Gender Identity, Asylum and the ECHR: A Critical Doctrinal Analysis of Extraterritorial Gender Rights

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Abstract

This article explores the jurisprudence of the European Court of Human Rights (ECtHR) in relation to gender identity and asylum. It argues that the right to privacy and moral autonomy under Article 8 of the European Convention on Human Rights must be interpreted to include public expressions of sexual and gender identity. As such, presentation, recognition and social expression are intrinsic to one's identity, preference and desire, particularly for trans and gender non-conforming individuals. The first part of the article examines post-*Goodwin* ECtHR case law on gender identity to clarify the scope of protection offered under the Convention. The second part analyses the extraterritorial application of Article 8 in asylum cases, focusing on sexuality-based claims and the absence of trans-specific case law. The article concludes by highlighting that the performance and recognition of gender identity in public spaces is inseparable from the exercise of Convention rights and must be legally protected in asylum contexts. The blurring of the public/private divide is particularly critical where validation by state and society affects one's gender expression and risk of persecution.

Keywords: gender identity; asylum; ECHR; privacy; Article 8; trans rights; public/private divide; moral integrity; persecution; legal recognition.

[A] INTRODUCTION

This article first reviews the jurisprudence of the European Court of Human Rights (ECtHR) on gender identity to conceptualize which aspects are protected and under which rights breaches are examined. It then analyses the extraterritorial application of the European Convention on Human Rights (ECHR)—particularly Article 8, which has predominantly protected LGBTQI+ rights—focusing on links between gender identity and the right to privacy and moral integrity. Finally, it proposes a conceptualization of gender rights in the public sphere, emphasizing the

right to relate, present and be acknowledged in one's true gender by state and society.

The extraterritoriality or extraterritorial application of international and European human rights treaties refers to the recognition of the international and European human rights of individuals or groups of individuals located outside their territory, followed by the identification of their corresponding duties to those individuals, such recognition being given by treaty state parties (Besson 2012). The ECHR offers protection for all persons within the limits of the jurisdiction of ECHR states. Although asylum is not one of the protections offered, protection from expulsion can influence the right to asylum. In this way, the ECHR protects rights of non-citizens with an impact that extends further than the ECHR jurisdiction, in terms that it guarantees protection from violation of fundamental rights extraterritorially, namely in the country of origin by prohibiting expulsion there. I use extraterritoriality as a term that refers to rights that make the sovereign management of borders porous, due to having an impact on the right of persons to remain in a jurisdiction, such as asylum claimants. This arises as a result of the risks that are posed in a claimant's country of origin and extends the scope of jurisdiction, not in a legal-functional way, but because it assigns state protection of non-citizens that are in the jurisdiction of the ECHR. Although the ECHR does not enshrine a right to asylum, its jurisprudence on expulsion has become central to refugee protection by prohibiting the removal of individuals to states where they face serious risks to life or ill-treatment. In this way, the Convention functions as a complementary safeguard to international refugee law, ensuring that non-refoulement obligations are respected even outside the Refugee Convention framework.

The ECtHR's case law on gender identity (especially in post-*Goodwin v United Kingdom* 2002; and *I v United Kingdom* 2002) helps delineate the scope of Article 8, which has been most extensively examined in transgender cases. In contrast, ECtHR asylum case law on Article 8 (which is the most relevant to asylum cases) focuses predominantly on homosexuality, as transgender asylum claims have not yet been adjudicated in the context of asylum claimants' right to remain in the jurisdiction (the ECHR does not guarantee the right to asylum *per se*). The argument presented is that sexuality in asylum jurisprudence is closely connected with gender identity and expression, both of which demand recognition and protection as rights that are private with public manifestations. The public/private divide is thereby blurred by the need for validation and protection of one's gender performance, particularly where persecution and credibility assessments are grounded in visibility, expression, and stereotyping

conformity. As Nuno Ferreira argues (2021), the ECtHR has presided over at least 23 sexual minority asylum claim cases. Unfortunately, some decisions—like in *ME v Sweden* (2015)—endorse the dangerous notion that applicants can be returned to their home countries if they agree to be "discreet" about their sexuality, reflecting a troubling detachment from the lived realities and vulnerabilities of sexual minorities. Ferreira frames this detachment as rooted in the Court's deference to state sovereignty and its focus on narrow jurisprudential thresholds (eg under Articles 2 and 3 ECHR) (Ferreira 2023: 118). This results in decisions inclined toward formal legal reasoning rather than substantive protection for asylum seekers.

In this article, I offer an introduction to the main themes of asylum and transgender applicants, with a focus on Laurie Berg and Jenni Millbank's work (2009). Later on, I try to expand the scope of ECHR protection of citizens' gender identity (section [C]) to asylum claimants under Article 8 applications in expulsion cases of trans applicants and provide a critique of the Article 8 notion of private life as well as the minimization of its scope of extraterritorial protection by the Court (section [D]). Finally, I focus on issues of credibility and the narrow scope of privacy (section [E]) before turning to the conclusion (section [F]).

