between the lips of medical doctors or psychologists or family judges who look at their penis size, vagina depth, breasts, vocal cords and even bodily hair.⁶⁸² Thus, what is tested and subjected to the sovereign decision here is the non-binary's "right to have rights", or in other words, their recognition as a member of political-legal community. Subsequently, the control over access to the benefits of belonging to the political community is virtually always gendered through control over bodies.⁶⁸³

In this sense, the "abstract nakedness" to which Nazis subject the Jews, is not much different from the bare-life in which the body of non-binary is abandoned. Both are deprived of being subject of human rights and reduced to their physical existence. They are both left to the mercy of the sovereign exception, which does not only decide the line distinguishes the inclusion and exclusion, but also the threshold between these two. However, there is a significant difference here.

Indeed, the non-binary person is not stateless or a refugee or a complete stranger. On the contrary, they still hold an officially issued ID card which connects them with the sovereign. Yet, they are not a fully citizen because they do not fit into one of the given citizenship categorises. They are national, but still deprived from the recognition as a member. They are not subjects of human rights. They are "legally absent". The feature of their bodies can be killed is due to the gendering of their bodies.⁶⁸⁴

⁶⁸² In Turkey, for example, judges often decide whether the applicant is "sufficiently female" or "sufficiently male" on the basis of a measure of penis size or vaginal depth, when considering the compulsory surgeries defined by law as a precondition for legal gender recognition is met or not.

⁶⁸³ TAMAR MAYER, *GENDER IRONIES OF NATIONALISM: SEXING THE NATION* 1 (2012).

⁶⁸⁴ In this sense, gender and patriarchy is the true "blind spot" or the point not sufficiently traced in both Foucault's and Agamben's theories of biopolitics. Although both thinkers focus on the 'body', they approached the body as an abstract phenomenon and ignored the asymmetrical power relationships produced by the patriarchy through the body. For more on feminist review of Foucault's biopower, see, MARGARET A. MCLAREN, *FEMINISM, FOUCAULT, AND EMBODIED SUBJECTIVITY* 1–17 (2002).

Nevertheless, although Arend built her theory particularly on example of refugees, Arendt's theory is not only about stateless deprived from citizenship status. Arendt's conceptualizing of 'right to have rights' does not only cover the refugee's example in terms of citizenship but equally attaches to those subjects who are pushed back to the margins of society.⁶⁸⁵ In this sense, although a non-binary body is a national, this tie they acquired by birth and binds them to the nation, is not sufficient enough to make them recognized as a political and legal member of the nation.

Then, it is true to conclude, then, that although citizenship remains a privileged legal status for seeking rights, it is clearly not the only status. A person may be a national in law in terms of having de jure citizenship and yet be politically or legally (or de facto) 'absent' or 'superfluous'.⁶⁸⁶ Despite having the formal status of citizenship, one may nonetheless be excluded from its recognition as well as rights and privileges, as non-binary people who do not fit into given citizenship categories. Thus, even if it is true that citizenship remains the primary criteria for being a subject of human rights, there is another criteria that is inherently embodied to it, which is "gendered citizenship".

⁶⁸⁵ Nanda Oudejans, *The Right to Have Rights as the Right to Asylum*, 43 NETH. J. LEGAL. PHIL. 7 (2014)

⁶⁸⁶ KESBY, *supra* note 7 at 87.

Chapter 6

CONCLUSION

The fact remains that transsexuals are neither archaic *homo sacer* figures nor do we live in ancient Rome. Yet still, the fact that this figure can still exist in such an immanent and concrete way in modern parliamentary democracies, despite the passage of thousands of years, paints a very dramatic picture. Indeed, today, Human Rights -in capital letters as Hoppgood conceptualised- institutionalised all over the world with its multi-billion dollar budget and its courts and bureaucracy⁶⁸⁷, have not been able to prevent the camps that have infiltrated our daily lives, that reign in our bodies. All over the world, human beings continue to be deprived of their rights because of their identities "identified" by the state. Human rights have turned into a "reading club" where hundreds of pages of reports revealing that people still do not enjoy even the most basic human rights such as access to food, access to clean water and sanitation, or adequate housing, are read three times a year at the Human Rights Council in Geneva. Under shiny ceilings,⁶⁸⁸ dressed in their finest clothes, the representatives of the countries are busy praising each other and painting rosy pictures of how well their countries observe human rights. Indeed, today's world, "we cannot not want human rights", as Ratna Kapur says.⁶⁸⁹ Even the most oppressive governments continue to include human rights principles in their constitutions.

