The European Courts and Transsexuals.
The Binary Distinction and the Pattern of Family

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I. Introduction

This study analyses selected issues surrounding the legal protection of transsexual persons[1] in the European Union and States that have ratified the European Convention of Human Rights through an examination of the approach followed by the European Court of Human rights (hereinafter, ECtHR) and by the Court of Justice of the European Union (hereinafter, CJEU).

In illustrating the arguments used by these European courts, the chapter seeks to determine whether the approach represents reaffirmation of the binary gender system and the traditional idea of family based on marriage between a man and a woman or whether it moves beyond these traditional categories. The reading of the case law suggests that the approach of the European Courts simply confirms the binary gender system and the mainstream idea of family as founded on marriage between men and women. The approach of the ECtHR and the CJEU follows a typical "heteronormative approach" to the family realm, leaving most transgender persons in a sort of legal limbo without full guarantee of their constitutional rights and freedoms.

Over the last three decades there has been an unprecedented wave of decisions by the European Courts regarding transgender persons and the recognition of their rights, in particular regarding the family (transparentality and the right of trans persons to marry). The rights of transgender persons have been upheld both by the ECtHR and CJEU in the context of broadening recognition of rights and freedoms. Generally speaking, several decisions of the European Courts represent important steps towards full recognition of trans rights and freedoms (Sharpe 2007, pp. 50-52; pp. 148-149).

From these considerations the paper moves to the following questions: what family model emerges from the decisions? Can we detect any evolution in them from the traditional idea of family founded on the marriage between a man and a woman?

Answering these questions requires reflecting on the manner in which the two European courts engage the idea of family and, consequently, of marriage as traditionally interpreted as the union of

[1] The expression 'transsexual' refers to a person who lives in a gender role consistent with his/her inner gender identity but in contrast with social expectations associated with his/her biological sex. The word 'transgender' is an umbrella term referring to anyone whose behaviour, thoughts, or traits differ from the societal expectations for his/her biological sex. Trans is an abbreviation used to designate persons whose self-perception of gender, gender identity and/or gender expression differs from the gender assigned to them at birth. The exact content of this concept varies from author to author but, in any event, it covers a wide range of sub-categories.

one man and one woman. The recognition of the right of trans persons to marry and to create (or maintain) families requires an analysis of the engagement of these two courts with the "sex/gender system" in the construction of family as legal institution. Access to marriage for trans persons is a delicate issue, as it challenges the definitions of gender that operate throughout the legal realm and reveals the implicit role played by gender norms that qualify the family as only possible when founded upon the marriage of a man and a woman.

If on one side the European Courts recognised the right to marry for transsexual persons, on the other side, the recognition was applicable under certain circumstances and (only) went as far as emphasizing the illegality of restricting 'postoperative' transsexuals from enjoying their right to marry (*Goodwin v. UK*; *I v. UK).*[2] The European Courts, therefore, do not overcome the binary dimorphism of sex and gender and the traditional idea of family. The European Court of Human Rights stated that Member States are free to decide legal rules determining the sex of transsexual persons for the purpose of marriage and the requirements to marry (for instance, *Rees v. UK*[3] of 1986 and *Cossey v. UK* of 1990).[4] Then, the ECtHR confirmed that the automatic conversion of a marriage into a registered partnership as a precondition to the legal recognition of an acquired gender when the trans person is married does not violate the European Convention of Human rights (*Parry v. UK* and *R. and F. v. UK* of 2006,[5] *Hämäläinen v. Finland* of 2014).[6] Regarding the CJEU case law, the leading case (*K.B. v. NHS* of 2004)[7] recognised pension rights to the female partner of a female-to-male (hereinafter, FtM) trans man who could not marry her because he was not legally considered a man and the national legislation barred marriage between same-sex partners. While on the surface the CJEU decision advances trans rights, it also intrinsically recognised and confirmed the traditional idea of family as based on heterosexual marriage.

Through analysis of the decisions and arguments of the European courts, this chapter further evaluates the complexity of the relation between transgender persons and the traditional idea of family and marriage. It will first analyse the series of the European Court of Human rights decisions regarding the transsexual condition and estimate the extent to which the decisions reaffirm or move beyond the heteronormative idea of marriage and family.

