Queering the Form of the Judgment: On Misgendering, Deadnaming and Cisnormative Fact Construction in the Decisions of the European Court of Human Rights

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Abstract

In *TH v Czech Republic* (2025), the European Court of Human Rights (ECtHR) found in favour of a non-binary applicant for the first time. However, throughout its judgment, the ECtHR also misgendered the applicant by using masculine pronouns. In this article, we explore the effects of such seemingly small aspects of the judgment's form through a queer lens. Focusing on ECtHR decisions concerning trans* and gender diverse people, we argue that misgendering, deadnaming and the use of pathologizing language produce a cisnormative "background", which can have a "disorienting" effect on queer readers and a "straightening" effect on society more broadly.

Keywords: European Court of Human Rights; judgment; form; trans*; gender diverse; misgendering; deadnaming; pathologization; cisnormativity.

[A] INTRODUCTION

In June 2025, the European Court of Human Rights (ECtHR) issued a judgment in *TH v Czech Republic* (2025)—the first (known) case before it involving a non-binary applicant. The case concerned the Czech authorities' refusal to grant the applicant's request to change their personal numerical

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code denoting gender from a male one to either a "neutral one or, at the very least, a female one" (*TH v Czech Republic* 2025: paragraph 7). The authorities had refused this request on the basis that the applicant had not fulfilled the requirement of "sex reassignment surgery", which was a statutory condition for making such a change at the time. The ECtHR ultimately found in the applicant's favour, reaffirming its position, as established in previous cases, that "making the legal recognition of the … gender identity of transgender people conditional on sterilisation, or on treatment involving a very high probability of sterilisation which such individuals do not wish to undergo" (*TH v Czech Republic* 2025: paragraph 49) violates the right to private life under Article 8 of the European Convention on Human Rights (ECHR).

And yet, despite this apparently positive outcome,[1] the ECtHR also misgendered the applicant throughout its judgment by using masculine pronouns to refer to a person whom it acknowledged as identifying "with having a non-binary gender identity" (*TH v Czech Republic* 2025: paragraph 6). This constituted a departure from both the ECtHR's previous communications in the case (*TH v Czech Republic* 2023), as well as the Czech Government's submissions (Ministerstvo Spravedlnosti 2024), which both addressed the applicant using feminine pronouns, coming closer to respecting the applicant's identity, while still not fully respecting their wishes (Ouředníčková & Vikarská 2025). The ECtHR justified its use of masculine pronouns on the grounds that, "[o]n the date of lodging of the application, the applicant was regarded for civil-law purposes as belonging to the male sex" (*TH v Czech Republic* 2025: paragraph 4)—an odd decision, given the Court's finding that the same legal status was the result of a legislative framework that had placed the applicant in an "insoluble dilemma" (*TH v Czech Republic* 2025: paragraph 58) and was thus incompatible with the ECHR. The ECtHR clarified that its use of the masculine form "cannot be construed as excluding [the applicant] from the gender with which [the applicant] identifies" (*TH v Czech Republic* 2025: paragraph 4). But this raises questions about the kinds of constructive effects judgments have. While it may be within a court's power to designate whether something is to have a legal effect, it is not so simple when it comes to the social and political effects that flow from a judgment's use of language or narrative choices.

This article explores the effects of these seemingly minor aspects of the judgment's form, drawing on insights from queer theory. We base our analysis on a selection of ECtHR cases concerning transness or gender diversity. The cases we discuss do not constitute an exhaustive

[1] The substantive decision also had limitations (Chollet 2025; Ouředníčková & Vikarská 2025).

representation of the field. Rather, we have selected a mix of earlier cases dating back to 1980, a number of cases from the more recent past (the 2000s and 2010s), and a selection of contemporary examples from the 2020s in order to illustrate the ECtHR's shifting approach to language and narrative over time.

We argue that misgendering and deadnaming practices, the use of pathologizing language, and the inclusion of intimate medical details in the summary of the facts function to produce a cisnormative "background", which accommodates certain bodies and ways of being but not others. This can have a "disorienting" effect on the queer reader, making them feel uncomfortable and out of place, regardless of the substantive outcome of the case.

This article begins with an account of why the form of a judgment matters, outing how a judgment's use of language and narrative can encode certain messages, ideas or worldviews (section [B]). As part of this, we engage with Sara Ahmed's work on queer phenomenology to draw out how the background details of a judgment can have both "disorienting" effects on queer subjects and "straightening" effects on society more broadly. We then provide a queer critique of the form of the ECtHR's judgments in cases involving trans*[2] and gender diverse people, comparing historical trends with contemporary ones (section [C]). In the final section, we consider how the form of the judgment could be approached differently through examples drawn from recent queer and feminist judgment projects (section [D]).

[B] WHY FORM MATTERS

Most legal scholarship focuses on a judgment's substance—that is, *what* it says in terms of the law. Yet, as many of the recent feminist, queer and other alternative judgment-rewriting projects have made clear, *how* a judgment conveys its findings, through layout, language, style, tone, the arrangement of information and other narrative choices, is often crucial to the way it is received (see, eg, Rackley 2010). To begin, the very fact that something *looks* like a judgment, through details such as a header, seal and even font, is part of what transforms it from a document containing an individual or collective opinion into a *legal* determination (Charlesworth 2023: 612). In other words, form helps to imbue a judgment with the authority of law.

