Margin of Appreciation Doctrine in ECtHR's Treatment of Transsexual Rights with Insights into the Influential Role of the EU

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Abstract Margin of appreciation doctrine is a legal tool frequently used by the ECtHR in cases dealing with certain human rights the definitions and boundaries of which are open to interpretation. It refers to the flexibility afforded to the Contracting States in fulfilling their responsibilities emanating from the Convention. This way, in cases where there is not a consensus across the Contracting States over a specific issue, national laws function as the ultimate point of reference. One of the areas where the margin of appreciation doctrine is used is cases about human rights violations against transsexuals stemming from state refusal to recognize reassigned sex. Generally, transsexuals taking their states to the Court for violating their basic human rights did not get any substantial result because, until 2002, the Court used the doctrine in favor of the Contracting States and most cases were decided in favor of them due to the lack of a consensus and a set of common practices among member states. In 2002, the Court changed its tendency in favor of the applicants by deciding that The United Kingdom violated Articles 8 and 12 of the Convention in *Christine Goodwin v. The United Kingdom*. This change in the approach of the Court came about as a result of a trend initiated by the European Union regarding the human rights of transsexuals. In 1989, the European Union published a resolution where it called on its member states to legally guarantee basic rights of transsexuals and called on the Council of Europe to issue a similar report. While this whole set of processes has had positive results for the protection of human rights of transsexuals, issues of whether human rights of transsexuals are properly defined and protected and how the position of the Court as a supranational judicial body is affected by the doctrine still call for more discussion as margin of appreciation doctrine creates a hierarchy of rights by putting certain human rights above others as deemed fit by the norms of the society.

Keywords: *ECHR, European Union, margin of appreciation, human rights, transsexual rights*

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Özet Takdir marjı doktrini, tanımları ve sınırları yoruma açık olan çeşitli insan haklarıyla ilgili davalarda AİHM tarafından sıklıkla kullanılan hukuki bir araçtır ve taraf devletlerin AİHS'den doğan sorumluluklarını yerine getirirken bu devletlere tanınan esnekliği ifade eder. Doktrinin uygulanması sonucunda, taraf devletler arasında görüş birliği olmadığı durumlarda, ulusal yasalar nihai referans noktası olarak kabul edilir. Takdir marjı doktrininin kullanıldığı alanlardan biri de transseksüellerin yeniden belirlenen cinsiyetlerinin taraf devletler tarafından tanınmaması durumlarının ele alındığı davalardır. Çoğunlukla, temel insan haklarının ihlal edildiği gerekçesiyle vatandaşı olduğu ülkeye AİHM'de dava açan transseksüeller önemli bir sonuç elde edememişlerdir çünkü 2002 yılına kadar AİHM takdir marjı doktrinini taraf devletler lehine kullanmış ve üye devletler arasında bir uzlaşma ve ortak bir dizi uygulama olmaması nedeniyle çoğu davada taraf devletler lehine karar verilmiştir. Ancak 2002 yılında *Christine Goodwin v. Birleşik Krallık* davasında Birleşik Krallık'ın AİHS'nin 8. ve 12. maddelerini ihlal ettiğine karar vererek genel tutumunu hak ihlallerine maruz kalan bireyler lehine değiştirmiştir. AİHM'nin yaklaşımındaki bu değişiklik, transseksüellerin insan haklarına ilişkin olarak Avrupa Birliği tarafından başlatılan bir trend sonucu olarak ortaya çıkmıştır. 1989 yılında Avrupa Birliği, üye devletleri transseksüellerin temel haklarını yasal olarak güvence altına almaya çağıran bir karar yayımlamış ve Avrupa Konseyi'ni de benzer bir rapor yayımlamaya davet etmiştir. Tüm bu süreçler transseksüellerin insan haklarının korunması için olumlu sonuçlar doğurmuş olsa da takdir marjı doktrini toplum normları ile paralel bir şekilde çeşitli insan haklarını diğerlerinden üstün tutarak bir haklar hiyerarşisi yarattığı için transseksüellerin insan haklarının doğru bir şekilde tanımlanıp korunup korunmadığı ve AİHM'nin uluslarüstü bir yargı organı olarak doktrinden nasıl etkilendiği konuları hala tartışmaya açık konular olarak karşımıza çıkmaktadır.

