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Gender Transgression as a European Value? The Role of the Court in Recognizing Human Rights

Damir Banović[1]

ABSTRACT

The paper examines gender transgression as a European value, as part of human dignity and individual human rights within the scope of the Council of Europe and the European Court of Human Rights. The paper also examines (1) Human dignity as an intrinsic value of an individual person; (2) Legal doctrine, legal arguments and legal interpretation as the means for applying certain concepts of human dignity; (3) Gender transgression and the right to self-determination as (part of) human dignity; (4) The role of the European Court of Human Rights in *recognizing* the right to gender transgression by applying different interpretative methods.

Key words: human dignity, gender transgression, evolutive interpretation, the European Court for Human Rights

Spolna transgresija kot evropska vrednota? Vloga Evropskega sodišča za človekove pravice pri priznavanju pravic

POVZETEK

Članek obravnava transgresijo spolov kot evropsko vrednoto, kot del človekovega dostojanstva in individualnih človekovih pravic v okviru Sveta Evrope in Evropskega sodišča za človekove

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pravice. Članek obravnava tudi: (1) Človekovo dostojanstvo kot resnično vrednoto posamezne osebe; (2) Pravno doktrino, pravne argumente in pravno razlago kot sredstvo za uporabo določenega pojma človekovega dostojanstva; (3) Transgresijo spola in pravico do samoodločbe kot (dela) človekovega dostojanstva; (4) Vlogo Evropskega sodišča za človekove pravice, ki priznava pravico do transgresije spolov z uporabo različnih načinov pravne interpretacije.

Ključne besede: človeško dostojanstvo, transgresija spolov, razvojna razlaga Evropskega sodišče za človekove pravice

1. On human dignity in legal philosophy and law; Right to individual self-determination

The status that human dignity has in contemporary legal documents undoubtedly testifies about the importance assigned to this idea. Human dignity is present in a large number of contemporary constitutions, international declarations, and conventions, and in many it is given special significance. In addition, human dignity has a rich philosophical history that goes back to ancient times and has not been forgotten[2]. Dignity is admittedly an ethereal concept, which can mean different things and therefore suffers from an inherent vagueness at its core.[3] Since human dignity is a capacious concept, it is difficult to determine precisely what it means outside the context of *a factual setting*[4]. Human dignity has carried an enormous amount of content, but different content to different people. The basis of dignity can be said to lay in the *autonomy of self*, *a self-worth* that is reflected in every human being's right to individual self-determination[5]. One of the key elements of twenty-first century democracies is the primary importance they assign to the protection of human rights. From this perspective, dignity is *expression of a basic value accepted in a broad sense by all people*[6]. It is a certain fundamental value to the notion of hu-

[2] *D. Franeta, Ljudsko dostojanstvo između pravnodogmatičnih i filozofskih zahtjeva, Filozofska istraživanja, (2011), no. 4, pp. 825-842.*
[3] *R. D. Glensey, The Right to Dignity, Columbia Human Right Law Review, (2011), no. 1, pp. 65-142.*
[4] *E. Eberle, Human Dignity, Privacy, and Personality in German and American Constitutional Law, Utah LR, (1997), no. 1, pp. 963-1056.*
[5] *R. D. Glensey (fn. 2).*
[6] *Ibid.*

man dignity which someone would consider a *pivotal right* deeply rooted in any notion of justice, fairness, and a society based on basic rights; it is a constitutional value, a fundamental right[7]; it *is a value that informs the interpretation of many, possibly all, other rights;*[8] it is *the basic theory underlying the (Canadian) Charter.*[9] Human dignity is *a basic human right*, *a fundamental human right;* criterion for setting the limits between the state and the individual; individual and groups; and between individuals themselves[10]; an interpretative argument for the regional and national judiciary bodies; political instrument for government to pursue executive actions, to formulate and impose norms and rules. But because of these capacities, the notion of human dignity can easily turn into its contradiction; into a *Trojan horse – a benign exterior masking a horrific interior.* To avoid uncertainties of meaning, the answer must lie in the ability to build a plausible legal theory that would translate the idea of the right to dignity into consistent jurisprudence[11].

Although the concept of human dignity in legal documents has a prominent significance, it seems that it is far less clear what in legal and dogmatic terms (but also philosophical) the dignity of a human being encompasses and what should be understood by it[12]. That is where the discomfort arises as today a sublime concept may be invoked for all sorts of things, as it has become, so to speak, legal and political »petty cash«[13]. Some scholars characterized human dignity (David A. Hayman) as merely a pretty concept that varies according to the eye of the beholder. When it comes to questioning whether, for instance, a dress code or keeping travel logs violate human dignity, then we see a sign that the concept is being misapplied and it starts doing harm by its inflationary use[14]. *Inexhaustibility* of situations in which human dignity can be violated implies also the *inexhaustibility* of the legal regulation of