[2] In this article, we use the term "trans*" as an umbrella term for the wide range of individuals whose gender and/or expression differs from the sex assigned to them at birth, including non-binary people.

Through its judgment, a court is also attempting to *persuade* its audience—first and foremost, that its decision is the "correct" one, but often, whether consciously or not, of the judges' underlying assumptions and worldviews too (see, eg, Johnson 2014: 553). While much of a judgment's persuasive force comes from its substantive reasoning, persuasion is also inevitably bound up with stylistic and rhetorical choices (Klinck 1986: 656). This is perhaps most obvious when it comes to the storytelling involved in the rehearsal of the facts. The judgment presents the opportunity to provide the "official" account of the event in question, the context of the dispute, and any "relevant" information about the parties involved (Rackley 2010: 45). How a court chooses to arrange and narrate these details, as well as what it decides to leave out, shapes our understanding of the "problem" that gave rise to the judicial process in the first place and thus the extent to which we accept the "solution" provided (Rackley 2010: 46). For example, Tanzil Chowdhury has argued that the adjudicative temporalities used in judicial fact construction can produce very different legal subjectivities. Beginning a legal event at the point at which a woman poured petrol on her husband can produce "a fully agential subject of law, making a victim of sustained domestic violence a murderer" (Chowdhury 2020: 2). In contrast, starting the story earlier, and thus bringing in that history of violence, may complicate "the picture of a fully willed legal actor" (Chowdhury 2020: 2).

But the persuasive force of a judgment's form does not end with its construction of the facts. Vocabulary, grammar, the length and complexity of sentences, and the level of formality throughout the judgment can all also play a role in "encoding" the court's message, idea or outlook (Posner 1995: 1422). For instance, it has been observed that the use of "short, staccato paragraphs can, whether intentionally or not give a judgment an added appearance of decisiveness" (Rodger, quoted in Rackley 2010: 46). A judgment's use of active or passive language can also affect how its subject matter is presented. In a study of ECtHR cases concerning religion and culture, for example, Lourdes Peroni points out how the Court's use of passive phrases such as "the wearing of the headscarf" works to erase the subject and transform her action into the "thing" under analysis, reducing the sense of agency surrounding the practice of veiling (Peroni 2014: 217).

While these persuasive techniques often echo the judgment's substance (Rackley 2010: 46), they can sometimes complicate or undercut it, particularly where the discrete outcome of the case risks not fitting neatly within established legal parameters or dominant social norms. In such cases, we might find two opposing currents of persuasion: one in

the legal reasoning and one embedded in the judgment's form. Or, put another way, there may be one message in the "foreground" and another in the "background". This may not make a difference legally, as the legal reasoning is what matters in terms of law. But it can make a difference socially and politically. For example, Sarah Ganty argues that the use of stigmatizing narratives or language in judgments relating to poverty can reinforce myths about people in poverty being "[l]azy, criminal, negligent parents, not politically able, unreasonable" and so on (Ganty 2025: 171)—even in cases where there was a positive legal outcome for the applicant.

Queer theorists have long been attentive to the "understated" or "background" nature of heteronormativity and cisnormativity.[3] "Heteronormativity" refers to the societal privileging of (monogamous, reproductive) heterosexuality as the "normal" or ideal mode of sexuality (Berlant & Warner 1998: 548). "Cisnormativity" describes the assumption that sex/gender is binary and that identifying with the sex/gender one was assigned at birth (ie being cisgender) is the natural and superior mode of being (Larson 2025: 59). However, it should be noted these two regimes of normativity are intertwined, with the notion of being attracted to the "opposite" gender relying on the idea of there being a stable gender binary (Butler 1990: 30).

In her book, *Queer Phenomenology: Orientations, Objects, Others*, for example, Sara Ahmed argues that "heterosexuality functions as a background" insofar as it is both something that directs or "is behind" social actions and something that often "does not come into view" (Ahmed 2006: 87). In Ahmed's account, people are not born straight but rather "become straight" and a "field of heterosexual objects" helps to bring them "into line" with heteronormative expectations. The prominence of certain objects, such as wedding gifts and family photos in the home, or the repetition of scenes, such as a resort lined with "[t]able after table" of heterosexual couples, can have a "straightening" effect by orienting us towards certain desires and away from others (Ahmed 2006: 82).

For the queer subject who is unable to, or refuses to, align themselves with the heteronormative values encoded into these objects or scenes, living their life against a "heterosexual background" can make them feel uncomfortable and out of place. When having dinner in the family home or holidaying at a resort, they may feel *dis*oriented, "shatter[ing] [their] sense of confidence in the ground or [their] belief that the ground on

[3] An early example of a queer theorist looking to the "understated" can be found in the work of Judith Butler, who emphasizes the ways in which the compulsory order of gender/sex/desire is largely rooted in the "mundane and taken-for-granted" world of significations (Butler 1990: 140).

which [they] reside can support the actions that make a life feel livable" (Ahmed 2006: 157).

