

Gender Identity in International Law

Gender Identity in International Law:

A Certain Inconvenience

By

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Jerry, just remember. It's not a lie... if you believe it.
'George Costanza,' Seinfeld.

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PREFACE

This book is five years in the making. The day in April 2019 when I dared tweet that women have sex-based rights was a day that was going to change my life, though I did not know it then. I thought I had said something obvious, banal even. But I knew already that for some reason my colleagues had become eerily silent about this obvious fact. What happened next is a matter of public record.¹ The usual litany of online abuse, death threats sent to my university email account, calls for me to be fired, disciplined, silenced. There is nothing special in what happened to me, unfortunately. Many women suffered a worse fate. If there is one thing that I will not countenance is to be told what to think, so that day in April 2019 meant the beginning of five years of research. For five years I have read and researched all aspects of gender identity theory.

Although gender identity and trans rights seem to be everywhere, actually researching them in a scientific manner proved elusive. All the literature I accessed took for granted the existence of gender identity, without any objective evidence of it. Like sand, the more I tried to hold it, the more it escaped my grasp. Used to apply legal logic to propositions, I was faced with a plethora of logical fallacies. At times, I thought I may be losing my mind. Were my colleagues really serious when they said some men are women inside? Had they not thought of the legal, political and social consequences of such a proposition? Had they not realised how sexist it was to claim all women think and feel in a certain “feminine” way and that men can know and mimic this?

At times it felt really lonely work. Debating this issue was almost impossible. The “No debate” injunction silenced academics and made us

¹ And by this I mean that it was played out on social media, where I used my name and that the consequences were the source of some attention from German media, where I lived and worked at the time. The Frankfurter Allgemeine Zeitung published a largely sympathetic article on the phenomenon of cancel culture in academia using my story as an example: Thomas Thiel, “Ende einer Treibjagd,” Frankfurter Allgemeine Zeitung, September 28, 2022, <https://www.faz.net/aktuell/karriere-hochschule/hoersaal/cancel-culture-rufmord-kampagne-an-der-universitaet-lueneburg-18328668.html>.

walk on eggshells on social media, where a pronoun could get you permanently suspended. Fortunately, I found a community of like-minded people, mostly women, with whom to share information, and to laugh and bond over the absurdity of it all. These women made these last five years endurable and enjoyable. They are too many to list, they know who they are and this book is dedicated to them.

The book is not dedicated to my academic colleagues, but it is addressed to them. I counted on them to ask and answer the questions I ask in this book, to engage, to debate, to argue and defend their position, if they had one. As I often quipped, lawyers who debated earnestly whether Jaffa Cakes were biscuit or cake, refused to answer the question “what is a woman.” With very few exceptions, academics refused to engage on this issue, though some of them told me privately they agreed with me, but they could not say so publicly. Some wrote to me to tell me to stop talking. I dare say that they did not understand what academic freedom of speech is, and that it does not only grant us more latitude than the general public in expressing our opinion in the academic marketplace of ideas, but it enjoins us to use this freedom. It is not just a right. It is actually our job, for which we get paid, to research, without fear, and go where research takes us, not to lead research to the conclusions we want to reach.

The results of these five years of research are contained in this book. There is so much more that could be said, as gender identity theory is having an effect in almost all areas of public life, from sports, to prisons, to schools, to hospitals, to Lesbian, Gay and Bisexual (LGB) rights. The book focuses on the effect of gender identity theory on international institutions and international law more generally. It is not just a critique, but a plea to reframe this concept and give it its proper place in human rights law as a belief, not shared by all, and not to be imposed either as a form of social control or via legal rules. It seems an immense task, as gender identity has been embedded in international and domestic law and, more troublingly, has generated a whole new area of medicine, dedicated to the disruption of the physical and intellectual development of children on the basis of a presumed disconnect between mind and body, a suspicious distinction in medicine if there ever was one. Children are being reinforced in their delusion that their body is somehow wrong and in need of being fixed through a litany of medication and surgeries. Females are, as always, especially targeted. The female body has always been the locus of exploitation and othering, from Eve born out of the rib of Adam, all the way to the nullification of femaleness in girls barely old enough to know

what their body is like, before they know what a female body is capable of doing.

I did not set out to write a book about feminist international law, but simply a book where international law is taken seriously and not bent out of shape to accommodate an ideology. And I speak about ideology not necessarily as a pejorative term, but simply to outline the difference between the claim that “some people” have a gender identity (a belief, or a theory) and the claim that “everyone” has a gender identity, even if they do not know it, or they disagree with the concept of gender identity (an ideology). The moment in which international law accepted as a definition the idea that all human beings have a gender identity, it transformed this theory into an ideology. The push to make this definition mandatory in social interactions and legislative acts risks transforming this concept from an ideological one to a totalitarian one. The fact that I cannot say *I* do not have a gender identity without receiving some form of abuse should make all academics stand up and take notice. Why is my belief in the idea of gender identities necessary for the protection of gender identities? International law does not require that beliefs are universally shared in order to grant individuals the right to hold them. It is a crucial principle, in human rights law, that only the right of people to hold a belief is protected, not the belief itself, and that human rights law does not impose on individuals the duty to respect any particular set of beliefs, but only to respect the right of people to hold them.