[7] *Ibid.*
[8] *The Constitutional Court of South Africa, 7. 6. 2002 – CCT 35/99, Dawood v Minister of Home Affairs.*
[9] *The Canadian Supreme Court, 28. 1. 1998 – [1988] 1 SCR 30, R v. Morgentaler.*
[10] *Human dignity in German law is both a positive right, imposing affirmative obligations on the state, and a negative right, preventing the state form acting in a way that violets the highest value of the German Basic Law, which encompasses all guaranteed rights and also includes a morality of duty that may limit the exercise of fundamental right (Federal Constitutional Court of Germany).*
[11] *R. D. Glensey (fn. 2).*
[12] *H. Ottiman, Dostojanstvo čovjeka: Pitanja o neupitno priznatome pojmu, Politička misao, (1997), no. 4, pp. 31-44.*
[13] *Ibid.*
[14] *Ibid.*

human dignity. If, in juridical terms, human dignity is exercised through human rights, thereby a violation of any human right may potentially be linked with the violation of human dignity (e.g. case law of the Constitutional Court of Bosnia and Herzegovina).[15] In conclusion, modern scholarship is deeply divided as to the propriety and the practicality of integrating the protection of human dignity within a functional legal system.[16] On one side, there are those who believe the task to be hopeless because assessments of human dignity are quite subjective, with considerable variation temporally, chronologically, geographically and culturally.[17] On the other side are those who posit that the idea of human beings as ends in them selves forms the foundation for the unfolding of human dignity as a workable legal concept[18]. Despite the fact that the concept of human dignity is relative as it depends on a worldview, what might help is taking into account the existing attempts to define the notion of human dignity in other states of the same or similar culture.[19] In that sense, a decision of the Federal Constitutional Court of Germany is noteworthy, as it abolished the *Law on Air Safety* in 2006, which was adopted by the Bundestag and which authorized the armed forces to shoot down a passenger aircraft which had been transformed into a bomb in order to protect an indeterminately large number of people on the ground. According to the court, the killing of the passengers by agencies of the state would be unconstitutional. The duty of the state according to Article 2.2 of the German Constitution to protect the lives of the potential victims of a terrorist attack is secondary to the duty to respect the human dignity of the passengers: '*... with their lives being disposed of unilaterally by the state, the persons on board the aircraft ... are denied the value which is due to a human being for his or her own sake*'[20]. Human dignity also includes self-determination as a human being, according to the constitution, is an end in him/herself and possesses personal values, which again presuppose that human beings have the freedom to decide about themselves and their lives.

[15] *D. Banović, Human Dignity in European Legal Culture-The Case of Bosnia and Herzegovina, in: P. Bechi & K. Mathis (eds.), Handbook of Human Dignity in Europe, 2016 (forthcoming).*
[16] *R. D. Glensey (fn. 2).*
[17] *Ibid.*
[18] *Ibid.*
[19] *C. Steiner & N. Ademović, Ustav Bosne i Hercegovine: komentar, Sarajevo, 2010.*
[20] *J. Habermas, Ogledi o ustavu Evrope, Sarajevo, 2011, p. 14.*

There are several conceptions of dignity that one can choose from, but one cannot coherently hold all of these conceptions at the same time.[21] It follows that the concept of human dignity within a legal framework acquits itself on no immediate definitional parameters, which create incentives for jurists to act instrumentally and arbitrarily when applying a certain concept of human dignity.[22] Nevertheless, in the constitutional and democratic societies, law must accommodate human dignity. Having in mind comparative perspective, human dignity can be treated as (1) a right in and of itself; (2) a general principle; (3) a value underlying other rights[23]. What seems to be a unifying theme is that any definition of dignity must at minimum acknowledge that every individual has protected specific inner attributes, such are thoughts and feelings, and possessed the independence to chose his or hers own course in life, unfettered by interference from the state or other people[24]. Professor Rex. D Glensy provides four theories on how human dignity could be applied:

(1) ***The positive rights approach*** where dignity becomes an actionable substantive legal right. This approach constitutes human dignity as a separate independent right upon which individuals could assert a private action against both the government and other private parties, and which would require the government to provide a minimum set of standards to ensure that each person's human dignity is protected.[25]

(2) ***The negative rights approach***, where dignity functions as a background norm. This concept embodies a non-interference norm, whereby the government is required to abstain from denigrating, rather than requiring governments to intervene on behalf of human dignity.[26] The negative rights approach is based on understanding that human dignity is the source of human rights and hence is anterior or above the state and to which it does not belong conceptually.[27] This notion of human dignity is closely associated with a liberal conception of governance.