Scholars have extended Ahmed's insights to cisnormativity, arguing that it too functions as a background, with disorienting effects for those who do not conform (Kondelin 2014; Sciullo 2019). For example, Nick Sciullo argues that for trans* and gender diverse people, seemingly insignificant spaces such as "[b]athrooms, changing rooms, and locker rooms all become sites of contestation over who counts as a person. Each space, each stall door is an opportunity for new thinking about body, relationships, and being" (Sciullo 2019: 687).

While Ahmed's notion of the "heterosexual background" and subsequent scholars' extension of this idea to the cisnormative background are focused on how physical space is arranged, their accounts are instructive for thinking about the work that the messages embedded in the judgment's form—or its "background"—can do in cases involving queer applicants. Just as a wedding photo on the wall can send a message about the way one "ought" to live one's life, even in spaces in which the queer person is permitted to enter, a judgment with heteronormative or cisnomative values woven into its use of language or summary of the facts can reinforce those values, even in a case where the legal outcome is ultimately positive for a queer applicant. In such a case, the form of the judgment may have a disquieting and disorienting effect on the queer applicant, who is reminded of how their life or body is out of alignment with the "normal" order of things.

The effects of a judgment's form can also travel far beyond the discrete dispute to which the court is responding and the individuals and groups involved therein. Judgments are public-facing documents. In addition to communicating the result of the judicial process to the parties and their counsel, a judgment addresses, and may be consumed by, the broader legal community, including other lawyers, judges, legal academics, and law students, as well as the media and public more generally (Rackley 2010: 47). These public documents are also imbued with a certain authority, which comes from both their carrying of the law and the social prestige afforded to judges (Ganty 2025: 175). To the extent that a judgment's use of storytelling, language and style encodes a message or idea, then, it can help to spark and reinforce broader social narratives, becoming part of the normative backdrop against which we live our lives (Ganty 2025: 175). In this way, judgments that reproduce and reinforce norms relating to gender and sexuality can have a "straightening" effect on society more generally, helping to bring those who come into contact

with them "into line" with certain values and contributing to the "out of placeness" experienced by those who do not conform with those values.

These wider social effects are even more pronounced when it comes to the ECtHR, which not only enjoys a particularly large audience as a result of it having jurisdiction over the now 46 member states of the Council of Europe, but is also often depicted as "the conscience of Europe" (Council of Europe 2010), giving an additional "moral" and "cultural" weight to its judgments. As Paul Johnston puts it in an article on the impact of the ECtHR's case law relating to (homo)sexuality, "the Court must be regarded as one of the most important discoursing machines in the world since it produces a pan-European legal framework for adjudicating on matters of sexuality" (Johnson 2010: 74). In our view, the ECtHR's judgments play a similar role when it comes to gender (identity). In the following sections, we illustrate the personal and social effects that flow from the form of ECtHR judgments through a queer reading of its use of language and narrative in cases relating to transness and gender diversity.

[C] CISNORMATIVE LANGUAGE AND NARRATIVE IN ECtHR JUDGMENTS

Misgendering

One of the ways in which the form of a judgment can project cisnormative values, regardless of the outcome of the case, is through misgendering. Misgendering refers to "the imposition of terms, honorifics, names, or pronouns at odds with a referent's gender" (McNamarah 2021: 2252). It also encompasses "the failure to use terms, honorifics, names, and pronouns in line with a referent's gender" (McNamarah 2021: 2252).

Historically, the ECtHR appears to have sought to avoid misgendering trans* applicants, albeit not always very successfully. Originally, this came in the form of the ECtHR using one set of pronouns to describe the applicant in their early life and then switching to the applicant's desired pronouns at a later point in the summary of the facts. In *Rees v United Kingdom* (UK) (1986), for example, which concerned the UK's refusal to update a trans man's birth certificate to match his gender, the ECtHR began by using feminine pronouns to describe the applicant and continued this practice even through its description of the applicant's use of gender-affirming treatment (paragraph 12). The ECtHR then switched to masculine pronouns at the point at which the applicant legally changed his name (*Rees v UK* 1986: paragraph 13; see also *Van Oosterwijck v Belgium* 1980). While this approach might be preferable

to using the incorrect pronouns throughout, the use of pronouns with which the applicant does not identify at any point in the judgment still constitutes a form of misgendering.

Following *Rees*, the ECtHR's approach changed. In *Cossey v UK* (1990), which involved a trans woman, the ECtHR began by noting that the applicant had been "registered in the birth register as a male" (paragraph 9). However, at the first point at which the ECtHR used pronouns, it adopted the feminine form, stating, "[a]t the age of 13 the applicant realised that she was unlike other boys" (paragraph 10). In *X, Y and Z v UK* (1997), the ECtHR went even further in its efforts to use the applicant's correct pronouns, describing him from the outset as "female-to-male transsexual" who "will be referred to throughout this judgment using the male personal pronouns "he", "him" and "his"" (paragraph 12).

