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CONTINUITY OF STATUS AND LEGAL GENDER RECOGNITION IN THE EUROPEAN LEGAL SPACE

Challenges and Perspectives in the Jurisprudence of the European Court of Human Rights

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Introduction

In 2025, the European Convention on Human Rights (hereafter, "the Convention") celebrated its 75th anniversary. Born in the aftermath of one of the darkest pages of contemporary history to prevent the same atrocities, the Convention was originally conceived as a protection against the State's interference. However, over seven decades, its scope has profoundly evolved. Nowhere is this evolution more visible than in the concept of personal status.

Historically, personal status was the exclusive domain of national sovereignty, a rigid national administrative tool to categorise individuals based on biological and immutable characteristics. Today, under the influence of the European Court of Human Rights (hereinafter "the Court" or "the ECtHR"), status has transformed into a dynamic projection of the self. The legal recognition of identity, whether concerning a name, family ties, or gender, is no longer merely a bureaucratic concession but a fundamental right rooted in the concept of private life and personal autonomy.

This thesis explores the tension between these evolving social realities and the conservative legal framework of the Council of Europe ("CoE") Member States. This creates the phenomenon of *limping status* (*negotium claudicans*): a situation where an individual is recognised as a parent or a spouse in one country but treated as a legal stranger to their own family in another. This friction is particularly acute in the field of Legal Gender Recognition ("LGR"). While some States have moved towards a self-determination approach, others maintain strict and invasive medical or procedural barriers. Crucially, this fragmentation exposes trans individuals to systemic discrimination, harassment, and social exclusion, forcing them to reveal intimate details of their private lives in daily interactions, and hindering their access to employment, services, and travel.

The central problem identified by this research is the conflict between the individual's right to identity, protected under Article 8 ECHR, and the State's margin of appreciation in matters of civil status and sensitive issues. Specifically, the question arises: if a person legally changes their gender in one Member State, can another State legitimately ignore this new status?

The primary objective of this work is to analyse how the Strasbourg Court manages this conflict. The research is driven by the question: "To what extent is the principle of

continuity of status, developed by the Court for cross-border families, reshaping State positive obligations regarding gender identity?". In other words, is the ECtHR effectively depowering national discretion on ethically sensitive issues, thereby imposing a *de facto* harmonisation of protection of standards? To answer this, the thesis argues that the Court is a progressively eroding the margin of appreciation. By applying the *living instrument* doctrine, the Court has shifted from a biological understanding of gender (as seen in early cases like *Rees*) to one grounded in social reality and bodily integrity (as in *Goodwin and A.P., Garçon and Nicot*). Furthermore, the research highlights how the Court of Justice of the European Union ("CJEU") is emerging as a new, powerful catalyst in this process, using market-related freedoms to bypass moral resistance.

Regarding the methodology, the research adopts a qualitative legal analysis approach, focusing primarily on the examination of the case law of the ECtHR. Given the evolutionary nature of the Court's interpretative doctrines (such as the *living instrument*), the analysis follows both a chronological and thematic trajectory. This allows for the identification of shifts in the Court's reasoning, specifically from the margin of appreciation to positive obligations, over a forty-year period (from the early 1980s to 2024).

The core of the research relies on primary sources, specifically the judgments and decisions available in the HUDOC database, as well as relevant soft law instruments adopted by the CoE (e.g., Recommendations of the Committee of Ministers). Furthermore, considering the increasing interplay between legal orders, the methodology incorporates a comparative perspective, analysing recent developments in the jurisprudence of the CJEU to highlight converging or diverging trends in the protection of fundamental rights.

Finally, the legal analysis is enriched by doctrinal contributions and interdisciplinary insights, particularly regarding the concept of *procedural justice* and the sociological understanding of gender identity, to provide a comprehensive assessment of the legal challenges at stake.

The thesis is structured into three main Chapters, following a logical progression from the institutional framework to specific case law analysis.

Chapter 1 analyses the "engine" of the system: the ECtHR itself. It examines the Court's history, its structural reforms (such as the 1998 establishment of a permanent Court), and

its fundamental interpretative principles. Special attention is paid to the tension between the living instrument doctrine, which pushes for expanded rights, and the margin of appreciation, which acts as a brake to preserve State sovereignty. It also explores the strategic role of civil society (NGOs) and new mechanisms like the "Impact Strategy" and advisory opinions under Protocol No. 16.

Chapter 2 serves as a logical bridge. Before addressing gender identity, it investigates how the Court has handled the portability of status in other sensitive areas, namely names, same-sex unions, and surrogacy. By analysing key judgments, this Chapter demonstrates that the Court has established a principle of continuity: the legal reality must correspond to the social reality. It introduces crucial concepts such as *downgrade recognition,* namely where a States recognise the substance of a right (e.g., a union) even if it refuses the specific title (e.g., marriage).

Chapter 3 focuses specifically on gender identity and legal gender recognition ("LGR"). It traces forty years of dense jurisprudence, identifying three distinct, yet non exhaustive, phases: the initial denial of rights based on biological criteria, the turning point of *Goodwin* (2002), which recognised the right to legal recognition; and the current phase of *self-determination*, where invasive requirements like sterilisation have been deemed violations of Article 8. The Chapter concludes by examining the most recent frontier: the role of the CJEU in enforcing the mutual recognition of gender changes.

Chapter 1: The European Court of Human Rights in the Contemporary Society

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1. 1 The Road to Strasbourg: Building a European system of Human Rights

For most people, especially in the legal sector, the European Court of Human Rights (hereinafter "ECtHR" or "the Court) needs no introduction. However, its history, structure, and functioning warrant careful examination. Behind the widely recognised authority of the Court lies a sophisticated system, whose ultimate aim is to ensure that the Member States of the Council of Europe ("CoE") comply with the European Convention on Human Rights ("ECHR" or "the Convention"), and that the rights enshrined in the Convention are genuinely protected and promoted throughout the European legal space.

In 2025, the 75th anniversary of the ECHR[1], adopted in Rome in November 1950, was celebrated. Over these seventy-five years, the system, centred around a judicial body entrusted with safeguarding the Convention, has expanded, consolidated, and undergone profound transformations[2], often beyond what its founder could have anticipated. Yet, at

[1] See F. KRENC, *The European Convention on Human Rights: Pillars, Shifts, and Challenges,* in *Human Rights Law Review*, 2025. Writing on this anniversary, Judge Krenc recalls the Convention's primary purpose as a direct response to the Second World War, aiming at preventing the repetition of its atrocities and serving as the first binding instrument to enforce the 1948 Universal Declaration.

[2] In the same year as the 75th anniversary, an open letter was also sent from several Member States calling for a reinterpretation of the ECHR on migration issues. There is therefore no shortage of opposition to this movement towards expansion and evolution of the Court. The open letter is available at this link: https://www.governo.it/sites/governo.it/files/Lettera_aperta_22052025.pdf. See also G. BARBATI, *Nine EU*

its core, this entire structure rests on an apparently simple idea: the protection and promotion of human rights.

The origin of the ECHR can be traced back to the will by the States not to repeat catastrophic global events such as the II World War, even though the concept of human rights did not emerge in a vacuum and several historical events concurred to its formation[3]. The global war, though, had a pivotal role in acknowledging the need for a new international and regional instruments to recognise and protect fundamental human rights[4]. This, in conjunction with the so-called "*communist threat*"[5], provided a profound impetus, accelerating the development of innovative mechanisms for human rights protection, of which the Strasbourg system is an excellent example[6].

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countries seek European human rights convention's rethink on migration, in *Euronews*, published on 23/05/2025.

[3] Indeed, the concept of human rights is rooted in centuries of philosophical reflection and legal development. The philosophical and legal foundations of human rights can be traced back at least two centuries before World War II. Among many, Enlightenment thinkers such as John Locke, Montesquieu, and Jean-Jacques Rousseau emphasized individual liberty, equality before the law, and the inherent dignity of the human person. and the French Declaration of the Rights of Man and of the Citizen (1789). Influenced by the abolition of slavery, the rise of liberal constitutions, and the gradual recognition of social and labour rights, the discourse on human rights expanded throughout the nineteenth century, and, while these developments were often uneven and regionally specific, they laid the intellectual and legal framework for the international human rights framework that would emerge after World War II. See B. LIŻEWSKI, *The Personal Identity of the Human Being and the Right to Privacy from the Perspective of Standards of the European Court of Human Rights: Theoretical Legal Reflections*, in *Białostockie Studia Prawnicze*, 29, no. 3, 2024, p. 80.

[4] While the Universal Declaration of Human Rights (1948) was considered a cornerstone, it was also viewed as a "*disappointing result*" precisely because of its non-binding nature. Consequently, a specific European instrument was deemed necessary to create a system that was more incisive and legally enforceable. See A. NUSSBERGER, *The European Court of Human Rights*, Oxford, 2020, pp. 4-5.

[5] See E. BATES, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, 2010, pp. 7-15. The political context of the Convention's drafting was defined by a blend of idealism and realism. The project was not only a lesson from past conflict but a direct and pragmatic response to immediate perceived political threats: the rise of national communist parties and Soviet imperial expansionism. This was also reflected in the actors who took part in the draft of the system. In this regard, see, *inter alia*, I. ZIEMELE, *European Judiciary (ECtHR, ECJ, National Courts),* in *The Oxford Handbook of International Law in Europe*, Oxford, p. 461; M. R. MADSEN, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, in *Law & Social Inquiry*, 2007, p. 140; A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 5.

[6] It is worth mentioning that, alongside a legal and institutional reconstruction, post-war Europe engaged in a cultural re-imagining of what *Europe* meant. Rather than imposing a single model, the emerging project sought to build a common framework on the plurality of national cultures. This is reflected, for example, in the 1954 European Cultural Convention, whose preamble commits states to a "*policy of common action designed to safeguard and encourage the development of European culture*" while avoiding any rigid definition of this culture. Later, the 2005 Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) broadened the concept of common heritage, including both "*all forms of cultural heritage in Europe*" (Article 3(a)) and the "*ideals, principles and values*" that sustain a peaceful, rights-respecting society (Article 3 (b)). In this sense, human rights form part of Europe's intellectual heritage and are intrinsically linked to cultural heritage. See V. BÍLKOVÁ, *The idea of European Culture(s) and Diversity*, in *The Oxford Handbook of International Law in Europe*, pp. 141 ff.

This ambitious project, described by Nussberger as a "*Great Leap Forward*", originally rested on three pillars. First, human rights were conceived not merely as internal matters but as a precondition for peace and prosperity. Second, there was a drive to rebuild Europe as a self-confident region within the newly established United Nations system. Third, and perhaps most radically, it required a fundamental change in international law, allowing for restrictions on state sovereignty in the name of collective protection[7].

The European Convention on Human Rights (ECHR), the product of those intertwined developments, was signed in 1950 within the framework of the Council of Europe (CoE), an organisation founded in 1949 to promote democracy, the rule of law, and human rights across the continent. The Convention entered into force on 3rd September 1953, following ratification by ten States[8], as provided for in Article 66(2), currently Article 59(3), and for those ratifying after, into force on the date of ratification, due to article 59(4). The Convention introduced, for the first time, a binding catalogue of fundamental rights in treaty form, alongside a system designed to supervise and enforce compliance by the contracting States[9].

Another aspect that made the system innovative was that at the beginning of the 20th century, international law primarily recognised only States as subjects of legal obligations. The idea that individuals could hold rights and bring claims under international law developed later, with the ECtHR providing a leading example of this shift[10]. At the 1950 signing of the Convention, drafters stressed that collective enforcement of fundamental rights among States was the most effective means to secure common minimum standards. However, the possibility for individuals to submit applications directly to the Court was not included in the original design[11].

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[7] A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 3-4.
[8] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, Oxford, 2014, p. 21. The ratification process reflected distinct national priorities. The United Kingdom was the first to ratify in 1951 but strongly opposed judicial control and insisted on a "*colonial clause*". Conversely, France championed a Court with mandatory jurisdiction yet did not ratify the Convention until 1974. Germany, seeking to signal its return to the democratic fold after WWII, was among the first to accept both individual petition and the Court's jurisdiction. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 11-12.
[9] See J.G. MERRILLS, *The Development of International Law by the European Court of Human Rights*, Manchester, 1988, p.1.
[10] L. WILDHABER, *The European Court of Human Rights: The Past, The Present, The Future*, in *American University International Law Review*, 2007, p. 522.
[11] Ibid., p. 523.

1. 2 The European Court of Human Rights within the Strasbourg System

The Strasbourg system thus represents a pioneering regional approach to human rights protection, combining legally binding obligations with judicial oversight through the ECtHR). And it is indeed this latter aspect of the CoE that will be scrutinised in this work, not without first briefly placing it in the broader CoE apparatus.

Today, the CoE counts 46 Member States, following the exclusion of Russia in 2022 due to its aggression against Ukraine[12]. Its creation, however, dates back to 1949, when ten European countries came together with the intention of promoting peace, justice, and international cooperation – a purpose explicitly reflected in the preamble of the Council's Statute.

The CoE was strategically headquartered in Strasbourg, situated on the border between France and Germany, symbolising reconciliation and cooperation in a regional long marked by war. On 5th May 1949, the founding members (Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom) formally established the organisation. Shortly afterwards, in August 1949, Greece and Turkey joined, followed by Iceland and Germany later that same year.

The objectives of the CoE, established and still pursued by its Member States, are articulated in Article 1 of its Statute: *"The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress*"[13].

[12] In March 2022, the Committee of Ministers decided that Russia could no longer remain a member of the CoE, citing violations of the obligations enshrined in Article 3 of the Statute. This expulsion marks the collapse of a political strategy that had governed Russia's accession in 1996. Indeed, despite the Russian non-readiness and ongoing violations of Article 3 at the time, the Council had adopted a "*better include than exclude*" logic, hoping to influence the country from within. The 2022 decision acknowledges the failure of this approach. Today, the only European states not part of the CoE are the Vatican and Belarus. For more on Russia's accession and expulsion from CoE, see K. BRUMMER, *The Council of Europe, Russia, and the Future of European Cooperation: Any Lessons to be Learned from the Past?*, in *International Politics*, 2024, p. 258 ff.

[13] These goals were further tested and expanded after the fall of the Berlin Wall, when many Central and Eastern European countries, despite differing political traditions, were admitted as members. Through assistance programs and integration measures, the CoE demonstrated its broader impact on consolidating democracy and human rights across the continent. See G. YUDKIVSKA, *The Council of Europe*, in *The Oxford Handbook of International Law in Europe*, Oxford, 2024, p. 381.

Membership to the CoE entails no special privileges; instead, it imposes a set of responsibilities, with the protection of human life and dignity considered the highest values.

The CoE bases its mission on three interrelated principles: democracy, human rights, and the rule of law[14]. These values are not conceived as separate goals, but as mutually reinforcing pillars that sustain the European project. Through the promotion of democratic governance, the CoE encourages transparency, accountability, and citizen participation in public life. Its commitment to human rights ensures the protection of civil, political, social, and cultural freedoms for all individuals. At the same time, the emphasis on the rule of law guarantees that justice is administered fairly and without discrimination. At present, having adopted over 220 conventions and agreements[15], the CoE has developed one of the most comprehensive and robust systems for the protection of human rights.

It is critical to place the ECtHR in the broader CoE framework because, even though it is its judicial pillar, it operates alongside other crucial bodies. From an administrative and financial perspective, the Court is not an isolated island but is fully integrated into the CoE's framework. Indeed, it does not possess a separate budget; rather, its expenditure is borne entirely by the Council, ensuring that the judicial machinery is sustained by the collective political will of the CoE Member States[16].

Based on the fundamental principle of democracy, the institutional framework of the CoE includes bodies that promote representative participation and democratic governance at both national and local levels. Undoubtedly, one of the most prominent among them is the Parliamentary Assembly of the Council of Europe (PACE).

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[14] F. KRENC, *The European Convention on Human Rights,* cit., p. 1. The author specifically identifies democracy and the rule of law as the "*underlying values*" of the Convention system, and he focuses on these as the core of the system, noting that the Convention was conceived to prevent the repetition of atrocities by establishing a democratic stability rooted in the rule of law.

[15] For the full list of the conventions, see: https://www.coe.int/en/web/conventions/full-list (last access 1st December 2025).

[16] See Article 50 ECHR. As Nussberger notes, the Court's administration is part of the CoE administration, and its budget is part of the general budget adopted biennially by the Committee of Ministers. The funding stems primarily from Member States' contributions, calculated based on population and GDP, supplemented by voluntary contributions and transfer payments from the EU for specific projects. The Grand Payers (major contributors) are currently France, Germany, Italy, the United Kingdom, and Turkey (following Russia's expulsion). For reference, the Court's budget has grown from roughly €70 million in 2019 to approximately €85 million in 2024. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 68-69; see also COUNCIL OF EUROPE, *Programme and Budget 2024-2027*.

PACE consists of 612 members (306 titular members and 306 substitutes). In addition to the delegations from Member States, observer states such as Canada, Mexico, and Israel, as well as "partners for democracy" (Jordan, Kyrgyzstan, Morocco, and Palestine), participate in the Assembly's activities. Members of PACE are not directly elected; instead, national parliaments designate their delegations, with the number of representatives proportionate to the population of each Member State[17]. The Assembly meets four times a year in Strasbourg[18]. Although it does not possess binding legislative powers, it exerts significant political influence through its recommendations, resolutions, statements, investigative missions, reports, and by observing elections. Crucially, PACE plays a central role in monitoring compliance with democratic standards. In cases of serious or persistent violations of the CoE's fundamental principles, it can sanction Member States by suspending their rights or voting privileges[19]. PACE also holds important electoral responsibilities within the CoE system. Indeed, it elects the Secretary General of the CoE, the Commissioner for Human Rights, and, most importantly for this study, the judges of the ECtHR. The election of the judges follows a two-stage procedure[20]: first, candidates undergo a pre-selection by a specialised Committee[21]; second, PACE makes the final decision by electing one judge from the shortlisted candidates.

Another major body of the CoE system is the Secretary General, playing a pivotal institutional role. Acting as the depository of the Convention, he receives all instruments of ratification, declarations, and reservations. Furthermore, under Article 52 ECHR, he exercises a monitoring function, empowered to request explanations from Member States regarding the way their domestic law ensures the effective implementation of the Convention[22].

Then, the Committee of Ministers is the decision-making body of the CoE. While it is formally composed of the Ministers for Foreign Affairs of the Member States, given the minsters' schedules, their functions are generally carried out in Strasbourg by Ministers' Deputies, who are the permanent representatives accredited to the CoE[23]. It is the

[17] For smaller countries, a so-called "bonus" representation is sometimes granted (e.g., San Marino).
[18] Each session lasts a week.
[19] Indeed, it occurred with Russia in 2000 (Chechnya conflict) and 2014 (annexation of Crimea), before its final expulsion in 2022.
[20] G. YUDKIVSKA, *The Council of Europe*, cit., p. 384.
[21] Committee on the Election of Judges.
[22] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, 4th ed., Oxford, 2006, p. 15.
[23] K. REID, *A Practitioner's Guide to the European Convention on Human Rights*, London, 2023, p. 1.

governmental body that discuss national approaches to CoE challenges, and, with the PACE, it monitors.

While the ECHR focuses primarily on civil and political rights, the protection of social and economic rights is entrusted to a parallel instrument: the European Social Charter (ESC). Historically, the drafters of the ECHR concentrated on civil and political rights, leaving social rights for a later stage. Following advice from the Consultative Assembly in 1951, the ESC was adopted in 1961, guaranteeing rights such as the right to work, collective bargaining, and healthcare. It was significantly updated by the Revised European Social Charter of 1996, which took into account major social developments in Europe and added protections against poverty and social exclusion. While ratification of the ECHR is a prerequisite for CoE membership, ratification of the ESC is not mandatory[24], though widely encouraged. The supervisory mechanism of the ESC differs from the ECHR. It is based primarily on a reporting system where States submit reports on their compliance to the European Committee of Social Rights (ECSR), which analysed them[25]. Although the ECSR is not a court and its conclusions are not judgments in the strict sense, its jurisprudence is wide and progressive. The ECtHR frequently refers to the ECSR's conclusions when interpreting the Convention[26] to bridge the gap between civil and social rights.

A crucial component of the system is also the European Convention for the Prevention of Torture, adopted in 1987, which established the European Committee for the Prevention of Torture (CPT). While the prohibition of torture under Article 3 ECHR is absolute, the Court can generally intervene only after a violation has occurred, *ex post.* To remedy this

[24] States that have ratified the ESC are 42. CoE's Member States that have not ratified it are Liechtenstein, Monaco, San Marino, Switzerland. See the list of signatures and ratifications at this link; https://www.coe.int/en/web/european-social-charter/signatures-ratifications (last access 6th December 2025).

[25] Reports are analysed by the European Committee of Social Rights (ECSR), a body of 15 independent experts. A major development was the 1995 Additional Protocol, which introduced a collective complaints procedure. This allows NGOs and social partners to lodge complaints directly with the ECSR regarding non-compliance, without the need to exhaust domestic remedies. States that have ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints are 16. See the Chart of signatures and ratifications of Treaty 158 at this link: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=158 (last access 6th December 2025).

[26] In this regards, two seminal cases are important to mention. In *Sidabras and Dziautas v. Lithuania* (App. nos. 55480/00 and 59330/00, 27 July 2004), concerning employment restrictions for former KGB agents, the Court found a violation of Article 14 (non-discrimination) taken in conjunction with Article 8, heavily relying on the ESC and ILO. See F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 50. The second case is *Demir and Baykara v. Turkey* ([GC], no. 34503/97, 12 November 2008), where the Court stated that, as the ECHR must be interpreted in the light of present-day conditions and international law rules (paras. 77 and 84), then also considering the standards set by the ESC (para. 103).

limitation, the CPT became operational in 1989, complementing the ECtHR's judicial work with a non-judicial, preventive mechanism, *ex ante*[27]. The CPT is an independent monitoring body composed of experts from legal, medical and penitentiary backgrounds. Its mandate is revolutionary: it has the right to visit, at any time, any place where persons are deprived of their liberty by a public authority. This includes prisons, police stations, psychiatric hospitals, and immigration detention centres. The goal is to prevent ill-treatment through direct observation and dialogue.

One more CoE body to consider, established in 1999, is the Commissioner for Human Rights that acts as an independent and non-judicial institution mandated to foster the effective observance of human rights through country visit and thematic reporting[28]. Unlike the Court, the Commissioner cannot adjudicate individual complaints but serves as a bridge between politics and law. Legally, its most significant function is the right to intervene as a third party in ECtHR proceedings. This interaction creates a "*mutual relationship*"[29]: the Court relies on the Commissioner's reports as authoritative evidence of European consensus, while the Commissioner utilises the Court's binding judgments to advocate for domestic reforms, effectively allowing soft law to influence hard law.

Finally,[30] within the broader CoE network, the European Commission for Democracy through Law (known as the Venice Commission) plays a significant role in the

[27] The CPT is an independent monitoring body composed of experts from legal, medical and penitentiary backgrounds. It has the right to visit, at any time, any place where persons are deprived of their liberty by a public authority. This includes prisons, police stations, psychiatric hospitals, and immigration detention centres. The goal is to prevent ill-treatment through direct observation and dialogue. Following each visit, the CPT sends a detailed report to the State concerned with recommendations. These reports are confidential to facilitate cooperation, but most States agree to publish them, ensuring transparency. If a state persistently fails to cooperate or implement recommendations, the CPT can issue a public statement. The effectiveness of this preventive approach has resonated beyond Europe, serving as a blueprint for international human rights law. Indeed, the CPT's model directly inspired the creation of the 2006 Optional Protocol to the UN Convention Against Torture (OP-CAT). See E. VOETEN, *Competition and Complementarity between Global and Regional Human Rights Institutions*, cit., p. 120.

[28] It has a wide mandate. The fundamental objectives of the Commissioner for Human Rights are laid out in Resolution (99) 50 on the Council of Europe Commissioner for Human Rights. 1) foster the effective observance of human rights, and assist Member States in the implementation of Council of Europe human rights standards; 2) promote education in and awareness of human rights in Council of Europe Member States; 3) identify possible shortcomings in the law and practice concerning human rights; 4) facilitate the activities of national ombudsperson institutions and other human rights structures; and 5) provide advice and information regarding the protection of human rights across the region

[29] F.R. AMMATURO, *The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe*, in *Social & Legal Studies*, 2014, pp. 189.

[30] This list is not exhaustive. Indeed, with the emergence of new challenges over time, the CoE has introduced several additional monitoring bodies, including the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the Group of Experts on Action against Trafficking in Human Beings (GRETA), the European Commission against Racism and Intolerance (ECRI), and the Ad Hoc Committee of Experts on the Rights of Persons with Disabilities (CAHDPH). This latter was suspended

constitutional field, frequently interacting with the Court by providing expert opinions and acting as *amicus curiae* in complex cases[31].

The system in which the Court is embedded is therefore a complex ecosystem, characterised by a continuous cycle of reciprocal exchanges where judicial interpretation both influences and is influenced by non-judicial actors. In this context, the value of soft law is paramount: recommendations, reports, and expert opinions often serve as the normative ground upon which the Court builds its evolutive interpretation. Consequently, the ECtHR cannot be viewed in isolation; rather, it functions as the apex of a dynamic institutional network, where political and judicial bodies collaborate to ensure the effective protection of human rights.

1. 3 The History of the European Court of Human Rights: From a Slow Start to an "Activist" Approach

The European Court of Human Rights (ECtHR) was established in 1959 with the aim of ensuring that Member States comply with the ECHR[32]. It represents the most authoritative and effective mechanism developed within the framework of the CoE for the protection of fundamental rights and freedoms. As a supranational court and judicial body responsible for ensuring compliance with the Convention, the ECtHR plays a central role in the European system of human rights protection. Together with national and the Court of Justice on the European Union (hereinafter "CJEU"), it forms part of the so-called "*European judiciary*"[33].

The Court's role within this system has become far more profound than its drafters had imagined[34]. This development is hardly surprising, considering that human rights

following the sustainable measures and adjustments to the Programme and Budget 2018-2019, adopted in April 2018.

[31] Established in 1990 to assist Central and Eastern European countries in their transition to democracy, the Venice Commission has evolved into a global standard-setter for the rule of law. Composed of independent experts, it provides legal opinions on draft legislation and constitutional reforms, Its most significant contribution is the *Rule of Law Checklist*, a tool used to assess the conformity of national legal with European standards, available at https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf (last access 22nd November 2025). See G. YUDKIVSKA, *The Council of Europe*, cit., pp. 392-394.

[32] J.G. MERRILLS, *The Development of International Law,* cit., p.1.

[33] This term refers to the network of courts operating within the European legal space. It includes national courts of all European countries, European-level courts (i.e., the ECtHR and the CJEU), and specialised courts with European relevance. See I. ZIEMELE, *European Judiciary,* cit., p. 462.

[34] Merrills concluded even then that the Court had "*far exceeded what it was imagined in 1950*" and that this "*transformation… is key to understanding the wider significance of the Court's decisions*". J.G. MERRILLS, *The Development of International Law*, cit., p.10.

obligations deeply permeate the internal relationship between the State and individuals. Indeed, the Court is constantly required to adjudicate on sensitive matters of national law that traditionally fell outside the scope of international law; this context explains the inevitable questions that have arisen regarding the impact of human rights law on national sovereignty.

Currently, the Court exercises its jurisdiction over 46 Member States, encompassing more than 800 million individuals across the continent[35]. It is widely regarded as one of the most prominent and influential international human rights courts in the world, both in terms of visibility and the scope of its jurisprudence[36].

Over the decades, the ECtHR has developed a rich and evolving body of case law that has significantly shaped the legal landscape of Europe. Its judgments have impacted key areas such as the right to private and family life, freedom of expression, the prohibition of discrimination, and the protection of vulnerable groups and minorities.

In addition, the ECtHR is actively engaged in a growing dialogue with other regional and international courts, including the CJEU (See Section 5.5 of this Chapter), the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights. The judicial interaction contributes to the cross-fertilisation of legal standards and promotes the development of a more coherent and universal framework for the protection of human rights.

The history of the Court has witnessed an important turning point, which will be considered here: the 1998 Reform. Indeed, with this reform, the system underwent significant structural changes that redefined its operation.

1. 3. 1 From its Origin to 1998

Initially, the judicial body of the Strasbourg system functioned through two bodies: the Commission and the Court. The work of those two bodies had the merit of bringing the rights provided for in the Convention from a treaty to concrete and effective protection[37].

[35] I. ZIEMELE, *European Judiciary*, cit., p. 462. For the Court's functions, and its impact, there are reasons to believe the Court has become a "*European quasi-constitutional court*", as written by the Former President of the Court Wildhaber. See L. WILDHABER, *The European Court of Human Rights,* cit., p. 528.
[36] Ibid.
[37] L. WILDHABER, *The European Court of Human Rights,* cit., p. 524.

Prior to the 1998 Reform, applications could be submitted to the Commission by a Member State, an individual, or a non-governmental organisation. Then, the Commission was responsible for the assessment of the admissibility of each case. While Member States were "privileged" applicants, as they could always initiate proceedings against another member state, individual petitions were only admissible if the respondent State had recognised the Commission's competence to consider such petitions[38].

Once the Commission accepted an application, its first task was to investigate the facts and attempt to facilitate a friendly resolution between the parties involved. If these efforts did not lead to an agreement, the Commission would produce a detailed report, summarising the facts and including its own legal assessment, which was then submitted to the Committee of Ministers of the CoE. Should the Court accept jurisdiction over the matter, either the Commission or the concerned Member State[39] could bring the case before the Court within a three-month window[40]. In instances where the case was not submitted to the Court after the admissibility review and the Commission's report, it fell to the Committee of Ministers to assess whether the provisions of the ECHR had been breached[41].

As stated by Merrills, *"the Commission's decision declaring an application admissible determines the object of the case brought before the Court"*[42]. Beyond this, the Commission had a pivotal function in the Court's procedures. The preliminary phase was generally conducted in writing, with all documents submitted through the Court's Registry. However, as Merrills also pointed out, the Court was not bound by the Commission's report and the two bodies could, and sometimes did, disagree. A clear example is the *Rees* case (1986)[43], where the Commission found a violation of Article 8, but the Court ultimately held there was no violation[44].

While the Commission itself did not participate as a party, it could designate one of its members as a Delegate to aid the Court. Additionally, the President of the Court could

[38] J.G. MERRILLS, *The Development of International Law*, cit., p. 2.
[39] This restriction was enshrined in the original Article 44, which dictated that "*Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court*".
[40] J.G. MERRILLS, *The Development of International Law*, cit., p. 2.
[41] J.G. MERRILLS, *The Development of International Law*, cit., p. 2.
[42] Ibid., p. 3.
[43] ECtHR, *Rees v. The United Kingdom*, 17 October 1986, Application no. 9532/81.
[44] J.G. MERRILLS, *The Development of International Law*, cit., p. 15. The case will be analysed in depth in Chapter 3.

invite, or authorise, Member States or other individuals not formally involved in the case to submit written observations[45].

The Court itself, in this pre-reform era, was structured differently. Judges were elected for nine-year terms by the Council's Consultative Assembly (later "PACE"), with one-third of the Court renewed every three years. Cases were typically heard by a Chamber of seven judges, which *ex officio* included the President (or Vice-President) and the national judge of the State concerned (or an *ad hoc* judge). Cases raising "serious questions" or risking inconsistency with previous judgements could be referred to Plenary Court[46].

At its inception, just few cases were registered[47]. The first case, *Lawless v. Ireland*[48], was adjudicated in 1961, while seven years elapsed before the second, the *Belgian Linguistic* case in 1968[49]. In its first decade, the Court was characterised by a very slow start, averaging only one case per year. This rate gradually increased, with the Court delivering its 100th judgment only in May 1985[50]. This early period, defined as the "*foundational era*", was characterised by judicial caution and a search for legitimacy[51]. Indeed, the newly established bodies had to act carefully to gain the trust of sovereign States before expanding their reach, and the Court was no exception.

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[45] This practice was formally introduced in 1983 by Rule 37(2) of the Revised Rules of the Court. See L. BARTHOLOMEUSZ, *The Amicus Curiae before International Courts and Tribunals*, in *Non-State Actors and International Law*, 2005, p. 233.

[46] J.G. MERRILLS, *The Development of International Law,* cit., p. 8.

[47] The institutional machinery took time to become operational: the Commission was elected in 1954, the Court in 1959. It was only in 1958 that the first two individual cases were declared admissible: *De Becker v. Belgium* and *Lawless v. Ireland*. Prior to these, the Commission's activity was limited to inter-state complaints, the very first being *Greece v. the United Kingdom* concerning emergency measures in Cyprus. See A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 13.

[48] ECtHR, *Lawless v. Ireland*, 1 July 1961, App. no. 332/57. While no violation was found, this first judgment remains a milestone. It concerned the preventive detention of an IRA member, which lacked a legal basis under Article 5 but was deemed necessary due to a public emergency under Article 15. The case also established the Court's approach to interpreting treaties (e.g., using *travaux préparatoires*). In this decade (1960s), the system relied heavily on inter-state complaints, resembling the current structure of the Inter-American system. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 16-19.

[49] ECtHR, *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Belgian Linguistic)*, 23 July 1968, App. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64. See also I. ZIEMELE, *European Judiciary,* cit., p. 463. Merrills also offers an interesting historical detail regarding the form of these early judgments. Initially, the Court adopted the drafting style of continental higher courts, where the reasoning is presented as a single long sentence culminating in "*The Court decides…*". This style was used for the first four judgments (1960-1962) but was abandoned precisely because the *Belgian Linguistic* case raised so many separate issues that a more flexible structure became necessary. See J.G. MERRILLS, *The Development of International Law*, cit., pp. 10-15.

[50] J.G. MERRILLS, *The Development of International Law*, cit., p. 16.

[51] See F. KRENC, *The European Convention on Human Rights*, cit., pp. 9-10.