[21] *R. D. Glensey (fn. 2).*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*

(3) ***The proxy approach*** where dignity is used as a heuristic for other enumerated rights. Under the proxy approach to the right to dignity, the invocation of a dignitary interest in a particular circumstance does not signify something independent or another enumerated right, but rather acts as a proxy for that right. The use of dignity functions as a heuristic - a cognitive device that serves as an aid to solve a complex problem that can act either through conscious application or else from a subconsciously auto-programmed source.[28]

(4) ***The expressive approach***, where dignity is referred to dialogically[29]. In this framework, the right to dignity is widely invoked as both a legal ground and a moral basis for redress of certain violations by the government or by private individuals.[30]

(5) ***The interpretation approach***, where human dignity is placed as the value within the legal document and used as teleological argument when interpreting the essence of the human rights and the basis for creating a *norm.*

The proposed classification presents only the practical aspect of the use of the notion of human dignity in the practice of courts and other bodies that reach meaning by interpretation. It does not provide a theoretical framework of relations of *human dignity* whose content is oftentimes undetermined, subject to various ideological interpretations, defined formally or with a meaning surplus; it fails to provide a framework for the meaning of the notion of human dignity, tools for its determination when the value is found in a legal source. A German lawyer, Günter Düring, offered one of the possible uses of the notion of human dignity in law and I will here refer to his interpretation.

On Günter Düring's object formula

The key notion of Düring's interpretation of the stand on dignity is the so-called *object - formula: Human dignity is violated when a given human is humiliated to the level of object, a pure means, a replaceable value.*[31] Kant's practical philosophy position is similar as the highest moral law of human dignity in action is the obligation to act in the manner that never treats humanity as a means

[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *D. Franeta (fn. 1).*

but always as an end: *Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means*.[32] According to Düring, the simplest way to come to the concretization of the *object – formula* relation, i.e. concretization of human dignity is from the process of violation.[33] He differentiates between a number of basic types of violations of human dignity: 1) blatant violations of dignity, such as mass expulsions and genocide in which humans are degraded to things and animals; 2) cruel punishments; 3) subordinating persons to objects and denial of legal subjectivity to humans and assigning it to objects; 4) transforming humans into an object of state proceedings (use of chemical and psycho-technical substances to extort »the truth«, denial of legal hearings); 5) threatening intimacy without which there can be no person; 6) depersonalization process; 7) certain forms of violations of honor; 8) life below elementary existential conditions that deprives persons of their subjectivity.[34] Blatant violations of dignity, according to Düring, primarily include torture, slavery, mass expulsions, genocide, humiliation, ostracization, mass murders, forced labor, experiments on people, and destruction of existence which is then not worth living.[35] Similarly to Kant, Düring thinks that the true guide for value is a human being in him/herself and not a concrete person.[36] Accordingly, dignity should be assigned to the unborn and to the dead. Relying on the claim that a *person in him/herself* is the holder of dignity, Düring concludes that dignity is something present, not something acquired.[37] Therefore, it is assigned to every person in any circumstances regardless of national, racial, gender, religious, status, age, or any other differences.[38] It prevents differentiating between people and all types of discrimination.[39] Other authors list some other dangers in the unilateral definition of the term human dignity: first, there is the danger of speciesism; then the danger of emptying the content that dilutes the meaning in the manner that nothing human can be excluded from the term; and third, that the notion of human

[32] *I. Kant, Zasnivanje metafizike morala, Beograd, 1981.*
[33] *D. Franeta (fn. 1).*
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*

dignity depends on certain achievements that some people reach and others do not.[40] Regardless of how many counter-arguments there are to the deliberation of human dignity by Günter Düring, such as: (1) by certain actions people are degraded to the level of animals which implies that certain actions are allowed against animals; (2) impossibility of creating an exhaustive list of actions that violate human dignity; (3) granting dignity to the unborn which implies prohibition of abortion and the right of choice of women etc., but also dangers of individual one-sided definitions given by Henning Ottiman, Düring sill provides a primarily juristic understanding of human dignity which could be a useful tool when interpreting legal principles and norms.

Human dignity as the legal principle in human rights law

It is impossible to speak about the *legal perspective on human dignity* without making reference to the most important international conventions that introduce the notion of human dignity. In that light, the Universal Declaration of Human Rights[41], *inter alia*, in its preamble, assumes *the inherent dignity and the equal and inalienable rights of all members of the human family* as the foundation of *freedom, justice and peace in the world,* and in its Article 1 proclaims that *all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.* The Charter of Fundamental Rights of the European Union in its first chapter (*Human Dignity)* places human dignity at the top of the human rights catalogue and states in Article 1: *Human dignity is inviolable. It must be respected and protected.*[42] The explanation of the Charter says, in the part on the respect of human dignity, that the dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. None of the rights laid down in the Charter may be used to harm the dignity of another person, and the dignity of the human person is part of the substance of the Charter itself. I will make another reference here to the European Convention on Human

[40] *H. Ottiman (fn. 11).*
[41] *The Universal Declaration of Human Rights 1948, http://cesi.fpn.unsa.ba/wp-content/uploads/2012/12/Univerzalna-deklaracija-o-ljudskim-pravima.pdf, accessed 13 January 2015.*
[42] *C. Steiner & N. Ademović (fn. 18).*