[B] GENDER IDENTITY/EXPRESSION AND ASYLUM

Under international law, a refugee is defined in Article 1A(2) of the 1951 Refugee Convention as a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside their country of nationality and unable or unwilling to avail themselves of that country's protection. These five grounds form the basis of the asylum framework, requiring decision-makers to assess both the credibility of the applicant's claim and the nexus between the feared harm and one or more of the protected characteristics. Importantly, the ground of "membership of a particular social group" has evolved to encompass claims related to gender, sexual orientation, and gender identity, enabling protection for individuals who may not fall within the more traditional categories but who nonetheless face systemic violence or discrimination. Asylum, therefore, is not a general remedy for hardship or insecurity but a targeted legal mechanism designed to protect individuals from persecution linked to these specific grounds.

A particular social group refers to persons that have a common, immutable and unchangeable characteristic that puts them at the risk of harm and/or are perceived as members of group that is discriminated against to such an extent due to their membership in it (United Nations High Commissioner for Refugees (UNHCR) 2019). Persecution is not clearly defined in the law but it refers to gross violations of human rights, especially non-derogable ones, or a systematic discriminatory practice that adds up to that level (UNCHR 2019). Traditionally, LGBTQ+ asylum claims have been adjudicated on the grounds of a particular social group on that basis, and the United Nations High Commissioner for Refugees (UNHCR) issued guidance on SOGIESC (sexual orientation, gender identity and expression, and sex characteristics) asylum claims in 2012 in which it examines good practices in determining the status of LGBTQ+ claimants. Gender identity has also been included explicitly on grounds that it should be examined in the particular social group in Directive 2011/95/EU (the Recast Qualification Directive).

It is undeniable that, as Berg and Millbank have noted in their study of relevant decisions by administrative tribunals in Australia, New Zealand, Canada, the United Kingdom (UK) and the United States, refugee status determination (RSD) bodies' jurisprudence in the area of transgender asylum claims remains fundamentally incoherent (Berg & Millbank 2009: 2-3). This calls for the re-evaluation of the legal framework applied by RSD bodies throughout the decision-making process in claims related to gender identity and expression. Berg and Millbank argue for an RSD framework that seriously considers gender nonconformity in its social context, alongside the applicant's own sense of gender identity and expression (Berg & Millbank 2009: 4-5). This allows for a conceptualization of transgender persecution that avoids erasing trans identities. A reconceptualized RSD framework could help ensure that various forms of transgender experience are acknowledged, and persecution is addressed in ways that safeguard both the applicant's human rights and the human rights-based rationale of international protection. As Millbank notes, "the wider the gulf between the experiences of the applicant on the one hand and the knowledge base and cultural frame of the decision-maker on the other, the greater the likelihood that credibility assessment may be problematic" (Millbank 2009: 401).

This is particularly true in gender identity asylum claims. Social stereotyping is widely used for credibility inferences, and identities are often categorized in medical, psychiatric or psychological terms, although they are primarily matters of gender identification (LaViolette 2007: 173-174). The fixed categories assumed in RSD effectively negate the

fluidity, personal configuration, and social meaning of gender identity. Instead, RSD processes impose extraneous criteria that are irrelevant to the applicant's actual experience of gender nonconformity and fear of persecution. Although social stereotypes are formally placed on the "grey list" of credibility assessment tools in refugee status determination—meaning they should not serve as the sole basis for decision-making—they nevertheless re-emerge in the adjudication of LGBTQ+ asylum claims before both the Court of Justice of the European Union (CJEU) and the ECtHR. In *A, B and C v Netherlands* (2014), the CJEU made clear that authorities cannot base credibility assessments on intrusive questioning or stereotypical expectations about how a gay man should behave, yet the Court still left room for subjective evaluations that implicitly rely on such assumptions. Likewise, in *ME v Sweden* (2015), the ECtHR accepted the possibility of return on the expectation that the applicant could avoid harm by being "discreet" about his sexuality, thereby reinforcing stereotypical notions about sexual identity and expression. These cases illustrate how, despite judicial recognition that stereotypes should not dictate asylum outcomes, they continue to resurface in credibility judgments and risk assessments. This jurisprudential ambivalence highlights the enduring influence of stereotypes in LGBT asylum adjudication, undermining the principle of individualized protection and weakening the substantive guarantees of international refugee and human rights law.

As Nicole LaViolette points out, it is dangerous to universalize the lives of sexual or gender minorities, especially given the global diversity of such experiences (LaViolette 2007: 176). The dialectic of sexual normalization and deregulation in asylum claims is worsened by stereotyping in LGBTQ+ emotive journeys that demand a linear narrative of sexual identity (Vogler 2016: 856-859; Camminga 2019: 163-199). This narrativization assumes a stable, coherent, and fully realized identity by the time the asylum claim is made. Many decisions rest on the assumption that this narrative is the appropriate "evidence" of sexual identity. The law thus struggles to recognize the complex, contradictory ways in which sexual desire and gender identity are lived. When the speech of asylum applicants intersects with legal strategies attempting to reduce it to coherent narratives, sexual and gender identity is queered by its instability (Vogler 2016: 870-872; Camminga 2019: 237-258).