I did end up writing a sort of feminist international law book, in the sense that I always centred women in gender identity theory, to investigate the effects on women and girls of the momentous change demanded by gender identity theorists. I found out quite early on in my work that there are two reactions to any criticism of gender identity theory: the first one, that this theory does not affect women; in fact, we benefit from it (though no-one can really point to any such material benefit for women specifically); the second, it does affect women, but the disadvantage to women is worth it, because “transwomen” are the most oppressed women, and we “cis women” have cis privilege. We are supposed to believe that Iranian women killed for refusing to wear a veil, Afghan girls prevented from going to school, even newborn girls killed because of their sex, are privileged compared to Jennifer Pritzker, American billionaire who decided to “become a woman” at the age of 63. This work cannot help being a feminist book, in the sense that it refuses to see international law through the lens of gender identity theory. It refuses to un-see sex in order to elevate gender identity to prominence. I know there are many who will

accuse me of not being a feminist because I am not a trans-inclusive feminist. This work is not an activist's work, so I do not have to prove what brand of feminism I support. It is a book about international law and its uneasy relationship with gender identity theory. It is not only about that, it is also a proposal to reframe this relationship on an altogether different basis, more firmly grounded on established principles and rules of international law.

Finally, the subtitle. "A Certain Inconvenience" is how the *Goodwin* Court described what society has to bear in order for transsexual people to enjoy their "rights." I cannot think of any other civil rights movement that is premised on the idea that their rights are an inconvenience for society at large. As it turns out, it is women who have to bear more than a certain inconvenience, as this book will show.

I am not going to name names in acknowledging and thanking people, not least because some of the women are still anonymous for their own safety. So I will thank the deeds. To those who supported me and made me laugh in these five years. To those who helped me in my work and who reassured me I was not going insane for holding on to reality. To all the feminists who rejected "Be kind" as their new slogan and their new command.

LIST OF ABBREVIATIONS

ACHR: African Court of Human Rights
APA: American Psychiatric Association
BIPOC: Black, Indigenous and Other People of Colour
CAHVIO: Committee on Preventing and Combating Violence against Women and Domestic Violence
CAT: Convention against Torture
CCPR: Committee on Civil and Political Rights
CEDAW: Convention on the Elimination of All Forms of Discrimination against Women
CHR: Commission on Human Rights
CJEU: Court of Justice of the European Union
CoE: Council of Europe
CRC: Convention on the Rights of the Child
DSD: Differences of Sexual Development
DSM: Diagnostic and Statistical Manual of Mental Disease
EA: Equality Act
ECHR: European Convention on Human Rights
ECtHR: European Court of Human Rights
ECOSOC: Economic and Social Council
ETBB: Equal Treatment Bench Book
FTA: Free Trade Agreement
GIDS: Gender Identity Development Service
GIREs: Gender Identity Research & Education Society
GRA: Gender Recognition Act
GRC: Gender Recognition Certificate
HRC: Human Rights Council
IACHR: Inter-American Court of Human Rights
IACHR: Inter-American Commission on Human Rights
ICC: International Criminal Court
ICCPR: International Covenant on Civil and Political Rights
ICD: International Classification of Diseases
ICERD: International Convention for the Elimination of All Forms of Racial Discrimination
ICESCR: International Covenant on Economic, Social and Cultural Rights
ICJ: International Court of Justice
ICJ: International Commission of Jurists

ICTLEP: International Conference on Transgender Law and Policy
IE on SOGI: Independent Expert on Sexual Orientation and Gender Identity
IHBGDA: International Harry Benjamin Gender Dysphoria Association
ILGA: International Lesbian, Gay Association
ILGA World: International Lesbian, Gay, Bisexual, Trans and Intersex Association
ISHR: International Service for Human Rights
LGB: Lesbian, Gay and Bisexual
LGBT: Lesbian, Gay, Bisexual and Trans
LGBTIQ+: Lesbian, Gay, Bisexual, Trans, Intersex, Queer+
MPRG: Multi-Professional Review Group
NGO: Non-Governmental Organisation
NHS: National Health Service
NICE: National Institute for Clinical Excellence
OHCHR: Office of the High Commissioner for Human Rights
ONS: Office for National Statistics
SHAFT: Self-Help Association for Transsexuals
SOGI: Sexual Orientation and Gender Identity
SOGIESC: Sexual Orientation, Gender Identity and Expression and Sex Characteristics
SRS: Sex Reassignment Surgery
STEMM: Science, Technology, Engineering, Math and Medicine
TGEU: Transgender Europe
UDHR: Universal Declaration of Human Rights
UN: United Nations
UNAIDS: United Nations AIDS Programme
UNDP: United Nations Development Programme
UNHCR: United Nations High Commissioner for Refugees
UNICEF: United Nations Children's Fund
UNPF: United Nations Population Fund
WHO: World Health Organization
WPATH: World Professional Association for Transgender Health
YP: Yogyakarta Principles

GENDER IDENTITY: AN INTRODUCTION

Trans women are women at the end of the day. Every woman is a woman. Women are multifaceted, intergenerational, international. They are limitless, formless ... women are the world.

—Aaron Rose Philip, quoted by UN Women, 6 March 2020²

As gender identity theory continued its march across institutions, I could not help notice how little critical assessment there was on the origin and the history of this concept, its incorporation into international and domestic law and, most urgently, the consequences of its incorporation. After all, gender identity was not even used as a term before the 1960s. How did it manage to become so influential and “inevitable” in such a short time? There are many areas of public life where gender identity theory has pushed all other ideas out of the field, from politics, to sociology, criminology, philosophy, medicine, biology. But my field of expertise is international law, and so I was particularly interested in the way this theory managed to establish itself as the hegemonic theory in the traditionally sceptical world of international lawyers.