Rights.[43] Even tough the original European Convention on Human Rights does not contain a reference to human dignity, it indirectly proceeds from the concept of *human dignity* and it makes direct reference to this notion in the preamble to Protocol 13 concerning the abolition of death penalty in all circumstances where it is being justified by the right of human beings to life, but also full recognition of *the inherent dignity of all human beings.* In interpreting the European Convention, the European Court of Human Rights and the European Commission of Human Rights have called upon the right to dignity numerous times.[44] The infusion of the right to dignity throughout the European Convention has led the European Court of Human Rights to proclaim that human dignity underpins the entirety of the document as a general principle of law.[45] *The very essence of the Convention is respect for human dignity and human freedom.*[46] The European Court of Justice, for example, in the case P v. S and Cornwall County Council interpreted human dignity in the way that prohibits discrimination of transgender individuals,[47] stating: *Where a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavorably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment (...) To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard* (par. 21–22). In the case Goodwin v. UK, the European Court of Human Rights found: *Nonetheless, the very essence of the Convention is respect for human dignity and human freedom* (par. 89). Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (par. 89).

[43] *European Convention on Human Rights 1998, http://www.ccbh.ba/public/down/konvencija_bos.pdf, accessed 13 January 2015.*
[44] *R. D. Glensey (fn. 2).*
[45] *Ibid.*
[46] *ECtHR, 29 April 2001 – App no 2346/02, Pretty v The United Kingdom*
[47] *In its judgment of 30 April 1996, in the case of P v. S and Cornwall County Council, the European Court of Justice (ECJ) held that discrimination arising from gender reassignment constituted discrimination on grounds of sex. The ECJ held, rejecting the argument of the United Kingdom Government that the employer would also have dismissed P if P had previously been a woman and had undergone an operation to become a man.*

If we perceive human dignity as a *moral value*, then human rights are the means for protecting this value. Human rights law translates moral norms of human freedom and human dignity into legal rights.[48] These legal rights empower individuals to lay claims against those who violate these moral norms.[49] Specifically, the Convention, by establishing a set of rights and freedoms, mandates contracting States to provide proper recognition and safeguards to different spheres of personal identity.[50] In its judgment S. H. and the others v. Austria (2011)[51], the Court had reiterated that the notion of private life within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, (1) the right to establish and develop relationships with other human beings[52], (2) the right to personal development[53], (3) or the right to self-determination as such[54]. It encompasses elements such as gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8[55], and the right to respect for both the decisions to have and not to have a child[56].

2. On evolutive/dynamic interpretation: interpretation or creation?

In cases Golder v. the United Kingdom (1975)[57] and Tyrer v. the United Kingdom (1978) the Court established the doctrine of evolutive interpretation[58] which was simultaneously deployed by the Court in a substantial number of cases.[59] The principle,

[48] *L. K. Y. Rosa, Expansive interpretation of the European Convention on Human Rights and the creative jurisprudence of the Strasbourg's Court, Mercury: HKU Journal of Undergraduate Humanities, (2014), no. 1, pp. 70-82.*
[49] *Ibid.*
[50] *Ibid.*
[51] *ECtHR, 3 November 2011 – App no. 57813/00, S. H. and others v Austria.*
[52] *See ECtHR, 16 December 1992, Series A no. 251-B, Niemietz v Germany, § 29.*
[53] *See ECtHR, 6 February 2001– App no. 44599/98, Bensaid v the United Kingdom, § 47.*
[54] *See ECtHR, 29 April 2002 – App no. 2346/02, Pretty v the United Kingdom, § 61.*
[55] *See, for example, ECtHR, 22 October 1981, Dudgeon v the United Kingdom, § 41 Series A no. 45. and ECtHR, 19 February 1997, Laskey, Jaggard and Brown v. the United Kingdom, § 36, Reports of Judgments and Decisions 1997-I.*
[56] *See ECtHR, 10 April 2007 – App no. 6339/05, Evans v the United Kingdom [GC], § 71, and ECtHR, 16 December 2010 – App no. 25579/05, A, B and C v Ireland [GC], § 212.*
[57] *ECtHR, 21 February 1975 – App no. 4451/70, Golder v The United Kingdom.*
[58] *J. E. Helgesen, What are the limits to the evolutive interpretation of the Convention, in Dialogue between judges, The European Court of Human Rights, Strasbourg, 2011, pp. 19-28.*
[59] *K. Dzehtsiarou, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, German Law Journal, (2011), 12, pp. 1730-1745.*