This invites a shift toward a more epistemically inclusive field of judicial grammar. Judges must demonstrate a "reflexive awareness" of the difficulties transgender individuals face in making their lives legible to legal authorities (Sharpe 2002: 16). Moving beyond narrow heuristics such as "sex stereotyping", the law must focus on the discursive and

material practices that comprise trans discrimination. Judicial reasoning must intertwine with lived experience. Legal institutions should reflect collective life and bodily diversity. Gender and sex are core human experiences. The law, as a system of governance, must engage with these experiences as lived and situated.

In the following sections, I will examine ECtHR jurisprudence on gender identity and asylum to illuminate the scope and limitations of its legal protections.

[C] *GOODWIN* AND *I* AND THE ECtHR TURN IN TRANSSEXUAL CASES

With the *Goodwin* and *I* cases in 2002, both against the UK, the Court's case law on legal sex and transgender rights experienced a significant shift. The Court has consistently used the term "transexual", implying a transition in sex in a more genitocentric and biological sense rather than an affirmative legal and social practice of the experience of gender. The applicants in these cases were two transsexual women who had undergone gender-affirming procedures through the National Health Service. After undergoing those procedures, they both claimed that the absence of full legal recognition of their gender that corresponded to medical interventions on sexual characteristics as well constituted a violation of their human rights. The Court unanimously agreed to diverge from its previous case law on these matters. The Court ruled that the applicants were correct and that they should be granted full legal recognition of their gender, including being treated as women for pension, retirement, and marriage purposes, as well as having their birth certificates amended to reflect their acquired gender. The Court's decision in favour of *Christine Goodwin v United Kingdom* (2002) demonstrated that it had opted to redefine legal sex in such a way that it could include transsexuals who had crossed the binary as members of the sex group on the other side of the line. The law had always been capable of reconstructing the legal concept of sex, as Judge van Dijk had anticipated in *Sheffield and Horsham v United Kingdom* (1998); rather, it was the Court itself that had declined to do so until 2002.

Nonetheless, the Court wasted yet another opportunity to explicitly acknowledge that the legal definition of sex is a legal, not a medical, problem. The Court was not persuaded that the state of medical research or scientific understanding afforded any deciding argument in the legal recognition of transsexuals or give any conclusive criteria, and the Court opted to change the legal definition of gender (2002: paragraph 82). As

a result, the Court has reserved the power to redefine its definition of legal sex in the future. However, it was unclear if this change was a recognition of the law's potential to redefine gender, or if it was simply because medical science could not (yet) deliver the "truth" about gender. As a result, the decisions in *Goodwin* and *I* rely more heavily on medical discourse than their predecessors. These cases could be interpreted as a step forward in the medical pathologization of transsexuality, in which the gender-affirming process is explained as a medically validated recipe for "relief" (Sharpe 2002: 31-32).

In reality, medical discourse was one of the key reasons for abandoning the "biological" criteria for determining gender: an examination of congruent biological variables can no longer be decisive in denying legal recognition to a post-operative transsexual's gender change. Other important factors include the acceptance of gender identity disorder by medical professions and health authorities within contracting states, the provision of treatment, including surgery, to assimilate the individual as closely as possible to the gender to which they perceive they belong, and the assumption of a gendered social role by the transsexual. Despite this, the conviction in the existence of a genuine biological sex persisted in the judgment: it remains the fact that a transsexual cannot acquire all of the biological traits of the assigned sex; the chromosomal element is the fundamental unchanging biological part of gender identity. The Court did not believe, however, that the chromosomal factor must unavoidably play a prominent role in the legal attribution of gender identity to transsexual in *Rees v United Kingdom* (1986: paragraph 46) and in *Cossey v United Kingdom* (1990: paragraph 40). As a result, the Court chose to grant privilege to another criterion in determining legal sex, despite the recognition of a biological truth of sex. The gender-affirming process, according to the Court, did not actually allow the person to acquire their gender. It just served to "assimilate" this newly acquired gender. In other words, transsexuals could never surpass the sex binary's "true" barrier even though they could come close enough that the law would overlook the "biological truth" and allow for a sex change. Furthermore, the legal ambiguity in which *Goodwin* and *I* had been living due to the partial recognition of their acquired sex was one of the decisive elements for recognizing that they had altered their gender. "The unpleasant condition in which post-operative transsexuals live in a transitional zone, not quite one gender or the other, is no longer sustainable", the Court stated in *Goodwin v United Kingdom* (2002: paragraph 77). As a result, the Court appeared hesitant to acknowledge its role in the legal ambiguity imposed

on *Rees*, *Cossey*, *Sheffield and Horsham* as a result of its previous judgments, and chose not to do so with *Goodwin* and *I*.