Secondly, this chapter will examine the case law of the Court of Justice regarding transsexual persons and their family life that also confirms the implicit heteronormative approach to the family realm, i.e., the approach that constructs family as founded upon the marriage of one man and one

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[2]*Christine Goodwin v. The United Kingdom* App no 28957/95 (ECHR, 11 July 2002) and *I. v. The United Kingdom* App no. 25680/94 (ECHR, 11 July 2002).

[3]*Rees v. The United Kingdom* App no 9532/81 (ECHR, 17 October 1986).

[4]*Cossey v. The United Kingdom* App no 10843/84 (ECHR, 27 September 1990).

[5]*Parry v. The United Kingdom* App no 42971/05 (ECHR, 28 November 2006)and *R. and F. v. The United Kingdom* App no 35748/05 (ECHR, 28 November 2006).

[6]*Hämäläinen v. Finland* App no 37359/09 (ECHR, 16 July 2014).

[7]Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-00541 (ECLI:EU:C:2004:7).

woman. Finally, the last part of the analysis teases out the meaning implicit in the European courts' decisions and the connections to the pattern of family emerging from them.

II. The European Court of Human Rights regarding transgender persons

Over the last three decades, transsexuals have argued that the Contracting States are responsible for a significant number of violations of the ECHR (Choudhry & Herring 2010, 142 ff.). In particular, they have argued that the provisions of the Convention that guarantee the right to respect for private and family life (Article 8) and the right to marry and found a family were violated (Article 12) (Lee2015, pp. 133 ff.).[8] Looking at the case law, it is possible to distinguish two phases in the Court's approach to these lawsuits.

A first phase begins with the refusal of the ECtHR to recognise transgender claims to marry or to found a family (Article 12) according to the national laws, or to exercise the right of familial life (Article 8). In *Rees v. UK* (1986) and *Cossey v. UK* (1990) transgender persons challenged the adoption of biological criteria in determining a person's sex for marriage purposes, affirming that Article 12 of the Convention was silent on the criteria to be applied (Sharpe 2007, pp. 56 ff.; Johnson 2015, pp. 151 ff.). At issue in the case was the desire of an FtM trans man to marry a woman in a country where same-sex marriage was banned and the marriage law used as the legal criterion for a marriage license the sex of the applicant as registered in the birth certificate. The ECtHR denied that there was any violation of the European Convention, and in so doing reaffirmed the belief that biology determines a person's sex for marriage purposes. In fact, in the Court's opinion, "the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex", which, following the wording of Article 12, is "mainly concerned to protect marriage as the basis of the family".[9] Despite the possibility that "the exercise

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[8] The European Court of Human Rights has dealt with several issues regarding transgender persons. For instance, in *B. v. France* App no 13343/87 (ECHR, 25 March 1992), the French refusal to rectify the birth certificate and the name of a post-operative transsexual was considered a violation of Article 8 (right to respect for private and family life). In *Sheffield & Horsham v. The United Kingdom* App no 22985/93, 23390/94 (ECHR, 30 July 1998), two MtF trans women claimed that the UK government's refusal to correct their birth certificates violated the ECHR; the application was rejected. *Van Kück v. Germany* App no 35968/97 (ECHR, 12 June 2003), involved the reimbursement of gender reassignment measures against a private health insurance company; *Grant v. The United Kingdom* App no 32570/03 (ECHR, 23 May 2006), involved the refusal to pay a retirement pension at the age applicable to other women to a MtF transwoman; *L. v. Lithuania* App no 27527/03) (ECHR, 11 September 2007), involved the possibility to undergo gender-reassignment surgery and change gender identification in official documents; *Schlumpf v. Switzerland* App no 29002/06 (ECHR, 9 January 2009) focused on the refusal by the applicant's health insurers to pay the costs of her sex-change operation on the ground that she had not complied with a two-year waiting period before gender reassignment surgery; *P. v. Portugal* App no 56027/09 (ECHR, 6 September 2011) and *Cassar v. Malta* App no 35810/09 (ECHR, 9 July 2013 (strike out decision), involved the lack of legal recognition; *Y.Y. v. Turkey* App no 14793/08 (ECHR, 10 March 2015) concerned the refusal by the Turkish authorities to grant authorisation for gender reassignment surgery on the grounds that the person requesting it, a transsexual, was not permanently unable to procreate. Finally, in *Identoba and Others v. Georgia* App. no 73235/12 (ECHR, 12May 2015), the ECtHR stated that trans people are protected against discrimination on grounds of gender identity under Art. 14 ECHR. However, more than 20 years earlier, the ECtHR had already addressed the issue of transgender people. In *Van Oosterwijck v. Belgium* App no 7654/87 (ECHR, 6 November 1980), the ECtHR declined to consider the merit (Evain 1997; Mowbray 2004, pp. 130 ff.; Sudre 2015).