which the present Court still applies with the reference to the Vienna Convention on the Law of Treaties, is that the Convention (ECHR) is a *living instrument.*[60] The Convention should be an instrument of development and improvement rather than an *end game* treaty that set to stone the situation of 60 years ago. However, evolutive interpretation should not be tantamount to arbitrary interpretation.[61] The Convention must be interpreted in a dynamic and evolutive way; must meet present day conditions; must be interpreted according to the purpose of the Convention; must be interpreted so as to make the rights practical and effective; the Court must elucidate, safeguard and develop the rules instituted by the Convention.[62] If important social and technical changes have occurred than the precedent of previous case law should change accordingly.[63] Is there a difference between the evolutive and dynamic interpretation? Legal theory has developed possible guidelines: the evolutive interpretation is an interpretative tool to cover the situation where the Court gives answers to new facts, societal changes, an issue which has never appeared before the Court; while dynamic interpretation refers primarily to the situation where the Court gives new answers to old facts.[64] According to professor and judge of the Court, Jan E. Helgesen, by using these interpretative tools the Court has to *limit* its scope of interpretation by identifying avenues or problems which need to be taken into consideration: (1) The Court provides the ultimate interpretation of the Convention (Art. 32) guided by legal methodology of public international law, keeping in mind that the ECHR is a very special convention. (2) Also, one might analyze the legal limits in terms of the extent to which the Court is bound by previous decisions. The Court's current position is that it must attach *considerable weight to previous case law.* The magical formula frequently used: *while the Court is not formally bound to follow its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart without good reason from precedents laid down in previous cases (Goodwin v. UK (2002), Mamatkulov and Askarov v. Turkey (2005));* (3) The question of state sovereignty and state consent

[60] *J. E. Helgesen (fn. 57).*
[61] *Ibid.*
[62] *J. E. Helgesen (fn. 57).*
[63] *K. Dzehtsiarou (fn. 58).*
[64] *J. E. Helgesen (fn. 57).*

raises an issue of national sovereignty restrictions, which is more of a political issue and will not be discussed here; (4) The fourth cluster of problems, according to professor Helgesen, relates to the legitimacy of the Court's judgments.[65] Usually, the issues of legitimacy are discussed at the domestic level within a paradigm often formulated as judicial activism v. judicial restraint. But this distinction is hardy applicable in the case of the Convention and the Court. If one wishes to defend the Court, one must remember that if the Court would refrain from being active and creating new norms, there would be no normative development at all. The Court cannot leave the challenge of developing norms to the legislator. But if one is to criticize the Court, one will emphasize that it is particularly dangerous to have international courts creating new norms, since there is no political body which can correct or control the court. The discussion on the legitimacy of the Court's judgments illustrates the tension between the two principles: the rule of law and the principle of democracy. The European consensus used in Court's judgments injects European context and predictability into the Court's legal reasoning and provides a sufficient response to the legitimacy challenges made against the evolutive interpretation;[66] (5) The fifth cluster of problems, according to professor Helgesen, constitutes the issues of efficiency.[67] The fight for respect for human rights is not settled when the Court delivers the judgment. What remains is the effective execution of the judgment. In relation to limits of evolutive and dynamic interpretation, the Court must be able to give guidance to governments on how they should best implement judgments; (6) Finally, the principle of subsidiarity[68] seen from the perspective of the States assumes the claim of a particular State that human rights protection is better at the domestic level. On the other hand, seen from the Court's perspective, the principle of subsidiarity has been effectively applied by these tools: (a) margin of appreciation; (b) 4th instance; (c) facts of the case; (d) proportionality, and (e) necessary in a democratic society. These principles are designed to allow States room for maneuver within the Convention, but the Court may also refrain from applying these principles, giving the

[65] *Ibid.*
[66] *K. Dzehtsiarou (fn. 58).*
[67] *J. E. Helgesen (fn. 57), p. 8.*
[68] *Ibid., p. 9.*

States the feeling of being overruled in issues of great importance to them.

3. The European consensus as a way to legitimize the creation of norms?

The concept of the European consensus in the case law of the Court may be defined as a general agreement among the majority of member states of the Council of Europe about certain rules and principles identified throughout comparative research of national and international law and practice.[69] When deploying an evolutive interpretation with creating a precedent, the Court may overrule previous judgments. The reason for departing from previous decisions may be rooted in phenomena such as: (1) developments in law (national case law, national positive law, regional case law)[70]; (2) medical progress; (3) societal changes[71]; (4) scientific changes; (5) acceptances in the society. Or, to be more specific: changes in law and/or facts.

The European consensus is considered a mediator between the evolutive interpretation and the margin of appreciation and it is a rebuttable presumption in favor of the solution adopted by the majority of the Contracting Parties.[72] In the case A, B and C v. Ireland[73], the Court has stated that *the existence of a consensus has long played a role in the development and evolution of Convention beginning with* Tyrer v. United Kingdom (...), *the Convention being considered a »living instrument« to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention.*

[69] *K. Dzehtsiarou (fn. 58).*
[70] *ECtHR, 15 October 2009 – App no 17056/06, Micallef v Malta: The Court observes that there is a widespread consensus among the Council of Europe member States, which either implicitly or explicitly provide for the applicability of Article 6 (...). Similarly, as can be seen from its case law (...) the European Court of Justice (par. 78). See also paragraph 31: On the basis of the material available to the Court in respect of the legislation of a relevant number of member States of the Council of Europe, it appears that there is widespread consensus on the applicability of Article 6 safeguards to interim measures, including injunction proceedings. This conclusion is inferred from constitutional texts, codes of civil procedure and domestic case-law.*
[71] *ECtHR, 27 September 1990 – App no 10843/84, Cossey v United Kingdom (...) Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions (...) (paragraph 35).*
[72] *K. Dzehtsiarou (fn. 58).*
[73] *A, B and C v Ireland (fn. 55).*