To summarize, after the *Goodwin* and *I* decisions, gender was no longer established by an unchangeable "biological reality" of the body, but rather by the surgically altered anatomy of the transsexual individual's genitalia. As the ECtHR observed in *L v Lithuania* (2007) and *Nunez v France* (2014), it was this procedure that revealed the truth about sex. The applicant in *L v Lithuania* was a pre-operative transsexual male who protested about Lithuania's lack of legal regulation of sex-reassignment surgery. He had undergone hormone treatment and partial sex-confirming surgery after being medically classified as transgender, including breast removal. Despite this, the hormone treatment was stopped due to legal concerns regarding the prospect of undertaking further surgery. The law did not fully recognize him as a man because of the "incomplete" stage of his transition. As a result, the applicant complained about the statute, which ostensibly recognized transsexuals who had undergone genital surgery but did not actually provide such a service. The Court acknowledged that the applicant was in the intermediate position of a pre-operative transsexual who had undergone partial surgery and had certain civil-status documents modified, but whose personal code would not be changed until full surgery was completed, leaving him legally categorized as a woman in important aspects of his private life, such as employment and travel abroad (*L v Lithuania* 2007: paragraphs 8-17, 57-59). The Court ultimately found that the lack of legal acknowledgment of the applicant's sex prior to surgery was compatible with the Convention, but it held that the refusal to allow him to complete his gender transition amounted to a violation of Article 8 (*L v Lithuania* 2007: paragraphs 56-61).

In *Nunez v Norway*, the Court reiterated its conviction that genital surgery is the decisive criterion for legal recognition of sex. The applicant was a transsexual woman undergoing gender transformation who argued that the lengthy nature of the process, together with the state's refusal to grant recognition until the transition was completed, caused her severe suffering. The Court accepted that it was not unreasonable for the state to condition full recognition of gender status on the completion of the surgical process, within its margin of appreciation (*Nunez v Norway* 2011: paragraphs 62-70). It is therefore reasonable to conclude that the Court endorsed a model of legal gender recognition contingent upon the completion of the medicalized, and particularly surgical, transition. Sharpe's allegation regarding the law's genitocentrism is backed up by

the importance accorded to genital surgery as the point that allowed for sex change (Sharpe 2002: 70).

It took the Court one-and-a-half decades to partially overcome the fixation with transsexuals' genitalia that started with the *Goodwin* and *I* judgments. The Court adopted a first (timid) step in this direction in 2015, when it decided a case regarding the requirement of sterilization for gender transition. In *YY v Turkey* (2015), the Court examined whether the legislation that established infertility as a prerequisite for obtaining a judicial authorization to undergo a gender-affirming process was consistent with the Convention. It ruled that such a requirement amounted to a breach of the right to respect for private life. However, while the Court was clear that sterilization could not be a prerequisite for authorizing a gender-transition process, it avoided offering a straightforward opinion as to whether sterilization could ever be a requirement for the legal recognition of gender. In fact, the judgment can be read as implicitly validating the requirement of sterilization that exists in many states' legislation, provided that sterility was not a condition for undergoing a gender-affirming process, but a consequence of the transition.

In *AP, Garçon and Nicot v France* (2017), the Court changed its mind about genital surgery. The case concerned three trans women who were refused gender recognition because they did not meet several conditions set forth by domestic legislation. While each applicant's situation was unique, the Court had to decide whether legislation that made legal gender recognition conditional on undergoing intrusive physical and psychological examinations by an interdisciplinary medical team and being medically diagnosed with a mental disorder was compatible with the Convention. The Court had to interpret the meaning of Articles 61-61-5 of the French Civil Code (*Code civil*), as interpreted by the Cour de cassation, which required proof of the "irreversible character of the transformation of the appearance" for gender recognition. This requirement was later removed by Law No 2016-1547 of 18 November 2016, on the Modernisation of Justice in the 21st Century. It was confirmed that the authorities had sought either sterilizing surgery or a medical therapy that was quite likely to produce sterilization (2017: paragraph 118). The state had overstepped its margin of appreciation by imposing such a condition, according to the Court. It held that the legislation's requirement for an irreversible transformation violated the applicants' right to privacy, stating that neither sterilizing surgery nor medical procedures likely to result in sterility may be deemed criteria for gaining gender recognition under the Convention.

The Court's implied overturning of its case law's genitocentrism is a crucial consequence of this sterilizing decision. Given that genital surgery most probably leads to sterilization as noted in *AP, Garçon and Nicot v France* (2017: paragraph 118), it can no longer be utilized as a criterion for gender recognition. In fact, the Court specifically stated that not every trans person can—or even wants to—have genital surgery as part of their gender change. This means that one's attitude toward genitalia should not determine one's gender, and gender can no longer be naturalized by case law as the obvious expression of an anatomical feature. That creates a new implied right—the right to gender identification and gender expression—as opposed to a more essentialistic view of gender identity based on medical interventions that confirm the transitionary state. This newly evolving right is rooted in the protection of personal identity and acknowledges social rights to validate and perform one's gender as a person wants to and, in this sense, it is highly relevant to asylum. In persecution settings, the right to gender identification and performance is socially located (in the context of gender nonconformity, see Avgeri 2021) and not necessarily seen as a medical condition. In fact, discrimination takes place in gender-performative socio-legal settings, and the risk of harm is rooted in discrimination that amounts to persecution. In the next section, I turn to how Article 8 can be applied in asylum cases, given that there is indeed a fundamental right to gender identity and identification recognized by the previously examined jurisprudence of the ECtHR. The following section interrogates the extraterritorial implication of the ECtHR's interpretation of gender recognition rights and expulsion cases of trans asylum claimants.