Inevitably, the international legal regime most likely to adopt and then disseminate this theory is the international human rights regime. Therefore, this work focuses on the genealogy of gender identity within international human rights institutions and courts, including the European Court of Human Rights (ECHR), the Court of Justice of the European Union (CJEU) and United Nations treaty bodies, especially those whose remit potentially covers gender identity issues. This project is also part legal history, with the proviso that gender identity has no legal pedigree at all. The more one excavates its genealogy, the more one finds there are no roots; gender identity was imported wholesale from the world of sexology in the 1960 and the world of transgender activists, especially from the 1980s, activists who had a legal background and were therefore well

² https://x.com/UN_Women/status/1235977079839166464?s=20.

placed to create, through strategic litigation in US courts,³ the legal grounding this concept sorely lacked.⁴

The thread followed in unraveling this genealogy is the work of the Independent Expert on Sexual Orientation and Gender Identity (IE on SOGI).⁵ As noted in their webpage, “the UN Human Rights Council (HRC) created the mandate of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity through HRC resolution 32/2.”⁶ It is especially in the work of the IE on SOGI that a narrative is developed, embedding gender identity in human rights law as if it were an inevitable and natural part of the fabric of human rights; the creation of this narrative was crucial, because gender identity has no direct grounding either in any conventional treaty or in customary law. In fact, the HRC resolution establishing the mandate is unusual in that it has no specific legal basis in one of the United Nations human rights treaties, nor a direct reference to a recognised protected category. The mandate was created on the basis to Article 2 of the Universal Declaration of Human Rights,⁷ its equality and non-discrimination provision, ensuring that nobody is discriminated against on the basis of the listed grounds and also “other status,” making this an open list, where gender identity and sexual orientation can be read into the Article. The Resolution also invokes in its Preamble the 1993 Vienna Declaration and Programme of Action;⁸ and finally the UN Resolution

³ Both the medical and the legal pedigree of this concept are firmly rooted in the United States. For a comprehensive and up-to-date review of US jurisprudence on gender identity issues, see Jillian Weiss and David Cruz, *Gender Identity and the Law* (Durham: Carolina Academic Press, 2021).

⁴ In this entire collection of papers of a Symposium titled “Queering International Law,” there is no investigation or reporting on the history of gender identity and its entry in international law materials and debates; see *American Journal of International Law*, 116 (2022): 1- 37, doi: 10.1017/aju.2021.72.

⁵ Notably with the 2021 Report “The Law of Inclusion,” A/HRC/47/27, <https://www.ohchr.org/en/documents/thematic-reports/ahrc4727-law-inclusion-report-independent-expert-sexual-orientation-and>.

⁶ Human Rights Council, “Protection against violence and discrimination based on sexual orientation and gender identity,” A/HRC/RES/32/2, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/2.

⁷ United Nations, *Universal Declaration of Human Rights*, 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

⁸ World Conference on Human Rights in Vienna, *Vienna Declaration and Programme of Action*, 25 June 1993, <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>.

which established the HRC.⁹ In other words, there is no direct reference in the supporting resolutions and declaration either to sexual orientation or gender identity. The political rather than legal character of this mandate is reflected in the voting pattern: of the 47 State Members of the HRC, 23 voted in favour, but 18 against, with 6 abstentions, making the favourable votes a minority. For contrast, the resolution for the mandate of the UN Special Rapporteur on Extreme Poverty was adopted by consensus.¹⁰ Inevitably, this voting pattern reflects the rejection of same-sex orientation in many UN Member States. Since this work is exclusively focused on gender identity, any criticism is to be directed only at gender identity theory, and not to be read as a criticism of LGB rights or praise to the countries that oppose them within the United Nations and in any other international organisation.

In this work I do not take issue with the idea that humans have an awareness of their sex and, as they grow up, of how gender expectations built around the sexes affect them and their life chances (and this especially for women), but with the idea that all humans have an innate and internal gender identity which is also fluid and mutable and trumps sex in defining our identity; or even, that sex is as mutable and fluid as gender identity, as much a social construct as gender is;¹¹ or that is gender identity that determines the sex of our bodies (so that a male sexual organ becomes a female sexual organ if the person expresses a female gender identity) and that sex is nothing but a colonial invention to control our bodies in a capitalistic society.¹² While naturally people are free to ideologise sexual differences, it is another matter when international law transforms these ideological conjectures into legal rules. While international

⁹ UNGA Resolution “Human Rights Council,” A/RES/60/251 of 3 April 2006, https://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf. The resolution also mentions “other status.”

¹⁰ HRC Resolution 8/11 of 18 June 2008, “Human Rights and Extreme Poverty,” https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_11.pdf.

¹¹ As posited by Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge 1990).