Anahtar Kelimeler: *AİHS, Avrupa Birliği, takdir marjı, insan hakları, transseksüel hakları*

Introduction

Historically, a number of conventions and documents have aimed at setting a cross-border standard for human rights, one of them being the ECHR.[2] Not all the rights laid out in The Convention are absolute, though. On the contrary; certain rights are conditional, may conflict with the national laws of the Contracting States, and individuals may ultimately be deprived of these rights by states.

Generally, the ECtHR[3] does not make formal differentiations among rights. It is yet possible to say that certain rights take precedence over others in certain situations. Absolute rights, for example, allow for no discretion because varying applications of these rights would render them no longer absolute (Greer, 2000, pp. 25-33). They are "subject to no exception in any circumstance whatever" (Greer, 2015, 108). Rights deemed fundamental and stated in Articles 2-4 of the Convention such as right to life, freedom from torture, freedom from slavery are examples of absolute rights. On the other hand, certain other rights are not *as absolute*. Protection of these rights may end up remaining at the discretion of the Contracting States. For example, each one of the rights secured in Articles 8-11 is "subject to restriction" for "legitimate purposes" (Greer, 2006, pp. 257-258) and national laws of the Contracting States are taken into account by the Court when determining whether any of said rights has been violated by states.

National laws are rendered determinant through margin of appreciation doctrine. As per the doctrine, the Court refrains from making its own judgment and practically leaves it to laws of states in 'sensitive' cases regarding which there is not enough common ground in the laws and applications of the Contracting States, a situation which by nature is not quite compatible with the supranational texture of the Court and throws into question how much power it has over the Contracting States.

[2] The ECHR will henceforth be referred to as the Convention. The full text is available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf
[3] The ECtHR will henceforth be referred to as the Court.

One of the areas for which margin of appreciation doctrine is frequently employed is cases about the human rights violations against transsexuals. Until 2000s, the overall tendency of the Court in these cases was not to interfere with the internal affairs of the Contracting States and subsequently deliver judgments in favor of them. From 2000s onwards, the Court has taken a different stand as a result of the trend initiated by an EU resolution published in 1989.

This study will first introduce margin of appreciation doctrine on general terms and will look into its application in cases covered in the study which deal with human rights violations against transsexuals stemming from state refusal to recognize reassigned sex; then briefly explain the international trend that changed the approach of the Court; and finally deliver a critical review of the doctrine and its application.

1. Margin of Appreciation Doctrine in the Context of the ECtHR

Margin of appreciation can be defined as "the room for manoeuvre" granted to the Contracting States in terms of fulfilling their responsibilities arising from the Convention (Greer, 2000, p. 5) and it has been formed through the case law of the Court (Doğru, 2018, p. 9). Accordingly, the Court takes the national law as the point of reference when deciding whether the state in question has violated human rights of individuals.

The doctrine first came to the fore in 1958 in *Greece v. the United Kingdom*[4] brought to the Court when the United Kingdom declared a state of emergency in Cyprus. European Commission of Human Rights ruled, on the basis of Article 15 of the Convention, that the respondent state "should be able to exercise a certain measure of discretion" (The Council of Europe, 1960, p. 174). According to the first paragraph of the Article,

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation,

[4] *Greece v. the United Kingdom*, Application No 176/56, Judgment of 26 September 1958.

> provided that such measures are not inconsistent with its other obligations under international law.

On July 1, 1961, European Commission for Human Rights once again referred to the doctrine implicitly in *Lawless v. Ireland*[5] brought to the Court with the allegation by a former IRA member, Gerard Richards, that Ireland violated Articles 5-7 of the Convention. The Court found Ireland's precautions against the IRA justified within the scope of national security and ruled in favor of the respondent state on the basis of Article 15 of the Convention (The Council of Europe, 1960, p. 318).