[9] *Rees v. The United Kingdom* App no 9532/81 (ECHR, 17 October 1986), para. 49.

of this right shall be subject to the national laws of the Contracting States" and although "the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired [...] the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind".[10]

In *Cossey v. UK* (1990), the ECtHR confirmed the legitimacy of adopting biological criteria to determine a person's sex for the purposes of marriage. The applicant (Miss Cossey) did not dispute that she had not acquired "all the biological characteristics of a woman" (such as, for instance, the ability to procreate).[11] The applicant argued, however, that "she could not marry at all: as a woman, she could not realistically marry another woman and English law prevented her from marrying a man".[12] Despite the fact that National States are free to interpret the concept of 'sex' in ways that do not privilege biology, the ECtHR stated that the right to marry referred to 'traditional' marriage between persons of the opposite biological sex. In fact, "attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry".[13]

In their dissenting opinions, Palm, Foighel, and Pekkanen particularly stressed their dissatisfaction with the link between the right to marry and the ability to procreate according to the assumed gender:

> "Gender reassignment surgery does not change a person's biological sex. It is impossible for Miss Cossey to bear a child. Yet, in all other respects, both psychological and physical, she is a woman and has lived as such for years. The fact that a transsexual is unable to procreate cannot, however, be decisive. There are many men and women who cannot have children but, in spite of this, they unquestionably have the right to marry. Ability to procreate is not and cannot be a prerequisite for marriage".[14]

Yet the dissenting opinions also stressed the traditional interpretation of marriage and family, arguing that the procreation is not the aim of the marriage and cannot be a prerequisite for it. In fact,

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[10] *Rees v. The United Kingdom* App no 9532/81 (ECHR, 17 October 1986), para. 50.

[11] Actually, the application was based on the fact that UK law did not confer legal status on the applicant corresponding to their actual condition, contrasting with Articles 8 and 12. Regarding Art. 8, the ECtHR stated that the changes demanded by the applicant would had involved fundamentally modifying the system for registering births, which would have entailed important administrative consequences and imposed new duties on the rest of the population. However, the Court stressed "the seriousness of the problems affecting transsexuals and of their distress" and recommended "keeping the need for appropriate measures under review, having regard particularly to scientific and societal development".*Cossey v. The United Kingdom* App no 10843/84 (ECHR, 27 September 1990), para. 47.

[12] *Cossey v. The United Kingdom* App no 10843/84 (ECHR, 27 September 1990), para. 44.

[13] *Cossey v. The United Kingdom* App no 10843/84 (ECHR, 27 September 1990), para. 46.

[14] *Cossey v. The United Kingdom* App no 10843/84 (ECHR, 27 September 1990), para. 5 of the dissenting opinion.

following the wording of the ECtHR, marriage could be only linked with procreation and parenthood, and family could only be founded on marriage. Judge Martens also challenged the reasoning of the majority "because marriage is far more than a union which legitimates sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties".[15] In both of these cases, the right to marry was contemplated through a traditional conception of marriage as between persons of opposite biological sex, limiting, in this way, transsexual persons from enjoying the right to marry a person of the opposite gender because they were legally considered the same sex.

Some years later, the Court confirmed the position expressed in *Rees v. UK* and *Cossey v. UK* and similarly applied a biological test to determine the sex of an individual (*Sheffield and Horsham v. UK*, 1998).[16] The ECtHR considered the functionality of the reproductive capability of the trans person now belonging to the other sex. The Court stressed the difference between the right to marry and the right to found a family, which were explicitly stated in the Article 12 of the Convention. The recourse to biological criteria in domestic law for determining a person's sex for the purpose of marriage was included within the power of Contracting States to regulate the exercise of the right to marry by national law. The Court concluded that the national laws could not be regarded as restricting or reducing the right of a transsexual to marry in such a way or to such an extent that the very essence of the right was impaired.[17] The application of the biological criterion implicitly suggested that the right to marry can only be enjoyed if the two partners have the ability to procreate and found a family.