In these early cases, the applicants were not legally registered as their lived gender and the ECtHR held that they did not have a right to be so registered under the ECHR. Nevertheless, the ECtHR still made an effort to use the pronouns that reflected the applicants' identity and lived experience. In this way, the form of these judgments projected a more inclusive air than their substance, at least when it came to pronoun use. While the applicants were ultimately unsuccessful, the ECtHR's use of their correct pronouns may have at least allowed them to feel seen and respected.

The messages encoded into the form and substance of the ECtHR's judgments regarding gender identity eventually came into alignment in *Christine Goodwin v UK* in 2002. In that case, the ECtHR not only referred to the applicant, who was a trans woman, as "she" from the outset (paragraph 13), but also held that the British authorities' failure to legally register her gender identity constituted a violation of her rights under the ECHR (paragraphs 83, 104). This set the tone for the ECtHR's engagement with issues relating to gender identity over the next decade or so.

However, in a handful of more recent decisions, the ECtHR has departed from this approach. In *AP, Garçon and Nicot v France* (2017), for example, which concerned France's refusal to recognize the gender identity of three trans women on the basis that they had not sufficiently demonstrated that they had undergone a change in physical appearance of an "irreversible nature", the ECtHR opted to use the masculine form to describe the applicants throughout its judgment. This was so, despite the ECtHR going on to find in favour of two of the three applicants, holding that the requirement for trans* persons to undergo "sterilisation surgery

or medical treatment entailing a very high probability of sterility" (*AP, Garçon and Nicot v France* 2017: paragraph 135) in order to have their gender identity recognized constituted a violation of the right to private life under Article 8 of the ECHR.

In *AP, Garçon and Nicot*, the ECtHR justified its use of masculine pronouns on the grounds that three applicants were legally registered as male:

> On the date of lodging of the applications, the applicants were regarded for civil-law purposes as belonging to the male sex. For that reason, the masculine form is used in referring to them; however, this cannot be construed as excluding them from the gender with which they identify (2017: paragraph 6).

This approach and justification were then repeated in relation to the non-binary applicant in the ECtHR's 2025 judgment in *TH v Czech Republic*, as described in the introduction. The ECtHR's increasing emphasis on legal gender over self-identity when it comes to pronoun use may be the result of the increasing politicization of transness in Europe since the mid-2010s (Lavizzari & Beyer Gregersen 2026), combined with a growing backlash against the Court, which has resulted in the ECtHR taking a more deferential approach towards the member states' laws and policies (Stiansen & Voeten 2020).

There are also recent examples of ECtHR judges using the correct pronouns for an applicant but undermining their gender identity in other ways. For example, in her concurring opinion in *AM and Others v Russia* (2021), Judge Elósegui referred to the applicant as the "biological father" (2021: Judge Elósegui, paragraph 12), despite using the pronouns "she"/"her" elsewhere in the opinion (eg 2021: Judge Elósegui, paragraph 1). This constitutes misgendering insofar as it still involves the use of gendered signifiers to describe the applicant, which were inconsistent with her lived gender.

The practice of misgendering is sometimes trivialized (McNamarah 2021: 2260). Reasons for this trivialization might lie in the fact that it often involves the use of "benign words", rather than slurs, which can seem semantically empty (McNamarah 2021 2237). However, the adverse effects of misgendering are real and well documented. Misgendering is often experienced as humiliating, disrespectful, and constituting a form of "symbolic subordination" that deprives a person of safety, privacy and even their humanity (McNamarah 2021: 2265). Frequent misgendering is associated with low self-esteem and gender dysphoria (Howansky & Ors 2022: 1027; Jacobsen & Ors 2023: 817) and is considered to have

a harmful impact on the addressee's mental health (Jacobsen & Ors 2023: 817). It has been described as giving rise to form of "gendered disorientation", which can produce "feelings of self-hatred and hatred of one's gendered body parts as well as frustration and helplessness" (Kondelin 2014: 37).

Furthermore, the ECtHR's practice of misgendering applicants in its judgments may have broader social effects. Specifically, it could prompt readers to question the "realness" of trans* identities and, in those cases where the ECtHR used legal status as its justification for its misgendering, reinforce the idea that law matters more than lived experience.[4] In this regard, while the ECtHR's recent practice of misgendering may appear as a small or "background" feature of its judgments, particularly in those cases where the applicant was otherwise successful, it can have significant and harmful effects, both on the applicant and society at large.

Deadnaming

Another way in which the form of a judgment can reflect cisnormative values is through the practice of "deadnaming". "Deadnaming" refers to the use of a trans* person's previous name, which they have rejected—hence, a *dead* name (McNamarah 2021: 2254; Lane 2025b: 1015). This is often the name a trans* person was given or assigned at birth and is associated with a gender other than the one with which that person identifies (McNamarah 2021: 2255; Nielsen & Ors 2023: 1181).