Though the early uses of the doctrine were mostly in cases related to national security, later on it also started to be used in cases related to certain other Articles of the Convention. In 1968, for example, the doctrine was explicitly used in *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium (Merits)*[6] which dealt with the alleged violations of Article 8 and Article 14 of the Convention. As stated by the Court,

> Article 14 (art. 14) "is of particular importance in relation to those clauses" which "do not precisely define the rights" which they enshrine, but "leave States a certain margin of appreciation with regard to the fulfilment of their obligation", "authorise restrictions on, or exceptions to the rights guaranteed" or "up to a point leave it to the States to choose the appropriate means to guarantee a right." (para. 4)

This statement demonstrates that the main function of the doctrine is to "determine which matters properly require a uniform international human rights standard and which allow legitimate variations from state to state" (Legg, 2012, p. 17) because the cultural, economic and juridical differences of the Contracting States make it difficult for the Convention to have a determining impact on national laws, hence the need to reach a common ground between the human rights practices of the Contracting States and the application of the Convention (Bakircioglu, 2007, p. 717). Moreover; the principle of subsidiarity, "respect for pluralism and State sovereignty," and the inability of the Court to reach definitive judgments in certain sensitive issues have become significant factors leading to the emergence of the

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[5] *Lawless v. Ireland*, Application No 332/57, Judgment of 1 July 1961.

[6] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium (Merits)*, Application No 474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968.

doctrine (Spielmann, 2012, p. 384). The courts stresses that the mechanism of human rights protection requires the national authorities to “have a primary duty to protect human rights under the Convention” (Lemmens, 2018, p. 85). Consequently, the Court has had to rely on the “good faith” and “continuing cooperation” of the Contracting States in order for the Convention Articles to be properly applied (Macdonald, Matscher, & Petzold, 1993, p. 123).

There are two main principles when determining whether and to what extent a respondent state should be allowed margin of appreciation. The first one of these is proportionality, looking at how proportionate state interference is in situations where individual and public interests clash. The second one is whether there is a consensus among the Contracting States on the issue in question in terms of laws and applications. If there is not enough legal or practical commonality in the majority of the Contracting States, and the Court rules that the state interference does not exist or is proportional; the respondent state is allowed a wide margin of appreciation, and the national law becomes the primary criterion when determining whether there has been a violation of a right.

2. Margin of Appreciation in Human Rights Violations against Transsexuals

This study covers ten cases that appeared before the Court between 1986 and 2014 all of which are about the Contracting States not properly recognizing the reassigned sex of their citizens. The first among these is *Rees v. the United Kingdom*[7] that came before the Court in 1986. Even though the applicant regarded himself as a man and was socially accepted as such, his birth certificate indicated that he was a woman. The applicant demanded that an amendment be made in his birth certificate and this amendment be kept secret in order for him not to have difficulties in his daily life. Yet, this request of his was denied since it would require fundamental changes in the structure of government offices (para. 43). Moreover, it was not possible, according to the English law, for a person to marry a woman if their birth certificate is that of a woman (para. 48). Ultimately the applicant argued

[7] *Rees v. the United Kingdom,* Application No 9532/81, Judgment of 17 October 1986.

that the fact that his birth certificate was not amended violated Article 8 of the Convention and the fact that he could not marry a woman violated Article 12 of the Convention.

The Court argued, on the other hand, that the state's refusal to amend his birth certificate or give him a new one could not be regarded as state interference and that the applicant's request would not constitute a positive obligation on the state given the interests of the public (paras. 35, 44). So, the Court did not need to analyze whether the state interference was proportionate. As for consensus on the issue, the Court stated that,

> It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation. (para. 37)

The Court allowed a wide margin of appreciation to the United Kingdom since there was no state interference, and a consensus was yet to be reached among the Contracting States on the issue. As a result, the Court ruled that neither Article 8 nor Article 12 of the Convention was violated.

A similar case that came before the Court in 1990 is *Cossey v. the United Kingdom*.[8] This case is almost identical to *Rees*.[9] The applicant had to constantly disclose private and sensitive information about the sex reassignment process he had been through in his daily life due to the necessary amendments not being made on his birth certificate as well as the fact that this situation prevented him from marrying his partner. So, similarly, he argued for the violations of Article 8 and Article 12 of the Convention.