The biological criterion was rejected in *Eriksson & Goldschmidt v. Sweden* (1989),[18] where the request for a marriage licence was rejected for a woman and a MtF trans woman who, without surgical treatment, had changed her name and the legal sex on the official documents and on the civil registers. Although the two persons were of opposite biological sex, the Court stated that there was no violation of Article 12 of the Convention because under their national law the applicants were both of female sex and marriage was only possible between opposite-sex couples. In the opinion of the ECtHR, the right to marry under Article 12 only covered the right to marry someone of the opposite (legal) sex and declared the application inadmissible. In this case, the biological criterion for the recognition of the right to marry for same-sex couples was not applied because the partners were for legal purposes the same gender.

The approach to the issue of transsexual access to marriage changed radically change in 2002. In that year, the ECtHR decided the *Goodwin v. UK* case,[19] unanimously considered a leading

[15]*Cossey v. The United Kingdom* App no 10843/84 (ECHR, 27 September 1990), para.4.5.2.
[16]*Sheffield & Horsham v. The United Kingdom* App no 22985/93, 23390/94 (ECHR, 30 July 1998).
[17]*Sheffield & Horsham v. The United Kingdom* App no 22985/93, 23390/94 (ECHR, 30 July 1998), paras. 66-67.
[18]*Eriksson & Goldschmidt v. Sweden* App no 14573/89 (ECHR, 9 November 1989).
[19]*Christine Goodwin v. The United Kingdom* App no 28957/95 (ECHR, 11 July 2002).

judgment in the Strasbourg Court's case law (Lee2015, 136 ff.). In *Goodwin v. UK* (as in *I. v. UK*),[20] the ECtHR held that the United Kingdom's refusal to allow transsexual people to obtain new birth certificates and to marry according to their self-identified gender violated the ECHR. The Court of Strasbourg stated that there was "no justification for barring the transsexual from enjoying the right to marry under any circumstances".[21] In *Goodwin v. UK*, the Court divided the right to marry and the right to found a family and observed "that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision".[22] The ECtHR rejected the previous interpretation followed in *Rees v. UK* and *Cossey v. UK* and stressed the sophistry of asserting that postoperative transsexuals had not been deprived of the right to marry as, according to law, they remained able to marry a person of their former opposite sex. In the Court's view, the very essence of the right to marry had been infringed because the applicant who lived as a woman could not marry her male partner because the two were of the same biological and legal sex.[23] The Court stated that it is for the Contracting State to determine the conditions to establish that gender re-assignment has been properly effected or those under which past marriages of transsexuals cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses). However, the Court found no justification for barring the postoperative transsexual from enjoying the right to marry under any circumstances.[24] It is significant to note that following these cases, the United Kingdom passed the Gender Recognition Act in 2004, which allows transsexual people to apply for legal recognition of their new gender, and to obtain new birth certificates. As a consequence, postoperative trans persons were allowed to marry a person of the same biological sex but of the opposite gender and legal sex. Here the Court went beyond the biologically-based conception of marriage, yet at the same time, it reaffirmed the idea of marriage as the union between a legal man and a legal woman, and thus the idea of a marriage as an heteronormative institution.

In a second phase of decisions, despite the progressive recognition of rights for transgender persons, the ECtHR put some limits on the recognition of the right to marry and found a family. For instance, the ECtHR failed to recognise the right for the transgender person to maintain their existing marriage when changing sex and introduced limits concerning the possibility to remain married after gender reassignment surgery.

[20]*I. v. The United Kingdom* App no. 25680/94 (ECHR, 11 July 2002).
[21]*Christine Goodwin v. The United Kingdom* App no 28957/95 (ECHR, 11 July 2002), para. 104. Similarly, *I. v. The United Kingdom* App no. 25680/94 (ECHR, 11 July 2002).
[22]*Christine Goodwin v. The United Kingdom* App no 28957/95 (ECHR, 11 July 2002), para. 98.
[23]*Christine Goodwin v. The United Kingdom* App no 28957/95 (ECHR, 11 July 2002), para. 101.
[24]*Christine Goodwin v. The United Kingdom* App no 28957/95 (ECHR, 11 July 2002), para. 103.