In its early judgments dealing with transness, the ECtHR sometimes used the applicant's dead name more than it did their actual (chosen) name. In the case of *Van Oosterwijck v Belgium* (1980), for example, the ECtHR used the applicant's dead name four times in its account of the procedure and the facts (paragraphs 1, 7-9, 12). In contrast, it referred to the applicant's actual name, Daniel Van Oosterwijck, only once, when explaining the changes he had requested to his birth certificate (which had subsequently been refused by the domestic authorities) (paragraph 12). For the remainder of its judgment, the Court then opted to use a degendered initial ("D"), which could apply to both the applicant's deadname and his actual name.

As time went on, the ECtHR began to use trans* applicants' actual names as the main way to refer to them throughout its judgments. This

[4] For a critique of the way in which "gender is one of the last remaining state-assigned, and supposedly stable and permanent, 'characteristics' of a person that remains explicitly registered as a key element of one's *legal* 'identity' in most countries around the world", see (Baars 2019, original emphasis).

may have been because, unlike the applicant in *Van Oosterwijck v Belgium*, those names were often the applicants' legal names in subsequent cases. However, throughout the 1980s and early 1990s, the ECtHR still frequently referred to trans* applicants' dead names in the summary of facts. In both *Rees v UK* (1986) and *Cossey v UK* (1990), for example, the ECtHR went out of its way to specify the name under which the applicant had been registered at birth at the beginning of the facts (*Rees v UK* 1986: paragraph 12; *Cossey v UK* 1990: paragraph 9), before describing the applicant's legal name change and then using that name to describe the applicant thereafter (*Rees v UK* 1986: paragraph 13; *Cossey v UK* 1990: paragraph 10).

It was not until the 1998 case of *Sheffield and Horsham v UK* that the ECtHR began referring to trans* applicants by their actual name from the outset and avoiding any reference to their dead name when describing a legal name change. For example, in relation to the first applicant in that case, who was a transgender woman, the ECtHR opened with the line: "Miss Kristina Sheffield, is a British citizen born in 1946 and currently resident in London" (paragraph 12), before noting that in the 1980s, she had "changed her name by deed poll to her present name. The change of name was recorded on her passport and driving licence" (*Sheffield and Horsham v UK* 1998: paragraph 13). In *Christine Goodwin v United Kingdom* (2002), in which the ECtHR finally recognized a right to change one's legal gender, the Court did not even mention the applicant's change of name in the facts. Instead, it only becomes apparent when the ECtHR describes the deadnaming to which the applicant had been subject: "She has received letters from the DSS addressed to the male name which she was given at birth" (*Christine Goodwin v UK* 2002: paragraph 18). These examples demonstrate the ease with which deadnaming can be avoided.

Deadnaming is now rare in the judgments of the ECtHR. This may be because it has come to the view that there is seldom a legally relevant reason to specify an applicant's dead name in the facts (on why this information is often irrelevant, see Molloy 2019). An increase in anonymous judgments in gender identity-related matters before the ECtHR, whereby the applicant is referred to using initials or a pseudonym throughout the course of the judgment (rule 47(4), Rules of Court), has also likely played a role in this shift.

However, the ECtHR still engages in deadnaming from time to time. In *Koutra and Katzaki v Greece* (2025), for example, the ECtHR used the dead name of one of the applicants twice in the opening paragraphs of the facts, before noting that the applicant "wishes to be referred to

as Anastasia Katzaki" (paragraph 2) and referring to her by that name thereafter. In *Savinovskikh and Others v Russia* (2024), the Court did not misgender the applicant or state any first name in the facts. However, in the judgment's appendix, the applicant's entire (dead) name at the material time is spelled out (Appendix).

Like misgendering, deadnaming is sometimes seen as a trivial matter. Yet, deadnaming trans* people often has a "visceral impact" (McNamarah 2021: 2255). Elek Lane writes that "[i]t can cause those who are deadnamed to wince or cringe and feel discomfort, or worse. It *hurts* to be deadnamed" (emphasis added, 2025a: 2). By contrast, the use of one's actual (chosen) name has been linked to better mental health outcomes in terms of reduced depressive symptoms, suicidal ideation and suicidal behaviour amongst transgender youth (Russell & Ors 2018: 505).

One reason why deadnaming can have such a negative effect is because it can constitute a form of misgendering where the dead name is associated with a gender with which the person does not identify, as is commonly the case (McNamarah 2021: 2255). In this way, deadnaming can give rise to the same "gendered disorientation" described in the previous subsection in relation to incorrect pronoun use. In addition, being called by a dead name may evoke painful memories associated with the time the person was known by that name and may have felt unable to be themselves (Lane 2025a: 10). But, perhaps most significantly, deadnaming undermines the linguistic authority and self-determination of a person who has made a clear decision about what they ought to be called (Lane 2025a: 13). For many, choosing a name more closely in line with their gender identity is an empowering process, which allows them to take control of their life and define who they are in the world. As one non-binary person describes it, choosing a name "was about choice, surviving, and giving myself agency. It's probably the only time I have ever made a choice that was just about me" (Corcione 2018). When a person or institution, including a court, challenges that choice by using the person's rejected name, it can thus take away a person's sense of power over their own life.