As in *Rees*, the Court stated that the state's refusal to amend his birth certificate or give him a new one could not be seen as interference, that the applicant's request would not constitute a positive obligation on the state (para. 38), and the United Kingdom was to be allowed a wide margin of appreciation on this matter since there

[8] *Cossey v. the United Kingdom,* Application No 10843/84, Judgment of 27 September 1990.
[9] The only difference is that the applicant did not have a partner in *Rees* while in *Cossey* the applicant had a partner he was planning to marry. See *Cossey v. the United Kingdom*, para. 32.

was no consensus among the Contracting States (para. 40). That is why the Court ruled that there was no violation of Article 8 or 12 of the Convention.

Until *Christine Goodwin v. the United Kingdom* in 2002,[10] the Court treated cases of this kind similarly. Both *X, Y, and Z v. the United Kingdom*[11] and *Sheffield and Horsham v. the United Kingdom*[12] were brought to the Court for human rights violations stemming from the state's refusal to amend the birth certificates of transsexuals, and both cases were ruled in favor of the respondent states with references to *Rees* and *Cossey* (*X, Y and Z v. the United Kingdom,* para. 44; *Sheffield and Horsham v. the United Kingdom,* para. 52). The only case where the Court ruled in favor of the applicant until *Christine Goodwin v. the United Kingdom* is *B. v. France*.[13] The Court separated this case from *Rees* and *Cossey* and ruled that the state violated Article 8 of the Convention by not allowing the applicant to change her forename and civil status since she had her sex reassignment surgery abroad (para. 63).

Christine Goodwin v. the United Kingdom in 2002 deeply changed the case law applied to cases that dealt with human rights violations stemming from states' refusal to recognize reassigned sexes of transsexuals. The applicant, who was fired due to her sex reassignment, still appeared as a man in her birth record and, for that reason, could not marry a man or could not get her things done in government offices for the fear of being embarrassed.

Surprisingly, even though in previous similar cases the Court emphasized that there was no consensus among the Contracting States on this matter and states' refusal to amend birth certificates was not regarded as interference, it did not allow the United Kingdom any margin of appreciation this time. A few of the important statements by The Court in this case are,

> The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of

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[10] *Christine Goodwin v. the United Kingdom,* Application No 28957/95, Judgment of 11 July 2002.
[11] *X, Y and Z v. the United Kingdom*, Application No 21830/93, Judgment of 22 April 1997.
[12] *Sheffield and Horsham v. the United Kingdom*, Application No 31–32/1997/815–816/1018–1019, Judgment of 30 July 1998.
[13] *B. v. France*, Application No 13343/87, Judgment of 25 March 1992.

> increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals. (para. 85)
>
> In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. (para. 90)
>
> … the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her sex reassignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. (para. 93)

These statements by the Court in *Christine Goodwin v. the United* Kingdom became the reference point in similar cases that were brought to the Court later on.[14] The Court ruled, referring to *Christine Goodwin v. the United Kingdom*, that there was a violation of Article 8 of the Convention in *Grant v. the United Kingdom*[15] where the applicant was denied retirement pension in accordance with her reassigned sex and in *L. v. Lithuania*[16] where the applicant was having a number of troubles in his daily life since his 'personal code' was not changed. The Court, however, ruled in favor of the respondent state in *Hämäläinen v. Finland*[17] where the recognition of the reassigned sex of the applicant was conditional on her current marriage being nullified, stating that the legalization of same-sex marriages was an issue that should be left to the national laws of the Contracting States (para. 49).

3. The "Trend" and the EU's Influence in its Making

On a side note, what the Court referred to as "continuing international trend" in *Christine Goodwin* should be dwelled on briefly and the role of the EU should be mentioned. Even though there was no consensus regarding various aspects of the issue, what was so crucial as to change the tendency of the Court was that the issue of legal recognition of transsexuals was getting more visibility across the

[14] Very similar to *Christine Goodwin* and heard by the same judges on the same day, *I. v. the United Kingdom* (Application No 25680/94, Judgment of 11 July 2002) resulted in the same judgment as that of *Christine Goodwin*, with the Court ruling in favor of the applicant.
[15] *Grant v. the United Kingdom*, Application No 32570/03, Judgment of 23 May 2006.
[16] *L. v. Lithuania*, Application No 27527/03, Judgment of 11 September 2007.
[17] *Hämäläinen v. Finland*, Application No 37359/09, Judgment of 16 July 2014.