¹² See Sally Hines, *Is Gender Fluid?* (London: Thames & Hudson Ltd, 2018); Maria Lugones, “Heterosexuality and the Colonial/Modern Gender System,” *Hypatia* 22(1) (Winter 2007): 186-209; Lugones, Maria. “The Coloniality of Gender.” In *The Palgrave Handbook on Gender and Development*, ed. Wendy Harcourt (London: Palgrave Macmillan, 2016), 13-33; Andr a Gill, “From Binary to Intersectional to Imbricated Approaches: Gender in a Decolonial and Diasporic Perspective,” *Contexto Internacional* 41(2) (May/August 2019): 275-302, doi: <https://doi.org/10.1590/S0102-8529.2019410200003>.

law has not done so in conventional means, such as treaties, these ideas are being accepted and disseminated in international legal materials, such as court judgments and international organisations documents. This work is a plea to stop and consider the origin and meaning of the concept, and the consequences of incorporating it into the law. There is a small disclaimer that ought to be incorporated into this plea: it is true that gender identity theory is more diverse, and more open to contestation,¹³ than its translation into the international law regimes shows, as the analysis of the case law and the legal materials will illustrate. So before gender identity theorists go up in arms about my reconstruction of the genealogy of gender identity in international law, I recognise that the theory is not as rigid, or as simplistic, as it is in legal materials. But this is precisely because gender identity theory is an academic endeavour and not a legal one. And like it or not, law needs stability, predictability, and yes, binary solutions.¹⁴

It is therefore particularly fruitful to investigate how the exercise of narrative building that underpins the embedding of gender identity theory in international law manages to avoid the strictures of legal logic. This work intends to focus not so much on the why, but on the how. How has gender identity managed to evolve from an obscure idea developed by sexologists in post-war United States, people as John Money, the discredited sexologist responsible for the Reimer twins' experiments¹⁵ or Harry Benjamin,¹⁶ into something that the UN IE on SOGI says all human beings have? What are the effects of the incorporation of gender identity

¹³ Though these disputes are always endogenous to the theory. There is no challenge to the idea of gender identity *per se*. In this regard, they are comparable to theological differences within a religion. The idea of God (gender identity) is not to be questioned, let alone refuted.

¹⁴ One does not need to be a Luhmann scholar to get the importance of binary distinctions in law, as starkly illustrated by the conduct of criminal trials. Niklas Luhmann, *Law as a Social System*, Trans. Klaus A Ziegert (Oxford: Oxford University Press, 2004).

¹⁵ A story of the Reimer twins in Gaetano, Phil, "David Reimer and John Money Gender Reassignment Controversy: The John/Joan Case." *Embryo Project Encyclopedia* (November 15, 2017). ISSN: 1940-5030, <https://hdl.handle.net/10776/13009>.

¹⁶ Together with Money, Benjamin started the first clinic for sex reassignment surgery at Johns Hopkins Hospital in Baltimore, the Johns Hopkins Gender Identity Clinic; see Charalampos Sotos and Others, "Origins of Gender Affirmation Surgery: The History of the First Gender Identity Clinic in the United States at Johns Hopkins," *Annals of Plastic Surgery*, 83(2) (August 2019): 132-136, <https://doi:10.1097/SAP.0000000000001684>.

theory into human rights law on the rights of women, children and LGB people? One of the goals of this work is to invite a frank, legally grounded, debate on the legal consequences of the momentous change gender identity theorists want to implement in international and domestic law.

Given how obscure gender identity theory was and how small the group affected,¹⁷ a reconstruction of the genealogy of this concept involves investigating the work of single influential individuals, reading magazines that never reached mainstream success, following the proceedings of conferences that were never reported in the media.¹⁸ It is painstaking work, but it is necessary to establish the genealogy of gender identity, a concept that has been accepted in academia, policy making and politics without any attention being paid to its origin and its intellectual background. Gender identity has become a legal artefact shared around different international bodies, seemingly acquiring more legal legitimacy with each reproduction. In reality gender identity has no proper legal or theoretical basis, as we will see the more we consider the assumptions that one needs to make in order to make sense of it.

The legal theorist Ronald Dworkin compared judicial law-making to a “chain novel.”¹⁹ According to Dworkin, judges work in a continuous dialogue to create a legal narrative that has to follow its own internal logic and coherence. It is a powerful metaphor, and evocative of the work of judges, especially in common law systems. However, I believe it may have

¹⁷ The last UK census is the only official statistic on the number of people who define themselves as transgender: the census 2021 shows that 0.10% of people identified as transmen and 0.10% as transwomen. Giulia Castagnaro, “The Office for National Statistics’ Sexual Orientation and Gender Identity Census 2021, GenderGP, January 13, 2023, <https://www.gendergp.com/sexual-orientation-and-gender-identity-census-2021-england-and-wales/#:~:text=The%20Census%202021%20includes%20the,identify%20as%20a%20trans%20man>. The number of people with a gender recognition certificate under the Gender Recognition Act 2004 is considerably lower, 5,871 in December 2020, so 0.0089% of the British population; “Gender Recognition Fee Reduced,” GovUK, May 4, 2021, <https://www.gov.uk/government/news/gender-recognition-certificate-fee-reduced#:~:text=As%20of%20December%202020%2C%20there,people%20living%20in%20the%20UK>.

¹⁸ In this research, the material collected in the Digital Transgender Archive, at <https://www.digitaltransgenderarchive.net/>, has been invaluable.

¹⁹ Ronald Dworkin, *Law’s Empire* (Cambridge: Cambridge University Press, 1986): 229.

a fatal flaw: once an element is incorporated into the logic of the chain novel, it becomes very difficult to dislodge it. The element acquires legitimacy and status at each new chapter of the novel. Each judicial iteration, and each legislative and administrative recognition, makes the removal of this element more difficult to accomplish.

Gender identity constitutes the perfect case study for this potential flaw. After having entered the case law of the ECHR in *Goodwin v UK*²⁰ with little or no scientific evidence, it acquired authority and legitimacy, so that each following chapter of the novel just referred back to *Goodwin* in a validation exercise. The *Goodwin* case is fetishised beyond any reasonable judicial approach to previous jurisprudence, on the basis of poor legal reasoning and a very flimsy factual basis.