Lack of consensus may prevent the Court from applying a dynamic interpretation (e.g. *Sheffield and Horsham v. the United Kingdom* in 1998). The Court stated that it could not depart from previous case law because the issues of transgender raise complex scientific, legal, moral and social questions in respect to which there is no common approach among the Contracting States. The case *Christine Goodwin v. the United Kingdom (2002)* dealt with similar facts and the previous decision was overturned with the reasoning that there is a *continuing trend in transsexuals' right recognition*[74]. But if the law of the respondent state diverts from the European consensus it does not automatically mean that the given state is violating the Convention. The member state may have a particularly strong justification for the concerned law even if this law is different from the common European consensus.[75] One can suggest that the assessment of this justification takes into account the moral sensitivity of the matter at stake, historical and political justification, as well as other factors.[76] The Court applies the European consensus extensively in relation to a broad variety of rights and it possesses legitimizing potential.[77] It is persuasive because it is based on decisions made by democratically elected bodies and it can positively affect the clarity of the Court's legal reasoning.[78] There is no common understanding among commentators on the relation between the evolutive interpretation and the European consensus. Some argue that the fact that the European consensus was deployed to support evolutive interpretation proves that the European consensus is not a sign of stability of the case law but rather an instrument *which justifies changes* and that the European consensus argument does not contradict evolution but rather restricts it.[79] Some commentators argue that the Court can either defer to the solutions adopted at the national level or deploy evolutive interpretation.[80] Nevertheless, the Court faces a dilemma: its judgments should be independent enough to effectively guarantee human rights but they should also reflect the common European position for the following reasons: (1) ac-

[74] *K. Dzehtsiarou (fn. 58).*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*
[80] *M. Pinto-Duschinsky & B. Gibbs, Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK, London, 2011.*

ceptance of its judgments by the respondent state and in general among the Contracting Parties; (2) as a foundation to legitimize its judgments; (3) to balance between respecting the margin of appreciation and deploying a dynamic interpretation.

4. Recognizing the right to gender transgression

The Council of Europe is a global pioneer in applying human rights to transgender people as well. Article 14 of the European Convention on Human Rights introduces the non-discrimination principle in relation to the rights set forth in the Convention. Although gender identity is not explicitly mentioned in the Convention, the term 'transsexualism' was used in the interpretation of 'other status' in the case P.V. v. Spain[81] in 2010. Since 1992, the European Court of Human Rights adopted positive decisions in a number of cases that referred to rights of transgender people in the following spheres of life: (1) right to recognition of gender in the postoperative phase of transgender persons (B. v. France)[82]; (2) right to marry (Goodwin and I. v. UK)[83]; (3) right to fair and proportional requirements in relation to gender reassignment procedures (van Kück v. Germany); (4) right to pension (Grant v. The United Kingdom)[84] and (5) right to appropriate and clear procedure of legal recognition of name and sex (L. v. Lithuania)[85]. Gender identity and its expression are very important elements of everyday life of transgender people, but are also important for the understanding of the concept of human rights of transgender people. Some legal systems of the Council of Europe member states still place gender identity under sexual orientation, and the two concepts are different. But if the case law recognizes discrimination against transgender people, the failure to include 'gender identity' into positive law is not problematic. Over the last 30 years, there is an evident tendency of the Council of Europe member states to provide full recognition of transgender people, but this tendency has primarily been caused by case law of the European Court of Human Rights. The issue of transgender rights was

[81] *ECtHR, 30 October 2010 – App no 35159/09, P. V. v Spain.*
[82] *ECtHR, 25 March 1992– App no 3343/87, B. v France.*
[83] *ECtHR, 11 July 2002 – App no 28957/95 and 25680/94, Christine Goodwin & I. v United Kingdom.*
[84] *ECtHR, 23 May 2006 – App no 32570/03, Grant v United Kingdom.*
[85] *ECtHR, 11 September 2007 – App no 27527/03, L v Lithuania.*

raised a number of times by the European Court of Human Rights as of 1979; until 2002 the Court considered this issue to be subject to 'free assessment by the state'. In its decision Goodwin v. The United Kingdom,[86] the Court unanimously found that there has been a violation of Article 8 (right to respect for private and family life) and Article 12 (right to marry). This decision developed a precedent by which member states of the Council of Europe may no longer invoke the so-called principle of free assessment when it comes to the right to respect for private and family life, and the right to marry of transgender and transsexual people. In the context of rights of transgender people to sex reassignment and legal consequences of sex reassignment, the European Court of Human Rights applied the European Convention on Human Rights in its important decisions and imposed the obligation upon member states to enable transgender people to have access to surgeries for full sex reassignment and that these should be covered by health insurance as medically necessary procedures (see van Kück v. Germany[87]), and to enable the change of sex marking in personal documents (see Goodwin v. The United Kingdom and B. v. France)[88].