Contracting States, and the course of international trend changing in favor of transsexuals rights had been signaled already in *Sheffield and Horsham v. the United Kingdom* heard in the Court in 1998 (Smith, 2003, p. 661).

In the making of this trend, the EU was quite influential. Obviously, the EU and the ECtHR do not share an organic bond in that they are fundamentally distinct entities and act independently from each other. The ECtHR is responsible for enforcing norms and laws introduced by the Council of Europe in ECHR, and the EU does not enjoy any authority over the operations of the ECtHR. Yet, at the same time, the two entities affect and are affected by each other in order to render the judicial practices over Europe unified. So, they can actually be thought of as a single entity with distinct judiciary mechanism. To exemplify, the ECHR has indirectly and unofficially affected the EU law as per the interaction of the two entities, and the Court of Justice acknowledged the ECHR's impact on the EU law before the process of accession of the EU to the ECHR even began. It was quite a standard practice for the Court of Justice to refer to the ECHR when deciding its cases (Eckes, 2013: pp. 256-257).

The milestone in this sense was the publication of the 1989 Resolution[18] by the European Parliament. Among many other things, the resolution called on the member states of the EU to create legal ground to ease the processes transsexual individuals go through, to include medical costs of transition periods in health care coverages, and to adapt the governmental systems in such a way as to make it possible to amend the identity cards of transsexuals.

At least as much important in the resolution was that it also called on the Council of Europe to come up with a Convention towards the protection of the rights of transsexuals. In the same year, the Council of Europe published a recommendation titled "Condition of Transsexuals" where it called on its members to accordingly change their legislations.[19] This not only shows how the Council of Europe and the

[18] Official Journal of the European Communities No C 256/33-37 of 9.10.1989.
[19] Parliamentary Assembly, Recommendation 1117 (1989).

European Union are mutually influenced by each other, but also shows the efforts to harmonize the European law.

The publication of the resolution paved the way for the European countries to set up the judicial frameworks covering the rights of transsexuals. For example, during 1990-2000 period, right after the publication of the resolution, most Council of Europe states made necessary changes that allow a transsexual's new sex to be reflected in their birth certificate. Only four Council of Europe member states were left by 2002 that did not allow such changes to be made to birth certificates, one of them being the United Kingdom, as stated in *Christine Goodwin v. the United Kingdom* (para 55). Further and more extensive legislative measures were taken by member states after *Christine Goodwin v. the United Kingdom* case, but the resolution was instrumental in terms of starting the trend.

4. A Critical Approach to the Doctrine

Even though there are certain opinions in favor of the doctrine citing the protection of the plurality of the Contracting States and respect for national sovereignty (Atakan, 2010, pp. 30-31), its most obvious feature of is that it creates a hierarchy of rights. At the top of this hierarchy stand right to life, freedom from torture and freedom from slavery as absolute rights. However, such rights as right to education, right to respect for private life, right to marry have been pushed down by being made conditional. Considering the human rights violations against transsexuals, for example, one sees that the Court held the right to change forenames in a higher regard than the right to get one's birth certificate amended until *Christine Goodwin*. Accordingly, a few things are up for debate: whether the Court, which changes the balances in this hierarchy through its case law in a historical process, is in a position to affect the Contracting States or to be affected by them as a 'living instrument'; how compatible it is with the mission of the Court that the hierarchy of rights causes injustices against certain groups and legitimizes certain human rights violations; how this situation would affect debates about the existence of universal human rights.

Another issue that must be brought up is "the fair balance which has to be struck between the general interest and the interests of the individual," which is the key criterion the Court refers to in analyses of how proportionate state interference is (*Rees v. the United Kingdom*, para. 37; *Cossey v. the United Kingdom*, para. 37; *Sheffield and Horsham v. the United Kingdom*, para. 52; *X, Y and Z v. the United Kingdom,* para. 41; *B. v. France*, para. 44; *Christine Goodwin v. the United Kingdom*, para. 72; *Grant v. the United Kingdom*, para. 39).