This book will focus exclusively on how international law understands gender identity and transgender rights and how gender identity was developed as a legal concept. However, my interest in the concept cannot be separated from the reality of my life as a woman and my understanding of feminism and women's place in the world, and how international law accommodates, or fails to accommodate, that place. Much is made in gender identity theory literature of the right not to be discriminated against because of one's gender identity. This work is an attempt to make sense of this narrative and expose its weak points and logical fallacies. One of the most glaring ones is that the reality of discrimination against "transgender" individuals does not prove that gender identity is anything other than a belief. People can be discriminated against because of their religious beliefs. That in itself does not prove the existence of God or of the immortal soul. There is no proof, other than what is affirmed dogmatically, that gender identity is an objectively observable material reality and not a belief.

I think most people would agree that we have some form of identity connected to our sex, though many feminists would prefer to talk about a sex identity, in order not to lose sight of the material reality of our sexed bodies. I think also it is a common understanding that we are not simply and not only, sexed animals. We grow up in societies where rules, norms, ideas and preconceptions about sex are deeply ingrained. We call this "gender." For feminists, these are negative superstructures women should

²⁰*Case of Christine Goodwin v the United Kingdom*, 11 July 2002, Application No. 28957/95.

[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-60596%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60596%22]}).

dismantle to achieve the liberation of women from “patriarchy.” For conservatives, these are necessary rules to keep women subservient to men. Both sides acknowledge the reality of sex. Gender identity theory leverages a lot of feminist theory in recognising that sex is accompanied in any society by a plethora of ideological constructs, cultural practices, political understandings, of what it means to be a man or a woman.²¹ These gender rules, in most, if not all, societies, are designed to keep women in an inferior position. Additionally, the exploitation of women’s reproductive capacity is the oldest axis of oppression. It is superficially attractive for women to be told that they do not have to accept the constraining rules of gender because sex does not matter.

As any woman, I remember acquiring an understanding and awareness of what being born female meant. This awareness went beyond knowing I *was* female. In that sense, I developed an identity *as* a female, first a girl then a woman. And I could see that gender predetermined not so much what my female body allowed me to do, but what gendered rules prevented me from doing. The goal of feminism is not to dispute the reality that humans, being an anisogamous and sexually dimorphic species, are either males or females. Feminism is the intellectual and political project for dismantling the misconception that sexual dimorphism establishes a hierarchy between the sexes, with a dominant male sex and a dominated female sex. Women are not inferior to men, they are simply different from men, and this difference is a strength. If diversity is a worthy political goal, then pretending there is no diversity in one of the most fundamental aspects of our human experience is certainly not wise.²² As an example, not registering the sex of newborn children, as gender identity theorists propose, is not going to make oppression, discrimination

²¹ Usually misrepresenting the work of Simone De Beauvoir, *The Second Sex*, translated by H.M. Parshley (London: Jonathan Cape, 1953). When De Beauvoir wrote that “one is not born, but rather becomes a woman” she was starting from her stated premise that “The division of the sexes is a biological fact, not an event in human history.” She simply suggested gender rules constrain the path that a woman can take and usually reduce her to her reproductive function. Not that men can become women by self-declaration.

²² In Davina Cooper, Robyn Emerton, Emily Grabham, Han Newman, Elizabeth Peel, Flora Renz, and Jessica Smith, *Abolishing Legal Sex. Final Report*, King’s College, London (2022). <https://www.kcl.ac.uk/law/research/future-of-legal-gender-abolishing-legal-sex-status-full-report.pdf>.) the authors argue the following: “Our research identified benefits to decertification. These included: dismantling a legal system which formally places people, from birth, in unequal social categories of female and male.” (Overview, para 5).

and exploitation of females disappear; it is just going to make it impossible to record them and track them. If one followed this approach to its logical conclusions, no difference and diversity should ever be acknowledged. We should deny that there are people of a different colour, because racism exists, so statistics should not be kept. And colour is a superficial, biologically irrelevant, difference in most cases (though ethnic origin, which is not the same as race anyway, can have a role in the incidence of certain diseases). Sex is a fundamental difference, the very distinction that allows our reproduction as individuals and as a species. Every child ever born was born out of a woman, and resulted from the fertilisation of an egg by a sperm. Noticing this is not “reducing” people to their biology, it is acknowledging the essential role biology plays in our existence. Denial and contempt of nature is a facet both of conservative religious movements and extreme capitalism. Religions claim that body and spirit/soul are separate and the soul prevails over the body (and of course, patriarchal religions relegate women to the lowly body). Capitalism claims that humans can control, and monetise, all aspects of nature and has reached the point in which bodies are monetised not just through the exploitation of labour, but also through the monetisation of bodily functions and parts (hence surrogacy) and of body modification (hence transgender surgeries).