[D] THE ECHR, PRIVATE LIFE (ARTICLE 8) AND ASYLUM

The right to asylum is not guaranteed by the ECHR. In contrast, the Court's dynamic interpretation of Articles 2(1) and 3 prohibits member states from deporting foreigners back to their home country if their lives are threatened or they risk being subjected to torture, degrading, or inhuman treatment. The Court has ruled that if "substantial grounds have been demonstrated for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3 … the person in question should not be deported to that country" (*Chahal v United Kingdom* 1996: paragraph 74).

According to reports by the FIDH (International Federation for Human Rights), ILGA-Europe (European Organization for the Representation of

LGBT Rights), and the International Commission of Jurists (2014: 6-7), the risk of persecution due to homosexuality is recognized as a ground for asylum in 34 Council of Europe Member States, including 27 EU member states. However, there is no comparable consensus for gender identity and expression. The interpretation of risk in countries of origin remains contentious in such cases, and, while Article 8 has been a primary source of protection for LGBTQI+ individuals, the Court's judgments have so far only dealt with sexuality—not gender identity—in expulsion cases.

On the other hand, the Court's judgment in *Rana v Hungary* established an important precedent for the protection of transgender persons under Article 8 of the Convention, finding that Hungary's refusal to allow the legal recognition of the applicant's gender identity violated his right to respect for private life (*Rana v Hungary* 2020: paragraphs 41-43, 76-77). By affirming that legal recognition is central to human dignity and personal development, the Court reinforced the principle that gender identity is an essential component of Convention rights. This reasoning has direct implications for transgender asylum seekers, who face compounded vulnerabilities when both their legal recognition in the host state and their protection from persecution in the country of origin are at stake. The pending case of *MS v Malta* illustrates this intersection: the applicant, a transgender woman, risks persecution if expelled to Iran while also suffering from the absence of adequate legal and procedural safeguards in Malta (*MS v Malta* pending, communicated 2025). Taken together, *Rana* and *MS* highlight the emerging recognition within the Court's jurisprudence of the specific challenges faced by transgender asylum seekers, pointing toward an evolving framework in which the Convention may complement refugee law by addressing both non-refoulement obligations and the need for gender recognition in host states.

The jurisprudence on asylum cases of the ECtHR provides an opportunity to rethink the law. In 2004, the Court decided two cases involving Iranians seeking asylum based on the risk of persecution if deported: *F v United Kingdom* and *IIN v Netherlands*. In both, the Court rejected the applicants' arguments under Articles 2 and 3, as it did not find sufficient evidence that deportation would pose a real threat. While acknowledging that "the general situation in Iran does not foster human rights protection and that homosexuals may be vulnerable to abuse", the Court concluded that the applicants had not shown substantial grounds for believing they would be subjected to Article 3 treatment.

Non-governmental organizations (ILGA-Europe 2014; European Council on Refugees and Exiles 2015) have criticized the Court's practice of rejecting applications on the assumption that asylum-seekers could conceal or suppress their identity to avoid harm in *F v United Kingdom* (1996), *IIN v Netherlands* (2004), *ME v Sweden* (2015) and *AAM v Sweden* (2016). The idea that the risk could be averted by "discretion" undermines both the right to physical and moral integrity and the principle that rights should not be contingent on invisibility. This directly contradicts the UNHCR's *Guidelines on International Protection No 9* (2012), which state that the capacity of applicants to conceal their identity is irrelevant to their protection claim (paragraph 30). It is also in contrast to the Court of Justice of the EU in *X, Y and Z v Minister voor Immigratie* (2013), which categorically rejected the "discretion requirement" in EU asylum law.

In more recent cases, including *AE v Finland* (2015), *AN v France* (2016) and *B and C v Switzerland* (2020), the Court found that expelling homosexual applicants to countries where they faced harm would breach Article 3. The Court has repeatedly affirmed that Article 3 prohibits expulsion to a country where the person faces a real risk of torture or degrading treatment, regardless of the source of the risk or the applicant's own conduct.

Yet, other qualified rights, such as Articles 5, 6, 8, and 14, require that a removal would result in a "flagrant breach" in order to bar deportation. As explained in *Mamatkulov and Askarov v Turkey* (2005), this threshold demands that the violation would nullify the right altogether. As Bratza, Bonello and Hedigan observed in their concurring opinion, the "flagrant denial of justice" standard implies a fundamental and manifest breach that destroys the very essence of the right (ibid: Joint Concurring Opinion).