In *Parry v. UK* and *R. and F. v. UK* of 2006,[25] the Court declared “manifestly ill-founded” the request of two trans persons, married with children, to remain married after gender reassignment surgery. According to the national law (the UK Gender Recognition Act of 2004), the Gender Recognition Certificate could not be obtained unless they terminated their original marriage. The applicants could enter into a civil partnership that could be considered a substitute for marriage but did not entail identical legal protection to that enshrined in statutes governing marriage. The Court’s argument stressed the impact of the recognition of same-sex couples on the national systems and the importance of considering the role of marriage in each society (Section B). The Court recognised that, although the applicants should divorce according to English law, they could continue their relationship and also enter into a civil partnership that guaranteed “almost” all the same legal rights and obligations. The Court thus declared the application inadmissible affirming that the State had not failed to afford legal recognition to gender re-assignment because the applicants could continue their relationship through a civil partnership. No violation of the right to respect for private and family life was recognized, nor was any violation with regards the right of marry as only permitted between persons of opposite legal sex, for that determination fell within the margin of appreciation of the Contracting States.

Recently, in *Hämäläinen v. Finland*,[26] the ECtHR declared that the automatic conversion of an opposite-sex marriage into a registered partnership as a precondition for the legal recognition of an acquired gender did not violate Articles 8 and 12 of the European Convention in the case of a trans-married person (Lee2015, 137 ff.). Despite the “minor differences” between marriage and registered partnership, the Finnish system, which only allows marriage for opposite-sex couples while admitting registered partnership for same-sex couples, does not violate the ECtHR because the rights of same-sex couples are currently protected by the possibility of contracting a registered partnership.[27] As the possibility of maintaining a marriage after gender reassignment would bring with it the introduction of a recognized same-sex marriage, the Court conceded that the State has a margin of appreciation for no European consensus exists on same-sex marriages. The applicants would thus be able to continue enjoying in essence, and in practice, the same legal protection under a registered partnership as afforded by marriage.

The ECtHR has considered not only access to marriage, but also familial rights. Regarding the possibility of family life for post-operative transsexuals who wished to adopt their partner’s child, the ECtHR stated that the right to respect for family life guarantees neither the right to found a

[25]*Parry v. The United Kingdom* App no 42971/05 (ECHR, 28 November 2006) and *R. and F. v. The United Kingdom* App no 35748/05 (ECHR, 28 November 2006).
[26]*Hämäläinen v. Finland* App no 37359/09 (ECHR, 16 July 2014).
[27]*Hämäläinen v. Finland* App no 37359/09 (ECHR, 16 July 2014), paras. 60-69.

family nor the right to adopt. In *X., Y. and Z. v. UK*,[28] the first applicant, an FtM trans man, legally considered a woman, could not marry his female partner. However, the situation was considered indistinguishable from the traditional notion of "family life". In the opinion of the Court, in fact, the definition of family could not be confined to families based on marriage. It encompassed other *de facto* relationships according to a number of relevant factors, including whether the couple shared a domicile, the length of their relationship and whether they demonstrated their commitment to each other by having children together or by any other means.[29] Given that the FtM trans man was his partner's child's father figure, the Court considered that they were a family *de facto* and that it was in the best interests of the child to have the social father recognised as such by law.[30] However, the Court stressed that the wide margin of appreciation of the Contracting State in relation to the 'complex scientific, legal, moral and social issues' raised by transsexuality[31] and reminded of the need that a fair balance be struck between the competing interests of the individual and of the community as a whole.[32] The Court also stressed the absence of a "common European standard" with regard to the legal recognition of parental rights for transsexuals and a "generally shared approach" with regard to the manner in which "the social relationship between a child conceived by AID [artificial insemination by donor] and the person who performs the role of father should be reflected in law".[33] In addition, the Court emphasised the public interest in maintaining a coherent system of family law that places the best interests of the child at the fore. In this respect, the Court weighed the caution of the State regarding family law against the disadvantages suffered by the child as a result of the refusal of legal recognition as the son of the trans man.[34] Despite the Court's acknowledgment of the family life between the trans man and his partner's child, no violation of the right to respect for private and family life (Article 8 ECHR) was recognised.[35]

In *P.V. v. Spain*,[36] which involved the restriction of parental rights for a MtF transsexual woman, the Court declined to recognise any violation of ECHR because it considered the applicant's right to visit her son relative to her temporary emotional instability and to the child's well-being. The Court stressed the importance of an arrangement that would allow the child to become gradually accustomed to his father's gender reassignment.