This slow, cautious beginning started to change significantly in the 1970s. The case law itself became more dynamic, shifting the Court's role. Key judgments like *Tyrer v. the United Kingdom* (1978)[52], which famously established the *living organism* doctrine[53], and *Marckx v. Belgium* (1979)[54], which demanded effective protection of rights[55], signalled a new, more activist approach[56]. The era from 70s to 90s, marked by seminal judgments like *Handyside* or *Sunday Times*, has been described as the "*substantive embedding phase*"[57] of the Court, where the key principles were solidified before the great expansion to the East[58].

This "*dynamic and expansive*" phase took many Member States by surprise and contributed to a growing caseload[59]. The Court's strategy had evolved: after spending its first decades building legitimacy and presenting itself as a reliable, non-threatening organ, it began to use that acquired legitimacy to interpret the Convention far more robustly[60]. This growing judicial influence, extending its case law into new sensitive areas[61] (together with the rising number of cases), was a primary driver for the major reform that would follow.

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[52] ECtHR, *Tyrer v. the United Kingdom,* 25 April 1978, App. no. 585672.
[53] See Section 4.4 of this Chapter.
[54] ECtHR, *Marckx v. Belgium*, 13 June 1979, App. no. 6833/74.
[55] Ibid., para. 31. See also M.R. MADSEN, *From Cold War Instrument*, cit., p. 153.
[56] Notably, this decade has been described as the period in which the Court laid down its "*essential doctrine basis*". Beyond *Tyrer*, seminal judgments included *Golder* (access to court), *Winterwerp* (rights of the mentally ill), and *The Sunday Times*, which marked the first-ever violation of Article 10 based on proportionality assessment. This legal expansion coincided with a geographical one. Indeed, France and Switzerland ratified in 1974, followed by the new democracies of Portugal (1978) and Spain (1979), while Greece re-entered the system in 1974. However, acceptance of the system remained fragmented: for instance, France and Greece initially accepted the Court's jurisdiction but refused the right of individual petition. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 19-23.
[57] A. CAMPOS, *Both Sides Now,* cit., p. 137 ff. (citing R. Spano).
[58] In particular, the 1980s was described as a period of consolidation and expansion. Legal developments included important follow-ups to the seminal cases of the 1970s and fundamental new judgments such as *Dudgeon v. the United Kingdom* (1981), dealing with the decriminalisation of homosexuality. Geographically, the system widened to include microstates, with Liechtenstein and San Marino adhering to the Convention. Normatively, a milestone was reached with the adoption of Protocol No. 6, concerning the abolition of the death penalty. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 23-25.
[59] M. R. MADSEN, *From Cold War Instrument*, cit., p. 153.
[60] Ibid., pp. 154-155.
[61] Seminal judgments included *Lopez Ostra v. Spain* (1995), which opened the door to protection against environmental pollution, and *McCann and Others v. the United Kingdom* (1995), a controversial case regarding the killing of IRA members by security forces, where the Court found a violation of Article 2 due to the lack of appropriate care in the operation's control. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 27-29.

1. 3. 2 The 1998 Reform

In 1998, with the entry into force of Protocol No. 11, the "*most significant reform*"[62], the Convention's system for the protection of human rights was profoundly reorganised[63]. It replaced the dual institutional structure, composed of the European Commission of Human Rights and the Court, with a single, permanent judicial body operating full-time[64]. The 1998 Reform marked the "*high point"* of a "*golden age*", representing the culmination of a period of optimism and expansion regarding the judicial protection of human rights in Europe[65]. At the same time, the right of individual application and the acceptance of the Court's jurisdiction, two elements that had previously been optional, became mandatory obligations for all states parties[66]. Moreover, the Committee of Ministers ceased to exercise its former quasi-judicial powers, thereby completing the transformation of the Strasbourg into a fully judicial and more streamlined mechanism for the protection of human rights in Europe[67].

The impact of this reform on the Court's visibility and workload was dramatic. Following the changes, the Court effectively became the biggest international tribunal in history. Between 1998 and 2003, the number of applications increased by approximately 15% each year[68]. By 2005, the Court was already facing a backlog of some 81,000 pending applications, receiving tens of thousands new cases annually[69].

1. 3. 3 Later Developments and Reforms

Following the 1998 Reform, the system faced a dramatic saturation, driven by an exponential rise in the caseload largely resulting from the accession of Central and Eastern European nations. To prevent the machinery from succumbing to its own success,

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[62] M. R. MADSEN, *From Cold War Instrument*, cit., p. 155.
[63] This profound transformation was driven by the geopolitical upheaval of the 1990s. The end of the decade saw a "*run for ratification*" by Central and Eastern European countries, for whom joining the ECHR was a natural precursor to EU membership. This period also witnessed the accession of Russia, which enormously increased the diversity among Member States. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 25-29.
[64] L. WILDHABER, *The European Court of Human Rights,* cit., p. 523.
[65] See F. KRENC, *The European Convention on Human Rights*, cit., pp. 10-11.
[66] L. WILDHABER, *The European Court of Human Rights,* cit., pp. 523-524.
[67] Ibid., p. 524.
[68] COUNCIL OF EUROPE, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 2004, para. 5. The Report provides statistical data demonstrating the massive increase in the Court's workload, noting that applications rose from 18,164 in 1998 to 34,546 in 2002, reaching approximately 39,000 in 2003 (para. 7).
[69] The highest number of these cases typically originated from a few specific countries (e.g., Russia, Turkey, Poland, and Romania). See L. WILDHABER, *The European Court of Human Rights,* cit., p. 527.

Protocol No.14 was introduced as a vital rescue measure[70]. Entering into force in 2010, it streamlined the judicial workflow.

This protocol established Single Judge formations for simplest cases[71] and introduced a new admissibility criterion, namely the "*significant disadvantage*"[72]. Furthermore, to strengthen judicial independence, it extended the judges' term of office to a single, non-renewable period of nine years.

Since 2010, the reform process has continued through a series of high-level conference on the future of the Court convened to identify means to guarantee the long-term effectiveness of the Convention system. These political summits paved the way for the adoption of Protocol No. 15, focusing on subsidiarity, and Protocol No. 16, introducing advisory opinions[73].

Another important development was the introduction of the *pilot judgments* approach, codified in Rule 61, through which the Court identifies systemic legal or structural problems[74]. This mechanism allows the Court to select one or more applications for priority treatment, adjourn similar cases, and suggests legislative or practical solutions to the State concerned. Once the pilot judgment established the principles, the remaining repetitive cases are processed though streamlined procedures[75]. A key example of the

[70] F. KRENC, *The European Convention on Human Rights*, cit., p. 11. The author attributes this increase in caseload primarily to the 18 new states joining in the 1990s. On the technical details of the reform, see COUNCIL OF EUROPE, *Explanatory Report to Protocol No. 14,* cit. This report provides the official interpretation of the amendments, clarifying that the introduction of the single-judge formation and the new admissibility criterion were urgent measures designed to increase the Court's filtering capacity.

[71] COUNCIL OF EUROPE, *Explanatory Report to Protocol No. 14,* cit., paras. 38.39.

[72] Ibid., paras. 77-80.

[73] See EUROPEAN COURT OF HUMAN RIGHTS, *History of the ECHR's Reforms*, available at: https://www.echr.coe.int/documents/d/echr/Reforms_history_ENG (last access: 2nd December 2025). The document highlights how these conferences led directly to the structural changes of 2013.

[74] The need for such systemic measures became apparent in the 2000s with the discovery of recurring structural violations. In this regard, *Burdov v. Russia* (2002) is a seminal case, where the state's failure to execute binding judgments concerning compensation for Chernobyl victims was held to violate Article 6 (fair trial). Similarly, *Kalashnikov v. Russia* (2002) exposed systemic inhuman prison conditions under Article 3. These cases highlighted the imbalances in the application numbers, with certain states generating most of the backlog. See A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 30. To address this, the Court developed the specific procedure now described, originally initiated by the Court before being codified in Rule 61. It involves inviting the parties' view on the systemic issue and potentially imposing a time-limit for the Government to adopt general measures. See K. REID, *A Practitioner's Guide*, cit., Chapter 1.

[75] Once the pilot judgment is established, the backlog of similar repetitive cases is examined by Committees of three judges under the Well-Established Case Law (WECL) procedure. To ensure efficiency, the Court does not invite observations from the parties in these cases. Furthermore, for large groups of repetitive cases, the Court may award non-pecuniary damages based on lump sum rates rather than individual assessments.

evolution of this mechanism is *Burmych and Others v. Ukraine* (2017)[76], where over 12,000 applications were dismissed as they all concerned the non-enforcement of final domestic judgments, a decision that drew considerable criticism for limiting individual access to justice[77].

Beyond those reforms, the Court has also developed internal instruments to cope with its massive caseload. Back in 2009, a *priority policy* was adopted under Rule 41 of the Rules of the Court, abandoning the strict chronological order of processing cases. This system classifies applications into seven categories, ranging from urgent (Categories I-III) to less urgent, allowing the Court to focus its resources where they are most needed[78].

In parallel with these internal measures, the political drive for reform culminated in the adoption of two additional legal instruments: Protocol No. 15, which explicitly inserted the principle of subsidiarity (see Section 4.5 in this Chapter) into the Preamble, and Protocol No. 16, which introduced the possibility of advisory opinions (see Section 5.4 in this Chapter)[79].

This normative shift marked the transition into a new historical phase, widely referred as the "*age of subsidiarity*". Having navigated the crisis of the backlog, the Court has moved towards a period of maturity characterised by a "*process-based review*", where the focus increasingly shifts to the quality of the national decision-making process rather than correcting every individual error[80].

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[76] ECtHR, *Burmych and Others v. Ukraine (striking out)* [GC], 12 October 2017, App. nos. 46852/13, 47786/13, 54125/13 et al. This case should be place in the broader context of tension in the 2010s. This decade saw emerging conflict with national superior courts, as in the cases of Germany, Italy, and Russia. Furthermore, *Burmych* exemplifies the issues of slow or inexistent implementation of judgments even in the absence of open criticism, leading the Court to adopt drastic measures to clear its docket. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 35-36.

[77] E. KINDT, *Giving up on Individual Justice? The effect of State Non-Execution of a Pilot Judgment on Victims*, in *Netherlands Quarterly of Human Rights*, 36(3), 2018, pp. 173-188. The author analyses the *Burmych* judgment as a potential capitulation on individual justice. She highlights that the judgment was the consequence of Ukraine's failure to execute the previous *Ivanov* pilot judgment. By striking out these cass and transferring them to the execution process of the Committee of Ministers, the Court prioritised the system's efficiency but effectively denied applicants a binding judicial decision and the possibility of claiming just satisfaction under Article 41.

[78] A. CAMPOS, *Both Sides Now,* cit., pp. 140-141.

[79] These reforms were not isolated legal adjustments but the result of intense political discussions at high-level conferences, most notably the Brighton Conference (2012). See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 34-37.

[80] R. SPANO, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, in *Human Rights Law Review*, 2014, p. 491. Judge Krenc confirms this periodization, noting that after the "quest for survival", the Court adopted a more deferential approach where domestic authorities demonstrably engage with Convention standards. See F. KRENC, *The European Convention on Human Rights,* cit., pp.11-13.

More recently, to address the risk that important but non-urgent cases might be delayed, a new *impact strategy* has been introduced. This approach identifies cases that, regardless of their chronological priority, touch upon significant moral or social issues, and processes them expeditiously[81]. This prioritisation reflects the Court's necessary response to what Judge Krenc identifies as the "*major challenges*" facing the Convention system today the need to ensure the long-term effectiveness of rights in a difficult context, preventing the regression of the rule of law and addressing new, existential threats[82].

1. 4 Fundamental Principles of Interpretation

1. 4. 1 Interpretative Methodology

The Court's approach toward interpretation relies on a defined methodology grounded in international law. Indeed, the Court's starting point is textuality, rooted in the Vienna Convention on the Law of Treaties (VCLT). Article 31(1) of the VLCT, which requires interpreting a treaty "*in good faith in accordance with the ordinary meaning… in their context and in the light of its object and purpose*", is a key methodological anchor. The Court cited this approach, for example, in the *Johnston* case (1986)[83] when determining the meaning of Article 12[84].

The reference to *object and purpose* allows for a teleological interpretation, where the treaty's aims are paramount. This approach is grounded in the specific nature of the Convention, which differs from traditional international treaties based on reciprocity. Instead, it creates *objective obligations* to protect fundamental rights rather than subjective rights for Contracting Parties. Consequently, the general presumption of international law that obligations should be interpreted restrictively to protect State

[81] A. CAMPOS, *Both Sides Now,* cit., pp. 141-142.
[82] Judge Krenc identifies the major challenges the system faces today, emphasising the Court's historic responsibility to ensure the promises of justice and freedom remain a reality for future generations despite the difficult context. See F. KRENC, *The European Convention on Human Rights,* cit., p. 1 ff. In the context of new conflicts, the Court's stance regarding the expulsion of the Russian federation was particularly significant. Despite the cessation of membership, the Court made a strategic judicial decision to continue adjudicating applications related to acts committed up to September 2022. As the actual ECtHR President Guyomar explains, this was not merely a procedural necessity but a moral imperative to establish a "*judicial truth*". See M. VENTURA, *La protezione dei diritti dell'uomo in Europa: tensioni interne e internazionali. Ruolo della Corte EDU e dei giudici nazionali (Intervista a Mattias Guyomar)*, in *Eurojus*, 2025, p. 100.
[83] ECtHR, *Johnston and Others v. Ireland*, 18 December 1986, App. no. 9697/82.
[84] Ibid., para. 51. See also J.G. MERRILLS, *The Development of International Law,* cit., p. 63.

sovereignty does not apply in this context[85]. This interpretation is often combined with a systematic, or contextual, interpretation, where the Convention is read as a whole.

Critically, Merrills also identifies the Court's use of implied terms. This moves in two directions. On the one hand, *implied rights*, of which the most famous example is *Golder v. the United Kingdom* (1975)[86], where the Court found that a right of access to a court was inherent in the right to a fair trial under Article 6, even though it is not explicitly written[87]. On the other hand, *implied limitations*, for which the Court implies limitations on seemingly absolute rights. In the *Belgian Linguistic* case, it held that the right to education, though stated in unqualified terms in Protocol No.1, must be subject to qualifications[88].

While dynamic interpretation (See Chapter 1.4.4) is dominant, the Court sometimes uses the *travaux préparatoires* (Article 32 VLCT) to establish the drafter's original intent, though this use has been "*highly selective*"[89].

Instead, the Court's teleological and evolutive approach is increasingly weighed on the concept of European consensus. The Court, indeed, defines the applicable European standard through a comparative inquiry into the domestic laws and national practices. The identification of a common ground is strategic, as it allows the Court to restrict the national margin of appreciation thereby consolidating rights linked to social and technological changes even against the will of the respondent states[90]. As we will see in the subsequent sections, this approach and its effectiveness have been debated by legal scholars.

Finally, a crucial component of the Court's methodology is the doctrine of *autonomous meaning*[91]. It is widely observed that the Convention employs terms that possess specific, and often diverging, definition within domestic legal systems. To prevent States from evading their obligations by merely re-labelling concepts under national law, and to

[85] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 47. See *Austria v. Italy (Pfunders case)*, Yearbook 4, p. 116.
[86] ECtHR, *Golder v. the United Kingdom,* 21 February 1975, App. no. 4451/70.
[87] J.G. MERRILLS, *The Development of International Law*, cit., pp. 73-75.
[88] Ibid., pp. 76-78.
[89] Ibid., p. 79.
[90] G. CAGGIANO, *La tutela europea dei diritti della persona tra novità giurisprudenziali e modifiche istituzionali*, in *Studi sull'integrazione europea*, 2014, p. 18.
[91] See G. LETSAS, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, in *European Journal of International Law*, 2004, p. 279 ff.

secure uniformity of protection across CoE Member States, the Court interprets these terms independently of domestic definitions[92].

Considering this methodological background, the following section will delve deeper into the most significant interpretative principles, specifically selected for their relevance to the case law analysis presented in Chapters 2 and 3.

1. 4. 2 The Structure of Judicial Review

The Court's judicial review is not a merely procedural formality. It is the operational mechanism through which the ECtHR applies its interpretative principles to concrete cases. Hence, before examining the specific interpretative doctrines, it is essential to briefly outline this structure; understanding this three-stage process is indeed crucial, as the choice of interpretation often determines the outcome of each specific stage: whether a right is applicable, whether an interference exists, and whether it is justified.

When adjudicating a case, the Court generally follows a structured logic of review consisting of three distinct stages; the first one is the determination of applicability. Here, the Court must decide whether the provision invoked applies at all to the specific facts of the case. To define this, the Court often faces a combination of interpretation and evidentiary issues[93]. A specific complexity arises regarding the prohibition of discrimination under Article 14. As doctrine highlights, this provision has no independent existence. Indeed, it does not prohibit discrimination in the abstract but only in relation to the enjoyment of the rights and freedoms set forth in the Convention and its Protocols. Therefore, for Article 14 to be applicable, the facts of the case must fall within the scope of another substantive provision[94].

The second stage is the determination of interference. The question is whether the facts disclose that the right in question has actually been interfered with. While the Court often

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[92] ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, App. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, para. 81. See also ECtHR, *König v. Germany*, 28 June 1978, App. no. 6232/73. See also F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 39.

[93] See J. GERARDS, *General Principles of the European Convention on Human Rights*, cit., pp. 1-34. See also Jacobs & White, p. 7.

[94] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 412. See also ECtHR, *Haas v. the Netherlands*, 13 January 2004, App. no. 36983/97, para. 41. The judicial review for discrimination typically follows three questions: 1) Is the complaint within the ambit of a substantive right? 2) Is the applicant in a relevantly similar situation to others treated differently? 3) Is there an objective and reasonable justification?

assumes interference once a claim falls within the scope of a provision, the interference must be real, and not just hypothetical[95].

The third and final stage is the justification of restrictions. If an interference is established, the Court assesses whether it is acceptable and to what extent. Crucially, this assessment depends on the type of the right in question. Doctrine distinguishes between *unqualified rights,* such as the prohibition of torture (Article 3), which allow for no exceptions, and *qualified rights* (Articles 8-11), where the Convention explicitly permits States to interfere provided specific conditions are met[96]. To restrict these qualified rights, the state must satisfy a strict three-part test: the interference must be *prescribed by law,* pursue a *legitimate aim*, and be *necessary in a democratic society*.

This final requirement is the embodiment of the principle of proportionality. Closely linked to the margin of appreciation (See Section 4.6 of this Chapter), this principle dictates that a measure interfering with a right must not only pursue a legitimate aim but mut also strike a *fair balance* between the general interest of the community and the rights of the individual. The roots of this doctrine can be traced back to the *Belgian Linguistic* case. Although Article 14 does not explicitly mention proportionality, the Court established that a difference in treatment requires a "*reasonable relationship of proportionality between the means employed and the aim sough to be realised*"[97]. This test has since been universalised across the Convention, particularly for qualified rights, where any restriction must be proportionate to the pressing social need invoked by the State[98].

A unique case is the right to marry under Article 12. Here, limitations are to be found in national law, though the Court has ruled that this does not leave Member States with unlimited discretion to impair the very essence of the right.

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[95] In this sense, a crucial example is the decision in *Maris* (ECtHR, *Mariş v. Romania (dec.)*), 29 September 2020, App. no. 58208/14), concerning a prisoner in Romania registered as Orthodox-Christian instead of Jewish. The Court considered this matter abstract and theoretical, as the data was accessible only to the prison administration and not used in daily life; consequently, no significant interference was found. See J. GERARDS, *General Principles of the European Convention on Human Rights*, Cambridge, pp. 1-34 (specifically Chapter 1.4 "The Structure of Convention Rights Review").

[96] Ibid., pp. 286-315 (Chapter 9). *See also* Articles 15-18 ECHR.

[97] ECtHR, *Belgian Linguistic*, cit., para. 10.

[98] See J. GERARDS, *Procedural Review by the ECtHR: A Typology*, in E. BREMS, J. GERARDS (eds.), *Shaping Rights in the ECHR*, Cambridge, 2013, p. 127. See also F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 412.

Beyond these specific clauses found in individual articles, the Convention contains general provisions governing restrictions. Paramount among these is Article 15, which allows States to take measures derogating from their obligations in times of emergency, "*to the extent strictly required by the exigencies of the situation*"[99]. However, this possibility is not absolute, as Paragraph 2 lists specific non-derogable rights (Article 2, 3, 4(1), and 7). The general framework of restrictions is completed by Article 16, which permits restrictions on the political activity of aliens, and Article 17, which prohibits the abuse of rights to prevent the destruction of rights under the guise of the Convention protection. Finally, Article 18 limits the use of restrictions, ensuring they are not applied for purposes other than those for which they have been prescribed.

1. 4. 3 The Principle of Effectiveness and Positive Obligations

The principle of effectiveness is a foundational interpretative tool used by the ECtHR[100]. Its expression can be traced back to early key judgments such as the *Belgian Linguistic* case[101]. The principle's core function is to ensure that the rights guaranteed by the Convention are "*practical and effective*", not merely "*theoretical or illusory*"[102].

This now-famous formula, articulated by the Court in *Airey v. Ireland* (1979), was then developed through a rich jurisprudence. The case *Artico v. Italy* (1980)[103] provides a further striking example: the Court found that providing an applicant with a state-appointed lawyer who subsequently failed to perform his duties rendered the applicant's right to legal assistance illusory[104]. The doctrine was consistently reaffirmed, for instance in *Soering v. the United Kingdom* (1989), where the ECtHR stressed that its interpretation must make the Convention's safeguards "*practical and effective*"[105].

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[99] Article 15(1) ECHR. See also a leading case on this, ECtHR, *Ireland v. the United Kingdom*, 18 January 1978, para. 207.
[100] For an extensive analysis see, *inter alia,* G. A. SERGHIDES, *The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the Other Convention Principles*, in *Hague Yearbook of International Law/Annuaire de La Haye de Droit International*, p. 1 ff.
[101] ECtHR, *Belgian Linguistic*, cit., para 5 (interpretation by the Court). See also A., NUSSBERGER, *The European Court of Human Rights*, cit., p. 74.
[102] ECtHR, *Airey v. Ireland*, 9 October 1979, App. no. 6289/73, para. 24.
[103] ECtHR, *Artico v. Italy*, 13 May 1980, App. no. 6694/74.
[104] Ibid., para. 33. See also J.G. MERRILLS, *The Development of International*, cit., p. 90.
[105] ECtHR, *Soering v. the United Kingdom,* 07 July 1989, App. no. 14038/88, para. 87. See also M. JACKSON, *Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction*, in *European Journal of International Law*, 2016, p. 825.

Methodologically, this approach is rooted in Article 31 VCLT, which requires that a treaty be interpreted considering its "*object and purposes*"[106]; for the ECHR, that purpose is the concrete protection of individual human beings.

The most significant impact of the effectiveness principle, as identified by both Merrills and Gerards, has been the Court's development of positive obligations[107]. While the Convention is primarily composed of negative obligations, i.e., what a State must refrain to do, the Court has consistently held that, being some right effective, States must sometimes take active measures. In this sense, the *Airey v. Ireland* case, is a great example. The applicant, seeking a separation from her violent husband, could not afford the high costs of legal representation in Ireland. The Court ruled that her right of access to a court, enshrined in Article 6, was rendered theoretical by this financial barrier, imposing a positive obligation on the State to provide effective access[108]. The same principle was also used to find a violation of Article 8, as the State's failure to provide an accessible remedy for separation constituted a failure to respect her private and family life[109].

This doctrine has even been extended to regulate relations between private individuals, often called *Drittwirkung* or horizontal effect. In *X and Y v. Netherlands*, the ECtHR held that the state had a positive obligation under Article 8 to provide criminal law measures that effectively protected a mentally disabled person form sexual assault by a private individual[110].

The principle of effectiveness is strictly linked to the *living instrument* doctrine, which will be discusses in the next Section; both are dynamic tools that allow the Court to interpret the ECHR in a way that avoids it becoming obsolete and ensures its relevance in contemporary society[111].

However, this principle is not absolute. As Merrills argues, it remains a principle of interpretation designed to give provisions their "*fullest weights and effect*"[112]. The Court itself has shown restraint. In cases like *Rees*, concerning trans rights, the Court

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[106] NUSSBERGER, *The European Court of Human Rights*, cit., pp. 74-75.
[107] J.G. MERRILLS, *The Development of International Law,* cit., pp. 101-107; J. GERARDS, *General Principles of the European Convention on Human Rights*, cit., pp. 50-51. See also D. SHELTON, A. GOULD, *Positive and Negative Obligations*, in D. SHELTON (ed.), *The Oxford Handbook of International Human Rights Law*, 2013, p. 563 ff.
[108] ECtHR, *Airey v. Ireland*, cit., para. 25.
[109] Ibid., para. 33.
[110] Ibid., pp. 89-90.
[111] NUSSBERGER, *The European Court of Human Rights*, cit., p. 75.
[112] J.G. MERRILLS, *The Development of International Law,* cit., p. 89.

acknowledged that not every interpretation which might secure more effective protection can be considered appropriate, especially when balanced against sensitive national issues or the consensus among Contracting States[113].

1. 4. 4 The Convention as Living Instrument

The Convention might be seen, from the Court's perspective, as an old lady with a young spirit. Since the ECHR is widely viewed as a *living instrument*, it requires a dynamic and evolutive interpretation to preserve its effectiveness, particularly in light of ongoing social transformation and technological progress. Without such adaptability, the Convention would risk losing its relevance and practical impact[114].

From a theoretical standpoint, the Court has not developed a general and abstract theory of interpretation, preferring flexible formulas to navigate the tension between stability and progress. One of the outcomes of this approach is the living instrument doctrine, famously articulated in *Tyrer v. the United Kingdom*. In this case, the Court established that the Convention "*must be interpreted in the light of present-day conditions*" and that it "*cannot but be influenced by the developments and commonly accepted standards ... of the member States*" [115].

This approach was immediately reaffirmed in *Marckx*[116], where the Court addressed the changing morals regarding children born out of wedlock, and in *Dudgeon v. the United Kingdom* (1981)[117], concerning the decriminalisation of homosexuality. In these foundational cases, the Court demonstrated that legal rules must change alongside societal values.

Here, the inevitable question is how the Court assesses the reality of these changes. The evidentiary basis relies heavily on comparative law, international treaties, and soft law. The Court acts similarly to how one might assess international customary law, looking for trends and consensus among Member States[118]. This methodology supports a vision

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[113] ECtHR, *Rees v. the United Kingdom*, cit., paras. 37-38. See also J.G. MERRILLS, *The Development of International Law,* cit., p. 111.
[114] For a theoretical grounding of this approach, see L. WILDHABER, *The European Court of Human Rights,* cit., pp. 524-525. The former President of the Court argued that Convention guarantees are not static rules but "*programmatic formulations, open to future*" (p. 525). Consequently, a judge cannot be viewed merely as the "*mouthpiece of law*" (p. 525) in the Montesquieu sense but must inevitably engage in a certain degree of law-making to give these rights concrete shape.
[115] ECtHR, *Tyrer v. the United Kingdom*, cit., para. 31.
[116] ECtHR, *Marckx v. Belgium,* cit., para. 41.
[117] ECtHR, *Dudgeon v. the United Kingdom,* 22 October 1981, App. no. 7525/76, para. 60.
[118] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 77.

of constant progress, as the "*increasingly high standards required in the area of the protection of human rights ... inevitably require greater firmness in assessing breaches of fundamental values of democratic society*"[119].

The cumulative effect of this dynamic evolution is profound and can be summarised in the fact that "*there is virtually no aspect of human life that could not be and is brought to the Court*"[120]. However, it creates a structural challenge: while social reality is often composed of "*areas of grey*", the judicial progress forces a binary outcome: a violation is either found or not[121]. This tension is evident in the evolution of the right to gender identity, a topic that will be analysed in depth in Chapter 3. For years, the Court kept the situation "*under review*", navigating the grey zone of evolving standards before finally declaring the lack of legal recognition unacceptable[122].

One might be tempted to think that this doctrine undermines the stability of some foundational principles, such as legal certainty and equality before law. However, in the interest of those latter, the Court follows a "*moderated doctrine of precedent*"[123]: to safeguard these principles, the Court generally adheres to its previous judgments. It departs from them only when *cogent reasons* impel it to adjust the interpretation to reflect significant change in societal values or present-day conditions.

Nevertheless, this development is not always unidirectional. Instances of regression or backwards development are also possible. A striking example is the case law on prisoners' voting rights: while *Hirst* (2005)[124] strongly condemned automatic disenfranchisement,

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[119] ECtHR, *Rantsev v. Cyprus and Russia,* 2010, App. no. 25965/04, para. 277.
[120] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 37.
[121] Ibid., p. 76.
[122] Ibid. See also F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, 4th ed., Oxford University Press, 2006, pp. 47 and 274-277. Doctrine considers this line of cases the "best example" of dynamic interpretation in action. Initially, in *Rees* (1986) and *Cossey* (1990), the Court found no violation, citing the lack of a common European approach. In *Sheffield and Horsham* (1998), the Court criticized the State for failing to keep the legislation under review but still found no violation. The turning point came with *Christine Goodwin* (2002), where the Court, citing a "continuing international trend", overruled its previous case law, stating that the "intermediate zone" of non-recognition was no longer sustainable. Another recent example of this evolution is within the environmental field, specifically with the *KlimaSeniorinnen* judgment (2024). By recognising positive obligations under Article 8 to mitigate climate change based on scientific standards, the Court demonstrated its capacity to reshape the Convention to address current threats unforeseeable at the time of its inception. See M. WEWERINKE-SINGH, *Climate Protection Obligations under the European Convention on Human Rights: The KlimaSeniorinnen Judgment*, in *European Constitutional Law Review*, 21, 2025, pp. 361-363.
[123] L. WILDHABER, *The European Court of Human Rights,* cit., p. 525.
[124] ECtHR, *Hirst v. the United Kingdom (No. 2)* [GC], 6 October 2005, App. no. 74025/01.

the subsequent Grand Chamber judgment in *Scoppola* (2012)[125] showed a degree of deference, allowing States more leeway to define restrictions[126].

Interpreting the Convention as a living instrument is essential for general terms. For example, the term "*unsound mind*" contained in Article 5 dealing with deprivation of liberty cannot be given a definitive interpretation, as the Court noted in Winterwerp, because psychiatric knowledge is "*continually evolving*"[127].

This doctrine also contains a political nuance. In *Rees,* the Court found no violation but pointedly added that the law in this area must be "*kept under review having regard [to] scientific and societal developments*"[128]. This was a clear signal to States that, while the Court would not anticipate developments, it expected national law to evolve.

Nevertheless, this role has clear limits. Wildhaber explicitly rejects the notion of a *Gouvernement des Juges*. The Court's task is to find its way, "*experimentally, inspired by the facts of the cases*" [129], rather than confusing its mandate with that of the legislature or imposing abstract theoretical systems upon Member States.

Considering the complexity of this interpretive method and the several layers to consider, this approach does not come without controversy. As Robert Spano highlights, critics argue that the application of the living instrument doctrine has led the Court to depart too far from the original meaning of the Convention. This concern is particularly acute regarding the expansion of certain rights, such as Article 8, where the Court is accused of widening the scope beyond intended limits. From this perspective, excessive dynamism risks failing to grant a sufficient margin of appreciation to national authorities, effectively imposing a uniform standard where diversity should be permitted[130].

1. 4. 5 The Principle of Subsidiarity

The principle of subsidiarity, lying at the core of Article 35 ECHR, reflects the fundamental idea that the protection of human rights is a shared responsibility, primarily entrusted to States[131]. Although this principle was not explicitly mentioned in the original

[125] ECtHR, *Scoppola v. Italy (No. 3)* [GC], 22 May 2012, App. no. 126/05.
[126] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 78.
[127] ECtHR, *Winterwerp v. the Netherlands*, 24 October 1979, App. no. 6301/73, para. 37.
[128] ECtHR, *Rees v. the United Kingdom,* cit., para. 47. See also J.G. MERRILLS, *The Development of International Law,* cit., p. 65.
[129] L. WILDHABER, *The European Court of Human Rights,* cit., p. 525.
[130] R. SPANO, *Universality or Diversity of Human Rights?,* cit., p. 489.
[131] I. ZIEMELE, *European Judiciary*, cit., pp. 466-467.

text of the Convention, it developed progressively through case law. An early articulation of this principle can be found in the *Belgian Linguistic* case[132], while the concept was addressed more extensively in the landmark *Handyside v. the United Kingdom* (1976)[133]. This judicial evolution culminated in the adoption of Protocol No.15, in force since 2021, which explicitly reaffirmed the principle in the Preamble of the Convention[134].

This framework establishes a clear division of labour: human rights must be respected first by national parliaments, governments, national court, and civil society. Only if these national safeguards fail does the ECtHR intervene. In this view, subsidiarity is understood as more than just "*pragmatic realism*" to manage the Court's workload; it is a fundamental mark of respect for democratic processes[135].

From a practical perspective, this principle is deeply connected to admissibility requirements, particularly the rule of exhaustion of domestic remedies. Since national authorities must have the discretion to detect and correct mistakes first, the ECHR requires that all domestic avenues be utilised before approaching the Court. Specifically, the ECtHR has clarified that this rule affords the State the opportunity to address the grievance within its own legal system before being answerable before an international court[136]. And indeed, the Court's role is not to replace national authorities but to supervise them.