This standard, however, does not apply to Articles 2 and 3, which are absolute rights. Article 3, in particular, is not subject to derogation and allows for no justification, even in cases of national emergency. Nevertheless, the Court has acknowledged that treatment which does not meet the "threshold of severity" under Article 3 may still be relevant under Article 8, which protects physical and moral integrity (*Bensaid v United Kingdom* 2001: paragraph 46). Asylum claims based on sexual orientation or gender-based harm, including domestic violence, often face obstacles both in refugee and human rights adjudication. In *F v United Kingdom* (above), the Court declined to apply the same standards from *Dudgeon v United Kingdom* (1981: paragraph 9), noting pragmatically that expulsion to a country not fully compliant with Convention standards is not in itself prohibited. That conclusion appears to restrict the extraterritorial

scope of Article 8 protection in asylum. The severity test is not the only difference between Articles 3 and 8. Whereas treatment under Article 3 must always be prevented, Article 8 is subject to the usual limitations: legality, legitimate aim, and proportionality. Governments may invoke interests such as economic well-being to justify expulsion.

Hathaway and Pobjoy's (2012: 368-371) concept of "endogenous harm"—that is, mental harm generated by suppression of identity—has been influential in these contexts. Mental health is protected as part of private life, particularly when it relates to identity and moral integrity. Because Article 8 guarantees a "right to identity and personal development, as well as the right to establish and develop relationships with other human beings in the outside world", mental stability is essential for its full enjoyment (*Bensaid v United Kingdom* (2001: paragraph 47). Expulsion cases may fall under Article 8 where they risk deteriorating the applicant's mental health, even if not rising to Article 3 standards. However, in *Bensaid*, the Court ultimately held that the interference did not reach the threshold required to constitute a breach.

Hathaway and Popjoy's argument has been subject to strong criticism. Their argument relies on a distinction between "internal" and "external" expressions of sexual orientation and gender identity, suggesting that only the latter fall within the ambit of refugee protection (2012: 469-471). This framing risks narrowing the scope of protection by implying that concealment or suppression of identity can be a legitimate expectation if an individual can still maintain an "internal" sense of self. Millbank (2012: 497-500) has argued forcefully against this distinction, noting that it undermines the very essence of the right recognized in *HJ (Iran) v Secretary of State for the Home Department* (2011)—the right of LGBTQI+ persons to live freely, openly and on equal terms. She emphasizes that attempts to separate "internal" from "external" manifestations of identity are both artificial and damaging, as they implicitly revive discretion reasoning in another guise. Avgeri contends that this conceptual bifurcation resurrects discretion reasoning under a different name, obliging transgender and gender-nonconforming claimants to conform to stylized norms of expression to access their rights (Avgeri 2021: 12). She argues that such a framework not only "reproduces medicalized notions of gender identity" but also disproportionately burdens applicants, delegitimizing their credibility unless they fit a narrow template of visibility and comportment (Avgeri 2021: 1415).

Hathaway and Pobjoy's argument fails to acknowledge the social aspects of LGBTQ+ identity by separating a core right (in the privacy sphere) from

social manifestations of it, ones that are more often acknowledged for political belief or religious conscience that falls under Article 9 ECHR. Indeed, Article 9 ECHR has occasionally been invoked in expulsion cases to safeguard freedom of conscience and religious manifestation in the country of origin, particularly where asylum claimants face risks as converts or members of persecuted minorities. For example, in *Z and T v United Kingdom* (2001: paragraphs 82–83) the Court recognized that severe restrictions on religious practice abroad could implicate Article 9, although it ultimately analysed the risk under Article 3. Similarly, in *FG v Sweden* (2016: paragraphs 127–129, 156) the Grand Chamber stressed that national authorities must assess *ex officio* whether an asylum seeker's conversion might expose them to serious repercussions upon return. This jurisprudence shows that Article 9 is used primarily to protect conscience and external practice in the country of origin, whereas Article 8 has been interpreted largely in relation to the protection of private and family life within the host country, balancing expulsion against ties built during long asylum procedures or residence, as in *Jeunesse v Netherlands* (paragraphs 117–121).

Asylum claimants with serious health conditions have also invoked Article 8 to resist removal on the ground that their return would lead to a deterioration in physical or psychological integrity. The Court has acknowledged that "private life" includes mental and physical health (*Bensaid v United Kingdom* 2001: paragraphs 46-48), but has generally found that the state's interest in immigration control prevails where medical treatment is available, even at a lower standard (*Nnyanzi v United Kingdom*: 2008: paragraphs 76-77). At the same time, in cases where removal would cause a significant reduction in life expectancy or serious suffering, the Court has signalled that both Article 3 and Article 8 may be engaged, as clarified in *Paposhvili v Belgium* (2016: paragraphs 221-223) and further developed in *Savran v Denmark* (2021: paragraphs 131-133). In short, Article 9 protects conscience primarily in relation to risks back home, while Article 8 has been mobilized to protect integration, family life, and, in certain instances, the health and dignity of asylum claimants whose expulsion would lead to serious medical deterioration. Yet, Article 8 could also be expanded to cover the right of LGBTQ asylum claimants to live openly and authentically, free from concealment pressures in their countries of origin. Just as Article 9 protects religious converts from having to suppress their faith on return, Article 8 could be interpreted to shield sexual and gender minorities from expulsion to environments where their private life could only be exercised clandestinely, at the cost of dignity and identity. The key question is whether the right to gender

identity and expression—including sexual identity and intimacy—can be recognized as a fundamental aspect of physical and moral integrity under Article 8, not in the sense of being something exclusively individual and identitarian without social implications. If so, a serious risk of harm in the country of origin targeting LBGTQ+ identity or its manifestations can trigger extraterritorial protection.