As a feminist, I did not think that, in order to escape the gender roles imposed on me by society, I had to reject my sex (a fool’s errand, as sex is part of what makes us who we are, just as our date of birth situates us in a specific time, over which we have no control), but that I had to fight the gender roles that were imposed on me and on women in general because of our sex. Gender is the tool of oppression, not sex. Gender identity theorists leverage the work done by feminists specifically on gender stereotypes and roles, to posit that gender identity is a fluid, changeable object, not in order to liberate women from the constraint of gendered norms; instead gender identity is used to deny the reality of sex, as if recognising that sex is real and immutable was equivalent to recognising that sexism is also real and immutable. Gender identity is then presented not simply as the awareness of our sexed body and of the constraints society puts upon it, but as a tool to negate our sexed body and self-determine our gender as the only relevant aspect of our identity. At the same time, it reframes knowledge of science around sex as anti-trans,

making it impossible for women to even have a ground over which to argue their rights.²³

This is a leap that defies logic and reality. It seems that no-one who should have done so, assessed the consequences of this leap. It is quite clear that, within the community that engineered it, negating the relevance of birth sex may have been the point all along, as we shall see in Chapter 3. Whether they originally planned to completely erase the significance of sex, to the point of arguing that if a man says he is a woman, his penis becomes a female organ,²⁴ is not clear. Certainly some fringes of the transgender movement planned this all along. And again, some fringes of the feminist movement might have been superficially attracted to the idea that sex was completely irrelevant and should be erased from the law, in the mistaken belief that not giving legal recognition to sex would finally accomplish full equality for women.²⁵ Clearly only women living in the

²³As illustrated clearly in this quote: “In the United Kingdom, anti-trans rhetoric, arguing that sex is immutable and gender identities not valid, has also been gaining baseless and concerning credibility, at the expense of both trans people’s civil liberties and women’s and children’s rights.” EP Committee on Equality and Non-Discrimination, Combating Rising Hate against LGBTI People in Europe, Doc 15121 Ref 4524 (September 2020) 20210921-RisingHateLGBTI-EN.pdf (coe.int). The Report is quoted in the Proceedings of the Roundtable organised by the Office of the Council of Europe Commissioner for Human Rights “Human Rights of LGBTI People in Europe: Current Threats to Equal Rights, Challenges Faced by Defenders, and the Way Forward,” CommDH(2021)32, Report of the Round Table with LGBTI HR defenders (coe.int), which in turn is quoted by the Council of Europe “Thematic Report on Legal Gender Recognition in Europe,” CM/Rec (2010)5, <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3>. Embedding the idea that to consider sex immutable is in itself anti-trans is no different from framing the knowledge that our body is mortal as anti-Christian.

²⁴ One finds claims such as this one in some areas of trans rights literature and media sources such as this article, Josh Jackman, “Pose Star Indya Moore: Trans Women’s Penises are Biologically Male,” Pink News, February 19, 2019, <https://www.thepinknews.com/2019/02/19/pose-indya-moore-trans-penises-biologically-female/>. A more critical treatment in Malcolm Clark “All Rise for the ‘Female Penis,’” The Critic, February 8, 2023 <https://thecritic.co.uk/all-rise-for-the-female-penis/>.

²⁵ The entirety of transfeminism is predicated upon the fact that “transwomen are women,” but with feminists doing all the lifting work of including them in feminism; see for example Talia Mae Bettcher, “Trans Feminism: Recent Philosophical Developments,” *Philosophy Compass*, 12(11) (November 2017): e12438, doi:<https://doi.org/10.1111/phc3.12438>. I believe transfeminism latched

US, UK or similarly situated countries could ever conceive of this as a possibility, given their experience of growing up in societies that, by and large, allow girls to develop a personality, get an education, make life choices, including the crucial choices about reproduction which shape a woman's life. Millions of women do not have these choices, not because they identify as women, but because they are women.

Gender identity is presented as a universal experience but also as a matter of group belonging. While there is the recognition that group rights depend on an applicable definition, there is no recognition that positive rights should not be granted to people on the basis of self-identification without a material basis. Gender identity theorists have to decide whether gender identity is a universal experience or whether only transgender individuals have a gender identity, if nothing else because if gender identity is a universal experience, "cis women" are discriminated on the basis of it. There is no "cis privilege" for women. Additionally, sex, while being a personal immutable characteristic, is also a relational and social characteristic. The sex of others matter, at species level, because only sexual differentiation allows for the continuation of our species;²⁶ at social level, because there are norms and rules attached to our sex, and not all of them are the result of discrimination against women (in fact, it is the task of the law to distinguish between rules that discriminate against women and rules that exist either to protect women against discrimination or to guarantee specific rights to women on the basis of their sex); and at individual level, both because we establish relationships on the basis of our sex and because our behaviour and experience of the world are coloured and influenced by our sex.

The gender identity of others does not hold the same significance because it is not perceptible in the same way that sex is. The reason we need to "ask for pronouns" is because gender identity is not evident to the eye.²⁷

on a certain attitude within feminism to reduce or ignore the reproductive role of women as inherently inferior; see Elaine Tuttle Hansen, *Mother Without Child. Contemporary Fiction and the Crisis of Motherhood* (Berkeley: University of California Press, 1967),

<https://publishing.cdlib.org/ucpressebooks/view?docId=ft1d5nb0ft;brand=ucpress>.

²⁶ This is not a form of biological essentialism, because it does not express an "ought" proposition, but only an "is" proposition. Stating that sex is the mechanism for reproduction does not mean sex ought to be [only] a mechanism for reproduction.