This approach is considered one of the most effective means of translating the Convention from mere theory to reality within the domestic legal system of Member States[137]. This complementarity was reinforced in 2021 with the entry into force of Protocol no. 15, which reduced the time limit for submitting an application after a national decision from six to four months. This procedural tightening underscores that the Strasbourg mechanism

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[132] ECtHR, *Belgian Linguistic,* cit., para. 10. See also A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 17.
[133] ECtHR, *Handyside v. the United Kingdom*, 7 December 1976, *Application no.* 5493/72, para. 48.
[134] Protocol No.15, adopted in 2013 and into force from 2021, inserted a new recital at the end of the Preamble to the Convention, which reads: "*Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention*". Furthermore, the Protocol amended Article 30, removing the parties' right to object to the relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber, thereby facilitating consistency in case law.
[135] L. WILDHABER, *The European Court of Human Rights,* cit., p. 526.
[136] ECtHR, *Demopoulos and Others v. Turkey* [GC], 1 March 2010, App. nos. 46113/99 et al., para 69. See also J. GERARDS, *General Principles of the European Convention on Human Rights*, cit., Chapter 1.
[137] L. WILDHABER, *The European Court of Human Rights,* cit., pp. 521-538, p. 526.

is a remedy of last resort, intended to function only when a national system has been exhausted and failed to provide redress[138].

Former President Robert Spano has defined this current phase of the Court's evolution as the *Age of Subsidiarity*. He argues that a robust concept of subsidiarity inherently implies accepting diversity in the implementation of human rights. Thus, the Strasbourg system must acknowledge that there may "*perfectly properly be different answers to some human rights issues in different States on similar facts*" [139], provided those answers are the result of a Convention-compliant assessment.

Recent scholarship, including reflections from ECtHR Judge Krenc, emphasises that the principle of subsidiarity should not be understood merely as a mechanism of judicial restraint or a tool to limit the Court's oversight. Instead, it possesses a vital "*positive dimension*": it entails a shared responsibility where national authorities are not just granted discretion but are actively required to ensure the effectiveness of Convention rights within their own domestic legal orders[140]. In this view, subsidiarity serves to empower national system to be the primary guarantors of human rights, rather than simply shielding them from Strasbourg's scrutiny.

Academic commentary supports this perspective, arguing that the procedural turn does not signify a retreat from substantive human rights protection. On the contrary, this approach incentivises national authorities to engage in transparent and inclusive decision-making. By linking the margin of appreciation to the quality of domestic procedures, the Court adopts a "*democracy-enhancing*" function, fostering a shared responsibility for rights protection rather than imposing standards top-down[141].

1. 4. 6 Margin of Appreciation Doctrine

Much like the principles previously discussed, the margin of appreciation doctrine was not explicitly mentioned in the original text of the Convention. Instead, it stands as an

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[138] I. ZIEMELE, *European Judiciary*, cit., pp. 466-467.
[139] R. SPANO, *Universality or Diversity of Human Rights?,* cit., p. 491 (citing Lord Justice Laws).
[140] Krenc also argues that the Court must move beyond the Brighton era by cultivating a "*positive credible conception of subsidiarity*" (p.15). This entails that subsidiarity is not intended for regressive purposes but is "*intrinsically linked to the objective of protecting rights*" (p. 15) and ensuring their effectiveness at the domestic level. See F. KRENC, *The European Convention on Human Rights,* cit., pp. 14-15.
[141] This approach is rooted in the political commitment to a "*shared responsibility*" between the Court and national authorities, as formally enshrined in the High-Level Conference on the Implementation of the European Convention on Human Rights, *Brussels Declaration,* 27 March 2015. See T. KLEINLEIN, *The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution*, in *International and Comparative Law Quarterly*, 2019, pp. 92 and 109.

emblematic example of the Court's capacity to develop key principles through its case law. Deeply rooted in the principle of subsidiarity, this doctrine stems from the idea that, particularly on sensitive issues, States should be afforded a degree of discretion to decide what is best for their citizens, taking into account the country's specific culture and traditions.

Historically, the doctrine traces its roots to the very first adjudicated case, *Lawless v. Ireland* case, where the Commission acknowledged that "…*a certain margin of appreciation – must be left to the government"*[142]. This approach was subsequently cemented by the Court in *Handyside*[143], establishing the premise that national authorities are often in a better position to assess local needs. This rationale is intrinsically linked to the principle of subsidiarity[144] and, as Nussberger notes, to the effectiveness of the ECHR within Europe's multi-layered legal system[145].

Since the Convention inevitably engages with domestic legal and cultural contexts, the doctrine of the margin of appreciation serves to answer the question of "*how far is the Court authorised to go in scrutinising the laws and practices of the Contracting States and measuring them against the Convention*?"[146]. Indeed, the application of this margin is often the decisive factor in determining the outcome of cases involving sensitive national issues, as seen in *Lautsi* regarding religious symbols or *S.A.S.* concerning the

[142] EComHR Report *Lawless v. Ireland*, App no 332/571959, para 90.
[143] ECtHR, *Handyside v. the United Kingdom*, cit., para. 49. See also A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 22.
[144] The doctrine's starting point is the acknowledgement that the Convention is an instrument of international law, and States are the primary actors responsible for its implementation. This aligns with the principle of subsidiarity: national authorities are considered "in a better position" to make initial assessments, which are then subject to review by the ECtHR. Interestingly enough, since the doctrine developed gradually, a structured academic analysis of the margin of appreciation only began in the late 1990s. For a comprehensive overview of the seminal doctrine on this subject, see, among the various, S. GREER, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Strasbourg, 2000; Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerpen, Oxford, New York, 2002; G. LETSAS, *Two Concepts of the Margin of Appreciation*, in *Oxford Journal of Legal Studies*, 2006; G. LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, 2007; A. LEGG, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford, 2012.
[145] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 23.
[146] J.G. MERRILLS, *The Development of International Law*, cit., p. 136.

face-veil ban[147]. This fundamental question opens a broader theoretical debate on the very nature of the Convention's standards[148].

Undoubtedly, this discretion has limits. As the Court established in *Handyside*, the margin granted to States "*goes hand in hand with a European supervision*" [149]. This dual action allows for a necessary flexibility in favour of Contracting States, which, however, must always be balanced against the imperative of ensuring the effective protection of Convention rights[150]. This tension resolves the problem of how far the Court can go in matters of national competence while still ensuring a uniform standard of protection for human rights.

The practical application of this supervision depends on the width of the margin, which varies greatly according to the context. The ECtHR often assesses the necessity of a restriction by analysing three steps: whether it is "prescribed by law"[151], pursues a "legitimate aim"[152], and is "necessary in a democratic society"[153].

The margin is generally broad when the Court is presented with a controversial political, economic, or social issue. The *Handyside* case is the quintessential example, where the Court famously stated "[…] *it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals*"[154]. Conversely, the margin of appreciation narrows significantly when a State's argument is weighed against one of the ECHR's basic values. The *Dudgeon* case vividly illustrates this restrictive dynamic. The Court acknowledged the government's argument regarding Northern Ireland's

[147] For instance, in *Lautsi v. Italy*, dealing with crucifixes in classrooms, and *S.A.S. v. France*, regarding the ban on face covering, the wide margin of appreciation granted to the State regarding religious symbols was the determining factor in finding no violation of the Convention. See ECtHR, *Lautsi and Others v. Italy* [GC], 18 March 2011, App. no. 30814/06; ECtHR, *S.A.S. v. France* [GC], 1 July 2014, App. no. 43835/11.
[148] Hutchinson addresses this exact theoretical question by reassessing how the margin of appreciation relates to ECHR. He explores three models: 1) the Convention as "minimum standards" (a "floor"), which he finds problematic as the Court's "floor" appears to be mobile in practice and not clearly articulated; 2) the Convention as "maximum standards", which he discounts as hostile to the extension of human rights and 3) his proposed solution, which views the margin as an "area of compliance" falling somewhere between these two extremes. See M.R. HUTCHINSON, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, in *International and Comparative Law* Quarterly, 1999, pp. 638 ff., pp. 642-650.
[149] ECtHR, *Handyside v. the United Kingdom*, cit., para. 49.
[150] G. CAGGIANO, *La tutela europea dei diritti della persona*, cit., p. 38.
[151] This means the interference must have a clear basis in national law, which must be accessible and foreseeable to the citizen.
[152] The interference must pursue one of the specific aims listed in the relevant article, such as "public safety", "public order", or "the protection of health or morals".
[153] This is the core proportionality test, where the Court assesses if the interference meets a "pressing social need" and is proportionate to the aim pursued. It is primarily at this stage that the margin of appreciation is applied.
[154] ECtHR, *Handyside v. the United Kingdom*, Application no. 5493/72, 1976, para. 48.

conservative social climate but ultimately stated it was not enough to justify the criminalisation of homosexuality. Because the case touched upon sexual behaviour, an "*essentially private manifestation of the human personality*"[155], the margin was interpreted more narrowly.

This contrast demonstrates that the Court's decisions are often "*not a technical exercise in interpreting texts, but judgments about political morality*"[156]. This link between the Convention and democracy is a core theme. Merrills notes "*Democracy... is a poor justification for always giving the majority what they want*"[157]. Thus, the Court must strike a *fair balance* between the general interest of the community and the interests of the individual, ensuring that pluralism and tolerance are preserved[158].

Therefore, the margin of appreciation is a ductile doctrine. Its width is not fixed but, as Nussberger describes it, "oscillates"[159] from *wide* to *narrow* depending on the case's context. Several key factors influence this variation. Academic analysis has sought to structure these variations. Hutchinson, for instance, identifies three main trajectories: the level of European consensus, the nature of the right at stake, and the aim pursued by the state's limitation[160]. Nussberger's analysis complements this framework, adding further nuance by examining the sensitivity of the issue at the national level and the existence of competing interest[161].

Among these factors, the concept of European consensus serves as a central piece in the *living instrument* architecture. It does not imply unanimity, but rather a "*substantial majority*" or merely an "*emerging consensus*"[162] based on comparative analysis. This assessment is primarily conducted within the CoE but occasionally extends to external legal systems, as seen in *Goodwin*, for pragmatic reasons[163]. Functionally, consensus acts

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[155] ECthR, *Dudgeon v. the United Kingdom,* Application no. 7525/76, 1981, para. 60.
[156] J.G. MERRILLS, *The Development of International Law*, cit., p. 149.
[157] Ibid., p. 113.
[158] ECtHR, *Rees v. the United Kingdom*, cit., para. 37. See also J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, 1988, p. 149.
[159] A., NUSSBERGER, *The European Court of Human Rights*, cit., p. 91.
[160] M.R. HUTCHINSON, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, in *International and Comparative Law Quarterly*, 1999, p. 640.
[161] Nussberger notes four similar aspects that the Court examines: the existence of a European consensus, aligning with Hutchinson; the relevance of the right for the person concerned; a refinement of the "nature of the right"; the sensitivity of the issue at the national level; and the existence of competing interests that must be weighed, which relates to the "aim pursued". See A., NUSSBERGER, *The European Court of Human Rights*, cit. p. 92.
[162] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 84.
[163] Ibid., p. 85.

as a harmonising tool: where a clear consensus exists the margin narrows. Conversely, where consensus is absent the margin remains wide[164]. Crucially, scholars argue that consensus cannot lead to regression: since the object and purpose of the Convention are to improve human rights standards (Article 31 VCLT), a consensus to lower protections would be legally invalid[165]. However, there is no automatism: in *A, B, and C v. Ireland* (2010)[166], despite acknowledging a clear European consensus favouring the applicant, the Court granted a wide margin of appreciation to the State, demonstrating the doctrine's inherent flexibility[167].

In recent legal literature, it has been argued that the Court's jurisprudence is increasingly characterised by "proceduralisation". This describes a shift whereby the Court focuses less on the substance of the national decision and more on the quality of the procedure by which it was reached[168]. Robert Spano defines this evolution as a "*qualitative, democracy-enhancing approach*": the Court is more likely to grant a wider margin, as seen in *Hirst*[169] and *Animal Defenders* (2013)[170], if the national parliament or courts have conducted a thorough, Convention-compliant analysis[171]. However, Spano himself warns that this deference is not unlimited. Human rights courts remain "*by definition counter-majoritarian*", acting as guardians against the potential tyranny of the majority[172].

This tension highlights that malleability brings with it critical issues. At its core, the doctrine forces a difficult question: is it truly possible to speak of a "common European value system" across such diverse contracting states?[173]. Critics argue that this excessive flexibility may lead to arbitrariness and provide insufficient human rights protection[174]. Indeed, granting States a margin of appreciation runs the risk of decisions that do not take

[164] Ibid., p. 84. See *Menesson v. France*, no. 65192/11, ECHR 2014; *Bayatyan v. Armenia* [GC], no. 23459/03, ECHR 2011 (concerning conscientious objection).
[165] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 88.
[166] ECtHR, *A, B, and C v. Ireland,* 16 December 2010, App. no. 25579/05.
[167] . NUSSBERGER, *The European Court of Human Rights*, cit., p. 93.
[168] A., NUSSBERGER, *The European Court of Human Rights*, cit., p. 94.
[169] ECtHR, *Hirst v. the United Kingdom,* cit.
[170] ECtHR, *Animal Defenders International v. the United Kingdom* [GC], 22 April 2013, App. no. 48876/08.
[171] R. SPANO, *Universality or Diversity of Human Rights?*, cit., pp. 497-498.
[172] Ibid., p. 488.
[173] A., NUSSBERGER, *The European Court of Human Rights*, Oxford University Press, 2020, p. 90.
[174] Ibid.

into account an objective analysis of the ECHR[175], making the Court's decision "*more opaque than is necessary*"[176].

1. 5 Analytical and Comparative Perspectives

From an analytical perspective, the Court represents a unique hybrid between legal traditions. The judgment structure reflects a mix of continental and common law systems. While the Convention says little about the form of the judgment, the practice has evolved to allow for a single judgment accompanied by separate opinions (concurring or dissenting)[177].

Separate opinions are considered crucial for the legal development of the system. They serve two primary purposes. First, they are important for transparency, as dissenting opinions allow for a better understanding of the reasoning behind the majority decision. Second, any separate opinion presents a different line of analysis which may inspire second thoughts in future case law, contributing to the dynamic interpretation of the Convention[178].

Shifting the focus from internal structure to broader legitimacy, recent scholarship has analysed the Court's functioning through the lens of the so-called *Procedural Justice*, arguing that the perceived fairness of the judicial process is a primary driver of the Court's legitimacy and compliance[179].

Beyond procedural fairness, empirical research highlights the Court's broader impact through the so-called *erga omnes* effect. Helfer and Voeten describe the Court's approach as "*majoritarian activism*", where rulings on sensitive issues (e.g., LGBT rights) leverage regional consensus to prompt legal reforms even in non-respondent States[180].

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[175] See M.R HUTCHINSON, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, cit., p. 641.
[176] Ibid., 649.
[177] J.G. MERRILLS, *The Development of International Law*, cit., p. 34.
[178] Ibid.
[179] See E. BREMS, L. LAVRYSEN, *Procedural Justice in Human Rights Adjudication: The European Court of Human Rights*, in *Human Rights Quarterly*, 35(1), 2013, pp. 176-200. Drawing on social psychology research by Tom Tyler, the authors argue that for human rights bodies lacking coercive power, legitimacy depends on 'procedural justice', namely the perception that the process was fair regardless of the outcome (p.177). They identify four key requirements: participation, neutrality, respect for people's rights, and trust in the judge's sincerity. In this framework, the ECtHR operates at two levels: as a 'champion' of procedural justice in its own proceedings (e.g., using separate opinions to ensure transparency, p. 186), and as a 'watchdog', reviewing whether domestic authorities have upheld these standards (p.185).
[180] L.R. HELFER, E. VOETEN, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, in *International Organization*, 2014, p. 4.

One of the system's greatest strengths is its global influence. Historically, the Court has contributed significantly to the interpretation of other regional instruments. Indeed, despite textual differences, the Strasbourg case law served as a reference point for the UN Covenants on Human Rights (1976), the American Convention on Human Rights (1969) and the African Charter on Human and People's Right (1981)[181].

This influence has fostered a systemic dialogue with other regional human rights bodies. One of the most important exchanges has developed with the Inter-American Court of Human Rights (IACtHR), established in 1979. While the American Convention was modelled on the European precedent, it introduced significant structural innovations. Contemporary scholarship attributes these procedural differences to distinct foundational logics: while the IACtHR prioritises a victim-focused approach with highly inclusive hearings, the ECtHR follows a model favouring administrative efficiency[182]. This divergence is practical as well as theoretical, being further reinforced by the massive caseload disparity, which compels the ECtHR to limit direct victim participation[183].

Significant distinction also exists regarding advisory jurisdiction. Whereas the Strasbourg Court's advisory power was originally strictly limited, the Inter-American Court was equipped with the power to interpret not only its own Convention but also other treaties concerning the protection of human rights in the Americas.

Despite these structural differences, scholars emphasise the inherent advantage that both regional systems share over universal ones (i.e., the UN mechanisms). Buergenthal argued that political and cultural homogeneity acts as a prerequisite for effective enforcement[184]. Supporting this view, Tucker observes that regional effectiveness is also driven by practical interdependence: because neighbouring States share vital economic and security interests, diplomatic or economic sanctions within a regional framework carry a weight that global bodies often lack[185].

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[181] J.G. MERRILLS, *The Development of International Law*, cit., p. 10.
[182] E. YILDIZ, *Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights*, in *Temple International & Comparative Law Journal*, 2020, pp. 311-312.
[183] Ibid., pp. 331-333.
[184] T. BUERGENTHAL, *The American and European Conventions on Human Rights: Similarities and Differences*, in *American University Law Review*, 1980, p. 156.
[185] C.M. TUCKER, *Regional Human Rights Models in Europe and Africa: A Comparison*, in *Syracuse Journal of International Law and Commerce*, 1983, pp. 139-140.

Today, this relationship has evolved into a horizontal cross-fertilization, facilitated by the fact that these regional systems share a common normative genesis grounded in the 1948 Universal Declaration of Human Rights[186]. In this context, Strasbourg and San José frequently cite each other's jurisprudence to define common standards of protection.

Finally, regarding the African continent, legal scholarship notes that the African Court on Human and People's Rights (AfCHPR) drew inspiration from Strasbourg's jurisprudence, particularly regarding the interpretation of admissibility criteria and the exhaustion of domestic remedies[187]. However, comparative analysis also highlights deep conceptual divergences rooted in different historical contexts. While the ECHR reflects a Western liberal focus on individual rights and negative freedoms (i.e., the protection from the State), the African Charter explicitly incorporates collective people's rights and emphasizes the individual's duties toward the community and the State[188].

1. 5. 1 Procedural Rules

To fully grasp the procedural framework of the Court, it is essential to first clarify its dual mandate within the Convention system. First, under Article 19 ECHR, the Court's primary function is to ensure the observance of the engagements undertaken by the Member States. This supervisory role focuses on offering individual redress to victims of violation, typically in the form of pecuniary or non-pecuniary damage[189]. Second, the Court fulfils a broader function derived from the Preamble: clarifying and safeguarding the minimum level of protection for fundamental rights across Europe. Through this collective enforcement, the Court harmonizes standards and ensures a uniform floor of protection[190].

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[186] E. VOETEN, *Competition and Complementarity between Global and Regional Human Rights Institutions*, cit., p. 120.
[187] R. MURRAY, *A Comparison between the African and European Courts of Human Rights*, in *African Human Rights Law Journal*, 2002, p. 218.
[188] C.M. TUCKER, *Regional Human Rights Models in Europe and Africa,* cit., pp. 161-163.
[189] J. GERARDS, *General Principles of the European Convention on Human Rights*, cit., pp. 35-76 (Chapter 2). Occasionally, specific individual measures to restore the applicant's rights are also indicated. Regarding non-pecuniary damages the Court has elaborated internal table to evaluate violations in a generalised manner. These guidelines, which remain confidential, are adjusted with World Bank indices to reflect different living standards, ensuring that compensation is equitable rather than punitive. Consequently, the sums granted are generally modest. Pecuniary damage, conversely, are calculated based on principles of tort law and can be significantly higher, particularly in cases involving property right. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 162-163.
[190] J. GERARDS, *General Principles of the European Convention on Human Rights*, cit., Chapter 2. See also Preamble to the ECHR.

The procedural avenues available to trigger this jurisdiction are threefold: individual complaints (Article 34)[191], inter-State complaints (Article 33), and requests for advisory opinions[192]. These procedures differ significantly regarding potential applicants and admissibility criteria.

Crucially, the composition of the bench reflects the foundational principle of equality: the Court is composed of a number of judges equal to that of the High Contracting Parties. In other words, *one State, one judge*. Each judge has one vote, ensuring that the judicial weight of a microstate is equal to that of a major power[193]. The selection follows a two-phase process aimed at ensuring both high qualifications and democratic legitimacy: a national phase of candidate selection and a European phase of election by the Parliamentary Assembly[194]. Once elected, judges sit in their individual capacity[195], bringing diverse professional backgrounds and legal traditions to the bench[196].

While all judges are equal, a unique feature of the Strasbourg system is the national judge. In every case, the judge elected in respect of the respondent State sits *ex officio*. This role is a hybrid remnant of classic international law: while the national judge is expected to be independent and impartial, their presence ensures that the Court has internal expertise on the domestic legal system of the State under scrutiny[197]. The Court's functioning relies on the Registry[198], described as its "*backbone*", which processes applications and manages

[191] The ECtHR has also published a Practical Guide on Admissibility Criteria to inform legal practitioners about the conditions for individual applications. The Guide is available at this link: https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng (last access 1st December 2025).
[192] Requests for advisory opinions can be submitted either by the Committee of Ministers (Article 47) or by the highest national courts (protocol No. 16). See A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 51.
[193] Ibid., p. 40. See also Article 20 ECHR.
[194] Regarding their qualifications, candidates must be of high judicial office or be jurisconsult of recognised competence. Furthermore, they must be under 65 years of age at the time the list of three candidates is requested and are strictly prohibited from engaging in any incompatible full-time work during their term. See K. REID, *A Practitioner's Guide*, cit., p. 2; A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 40-41.
[195] They must reside permanently in Strasbourg.
[196] Despite the *nomen,* professional backgrounds range from law professors and practitioners to former government agents and NGO members. This diversity inevitably extends to legal culture, integrating judges from civil law, common law, and socialist law traditions. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 44-45.
[197] Ibid., p. 42.
[198] Article 26 para. 1 ECHR recites: "*The Court shall have a Registry, the functions and organization of which shall be laid down in the rules of the Court*".

linguistic diversity[199]. Consistent with this independence, the Court possesses the autonomous power to regulate its own procedure by adopting its own Rules of Court[200].

The Court's jurisdiction is grounded in Article 1 of the Convention. As clarified in *Banković and others v. Belgium and others* (2001), this jurisdiction is primarily territorial but can extend to exceptional circumstances where a State exercises effective control outside its borders[201].

Individual access represents the core of the Court's work. Under Article 34 ECHR, standing is granted to "*any person, non-governmental organisation or group of individuals*" claiming to be a victim of a violation, regardless of citizenship[202]. However, access is strictly subject to admissibility conditions[203]. The rule of exhaustion of domestic remedies constitutes a pillar of this mechanism and is the concrete expression of the principle of subsidiarity[204]. It obliges the applicant to use all available national instruments before applying before the Court, unless such remedies are inadequate[205]. This is coupled with the strict time limit, recently reduced from six to four months by Protocol No. 15[206].

Other grounds for admissibility include the prohibition of anonymous or repetitive complaints. Furthermore, the Court rejects applications considered an "*abuse of the right of petition*", or incompatible with the provisions of the Convention. Protocol 14 introduced the criterion of "*no significant disadvantage*", allowing the Court to reject trivial cases based on the principle *de minimis non curat praetor*[207]. Another fundamental

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[199] Staffed by legal and administrative professionals from all Member States, the Registry processes applications though a crucial filtering stage and assists judges in drafting decisions, managing the linguistic diversity of applications filed in over 40 languages. See A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 47-48.

[200] Ibid., p. 40.

[201] I. ZIEMELE, *European Judiciary,* cit., p. 466. ECtHR, *Banković and Others v. Belgium and Others* (dec.) [GC], 12 December 2001, App. no. 52207/99. For exceptions regarding "effective control", see ECtHR, *Loizidou v. Turkey*, 18 December 1996, App. no, 15318/89; and ECtHR, *Ilaşcu and Others v. Moldova and Russia* [GC], 8 July 2004, App. no. 48787/99. Historically, this geographical scope was also influenced by the so-called "colonial clause" (Article 56), allowing States to extend the Convention to territories for whose international relations they were responsible. See F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 30.

[202] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 51.

[203] Conditions are set in Article 35 ECHR. See I. ZIEMELE, *European Judiciary*, cit., p. 466.

[204] See also Section 4.6 on the principle of subsidiarity.

[205] I. ZIEMELE, *European Judiciary*, cit., p. 467.

[206] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 54. See also Protocol No. 15.

[207] Some scholars identify the *manifestly ill-founded* rule as the broadest criterion for rejecting applications. This serves as a general filter for cases that, while formally complying with technical requirements, lack apparent merit or sufficient evidence. See A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 55.

condition concerns the temporal scope (*ratione temporis)*: the Convention operates without retroactive effect, except for continuous violations persisting after ratification[208]. It is worth noting that these strict criteria primarily apply to individual applications; inter-State complaints are not subject to the same formal hurdles, as they focus more broadly on systemic violations and public order[209].

To ensure practical access, the Court applies a specific linguistic regime: while the official languages of the Court are English and French, applications may initially be drafted in any official languages of the Contracting States[210]. Once admitted, the Court's review is not of *fourth instance*; it cannot review national judgments for errors of fact or law unless they resulted in a violation of a Convention right[211].

While it is always the Court that formally decides a case, the specific judicial formation depends on the nature of the matter. The Single Judge formation, introduced by Protocol No. 14 to address the backlog, handles clearly inadmissible cases[212]. The Committee of three judges operates primarily through a written procedure and can render judgments on the merit in cases of *Well-Established Case-Law* (WECL)[213]. The Chamber (seven judges) handles the main judicial work, dealing with all topics to ensure a unified jurisprudence[214]. The Grand Chamber (17 judges)[215] represents the supreme authority, deciding on the most debated issues or cases where a Chamber has relinquished

[208] See ECtHR, *De Becker v. Belgium,* 27 March 1962, App. no. 214/5, para. 8. See also F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 28.
[209] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 56. Furthermore, unlike individual complaints, the procedure is not restricted to States whose citizens are victims of a violation; any High Contracting Party may refer an alleged breach to the Court, acting as a guardian of the public order of Europe.
[210] This means the Court must manage a vast linguistic diversity during initial stages; official languages are 41. See L. WILDHABER, *The European Court of Human Rights,* cit., p. 527.
[211] J.G. MERRILLS, *The Development of International Law*, cit., p. 10.
[212] It is worth noting that the Single Judge does not work in isolation but relies on non-judicial rapporteurs. The judge has four options: accept the rapporteur's proposal, ask for more information, refer the case to a Committee, or refer it to a Chamber. See A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 57.
[213] To balance efficiency with safeguards, decisions in Committees must be unanimous. If a single judge disagrees, the case is automatically referred to a Chamber. Furthermore, the national judge is not included *ex officio* in this formation. See Ibid., p. 58.
[214] Ibid., p. 59.
[215] Its composition includes *ex officio* members, while the others are drawn by lot based on regionally diverse groups. Unlike Chambers, which have a relatively stable composition, the Grand Chamber changes for each case.

jurisdiction[216]. Finally, the Plenary Court performs only administrative and organisational functions, such as electing the President and adopting the Rules of Court[217].

In exceptional circumstances, the Court can react immediately through Interim Measures. Although Rule 39 of the Rules of Court is silent on their legal effect, jurisprudence has evolved to regard failure to comply as a violation of the right of individual petition. Consequently, these measures, reserved for cases of imminent danger to life or limb, are now considered legally binding[218].

The decision- making process focuses strictly on Convention violations rather than fact-finding[219]. The procedure is predominantly written; oral hearings are discretionary and rare for Chambers[220]. The final judgment may include separate opinion, a distinctive feature for transparency and legal development[221].

1. 5. 2 Enforceability of Judgments

From international law perspective, the obligation to implement the Court's decisions is absolute. Under Article 46 ECHR, all Member States are bound by final judgments. As noted in legal scholarship, this follows a *purist* perspective consistent with Article 27 VCLT, meaning a State cannot invoke provisions of its domestic law as justification for its failure to perform a treaty. Consequently, for the purpose of execution, the distinction between monist and dualist legal systems is formally irrelevant; the obligation to comply remains unconditional[222].

However, from a constitutional law perspective, practical implementation varies significantly depending on the status the Convention holds in the national hierarchy of

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[216] Cases reach the Grand Chamber via two avenues: relinquishment by a Chamber if the case raises serious questions, or a referral request by parties within three months of a Chamber judgment, accepted only if raising serious issues. See Ibid., pp. 60-61.
[217] K. REID, *A Practitioner's Guide,* cit., p. 2.
[218] Practically, requests are handled by a centralised Rule 39 Unit within the Registry. They are strictly reserved for cases of "*immediate danger*", such as expulsion or extradition where the applicant fears death or ill-treatment. See A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 61. From a practical perspective, Reid advises practitioners to fax requests and verify receipt by phone. She notes that measures are applied during the proceedings and are not renewed if the risk disappears. Interestingly, Rule 39 has also been applied against CoE members like Turkey, Greece, and Italy, despite the presumption that they provide necessary guarantees. See K. REID, *A Practitioner's Guide*, cit., pp. 18-21.
[219] While the burden of proof generally follows the principle *affirmanti incumbit probatio*, the Court may engage in fact-finding missions in exceptional cases involving vulnerable applicants or complex inter-state disputes. See A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 63.
[220] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 63
[221] *Ibid.*, p. 68. See, for instance, the debate surrounding the dissenting opinions in ECtHR, *Lambert and Others v. France* [GC], 5 June 2015, App. no. 46043/14.
[222] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 112.

sources. While in some Member States, such as Austria, the ECHR is explicitly accorded constitutional rank, in others like Germany it formally holds the status of ordinary federal law, albeit with a special interpretative weight. This complex interaction has occasionally led to friction between the ECtHR and national superior courts[223].

Beyond the constitutional status, the practical machinery of execution is supervised by the Committee of Ministers under Article 46 para. 2. Unlike national legal systems, the international order lacks coercive agents to enforce decisions; consequently, the system relies on a structured and cooperative dialogue between the respondent State and the Committee[224].

The obligations arising from a violation are comprehensive. As established in the landmark judgment *Scozzari and Giunta v. Italy* (2000)[225], a ruling imposes a legal obligation on the State not only to pay just satisfaction but also to adopt the necessary general and individual measures to put an end to the violation[226]. The supervision mechanism allows for an active role of the applicant, who may communicate failures to receive compensation. Furthermore, should a State persistently refuse to abide by a final judgment, the Committee of Ministers may trigger infringement proceeding before the Court under Article 46(4), a powerful tool introduced to sanction non-compliance[227]. While the Court itself generally holds no execution duties, the effectiveness of this mechanism remains a principal challenge, necessitating constant vigilance[228].

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[223] Significant tensions emerged in Germany in the early 2000s, notably with the *Görgülü* and *Von Hannover* cases, regarding the limits of the Convention's impact. Similarly, in the United Kingdom, the incorporation of the Convention via the Human Rights Act of 1998 and the Court's subsequent involvement in sensitive national issues has often been a subject of intense public debate. In Italy the relationship was clarified by the Constitutional Court's *sentenze gemelle* of 2007, which established that the Convention holds a sub-constitutional rank, superior to ordinary statutes but subject to the Constitution. See A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 112. See *Görgülü v. Germany*, no. 74969/01, ECHR 2004-I; Italian Constitutional Court, judgments nos. 348 and 349 of 2007.

[224] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 157. Nussberger highlights a structural difference: while national courts rely on bailiffs (*ufficiali giudiziari*) to enforce judgments, in international law "there are no bailiffs". Therefore, the procedure is based on reporting: the State submits an "Action Plan"; once measures are taken, it submits an "Action Report". Only when the Committee accepts this report does it issue a Final Resolution closing the case.

[225] ECtHR, *Scozzari and Giunta v. Italy* [GC], 13 July 2000, App. nos. 39221/98 and 41963/98.

[226] Ibid., para. 249. See also A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 161. The obligation implies three steps: 1) cease the breach, 2) make reparation, and 3) ensure non-repetition.

[227] K. REID, *A Practitioner's Guide*, cit., p. 17. Reid notes that the matter is automatically recalled on the Committee's agenda no less than every six months. While the Court rarely suggests specific steps to remedy the violation, leaving the Committee to operate independently, the infringement proceeding allows the Court to formally confirm a breach of the obligation to execute the judgment.

[228] A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 153 and 159. Although the Court is not responsible for execution, it may indirectly intervene through so-called 'Number 2 complaints', which allege that a new violation has occurred during the execution process.

Therefore, while the primary impact of a judgment is on the respondent State, which must take all reasonable steps to cease the breach and ensure non-repetition, the Court's case law has a wider significance. Although Article 46(1) explicitly restricts the binding nature of judgments to the parties involved (*inter partes*), the ruling generates an authoritative interpretation of Convention norms that transcends the single dispute. Indeed, legal scholarship identifies a broader, systemic impact known as *res interpretata.* By clarifying the meaning of Convention provisions, the Court establishes an authoritative precedent that extends beyond the specific facts of the case. Guided by the imperative of legal certainty emphasized in *Goodwin*[229], these rulings effectively crystallize a harmonized European standard, compelling all Contracting Parties to align their domestic legal orders with the Court's evolving jurisprudence[230].

Moreover, it is a consolidated principle that every member state "*must stay abreast of developments*"[231]. This means that even if a judgment concerns a specific country, all other Member States should monitor the ECtHR's interpretation to ensure their own laws remain compliant, preventing future violations.

The tangible effect of this mechanism is substantial. Empirical research confirms that the Court does not merely adjudicate individual disputes but actively drives the harmonization and raising of human rights standards across the continent, leading to structural changes in domestic legal systems regardless of the specific State involved[232].