[E] GENDER, THE PUBLIC SPHERE AND CREDIBILITY

This article has so far attempted to show that gender identity and expression, like sexuality, are integral to the exercise of human rights in the public sphere. It follows that asylum law should acknowledge that the enforcement of social norms in the public sphere may be as harmful as state-led persecution. A narrow understanding of persecution and a failure to interpret gender as performed publicly can obscure the mechanisms through which legal categories are applied to asylum seekers. To fully understand the risk of persecution on grounds of gender identity, attention must be paid to how state and non-state actors interpret nonconforming gender expression as a signifier of sexuality, and how these social responses are shaped by a collective public imagination.

The Convention organs have stated that a denial of the right to establish and develop relationships with others on account of a person's gender identity violates Article 8 of the Convention. According to the Court, these relationships form part of an individual's identity and integrity (*Van Kück v Germany* 2003; *PV v Spain* 2010: paragraph 22). As Butler points out, "it is the body's exposure to the gaze, and to touch, and to language, that constitutes one's vulnerability" (Butler 2004: 49). Legal protections that are structured around the private sphere risk ignoring the conditions under which the individual may be exposed to harm in public. This is particularly problematic when credibility assessments in asylum law demand that the individual demonstrate evidence of "being" their claimed identity, as performance. Such evidence is often produced through gendered signifiers, bodily appearance, gestures, or social acts.

In this respect, the ECHR reproduces the logic of the public/private divide by limiting SOGIESC issues mostly to Article 8 and the notion of private life. While the right to privacy and moral integrity has become a useful legal instrument to protect the rights of sexual and gender minorities, it can also obscure the public performativity of gender and sexuality as a derogable right. As Edelman observes, privacy may "repress sexuality's performativity" because it presumes that identity is "stable,

intrinsic, and anterior to its effects" (Edelman 2002: 135). Yet, as the ECtHR jurisprudence on trans identity suggests, gender identity is not merely a private self-perception but has consequences for the individual's social and legal status, shaped through relations with others in the social world. Libby Adler (2018: 57-62) develops a similar critique in *Gay Priori*, where she argues that legal strategies built on privacy claims risk reinscribing the marginalization of queer subjects by protecting them only insofar as they remain invisible within the dominant public order. In her view, such arguments enable law to tolerate difference without transforming heteronormative institutions, producing what she calls a "politics of preservation" rather than a politics of liberation (Adler 2018: 115-121). This reasoning resonates with Halley's (1998: 94) analysis that privacy-based frameworks tend to reframe sexual orientation as a fixed status, obscuring its performative and relational dimensions. These critiques underscore how the Court's emphasis on private life in SOGIESC cases, while offering protection, risks foreclosing a more robust recognition of sexual and gender identity as inherently public, embodied, and socially constituted.

If credibility assessments in the refugee context rest on the premise that the individual is telling the truth about their sexual orientation or gender identity, then those assessments must take into account the public aspects of identity formation. These include the expression of gender through performative acts that are visible and legible within a particular social context. To require someone to conceal or suppress these aspects of themselves to avoid persecution is not only unreasonable but amounts to a denial of the very identity that human rights law is meant to protect. In *HJ (Iran)* (2011), the UK Supreme Court famously held that it was not acceptable to deny asylum on the basis that a gay person could avoid persecution by behaving discreetly. Lord Rodger stated that gay individuals are entitled to live openly and to express their sexual orientation through conduct, relationships, and modes of expression. As he put it, "to pretend that his sexuality does not exist or matters less than it does" is to fail to recognize the applicant's right to live freely and authentically (ibid: paragraph 78). Although this judgment formally rejected the notion that gay claimants must "be discreet" in order to avoid persecution, Moira Dustin (2018: 110) observes that Home Office decision-makers continue to operate under the assumption that some LGBTQ+ individuals are inherently discreet—or that concealment is socially, rather than fear based. She further documents how asylum policy instructions and Home Office guidance privilege Western models of identity, effectively penalizing applicants whose lived experiences or

cultural backgrounds do not conform to "openly LGBTQ+" narratives. Janna Wessels (2012) acknowledges that the Supreme Court rejected the "reasonably tolerable test", but argues that the judgment still retains "discretion logic"—by treating openly demonstrated versus concealed sexuality as distinguishable categories relevant to risk assessment and preserving the idea that concealment could be a valid choice. The decision also places undue emphasis on subjective fear, resulting in a stricter well-founded fear standard (ibid: 815-830, especially 815-820).

This reasoning is equally applicable to claims based on gender identity and expression. It challenges any notion that rights to protection are conditional upon the suppression of identity in public life. This can be better conceptualized in the asylum setting as socially located fundamental gender nonconformity that jeopardizes the individual's safety and personhood in a relational context. It affirms that gender identity is a lived experience, not a concealed attribute. Public presentation—clothing, pronouns, gestures, relationships—is intrinsic to that experience. Law must not merely tolerate these acts but protect them. Article 8's notion of private life should be seen as a protective mechanism for moral integrity with public manifestations and impact on transgender and gender nonconforming persons' lives.