5. Creating precedents, creating norms; A short overview of Goodwin v. UK (2002)

Putting aside other sources of international human rights law, the international courts as agents have the *authority* to formally *recognize* the existence of law.[89] That is, to certify that a given human right exists in positive international law and to use it as a basis for adjudicating the dispute before them. The boundaries between interpretation and lawmaking are blurred.[90] Or, put more concrete, seeing »lawmaking« by the means of judicial recognition as an alternative avenue that permits positive international law to side step its own systematic deficiencies and evolve beyond the sovereign state.[91] In the Elmar case from 1882, the judges of the

[86] *Christine Goodwin v United Kingdom and Northern Ireland (fn 82).*
[87] *ECtHR, 12 September 2003 – App no 35968/97, Van Kück v Germany.*
[88] *B. v France (fn. 81).*
[89] *V. P. Tzevelekos, The Making of International Human Rights Law, in C. M. Brölmann, & Y. Radi (eds.), Research Handbook on the Theory and Practice of International Law-Making, Cheltenham, Northampton, 2015, pp. 329-353.*
[90] *Ibid.*
[91] *Ibid., p. 12.*

New York Supreme Court could not agree about what the law said.[92] Minority dissenting opinion of judge Gray advocated the theory of *literal interpretation* of legislation.[93] According to this theory, the words in the law should be assigned those meaning that we would assign without any special knowledge about the context they were used in or the intentions of their maker;[94] in other words, that we would assign in an acontextual reading. However, judge Earl, who wrote on behalf of the majority, used a significantly different legislation theory, according to which the *intentions* of the legislator have a notable influence on the law.[95] Judge Earl thought that they should rely on the following principle: that the law should not produce a consequence that the legislators would not have approved had they thought about it.[96] But he did not rely only on this principle, he said that the law should not be interpreted based on the text in a historical isolation, but within what he calls a general legal principle: judges should interpret the law in a way to approximate it as much as possible to the principle of justice, inherent to the law.[97] First, it is reasonable to assume that the legislators had a general and broad intention to respect the traditional principles of justice.[98] Second, as the law is a part of a wider system of thought – law as a whole – it should be interpreted in the manner which will make the wider system coherent *in principle*.[99] In the Goodwin case, the European Court had stated that while the Court is not formally bound to follow its previous judgments, it is in the interest of *legal certainty*, *foreseeability* and *equality* before the law that it should not depart, without good reason, from precedents laid down in previous cases (see *Goodwin v. UK* par. 74). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and should respond, for example, to any evolving convergence as to the standards to be achieved (see *Goodwin v. UK* par. 74). It is of crucial importance that the Convention is *interpreted and ap-*

[92] *R. Dworkin, Carstvo prava, Beograd, 2003, p. 26.*
[93] *Ibid., p. 27.*
[94] *Ibid.*
[95] *Ibid., p. 28.*
[96] *Ibid., p. 29.*
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.*

plied in a manner, which renders its rights practical and effective, not theoretical and illusory (emphasis added). A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (par 74). In the present context the Court has, on several occasions since 1986, signaled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (par. 74). The Court proposed therefore to look at the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention (par. 75). The Court observed that the applicant, registered at birth as male, had undergone gender reassignment surgery and lives in society as a female (par 76). Nonetheless, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women (par 76). It must also be recognized that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (par 76). The stress and alienation arising from discordance between the positions in society assumed by a post-operative transsexual and the status imposed by law, which refuses to recognize the change of gender, cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality (par 77). A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety (par. 77).

The state of European or any international consensus in Goodwin case

Already at the time of the Sheffield and Horsham case, there was an *emerging consensus* within Contracting States in the Council of Europe on providing legal recognition following gender reassignment (par 84). The latest survey submitted by Liberty in the case *Goodwin vs. UK* showed a continuing international trend towards legal recognition (par 84)[100]. The Court observed that in

[100] *In Australia and New Zealand, the courts are moving away from the biological birth view of sex and taking the view that sex, in the context of a transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of marriage (par. 84). See R. Dworkin, (fn. 91), p. 27.*

the case of Rees in 1986 it had noted that *little common ground existed between States*, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (par. 84). In the later case of *Sheffield and Horsham*, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection (par. 84) (...). *The Court accordingly attached 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 favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals* (emphasis added) (par 85). The Court retreated from finding a general or European consensus in situations of sensitive intimate or moral issues, *in concreto* transgender identity issues. This retreat is quite understandable having in mind the different views of *public morality* in states members of the Council of Europe. However, it is not justified to search for *majority consensus* when it comes to human rights, as the majority may not decide about the rights of the minority. In the conflict between the rule of law and the democratic majority principle, primacy should be given to the rule of law. In this light, the Court moved towards developing argumentation which is marked by (1) *a continuing international trend in social acceptance of transsexuals* and (2) *legal recognition of the new sexual identity* within the already established evolutive method of interpreting the Convention.