1. 5. 3 Third Party Intervention and the Role of Non-Governmental Organisations

Third Party Intervention (TPI) is another feature of the Court that has changed dramatically over time. At the beginning, the participation of third parties was not

[229] ECtHR, *Goodwin v. the United Kingdom,* cit., para. 74.
[230] G. CAGGIANO, *La tutela europea dei diritti della persona tra novità giurisprudenziali e modifiche istituzionali*, in *Studi sull'integrazione europea*, 2014, p. 19.
[231] J.G. MERRILLS, *The Development of International Law*, cit., p. 10. This assessment is supported by the extensive monitoring work of the Open Society Justice Initiative, *From Judgment to Justice*, New York, 2010.
[232] See J. GERARDS, *General Principles of the European Convention on Human Rights* (2nd edn, Cambridge University Press 2023), p. 3. This assessment is supported by the extensive monitoring work of the Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, New York, 2010, particularly pp. 11-12 which documents how the Court's judgments have influenced legislation and policy across the continent.

envisaged in the original design of the Convention. Only in 1983, through the amendment of the Rules of Court, was this procedure recognised[233].

Today, under Article 36 ECHR, TPI takes two distinct forms based on the actor involved[234]. On one hand, the Member State of which the applicant is a national, if not the respondent State, has an unconditional right to intervene. A similar statutory right is granted to the CoE Commissioner for Human Rights[235]. On the other hand, other third parties, primarily Non-Governmental Organisations (NGOs) and private individuals, require permission from the President of the Court[236]. For these actors, participation is generally limited to the submission of written observations focusing on domestic or international law issues, or statistical information. Unlike State parties, it is significantly rare for non-State intervenors to be granted leave to participate in oral hearings.

Recent scholarship highlights a qualitative asymmetry in this framework. While intervening States are generally free to support a specific party to protect their interest, non-State actors admitted under Article 36(2) are expected to adhere to a strict standard of objectivity[237]. They must function as impartial *amici curiae* rather than advocates.

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[233] In the first decade following its introduction in 1983, the Court received only 30 interventions, whereas today the number has increased. A theoretical distinction is also crucial: while the *amicus curiae* is traditionally a *super partes* expert assisting the judge without supporting any party, the third-party intervention, *stricto sensu*, presupposes a legal interest capable of being prejudiced by the ruling. In the European context, however, these two figures often merge. See V. PASSALACQUA, *Amicus curiae e intervento di terzo davanti alla Corte di Giustizia dell'UE e alla Corte Europea dei Diritti Umani*, in *Eurojus*, 2025, p. 128. See also L. VAN DEN EYNDE, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights*, in *Netherlands Quarterly of Human Rights*, 2013, p. 271 ff.

[234] For a detailed analysis of this practice, see EUROPEAN NETWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS, *Third Party Interventions Before the European Court of Human Rights: Guide for National Human Rights Institutions*, 2020.

[235] K. REID, *A Practitioner's Guide*, cit., Chapter 1. Specifically, the author notes that the State of the applicant's nationality is formally informed when the case is communicated to the respondent Government and is given 12 weeks to notify the Court of its intention to submit written observations or participate in oral hearings.

[236] Article 36 para. 2 ECHR states "*The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings*".

[237] V. PASSALACQUA, *Amicus curiae e intervento di terzo davanti alla Corte di Giustizia dell'UE e alla Corte Europea dei Diritti Umani*, in *Eurojus*, n. 4, 2025, p. 130. The author argues that this creates a potential imbalance, as States enjoy a privileged status while NGOs face uncertain admissibility criteria. See also *Practice Directions: Third-party intervention under Article 36 § 2*, issued by the President of the Court on 13 March 2023, available at this link: https://hudoc.echr.coe.int/eng-press?i=003-7600935-10455264 (last access 2nd December 2025). On the specific motivation of States, see K. DZEHTSIAROU, *Conversation with Friends: 'Friends of the Court' Interventions of the State Parties to the European Convention on Human Rights*, in *Legal Studies,* 43, 2023, p. 381 ff. Through empirical analysis, Dzehtsiarou demonstrates that States predominantly intervene not out of altruism, but to prevent the Court from developing standards incompatible with their domestic laws (p.382). However, statistical evidence suggests that mere State intervention does not significantly change the finding of violations, unless a high number of States intervene simultaneously (pp. 396-397).

Furthermore, the selection process remains opaque: since the Court typically does not publish reasoned decisions for rejections, a significant portion of civil society's attempts to engage with the system remains effectively invisible in the official case law[238].

Despite these hurdles, the contribution of NGOs is often pivotal in *strategic litigation* cases, where a ruling is expected to have an impact beyond the individual circumstances of the applicant. This practice aligns with the broader global trend defined in scholarship as the "*judicialization of mega*-politics", where courts are increasingly tasked with adjudicating core political controversies that were traditionally the domain of the legislative branch[239]. By providing the Court with specialised information and comparative law data, NGOs assist in adjudicating complex issues. Nevertheless, the current procedural framework strictly limits their standing to this auxiliary role, maintaining the *victim status* requirement as the sole gateway for lodging an application[240].

However, the role of civil society is not confined to the courtroom. A crucial expansion of their function occurred in 2006 with the amendment of *Rule 9* of the Rules of the Committee of Ministers, which governs the supervision of the execution of judgments. This reform significantly broadened access to the accountability mechanisms, allowing NGOs to participate formally in the post-judgment phase. Through written

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[238] V. PASSALACQUA, *Amicus curiae e intervento di terzo davanti alla Corte di Giustizia dell'UE e alla Corte Europea dei Diritti Umani*, in *Eurojus*, n. 4, 2025, pp. 129-130 and 140. The author highlights that approximately one-third of intervention requests are rejected without motivation, which is not mandatory. Furthermore, interventions are typically invisible only if mentioned in the final judgment, leaving a significant number of rejected or unmentioned attempts excluded from official statistics.

[239] R. HIRSCHL, *The Judicialization of Mega-Politics and the Rise of Political Courts*, in *Annual Review of Political Science*, 11, 2008, pp. 93 ff. Hirschl argues that the expansion of judicial power now encompasses "*pure politics*", marking a transition to what he calls "*juristocracy*" (p. 116). In this context, strategic litigation by NGOs represents a form of "*judicialization from below*", where social movements use courts to advance claims that are blocked in the political sphere (p. 106). However, the author warns that transferring such "*existential*" political questions to courts challenges the democratic principle of majoritarian decision-making (p. 94).

[240] Considering the procedural barrier discussed in Section 5.2, namely the risks associated with lack of anonymity and the burden of proving victim status, doctrine has argued for a structural reform to allow for representative actions. According to this perspective, enabling NGOs to file applications on behalf of identified victims while reserving their anonymity, or even in the public interest, would significantly mitigate the hurdles faced by vulnerable groups, such as LGBTQI+ applicants. Such a reform would offer a threefold advantage: it would shield vulnerable individuals from the risks of reprisals associated with public exposure, it would lower the financial and emotional costs of litigation, and it would ensure that systemic human rights violations are brought to the Court even when individual victims are too intimidated to proceed. While the Convention system remains anchored to the concept of individual relief, opening the door to representative actions is increasingly seen as a necessary evolution to protect rights effectively in a context of rising populism and hostility towards minority groups. See F. HAMILTON, N. ALAGIC-BOWDER, *Navigating Admissibility Before the European Court of Human Rights for Lesbian and Gay Human Rights Defenders*, in *International Human Rights Law Review* 13, 2, pp. 359-383, 2024, pp. 381-383.

communications, human rights organisations can provide the Committee of Ministers with a "contextualised assessment" of the implementation process. Often taking the form of *shadow reports*, these interventions allow NGOs to criticise inadequate Action Plans, highlight delays, or expose a lack of interim measures, effectively transforming them into vigilant *watchdogs* in the aftermath of the judgment, ensuring that the Court's rulings translate into tangible domestic changes[241].

Furthermore, the role of NGOs is expanding even in the litigation phase: in the landmark *KlimaSeniorinnen* case (2024)[242], the Court exceptionally granted *locus standi* to an association while denying it to individual applicants. This innovative approach acknowledges that, for complex global issues, collective action by NGOs may be the only effective means to prevent a denial of justice[243].

1. 5. 4 Advisory Function

The Court's advisory jurisdiction can be triggered through two distinct channels. The first, under Article 47 ECHR, allows the Committee of Ministers to request opinions on legal questions concerning the interpretation of the Convention and its protocols. The second, and more recent channel, was introduced by Protocol No. 16, in force since 2018[244].

While Article 47 is reserved for the political body of the CoE, Protocol No. 16 introduced the possibility for the highest national courts to ask the Court an advisory opinion on interpretation issues of the Convention. These highest courts and tribunals are specifically designated by the Member States upon ratification. The opinion, not binding, promotes a preventive dialogue between Strasbourg and the national judges, allowing for the national jurisprudence to be oriented towards a common European interpretation of the Convention[245]. For some scholars, it actually enhances the function of national judges,

[241] A. KÜÇÜKSU, *In the Aftermath of a Judgment: Why Human Rights Organisations Should Harness the Potential of Rule 9*, in *Strasbourg Observers*, 3 March 2021. The author highlights how this procedure has *democratised* access to the execution process, creating a feedback loop that allows the Committee of Ministers to receive assessments from actors with direct knowledge of the local context.
[242] ECtHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, 9 April 2024, App. no. 53600/20.
[243] Ibid., paras. 489, 523-526 and 535. The Court explicitly relaxed the standing rules for associations to reflect the evolving role of civil society in addressing modern challenges. See M. WEWERINKE-SINGH, *Climate Protection Obligations under the European Convention on Human Rights: The KlimaSeniorinnen Judgment*, in *European Constitutional Law Review*, 21, 2025, pp. 360-361.
[244] Signed five years before, in 2013.
[245] I. ZIEMELE, *European Judiciary,* cit., p. 467.

who can resolve uncertainties beforehand, rather than waiting for a retroactive condemnation[246].

Crucially, the request must indicate the factual and juridical context of the case and must be strictly linked to a case pending before the requesting national court[247]. It is evaluated by a group of five judges of the Grand Chamber that decides on the admissibility of the request[248].

The ECHR system is based on constant dialogue between Strasbourg and national courts. This interaction manifests itself both through the obligation to exhaust domestic remedies and through the use of advisory opinions provided for in Protocol No. 16. Both mechanisms reflect a cooperative approach to the protection of rights, in which the Court acts as the final guarantor only after the national courts have exhausted their primary role of protection.

To date (2025), the Grand Chamber has received three requests for advisory opinions under Article 47 and five requests under Protocol No. 16[249].

1. 5. 5 Relationship with the Court of Justice of the European Union

The relationship between the ECtHR and the CJEU is unique, characterised by a partially overlapping membership and a complex institutional history. Originally, the founding treaties of the European Communities did not explicitly include human rights within their core mandate. However, as early as the 1980s, scholars observed that the Luxembourg Court had held that fundamental rights, and general principles of law analogous to them, were "*part of Community law*"[250]. This early recognition laid the groundwork for the complex dialogue between the two European courts that exists today.

The protection of human rights offered by the joint action of the CoE and EU systems, together with the Constitutional Courts at national level, has been described by legal scholarship as a *multilevel system of protection*, where no single court holds absolute hierarchy. The reciprocal cross-referencing of case law makes it possible for the different

[246] G. CAGGIANO, *La tutela europea dei diritti della persona tra novità giurisprudenziali e modifiche istituzionali*, in *Studi sull'integrazione europea*, 2014, pp. 38-39.
[247] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 56.
[248] I. ZIEMELE, *European Judiciary*, cit., 467.
[249] K. REID, *A Practitioner's Guide*, cit., p. 2.
[250] J.G. MERRILLS, *The Development of International Law*, cit., p. 18.

courts to stabilise fundamental rights guarantees, and mitigate the risks of conflicts inherent in a pluralist system[251].

This evolution culminated in the Treaty of Lisbon (2009), which made the Charter of Fundamental Rights binding and explicitly mandated EU's accession to the Convention. However, following the stagnation of the accession agreement, due to the CJEU's Opinion 2/13 citing the particularities of the EU legal order, the relationship now relies on "*dialogue and control*" to avoid contradictory outcomes, a task made more urgent by the EU's enlarged competence in the area of freedom, security, and justice[252].

To manage these two parallel systems without formal accession, the courts rely on complementary mechanisms. On the EU side, Article 52 para. 3 of the Charter ensures that rights corresponding to the Convention have the same meaning and scope. From the Strasbourg perspective, the Court addressed the issue of State responsibility in the landmark *Bosphorus* case (2005)[253]. Here, it established a presumption of equivalent protection: as long as the EU protects fundamental rights effectively, the Court will not intervene[254]. However, as demonstrated in subsequent cases like *M.S.S.* (2011)[255] and *Avotins* (2016)[256], this presumption is not absolute and can be rebutted if the protection in a specific case is found to be "*manifestly deficient*"[257].

Beyond formal institutional links, legal scholarship highlights a profound methodological interaction between described as "*cross-pollination*"[258]. The two courts have evolved from an initial phase of distance to one of mutual reliance. The ECtHR has drawn on CJEU jurisprudence to refine complex legal concepts, such as indirect discrimination, while the Luxembourg Court frequently cites Strasbourg case law to define the precise scope of rights enshrined in the Charter. Importantly, the CJEU increasingly utilises the lever of EU citizenship and free movement to adjudicate on fundamental rights, effectively influencing civil status matters traditionally reserved to Member States.

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[251] G. CAGGIANO, *La tutela europea dei diritti della persona tra novità giurisprudenziali e modifiche istituzionali*, in *Studi sull'integrazione europea*, 2014, pp. 13-14.
[252] A. NUSSBERGER, *The European Court of Human Rights*, cit., p. 37.
[253] ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [*GC], 30 June 2005, App. no. 45036/98.
[254] Ibid., paras. 155-156.
[255] ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011, App. no. 30696/09, paras. 338-340.
[256] ECtHR, *Avotiņš v. Latvia*, 23 May 2016, App. no. 17502/07, paras. 101-105.
[257] A. NUSSBERGER, *The European Court of Human Rights*, cit., pp. 133-134.
[258] C. MCCRUDDEN, *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, in *Cambridge Yearbook of European Legal Studies*, 2013, p. 8.

However, a significant divergence persists regarding the use of comparative reasoning. While ECtHR positions itself within a "*global discursive community*"[259], frequently citing external domestic sources (e.g., the Supreme Courts of Canada, South Africa, or the United States) to establish emerging consensus, the CJEU adopts a more self-referential approach. This methodological gap reflects their distinct ontological functions: the Strasbourg Court operates as a specialised human rights tribunal aiming for universality, whereas the CJEU functions primarily as the constitutional court of a specific legal order, prioritising the autonomy and integration of European governance.

[259] S.E. MERRY, *Human Rights and Gender Violence: Translating International Law into Local Justice,* Chicago, 2006, pp. 228-29, quoted in C. MCCRUDDEN, *Using Comparative Reasoning in Human Rights Adjudication*, cit., p. 29.

Chapter 2: Personal Status and the Concept of its Continuity in The ECtHR case law

CONTENTS: 2.1. What is in a Status? A Simple Word, Multifaceted Concept. – 2.2. The Right to Continuity of Status in the ECtHR Case Law. – 2.2.1. The Right to a Name (and Surname) in The ECtHR Case Law. – 2.2.2. Same-Sex Unions in the ECtHR Case Law. – 2.2.3. Surrogacy in the ECtHR Case Law. – 2.3. The Impact of the ECtHR Jurisprudence on EU Law. – 2.4. Partial Conclusions.

2. 1 What is in a Status? A Simple Word, Multifaceted Concept

This second Chapter is entitled to analyse some of most important issues related to personal status within the case law of the ECtHR, as it will be functional to the analysis of the right to gender identity under the same jurisprudence and since sex/gender is one of the components of the status.

Hence, what's a personal status in the first instance? Personal status defines a natural person's legal-social position within the legal order[260]. Family law and the law of persons mainly define it[261], and it comprises a set of rights, duties, capacities and entitlements that attach to that position. It encompasses several elements, including legal personality and capacity, filiation, marital status, and the person's name. And since the personal status influences family law, in most of the States, it is registered in civil status registers[262].

In Continental systems, it denotes the individual's condition, i.e. the factual situation of a person, and it is distinct from personal law, i.e. the body of rules that govern that condition[263]. Common-law jurisdiction, instead, often blur these two dimensions, using "personal status" to mean the same thing as the French *statut personnel*[264].

However, under the influence of human rights law, the static concept of *status* is undergoing profound evolution. The focus has shifted from a State-centric perspective,

[260] A. DUTTA, *Personal Status*, in *Encyclopedia of Private International Law*, p. 1346. Strictly linked to personal status is the concept of "identity", coined by Viktor Tausek in 1919. Identity is a multidimensional and interdisciplinary concept, which includes both a personal "self" and a collective "we" dimension. See, in this regard, B. LIŻEWSKI, *The Personal Identity of the Human Being and the Right to Privacy from the Perspective of Standards of the European Court of Human Rights: Theoretical Legal Reflections*, in *Białostockie Studia Prawnicze*, 2024, p. 78.
[261] A. DUTTA, *Personal Status,* cit., p. 1346.
[262] Ibid., p. 1346.
[263] G. TEDESCHI, *Personal Status and Statute Personnel*, in *McGill Law Journal*, 1969, p. 452.
[264] Ibid., p. 452.

where the status served primarily for administrative registration and public order, to a person-centric recognition of identity. In this modern framework, status is no longer merely a legal label imposed from above, but a projection of the individual's private life and personal development[265].

Personal identity, although not mentioned in the Convention, has been the object of the ECtHR case law. In the jurisprudence of the Court, the protection of it encompasses different aspects, such as biological family ties, sexual identity, nationality, and the name[266]. While acknowledging this broad spectrum, this Chapter will specifically focus on three of these dimensions, which are considered to be most relevant to the continuity of status cross-border scenarios: the right to a name, the recognition of sexual orientation through same-sex unions, and family ties (specifically filiation through surrogacy). The aspect of gender identity[267], while central to the concept of personal status, will be addressed separately the third Chapter.

International cooperation plays a pivotal role in ensuring the continuity of status across borders. Specifically, the harmonisation of rules and decisions is essential to prevent the emergence of so-called *limping situations*[268], while the adoption of common documentation standards serves as a primary tool to mitigate administrative discrepancies in cross-border cases[269]. However, within EU, harmonization concerning personal status is mainly limited to divorce decisions[270]. Consequently, a methodological shift is

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[265] N. VAN DE POL, *The Right to Personal Identity: On the Protective Potential of Article 8 ECHR*, in E. DORE-HORGAN ET AL. (eds), *The Cambridge Handbook of Human Rights for the Mind*, Cambridge, (forthcoming), pp. 6-7.

[266] Ibid., p. 2. The author finds at least 6 aspects of identity in the ECtHR case law: *"(1) information about biological family ties, (2) sexual identity (including sexual orientation and gender), (3) nationality and ethnicity, (4) culture, (5) images of oneself, and (6) one's name*".

[267] A person's gender was originally fact-oriented, while it is now mostly governed by law. The evidence of this shift is represented by the possibility in most European countries to change their legal sex/gender. See A. DUTTA, *Personal Status*, cit., p. 1346.

[268] For a definition of *limping situations*, see S. DEN HAESE, J. VERHELLEN, *Personal Status across Borders: Family Reunification Procedures meet Private International Law*, in *Family Reunification in Europe*, London, 2024, pp. 43-61. The authors describe these as instances where a person's legal status is considered lawful and valid in one legal order but not in another. As illustrated throughout this Chapter, such discrepancies frequently arise in diverse cross-border contexts, creating legal uncertainty that hinders the individual's fundamental rights.

[269] While the International Commission on Civil Status (CIEC) historically played a key role through its conventions, the organisation is currently facing a crisis due to withdrawals. Consequently, the EU has stepped in with instruments like Regulation (EU) 2016/1191 to simplify administrative formalities and ensure free movement of public documents. See F. MAOLI, *Civil Status and Circulation of Public Documents in EU and Worldwide: The Need for a European Common Framework for Third Countries,* in *Papers di Diritto Europeo,* 2023, pp. 185-186.

[270] A. DUTTA, *Personal Status*, cit., p. 1348. The reference is to the uniform rules on jurisdiction and recognition of judgments in matrimonial matters, originally established by Council Regulation (EC) No

observable in several European jurisdictions: rather than relying strictly on conflict-of-law rules, they are increasingly moving towards the direct recognition of foreign civil status documents, according them the same evidentiary value as national ones[271]. Undoubtedly, this approach would facilitate free movement: it stems from the idea that a personal status legally acquired and documented in one State should be recognised in the State of arrival, limiting the exclusionary effects of the *lex fori*.

This emerging approach marks a significant departure from the traditional paradigm, which was historically anchored in the principle of nationality. Coined by Mancini, it emphasized the stability of the bond between the individual and their country of origin. However, with the evolution of contemporary society and increasing cross-border mobility, it became evident largely relying on nationality as the general connecting factor fails to adequately address the complexity of status challenges and hinders the continuity of personal status[272].

In particular, regarding the recognition of gender, a departure from the original principle of nationality acquires a distinct *human rights* dimension[273]. A pertinent example is found in the German Federal Constitutional Court, which held that applying the national law on Legal Gender Recognition (hereinafter "LGR") exclusively to citizens, excluding foreign residents, violated the constitutional principle of equality[274]. While the specific implications of LGR will be examined in depth in the third Chapter, it is important to note here how the ECtHR has increasingly highlighted that legal recognition of a new status often generates frictions with other protected interests[275].

This friction frequently manifests as a tension between *legal reality*, i.e. what the State registers, and *social or biological reality*, i.e. the individual's lived experience. As will be explored in the Sections on same-sex unions and surrogacy, the Court increasingly

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2201/2003 (Brussels IIa) and now governed by Council Regulation (EU) 2019/1111 (Brussels IIb), applicable since 1st August 2022.

[271] Ibid., p. 1348.

[272] A. DUTTA, *Personal Status*, cit., p. 1348.

[273] Ibid., p. 1349. See also G. ROSSOLILLO, *Personal Identity at a Crossroad Between Private International Law, International Protection of Human Rights and EU Law*, in *Yearbook of Private International Law*, 2009, pp. 154-156.

[274] Bundesverfassungsgericht (German Federal Constitutional Court), Order of 18 July 2006, 1 BvL 1/04. See also Abstract of the Federal Constitutional Court's Judgment of 18 July 2006, 1 BvL 1/04, 1 BvL 12/04, available at this link: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/07/ls20060718_1bvl000104en.html (last access 7th January 2026).

[275] B. LIŻEWSKI, cit., pp. 81-82.

requires that legal status aligns with the underlying social facts, utilising the concept of identity as a strategic tool to bridge this gap and overcome national resistance[276].

Furthermore, within the human-rights discourse, *status* acts as a protected ground for non-discrimination; international covenants list "*birth or other status*" among the categories that may not justify differential treatment[277].

Finally, when the status in question involves minors, the interpretative framework is further constrained by the principle of the best interest of the child[278]. As highlighted in the ECtHR's jurisprudence and confirmed in recent doctrine, this principle acts as a paramount consideration that limits the State's margin of appreciation, often compelling the recognition of bonds that national law would otherwise reject on public policy grounds.

2. 2 The Right to Continuity of Status in the ECtHR Case Law

While the issue of portability of status naturally finds its primary domain within the European Union legal framework, where the Court of Justice acts as the guarantor of citizens' free movement, it is nevertheless crucial to examine the specific role played by the Strasbourg Court in this domain.

Addressing this issue here responds to a dual logic and legal necessity. First, gender identity constitutes a core element of a person's legal status. Consequently, this subject matter is situated at the intersection of Private International Law (PIL) and the protection of human rights. Second, and perhaps more significantly, the definition of minimum standards of protection at the European level acts as a factor of compressing State discretion, reducing the ability of States to invoke the public policy (*ordre public*) exception to refuse recognition of statuses legitimately acquired abroad.

This theoretical contraction finds its concrete application in the Court's recognition of a specific "*right to continuity of status*", derived as a corollary of the right to respect for private and family life under Article 8[279]. This right implies a positive obligation for States to avoid so-called *limping situations*, where an individual possesses a legal status in one

[276] A. MULLIGAN, *Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements*, in *Medical Law Review*, 2018, p. 450.
[277] B. LIŻEWSKI, cit., pp. 84-85.
[278] More on this in the Section on Surrogacy.
[279] L. CARPANETO, *Autonomia privata e relazioni familiari nel diritto dell'Unione europea*, Roma, 2020, p. 267.

jurisdiction but finds it unrecognised in another. The Court's attention is increasingly focused on the discrepancy between legal and factual reality: the guiding principle is that "*legal reality must correspond to social reality*"[280].

Through a line of jurisprudence involving cases such as *Wagner, Mennesson, and Labassee*, the Court has legitimised the exercise of private autonomy in cross-border settings. Crucially, for the Strasbourg system, the origin of the legal situation is largely irrelevant: the continuity of status can be invoked regardless of whether the situation was established in another CoE Member State or in a third country. What triggers the Court's scrutiny is simply whether the refusal to recognise the status constitutes an interference by a Member State's authority[281].

However, this recognition is not always absolute. The ECtHR often accepts a technique known as *downgrade recognition*. This occurs when a legal status established in the State of origin does not exist in the destination State. In such cases, to guarantee continuity, the status is re-qualified into the closest available institute in the domestic legal order, producing more limited effects but avoiding a total legal vacuum[282]. This dynamic between national discretion and the imperative of continuity is evident in three key areas: the right to a name, same gender unions, and filiation matters.

2. 2. 1 The Right to a Name (and Surname) in The ECtHR Case Law

The legal regulation of a person's name (and surname) is situated, like other areas analysed here, at a complex intersection between Private International Law (PIL) and the protection of fundamental human rights. While PIL generally relies on nationality as primary connecting factor to determine the choice of law, reflecting the national interest in stable identification, the connection between one's name and the right to private life has driven significant jurisprudential developments within human rights law[283].

Indeed, the right to a name is considered a constitutive element of one's identity and private life, a principle established by the Court in cases such as *Mentzen* (2004)[284], and

[280] Ibid., translation from Italian by the author.
[281] Ibid., p. 268-269.
[282] Ibid., p. 270.
[283] O. N. RETEA, *Infringement in One's Right to Name, Intrusion in Private Life or Family Life? The European Court of Human Rights Perspective*, in *Perspectives of Business Law Journal*, 2016, p. 133.
[284] ECtHR, *Mentzen v. Latvia*, 7 July 2004, App. no. 71074/01.

Dadouch v. Malta (2010)[285]. In this regard, international human rights law has undergone significant transformation. Since, as seen, it moved from a mainly State-centric focus on *identification*, aimed at registration for administrative and public order purposes, to a person-centric recognition of *identity*, the name is no longer a mere label for classification, but it is viewed as a means for free personal development and the preservation of one's individuality and relationships[286]. Consequently, the legal discourse is nowadays converging towards a specific "*right to one's own name*", limiting the State's ability to impose restrictions solely based on cultural or linguistic preferences[287].

The Convention does not explicitly recognise a right to a name[288]. Nonetheless, starting with the landmark judgment in *Burghartz v. Switzerland* (1994)[289], the Court established that legal issues concerning names and surnames fall within the ambit of the right to respect for private and family life under Article 8[290]. The case concerned a Swiss couple who had married in Germany. Under German law, they chose the wife's surname (Burghartz) as their joint family name, and the husband exercised the right to prefix his birth name to it. However, upon their return to Switzerland, where they resided, the authorities rejected this arrangement. At the time, Swiss law allowed a wife to add her maiden name before the husband's family name but denied the husband the same option. The Court held that this refusal amounted to discrimination based on gender, in violation of Article 14 taken together with Article 8. It recognised the name as a means of personal

[285] ECtHR, *Dadouch v. Malta*, 20 July 2010, App. no. 38816/07. See also ECtHR, *Kus v. Turkey*, 8 December 2015, App. no. 28221/08.
[286] See G. ROSSOLILLO, *Personal Identity at a Crossroad*, cit., p. 143.
[287] F. DE VARENNES, E. KUZBORSKA, *Human Rights and a Person's Name: Legal Trends and Challenges*, in *Human Rights Quarterly*, 2015, pp. 985-986. The authors argue that the right to a name has evolved from a tool for state administration into a core aspect of personal dignity and identity. See also N. VAN DE POL, *The Right to Personal Identity*, cit., pp. 6-7. For a critical analysis of the State's interest, see A.M. GROSS, *Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names*, in *Harvard Human Rights Journal*, 1996, p. 269 ff.
[288] Conversely, other international instruments contain explicit provisions on names, as observed by the Court in the *Burghartz* case, at para. 24. In particular, Article 24 para. 2 of the International Covenant on Civil and Political Rights (ICCPR) provides that "*Every child shall be registered immediately after birth and shall have a name*". Similarly, Article 7 para. 1 of the Convention on the Rights of the Child establishes that "*The child shall be registered immediately after birth and shall have the right from birth to a name*" and Article 8 para. 1 CRC that "*States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference*". Finally, Article 18 of the American Convention on Human Rights provides that "*Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary*".
[289] ECtHR, *Burghartz v. Switzerland*, 22 February 1994, App. no. 16213/90.
[290] Ibid., para. 24. See also L. CARPANETO, *Autonomia privata,* cit., p. 277.

identification and a link to a family; thus, forcing the husband to abandon the name he had used in professional life was disproportionate.

However, it is noteworthy that this extensive interpretation was not unanimous. Three dissenting opinions were attached to the judgment, all challenging the very applicability of Article 8. Particularly significant was the joint dissenting opinion of Judges Pettiti and Valticos, who described the majority's interpretation as "*extreme*". Their objection was threefold: first, the text of Article 8 does not refer to names; second, while the principle of equality of genders is fundamental, it should not be used to artificially expand the scope of the Convention (and, in particular, of Article 8); third, and crucially, the regulation of names, much like nationality, should remain within the exclusive discretion of the State, given the highly fragmented legal landscape across Europe regarding naming conventions[291].

The Court tends to grant a wide margin of appreciation to States in this area. This approach echoes the concerns raised by the dissenting judges in *Burghartz*, emphasising the difficulty of imposing a uniform standard "*in a field in which legal provisions, like opinions, are still very varied*"[292]. However, this discretion narrows significantly when the change of name or surname serves the specific purpose of aligning the legal situation with the social reality of the individual[293]. Nevertheless, Article 8 does not guarantee an unconditional right to change one's name; such a request must be supported by "*sufficiently serious reasons*", such as when the name is inextricably linked to a person's gender identity or ethnic origin[294].

Legal doctrine has identified three main areas where the Court has exercised this scrutiny. The first concerns the transcription or transliteration of names. Here, the case law is not univocal: while in some cases the Court found no violation, prioritising national linguistic rules[295], in others, regarding long-standing usage of the surname[296], or regarding gender identity[297], it found a violation due to the disproportionate impact on private life. The

[291] ECtHR, *Burghartz v. Switzerland*, cit., Joint Dissenting Opinion of Judges Pettiti and Valticos. The Judges argued that the Court was substituting its own view for that of the national legislature in a field where traditions vary significantly, warning against transforming the Convention into a tool for harmonising civil status laws.
[292] Ibid., para. 3.
[293] L. CARPANETO, *Autonomia privata*, cit., p. 278.
[294] N. VAN DE POL, *The Right to Personal Identity,* cit., p. 7.
[295] ECtHR, *Mentzen v. Latvia* (dec.), 7 December 2004, App. no. 71074/01.
[296] ECtHR, *Daróczy v. Hungary,* 1 July 2008, Application no. 44378/05.
[297] ECtHR, *Goodwin v. the United Kingdom*, cit.

second area concerns compound names, where the Court has generally upheld state refusals to register complex combinations[298]. The third area involves noble titles, where the Court has originally rejected applications, refusing to consider hereditary titles as part of the protected name[299], but recently opened towards a recognition of a violation Article 8 when a long-standing use of that surname is present[300].

This jurisprudence has also rigorously tackled gender discrimination, striking down laws that forced women to adopt their husband's surname while denying men the same option, as in *Ünal Tekeli v. Turkey* (2010)[301]. Similarly, in *Cusan and Fazzo v. Italy* (2014)[302], the Court established that the inability for parents to transmit the maternal surname to their children constituted a discriminatory interference with private and family life. The Court identified this rigidity as the legacy of a "*patriarchal conception of the family*"[303], which is no longer compatible with the principle of equality between women and men required by the Convention[304]. This stance was recently reaffirmed in *León Madrid v. Spain* (2021)[305]. Dealing with a law that automatically prioritised the father's surname in case of disagreement between parents, the Court found that such automatism constitutes a discriminatory treatment unjustified by any objective reason, reinforcing the notion that patriarchal traditions can no longer dictate civil status rules[306].