²⁷ The rules on language imposed by gender identity theory are only intelligible in English, as other languages have different rules on gendered pronouns. The

All one can say is that a “transgender identity” is evident in the sense that there is a disconnect between the perceived sex and the chosen presentation, although of course that brings into place stereotypes of femininity and masculinity embraced by the transgender individual. Gender identity theory forbids us from relying on the cues that our brain gives us about the sex of the individual we are seeing and forces us to transfer to others the power to name what we see. The demand that we use third person pronouns, not in accordance to our perception of reality, but in compliance to a demand made by the person those pronouns refer to, is an unreasonable demand, especially evident when those pronouns are not the familiar ones in one’s language, but made up by gender identity theory or even by the transgender individuals themselves (zir, per, and so on). Pronouns are a fundamental part of speech, and one that is selected automatically and naturally in response to cues given by our brain about the sex of the individual we see or hear. From the speaker’s perspective, the “correct pronoun” is the one that matches the visual and audio cues given to us by our brain. If we see a man, our brain and our language is primed to refer to him as “he.” The demand that we refer to him as “she,” “they,” “zir,” “per,” or any other pronoun they come up with, and/or we switch pronouns back and forth on the basis of their demands, puts a considerable onus on the speaker, one not justified by any legal or moral obligation. It goes beyond freedom of speech, because we do not refer to a man as “he” because we are free to do so, but because breaking the link between language and reality makes communication impossible. While we are free to decide what to say, and how to say it, that freedom does not include our right to call things what they are not. Or better, while we are free to call a chair a table, we cannot expect others to understand us and certainly we do not have the right to compel others to call chairs tables. It is true that language evolves, but not by compelling others to ignore the link between reality and words. From a feminist perspective, the power to name reality, which men have always arrogated to themselves, is an especially precious conquest, always fragile, as gender identity demands prove. Forcing a woman who has been raped to refer to her rapist as “she,” or seeing him referred to as a woman by others, is a further violation of her

adoption of English pronouns by non-English speakers, in their social media profiles for example, is a good illustration of the cultural imperialism of gender identity theory, which needs English as the carrier language for many of its supposedly universal principles.

autonomy and her right to name the violence and the body violation she has suffered.²⁸

This book is not just a historical reconstruction of gender identity in international law, but contains a proposal for a reframing of this concept. There is nothing, as I shall be noting in several instances in the course of this work, in international human rights law that requires the State, or any third party, to believe that people have a gender identity, and/or that it is actually possible for people to change their birth sex in any significant way, in order to put in place clear rules to protect the belief in gender identity in international human rights law and domestic equality law and to guarantee the proper mental health care for people whose belief in gender identity becomes a disabling condition.²⁹ Inevitably, reframing gender identity as a belief (much as having an immortal soul is a belief held by Christians) involves re-assessing how it ought to be protected in human rights law. The proposal will be explored more fully in the Conclusions chapter. For now suffices to say that an important element of belief protection is an assessment of the way in which the belief potentially affects the rights of others.

The book is structured in the following manner. **Chapter 1** outlines the terminology adopted in the work and the methodology followed, namely the focus on primary sources and the close analysis of the jurisprudence. Unusually for a legal monograph that is not strictly about legal history, there is more attention paid to the older jurisprudence, in order to track the entry and the development of the concept of gender identity in international law. With **Chapter 2** the book moves on to an historical narration which focuses on the development of this concept in the United States, on the one hand in the areas of sexology and the medical treatment of transsexuality,

²⁸ This argument is not intended to draw a link between transwomen and sexual violence, but only to reaffirm the right of women to name reality as they see it.

²⁹ In those cases, we can more properly speak of body integrity dysphoria, akin to anorexia. Just as no-one would suggest gastric band surgery for an anorexic patient, I argue gender dysphoric patients (more accurately body or sex dysphoric patients) should not be cured by surgery but through therapy, in keeping with the most fundamental tenet of gender identity theory, that gender (identity) and sex are not the same thing, and that affirming your gender identity does not require body modification. The link is also made in this publication, though I disagree with the conclusions: Leandro Loriga, "Body Identity Dysphoria and 'Just Amputation: State of the Art and Beyond,'" *Human Affairs-Postdisciplinary Humanities & Social Sciences Quarterly* (Berlin: Walter De Gruyter GmbH, 2023), doi: 10.1515/humaff-2022-1005.

and on the other within the trans rights movement, again with a focus on primary sources. **Chapter 3** tracks the migration of gender identity in the legal materials produced by international and regional organisations, and **Chapter 4** more specifically the work of the United Nations Treaty Bodies, because of their quasi-judicial function. **Chapter 5** is dedicated to the case law originating from European courts. Europe has provided the longest and richest jurisprudence on gender identity in the judicial work of the European Court of Human Rights and of the Court of Justice of the European Union. The case law of the ECHR is considered chronologically, and divided into three parts: the first, on the case law from *Rees* to *Goodwin*. The second, a close analysis of the seminal *Goodwin* case, and the third, on the post-*Goodwin* case law. **Chapter 6** considers the case law of the Inter-American Court of Human Rights and of the work of the Inter-American Commission for Human Rights, while **Chapter 7** looks at the work of the African Union. There is as of yet no case law from the African Court of Human Rights, but in **Chapter 8**, which contains selected cases from domestic courts, there are some cases from African courts. In fact all the cases in this chapter come from “peripheral” courts in relation to the “centre” of gender identity theory, the developed West. **Chapter 9** considers “the backlash” against gender identity theory, from two perspectives: the first, the effects “on the ground” of gender identity theory, especially on women, children and LGB individuals; the second, the internal backlash in the regime of global health law in the area of transgender care “affirmative approach.” Finally, **Chapter 10** offers both conclusions and a proposal for reframing gender identity as a belief.