To wrap up the analysis of these two phases, certain considerations present themselves. In the first

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[28] *X., Y. and Z. v. The United Kingdom* App no 21830/93 (ECHR, 22 April 1997). *X*, a female-to-male transsexual, was living in a permanent and stable union with *Y*, a woman. *Z* was born to the second applicant as a result of artificial insemination by donor; the applicants submitted that the lack of legal recognition of the relationship between X and Z, born with IVF (in vitro fertilisation) techniques amounted to a violation of Art. 8 of the Convention.

[29] *X., Y. and Z. v. The United Kingdom* App no 21830/93 (ECHR, 22 April 1997), paras. 35-36.

[30] *X., Y. and Z. v. The United Kingdom* App no 21830/93 (ECHR, 22 April 1997), para. 38.

[31] *X., Y. and Z. v. The United Kingdom* App no 21830/93 (ECHR, 22 April 1997), para. 39.

[32] *X., Y. and Z. v. The United Kingdom* App no 21830/93 (ECHR, 22 April 1997), para. 41.

[33] *X., Y. and Z. v. The United Kingdom* App no 21830/93 (ECHR, 22 April 1997), para. 44.

[34] *X., Y. and Z. v. The United Kingdom* App no 21830/93 (ECHR, 22 April 1997), paras. 47-48.

[35] *X., Y. and Z. v. The United Kingdom* App no 21830/93 (ECHR, 22 April 1997), para. 37.

[36] *P.V. v. Spain* App no 35159/09 (ECHR, 30 November 2010).

phase, the ECtHR judgments appear, at least to some extent, quite innovative, because they progressively recognised rights and freedoms for transgender people. However, a closer look reveals that the Court of Strasbourg remained rather restrictive in its approach to the idea of different models of family and marriage. In fact, even though the Court has, since 2002, moved beyond a biological conception of marriage (*Goodwin v. UK* and *I v. UK*), it has also confirmed the idea of marriage as the union between a legal man and a legal woman, thus reaffirming the idea of marriage as a heteronormative institution (*Parry v. UK* and *R. and F. v. UK*, *Hämäläinen v. Finland*).

It is true that in *Goodwin v. UK* the ECtHR stressed that Article 9 of the EU Charter of Fundamental Rights departed from the wording of Article 12 of the ECHR by removing the reference to men and women. However, and following the Charter itself, the ECtHR stated that the right to marry and to found a family "shall be guaranteed in accordance with the national laws governing the exercise of these rights".[37] The ECtHR thus recognised a margin of appreciation for the States in governing sexuality and the conditions for marriage. Regarding the right to found a family, a more restrictive approach can be identified, one that leaves no room for overcoming the biological criteria for fatherhood by excluding it in the case of a trans man (i.e. a biological woman).

III. The European Court of Justice: mainstream conceptions of family and marriage as heteronormative institution

Before delving into discussion of the issues related to the supposed necessity of the gender dichotomy, it could be interesting to analyse the positions of the CJEU on transgender issues. Since 1999, the CJEU has recognised discrimination against transsexuals based on gender reassignment as a form of sex discrimination.[38] In the family realm, the milestone decision was *K.B. v. NHS*,[39] where the female partner of an FtM postoperative trans man went to court to secure her right to marry him so that she could leave him her pension at death.[40] The Court of Appeal referred the case to the CJEU, which ruled in favour of the applicant *in principle*. Drawing upon *Goodwin v. UK* case, the Court of Luxembourg declared that the UK legislation, which disqualified the couple from fulfilling

[37] Article 9 (Right to marry and right to found a family): The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

[38] Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-02143 (ECLI:EU:C:1996:170); Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585 (ECLI:EU:C:2006:256): the applicant was a British transsexual woman treated as a man and refused a state pension (Bell 2002; Ellis & Watson 2013, pp. 27 ff.).

[39] Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health*[2004] ECR I-00541 (ECLI:EU:C:2004:7).