Human dignity as a value and legal principle

Court cases, at least in principle, always raise three disputable questions: (1) the question of facts, (2) the question of law, and (3) mutually intertwined questions of political morality and devotion.[101] When we discuss the disagreement about what law is, this may be a disagreement about the empirical disagreement, and the theoretical disagreement about law, i.e. *basic rights*.[102] Law is

[101] *R. Dworkin (fn. 91), p. 13.*
[102] *Ibid., p. 15.*

what is contained in decisions of legal institutions, such as legislative authorities, city councils and courts (»pure facts« view).[103] But if that stands, what are the lawyers disputing about? Well, when it seems that they disagree as to what law is, they are in fact disagreeing about what law *should be*. It seems that their disagreement relates to morality and devotion.[104] The most popular view in Great Britain and the United States of America requires from a judge to primarily follow the law in his/her decision, not to improve it.[105] There are those with an opposing opinion: judges should try to improve law whenever they can, to be educative.[106] A good judge favors justice over law.[107] In addition, there is no doubt that judges create new law when they adjudicate in an important case.[108] In examples of *gender transgression*, part of the intimate and private sphere of an individual having consequences in the outer world of social relations, the question is raised about what law is in such a case, and what is the matter of the political morality here as gender transgression and its legal recognition is primarily the question of *public conscience*, *public morality*, but also *human dignity*. The facts remain the same, but the question of recognizing what law constitutes changes in a given period of time. How is it possible that within a single *positive law*, something does not constitute a right in the practice of the Court, but is later recognized as a right through *interpretation*? Are we then talking about the *creation of law* or its *interpretation?* In the specific precedent of *Goodwin v. UK (2002)* the Court found that the right to privacy has been violated (Article 8). Thereby, judicial interpretation allows the already existing rights to act as an *umbrella* widening their semantic field to the extent that they acquire a new dimension and accommodate an enriched scope.[109] Depending on the legal theory one belongs to, it is possible to speak about the *creation of law* or *interpretation of law.* If we accept that only democratically elected bodies have the right to create law, and in the state of deficit of the legitimacy to create law, the Court introduces a model of the so-called European consensus on the future precedent. The

[103] *Ibid., p. 17.*
[104] *Ibid.*
[105] *Ibid., p. 18.*
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid., p. 16.*
[109] *V. P. Tzevelekos (fn. 88), p. 14.*

European consensus is in fact nothing more than a legitimizing model that a state resorts to at national level when adopting laws to regulate social relations. The conflict between *social facts* and *law,* and the lack of *rule of recognition* in international law, leads to a situation where international courts appear as *de facto* bodies that *recognize* the existence of law.[110] Although not a part of evolutive interpretation method, human dignity appears as (1) value and (2) legal argument of the interpretations of rights from the Convention: *the very essence of the Convention is respect for human dignity and human freedom.* Also, in the specific precedent, *the Court considers that society may be reasonably be excepted to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost* (par 91). In the terminology of Rex D. Glensey, human dignity is in the function of defending the individual from the state (*the negative rights approach)*, but also is the representative of other rights (*the proxy approach*), as well as the moral and legal basis (*the expressive approach*) and the means of targeted interpretation for a precedent but also for future cases (*the interpretation approach*).

In interpreting law, the judge may decide to apply the mechanical, literal interpretation of the legislation which makes him/her apply law in a simple, acontextual manner, whatever illogicalities it produces. The other path is to set the goal, the intention of those who created the norms, which in its radical form rejects the existence of law as the source of the norm, and start from it as from a framework. The middle, conciliatory way combines the argumentation of goal and intention with the systemic linkages of legal norms, precedents and legal principles. In recognizing the right to gender transgression, the European Court took the *middle way* (1) by applying parts of the evolutive method, but retreating from the search for *European or any other consensus*, i.e. by translating social evolution into law: the majority may not and should not decide on the rights of the minority; (2) referring to *the general trend of recognizing the social acceptance of transgender people* and *legal recognition of the new gender identity* in member states*;* (3) by targeted, teleological interpretation of the Convention that is to protect the values of human dignity, and where human dig-

[110] *See more in V. P. Tzevelekos (fn. 88).*

nity appears also as a *legal principle*[111]; (4) systematically linking it to the existing rights (right to marry and right to privacy and family life), it finally *recognizes* gender transgression not only as a new human right, but also as a value within the framework of the European human rights law. The European Court for Human Rights has *formally* recognized the right to transgression as the *legal norm*: the political claim has been translated into an individual positive right; it has become an *institutionalized value*. If we take into consideration the premise that human dignity encompasses the *right to personal self-determination*, individual identity (sexual or gender) is then part of his or her right to personal self-determination. Also, if we accept the premise that human dignity is a value in democratic societies which legitimates state's existence, it's decisions and power, then human dignity is a value in every state which not only formally but essentially defines itself as democratic and in its foundations respects individuals. Human rights law (universal and regional) introduces human dignity as a *positive moral and legal value* and human rights as *instruments, tools, processes and material preconditions* the final purpose of which is to protect this value.

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[111] *Human rights should be interpreted in the light of the foundational philosophical principles that underpin them, see V. P. Tzevelekos (fn. 88).*

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