In the context of gender identity, which will be analysed in detail in the next Chapter, this evolution is pivotal. As noted in *Goodwin*, the State's interest in maintaining rigid birth registers must yield to the superior interest of the individual to live in accordance with their identity. Therefore, the refusal to change a name to reflect a gender transition is increasingly viewed as an unjustified interference with private life[307]. Legal scholarship

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[298] ECtHR, *Heidecker-Tiemann v. Germany* (dec.), 6 May 2008, App. no. 31745/02.
[299] L. CARPANETO, *Autonomia privata,* cit. pp. 279-280.
[300] ECtHR, *Künsberg Sarre v. Austria*, 17 January 2023, App. nos. 19475/20 et al., para. 70.
[301] ECtHR, *Ünal Tekeli v. Turkey*, 16 November 2004, App. no. 29865/96. See also F. DE VARENNES, E. KUZBORSKA, *Human Rights and a Person's Name*, cit., pp. 993-994. Discussing *Ünal Tekeli*, the authors highlight that imposing a different surname based on sex/gender is now widely considered discriminatory under international law.
[302] ECtHR, *Cusan and Fazzo v. Italy*, 7 January 2014, App. no. 77/07.
[303] Ibid., para. 67. Translation from French by the author.
[304] F. PESCE*, La tutela europea dei diritti fondamentali in materia familiare: recenti sviluppi*, in *Diritti umani e diritto internazionale*, 2016, p. 44. See also D. VITIELLO, *La disciplina del cognome nella giurisprudenza europea: un inquadramento dei valori sottostanti e del loro bilanciamento*, in A. FABBRICOTTI (ed.), *Il diritto al cognome materno*, Napoli, 2017, p. 110.
[305] ECtHR, *León Madrid v. Spain,* 26 October 2021, App. no. 30306/13.
[306] Ibid., para. 68. See also M. ŽUPAN, M. DRVENTIĆ, *Gender Issues in Private International Law*, in G. CARAPEZZA FIGLIA ET AL. (eds.), *Gender Perspectives in Private Law*, Cham, 2023, p. 22.
[307] F. DE VARENNES, E. KUZBORSKA, *Human Rights and a Person's Name*, cit., p. 988 (footnote 25). The authors cite *Goodwin v. the United Kingdom* as the turning point where the Court recognised that the fair

defines this misalignment between a gendered name and the person's lived identity as "*contradictory embodiment*" [308], describing it as a breach of normative expectations that disrupts the social existence of the individual.

Finally, a crucial dimension of the right to a name established by the Court's case law concerns the principle of continuity, especially in conjunction with the principle of non-discrimination in the choice of law. The principle implies that forcing an individual to bear different name in different jurisdictions, placing the individual in a so-called *limping situation*, hinders the enjoyment of their right to identity. Unless there is a compelling public interest justification, the name legally acquired in another State must be preserved[309]. In *Losonci Rose and Rose*, Swiss authorities prevented the Hungarian husband of a Swiss citizen to choose his national law to determine his surname. This option would have allowed him to keep his original name, while a Hungarian wife in a similar position would have been granted that choice. The Court held that Swiss conflict-of-law rules resulting to a different in treatment based on sex could not be justified[310], thereby affirming that the preservation of one's surname is an essential aspect of personal identity that cannot be restricted by discriminatory legal barriers.

2. 2. 2 Same-Sex Unions in the ECtHR Case Law

The second line of case law considered is the one about the recognition of same-sex, trying to underline the cross-borders implications. First to say, to correctly place this issue within the European space and from a comparative perspective, the trajectory towards the legal recognition of same-sex couples reveals a distinct pattern. Unlike other regional jurisdictions (e.g. the Americas) where judicial intervention often served as the primary push for change, the European landscape has been predominantly shaped by legislative action driven by political and societal advocacy[311]. Nevertheless, judicial recourse retains a critical subsidiary function, acting as a mechanism to call for legal reforms precisely in

balance now tilts decisively in favour of the applicant's right to legal recognition of their new identity, including the change of name.

[308] M. ŽUPAN, M. DRVENTIĆ, *Gender Issues in Private International Law*, cit., p. 8 (citing Connell and Pilcher).

[309] ECtHR, *Losonci Rose and Rose v. Switzerland*, 9 November 2010, App. no. 664/06, para. 51.

[310] Ibid., paras. 47 and 52.

[311] This contrast highlights the different mechanism of legal change: while Europe relied mainly on legislative action often driven by NGOs and political parties, non-European jurisdictions (e.g., Canada, Brazil, and South Africa) predominantly used litigation based on constitutional and human rights to achieve recognition. See D. JANIĆIJEVIĆ, *The Role of the European Court of Human Rights in the Legal Recognition of Same-Sex Couples,* in *Facta Universitatis*, 2021, p. 3.

those contexts where the legislative process has stagnated or failed to ensure adequate protection[312].

To fully understand the Court's stance on the portability of same-sex unions, it is first necessary to look at how the concept of sexual identity has evolved within the Article 8 case law, being it included by the Court under personal identity[313]. Originally, and without surprise, Strasbourg took a restrictive view, accepting general prohibition on homosexual practices as justified for the protection of health and morals"[314]. In this field, a groundbreaking shift occurred with the judgment in *Dudgeon v. the United Kingdom* (1981)[315]. Here, the Court ruled that the adverse effects of the criminalisation of homosexual acts on the life of the applicant outweigh any moral justification[316], recognising sexual activity as a "*most intimate aspect of private life*"[317]. This established the principle, now well-settled, that sexual orientation is a profound part of a person's identity, and its suppression constitutes a serious interference with Article 8[318].

The recognition of sexual orientation as a core component of identity constituted the necessary basis for the subsequent protection of same-sex relationships, and the turning point occurred with the Court's judgment in *Schalk and Kopf v. Austria* (2010)[319]. Prior to this decision, same-sex relationships were primarily protected under the narrower scope of private life, as the Court historically interpreted family protections within a strict "*heteronormative framework*"[320]. By explicitly recognising that "*a cohabiting same-sex*

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[312] This type of actions can be reconducted to the concept of strategic litigation. See J. SCHERPE, *The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights*, in *The Equal Rights Review*, p. 84.

[313] See ECtHR, *S. and Marper v. the United Kingdom* [GC], 4 December 2008, App. nos. 30562/04 and 30566/04, para. 66. See also N. VAN DE POL, *The Right to Personal Identity,* cit., p. 3.

[314] For a brief overview on this case law, see P. JOHNSON, *An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights*, in *Human Rights Law Review*, 2010, p. 75.

[315] ECtHR, *Dudgeon v. the United Kingdom*, 22 October 1981, App. no. 7525/76.

[316] Ibid., para. 60.

[317] Ibid., para. 52.

[318] See also ECtHR, *Smith and Grady v. the United Kingdom*, 27 September 1999, App. nos. 33985/96 and 33986/96, reaffirming that sexual orientation is an essentially private manifestation of human personality; N. VAN DE POL, *The Right to Personal Identity,* cit., pp. 3-4.

[319] ECtHR, *Schalk and Kopf v. Austria*, 24 June 2010, App. no. 30141/04.

[320] E. KUKURA, *Finding Family: Considering the Recognition of Same-Sex Families in International Human Rights Law and the European Court of Human Rights*, in *Human Rights Brief*, 2006, p. 20. Writing prior to the *Schalk and Kopf* turning point, the author criticised the Court's rigid approach, noting that by interpreting the Convention through such a heteronormative lens, the Court created a misalignment between international human rights law and the lived realities of same-sex couples, effectively refusing to apply the *living instrument* doctrine to family structures that did not resemble the heterosexual model. See also S.L. COOPER, *Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights*, in *German Law Journal*, 2011, p. 1751.

couple living in a stable de facto partnership, falls within the notion of 'family life'"[321] under Article 8, the Court laid the necessary dogmatic foundation for claiming the continuity of such status across borders. Once the existence of family life is established, the complete non-recognition of the relationship becomes difficult to justify under the Convention[322].

Despite this development, in *Schalk and Kopf* no violation was found regarding the right to marry[323]. The Court granted a wide margin of discretion to States, leaving them the competence to regulate and the possibility to exclude same-sex marriage. To justify maintaining this exclusion, the Court explicitly set aside the interpretation of the Convention in the light of "*present-day conditions*", the so-called *living instrument* doctrine. Instead, it reverted to the historical context of the 1950s, anchoring the definition of marriage to the traditional intent of the drafters. Critics have noted that, in order to draw a specific line between "*real*" and "*unreal*" couples regarding marriage, the Court effectively decided to "*travel 60 years back in time*", creating a methodological inconsistency with its standard evolutive approach[324]. This judicial compromise, balancing the recognition of family life with the exclusion from marriage, effectively amounted to a "*simultaneous flirting*"[325] with conflicting legal paradigms[326].

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[321] ECtHR, *Schalk and Kopf v. Austria*, cit., para. 94.

[322] J. SCHERPE, *The Legal Recognition of Same-Sex Couples in Europe,* cit., pp. 90-91. See also S.L. COOPER, *Marriage, Family, Discrimination & Contradiction,* cit. The author describes the *Schalk and Kopf* judgment as "*oxymoronic*" (p. 1748), arguing that by recognising the existence of a family life but failing to impose a positive obligation to protect it, the Court endorsed a "*legal vacuum*" (p. 1761), leaving same-sex families in a state of recognised vulnerability. The decision to include same-sex couples within the concept of family was also described as a judicial "*trade-off*": by simultaneously upholding the exclusion from marriage, the Court effectively reinforced a hierarchy where same-sex partnerships, though recognised, remain structurally distinct from and inferior to the traditional heterosexual mode. On this, see D.A. GONZALEZ-SALZBERG, *The Making of the Court's Homosexual: A Queer Reading of the European Court of Human Rights' Case Law on Same-Sex Sexuality*, in *Northern Ireland Legal Quarterly*, 2014, p. 384.

[323] ECtHR, *Schalk and Kopf v. Austria*, cit., para. 63.

[324] GONZALEZ-SALZBERG, *The Making of the Court's Homosexual*, cit., p. 384. See also M. SHAHID, *The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis*, in *Erasmus Law Review*,2017, p. 193. The paper offers a critique about the Court's reliance on consensus, arguing that offering a wide margin of appreciation in cases involving sensitive moral issues effectively allows discriminatory treatment of minorities to persist, as States may prioritise public or political interests over equal rights.

[325] F.R. AMMATURO, *The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe*, in *Social & Legal Studies*, 2014, p. 178.

[326] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU. The Cases of Reproductive Matters and Legal Recognition of Same-Sex Relationships*, Cambridge, Antwerp, Portland, 2015, p. 364. See also R. HUNTER, *The Reproduction of Gender Difference and Heteronormativity in Family Law*, in G. CARAPEZZA FIGLIA ET AL. (eds.), *Gender Perspectives in Private Law*, Cham, 2023, pp. 30-32, where the author argues that this dynamic reveals the resilience of the "heteronormative" model: legal recognition is often contingent on the ability to replicate the traditional features of heterosexual marriage, creating a system where equality is measured by "sameness" to the heterosexual norm.

Critics, including the dissenting judges in *Schalk and Kopf*, argued that this approach created a paradoxical legal vacuum[327]. By recognising the existence of family life but failing to impose a positive obligation to protect it, the Court effectively left same-sex families in a state of recognised vulnerability without legal cover.

This restrictive approach on marriage contrasts with the strict scrutiny applied to other forms of differential treatment. Following *Schalk and Kopf*, the Court established that any difference in treatment based on sexual orientation required "*particular serious reasons by way of justification*"[328]. The standard is rigorous, as States must prove that excluding same-sex couple from legal recognition is strictly necessary to achieve a legitimate aim, such as the protection of the traditional family. Given that granting rights to one group does not inherently damage the rights of others, this high threshold makes the refusal to recognise status increasingly indefensible, paving the way for the portability of rights[329].

This approach was further applied in *Vallianatos and Others v. Greece* (2013)[330]. In this case, examining a law that excluded same-sex couples from civil unions, the Court went beyond the mere assessment of material rights. The judgment explicitly recognised that a legal framework for recognition possesses an "*intrinsic value*"[331] for the applicants, irrespective of the practical benefits attached to it. By acknowledging this, the Court reinforced the notion that the legal status itself is a component of the couple's dignity[332]. In the same year, the priority accorded to the effective recognition of same-sex unions was further demonstrated by the Court's position when this right conflicts with individual conscience[333].

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[327] ECtHR, *Schalk and Kopf v. Austria*, cit., Joint Dissenting Opinion of Judges Rozakis, Spielmann and Jebens, para. 4.
[328] ECtHR, *Schalk and Kopf v. Austria*, cit., para. 97.
[329] D. JANIĆIJEVIĆ, *The Role of the European Court of Human Rights in the Legal Recognition of Same-Sex Couples*, cit., p. 7.
[330] ECtHR, *Vallianatos and Others v. Greece*, 7 November 2013, App. nos. 29381/09 and 32684/09.
[331] Ibid., para. 81.
[332] M. SHAHID, *The Right to Same-Sex Marriage*, cit., p. 187. The Court explicitly rejected the Greek government's argument which restricted civil unions to parents: the judgment clarified that "*Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples*" (para. 81). See also F. PESCE, *La tutela europea dei diritti fondamentali in materia familiare*, cit., p. 20.
[333] Indeed, in In *Eweida and Others v. the United Kingdom* (ECtHR, 15 January 2013, App. nos. 48420/10, 59842/10, 51671/10 and 36516/10), the Court established that the State's interest in ensuring non-discriminatory access to civil unions justifies the restriction of the conscientious objection of public officials. See also See C. MCCRUDDEN, *Marriage Registrars, Same-Sex Relationships, and Religious Discrimination in the European Court of Human Rights*, in *SSRN Electronic Journal*, 2016, p. 11.

With those latter cases, the ECtHR jurisprudence prepared the ground for the outcome reached in the judgment in *Oliari and Others v. Italy* (2015)[334]. In this decision, the Court explicitly acknowledged a global trend toward same-sex marriage, citing for instance the case *Obergefell* by the US Supreme Court[335], but nonetheless maintained a conservative view on Article 12. Citing the persisting lack of European consensus[336], it refused to apply an evolutive interpretation to the right to marry, limiting the positive obligation to the provision of a legal framework under Article 8[337].

The tension between national public policy and the portability of status is perhaps most visible in the recognition of same-sex marriages contracted abroad. Some scholars anticipated that the principles established in cross-border adoption cases, such as *Wagner v. Luxembourg* (2007)[338], would logically extend to this domain: if Article 8 requires the recognition of family ties lawfully created abroad to protect the child's best interests, similar reasoning should apply to protecting the family life of same-sex couples moving across borders[339]. This theoretical framework was confirmed in the landmark judgment in *Orlandi and Others v. Italy* (2017)[340], that represents a watershed moment in this type of litigation. While the Court reaffirmed that the Convention does not impose an obligation to grant same-sex marriage access[341], it established that the refusal to recognise status acquired abroad (and the specific legal reality associated with it) violated Article 8[342].

Applying the logic of downgrade recognition, the Court mandated that the relationship established abroad must be recognised domestically through a legal framework ensuring equivalent protection (e.g., civil unions). This mechanism allows States to engage in a form of "*partial accommodation*": they respect the continuity of the couple's status while

[334] ECtHR, *Oliari and Others v. Italy*, 21 July 2015, App. nos. 18766/11 and 36030/11.
[335] Ibid., para. 65.
[336] Ibid., para. 192.
[337] Ibid., para. 185. See also M. SHAHID, *The Right to Same-Sex Marriage*, cit., pp. 190-191. Legal scholarship suggests that this reluctance comes from a strict application of the consensus inquiry: unlike other areas where emerging trends might suffice, regarding the specific right to marry under Article 12, the Court appears to require a clear numerical majority of Member States to trigger an evolutive interpretation. Until this majority is reached, the margin of appreciation remains wide, effectively deferring the matter to national sovereignty. On this point, see C. POPPELWELL-SCEVAK, *The European Court of Human Rights and Same-sex Marriage: The Consensus Approach*, in *PluriCourts Research Paper*, 2016, pp. 45-47.
[338] ECtHR, *Wagner and J.M.W.L. v. Luxembourg*, 28 June 2007, Application no. 76240/01.
[339] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., pp. 397-398.
[340] ECtHR, *Orlandi and Others v. Italy*, 14 December 2017, App. nos. 26431/12; 26742/12; 44057/12 and 60088/12.
[341] Ibid., para. 192.
[342] Ibid., para. 210.

symbolically protecting the traditional definition of marriage by assigning a different *nomen* to the relationship[343]. Hence, this interpretation confirms that while the *nomen* (marriage) might not be portable, the status (i.e., the legal recognition of the couple's life) must be continuous[344]. The Court's position aligns with the idea of "*functional equivalent*": while States may refuse the specific title of marriage due to its deep-rooted social and cultural connotations, they are nonetheless obliged to provide a legal framework that secures the substantive rights and duties of the couple's family life[345].

This jurisprudential evolution culminated in the Grand Chamber judgment in *Fedotova and Others v. Russia* (2023)[346]. Here, the Court confirmed the principle that Article 8 imposes a positive obligation on all Member States to provide a specific legal framework for same sex couples, grounding this duty not only in family life, but also in the concept of "*private social life*"[347].

The standard of protection imposed by the Court, for some, remains ambiguous. By requiring Member States to provide a legal framework that is "*adequate*"[348], without

[343] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., p. 624.
[344] ECtHR, *Orlandi and Others v. Italy,* cit. See also L. CARPANETO, *Autonomia privata,* cit., p. 270.
[345] On the theoretical distinction, see J. SCHERPE, *The Legal Recognition of Same-Sex Couples in Europe,* cit., pp. 85-86 and 90. The author discusses the concept of "*functional equivalent*" (p. 85) and notes that while the Court allows States discretion regarding the name "marriage" due to its social significance (p. 90), it mandates legal recognition for same-sex couples under the protection of family life. See also RADONJIĆ A., *European Court of Human Rights Caselaw on the Right of the Same-Sex Couples to Marry. A View from a Social Justice Perspective*, in *Političke perspektive*, 2023, p. 81 ff. The author analyses the Court's interpretation, obliging legal recognition while permitting the refusal of marriage based on "*dominant moral beliefs*", through the lens of social justice theories, questioning whether such a compromise satisfies the requirements of justice. While the author describes the Court's approach as "*pragmatic*" (p. 86) insofar as it solves some practical issues, the author concludes that this compromise fails the test of justice under utilitarian, libertarian and natural law theories. It finds only limited, temporary justification from a Rawlsian perspective, on the assumption that the Court's evolutive interpretation will eventually lead to full equality.
[346] ECtHR, *Fedotova and Others v. Russia*, 17 January 2023, Applications nos. 40792/10, 30538/14 and 43439/14.
[347] Ibid., paras. 143 and 178. This reasoning regarding the restriction of State discretion was doctrinally anticipated by S.L. COOPER, *Marriage, Family, Discrimination & Contradiction*, cit., p. 1762. Writing more than a decade prior to Fedotova, the author argued that given the emerging consensus, the State's margin of appreciation should no longer apply to the question of *whether* to recognise same-sex relationships but should be restricted solely to the discretion of determining the specific modality of such recognition. However, critical legal scholarship remains sceptical about the outcome of this approach. As Hodson observes, while the judgment mandates adequate recognition, it simultaneously entrenches a "*heteronormative*" hierarchy. Indeed, by steadfastly refusing to apply Article 12 and treating marriage as a special status distinct from other forms of union, the Court has effectively institutionalised a peculiar and narrow construct of same-sex relationship: legally secured, yet symbolically subordinate. See also L. HODSON, *The European Court of Human Rights and Same-Sex Marriage: Incompatible Bedfellows?*, in *Journal of Social Welfare and Family Law*, 2025, pp. 76-82.
[348] ECtHR, *Fedotova and Others v. Russia*, cit., para. 190.

defining the specific content of rights, the judgment risks validating "*barebones*"[349] recognition regimes. This lack of clarity creates potential friction with the principle of continuity of status: if domestic legislation need only to be adequate rather than equivalent, the continuity of a full marital status acquired abroad may still face significant erosion when transposed into national legal systems.

2. 2. 3 Surrogacy in the ECtHR Case Law

To understand the Court's approach to surrogacy, one must first recognise the central role of biological identity. Indeed, the Court's jurisprudence identifies the knowledge of one's biological origins as a fundamental component of personal identity[350]. In seminal cases such as *Mikulić v. Croatia* (2002)[351] and *Odièvre v. France* (2003)[352], the Court established that individuals have a "*vital interest*"[353] in establishing the "biological truth" of their parentage. However, this right is not absolute, and must be balanced against competing interests, such as the right of the biological parent to remain anonymous in cases of anonymous birth or donation[354].

In this field, the Court's case law reveals a progressive evolution: while initially granting a wide margin of appreciation to States in balancing these rights, the ECtHR has moved toward a narrow discretion, increasingly prioritising the child's interest in personal development and autonomy over the protection of adult privacy, as in *Godelli v. Italy* (2012)[355]. Biological identity, then, is increasingly seen by the Court as a constitutive element of personal identity, introducing the positive obligation for States to ensure its legal recognition[356].

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[349] Ibid., partly dissenting opinion of Judge Pavli, joined by Judge Motoc, para. 7. On the geopolitical context of this approach, see also M. SHAHID, *The Right to Same-Sex Marriage*, cit., p. 196, where the author contextualises the Court's reluctance to impose a uniform marriage obligation as a reflection of the broader "*East-West divide*" within the CoE. Specifically, the author highlights the disparity between Western and Eastern States regarding the consolidation of democratic values and the social acceptance of diversity, which influences the Court's reliance on regional consensus.
[350] See, for instance ECtHR, *Gaskin v. the United Kingdom*, 7 July 1989, App. no. 10454/83, para. 49; ECtHR, *Mikulić v. Croatia*, 7 February 2002, App. no. 53176/99, para. 55; ECtHR, *Odièvre v. France* [GC], 13 February 2003, App. no. 42326/98, para. 29.
[351] ECtHR, *Mikulić v. Croatia*, cit.
[352] ECtHR, *Odièvre v. France* [GC], cit.
[353] ECtHR, *Mikulić v. Croatia*, para. 62.
[354] ECtHR, *Odièvre v. France* [GC], cit., para. 44.
[355] ECtHR, *Godelli v. Italy*, 25 September 2012 App. no. 33783/09, para. 57.
[356] N. VAN DE POL, *The Right to Personal Identity,* cit., pp. 2-3.

More broadly, this approach aligns with the Court's expansion of Article 8 to cover the sphere of reproductive rights. This judicial evolution marks a significant shift from the case law on Article 12, historically limited to the right of founding a family within marriage. Under Article 8, the Court has recognised the decision to become, or not to become, a genetic parent not merely as a family matter, but as a core aspect of personal autonomy and physical and social identity[357].

Furthermore, this protection extends to the choice of the circumstances of becoming a parent. Consequently, the right to conceive a child includes the right to make use of medically assisted procreation techniques for that purpose, placing the recourse to such techniques within the protective ambit of private life[358].

The continuity of family status faces one of its most complex challenges in the field of filiation, particularly in situations concerning children born abroad through surrogacy. This practice, defined by the Court as an arrangement where a woman carries a child with the specific intent of surrendering parental rights at birth[359], gives rise to significant legal issues when dealing with so-called *gestational surrogacy*, where the child is genetically unrelated to the surrogate[360]. This practice remains highly divisive across Europe, creating a legal landscape where the Court must navigate between absolute bans and varying degrees of tolerance[361].

Some scholars define this phenomenon as a form of "*procreative tourism*"[362], where citizens travel to jurisdictions with more permissive laws to bypass domestic prohibitions,

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[357] A. MULLIGAN, *Identity Rights and Sensitive Ethical* Questions, cit., pp. 451-452. In the article, the author contextualises the surrogacy cases within the broader Article 8 jurisprudence on medically assisted reproduction, citing *Evans v. UK* and *S.H. v. Austria* as examples where the Court extended Article 8 protection to the decision to become a parent. See also N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., pp. 17-20.

[358] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., p. 20. The author refers to the cases such as *Ternovsky v. Hungary* (2010), *V.C. v. Slovakia* (2011), and *S.H. v. Austria* (2011).

[359] EUROPEAN COURT OF HUMAN RIGHTS, *Key Theme - Article 8 Surrogacy* (August 2025), p. 1.

[360] Ibid.

[361] Indeed, the legal landscape is fragmented, ranging from countries that permit commercial surrogacy (e.g., Ukraine, and former Member State Russia) to those that strictly ban it (e.g., France, Germany, Italy), creating inevitably complex conflict of laws. See A. MULLIGAN, *Identity Rights and Sensitive Ethical Questions*, cit., p. 450. See also J.W. MÄRZ, *Challenges Posed by Transnational Commercial Surrogacy: The Jurisprudence of the European Court of Human Rights*, in *European Journal of Health Law*, 2021, pp. 263-264. See also C. DANISI, *Maternità surrogata come reato "universale": considerazioni di diritto internazionale e dell'Unione europea*, in *GenIUS*, 2024, pp. 9-11, where the author notes that while the Convention does not grant a right to become parent nor oblige States to legalise surrogacy, this margin of appreciation narrows significantly when the identity of a child already born is at stake.

[362] See, for example, V. PIERSANTI, F. CONSALVO, F. SIGNORE, A. DEL RIO, S. ZAAMI, *Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspectives?*, in *Medicina*, 2021, p. 1 ff. Nonetheless, it is a debated term. Some calls for the use of other concepts, such as "reproductive exile" in order to grasp the complexity of the experience of those who travel abroad to access

subsequently presenting national authorities with a *fait accompli* upon their return. Regardless of the terminology employed, this practice places States that prohibit surrogacy in the position of having the duty to manage the effects of extraterritorial conduct that contrasts with their own public policy[363].

In this complex context, the Court opposes the existence of *limping statuses*, especially when the wellbeing of the minor is at stake. The Court's reasoning relies on a clear distinction based on the existence of a biological link between the parent and the child.

In this regard, the leading judgments in *Mennesson*[364] and *Labassée v. France* (2014)[365] established a pivotal distinction. While States, within their margin of appreciation, may legitimately refuse to register the foreign birth certificate regarding the family life of the intended parents to discourage surrogacy[366], they cannot deny the legal parent-child relationship when a biological link exists[367].

Specifically, in *Mennesson* the Court found no violation regarding family life because the parents were not prevented from living with the children in France[368]; in other words, the ECtHR observed that the practical impact of the recognition refusal was limited. However, the Court found a violation of the child's private life[369]. The Court focused on

techniques that are banned in their home country. See M.C. INHORN, P. PATRIZIO, *Procreative tourism: debating the meaning of cross-border reproductive care in the 21st century*, in *Expert Review of Obstetrics & Gynecology*, 2012, p. 509 ff.

[363] C. CAMPIGLIO, *Surrogazione di maternità transnazionale e limite dell'ordine pubblico*, in F. PESCE (ed.), *La surrogazione di maternità nel prisma del diritto*, Napoli, 2022, p. 61. See also C. DANISI, *Maternità surrogata come reato "universal",* cit., pp. 4-6. Regarding the clash with public policy, the author cautions against the stereotype that surrogacy is inherently incompatible with human rights, and notes that international bodies (e.g., UN Special Rapporteur on the sale, sexual exploitation and sexual abuse of children) advocate for regulation rather than absolute bans to better protect the individuals involved. See also K. LEMMENS, *Cross-border surrogacy and the European Convention on Human Rights: The Strasbourg Court caught between "fait accompli", "ordre public", and the best interest of the child*, in *Netherlands Quarterly of Human Rights*, 2024, p. 177, who notes that cross-border surrogacy forces legal systems to confront a dilemma: strictly enforcing domestic bans or protecting the child's best interests, as the judges cannot ignore the factual reality of a child already born.

[364] ECtHR, *Mennesson v. France*, 26 June 2014, App. no. 65192/11.

[365] ECtHR, *Labassée v. France*, 26 June 2014, App. no. 65941/11.

[366] ECtHR, *Mennesson v. France,* cit., para. 92; ECtHR, *Labassée v. France*, cit., para. 74.

[367] ECtHR, *Mennesson v. France,* cit., para. 100; ECtHR, *Labassée v. France*, cit., para. 78. Regarding this, even though the Court rarely explicitly invokes public morals as a formal justification in surrogacy jurisprudence, recent legal scholarship notes that moral considerations remain the silent engine behind national restrictive choices. These ethical grounds often implicitly influence the judicial positioning, placing the abstract morality of the State against the concrete rights of the individuals involved. See L. POLI, *Tutela dei valori morali e pluralismo nella giurisprudenza della Corte europea dei diritti umani*, Napoli, 2024, p. 207. See also A. BALZANO, *Gestazione per altri e mercato della riproduzione*, in *il Mulino*, 2017, pp. 566-568.

[368] ECtHR, *Mennesson v. France*, cit., para. 92.

[369] Ibid., paras. 96-100.

the "*legal uncertainty*"[370] surrounding the children's status, specifically regarding their lineage and nationality, which was liable to have negative repercussions on the definition of their personal identity[371].

As observed, the Court prioritised the *biological truth* as an essential aspect of the individual's identity, which significantly narrowed the State's margin of appreciation[372]. According to legal scholars, this approach reflects a strategic use of identity rights: by framing the issue through the lens of the child's identity rather than the parents' family life, the Court bypasses the sensitive ethical debate on surrogacy itself, focusing instead on the concrete consequences for the individual[373].

As noted by legal scholarship, denying recognition in these cases would not only place children in a situation of legal uncertainty, but it would also effectively "punish" them for the parents' conduct. In this context, Koffeman highlights a shift in the application of the *best interest* principle: while States often invoke the abstract interest of the future child to justify bans on surrogacy, citing the risks of commodification, the Court prioritises the concrete interest of the child already born to preserve their identity and legal security[374]. Thus, the imperative of continuity and the best interest of the child override public policy exceptions when the core identity of the minor is at stake[375].

This child-centred approach has raised concerns about unintended consequences. Indeed, the *Mennesson* ruling removed a significant disincentive for cross-border surrogacy: the risk of the non-recognition of the child's nationality. Critics argue that by mandating

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[370] Ibid., para. 96.

[371] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., p. 65. See also S. TONOLO, *Identità personale, maternità surrogata e superiore interesse del minore nella più recente giurisprudenza della Corte europea dei diritti dell'uomo*, in *Rivista di diritto internazionale privato e processuale*, 2015, pp. 206-207.

[372] A. MULLIGAN, *Identity Rights and Sensitive Ethical Questions*, cit., pp. 457-461. The author notes that the Court separated the analysis of family life from private life. The violation was found only under private life because the refusal to recognise the biological link created uncertainty regarding the child's nationality and identity, which constitutes an essential aspect of the individual.

[373] A. MULLIGAN, *Identity Rights and Sensitive Ethical Questions*, cit., pp. 450 and 456. The concept of identity, in the author's view, allows the Court to sidestep the moral controversy surrounding surrogacy, creating a "*shield*" for the child against the State's public policy exception.

[374] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., pp. 319-320.

[375] F. PESCE, *La tutela europea dei diritti fondamentali in materia familiare*, cit., pp. 42-43. On broader interpretative framework, see G. CAGGIANO, *La tutela europea dei diritti della persona*, cit., p. 34. Although referencing different case law (*Neulinger and Shuru v. Switzerland*), the author analyses how the Court consistently employs the *best interests of the child* principle as a paramount criterion to restrict the national margin of appreciation in cases involving minors. According to legal scholarship, this jurisprudential shift suggests that the best interest of the child has evolved from a mere consideration into a counter-limit to public policy, capable of overriding national prohibitions when the child's identity is considered. See S. TONOLO, *Identità personale, maternità surrogata e superiore interesse del minore*, cit., pp. 208-209.

recognition, the Court signalled that the effects of surrogacy are acceptable as long as surrogacy occurs outside national borders, potentially encouraging cross-border surrogacy in jurisdictions with fewer protections for surrogate mothers[376].

However, in *D. and Others v. Belgium* (2014)[377], the Court clarified that States are under no obligation to authorise the entry of a child born to a surrogate abroad without first subjecting the case to some form of legal examination[378]. In this decision, the temporary refusal to issue travel documents pending DNA verification was found to be within the State's margin of appreciation, as it served the legitimate aim of preventing human trafficking[379].

Partly in response to these fears of uncontrolled deregulation, the limits of the obligation to recognise the legal parent-child relationship were clarified in *Paradiso and Campanelli v. Italy* (2017)[380]. The case concerned a couple who entered a surrogacy agreement in Russia; although the foreign birth certificate indicated a biological link with the intended father, subsequent DNA testing revealed no genetic connection to either parent. Reversing the Chamber's decision, the Grand Chamber ruled that no *de facto* family life existed. This conclusion was based on three concurrent factors: the absence of any biological tie[381], the short duration of cohabitation (8 months)[382], and the legal uncertainty of the ties, created by the applicant's own conduct in violation of Italian law[383].

While the shift from *Mennesson* to *Paradiso* may initially suggest a retreat by the Court in favour of a wider State discretion, academic analysis offers a more nuanced reading of the ECtHR's approach, centred on the concept of identity. Indeed, these two judgments can be seen as consistent if one considers that the margin of appreciation operated dynamically, contracting significantly where the core of private life, specifically genetic history, is at stake. Thus, the concept of biological truth emerges once again as a pivotal factor in the Court's reasoning. In *Paradiso*, the absence of this biological component

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[376] N. BALA, *The Hidden Costs of the European Court of Human Rights' Surrogacy Decision*, in *Yale Journal of International Law Online*, 2014, pp. 14-15. The author argues that while the decision rightly protected children from legal limbo, it failed to address the rights of surrogates, creating a gap that could fuel exploitation in developing countries without uniform international regulation.
[377] ECtHR, *D. and Others v. Belgium (dec.),* 8 July, 2014, App. no. 29176/13.
[378] Ibid., paras. 59-62.
[379] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., pp. 67-68.
[380] ECtHR, *Paradiso and Campanelli v. Italy* [GC], 24 January 2017, App. no. 25358/12.
[381] Ibid., para. 148.
[382] Ibid., paras. 151-153.
[383] Ibid., paras. 154-156. For a detailed analysis of the three grounds used to reject the protection of family life, see M. ILIADOU, *Surrogacy and the ECtHR: Reflections on Paradiso and Campanelli v Italy*, in *Medical Law Review*, 2018, pp. 146-147.

meant that the high threshold of identity protection was not reached, thereby permitting the State to prioritise its public policy objectives over the *de facto* relationship[384].

However, the heavy reliance on the applicants' behaviour has sparked debated. Indeed, legal scholarship has critically observed that by focusing on the parents' illegal conduct, the Court effectively treated the family unit as illegitimate[385]. This approach contrasted with previous case law, such as *Wagner* where the Court prioritised the continuity of status even in cases of adoption that bypassed national laws. In *Paradiso,* however, the Court held that "*weighty public interests*"[386], namely putting an end to an illegal situation and preventing the sale of children, justified the removal of the child[387]. The interference was deemed necessary to protect the State's exclusive prerogative to regulate adoption and filiation, overriding the individual interest in maintaining a relationship that lacked a biological foundation[388].