For example, the individual interest of a person in getting their birth certificate amended, which would enable them to get through their daily and professional lives with ease, has been made secondary to public interest and regarded as detrimental to it as can be understood from a number of judgments by the Court and the justifications of these judgments. It is of no doubt that the interest of the public in such a case is its traditional structure and norms. Legal recognition of the reassigned sexes of transsexuals means enabling them to live their lives as easily as any other individual in the society and making them visible. So, transsexuals would exist in government offices, banks, cafés, registry offices; in other words, their existence would be institutionally and publicly recognized. Yet, including 'the other' in the living space of 'the normal' would undoubtedly cause anxiety and insecurity; one of the main building blocks of the society, the cisnormative[20] structure, would be disturbed. The statement by the Court in *Christine Goodwin*, "… the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy…" (para. 90) and the following judgment in favor of the applicant are proof of the fact that transsexuals had been deprived of said rights until 2002 for the sake of protecting societal norms.

Alongside Article 8, another Article that is brought up frequently in the cases covered in this study is Article 12, right to marry. The Court's approach towards difficulties transsexuals encounter due to their reassigned sex not being recognized

[20] Of the assumption that all individuals are cissexual, meaning that they have the same sex as the one assigned at birth.

or the danger of their current marriages being nullified is a concrete example of how public interests are being protected by the Court. According to said Article,

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The Court stated, in *Cossey v. the United Kingdom* for instance, that this Article refers to “traditional” marriages (para. 43), that “the developments which have occurred to date … cannot be said to evidence any general abandonment of the traditional concept of marriage” (para. 46) and ruled ultimately that there was no violation of Article 12 of the Convention.

Transsexuals who are already married before the sex reassignment surgery also face the danger of their marriage being nullified. In *Hämäläinen v. Finland*, it was ruled that there was no violation of right to respect for private life and right to marry against the applicant whose marriage was to be nullified and turned into registered partnership if her identity card was amended in a way that would reflect her reassigned sex. This way, her access to the marriage institution was blocked.

In addition, parenthood, which is one of the building blocks of the family institution that the Court regards as a public interest and strives to protect, is a status fairly impenetrable for transsexuals. In *X, Y and Z v. the United Kingdom*, the fact that the applicant was not able to get a child’s custody due to his birth certificate was not considered a human rights violation as the Court stated that “… the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront” (para. 47).

All this said, it is still important to note that the judgments delivered in *Christine Goodwin* are quite noteworthy towards the protection of transsexuals rights. It is equally important, however, that these judgments be binding and actually lead to a change in the national laws of the Contracting States. Thus, it would be helpful to see whether there has been any legal changes or amendments as a result of a judgment by the Court in the United Kingdom, which is by far the most frequent visitor to the Court in cases covered in this study.

Two years from *Christine Goodwin*, in 2004, Gender Recognition Act came into force in the United Kingdom. Accordingly, an applicant who "has or has had gender dysphoria," who "has lived in the acquired gender throughout the period of two years ending with the date on which the application is made," and who "intends to continue to live in the acquired gender until death" (Chapter 7, Section 2) is given a gender recognition certificate.

Conclusion

It is safe to say that certain judgments by the Court have been impactful and subsequent changes have been beneficial in terms of securing and protecting transsexual rights. Yet, it still appears to be fairly vague to what extent and in how much time it will be possible to genuinely prevent the human rights violations against transsexuals.

Due to the nature of the doctrine, it is far from easy to foresee how it will be used in a given case (Clayton, Tomlinson, & Clayton, 2009, p. 285). Moreover, cultural relativity arguments are likely to be justified by the doctrine, which dilutes the conditions of the Convention (Türmen, 2002, p. 202). It thus appears that the Court does not intend to form a uniform system of protection for human rights (Costa, 2011, p. 180). Under such circumstances, the fact that the Court still grants margin of appreciation to Contracting States in human rights violations of this kind makes it debatable how possible it is to envisage an international and supranational concept of law.

Perhaps it is high time to re-consider national and international systems of law based on stereotypical gender roles and dualities.

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