[40] Despite the surgical gender reassignment, the trans man partner of K.B. was not allowed to amend his birth certificate to reflect this change officially. As a result, the couple was not able to marry. When K.B. claimed a widower's pension for her partner, the National Health Service Pensions Agency refused to recognise the partner as a widower, which refers to a person married to the pension scheme member.

the marriage requirements, must be regarded, in principle, as incompatible with the requirements of Article 141 TEU (formerly Article 119, now Article 157 TFUE, on the prohibition of discriminating on the basis of sex).[41] Although Member States have the power to determine whether, when and how change of gender can be recognised, the UK law infringed the prohibition of gender discrimination.

The approach of the Court in *K.B. v. NHS* has two major weaknesses. First, it does not provide protection for certain transgender persons, namely preoperative trans persons or trans persons who do not wish to undergo surgical gender reassignment. Secondly, it does not clarify the definition of the margin of appreciation and the point at which Member States no longer possess the power to choose when gender reassignment surgeries are required. Even though, at first glance, the CJEU decision appears to represent greater recognition of the rights of transgender persons, a closer look reveals that the Court bolstered the traditional ideas of marriage and family as legal institutions, protecting trans persons only when (and if) they completed the medical process of gender reassignment.

The Court thus demonstrated a continued and rather restrictive approach to different models of family and couples. Despite the fact that the FtM trans man completed his sex reassignment in *K.B. v. NHS*, the applicant was not legally considered a man so could not marry his female partner. In that way, the CJEU heteronormatively conditioned the institution of marriage, i.e., as the union of one legal man and one legal woman. Both European courts moved from biological to legal criteria, but remain committed to a binary conception of sex and gender.

IV. The right to family life for transsexuals: the biological foundations of marriage and the heteronormative character of the family

Access to marriage for trans-persons questions the binary idea of marriage and the traditional idea of family as based on marriage between one man and one woman. As a preliminary observation, it must be remembered that the traditional ideas of marriage and family seems to have been confirmed by the decisions of the Strasbourg and Luxembourg courts.

Despite the European courts' progressive recognition of the right to personal identity for transsexual persons, they also reaffirmed the necessity of completing the gender reassignment by surgery, excluding the possibility of remaining in a transgender condition, leaving transgender persons without full protection.[42] This approach can be considered an effect of the persistent gender binary system that not only distinguishes uniquely in terms of man and woman but also requires and prescribes that every person be either man (and male) or woman (and female). The ECtHR and the CJEU have also reaffirmed the idea of marriage as a heteronormative institution based on gender

[41] In fact, the EU antidiscrimination law does not include transgender condition in the protected grounds.
[42] *Y.Y. v. Turkey* App no 14793/08 (ECHR, 10 March 2015).

dichotomy. In fact, according to the case law analysed earlier, marriage has only been considered possible between a man and a woman as they are identified in the civil documentation.[43] Regarding the right to found a family, as explained above, the Court of Strasbourg did not recognise an FtM trans man's petition to be considered the legal father of his partner's child because he was not the biological father (*X., Y. and Z. v. UK*). Biology thus remains the basis for the recognition of familial rights.

In conclusion, the courts remain fairly restrictive in their approach to family patterns and couples that diverge from the traditional idea of marriage as an heterosexual institution. Regarding the possibility of recognising marriage for transgender persons without completed gender reassignment, the European high courts have halted their progressive recognition of rights. It seems that the implications of doing away with the binary construction of society and law (especially family law) could destabilise foundational social conceptions that are built upon the gender dichotomy. The European courts have therefore left to the Member States to define the sex of transsexual persons and the legal conditions for marriage,[44] leaning heavily on the doctrine of margin of appreciation.[45]

This argument, however, implies the possibility that, according to national law, the concept of marriage be strictly tied to the sexual (biological or legal) difference of the partners, which affects the full recognition of rights and freedoms for transgender persons, for instance, by barring transsexual from enjoying the right to marry and found a family.

The access to marriage for transgender persons poses significant challenges to the legal construction of family law because it requires a new reading of marriage, traditionally considered a legal institution founded on the union between one man and one woman.

V. Conclusions

In addressing transgender issues, this paper has analysed several family law decisions of the ECtHR and CJEU. The analysis has verified their failure to overcome the gender dichotomy as a basis for marriage and family in order to widen the recognition of rights and freedoms for trans persons. Particular attention was then devoted to the interrelation between the gender dichotomy and the traditional idea of marriage and the impact on individual rights and freedoms in accessing marriage and the right to found a family.