⁶⁸⁷ Hoppgood, *supra* note 133.

⁶⁸⁸ The Human Rights and Alliance of Civilisations Room, formerly known as Room XX, one of the largest conference rooms of the Palace of Nations in Geneva, was renovated in 2008. Within the scope of this renovation, the ceiling of the room was redecorated with a total expenditure of 20 million Euros, which brought criticism due to the high cost. See more Coen, U.N. Human Rights Council Gets a New Ceiling – and More Controversy, UN WATCH (Nov. 18, 2008), <https://unwatch.org/u-n-human-rights-council-gets-new-ceiling-controversy/>

⁶⁸⁹ Ratna Kapur, *Human Rights in the 21st Century: Take a Walk on the Dark Side [Paper in Special Issue: Gender, Sexuality and Reproduction.]*, 28 THE SYDNEY LAW REVIEW 665, 682 (2020), <https://search.informit.org/doi/10.3316/ielapa.200701271>

There is no constitution today that declares, for example, that women are not equal and full citizens, or that they are not the subjects of human rights, or that they have no equal access to rights. But there is also no one single country in the world today where women can enjoy rights on an equal basis with men and be equal subjects of rights. Indeed, as seen in constitutions, states seem to have embraced rhetoric such as human rights, dignity and equality and codified them in their constitutions.⁶⁹⁰ However, it is precisely this appropriation and adoption by the sovereign that in practice seriously water down human rights, - the rights that people believe they have simply because they are human.

As discussed in detail in the Chapter 2, the idea of universality is a highly contested claim, ontologically and empirically, and cannot by itself ground human rights. Indeed, human rights as a historical and political concept emerged in the second half of the twentieth century -and from the Arendtian perspective, it was perhaps a "broken" concept from the very beginning-. Drawing on critical legal theorists, the Chapter 2 critically examines the claim to universality of human rights and demonstrates the state-centred structure of human rights law as a branch of international law based on state voluntarism.

The state-centred structure of human rights reveals a great paradox of that human rights which are supposed to protect people from the state are at the mercy of the state. This paradox, therefore, invalidates the idea that human rights are inherent to all human beings no matter who they are; in fact, human rights *have* a subject. As analysed during the Chapter 2, human rights are defined and examined *by* and *within* the sovereign state, consequently, only rights created and enforced by domestic legal systems could give protection to members of the community, namely, citizens. Drawing on Hannah Arendt's conceptualisation of the "right to have rights", Chapter 2 analyses the relationship between citizenship and the subject of rights and confirms the primacy given to citizenship by the world of nation states, meaning that the subject of human rights is the citizen, not the human being.

Acknowledging that human rights have a subject, and that this subject is the citizen, inherently raises the question of who the citizen is, to which Chapter 3 seeks an answer. The transition from the subjects of the King to the citizen corresponds to the transfer of sovereignty from divine power to the nation, and the subsequent emergence of the nation-state as sovereign. In

⁶⁹⁰ For instance, according to the data of the Comparative Constitutions Project, general provision on guarantee of equality is included in 186 constitutions that are in force in the world currently. See www.constituteproject.org Elkins, Zachary, Tom Ginsburg, James Melton. *Constitute: The World's Constitutions to Read, Search, and Compare*.

this context, the members of the nation, whom sovereignty now resides, become the sovereign members of the nation, and this made it crucial that all individuals are identified and recognised individually in order to be sure that who will have the privilege of being recognised as a member of the nation. This led to a process of the identification of citizens; people were given surnames, numbered and marked sexually or ethnically through identification documents. As a result, a person's status as a citizen, or in other words as a subject of rights, was made dependent on the identification of that person. Hence, the citizenship, first and foremost, is about identification and classification.

However, not every member of the nation is a “sovereign member of the nation”, because identification and recognition always came with define, classify, segregate, separate and select,⁶⁹¹ and are therefore always “political” in the Schmittian way of thinking. Consequently, citizenship works as a mechanism of inclusion and exclusion which constantly reaffirms who counts as the citizen and who does not, therefore, as Balibar points out, the history of citizenship is the history of inclusion and exclusion.⁶⁹² As presented in the Chapter 3, the body, sexuality and reproduction have always the most critical layer in the mechanism of inclusion and exclusion of citizenship, and in this context women, children, mentally disabled people or LGBTI+s have been systematically excluded from citizenship to the extent of their capacity to “reproduce” the citizenship.