Pathologizing language

A third way in which the form of the ECtHR's judgments can make trans* and gender diverse people feel disoriented and out of place is by using pathologizing language and narrative. "Pathologization" describes "the act of unfairly or wrongly considering something or someone as a problem, especially a medical problem" (Cambridge Dictionary). In the context of

transness, it usually refers to the depiction of trans* people as having a mental illness or disorder (Theilen 2014: 332).

In the ECtHR's early decisions relating to gender identity, being trans* was regularly described as a "condition", which gave rise to "considerable problems" for the individuals concerned and could be "alleviated", at least to some extent, through "medical and surgical treatment" (*Rees v UK* 1986: paragraph 38). These descriptions largely reflected the state of medical and psychological science at the time, which classified "transsexualism" as a disorder. However, some ECtHR judges may have further contributed to the social perception that there was something "wrong" with trans* people through their own descriptions of them as sick, flawed and unfortunate.

In his dissenting opinion in *X, Y and Z v UK* (1997), for example, Judge Foighel stated, "[a] transsexual is someone who has been born different from others, someone who has been born with a 'defect'" (Judge Foighel, paragraph 10). In a similar vein, in his dissenting opinion in *Cossey v UK* (1990), Judge Martens said:

> Like Mr Rees, the applicant is a transsexual, that is she belongs to that small and tragic group of fellow-men [sic] who are smitten by the conviction of belonging to the other sex, this conviction being both incurable and irresistible (paragraph 2.1).

In both instances, the dissenting judges found in favour of the applicants. That is, in contrast to the majority, they were of the view that trans* people's inability to change their legal gender in the UK at the time amounted to a violation of the ECHR (*X, Y and Z v UK* 1997: Judge Foighel paragraph 10; *Cossey v UK* 1990: Judge Martens, paragraph 1.1). And yet, by describing them as "defective", "tragic" and "incurable", these judges created a "background" message, in which being trans* was presented "as something unusual, a deviation, a cause for concern – in short, an illness" (Theilen 2014: 332). In these statements, trans* people were not only made to seem unwell, but also an object of pity.

Although the ECtHR's use of pathologizing language in cases involving trans* people has decreased over time, it has not disappeared either. This is perhaps because a narrative of pathologization ultimately proved central to the ECtHR's holding that trans* people have a right to have their gender legally recognized in *Christine Goodwin v UK* (2002) (Theilen 2014: 329). In that case, the Court considered it significant "that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief" (paragraph 81) and observed that "[w]here a State has authorised the treatment and surgery

alleviating the condition of a transsexual, … it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads" (paragraph 78). Trans* identities also continue to be pathologized within medicine—only now under the psychiatric condition of "gender incongruence",[5] rather than "transsexuality" or "gender identity disorder" as it was previously labelled (MacKinnon 2018: 89).

One way in which the ECtHR continues to use pathologizing language is by simply employing the terminology of "transsexuality", "transsexualism", and "transsexual", as it still does from time to time. This now mainly occurs when the ECtHR is recounting decisions made by other institutions, such as courts or medical institutions. In this context, the ECtHR often uses quotation marks to distance itself from this terminology (see, eg, *WW v Poland* 2024: paragraph 41), but there are some examples where it has not done so (see, eg, *RK v Hungary* 2023: paragraph 26; *OH and GH v Germany* 2023: paragraphs 13ff, 54ff). There are also recent examples of judges on the ECtHR employing this terminology without quotation marks in their separate opinions (see, eg, *WW v Poland* 2024: dissenting opinion, Judge Wojtyczek, paragraph 3).

These terms are widely considered outdated and offensive by trans* communities due to their origination in the medical and psychological sciences and association with the condition that once held that name (GLAAD Media Reference Guide). Although some trans* people have reclaimed the term "transsexual" and use it to describe themselves (Leon & Ors 2025), many do not. As such, in cases where the ECtHR or individual judges on the Court opt to use this terminology and it is not how the applicant self-describes, it can import a pathologizing narrative into the "background" of the judgment, even in the absence of more explicit language relating to illness.

Pathologizing language and narratives can have a disorienting and disempowering effect on trans* people. This is because it creates a binary of "normal" and "abnormal", in which trans* people are placed on the side of "abnormal", contributing to their social marginalization (MacKinnon 2018: 75ff). One need only look to the example of homosexuality, which was previously classified as an illness but is no longer, to see the difference that (de)pathologization can make when it comes to social acceptance (Theilen 2014: 332ff). Further, the pathologization of trans* identities can push trans* people towards a medicalized process, in which they "become

[5] This is how it is classified in the *International Classification of Diseases 11* (ICD 11), which is a standard diagnostic tool published by the World Health Organization. The ECtHR itself addresses this change in terminology (*TH v The Czech Republic* 2025: paragraph 50).

positioned as disempowered patients, who require education and mental health support from (mostly) cisgender professionals" (Dewey & Ors 2023: 362). In this process, they may feel pressure to undergo surgical and other interventions in pursuit of a medical "fix" (Pfäfflin 2015: 23). In this way, pathologization can be seen as the opposite of self-determination. Instead of accepting and understanding diversity in its complexity, it projects a sense of disorder onto it (Singer 2006: 615), undermining people's ability to simply be who they are in the world.