The Court has held that the notion of private life covers "the physical and psychological integrity of a person", which includes a person's right to personal autonomy and "the right to self-determination as to how they lead their life" (*Pretty v United Kingdom* (2002: paragraph 61). Gender is an internal experience with constitutive relationality, so as to acknowledge the social aspect of gender in particular where there is a material risk of persecution. Private life should not be seen as a vehicle to minimize the social protection and manifestation of gender, as legal gender recognition cases demonstrate, and understate the need to be one's gender. The extent to which the meaning of "private life" has been interpreted in asylum cases is not justified and creates double standards in the protection of LGBTQ+ noncitizens, by not acknowledging that persecution that targets LGBTQ+ identity is inhumane treatment.

[F] CONCLUSION

The ECtHR has acknowledged that gender identity is part of an individual's personal identity protected under Article 8 of the Convention. It has also affirmed that forced sterilization and mandatory surgery as prerequisites for gender recognition are incompatible with the right to respect for private life (*YY v Turkey* 2015; *AP, Garçon and Nicot v France* 2017).

Nonetheless, the Court has not yet clarified the extent to which these rights apply extraterritorially in asylum contexts. It remains unclear whether deporting a person to a country where their gender identity puts them at serious risk would violate the Convention. While Article 3 offers protection against removal to inhuman or degrading treatment, Article 8 has been relied on with much inhibition where the threshold of Article 3 is not—but the ECtHR's asylum jurisprudence under Article 8 has not yet included transgender claims.

This article has argued that gender identity and expression should be recognized as central elements of moral and physical integrity under Article 8 and that their suppression in the context of asylum may amount to serious harm. In line with Millbank's argument (2012), suppression of gender identity through enforced concealment constitutes a violation of the right to identity and personal development. The Court should not require applicants to erase or hide their gender expression as a condition of avoiding persecution. The UK Supreme Court in *HJ (Iran)* (2010) should be revisited in an affirmative manner so that individuals cannot be expected to exercise discretion about their sexual identity to avoid persecution. That reasoning must be extended to gender identity in line with legal gender recognition jurisprudence. Social manifestations and expression are an integral part of gender identity.

As this article has shown, gender is not confined to internal self-identification. It is lived, performed, and interpreted through social acts and appearances in the public sphere. The ECtHR has already recognized in its trans rights jurisprudence that gender identity involves recognition by others and that failure to legally acknowledge gender harms personal integrity (*Van Kück v Germany* 2003: 51). It must now recognize that failure to protect individuals from persecution based on gender expression is also a denial of dignity. This requires a rethinking of gender rights as they relate to public presence, state recognition, and risk of harm.

The right to one's identity, developed in case law as a fundamental dimension of the right to privacy (Article 8 ECHR), could be conceptualized as a key element in the discourse of gender identity rights in asylum cases. The individual's right to define and perform their own gender identity, free from state-imposed classifications or performative expectations, resonates with a broader conception of dignity and authenticity. As Angelo Calogero has argued, there is a need to frame legal subjectivity not through fixed identity categories but through the right to difference and the openness of subjectivity itself (2020: 88). This understanding would ground legal protection in the lived experience of marginalized

subjects from non-European backgrounds, thereby advancing a queer, decolonial and performative reading of the right to gender recognition under the ECHR.

The Court's analysis has focused heavily on the potential violation of substantive Article 8 at the expense of equality and non-discrimination considerations, as well as the freedom of expression. The absence of analysis on freedom of expression in the ECtHR jurisprudence on gender identity claims is problematic. Social manifestations of privacy rights are very important since they link with the idea of self-definition and the "right to opacity", instead of the state's requirement for transparency and narrativity in asylum proceedings. These are areas that could be incorporated into the Court's analysis, instead of relying solely on the logic of privacy or physical integrity. As Michele Grigolo argues, there is a "liberal management of difference" at play which "turns human rights into a technology of power" by pushing subjects to conform to identity categories that the state recognizes and regulates (Grigolo 2010: 900).

In light of the above, one can draw on Grigolo, who distinguishes two core sexual rights: the right to choose sexual activity and sexual identity, as well as the right to form partnerships and start a family based on that choice (Grigolo 2010: 895). Flowing from this, I identify two core gender rights: the right to be recognized as the gender one experiences and the right to relate and participate in society in the gender one feels (which includes gender performance and expression). When the private sphere of sexual and gender rights is diffused into the public sphere—an essential relational characteristic of sexual preference and gender identity/performance/expression—then the right to privacy and moral integrity, as well as a relational concept of autonomy, invokes the freedom to be respected in the context of a society. It remains to be seen whether the nature of gender identification and relational validation of one's gender expression can have extraterritorial application, and whether a clarified threshold of severity might be established for a violation of the right to be and perform one's gender in a manner akin to protections for religious and political beliefs.

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