Nevertheless, many scholars warn against treating *Paradiso* as a general rule for all non-biological cases. In this view, the facts of the case were considered atypical and extraordinary[389]: unlike other surrogacy cases, the intended parents' status was uncertain even under the law of the country of origin (Russia), and the child was not a party to the proceedings. Consequently, the decision should be viewed as a specific response to extreme illegality rather than a blanket denial of protection for non-biological families[390].

This distinct approach regarding non-biological ties was further consolidated in *Valdís Fjölnisdóttir and Others v. Iceland* (2021)[391]. The case concerned a female same-sex couple who had a child via surrogacy in California using donated gametes, thus lacking any genetic link to the child. Although recognised as parents in the US, the Court found that Iceland's refusal to recognise the legal parent-child relationship did not violate Article

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[384] See A. MULLIGAN, *Identity Rights and Sensitive Ethical Questions*, cit., p. 468.
[385] M. ILIADOU, *Surrogacy and the ECtHR: Reflections on Paradiso and Campanelli v Italy*, cit., 148-150.
[386] ECtHR, *Paradiso and Campanelli v. Italy* [GC], cit., paras. 203-204.
[387] M. ILIADOU, *Surrogacy and the ECtHR*, cit. pp. 148, 150 and 152. The author criticises the judgment for seemingly distinguishing between legitimate and illegitimate families based on the parents' conduct, a departure from the reasoning in *Wagner v. Luxembourg* and previous case law. Furthermore, the author questions the proportionality assessment, arguing that, as also held by the Court, the separation of a child is typically a measure of last resort in cases of immediate danger, which was absent in this case.
[388] EUROPEAN COURT OF HUMAN RIGHTS, *Key Theme - Article 8 Surrogacy*, cit. See also F. PESCE*, La tutela europea dei diritti fondamentali in materia familiare*, cit., p. 43.
[389] See, for instance, K. LEMMENS, *Cross-border surrogacy and the European Convention on Human Rights*, cit., pp. 180-181.
[390] See, *inter alia,* J.W. MÄRZ, *Challenges Posed by Transnational Commercial Surrogacy*, cit., pp. 275-276; A. MARGARIA, *Parenthood and Cross-Border Surrogacy: What is 'New'? The ECtHR's First Advisory Opinion*, in *Medical Law Review*, 2020, p. 422.
[391] ECtHR, *Fjölnisdóttir and Others v. Iceland*, 18 May 2021, App. no. 1552/17.

8[392]. The ECtHR reaffirmed that where no biological link exists, the State acts within its margin of appreciation, provided the decision is proportionate[393].

The variety and complexity of the cases brought before the Court demonstrate that regulating transnational surrogacy involves what has been described as a "*Herculean task*": State authorities must navigate the tension between avoiding the sanctioning of children for their parents' conduct and ensuring they do not "*reward*" the circumvention of national bans[394], leaving the Court to adjudicate on these sensitive matters.

Finally, regarding the intended mother, who typically lacks a biological link, the jurisprudence has further evolved following the request for clarification by the French Court of Cassation. In its Advisory Opinion of 2019[395], the ECtHR refined the principles set out in *Mennesson*. The Court established that, while the child's right to respect for private life requires the domestic law to provide a possibility of recognition of the parent-child relationship, this recognition does not necessarily have to take the form of transcription of the foreign birth certificate[396].

With this *Opinion*, the Court introduced a specific criterion: the relationship must be legally endorsed at the latest once the link between the child and the intended parent has become a "*practical reality*"[397]. However, the choice of means remains within the State's margin of appreciation; adoption is deemed an acceptable alternative to transcription,

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[392] Ibid., para. 123.

[393] For a critical commentary on the case, see J.W. MÄRZ, *What Makes a Parent in Surrogacy Cases? Reflections on the Fjölnisdóttir et al. v. Iceland Decision of the European Court of Human Rights*, in *Medical Law International*, 2021, p. 272 ff. The author is particularly concerned about the requirement of a biological link as necessary for the parenthood recognition, arguing that this requirement should not absolve the State from preventing statelessness and parentlessness for the child. See also K. LEMMENS, *Cross-border surrogacy and the European Convention on Human Rights*, cit., p. 184.

[394] J.W. MÄRZ, *Challenges Posed by Transnational Commercial Surrogacy*, cit., p. 279.

[395] ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Request no. P16-2018-001, 10 April 2019. For a critical analysis, see L. POLI, *Il primo (timido) parere consultivo della Corte europea dei diritti umani: ancora tante questioni aperte sulla gestazione per altri*, in *Diritti umani e diritto internazionale*, 2019, pp. 418-420. The author describes the opinion as "*shy*" (from Italian, "*timido*"), suggesting that the Court, in its effort to secure unanimity, missed an opportunity to provide bolder guidance on bio-law issues, such as the one considered, leaving significant questions unsolved regarding the specific modalities of recognition.

[396] ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother,* cit., paras. 51-53.

[397] Ibid., para. 49.

provided the proceedings are "*prompt and effective*"[398] to avoid leaving the child in a prolonged state of legal uncertainty[399].

This functional approach was applied in the subsequent case *C. and E. v. France* (2019)[400] and reaffirmed in *D. v. France* (2020)[401], where the Court confirmed that the difference in treatment between genetic father (transcription) and the intended mother (adoption) is justified by the State's need to afford additional protection to the best interest of the child through the scrutiny inherent in adoption proceedings[402].

Subsequent jurisprudence, such as *Bonzano and Others v. Italy*[403], confirmed this stance. The ECtHR clarified that a partial refusal to transcribe the birth certificate, specifically regarding the intended parent, does not violate Article 8 if the national legal system provides an alternative mechanism, such as adoption in particular cases, to legally secure the family tie[404]. Thus, the violation arises only from a radical refusal that leaves the child in a legal limbo without any possibility of recognition[405].

Crucially, this jurisprudential framework has been explicitly extended to same-sex couples. In *D.B. and Others v. Switzerland* (2022)[406], the Court applied the principles set out in *Mennesson* and the *Advisory Opinion* to a gay couple who had children via surrogacy in the United States. The judgment confirmed that the refusal to recognise the genetic father's parentage violates Article 8, while for the non-genetic father, the State must provide a mechanism for recognition (e.g., adoption). This ruling serves as a vital bridge between the Court's surrogacy case law and the protection of same-sex families,

[398] Ibid., para. 54.
[399] See J.W. MÄRZ, *Challenges Posed by Transnational Commercial Surrogacy*, cit., p. 272. Regarding the theoretical framework, see S.L. COOPER, *Marriage, Family, Discrimination & Contradiction*, cit., p. 1762. As discussed previously, the author anticipated this distinction, arguing that the margin of appreciation should apply to the *modality* (*how*) rather than the *principle* (*if*) of recognition. See also L. POLI, *Il primo (timido) parere consultivo della Corte europea dei diritti umani*, cit., p. 425; K. LEMMENS, *Cross-border surrogacy and the European Convention on Human Rights*, cit., pp. 181-183.
[400] ECtHR, *C and E v. France* (dec.), App. nos. 1462/18 and 17348/18, 12 December 2019.
[401] ECtHR, *D v. France*, no. 11288/18, 16 July 2020.
[402] ECtHR, *C. and E. v. France* (dec.), cit., para. 46; ECtHR, *D. v. France* (dec.), cit., para. 67. See also J.W. MÄRZ, *Challenges Posed by Transnational Commercial Surrogacy*, cit., pp. 272-273.
[403] ECtHR, *Bonzano and Others v. Italy* (dec.), 31 August 2023, App. nos. 39884/21 and 40578/21.
[404] I. QUEIROLO, F. MAOLI, *Surrogacy and Circulation of Family Relationships: Which Role for the Best Interests of the Child?*, in *Papers di Diritto Europeo*, 2025, p. 10.
[405] Ibid., p. 11.
[406] ECtHR, *D.B. and Others v. Switzerland*, 22 November 2022, App. nos. 58817/15 and 58252/15.

ensuring that the child's identity rights are not diminished by the sexual orientation of the parents[407].

This approach was adopted in the case of *C. v. Italy* (2023)[408]. In this judgment, the Court ruled that the Italian authorities' refusal to transcribe the foreign birth certificate regarding the intended mother did not violate Article 8. Consistent with the *Advisory Opinion*, the Court held that the availability of adoption in Italian law constituted an adequate and effective mechanism to recognise the parent-child relationship, thus striking a fair balance between the child's interest in continuity and the State's public policy concerns. However, concerning the biological father, the Court found a violation due to the "*excessive formalism*" of national authorities. By rejecting the transcription request on purely procedural grounds without indicating alternative paths, domestic courts failed to ensure the required promptness and efficiency, leaving the child in a prolonged state of uncertainty[409].

Conversely, critical voices within domestic legal scholarship argue that relying on adoption constitutes a suboptimal remedy compared to direct recognition. While technically complying with European requirements, this mechanism fails to ensure immediate legal security, leaving the minor in a temporary vacuum dependent on judicial timelines and biological parental consent. Consequently, this approach creates a paradox where the child's legal status is effectively restricted to serve the State's objective of deterring the parents' conduct[410].

This jurisprudential evolution can be seen as a progressive "*depowering*" of national discretion: while States formally retain the power to prohibit surrogacy domestically, the obligation to provide effective recognition of the parent-child relationship, whether through transcription or adoption, substantially erodes their ability to enforce such bans

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[407] For a commentary on the case, or a commentary, see A. VRAČARIĆ, *D.B. and Others v. Switzerland: Tracing the Origins of the Right to Recognition of Same-Sex Parentage in International Surrogacy*, in *Strasbourg Observers*, 2022. See also R. SABATO, *Riconoscimento della filiazione e tutela del superiore interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo*, in *Cittadinanza europea*, 2024, p. 10. Judge Sabato notes that the Court distinguished the child's position from that of the parents. While the former suffered a violation due to legal uncertainty, the latter did not, as they had knowingly circumvented domestic law to present authorities with a *fait accompli*.

[408] ECtHR, *C. v. Italy* (dec.), 31 August 2023, App. no. 47196/21.

[409] R. SABATO, *Riconoscimento della filiazione*, cit., p. 11; C. DANISI, *Maternità surrogata come reato "universale"*, cit., pp. 17-18. For a comment on this case, see also C. LUZZI, *Sui "venuti al mondo" grazie alla surrogazione di maternità, la Corte Edu supporta le Sezioni unite, ma delude (comprensibilmente) qualche aspettativa. Osservazioni a partire dalla sentenza C. c. Italia*, in *GenIUS*, 2024, p. 240 ff.

[410] G. FERRANDO, *L'adozione in casi particolari e le nuove istanze di tutela*, in F. PESCE (ed.), *La surrogazione di maternità nel prisma del diritto*, Napoli, 2022, pp. 110-111 and 115-116.

in cross-border scenarios[411]. The margin of appreciation is no longer about *whether* to recognise the relationship, but merely about the technical instrument to achieve it, creating a trajectory where national public policy exceptions are increasingly destined to yield before the child's right to identity[412].

2. 3 The Impact of the ECtHR Jurisprudence on EU Law

Without going into much detail, it is worth briefly examining the impact of the ECtHR jurisprudence on EU Law on these matters. As noted, the relationship between these two systems, and consequently between the two European Courts, is unique and mutually influential.

In the areas considered above, the EU legal framework faces a structural limitation: the Treaties do not confer direct competence to the Union to regulate substantive family law, nor to determine the rules governing civil status and the attribution of nationality[413]. Also, despite increasing efforts in the protection of human rights, the EU was not originally designed for this purpose[414].

However, this does not imply that EU is entirely extraneous to human rights or to competences deemed to be exclusive for States. Indeed, addressing cross-border situations in relation to the concept of, free movement of workers, and then of EU citizenship, the CJEU has developed a dense body of case law in matters that were originally of exclusive competence of Member States[415].

The first area presented in this Chapter, the right to a name, was also addressed by the CJEU. The Court of Luxembourg, noting that the lack of harmonisation in this field can violate principle of non-discrimination and freedom of movement, ruled that "*a name which has been acquired in one member state has to be recognised in the other member states"*[416]. Regarding this, a distinct approach may be recorded: while CJEU traditionally protects the right to a name as instrumental to the freedom of movement, in a market-

[411] F. PESCE, *Gestazione per altri e discrezionalità nazionale "depotenziata" nella prospettiva della CEDU*, in F. PESCE (ed.), *La surrogazione di maternità nel prisma del diritto*, Napoli, 2022, pp. 162-163. The specific term used in the original text is "*depotenziamento*", translated here by the author as "*depowering*".
[412] Ibid., p. 167.
[413] F. DEANA, *Dalla libera circolazione del nome alla libera circolazione dell'identità di genere: la giurisprudenza della Corte di giustizia dopo la sentenza Mirin*, in *Eurojus*, 2024, p. 126.
[414] F. PESCE*, La tutela europea dei diritti fondamentali in materia familiare*, cit., p. 5.
[415] F. MAOLI, *Civil Status and Circulation of Public Documents in EU and Worldwide,* cit., p. 177.
[416] A. DUTTA, *Personal Status*, cit., p. 1349.

oriented way[417], the ECtHR anchors it to personal identity and equality, with a human rights-oriented approach. However, although different perspectives, recent jurisprudence shows a tendency towards convergence[418], especially from the entry into force of the Treaty of Lisbon and the consequential establishment of the Charter as EU primary law[419]. This alignment is also confirmed that, when dealing with names, the CJEU has started to refer to the ECtHR to define the scope of the right to private life[420].

In matters concerning the recognition of same-sex couples, the ECtHR's work had a huge impact on the CJEU's jurisprudence as well. It is possible to summarise this influence though a first recognition of same-sex relationship as falling within the scope of family life set out by the ECtHR[421], which laid the ground for the subsequent CJEU's case-law. This impact became quite evident with the landmark judgment *Coman* (2018)[422], where the CJEU explicitly referred to the ECtHR's case law[423], recognising the status of spouse for same-sex partners, even though for the purpose of residence rights.

While Coman focused on the horizontal dimension of the couple, the CJEU had subsequently the chance to address its vertical dimension. Although not legally relevant, a statement made by von der Leyen during her State of the European Union (SOTEU) speech in 2020, anticipated one of the most important cases in this field: *"If you are a parent in one country, you are a parent in every country"*[424]. Indeed, the CJEU incorporated the ECtHR's approach in its jurisprudence in the case *Pancharevo* (2021)[425], explicitly referring to Strasbourg's interpretation of Article 8 ECHR[426]. The Court introduced a form of functional recognition: while Member States are not obliged to accept same-sex parenthood in their domestic family law, they must recognise the parent-

[417] See CJEU, *Garcia Avello v. Belgian State*, Judgment of 2 October 2003, Case C-148/02, para. 36; CJEU, *Grunkin and Paul v. Standesamt Niebüll*, Judgment of 14 October 2008, Case C-353/06, para. 23.
[418] D. VITIELLO, *La disciplina del cognome nella giurisprudenza europea*, cit., pp. 110-111.
[419] Ibid., 113.
[420] See, for instance, CJEU, *Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of 22 December 2010, Case C-208/09, para. 52; CJEU, *Runevič-Vardyn and Wardyn v. Vilniaus miesto savivaldybės administracija*, Judgment of 12 May 2011, Case C-391/09, para. 89.
[421] D. JANIĆIJEVIĆ, *The Role of the European Court of Human Rights in the Legal Recognition of Same-Sex Couples*, cit., p. 6.
[422] CJEU, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Judgment of 5 June 2018, Case C-673/16.
[423] Ibid., para. 50.
[424] The complete version of the speech "State of the Union Address by President von der Leyen at the European Parliament Plenary" of the 16th September 2020 can be found at this link: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655
[425] CJEU, *V.M.A. v. Stolichna obshtina, rayon "Pancharevo",* Judgment of 14 December 2021, case C-490/20.
[426] Ibid., para. 61. See also I. QUEIROLO, F. MAOLI, *Surrogacy and Circulation of Family Relationships*, cit., p. 13.

child relationship for the specific purpose of exercising EU rights, such as free movement and residence[427]. This approach strikes sensitive balance: it prevents the use of public policy exceptions to block fundamental freedoms, yet it creates a partial status where a child may be considered a son or daughter for some purposes but not for others withing the same national territory[428].

The CJEU went even beyond its previous case law with *Wojewoda Mazowiecki* (2025)[429], where it ruled that Member States are obliged not only to grant residence rights but to effectively recognise the marital status acquired in another Member States. Crucially, the Court established that if the transcription of the foreign marriage certificate is the only administrative procedure available to ensure such rights, the refusal to transcribe it amounts to a violation of EU law[430]. This judgment perfectly illustrates the systemic dialogue between the two European Courts: in its reasoning, the Luxembourg Court explicitly relied on the ECtHR's jurisprudence[431], using the Strasbourg standard on the protection of private and family life to interpret the scope of EU free movement rights[432]. Thus, the continuity of status is no longer just a Strasbourg doctrine, but a binding obligation within the EU legal order.

As far as concern matters of cross-border surrogacy, the CJEU adopted a *self-restrain* approach, never dealing with the recognition of the *status filiationis* from it. However, in two cases[433], the Court established that EU maternity leave legislation[434] does not cover intended mothers in surrogacy cases, as it presupposes that this right is conditional upon the employee's pregnancy and childbirth[435].

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[427] CJEU, *V.M.A. v. Stolichna obshtina, rayon "Pancharevo",* cit., para. 58. I. QUEIROLO, F. MAOLI, *Surrogacy and Circulation of Family Relationships*, cit., pp. 11-12.
[428] Ibid., p. 13.
[429] CJEU, *Wojewoda Mazowiecki* [GC], Judgment of 25 November 2025, Case C-713/23.
[430] Ibid., paras. 72-75.
[431] Ibid., para. 66.
[432] Ibid., para 64. See also M. GRASSI, *Finché patria non ci separi? La libera circolazione dei matrimoni same-sex all'interno dell'Unione europea nella recente sentenza Wojewoda Mazowiecki*, in *SIDIBlog*, 16 January 2026, para. 3.
[433] CJEU, *C.D. v S.T.* [GC], Judgment of 18 March 2014, Case C-167/12; CJEU, *Z. v A Government Department and The Board of Management of a Community School* [GC], Judgment of 18 March 2014, Case C-363/12.
[434] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, pp. 1–7
[435] CJEU, *C.D. v S.T.* [GC], cit., para. 40; CJEU, *Z. v A Government Department and The Board of Management of a Community School* [GC], para. 59.

To bridge the gap between CJEU's case law and administrative practice, the EU has introduced a specific legislative tool that it is worth to mention here. Despite the already mentioned limited competence in substantive law, and alongside the evolving case law of Luxembourg, this instrument serves as an enabler that cannot be overlooked.

Indeed, the EU Regulation 2016/1191[436] simplifies the use of public documents across Member States by removing the need for apostille stamps and reducing translation requirements. It applies to documents related to birth, marriage, residence, nationality and criminal record[437], focusing on verifying authenticity rather than the content[438]. Certified copies issued in one EU country must be accepted by all the others[439], and optional multilingual forms attached to the regulation help avoid translation[440].

The Regulation also sets up cooperation between authorities to prevent document fraud. It has been in effect since February 2019, with some provisions starting earlier. For the purposes of the application of the Regulation, the issuing authority must belong to a Member State; this is what links most of the provisions of the act to its application, even though the legal basis of the act can be found in Article 21(2) TFEU, i.e. the free movement of citizens. The founding principle of the regulation is the mutual trust among EU Member States[441].

Pursuant to article 2 of the Regulation, documents eligible for preferential treatment must refer to legal situations that determine the exercise of rights deriving from EU citizenship and free movement. The scope covers a wide range of documents establishing facts such as birth, marriage, registered partnership, parenthood, adoption, residence, and absence

[436] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1191
[437] Ibid., Art. 2 para. 1.
[438] Regulation (EU) 2016/1191, cit., Art. 2 para. 4.
[439] Regulation (EU) 2016/1191, cit., Art. 5 para. 2.
[440] Regulation (EU) 2016/1191, cit., Art. 6. The applicant can contact the authority to obtain the necessary form when they need to submit the document in another Member State. Of course, the form cannot be completed independently by the person requesting the document but serves exclusively as a translation aid.
[441] Recital no. 3 of the Regulation. See also D. DANIELI, C. PERARO, *L'applicazione del regolamento UE sui documenti pubblici e i suoi possibili sviluppi futuri,* in *Papers di diritto europeo,* 2022, p. 58; G. PALAO, *Challenges to the Codification of Cross-Border Dimension of the Digitalization of Civil Status Records and Registers*, in *Papers di diritto europeo*, 2023; B. WARREN, N. SIMS, *The Changing Nature of Trust: the Apostille Convention, Digital Public Documents, and the Chain of Authentication*, in *Papers di diritto europeo*, 2023, p. 268.

of a criminal record, provided that are issued for a citizen of the Union by the authorities of that citizen's Member State of nationality[442].

Those have not an independent EU definition, but the preamble of the Regulation tries to give scope of application of the terms. In particular, *Public documents on a change of name should also be regarded as being public documents whose primary purpose is to establish an individual's name"* (recital 12)[443]. However, change in the sex/gender is not included, marking a distinction with the current legislative framework that will be briefly presented in the next Chapter. Finally, passports and identity cards are not included because they are already automatically recognized in foreign member states other than the one that have released them[444].

Ultimately, the interplay between Strasbourg, Luxembourg in this field illustrates what has been defined as the "*cross-border dimension of multilevel jurisdictions*"[445]. In this unique framework, cross-border movement acts as a *stepping stone* for judicial interaction. While EU law provides the vehicle (free movement provisions), the ECHR provides the normative substance (the protection of private and family life). Consequently, the CJEU increasingly relies on the Strasbourg Court's expanding definition of family to fill the content of EU citizenship rights, effectively merging the two legal orders in the protection of cross-border families[446].

More broadly, the judicial interaction between ECtHR, CJEU, and national courts has been described as "*circularity of values*"[447]. Since fundamental family rights are not harmonised at the EU level, the principles emerging from one national tradition or international court inevitably influence the others. In this dynamic, the CJEU adopts a policy of self-restraint regarding sensitive ethical issues yet effectively synthesises these

[442] Regulation (EU) 2016/1191, cit., Art. 2 para. 1.
[443] Recitals of Regulations, as well as Directives, are not binding. But they help in the interpretation of the act, nonetheless. See also D. DANIELI, C. PERARO, *L'applicazione del regolamento UE sui documenti pubblici e i suoi possibili sviluppi futuri,* cit., p. 63.
[444] Recital no. 10: *"This Regulation should not apply to passports or identity cards issued in a Member State as such documents are not subject to legalisation or similar formality when presented in another Member State"*, D. DANIELI, C. PERARO, *L'applicazione del regolamento UE sui documenti pubblici e i suoi possibili sviluppi futuri,* cit., p. 63.
[445] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., p. 647.
[446] Ibid.
[447] M.C. BARUFFI, *Cittadinanza dell'Unione e maternità surrogata nella prospettiva del mercato interno alla luce della giurisprudenza della Corte di giustizia*, in F. PESCE (ed.), *La surrogazione di maternità nel prisma del diritto*, Napoli, 2022, p. 24.

diverse instances through the right of free movement, creating a *de facto* harmonisation[448].

2. 4 Partial Conclusions

The analysis conducted in this Chapter shows an interesting evolution in the legal conception of personal status within the CoE space. Through the lens of the Court's jurisprudence on names, same-sex unions, and surrogacy, it is possible to identify a distinct trajectory: the transition from a state-centric administrative model to a person-centric human rights model.

As observed, the notion of status has undergone a reorientation. Historically conceived as a statal mean to catalogue citizens and maintain public order, status has evolved into a constitutive element of personal dignity. Recent legal scholarship observes that elements such as the name, sexual orientation, and filiation have transcended their regulatory origins to become fundamental rights protected, at least to some extent, under the Convention, and most specifically under Article 8[449]. This evolution challenges the feasibility of traditional "blind" choice-of-law rules; according to legal doctrine, the legal framework is shifting from a neutral approach towards a methodology sensitive to "*substantial justice*"[450]. Consequently, the function of public policy (*ordre public)* has been overturned: traditionally acting as a negative shield against foreign acts contrary to national values, it now exercises a positive function[451]. Policy is increasingly invoked to facilitate the entry of new statuses, transforming the protection of individual identity into a fundamental value of the domestic legal order itself[452].

To manage the friction between this expanding right to identity and national interests and moral sensitivities, the Court has developed specific strategic tools. Critical doctrine, for example, argues that the Court employs the concept of identity to depoliticise ethical debates[453]. By focusing on individual impact rather than the morality of practices, identity acts as a shield, protecting the applicant from the State's abstract moral choice[454].

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[448] Ibid., p. 22.
[449] N. VAN DE POL, *The Right to Personal Identity,* cit., pp. 6-7; F. PESCE*, La tutela europea dei diritti fondamentali in materia familiare*, cit., p. 44.
[450] M. ŽUPAN, M. DRVENTIĆ, *Gender Issues in Private International Law*, cit., p. 22.
[451] C. CAMPIGLIO, *Surrogazione di maternità transnazionale*, cit., p. 79.
[452] C. CAMPIGLIO, *Surrogazione di maternità transnazionale*, cit., p. 79.
[453] See, for example, F. DE VARENNES, E. KUZBORSKA, *Human Rights and a Person's Name*, cit., p. 1021.
[454] A. MULLIGAN, *Identity Rights and Sensitive Ethical Questions*, cit., p. 450.

However, this protection is not absolute. The jurisprudence reveals what has been described as a *threshold logic*[455]. The margin of appreciation, being dynamic by nature, operates like a switch, contracting drastically only when an interference threatens the core of identity, which the Court frequently identifies with the *biological truth*. This creates a hierarchy of ties: biological links enjoy almost absolute protection, whereas relationships lacking a genetic foundation, especially when stemming from illegal conduct, face a wider margin of appreciation where the State's public policy may prevail[456].

The tension between continuity of status and national sovereignty has led to a functional compromise, best summarised by the distinction between the *an* and the *quomodo*[457]. The Court has effectively "*depowered*"[458] national discretion: State have lost the power to decide *whether* to recognise a relationship but retain the discretion to decide how to do so[459]. Sometimes, this results in the technique of *downgrade recognition,* visible in both same-sex unions and surrogacy. While this approach avoids limping statuses[460], it is not without critics. Legal doctrine warns that reliance on functional equivalence like adoption risks creating a second-class protection. Unlike automatic transcription, adoption leaves the minor in a temporary legal vacuum, dependent on judicial timelines and consents. Furthermore, using the refusal of full recognition as a tool to deter parents creates a paradox: the child is instrumentalised for sanctioning policy, contradicting the very principle of the best interests of the child[461].

From a systemic perspective, the interplay between national choices and European supervision follows a dynamic described as "*in for a penny, in for a pound*"[462]. While European courts respect the States' initial freedom to legislate on sensitive moral issues, once a State takes a step it must adhere fully to European standards of non-discrimination and effectiveness. This logic prevents what has been defined as the "*chilling effect*" or "*backing out*": the idea that progressive national reforms, like same-sex marriage, would

[455] ECtHR, *Guide on Article 8 of the Convention,* cit., p. 17.
[456] See M. ILIADOU, *Surrogacy and the ECtHR*, cit., p. 148. See also F. PESCE*, La tutela europea dei diritti fondamentali in materia familiare*, cit., p. 43; A. MULLIGAN, *Identity Rights and Sensitive Ethical Questions*, cit., p. 468.
[457] See R. SABATO, *Riconoscimento della filiazione*, cit., p. 12.
[458] See F. PESCE, *Gestazione per altri e discrezionalità nazionale "depotenziata"*, cit., pp. 162-168.
[459] S.L. COOPER, *Marriage, Family, Discrimination & Contradiction,* cit., p. 1762; M. SHAHID, *The Right to Same-Sex Marriage*, cit., p. 190-191.
[460] See L. CARPANETO, *Autonomia privata*, cit., p. 267.
[461] See G. FERRANDO, *L'adozione in casi particolari*, cit., pp. 115-116.
[462] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., pp. 637-638.

lead to legal complications abroad often deterred States from acting[463]. By mandating the continuity of status, the Court removes this barrier, indirectly encouraging legislative evolution across the continent[464]. Simultaneously, the system allows for a form of ethical "*outsourcing*"[465]. States may maintain restrictive laws domestically to signal moral disapproval (e.g., banning surrogacy), while aiming to resolve the practical problems of families returning from abroad through "*accommodation*"[466]. This acts as a safety valve[467], preventing the clash between rigid national morals and individual rights from becoming untenable[468].

Ultimately, as observed in legal literature, "*reality outpaces and dictates the law*"[469], particularly in cross-border scenarios. The *fait accompli* of a child born abroad or a marriage celebrated in another jurisdiction creates a factual reality that national legal orders can no longer ignore. In this landscape, the principle of continuity of status serves as the necessary bridge between the static nature of national law and the dynamic reality of European families.

This sets the stage of the analysis in the following Chapter. As seen, the Court's jurisprudence often retains a strong reliance on biological truth as a prerequisite for legal recognition, a stance that becomes particularly problematic when applied to gender identity. If the Court has struggled to balance biology, autonomy, and public order in matters of name, marriage, and filiation, these tensions are destined to intensify when the object of the dispute is not merely a family tie, but the gendered self[470]. Eventually, this creates the risk of what scholars term as "*contradictory embodiment*", where the legal status fails to align with the lived reality of the body and identity[471].

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[463] Ibid., pp. 626-627.
[464] Ibid., p. 627. See also L.R. HELFER, E. VOETEN, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, cit., p. 1.
[465] C. FENTON-GLYNN, *Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements*, in *Medical Law Review*, 2016, p. 59. See also N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., pp. 339-341.
[466] Ibid., p. 334 ff.
[467] G. PENNINGS, *Legal Harmonization and Reproductive Tourism in Europe*, in *Human Reproduction*, 2004, p. 2694.
[468] Ibid., pp. 339-341. The author highlights the risk of "*systemic hypocrisy*" inherent in this mechanism: if a practice is deemed contrary to human dignity domestically, accepting its effect merely because it occurred abroad weakens the State's moral coherence.
[469] Ibid., p. 646.
[470] See, for example, F. PESCE*, La tutela europea dei diritti fondamentali in materia familiare*, cit., p. 32, highlighting the clash between identity and public order regarding the forced divorce requirement for trans persons.
[471] M. ŽUPAN, M. DRVENTIĆ, *Gender Issues in Private International Law*, cit., p. 8.

Chapter 3: Gender Identity and Legal Gender Recognition in Europe: Challenges and the Role of the European Court of Human Rights

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3. 1 A Necessary Note on Terminology in Gender Issues

Given that the themes of this Chapter are related to gender studies and involve concepts not always thoroughly examined by legal scholarship, it is necessary to clarify the terminology used before delving into the core of the analysis[472].

An initial distinction must be made about two terms that are often used synonymously but instead represent two different concepts: "sex" and "gender". While the former refers to a legal and medical classification based on biological characteristics (e.g. chromosomes, hormones, and reproductive organs)[473], the latter is a more complex concept, referring to the social construction of how individuals perceive and express themselves, usually identifying with a female, male, or non-binary identity[474]. However,

[472] A note on terminology is necessary because for a long time now, social sciences have been advancing the presumption that discourse not only reflects reality but also contributes to create it. Among various scholars who have tackled these issues, see M. FOUCAULT, *L'Ordre du Discours*, Paris, 1971. In Foucault's work it is possible also to see how law, as a form of institutionalised discourse, contributes to naming and structuring social reality. However, sometimes law resists insights from other disciplines, such as gender studies and sociology. See, *inter alia*, C. SMART, *Feminism and the Power of Law*, London, 1989, p. 11; M. PREARO, *Le radici rimosse della queer theory. Una genealogia da ricostruire*, in *Genesis*, vol. 11, n. 1-2, 2012, p. 95 ff.

[473] EUROPEAN COMMISSION: DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, *Legal Gender Recognition in the EU: the Journeys of Trans People Towards Full Equality*, 2020, p. viii.

[474] Ibid., p. vi. See also G. GILLERI, *Abituarsi ad altro (e all'altro): i diritti umani e il metodo queer femminista*, in *Quaderni di SIDIBlog*, 2024, p. 197; C. RINALDI, C. RINALDI, *"Castrazioni culturali". Riflessioni sociologiche a partire dalla normativizzazione binaria del sesso e la medicalizzazione del corpo intersex*, in *Sociologie*, p. 46 ff.

although conceptually distinct[475], the terms "sex" and "gender" will sometimes be used interchangeably. This reflects the fact that, in most European States, the same indicator refers to both sexual and gender identity, without establishing a clear distinction[476]. Similarly, the term "sex/gender assigned at birth" will also be employed to reflect the reality that, in many legal contexts, the act of birth registration assumes that the biological classification equates to gender identity.

A second term to be defined is "gender identity" which, according to the Yogyakarta Principles[477], is the internal and individual experience of gender. In some cases, gender identity can match the sex/gender assigned at birth and, in those cases, the individual's identity is defined as cisgender[478]. In cases where the sex/gender assigned at birth does not match the gender identity, the term transgender[479] is used. The external expression of gender identity may include, if freely chosen, bodily modifications and other behavioural expressions (e.g. manner of dress)[480]. Gender identities are diverse and plural, despite the "traditional" perception of a binary system. Indeed, in addition to the normative categories of male and female, non-binary identities are increasingly gaining visibility and recognition.