Regarding the conceptions of marriage and family, the case law of the two courts advances a traditional idea of both institutions. In particular, as explained earlier, both courts have emphasised

[43]*Christine Goodwin v. The United Kingdom* App no 28957/95 (ECHR, 11 July 2002); *I v. UK*, for the ECtHR; Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-00541 (ECLI:EU:C:2004:7), for the CJEU.

[44]*Rees v. The United Kingdom* App no 9532/81 (ECHR, 17 October 1986);*Cossey v. The United Kingdom* App no 10843/84 (ECHR, 27 September 1990).

[45]*Hämäläinen v. Finland* App no 37359/09 (ECHR, 16 July 2014).

that marrying a person of the same biological sex, as long as they possess a different gender and legal sex, is guaranteed by EU law,[46] but that being recognised as father to your partner's child without a biological link,[47] or maintaining a marriage after gender reassignment because your legal sex becomes identical to that of your spouse are not guaranteed.[48] In this scenario, this study has offered an analysis of how the traditional conceptions of marriage and family as heteronormative institutions affect the full recognition of rights and freedoms for transgender persons.

Far from attempting a systematic analysis of the theme of transsexuality in the European courts,[49] this chapter sought to examine the ways in which the European courts decisions might offer a perspective to envision overcoming the traditional ideas of family and marriage. The chapter has sought to place in a broader context the decisions of ECtHR and of CJEU that are part of a progressive widening in the recognition of a right to a family and to marry for trans persons. In this regard, it can easily be argued that the European courts have steadily progressed in their recognition of rights and freedom for trans persons.

However, although both courts held that Member States could not deny transsexuals the right to marry altogether, they have stressed that denying it is only illegal under any circumstances regarding postoperative transsexuals. Far from deconstructing the concept of marriage as an heteronormative institution, this action represents its reaffirmation. Member States can define the legal sex for transgender persons, and thus the necessity to be operated or not in order to complete the path to gender reassignment and, in turn, to marry and found a family according to the national system. In fact, Member States can still limit the access to marriage for two persons who are considered by the law to be of the same legal sex.

In sketching a path to full recognition of rights and freedom for trans persons, this piece has underscored how the traditional model of family has been in some ways reinforced by the decisions of the ECtHR and CJEU. Most significantly, the idea of marriage as solely the union of one man and one woman was reinforced without questioning the reasons for considering gender and sex in only two categories. In fact, the institution of marriage remains almost untouched after the courts' decisions. They leave no possibility for EU or international law to push the national legislations in the direction of a more open approach to the institution of marriage. It is true that in *Goodwin v. UK*, the ECtHR stressed that Article 9 of the EU Charter of Fundamental Rights departed from the wording of Article 12 of the ECHR in removing the reference to men and women. However, and following the Charter itself, the ECtHR stated that the right to marry and to found a family "shall be

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[46] *Christine Goodwin v. The United Kingdom* App no 28957/95 (ECHR, 11 July 2002), *I. v. The United Kingdom* App no. 25680/94 (ECHR, 11 July 2002), e.g.

[47] *X., Y. and Z. v. The United Kingdom* App no 21830/93 (ECHR, 22 April 1997), e.g.

[48] *Parry v. The United Kingdom* App no 42971/05 (ECHR, 28 November 2006), *R. and F. v. The United Kingdom* App no 35748/05 (ECHR, 28 November 2006), *Hämäläinen v. Finland* App no 37359/09 (ECHR, 16 July 2014).

[49] For a general list on the cases law, see footnotes no. 8 and 38.

guaranteed in accordance with the national laws governing the exercise of these rights".[50]
According to the margin of appreciation doctrine, the ECtHR recognised a general limit on family law and in the civil status regulation that was followed by the CJEU. In the other direction, there may be potential for the recognition of the right of transgender people to maintain marriages contracted prior to sex and gender changes,[51] which in turn may provide an avenue to challenge the traditional ideas of marriage and family as heteronormative institutions. Similarly, the chapter has suggested that full recognition of rights and freedoms for transgender persons could be a useful tool to overcome the idea of the necessity of sexual dichotomy.

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[50] Article 9 (Right to marry and right to found a family): The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

[51] *Parry v. The United Kingdom* App no 42971/05 (ECHR, 28 November 2006); *R. and F. v. The United Kingdom* App no 35748/05 (ECHR, 28 November 2006);*Hämäläinen v. Finland* App no 37359/09 (ECHR, 16 July 2014).