Intimate details of surgery

The final issue that we will discuss in relation to the form of ECtHR judgments concerns the inclusion of intimate details about trans* applicants' bodies and medical history in the summary of the facts. In the ECtHR's earlier judgments relating to gender identity, there was a tendency to describe gender-affirming surgeries in detail. This sometimes entailed descriptions of applicants' genitalia, both before and after the relevant interventions. In *Cossey v UK*, for example, the Court noted that the applicant originally "had male external genitalia" (1990: paragraph 10). It then went on to describe in detail the various medical interventions and surgeries she had since undergone:

> In December 1974 the applicant, who had previously taken female hormones and had had an operation for breast augmentation involving implants, underwent gender reassignment surgery in a London hospital, to render the external anatomy nearer that of the female gender (*Cossey v UK* 1990: paragraph 11).

The ECtHR also included information from a medical report about the apparent "success" of these medical interventions, measured in terms of the applicant's ability to have heterosexual penetrative sex: "a genital examination showed her to have the external genitalia and vagina of a female. As a post-operative female transsexual, she is able to have sexual intercourse with a man" (*Cossey v UK* 1990: paragraph 11).

Queer legal theorists have suggested that the ECtHR's emphasis on surgery and other medical interventions in these early decisions stemmed from a concern with the authenticity of trans* identities (Sharpe 2010: 108; Gonzalez Salzberg 2019: 47). How far an individual was prepared to go in terms of modifying their body, and the apparent "sacrifices" they were willing to make along the way, came to serve as metrics for how serious a person was about their gender identity (Sharpe 2010: 108; Gonzalez Salzberg 2019: 47). This view of gender-affirming surgery as authentic "sacrifice" became more explicit in some of the ECtHR's subsequent judgments. For example, in *Christine Goodwin v UK*, the

ECtHR presented "the numerous and painful interventions involved in … [gender-affirming] surgery" as evidence of the applicant's transition being anything but "arbitrary or capricious" (2002: paragraph 81).

The Court's interest in applicants' genitalia, as well as the issue of whether they could engage in heterosexual penetrative sex following surgery, may have also been underpinned by a latent homophobia in the law at this time, which sought out opportunities to "heterosexualize" those who might otherwise present a challenge to sexual and gender norms (Gonzalez-Salzberg 2019: 49ff; Sharpe 2002; this echoes Ahmed 2006: 96). In addition, the ECtHR's inclusion of such intimate details in its summary of the facts was likely bound up with the pathologizing narratives described in the previous subsection, which cast trans* people as unwell and in need of a medical "fix" (Gonzalez Salzberg 2019: 47). This medicalized lens lends itself to the inclusion of medical details, regardless of their legal relevance.

Detailed descriptions of surgical interventions are now less common in the ECtHR's judgments. This is perhaps because the ECtHR has since recognized that making legal gender recognition for trans* people contingent on surgery is itself a violation of the ECHR, at least when it involves the possibility of sterilization (*AP, Garçon et Nicot v France* 2017), thus reducing the need to find evidence of bodily "sacrifice" in order to authenticate trans* identities. Nevertheless, the ECtHR does still occasionally refer to surgery and other medical interventions in more detail than appears to be strictly necessary. In *Savinovskikh v Russia*, for example, the ECtHR noted in the facts that "[o]n 21 July 2017 the applicant underwent a double mastectomy and all of his breast tissue was surgically removed" (2024: paragraph 13). This was so, despite the issue of whether or not the applicant's breast tissue had been removed being of marginal relevance to the question of whether removing children from a person's custody on account of them being trans* constitutes a violation of the ECHR, which was at issue in that case.

Having the details of one's body or medical history shared with the world via a court judgment can be embarrassing, humiliating and affect a person's sense of dignity. Trans* people have described being asked questions about their body by people who are not within their circle of trust as "sensationalizing our being transgender and not actually valuing or recognizing our personhood" (Finch 2017). It comes across as if trans* people owe the world "private or intimate details", in a way that cis people do not, and reduces trans* people to their bodies and medical history, rather than seeing them as full people (Finch 2017). Including such

details in public-facing judgments can also contribute to harmful social narratives, ranging from the pathologization of trans* identities and the idea that authentic transness entails some form of surgical intervention, to the notion that "transgender people exist for the entertainment, comfort, or curiosity of cisgender people" (Finch 2017). In this regard, it is a harmful practice, which should be avoided.

[D] AN ALTERNATIVE APPROACH: THE FEMINIST AND QUEER JUDGMENT PROJECTS

A queerer approach to the form of the judgment can be found in the multiple critical or alternative judgment projects that have taken place over the past two decades. Since 2006, there has been a proliferation of feminist judgment projects, including one focused on international law, which contains a section on the ECtHR (Hodson & Lavers 2019).[6] In these projects, legal academics, lawyers and activists rewrite existing judgments from a feminist perspective. In doing so, some contributors have drawn on insights from both feminist and queer theory (see eg Bengtson & Ors 2019). More recently, there have also been projects aimed at rewriting judgments from an explicitly queer perspective, including the 2025 *Queer Judgments* collection (Ferreira & Ors 2025; see also Sharpe 2017).