In the present work, the terms "trans" and "transgender" individuals are primarily used, as they are widely accepted and reflect the contemporary understanding of gender

[475] While it is true that the two terms are distinct and it is not methodologically correct to use them as synonyms, it is equally true that what we consider "sex" and what we consider "gender" are closely related. Many scholars, especially in the field of gender studies, have spoken on this relationship. Notable among them are the elaborations of Judith Butler. See, *inter alia*, J. BUTLER, *Gender Trouble: Feminism and the Subversion of Identity*, New York, 1990; J. BUTLER, *Bodies that Matter: On the Discursive Limits of "Sex"*, New York, 1993; J. BUTLER, *Undoing Gender*, New York, 2004.

[476] See P. CANNOOT, *Y v France: Intersex Rights in the Age of Subsidiarity*, in *The European Convention on Human Rights Law Review,* 2024, p. 9.

[477] The Yogyakarta Principles are legal instruments of soft law, therefore not binding for States. However, their importance is increasing in international law and legal research. They address a broad range of international human rights standards and their application to sexual orientation and gender identity (SOGI) issues. On 10 Nov. 2017 a panel of experts published additional principles expanding on the original document reflecting developments in international human rights law and practice since the 2006 Principles, The Yogyakarta Principles plus 10. The new document also contains 111 'additional state obligations', related to areas such as torture, asylum, privacy, health and the protection of human rights defenders. The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are available at: www.yogyakartaprinciples.org (last access 24th December 2025).

[478] EUROPEAN COMMISSION: DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, *Legal Gender Recognition in the EU: the Journeys of Trans People Towards Full Equality*, cit., p. vi.

[479] Ibid., p. viii. On the definition of sex assigned at birth and its historical evolution as a concept, see J. A. CLARKE, *Sex Assigned at Birth*, in *Columbia Law Review,* 2022, p. 1821.

[480] The definition of gender identity use in the present work is contained in the introduction of the Yogyakarta Principles, and had been used in many other legal documents, including the last Commissioner for Human Rights' *Issue Paper on Human Rights and Gender Identity and Expression*.

identity[481]. These terms are inclusive and acknowledge the diversity within the trans community. Outdated terms are avoided, as they carry historical and medicalised connotations that are no longer considered appropriate in many contexts. In particular, the designation "transsexual" refers specifically to transgender individuals who have chosen to undergo gender-affirming medical procedures[482]. However, this term is incomplete as it excludes transgender people who choose not to undergo such procedures and, moreover, has acquired a negative connotation in common parlance over time. For these reasons, its use will be avoided. When such terminology is explicitly used in court rulings or legal documents, it will be retained solely for accuracy and consistency in referencing those sources. This approach ensures respect for evolving language[483] norms while maintaining the integrity of the legal analysis.

Another note on terminology pertains to the concept of Legal Gender Recognition (hereinafter "LGR"), which is defined as *"the process(es) by which individuals request the changing of their first name and gender marker in their administrative records so that official registers and their documents, including identity documents, birth or civil status certificates"*[484] reflect their gender identity. From the perspective of international human rights law, LGR holds significant importance due to its profound impact on individuals' lives. It not only affirms the right to identity, a cornerstone of personal autonomy, but also affects individuals' relational sphere, including how they are recognised in social, professional, and legal contexts[485]. Moreover, access to LGR often serves as a gateway to other rights, as it facilitates full participation in society and ensures equal treatment in areas such as healthcare, employment, and legal protection[486].

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[481] On trans identity and terminology to use, see *inter alia*, I. KEHRER, *Il diritto alla propria identità di fronte al binarismo di sesso e genere*, in *AboutGender*, 2019, p. 339; F. EDEL, *Case law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity*, 2019, p. 1; I.C. JARAMILLO, *The Stakes in Sex: Obstacles and Opportunities in Legal Reform for Trans Persons*, in I.C. JARAMILLO, L. CARLSON (eds.), *Trans Rights and Wrongs*, Cham, 2021, p. 8.

[482] EUROPEAN COMMISSION: DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, *Legal Gender Recognition in the EU: the Journeys of Trans People Towards Full Equality*, cit., p. viii.

[483] Moreover, although legal language is sectoral, it is one of sectoral languages that is most contaminated by everyday language. This can give rise to ambiguity and vagueness, which is why its development needs to be monitored. This is all the truer for the terminology used by international private law, defined as sub-sectoral, which proves to be less technical than the others. For an example on the relationship between the Italian system of private international law and language, see C. CAMPIGLIO, *Linguaggio e tecniche redazionali nel diritto internazionale privato italiano*, in *Rivista di diritto internazionale privato e processuale 3/2024*, 2024, p. 709.

[484] EUROPEAN COMMISSION: DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, *Legal Gender Recognition in the EU: the Journeys of Trans People Towards Full Equality*, cit., p. vii.

[485] C.M. REALE, *Il lento incedere dei diritti trans: una prospettiva critica sulla giurisprudenza delle corti sovranazionali europee*, in *BioLaw Journal – Rivista di BioDiritto*, 2024, p. 136.

[486] Ibid.

3. 2 Legal Gender Recognition in Europe at Glance

In Europe, over the past two decades, there has been a significant increase in attention to gender identity issues in both public and legal debates[487]. At various levels, and to different extents, the law has addressed, *inter alia*, the matter of gender identity and its registration by public authorities, particularly in cases where the gender marker needs to be amended due to a discrepancy between an individual's perceived gender and the sex/gender assigned at birth.

The process of LGR varies significantly across European countries, and the lack of harmonisation among national legislations undoubtedly affects the recognition of status and, consequently, the free movement of trans persons[488]. In transnational situations, conflicts between national laws can result in a person being recognised with different genders in two different States[489]. Even when recognition is achieved in one State, its acceptance in another State can be denied on the grounds of public policy. Only a few States have explicit provisions regulating the recognition of gender changes obtained in another jurisdiction[490]. When a State refuses to recognise such amendments, a balance must be struck between public interests and individual rights[491]. However, as previously noted, public policy considerations can differ greatly from one State to another in such a

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[487] Some of the most important contributions by international institutions on this topic include: UN Independent Expert on sexual orientation and gender identity, *Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 2018; UN Independent Expert on Sexual Orientation and Gender Identity, *Report on Socio-cultural and Economic Inclusion of LGBT People - Note by the Secretary-General,* 2019; Commissioner for Human Rights, *Issue Paper on Human Rights and Gender Identity and Expression*, Strasbourg, 2009; Commissioner for Human Rights, *Issue Paper on Human Rights and Gender Identity and Expression*, Strasbourg, 2023; European Union Agency for Fundamental Rights, *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Comparative Legal Analysis*, 2010; TOBLER C, AGIUS S., *Trans and Intersex People : Discrimination on the Grounds of Sex, Gender Identity and Gender Expression*, 2012; PARADIS E, LEIGH V, LONG J, ALTAN L., *Towards an EU Roadmap for Equality on Grounds of Sexual Orientation and Gender Identity*.

[488] On the portability of status as one of the preconditions for the full enjoyment of EU fundamental rights, see F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Vol. II, Milano, 2023, p. 238. See also L. CARPANETO, *Autonomia privata e relazioni familiari nel diritto dell'Unione europea*, in *Scritti di diritto privato europeo ed internazionale*, 2020, p. 250.

[489] For example, the most recent case by the CJEU on this issue concerned exactly this situation: a citizen with dual British and Romanian citizenship who, after having obtained recognition of his gender in the United Kingdom, was denied it by the Romanian authorities. See Section 3.5 in this Chapter.

[490] Among the States that have such legislation are Malta, Portugal, Sweden, Ireland and the United Kingdom. Also to be considered is the International Commission on Civil Status (ICCS) Convention No. 29 on the recognition of decisions recording a sex reassignment signed, Vienna, 12 September 2000, full text available at https://www.ciec1.org/convention-29-texte-en (last access 8th January 2026); however, the Convention is only ratified by Spain and the Netherlands. For more details, see S.L. GÖSSL, *From Question of Fact to Question of Law to Question of Private International Law: the Question Whether a Person is Male, Female, or …?,* in *Journal of Private International Law*, 2016, p. 266.

[491] Ibid., p. 265.

sensitive area, creating a fragmented and complex legal landscape[492]. This lack of consistency leads to significant legal uncertainty for trans individuals navigating the European space, and well as for the legal system as a whole.

To understand how the concept itself, the content and application of public policy varies between European States and whether it may, in fact, have limits, it is essential to examine the case law on gender identity developed by the ECtHR[493], representing a tool to sound out the consensus that European States have developed on such an issue. The Court is one of the most prolific and influential actors in this field, having produced extensive jurisprudence[494], though certain issues remain unresolved. The ECtHR's work is particularly significant as it provides an interpretative framework that encourages States to align with human rights standards, thereby slowly and partially reducing conflicts of laws and promoting legal certainty[495].

One might ask why gender is registered in the first place. Gender registration serves a functional role in most legal systems because all Member States of the CoE distinguish between genders in their jurisdiction[496]. In simple words, this means that, depending on the (registered) gender, different rights and duties may apply[497].

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[492] Indeed, those legal systems that lack explicit rules often rely on general provisions. Two main approaches apply in this case. One the one hand, procedural recognition, common in civil law systems, accepts foreign legal acts and treat sex/gender as factual. The other approach is to determine the applicable law (e.g. based on citizenship or habitual residence) to access the validity of the status. This latter approach is more common in systems that treat status as legally significant. See Ibid., pp. 268-269; S.L. GÖSSL, *Gender, Identity and Private International Law*, in *Research Handbook on International Family Law*, Cheltenham, 2024, pp. 76-82.

[493] To further explore the relationship between gender identity, private international law and the human rights approach, see S.L., GÖSSL *From Question of Fact to Question of Law to Question of Private International Law: the Question Whether a Person is Male, Female, or …?,* cit., p. 271; S.L. GÖSSL, *Gender, Identity and Private International Law*, cit., p. 82.

[494] For a non-exhaustive list of cases on gender identity, see EUROPEAN COURT OF HUMAN RIGHTS, PRESS UNIT, *Factsheet – Gender Identity Issues*, 2024.

[495] Although the Court was not instituted to settle questions of private international law, some questions of private international law do come before the Court, which nevertheless analyses the matter from the point of view of the rights enshrined in the Convention. For more on this, P. KINSCH, *Private International Law Topics before the European Court of Human Rights*, in *Yearbook of Private International Law*, Vol. 13, 2011, p. 37.

[496] L. HOLZER, *Legal Gender Recognition in Times of Change at the European Court of Human Rights,* in *ERA Forum 23*, p. 167.

[497] The legal gender of a person is relevant in many legal provisions, such as marriage, registered partnership, parentage, name law. See S.L. GÖSSL, *From Question of Fact to Question of Law to Question of Private International Law: the Question Whether a Person is Male, Female, or …?,* cit., p. 265.

In Europe, Sweden became the first State to enact legislation permitting the change of legal gender with the introduction of the Swedish Act in 1972[498]. This marked a pivotal moment in the recognition of transgender rights. Even though most countries now have legislation in place addressing LGR, the contemporary European landscape remains highly fragmented. Member States of the CoE exercise significant discretion in determining the requirements for altering registered gender, though, as we shall see, this discretion has been gradually curtailed by evolving human rights standards.

The requirements for LGR also vary considerably across States. In many cases, they include medical prerequisites, such as mandatory gender affirmation surgery or hormone therapy, as well as sterilisation. Additionally, certain countries impose conditions related to family status, such as requiring individuals to be single or divorced, and other intrusive requirements, including psychological evaluations or evidence of living in the "desired" gender for a specified period[499].

Although States retain full sovereignty over how LGR is regulated within their territories, in recent years, LGR requirements have increasingly been challenged by both human rights institutions and advocacy groups. This shift has led to the recognition of the principle of self-determination[500], which asserts that individuals should have the right to determine their gender identity without being subject to overly intrusive or arbitrary requirements such as sterilisation, medical intervention, or psychological evaluations.

Within international human rights law, there has been a growing consensus regarding the fundamental right to gender identity. This consensus is reflected in the jurisprudence of

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[498] J.M. SCHERPE, *Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons,* in SCHERPE J.M., DUTTA A., HELMS T. (eds.), *The Legal Status of Intersex Persons*, Cambridge, 2018, p. 204.

[499] For an overview on requirements, see TGEU Trans Rights Index Europe & Central Asia 2024, available at https://transrightsmap.tgeu.org/index (last access 28th December 2025). See also EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, *Legal Gender Recognition in the EU – The Journeys of Trans People Towards Full Equality*, cit., pp. 109-118. For a specific and updated overview of national legislations within the European Union see also the official portal *Your Europe – Rules on gender change in different EU countries*, available at https://europa.eu/youreurope/citizens/family/gender-change/index_en.htm (last access 18th January 2026).

[500] See, for example, Council of Europe Parliamentary Assembly, *Discrimination Against Transgender People in Europe*, Resolution 2048 (2015), 22 April 2015. In particular, the Parliamentary Assembly calls on Member States to *"develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents (…)"* (para. 6.2.1). See also EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: LGBTIQ Equality Strategy 2020-2025*, Brussels, 2020, p. 16.

various bodies, such as the Inter-American Court of Human Rights, and the UN Human Rights Committee[501]. The ECtHR, as mentioned before, is also a key actor in this development, contributing to the evolving understanding of gender identity as a protected human right. The importance of activism in this process cannot be overstated, as it has been a driving force behind legal reforms. Advocacy by trans organisations and human rights groups has played a crucial role in challenging discriminatory practices and pushing for greater recognition of trans rights[502].

3. 3 Gender Identity in the ECtHR case law

The ECtHR's case law has primarily focused on the requirements for LGR, specifically analysing their compatibility with the Convention. The first case brought before the Court dealing with LGR was the *van Oosterwijck v Belgium*[503] case, but it was declared inadmissible because the applicant had not exhausted domestic remedies[504]. Nevertheless, the European Commission of Human Rights[505], in its report, recognised the legitimacy of the applicant's request for LGR following medical intervention, and suggested that its denial amounted to a violation of Article 8 of the Convention[506]. It took over 20 years before the Court formally acknowledged this violation. Despite the significance of this case, the analysis will begin with *Rees*[507], which was the first case in which the Court ruled on the merits of LGR issues.

The ECtHR's jurisprudence on this matter can be divided into three main phases, as identified through previous analyses of the Court's approach to the LGR[508]. In the first phase, the Court acknowledged that trans people did not have a full right to have their gender identity recognised. The second phase, often referred to as the era of "genitocentrism", saw the Court recognising gender identity only when individuals had undergone gender affirmation surgery. In the third phase, while recognising that the regulation of LGR remains within the competence of each State, the Court began to

[501] J.M. SCHERPE, *Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons,* cit., p. 209.
[502] Ibid.
[503] ECtHR, *van Oosterwijck v Belgium*, 6 November 1980, App. no. 7654/76.
[504] Ibid., para. 41.
[505] C.M. REALE, *Il lento incedere dei diritti trans: una prospettiva critica sulla giurisprudenza delle corti sovranazionali europee*, cit., p. 140.
[506] See F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 274.
[507] ECtHR, *Rees v. the United Kingdom*, cit.
[508] See L. HOLZER, *Legal Gender Recognition in Times of Change at the European Court of Human Rights,* cit., p. 172 ff.

examine the requirements for access to LGR more thoroughly. In this phase, the Court found that some of these requirements were in violation of the Convention.

In this Section, the development of the Court's case law will be outlined, dividing its jurisprudence into these three phases. The cases analysed here do not represent the entire caseload of the Court, but they are among the most significant in highlighting the evolving standards for LGR.

3. 3. 1 The First phase of ECtHR's case law on Legal Gender Recognition: the "Biological Model"

The evolution of the Court's jurisprudence on this matter is widely regarded as a paradigmatic illustration of the *living instrument* doctrine. As noted by Jacobs and White, the line of cases under Article 8 dealing with the rights of trans people constitutes *"perhaps the best example of the dynamic interpretation of the Convention*"[509].

During the first phase of the ECtHR case law on gender identity, States were granted a wide margin of appreciation[510]. In fact, in *Rees*[511], the first case in which the Court had the opportunity to rule on the merits of gender identity issues, no violation of Article 8 of the Convention (the right to respect for private and family life) was found. The Court, in balancing the individual right to private life with public interests, held that the latter should prevail. It stated that changes in birth registries *"would have important administrative consequences and would impose new duties on the rest of the population"*[512]. In this case, the applicant, a female-to-male trans person who had undergone surgery, was requesting a change in the sex entry on the birth register. As the Court pointed out, one could change their name and surname more easily than in other

[509] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 47.
[510] For more on the margin of appreciation doctrine and LGR, see O.M. ARNADÓTTIR, *Equality and Non-Discrimination under the European Convention on Human Rights*, The Hague, 2003, p. 58; I.S.M. KORKIAMÄKI, *Legal Gender Recognition and (Lack of) Equality in the European Court of Human Rights* in *The Equal Rights Review,* 2014, p. 26.
[511] ECtHR, *Rees v. the United Kingdom*, cit.
[512] Ibid., para. 42(a). Recent scholarship suggests that this reliance on the "general interest of the community" concealed a deep concern. As noted by Poli, behind this seemingly neutral label, the Court was implicitly protecting traditional moral constructs of society, using the margin of appreciation to shield national moral conceptions from scrutiny. See L. POLI, *Tutela dei valori morali e pluralismo nella giurisprudenza della Corte europea dei diritti umani*, cit., pp. 220-221.

States[513]; however, for civil status purposes, the birth certificate (or an extract thereof) was often used[514].

In this case and the subsequent one[515] (which also involved the UK) the Court granted the State a wide discretion, acknowledging the absence of a European consensus on the issue of LGR[516]. Sex/gender was still conceived from an essentialist perspective, seen as fixed and immutable over time[517]. Moreover, critical legal scholarship highlights that this approach was grounded in a rigid dichotomy between private and public spheres. Indeed, the Court's early jurisprudence operated on a logic of the "*closet*": while it was willing to protect sexual conduct and identity within the private sphere, as in *Dudgeon*, it consistently refused to extend this protection to the public sphere of official state documentation[518].

A significant development in this first phase occurred in 1992, with the case *B v. France*[519], where the Court found a violation of Article 8. The applicant, a female-to-male trans person who had undergone surgery, requested that French authorities amend the civil-status register[520]. Unlike in the UK cases, the French system's refusal to rectify official documents forced the applicant to disclose her transgender identity in numerous aspects of her daily life, creating difficulties that the Court deemed incompatible with the respect for private and family life[521]. The Court ruled that the applicant's daily life situation, where her gender identity and external appearance differed from the sex indicated on official documents, amounted to a violation of Article 8. The Court established a positive obligation on France to amend the applicant's gender identity on certain official documents.

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[513] ECtHR, *Rees v. the United Kingdom*, cit., para. 19.
[514] Ibid., para. 25. In this regard, at para. 40 of the same judgment, the Court also reminded *"(...) that the United Kingdom does not recognise the applicant as a man for all social purposes. Thus, it would appear that, at the present stage of the development of United Kingdom law, he would be regarded as a woman, inter alia, as far as marriage, pension rights and certain employments are concerned"*.
[515] ECtHR, *Cossey v. the United Kingdom*, 27 September 1990, App. no. 10843/84.
[516] See F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 274.
[517] REALE C.M., *Il lento incedere dei diritti trans: una prospettiva critica sulla giurisprudenza delle corti sovranazionali europee,* cit., p. 141. However, it is noteworthy that dissenting judicial voices, began to challenge this rigidity. The articulated dissenting opinion by Judge Martens in the case *Cossey* is one of those voices, arguing that the legal definition of sex under the Convention could not be interpreted solely as a biological determination fixed at birth, but required an evolutionary interpretation capable of encompassing the social and psychological reality of gender (Para. 4.5.1 of the Dissenting Opinion of Judge Martens). See S.L. COOPER, *Marriage, Family, Discrimination & Contradiction*, cit., p. 1752.
[518] See also D.A. GONZALEZ-SALZBERG, *The Making of the Court's Homosexual,* cit., pp. 374-376.
[519] ECtHR, *B v. France*, 25 March 1992, App. no. 13343/87.
[520] Ibid., paras. 13-17.
[521] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 274 ff.

Despite the importance of the *B v. France* case, the Court was cautious to clarify that this did not overrule the *Rees* case[522], a stance that was only definitively overturned in 2002 with the *Goodwin v. the United Kingdom* case. The distinction lay in the differing nature of the systems in France and the UK[523]. In the UK, civil registers recorded historical facts, while in France, they were designed to be updated throughout a person's life[524].

This first stage of the ECtHR's jurisprudence on gender identity was characterised by a less interventionist approach by the Court, which, in no case, found a duty on States to grant full legal recognition[525]. The concept of gender was often conflated with biological sex, with little distinction made between the two. This is reflected in the language used in the judgments, where "sex" was consistently the focus and there was no reference to "gender identity". In fact, the only relevant factor was physical (namely, gender reassignment surgery) which, as the Court stated, "*does not result in the acquisition of all the biological characteristics of the other sex"*[526]. As a result, applicants' gender in the judgments of this period was always interpreted as a biological factor, considered unchangeable[527].

It is also important to note that the judgments from this period reflect a "medical approach"[528] to LGR, common to many CoE States, which required recognition of gender identity by public authorities only after surgery, sterilisation and, often, other intrusive requirements[529].

This line of cases remains, however, a fundamental starting point for studying the Convention as a *living instrument* and the development of positive obligations. While the Court initially refused to find a violation, the shifting majority (from a 12:3 vote in *Rees* to a much narrower 10:8 in *Cossey*) signalled that this was an "*area to be kept under*

[522] ECtHR, *B v. France*, cit., para. 63.
[523] Ibid., para. 51.
[524] Ibid., para. 52.
[525] D. A. GONZALEZ-SALZBERG, *An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France*, in *The Modern Law Review,* 2018, p. 527.
[526] ECtHR, *Cossey. v the United Kingdom*, cit., para. 40.
[527] GONZALEZ-SALZBERG D. A., *An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France*, cit., p. 532.
[528] SCHERPE J.M., *Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons,* cit., p. 204.
[529] Ibid., p. 205.

review", as the lack of common ground among Contracting Parties was beginning to be challenged from within the Court itself[530].

Before the definitive shift in *Goodwin*, the case of *Sheffield and Horsham* (1998)[531] illustrated the Court's initial reluctance to depart from its previous findings. In these instances, the Court refused to find a violation of Article 8 because it was not satisfied that there had been "*noteworthy scientific developments*" in the area[532]. Nevertheless, the Court criticised the United Kingdom for failing to keep its legislation under review, especially regarding the difficulties trans people faced when forced to disclose their gender recorded at birth[533].

3. 3. 2 The Second Phase of ECtHR's Case Law on Legal Gender Recognition: from Goodwin to the Era of "*Genitocentrism*"?

In 2002, there was a turning point in the jurisprudence of the ECtHR regarding gender identity. In *Goodwin*, the Court, sitting as a Grand Chamber, ruled for the first time that the lack of full recognition was a violation of Article 8 of the Convention[534]. The Court concluded that *"since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, (...) the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant"*[535].

The applicant, a transgender woman (MtF) who had undergone gender reassignment surgery, faced considerable legal and social challenges because her gender was not recognised in official civil status records. This discrepancy led to severe consequences, including being denied access to a pension at the age of sixty, which was only available for women, as her official documentation (including the extract of her birth certificate)

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[530] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 274, where the authors describe this case law as an excellent example to analyse the evolution of the Convention as a living instrument, and the progressive expansion of positive obligations.
[531] ECtHR, *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, App. nos. 22985/93 and 23390/94.
[532] Ibid., para. 55.
[533] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 274. Moreover, scholars have highted the profound inconsistency of this period, as a paradoxical situation emerged where the UK facilitated and funded gender reassignment surgeries, yet refused to recognise the legal consequences of that very same procedure. In those cases, a form of internal "limping status" was created, leaving individuals in a legal limbo. See S.L. COOPER, *Marriage, Family, Discrimination & Contradiction*, cit., p. 1756.
[534] D.A. GONZALEZ-SALZBERG, *An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France*, cit., p. 527.
[535] ECtHR, *Goodwin v. the United Kingdom*, cit., para. 93.

did not reflect her actual gender identity. Moreover, the lack of recognition created numerous difficulties in her social life and social interactions, which she argued amounted to a violation of Article 8 of the Convention. Additionally, the applicant claimed that the failure to recognise her gender identity infringed upon her rights under Article 12 of the Convention (the right to marry). As her documentation categorised her as male, she and her male partner were categorised as a same-sex couple, preventing them from marrying under UK law at the time[536].

This legal impasse was not entirely unforeseen. In the previous *Sheffield and Horsham* case, the Court had already criticised the United Kingdom for failing to keep its legislation under review, specifically regarding the constant need for trans individuals to disclose their gender recorded at birth in daily life. Although the Court did not depart from *Rees* and *Cossey* at that time, citing a lack of "*noteworthy scientific developments*", it laid the groundwork for the shift in *Goodwin* by identifying the systemic failure of the domestic legal framework[537].

In the *Goodwin* case, the Court recognised a violation of Article 8 of the Convention, noting the increasing consensus among CoE States in both the social acceptance and legal recognition of transgender individuals, particularly those who had undergone gender reassignment surgery[538]. This judicial turnaround has been described as a paradigmatic case of "*majoritarian activism*"[539]. According to this view, the shift from the judicial restraint of the *Rees*, *Cossey*, and *Sheffield* era to *Goodwin* was not accidental but strategic. The ECtHR effectively waited for a critical mass of national legislation to evolve, using the resulting consensus as a lever to impose a new obligation on the remaining States only once the trend had become undeniable[540].

In this context, legal scholarship notes a strategic methodological choice: faced with a European consensus not yet fully consolidated, the ECtHR broadened its horizon and, to support the overruling of previous precedents, the judges relied significantly on legal developments outside Europe, acknowledging a "*continuing international trend*"[541]. The

[536] To see the facts of the case, Ibid., paras. 12-19.
[537] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 274 ff.
[538] ECtHR, *Goodwin v. the United Kingdom*, cit., para. 84.
[539] L.R. HELFER, E. VOETEN, *International Courts as Agents of Legal Change*, cit., p. 29.
[540] Ibid., p. 10 (see Table 2) and p. 29.
[541] ECtHR, *Goodwin v. the United Kingdom*, cit., para. 84. See also F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 274, identifying the case and *I. v. UK* as the turning point where the Court, despite the lack of a common European approach, prioritised the international trend in favour of legal recognition.

Court was *"(...) struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law"*[542], and it emphasised that the situation arising from the facts of the case could not be reconciled with the principle of human dignity protected under the Convention[543]. Moreover, the ECtHR moved from prioritising a traditional general interest to placing individual self-determination at the centre of its reasoning. This evolution reflects a broader transformation in European moral standards, characterised by greater openness towards sexual freedom and the acceptance of identities diverging from traditional social constructs[544].

Similarly, the Court found a violation of Article 12 of the Convention (the right to marry) acknowledging that the denial of marriage rights to transgender individuals based on outdated biological criteria was no longer justified[545]. The Court asserted that while individual States could determine the specific requirements for marriages involving transgender individuals, there was no reasonable basis for denying them the right to marry under any circumstances[546]. However, a dilemma remained for those already married: the so-called forced divorce requirement, which compelled applicants to dissolve their existing marriage as a non-negotiable condition to access legal recognition[547].

The *Goodwin* judgment marked a significant departure from the previous approach, where the Court had relied heavily on biological criteria to determine legal gender. However, it also brought with it a certain level of "genitocentrism"[548]. While the Court moved away from viewing gender as fixed and solely biologically determined, it still

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[542] ECtHR, *Goodwin v. the United Kingdom*, cit., para. 78.
[543] Ibid., para. 91.
[544] L. POLI, *Tutela dei valori morali e pluralismo nella giurisprudenza della Corte europea dei diritti umani*, cit., pp. 222 and 243.
[545] ECtHR, *Goodwin v. the United Kingdom*, cit., para. 100. Crucially, this ruling partially severed traditional link between marriage and procreation. The Court established that the inability to conceive could not be used as a justification to deny the right to marry, thereby moving from a purely biological understating of the family foundation. See S.L. COOPER, *Marriage, Family, Discrimination & Contradiction*, cit., p. 1753. See also F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 277.
[546] ECtHR, *Goodwin v. the United Kingdom*, cit., para. 103.
[547] N.R. KOFFEMAN, *Morally Sensitive Issues and Cross-Border Movement in the EU*, cit., pp. 355-359. The author cites, for example, the case of *Parry v. the United Kingdom*, cit.
[548] "Genitocentrism", a term coined by the scholar Alex Sharpe, refers to the presumption that the physical transformative process and thus the adaptation of the genitals to the declared gender identity is the final step and the objective of the gender transition process. This presumption led the Court to legitimise gender affirming surgeries as a legitimate requirement for LGR. For more on the concept of genitocentrism, see A. SHARPE, *Transgender Jurisprudence: Dysphoric Bodies of Law*, London, 2002, p. 25; D. A. GONZALEZ-SALZBERG, *An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France*, cit., p. 532; L. HOLZER, *Legal Gender Recognition in Times of Change at the European Court of Human Rights*, cit., p. 173.

allowed the requirement of gender reassignment surgery as a condition for legal recognition[549]. The decision could be seen as reinforcing a somewhat rigid understanding of gender based on physical characteristics, even though it recognised that gender identity is a deeply personal and complex matter.

Thus, *Goodwin* can be seen as both a breakthrough and a limitation. On one hand, the judgment signified a shift away from an essentialist view of gender as a biological fact, recognising instead the importance of LGR for individuals who had undergone gender-affirming surgery. On the other hand, by linking LGR to medical procedures, the judgment continued to frame gender identity through the lens of physical, medical interventions, potentially reinforcing a narrow, surgery-focused view of what constitutes gender. Moreover, it has been argued that the decision paradoxically strengthened a heteronormative framework: the right to marry was granted essentially because, following surgery, the individuals could fit the traditional binary paradigm composed of a woman and a man, leaving the underlying gender system unchallenged[550].

This balance between acknowledging gender identity and relying on medical procedures as the means to recognition contributed to a more complex and evolving understanding of gender identity in law, which would continue to develop in later cases.

3. 3. 3 The Third Phase of ECtHR's Case Law on Legal Gender Recognition: from the Era of "*Genitocentrism*" Towards Self-Determination

The third phase of the ECtHR's case law marks a significant shift in its approach to LGR. In earlier cases, as we have seen, certain operations and medical evaluations were often

[549] D.A. GONZALEZ-SALZBERG, *An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France*, cit., p. 532.

[550] See D.A. GONZALEZ-SALZBERG, *The Making of the Court's Homosexual*, cit., p. 384. This tension between identity recognition and the preservation of traditional marriage was illustrated in the subsequent case of *Hämäläinen v. Finland* (2014). Here, the Court ruled that conditioning LGR on the conversion of a pre-existing marriage into a civil partnership fell within the State's margin of appreciation. As observed by Hodson, this judgment highlights the ECtHR's persistent prioritisation of the "traditional family" model. The applicant therefore faced a lack of status continuity within the national territory and was compelled to "downgrade" the marital status, from the existing relationship to avoid the creation of a same-sex marriage. On this, see also L. HODSON, *The European Court of Human Rights and Same-Sex Marriage,* cit., p. 74. For a national perspective in this tension, see also F. PESCE, *La tutela europea dei diritti fondamentali in materia familiare,* cit., pp. 32-33. The author analyses the landmark Judgment no. 170/2014 of the Italian Constitutional Court. In that instance, the Court declared the automatic dissolution of marriage following gender recognition unconstitutional where no alternative form of legal recognition, such as civil unions, existed; thus, rejecting the so-called "forced divorce" requirement in a legal vacuum.

treated as legitimate requirements for LGR, and the Court frequently relied on them in its rulings. However, in this third phase, the Court began progressively distancing itself from these medical prerequisites, signalling a shift toward greater recognition of the requests of transgender individuals.

Indeed, the ECtHR's scrutiny extended to the fairness of medical procedures and related costs. In *Van Kuck v. Germany* (2003)[551], the Court held that while there is no automatic right to state-funded gender affirmation surgery, denying reimbursement without a fair and objective assessment of medical necessity constituted a violation of both Article 6 (fair trial) and Article 8. This underscored that the burden of proving the medical condition could not be made disproportionately difficult for the applicant[552].

A crucial precursor of this phase was the case *Y.Y v. Turkey* (2015)[553], which dealt with the refusal to authorise gender reassignment surgery because the applicant, a trans man, had not been previously sterilised. This case marked a turning point regarding bodily integrity as a fundamental and absolute right. The Court established that the State cannot impose the permanent forfeiture of reproductive capacity as a prerequisite for accessing identity rights, signalling that physical integrity could no longer be sacrificed for the public interest[554].

Two most relevant cases in this regard are *A.P., Garçon and Nicot v. France*[555] and *X and Y v. Romania*[556].

In *A.P., Garçon and Nicot*, the Court ruled that requiring sterilisation, or any medical treatment likely to result in sterilisation, as a condition for LGR, constituted a violation of Article 8 of the Convention[557]. This judgment marked a landmark moment in the Court's jurisprudence, as it explicitly acknowledged the violation of the bodily integrity of trans individuals when forced into such procedures[558]. Although the facts of the three applicants were different, the Court decided to analyse them jointly; the applications

[551] ECtHR, *Van Kuck v. Germany*, 12 June 2003, App. no. 35968/97.
[552] F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, cit., p. 274.
[553] ECtHR, *Y.Y. v. Turkey*, 10 March 2015, App. no. 14793/08.
[554] For a comment on this, see L. POLI, *Tutela dei valori morali e pluralismo nella giurisprudenza della Corte europea dei diritti umani*, cit., pp. 246-247.
[555] ECtHR, *A.P., Garçon and Nicot v. France*, 6 April 2017, App. nos. 79885/12, 52471/13 and 52596/13.
[556] ECtHR, *X and Y v. Romania*, 19 January 2021, App. nos. 2145/16 and 20607/16.
[557] ECtHR, *A.P., Garçon and Nicot v. France*, cit., paras. 131-135.
[558] L. HOLZER, *Legal gender recognition in times of change at the European Court of Human Rights*, cit., p. 175.

concerned three French transgender women who were denied legal recognition of their gender identity.