However, there is clear paradox here, which radically challenges the equation linking the subject of human rights to citizenship by birth, but which has not been sufficiently analysed in critical legal studies. This paradox is the exclusion of transgender people from citizenship and thus from being the subject of human rights, through the legal non-recognition of their gender.

In fact, exclusion from legal recognition is highly different from the social exclusion of women, children, the disabled people or disadvantaged groups from citizenship. Because these people are, first of all, citizens. In this sense, they are the people who are recognised as members of the nation and therefore as citizens and rights-holders, but they are discriminated against through social or legal exclusion and are not able to enjoy the citizenship rights, on an equal basis with others. In other words, the law was applied to them in an unequal way.

However, the situation is completely different when it comes to non-binary people, as they would not be citizens at all if they were not legally recognized. It is true that they are tied to

⁶⁹¹ BAUMAN, *supra* note 250 at 21.

⁶⁹² BALIBAR, *supra* note 254 at 76.

the nation by birth, that they are a member of the nation, that they are national, and indeed, they hold an officially issued identity card. However, the identity card they hold in their hands is not capable of making them “identifiable” and “recognizable” as a citizen, because they do not fit into one of the given citizenship categorises determined by the sovereign biopower. As there are only 2 types of citizenship categorizes, citizens can legally exist only in these two gendered citizenship categories: namely, male and female. Thus, when they are excluded from legal recognition, they are deprived of being a subject of the right. In this sense, in Arendt’s words, “what they suffered from is not that they are not equal before the law, because there is no law exist for them.” Rather, what they have suffered is that they are “legally absent” as a citizen. Thus, through the non-recognition of their gender, the place to which transgenders were exposed to, was the zone of indistinction between citizen and non-citizen. In between citizen and non-citizen, they were “right-less” in Arendt’s words, and their “unrecognizable” body is the true abstract nakedness of being human, in which the world found nothing sacred.

On the other hand, that we are not in 1945 when Arendt developed her critique. Indeed, international human rights law has developed and become largely institutionalised with its own mechanisms, conventions, directives, courts, tribunals, monitoring bodies and special procedures. As demonstrated in detail in the Chapter 4, it is fortunate that international human rights have evolved, albeit with constant threats of backsliding, in a way that acknowledging the massive exclusion of trans people are subjected to. Indeed, although slowly evolving, international human rights law has clearly established the framework for legal gender recognition. In this context, under human rights law, legal gender recognition must be quick, transparent and accessible for all including minors, and based on self-identification and free from abusive pre-requisites, including forced medical interventions and psychological assessment tests.

However, this is still not enough to eliminate the fact that trans people in the 21st century live in camps where they are reduced to bare life. Although the international human rights law clearly defines the scope of the right to legal gender recognition, there is an enormous gap between the human rights law and states practice. It is true that there are countries such as Argentina that ensures legal gender recognition fully in line with human rights law standards, but the vast majority of states still engage in practices that fall well outside the framework of human rights law, such as non-recognition, criminalisation or the abusive preconditions such as forced surgeries targeting bodily integrity, or psychiatric diagnosis alleging they are mentally ill.

This enormous gap between theory and practice reveals more than a violation of a human right. Today, there is probably no other category of rights other than legal recognition of gender that so clearly demonstrates the distinctive power of the state's sovereign decision. Indeed, there is no such extreme discrepancy between the scope of the right as defined in human rights law framework and states' implementation in regard to, for example, right to life or freedom of association. What we see here in these examples is the sovereign decision on exception, which suspends the right under certain circumstances. What we see at the moment that the sovereign decides the exception, is a violation of rights resulting from the arbitrary suspension of the law, which has a possibility to be ended or to be compensated. However, when a non-binary body, as an exception, is systematically denied or excluded from legal recognition, what we see is not a suspension of the law anymore, but rather, a "state of exception" in which the rule and exception becomes to indistinguishably intertwined and the distinction between these two is getting blurred, and thus, the exception begins to become the rule. Drawing on Agamben, the camp in which non-binary bodies are excluded from legal recognition, is this threshold of indistinction, where the bare life is reproduced through non-recognition, systematically. This is why, legal non-recognition is much more than a mere violation of rights, because what is not recognised is one's existence as the legal subject, here. Therefore, as shown in the Chapter 5, non-recognition of gender identity is the most crystal clear example confirming the extent to which human rights in the 21st century are still subject to the absolute authority of the sovereign decision.