At the outset of this work, I think a disclaimer on language is necessary, as gender identity theory rests on a revolutionary approach to language use (exemplified by the rules on pronouns) and development. For the first, I avoided using pronouns when these would signal allegiance to gender identity theory. For the second, I always adopt the traditional distinction between sex and gender, using the first to refer to the reality of our sexed bodies, and the second to refer to the social constructs built on that reality. The only exception is when I refer to such commonly used phrases as “gender pay gap.” When quoting legal materials, I quote the terms as they are used. For what concerns more specific transgender terminology, I mostly follow the usage of the times when the material was produced. Therefore transsexuals for the older materials, and transgender for the newer ones. I try not to use the terms “transwoman” and “transman,” unless called for by the context, as I find them confusing and potentially misleading. As the terms are commonly used in legal materials, I often use MtF man to refer to a man who identifies as a woman (with or without

surgical/medical transition) and FtM for a woman who identifies as a man. The condition of being transgender has gone from being referred to as gender identity disorder, to gender dysphoria, to gender incongruence. I follow the nomenclature as it evolves.

CHAPTER 1

TERMINOLOGY AND METHODOLOGY

Agender, Androgyne, Androgynous, Bigender, Cis, Cisgender, Cis Female, Cis Male, Cis Man, Cis Woman, Cisgender Female, Cisgender Male, Cisgender Man, Cisgender Woman, Female to Male, FTM, Gender Fluid, Gender Nonconforming, Gender Questioning, Gender Variant, Genderqueer, Intersex, Male to Female, MTF, Neither, Neutrois, Non-binary, Other, Pangender, Trans, Trans, Trans Female, Trans* Female, Trans Male, Trans* Male, Trans Man, Trans* Man, Trans Person, Trans* Person, Trans Woman, Trans* Woman, Transfeminine, Transgender, Transgender Female, Transgender Male, Transgender Man, Transgender Person, Transgender Woman, Transmasculine, Transsexual, Transsexual Female, Transsexual Male, Transsexual Man, Transsexual Person, Transsexual Woman, Two-Spirit*

—The 58 gender identities offered by Facebook³⁰

The issue of definitions makes discussing gender identity as a legal artefact especially fraught, as legal definitions serve to exclude and contain the application of the law. Gender identity theory, being predicated upon self-identification, resists this normative function.³¹ It is banal to note

³⁰ Russell Goldman, “Here’s a List of 58 Gender Options for Facebook Users,” ABC News, February 13, 2014, <https://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users>.

³¹ The rejection is all encompassing, as gender identity theory constantly refines its jargon, maintaining individuals in a constant state of alarm about acceptable language. Just as an example, Dianne Duffy, “Contested Subjects of Human Rights: Trans- and Gender-variants Subjects of International Human Rights Law,” *The Modern Law Review*, 84(5) (2021): 1041-165, at 1055 notes that the term “transgender” is problematic: “The Anglophone understanding of ‘transgender’ implies a narrative of passage from one binary gender to another. This implies a boundary, between two genders; a male/female duality and a subject who has transitioned from an identifiable A to an equally identifiable B.” Even the term gender identity, or at least its definition, has been criticised: see again Dianne Duffy and Dianne Otto, “Queering Gender [Identity] in International Law,” *Nordic Journal of Human Rights*, 33(4) (2015): 299-318, doi: 10.1080/18918131.2016.1123474. The acronym SOGI, supposedly designed to avoid the pitfalls of transgenderism, has also been criticised as unitary and monolithic (Duffy, *ibidem*).

that no legal rule conferring positive rights can accept self-identification as the basis for conferral. Simply put (and somewhat simplistically, from a legal theory perspective), positive rights are rights that require positive duties from the State, putting the State under a duty to act, as opposed to negative rights, which enjoin the State from acting, or better, interfering. The right to privacy, or, as Judge Brandeis defined it, the “right to be let alone,”³² is a classic negative right.³³ The right to education is a classic positive right, because it requires the State to provide resources for schools, teachers etc.

Human rights can be seen through the universal/group lens as well. Certain rights belong to all humans “as humans.” They go beyond the traditional rights championed by the revolutions of the Enlightenment era. The era of ideologies of the last century³⁴ showed that civil rights could not survive the classification of entire groups of people as subhumans and the deprivation of full citizenship³⁵ (the master key for obtaining rights in society), their exclusion from society, and eventual physical elimination. The real distinguishing characteristic between the Enlightenment rights and post-war human rights is the internationalisation of the latter; human rights are not just guaranteed by domestic constitutions, but contained in international treaties, by which States promise *each other* that they will respect the human rights of the people of their territory. Not, as in constitutions, a social contract with the citizens, but an international promise between States. The second innovation is the possibility for individuals to vindicate their rights directly against the State (once domestic remedies are exhausted) in international courts.

International human rights are either universal or group rights. While the 1948 Declaration of Human Rights can be understood as an instrument of

It is a game of infinite regress. There is no escape from the cisgender heteronormative matrix. Unless one is trans, in which case inhabiting the cisgender matrix and demanding no criticism for this choice is absolutely acceptable.

³² Samuel D. Warren and Louis Brandeis, “The Right to Privacy,” *Harvard Law Review*, IV(5) (December 1890) https://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html.

³³ Interestingly, the ECHR reconceptualises Article 8, the right to a private life, as a positive as well as a negative right, as we shall see in Chapter 5.

³⁴ What Hobsbawm called the short century. Eric J. Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914-1991* (London: Penguin Books 1994).

³⁵ The right to have rights, as Hannah Arendt defined it. Hannah Arendt, *The Origins of Totalitarianism* (New York: Schocken Books, 1951).