In addition to queering the substance of the law, many of these rewritten judgments also seek to queer the form of the judgment (Sharpe 2017: 421). For some contributors, this means dispensing with the genre of judgment-writing altogether. However, for others, it involves demonstrating how a queer-inclusive "background" message can be constructed within that genre so as to reduce its disorienting effects. These contributions constitute a valuable resource for thinking about how language and narrative can be used in judgments to "reorient" international law in ways that allow more queer people to "feel at home in it" (Holzer & Ors 2023) while still maintaining a judicial voice.

In the rewritten judgments relating to trans* and gender diverse people in these projects, practices of deadnaming and misgendering are nowhere to be found. This is so even in cases where one of the parties is legally registered as having a name or gender other than that with which they identify. For example, Carolynn Gray's rewritten version of the English case *R (On the Application of Elan-Cane) v Secretary of State for the Home Department* contains the following note on terminology:

[6] Note that there is also an alternative judgments project focused specifically on the ECtHR (Brems 2012) but it does not include cases concerning transness or gender diversity.

> The claimant self-identifies as non-gendered and, therefore, although legally registered as female, this judgment will refer to the claimant using the gender-neutral pronouns they and them. It is important that the court recognise and respect the identity of the claimant throughout, regardless of the decision being reached in relation to the obligations on the state to afford legal recognition of the claimant's gender identity (Gray 2025: 269).

The fictive benches also show a willingness to use multiple pronouns, if that is how a party identifies. For instance, the rewritten version of the Australian High Court's decision in *NSW Registrar of Births, Deaths and Marriages v Norrie* states, "Norrie uses the pronouns 'she/her' and 'they/them' and we will use both in this judgment" (Mazel & Ors 2025: 185). Applying this approach to a decision like *TH v Czech Republic* (2025) would entail the ECtHR asking the non-binary applicant for their preferred pronouns and using them from the outset, whether they be they/them, she/her or a mix of both.

The rewritten judgments relating to transness and gender diversity in the feminist and queer judgment projects also avoid pathologizing language. In Paul Johnston & Ors' rewritten version of the ECtHR's judgment in *Christine Goodwin v UK* in the *Feminist Judgments in International Law* collection, for example, rather than opening with a line about the applicant being a "post-operative male to female transsexual", as the original judgment did (paragraph 12), the fictive judges refer to her having "undergone male to female gender reassignment" (Bengtson & Ors 2019: 182, paragraph 1). Moreover, in addition to distancing themselves from the pathologization to which the applicant had been subject by using quotation marks around the term "diagnosed" (Bengtson & Ors 2019: 182, paragraph 2), the fictive judges explicitly call out this process: "[t]he Court notes that medical science continues to pathologize transsexuality" (Bengtson & Ors 2019: 185, paragraph 19).

Further, the rewritten judgments limit the disclosure of intimate bodily or medical details. In a number of examples, the fictive judges simply refer to a "sex affirmation procedure" (Mazel & Ors 2025: 186, paragraph 10) or "gender affirmation surgery" (Avgeri 2025: 243, paragraph 16) without going into greater detail. In others, the fictive judge seeks to explain the purpose of such medical procedures in a non-pathologizing way. For example, Carolynn Gray states the following in the summary of facts:

> The claimant underwent medical procedures … to alter their body in ways which enabled them to live comfortably, having experienced dysphoria as a result of living as, and being perceived by others, as female (Gray 2025: 261).

In a decision like *Savinovskikh v Russia* (2024), this approach would ideally entail the ECtHR omitting the reference to the applicant's double mastectomy or, if the Court found it necessary to its legal analysis for some reason, describing it in a self-affirming way. In this regard, the feminist and queer judgment projects constitute an archive from which the ECtHR and other courts can draw when considering how to approach language and narrative in their decisions concerning trans* and gender diverse people in a more queer-inclusive way.

[E] CONCLUSION

In this article, we explored the social and political effects that can flow from the form of the judgment through a queer reading of ECtHR decisions concerning trans* and gender diverse people. We argued that misgendering, deadnaming, the use of pathologizing language, and the inclusion of intimate bodily and medical details in judgments work to produce a cisnormative "background" message, which can have a "disorienting" effect on queer readers and a "straightening" effect on society more broadly. This is so, even in cases in which a trans* or gender diverse applicant was ultimately successful. However, as we demonstrated through reference to the feminist and queer judgment projects, the form of the judgment need not operate in this way. These projects demonstrate the ease with which cisnormative and trans-exclusionary language and narrative can be avoided without compromising the genre of judgment-writing. In this way, the feminist and queer judgment projects constitute a valuable resource for courts wishing to project a message of respect, inclusion and openness to diversity in both the foreground and the background of their judgments.

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