The applicant A.P. had undergone gender-affirming surgery in Thailand, but French authorities refused to recognise her gender identity because she refused to undergo a physical and psychological evaluation. French law at the time required such evaluations to confirm that her physical appearance, referring to sex characteristics, aligned with the gender identity she claimed[559]. Garçon, who was undergoing hormonal treatment, was also denied recognition of her gender identity because she failed to demonstrate that her transition was irreversible, as a requirement under French national legislation[560]. Similarly, Nicot had not undergone surgery, and as a result, the French authorities rejected her request for gender recognition[561].

In its ruling, the Court found a violation of Article 8 ECHR regarding the second and third applicants, as they were required to prove the irreversible nature of their physical transformation. At the same time, no violation of Article 8 was found regarding the requirement to prove that they suffered from gender identity disorder[562] and, for the first applicant, regarding the obligation to undergo a medical examination, *"although the expert medical assessment that was ordered entailed an intimate genital examination"*[563].

In its judgment, the Court stressed that conditioning LGR on gender-affirming surgery or any sterilising treatment against the will of the individual infringed upon their right to respect for private life, as it essentially made the recognition of their gender identity contingent upon the forfeiture of their physical integrity. The judgment in *A.P., Garçon and Nicot* marked a "monumental shift" in the ECtHR case law[564] by removing sterilization from the list of requirements for LGR.

However, the Court did not go so far as to rule that medical assessments or psychological evaluations were inherently a violation of human rights. It still maintained that certain medical prerequisites (e.g., medical examinations and a diagnosis of gender dysphoria)

[559] ECtHR, *A.P., Garçon and Nicot v. France*, cit., paras. 7-31.
[560] Ibid., paras. 32-40.
[561] Ibid., paras. 41-52.
[562] This finding of the Court was reached based on an analysis of the European consensus, i.e. on the consideration of how widespread this requirement was among CoE States. In addition, the Court considered that "*transsexualism*" appeared in Chapter V of the World Health Organisation's International Classification of Diseases as a disorder. See ECtHR, *A.P., Garçon and Nicot v. France*, cit., para. 139.
[563] ECtHR, *A.P., Garçon and Nicot v. France*, cit., para. 152.
[564] Ibid.

could be legitimate under specific circumstances[565]. This reflects the Court's nuanced approach, recognising the importance of the individual's bodily autonomy while also allowing some medical involvement in the process of LGR.

Ultimately, this judgment represents a critical step forward in the protection of the rights of transgender people in Europe, ensuring that the path to legal recognition of one's gender identity is not dependent on such invasive medical procedures as sterilisation that violate bodily integrity, when carried out against the individual's will.

Another pivotal case in the ECtHR's evolving stance on LGR is *X and Y v. Romania*, in which the Court found that requiring surgery for LGR constituted a violation of Article 8 of the Convention. The applicants in this case were two transgender men who requested recognition of their gender identity in Romania but were denied because they had not undergone gender-affirming surgery, a requirement under Romanian law.

The Court acknowledged that gender-affirming surgeries have a significant impact on an individual's physical integrity[566]. However, it criticised the Romanian courts for failing to justify the necessity of such invasive procedures and for not conducting a fair balancing test between public interests and the individual rights. The ECtHR observed that this situation placed Romanian transgender individuals in an "impossible dilemma": they were faced with the choice of either undergoing surgery, thereby compromising their right to bodily integrity, or renouncing their right to LGR, which constituted a violation of their right to private life[567].

The ECtHR found that the applicants' situation mirrored that of the applicants in *A.P., Garçon and Nicot*, where individuals were required to undergo mandatory sterilisation to obtain LGR. However, the Court also highlighted an important difference between the two cases. Unlike in *A.P., Garçon and Nicot*, *X and Y*, the applicants in *X and Y* did not specifically challenge sterilisation as a potential consequence of surgery. Instead, their case focused on the invasiveness of the surgery itself, regardless of its effect on fertility. The Court noted that any requirement for LGR that involves procedures affecting physical

[565] J.M. SCHERPE, *Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons,* cit., p. 209.
[566] ECtHR, *X and Y v. Romania*, 19 January 2021, App. nos. 2145/16 and 20607/16, para. 161.
[567] Ibid., para. 165.

integrity is inherently problematic, as it places an unnecessary and disproportionate burden on individuals seeking to have their gender identity legally recognised[568].

This ruling in *X and Y v. Romania* represented a significant shift in ECtHR case law concerning the rights of transgender individuals, particularly in relation to their bodily autonomy and physical integrity[569]. Together with the *A.P., Garçon and Nicot* decision, *X and Y v Romania* marked a departure from the Court's previous approach, which had been influenced by a "genitocentric" view of gender identity[570].

By contrast, the *X and Y* judgment emphasised that the right to private life, including the recognition of one's gender identity, should not be contingent on invasive and irreversible medical procedures. The Court also criticised the Romania authorities for failing to strike a fair balance between the individual's right to private life and the public interests in legal certainty, inalienability, consistency and the reliability of civil status records. The ruling underscored the importance of ensuring that any legal requirements for gender recognition do not disproportionately infringe on an individual's physical integrity or autonomy.

In sum, *X and Y v. Romania* reinforced the ECtHR's evolving approach to transgender recognition and rights, establishing that LGR should not be contingent on invasive surgeries. This case, alongside *A.P., Garçon and Nicot*, marked a critical turning point in the Court's approach to bodily autonomy, aligning it more closely with the principles of dignity, privacy, and non-discrimination.

During this phase of the ECtHR's jurisprudence, the Court further clarified which requirements are permissible for LGR and how such processes should be regulated. Although it did not provide a definitive and unambiguous framework, certain rulings significantly contributed to shaping the standards for LGR.

In *S. V. v. Italy* (2018)[571], the Court emphasised the importance of ensuring that procedures for LGR are *"quick transparent and accessible"*[572]. While the case arose in response to specific circumstances where the applicant was denied a change of name, the judgment

[568] Ibid., para. 161.
[569] S. SCHOENTJES, P. CANNOOT, *X and Y v. Romania: the "Impossible Dilemma" Reasoning Applied to Gender Affirming Surgery as a Requirement for Gender Recognition*, in *Strasbourg Observers*, 2021.
[570] L HOLZER., *Legal gender recognition in times of change at the European Court of Human Rights*, cit., p. 175.
[571] ECtHR, *S. V. v Italy*, 11 October 2018, App. no. 55216/08.
[572] Ibid., para. 73.

established an important precedent for recognising the right to name changes for transgender individuals. In *Rana v. Hungary*[573] (2020), the Court addressed the denial of LGR to a non-national residing in Hungary. The applicant, an Iranian transgender man, was refused recognition of his gender identity because Hungarian law restricted LGR to its nationals. The ECtHR held that this denial violated Article 8 of the Convention, stressing that the right to private life includes the right to recognition of one's gender identity, regardless of nationality.

Another significant case from this phase is *Y v. France*[574], which although primarily concerning an intersex individual, intersects with broader issues of LGR. The applicant, who identified as *"intersexe"* or with a *"sexe neutre"*[575], challenged the discrepancy between their gender identity and the sex assigned at birth. This case raised important questions about how legal systems recognise gender identities that do not conform to the binary framework of male or female. The Court ultimately upheld the French government's position that the coherence and inalienability of civil status records justified rejecting the applicant's requests and avoided addressing the deeper issue of whether sex/gender registration is necessary, and for which purposes[576].

This cautious stance was explicitly clarified by President Mattias Guyomar. Commenting on the decision, he explained that the Court's reasoning rests on a dual premise: while affirming that non-binary gender identity falls within the scope of Article 8, the ECtHR acknowledges the absence of a European consensus regarding the obligation to recognise a third or neutral gender. Consequently, lacking common ground among Member States, the matter currently remains within the national margin of appreciation[577].

While the Court maintained a cautious approach in *Y v. France*, the political bodies of the CoE have recently taken a bolder stance. In 2025, the Committee of Ministers adopted a specific Recommendation on the equality of rights of intersex persons[578]. This non-binding but highly authoritative instrument calls on Member States to ensure that sex/gender registration procedures are flexible and respectful of self-determination[579],

[573] ECtHR, *Rana v. Hungary*, 16 July 2020, App. no. 40888/17.
[574] ECtHR, *Y v. France*, 31 January 2023, App. no. 76888/17.
[575] Ibid., para. 13.
[576] P. CANNOOT, *Y v France: Intersex Rights in the Age of Subsidiarity*, cit., p. 13.
[577] M. VENTURA, *La protezione dei diritti dell'uomo in Europa,* cit., p. 98.
[578] Council of Europe, Committee of Ministers, *Recommendation of the Committee of Ministers to member States on equal rights for intersex persons*, adopted on 7th October 2025.
[579] Ibid., para. 39.

explicitly encouraging the possibility of non-binary markers or the removal of sex markers from official documents where possible[580]. This signals a potential future divergence between the cautious judicial restraint of the Court and the progressive political consensus emerging within the CoE.

3. 4 The Role of NGOs in the ECtHR Case Law on Gender Identity

As already outlined in Chapter 1, generally, the role of NGOs within the ECtHR jurisprudence is exercised through third-party interventions (See Chapter 1.5.3). Through this mechanism, NGOs have had a significant impact on Strasbourg case law, mainly in three different ways.

First, they play a crucial role in bringing specialised data to the Court. As the Court is a judicial body that deals with many different areas of human rights, it is especially important to work with updated comparative law studies and sociological data. In some cases, such information helps the judge establish the European *consensus* on the matter, for the purposes of the margin of appreciation test. In *Sheffield and Horsham*, for instance, the Court relied on a survey submitted by the NGO Liberty to recognise that "*the majority of member States now make provision for such recognition*"[581] (i.e., full legal recognition of gender reassignment) at that time[582]. Moreover, in *Goodwin,* the same NGO provided the Court with evidence of the international trend towards trans rights[583], leading to a positive outcome this time. In *Y v. France,* a coalition of NGOs[584] produced a comparative law analysis to demonstrate a growing recognition in Europe of the self-determination principle and the recognition of non-binary markers[585].

Second, they intervene to suggest to the Court the use of terminology that is as respectful as possible, usually advocating for depathologising and non-medical terms. For instance, they recommend avoiding the use of "trans" or similar labels as nouns, advocating instead for their use exclusively as adjectives; however, studies on case law reveal that the Court

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[580] Ibid., para. 40.
[581] ECtHR, *Sheffield and Horsham v. the United Kingdom*, cit., para. 35.
[582] See F. EDEL, *Case Law of The European Court of Human Rights Relating to Discrimination on Grounds of Sexual Orientation or Gender Identity*, cit., p. 213.
[583] See C. MCCRUDDEN, *Using Comparative Reasoning in Human Rights Adjudication*, cit., p. 16. See also L. VAN DEN EYNDE, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights*, cit., p. 299 ff.
[584] The coalition was composed of the Organisation Intersex International (OII Europe), the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)-Europe, and the Collectif Intersexe Activiste (CIA).
[585] ECtHR, *Y v. France,* cit., para. 64.

does not always adhere to these guidelines, frequently employing such terms as nouns[586]. In this regard, it has been noted that, while historically the Court adopted pathologising language, recently it has shifted toward the use of the term "transgender", which is one of the more inclusive options[587]. Again, in *Y v. France*, the organisations recommended that the Court use the terms *gender identity* and *sex characteristics* instead of other outdated terminology[588].

Third, and linked to the first point, NGOs may bring to the Court legal arguments aimed at reducing the margin of appreciation of States, implicitly supporting applicants, as noted by the Court in *A.P., Garçon and Nicot*[589]. Although formally acting as neutral *amici curiae*, their interventions often carry an implicit advocacy role: by providing comparative law data that highlight increasing societal and legal recognition of trans rights, NGOs strategically aim to demonstrate that the respondent State is in contravention of the ECHR.

3. 5 The Emerging Role of the Court of Justice of the European Union

The evolutions of the two Courts, the ECtHR and the CJEU, reveal a distinct pattern: while not perfectly parallel, they exhibit clear signs of reciprocal *cross-fertilisation*. Initially, the CJEU's jurisprudence was largely confined to the workplace[590], adjudicating discrimination cases based on EU secondary law and offering protection primarily to post-operative individuals[591]. However, the introduction of the Charter of Fundamental Rights into EU primary law with the Treaty of Lisbon marked a shift, allowing the Luxembourg Court to move beyond its early and narrower approach.

The legal mechanism driving this change is quite precise: while Member States retain exclusive competence over the modalities of LGR, they must exercise this competence in compliance with EU law whenever the matter falls within its scope, such as in cases

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[586] K. PERUZZO, *'Trans', 'Transgender' and 'Transsexual' in Case Law: A Corpus-Assisted Analysis of ECtHR Judgments*, in *Where Gender and Corpora Meet: New Insights into Discourse Analysis*, 2024, p. 166 ff.
[587] P. CANNOOT, *The Pathologisation of Trans Persons in the ECtHR's Case Law on Legal Gender Recognition*,* in *Netherlands Quarterly of Human Rights*, 2019, p. 22.
[588] ECtHR, *Y v. France,* cit., para. 59.
[589] ECtHR, *A.P., Garçon and Nicot v. France*, para 138.
[590] A. TRYFONIDOU, *The Cross-Border Recognition of Changes in the Legal Sex of Transgender Persons: The Landmark Court of Justice ruling in the Mirin case,* in *European Constitutional Law Review,* 2025, p. 340.
[591] Ibid., p. 343.

involving freedom of movement[592]. It is precisely through this lever that fundamental rights, and consequently ECtHR jurisprudence itself, have permeated CJEU case law. Remarkably, in the *MB* (2018)[593] case, the CJEU decided that the requirement of annulment of marriage as a condition for a full legal recognition constituted discrimination based on sex[594]. As noted by scholars, in this instance the CJEU proved even more protective of LGBTQ+ rights than the Strasbourg Court, contrasting the *MB* ruling with the ECtHR's finding in *Hämäläinen* regarding the "forced divorce" requirement[595].

While the ECtHR has been the traditional guardian of human rights in Europe, recent jurisprudence from the CJEU is emerging as a powerful complementary force, particularly regarding the cross-border recognition of gender identity[596] and data protection.

A landmark development occurred with the Grand Chamber judgment in *Mirin* (2024)[597]. The case concerned a Romanian citizen assigned female at birth who, exercising free movement rights, moved to the United Kingdom (then an EU Member State), obtained British citizenship, and legally changed his gender and name to male[598]. Upon attempting to update his Romanian birth certificate, national authorities refused, requiring a new judicial procedure in Romania[599]. The CJEU ruled that such a refusal violates Article 21 TFEU (freedom of movement)[600]. The Court established that Member States are precluded from refusing to recognise and register a change of first name and gender

[592] See, *inter alia,* Ibid., p. 337; C. FOSSATI, *Il riconoscimento della modifica dell'identità di genere tra gli Stati membri dell'Unione europea: il caso Mirin*, in *Quaderni di SIDIBlog*, 2024, p. 240; S.L. GÖSSL, *"Mirin" and Beyond - Gender Identity, Domestic Private International Law, and Human Rights in the EU*, in *International Journal of Law, Policy and the Family*, 2025 (accepted for publication), p. 14.
[593] CJEU, *MB v. Secretary of State for Work and Pensions*, 26 June 2018, Case C-451/16.
[594] Ibid., para. 52.
[595] A. TRYFONIDOU, *The Cross-Border Recognition of Changes in the Legal Sex of Transgender Persons,* cit., p. 341.
[596] For the purposes of this work, it is not possible to carefully examine the protection of the rights of trans people under EU law and the role of the CJEU. However, it would be relevant to analyse CJEU's case law in this regard. Historically, the Court's protection was limited to the employment sphere. See, e.g., CJEU, *P v. S and Cornwall County Council*, 30 April 1996, Case C-13/94, establishing that dismissal based on gender reassignment constitutes sex discrimination; CJEU, *K.B.*, 7 January 2004, Case C-117/01; CJEU, *Richards*, 27 April 2006, Case C-423/04. For a commentary on this case law, see M.H. LUDWIG, *The Advancement of the Rights of Trans Persons before the CJEU*, in *ERA Forum*, 2025, vol. p. 611 ff.
[597] CJEU, *Mirin* [GC], 4 October 2024, Case C-4/23. *See also* Articles 20 and 21(1) TFEU; Articles 7 and 45 of the Charter of Fundamental Rights of the European Union.
[598] Ibid., paras. 15-18.
[599] Ibid., para. 21.
[600] Ibid., para. 69.

identity lawfully acquired in another Member State[601]. Crucially, the CJEU shifted the burden of justification, noting that such a refusal creates a discrepancy in identity documents that hinders the right to free movement and residence. This judgment sets a clear obligation of mutual recognition for gender identity within EU, bypassing the need for the harmonisation of national LGR procedures[602].

The CJEU has also leveraged the General Data Protection Regulation (GDPR)[603] to protect trans rights internally, even without a cross-border element. In *Mousse* (2025)[604], the CJEU held that the mandatory collection of gendered titles, such as Mr. or Ms., by a railway company for ticket purchases violated the GDPR's principle of data minimization[605]. The Court recognised that such data is not necessary for the performance of the contract and that its processing could entail a risk of discrimination based on gender identity[606].

This protection extends to the rectification of official State registers, as seen in the *Deldits* (2025)[607] case. In this case, regarding an Iranian refugee in Hungary whose gender was registered as female despite his male identity, the Court interpreted the right to rectification enshrined in Article 16 GDPR and the principle of accuracy (Article 5) as obliging national authorities to correct gender data when it does not match the individual's identity[608]. Significantly, the Court declared that administrative practices requiring gender affirmation surgery as proof for rectification are incompatible with the Regulation and the Charter of Fundamental Rights, as they violate physical integrity[609]. The case is seen as a turning point, where the CJEU, using GDPR and human rights, abandons a pathologising view on trans identity[610].

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[601] Ibid., para. 62.
[602] For a commentary of the case, see A. TRYFONIDOU, *The Cross-Border Recognition of Changes in the Legal Sex of Transgender Persons: The Landmark Court of Justice ruling in the Mirin case*, cit., pp. 333 ff.
[603] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, pp. 1–88.
[604] CJEU, *Mousse (Mousse v Commission nationale de l'informatique et des libertés (CNIL) and SNCF Connect)*, 9 January 2025, Case C-394/23.
[605] Ibid., para. 55. See also M.H. LUDWIG, *The Advancement of the Rights of Trans Persons before the CJEU*, cit., p. 619.
[606] CJEU, *Mousse*, cit., para. 43.
[607] CJEU, *Deldits (VP v Országos Idegenrendészeti Főigazgatóság)*, 13 March 2025, Case C-247/23.
[608] Ibid., para. 50.
[609] Ibid.
[610] On a commentary of the case, and previous case law, see A. MARCIA, *Trans* Rights Beyond Medicalisation? The CJEU in Case Deldits (C-247/23)*, in *European Law Blog*, 2025, p. 5.

Finally, the recent judgment in *Shipova* (2026)[611] has pushed these boundaries even further. The case concerned a Bulgarian citizen residing in Italy who sought to amend her gender data (sex, first name, patronymic and family name) in the Bulgarian civil registry to reflect her gender identity. The national authorities and courts had refused the request, relying on national legislation and a Constitutional Court that defined sex exclusively in its biological dimension, thereby precluding a change of gender identity without a physical modification[612].

The CJEU ruled that such a prohibition violates Article 21 TFEU and Article 4(3) of Directive 2004/38, read in the light of Article 7 of the Charter[613]. The Court held that the discrepancy between the applicant's lived gender identity and the gender data on her only identity documents creates a real risk of having to repeatedly dispel doubts about her identity, which significantly hinders her right to free movement. Crucially, as highlight in recent commentary, unlike *Mirin*, which involved the recognition of a gender change already legally acquired in another Member State, *Shipova* establishes a direct obligation for the Member State of origin to permit the amendment of civil status records for its own nationals who have exercised free movement rights[614]. Furthermore, reaffirming the absolute primacy of EU law, the CJEU established that national courts must disapply interpretations by their national Constitutional Courts if such interpretations are contrary to the rights conferred by EU law[615].

By aligning with the core reasoning proposed by the Advocate General[616], this judgment implies a positive obligation for EU Member States to provide some form of LGR procedure for citizens exercising free movement, effectively bridging the gap with the ECtHR jurisprudence but with the stronger enforcement mechanism of EU law[617].

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[611] CJEU, *K. M. H. v Obshtina Stara Zagora (Shipova),* 12 March 2026, Case C-43/24.
[612] Ibid., paras. 17-21.
[613] Ibid., para. 56.
[614] The judgment marks a significant step because it does not merely concern the cross-border recognition of an act obtained abroad, but a direct judicial request to the State of nationality to change the gender marker to facilitate the free movement of the Union citizen. See A. ADINOLFI, O. FERACI, *Modifica dei dati relativi al genere nei registri dello stato civile e libertà di circolazione e soggiorno dei cittadini dell'Unione: la sentenza Shipova*, in *Osservatorio Lefebvre Giuffrè*, 24 March 2026.
[615] CJEU, *Shipova*, cit., para. 64.
[616] See also M.H. LUDWIG, *The Advancement of the Rights of Trans Persons before the CJEU*, cit., p. 626; C. FOSSATI, *Il riconoscimento della modifica dell'identità di genere tra gli Stati membri dell'Unione europea: il caso Mirin*, *cit.,* p. 240; A. TRYFONIDOU, *Legal Gender Recognition and Free Movement in the EU: In Defence of the Advocate General Opinion in Shipov,* in *VerfBlog,* 2025.
[617] CJEU, *Shipova*, Opinion of the Advocate General delivered on 4 September 2025, Case C-43/24.

3. 6 Partial Conclusions

The interpretative framework provided by the ECtHR raises significant questions about its sufficiency in reducing legal uncertainty and resolving conflict of laws between States. While the Court's jurisprudence aims to establish consistency in establishing standards for human rights protection, ambiguity persists. The gradual but uneven evolution of the ECtHR's approach to LGR highlights both progress and unresolved tensions.

On one hand, the Court has condemned invasive medical requirements and emphasised procedural fairness. On the other, it has yet to provide a fully harmonised framework that addresses the wide variation in national systems of registration and recognition of gender identity. This inconsistency can result in contradictory rulings, undermining the goal of a coherent European standard. Specifically, ambiguity persist regarding non-binary identities and complete depathologisation, as on those matters the Court still relies heavily on the margin of appreciation.

The impact of the ECtHR's jurisprudence is undeniable. In several instances, it has led to concrete legislative changes in CoE States, such as France and the United Kingdom[618]. The Court's rulings have progressively reduced the margin of appreciation granted to States, thereby establishing a clearer right to the recognition of gender identity. This has included the removal of sterilisation and surgery as legal requirements for LGR, reflecting a significant shift towards respecting bodily integrity and individual autonomy. As already noted, this evolution marks a crucial paradigm shift: the Court has moved from solely protecting a general interest to placing individual self-determination at the centre of its reasoning.

Despite these developments, the ECtHR has stopped short of fully embracing a framework of self-determination. While its judgments have moved away from essentialist views of gender, they remain rooted in procedural and administrative safeguards that vary widely across States. The limits of public policy in matters of gender identity now faces an old obstacle, namely the need to establish minimum standards of protection of human rights common to all European States. Moreover, the Court's reasoning remains

[618] L. HOLZER, *Legal Gender Recognition in Times of Change at the European Court of Human Rights*, cit., p. 172.

embedded in a heteronormative and gender binary framework[619], which serves as a hindrance to full identity recognition.

In this context, the CJEU is emerging as a powerful catalyst. Through cases like *Mirin* and *Deldits*, EU law is effectively bypassing the margin of appreciation doctrine by framing LGR as a matter of free movement and data protection, potentially succeeding where human rights litigation has stalled, but referring to ECtHR case law to establish a minimum guarantee for protecting human rights in the EU.

The ECtHR's jurisprudence suggests a cautious movement from essentialism towards self-determination. However, this evolution is incomplete. A critical analysis of recent cases, such as *Y v. France* and *Y v. Poland* (2022)[620], underscores the limits of the current framework. Consequently, the framework provided by the Court, while groundbreaking in many respects, is insufficient to address the deep disparities in LGR systems among CoE States, and several challenges remain.

First, national LGR systems still vary widely, with some States now allowing for non-binary or third-gender markers and others adhering strictly to a binary model. Second, the procedures for obtaining LGR also differ drastically. Some States have adopted self-determination models, while others retain medical, psychological, or juridical prerequisites. These differences often lead to conflicting outcomes in similar cases, creating situations of *limping status*. As analysed in Chapter 2, this lack of cross-border continuity constitutes a systemic failure to protect the right to personal identity in a transnational context. While the Court has effectively "disempowered" States from refusing recognition entirely, it still permits a form of downgraded recognition that leaves trans individuals in a fragmented legal reality. Third, despite the Court's efforts to establish certain principles, its jurisprudence has not achieved sufficient harmonisation.

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[619] See P. CANNOOT, M., DECOSTER, *The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis*, in *International Journal of Gender, Sexuality and Law*, 2020, p. 27; E. TISSANDIER-NASOM, *Effective Recognition and Protection of Non-Binary Gender Identities in the Council of Europe Framework*, in *University of Bologna Law Review*, 2023, p. 120; G. VIGGIANI, *Appunti per un'Epistemologia del Sesso Anagrafico*, in *GenIUS*, 2018, p. 998; G. GILLERI, *Abituarsi ad altro (e all'altro): i diritti umani e il metodo queer femminista*, cit., p. 204.

[620] ECtHR, *Y v. Poland*, 17 February 2022, App. no. 74131/14. To read more on critical analysis on this case, see CANNOOT P., *Y. v. Poland: ECtHR Case Law on Gender Recognition Remains Embedded in Cisnormativity*, in *Strasbourg Observers*, Ghent, 2022, available at https://strasbourgobservers.com/2022/04/07/y-v-poland-ecthr-case-law-on-gender-recognition-remains-embedded-in-cisnormativity/ (last access 28th December 2025).

And new challenges, such as the introduction of non-binary gender identities, are lying ahead.

A more unified European framework would not only enhance compliance with human rights but also address private international law concerns by establishing minimum standards for the recognition of gender identity. Such a framework would facilitate mutual recognition of LGR decisions, reduce conflicts of laws, and ensure consistent protection for individuals across borders. Ultimately, the future of LGR will likely depend on the interplay between the moral evolution of the Strasbourg Court, the market-driven imperatives of the CJEU, and political pressure for self-determination.

Conclusions

Even a partial analysis of the ECtHR case on *sensitive* matters leads to the conclusion that the development of human rights protection in the European legal space has been profound. In all the areas considered, a clear trajectory is visible: a transition from a phase of minimal (or absent) protection, characterised by a wide margin of appreciation in favour of States, to a phase of increased scrutiny where individual rights are more robustly safeguarded.

As observed in this work, the concept of personal status has entered into the Strasbourg courtroom and emerged reshaped. Departing from its historical function as a static tool for State administration and population control, status has increasingly evolved into a dynamic projection of individual autonomy and private life. It is difficult to determine with certainty whether societal changes influenced the Court's approach or vice versa; it is more likely a reciprocal influence[621], where the Court interprets the *living instrument* of the Convention while States often attempt to maintain the status quo.

It is now possible to address the primary research question posed at the beginning: within the ECtHR case law, is the principle of continuity reshaping State obligation? The answer is affirmative, albeit with significant qualifications. The shift toward a person-centric view of status has necessarily contracted the national margin of appreciation. In cross-border scenarios, States are no longer confronted with the question *if* they must recognise a status acquired abroad, but rather *how* to recognise it. This pivotal shift was also facilitated by the Court's work on the internal dimension of human rights: by setting minimum domestics standard, the Court inevitably created a baseline that influences the continuity of status in transnational cases.

In the specific area of gender identity, the evolution of the ECtHR's jurisprudence registers crucial achievements. The Court has progressively eroded the margin of appreciation, particularly when self-determination and bodily integrity are at stake. It has established minimum standards, from which it will be difficult to regress. First, it called the States on the abolition of invasive medical requirements, most notably forced

[621] See, *inter alia¸* C. RINALDI, C. VIGGIANI, *Il Riconoscimento Giuridico del "Terzo Sesso": Un Esempio di Inclusione-Esclusione? Riflessioni Socio-Giuridiche e Culturali sulla Condizione Intersex*, in *Cambio. Rivista Sulle Trasformazioni Sociali*, 2022, p. 150.

sterilisation. Second, it established the positive obligation to legally recognise the gender identity of trans people domestically. Third, it imposed the obligation of quick, transparent, and accessible LGR procedures.

However, this progress is accompanied by unresolved tensions, i.e. the "yes, but" part of the answer. Nonbinary identities remain, at least for now, outside of mandatory recognition, revealing the limits of a self-determination concept that is still tethered to a binary framework. The "marriage dilemma" also persists: while the Court protects same-sex unions, a form of *downgrade recognition* persists. Trans individuals in a relationship may be forced to convert their marriage into a civil union to obtain LGR, as the Court does not impose an obligation to recognise same-sex marriage. It is likely that this requirement, present in some jurisdiction, will be affected by subsequent case-law on same-sex marriages, even though this is not the case for all trans individuals. Third, States are still permitted to require intrusive non-sterilising conditions, such as a diagnosis of gender dysphoria, maintaining a medicalised view of identity.

Is there a *fil rouge* that traces a common origin for those limits? Reconstructing entirely this genealogy it is not possible here. Suffice it to say here that some scholars trace back the origin of those structural limits to, *inter alia*, a legal system that is still heteronormative and binary. This means that there is a strong presumption that sex assigned at birth corresponds to gender identity, that gender identities are only female and male, and that the two recognised genders are complementary[622].

Crucially, these legal gaps have profound impact on human existence. The failure to ensure full continuity of status results in the phenomenon of *limping status*. This fragmentation creates not only bureaucratic hurdles but, most importantly, affects individuals who experience discrimination, with severe consequences for their psycho-physical well-being. In this regard, human dignity should always be taken into account and emphasised as the ultimate benchmark of legal protection.

A critical reflection must be made regarding the role of *biological link*. A tension exists in the Court's reasoning between different areas of personal status. In cases concerning surrogacy and filiation, the Court heavily relies on the biological link as a primary protector of identity. Conversely, in gender identity case law, the Court is moving in the

[622] See, *inter alia*, C. SMART, *Feminism and the Power of Law*, cit., p. 11; G. GILLERI, *Abituarsi ad altro (e all'altro): i diritti umani e il metodo queer femminista*, cit., p. 204.

opposite direction: the "biological truth" of sex assigned at birth is increasingly deemphasised in favour of the *social reality* of the gendered self. This divergence suggests that the Court's concept of identity is not yet full coherent, fluctuating between biological essentialism and social construction depending on the context.

Looking ahead, three major factors will shape the future of LGR in Europe. First, the durability of the established standards. While the case law has set a minimum threshold, the *living instrument* doctrine works both ways. The question remains: are these standards truly irreversible, or could a shifting political scenario, marked by a registered backlash against gender issues[623] and reinforced concept of sovereignty in several (European and not) States[624], lead to a regression in the Court's approach?

Second, the emerging role of the CJEU. While Luxembourg's case law has historically been influenced by Strasbourg, recent developments suggest the CJEU is becoming a new engine for protection. By framing gender recognition as a prerequisite for free movement and EU citizenship, the CJEU may soon grant trans individuals even stronger protection than the ECtHR. It remains to be seen whether this market-driven acceleration will, in turn, influence the moral reasoning of the ECtHR, closing the gap between the two European legal orders and granting enhanced protection to trans individuals.

Third, the future trajectory of LGR will depend on civil society. The *living instrument* doctrine, as seen, does not evolve in a legal vacuum, instead the pressure exerted by NGO through strategic litigation and third-party interventions is increasing and remains crucial for legal recognition.

What should be the ultimate goal? It is difficult to establish definitively. Law should be a means to establish rules that are fair for everyone, granting effective rights. Currently,

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[623] Indeed, scholars highlight the existence of a strong backlash against trans people. This phenomenon, far from being isolated, is a transnational, political and cultural movement. At the centre of this backlash, the identification of an alleged enemy, usually the "gender ideology" or the "gender theory". The backlash is not only theoretical and linguistic, but it is also epistemic, translating in an attempt to "erase" from the discourse trans people. In the US and Canada, the backlash already translated in restrictive laws. To see more on the backlash, A. LAVIZZARI, M. PREARO, *The Anti-Gender Movement in Italy: Catholic Participation between Electoral and Protest Politics*, in *European Societies*, 2019, p. 422 ff.; S. GARBAGNOLI, M. PREARO, *La crociata "anti-gender": dal Vaticano alle manif pour tous*, Torino, 2018, p. 8; L. ARMITAGE, *Explaining Backlash to Trans and Non-Binary Genders in the Context of UK Gender Recognition Act Reform*, in *INSEP Journal*, 2020, p. 19; P. CURRAH, *Gender Wars: Two Scholars Excavate the Origins of Today's Trans Backlash*, in *The Yale Review*, vol. 112, n. 1, 2024, p. 128; K. KELLY-THOMPSON, A. LUSVARDI, *Transgender Bodies are the Battleground: Backlash, Threat, and the Future of Queer Rights in the United States*, in *PS: Political Science & Politics*, 2025, p. 496 ff.

[624] See, for instance, W. MARTINO, D. KUHL, *Epistemic Injustice and Violence in Times of Resurgent Anti-Trans Backlash, Emboldened White Supremacist Rhetoric and Far-Right Extremism*, in *Discourse: Studies in the Cultural Politics of Education*, vol. 45, n. 5-6, 2024, p. 605.

there are gaps to fulfil, as outlined above. However, a possible objective could be the minimisation of limping status and the full consideration of civil society's demands, especially those of marginalised groups.

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