But if we are in favour to argue that human rights must have the legitimacy and capacity to fulfil its promise, we must abandon this fatalistic and essentialist place, because otherwise we will continue to be kept in the camps where the bare-life is reproduced "forever and everywhere".⁶⁹³ Indeed, today's *homo sacer* is the transgender, but it is the sovereign, who decides who will be the next *homo sacer* tomorrow.

In fact, we are not entirely without hope of getting out of this fatalistic and essentialist place. In this sense, it is possible to find the hope in human rights law which reaffirms legal gender recognition based on self-identification accessible for all including minors without any abusive conditions. However, human rights cannot find the capacity to realise itself beyond being presented as a possibility, because of the state-centred structure of international human rights law which makes rights subject to the absolute decision of the state. As shown in the Chapter

⁶⁹³ LEMKE AND TRUMP, *supra* note 550 at 56.

4, today, sovereign states can freely withdraw from a human rights convention on combatting against gender based and domestic violence in a night as in Turkey, or, can abolish already existing legal provisions ensuring legal gender recognition as in Hungary.

Therefore, if we do not want to remain forever trapped in the bare-life in the arms of a giant international human rights law monster that whispers to us that we have some rights only because we are human, what we need to do is to imagine the possibilities of thinking human rights beyond the sovereign state-centred fiction.

In this regard, this thesis concludes by offering 3 modest possibilities for re-thinking:

First, *overthrowing the sovereignty of the state in defining human rights*. The law-makers of human rights law are the “state-by-appointed” representatives of humanity, based in Geneva and New York; while the subjects of rights are the real people all over the world. Thus, it is necessary to challenge the sovereignty of the state in defining the scope of the rights by ensuring a real participation which has a power to influence in human rights mechanisms of women, children, disabled and elderly people, LGBTI+s and those who are excluded from rights.

Second, *overthrowing the sovereignty of the state in ensuring human rights*. What rights mean and how they are applied is determined by the sovereign. Thus, it is necessary to challenge the sovereignty of the state in deciding for whom and how rights are to be applied, in other words, deciding who will be the subject of rights and to what extent, by strengthening the public capacity to act as a political subject⁶⁹⁴ and capacity to resist. It is true that it was as late as 1944 when women finally gained their right to vote in France, and 1971 in Switzerland. In late nineteenth-century Britain and the United States, women were not recognised as independent legal subjects and did not have the right to contract or control property. However, through public action and resistance, women demonstrated that they actually had the rights that the Constitution denied and that they could realise these rights. When they acted as a political subject who has capacity to resist, they gained the status of the subject of the rights. Indeed, it was 1970s but not 1940s when human rights came to dominate the political scene because it started to be used as an inspiration for political social movements globally. Therefore, it is always be remembered that the subject of the rights is a political subject who has capacity to resist and act.

⁶⁹⁴ Rancière, *supra* note 7 at 303.

And third, *overthrowing the sovereignty of the state in protecting human rights*. The protection of human rights is at the mercy of the sovereign who violates them. It is necessary to imagine a new base of legitimacy, changes in the concept of statehood, and sovereignty beyond the nation-state. In fact, it is not a far-fetched utopia. Indeed, more than 200 years ago, in 1795, in his essay “Toward Perpetual Peace: A Philosophical Sketch”, Immanuel Kant was providing us a possibility of thinking about the state of nature among nations through a new form of cosmopolitan law.⁶⁹⁵ Today, the ideas that have developed around new Kantian readings or global constitutionalism⁶⁹⁶ continue to be inspiring propositions as imaginaries of thinking sovereignty and the subject of rights beyond the limits of sovereignty.



⁶⁹⁵ JAMES BOHMAN & MATTHIAS LUTZ-BACHMANN, *PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL* 4 (1997).

⁶⁹⁶ See; Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 579 (2006); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 907 (2004), <https://doi.org/10.1093/ejil/15.5.907> ; Neil Walker, *Taking Constitutionalism beyond the State*, 56 *POLITICAL STUDIES* 519 (2008).

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