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The Right to Gender Identity  
A Case Study on Transgenderism  
in the European Court of Human Rights

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# Summary

The thesis explores to which extent it is possible for an individual to live in accordance with his or her chosen gender identity within the framework of the European Convention on Human Rights, and within the conventional right to privacy in particular.

The specific research question has been to find out whether a right to decide one's gender identity has emerged in the European Court of Human Rights by studying the argumentation of the Court in cases concerning rights of transgendered individuals.

Discourse theory has been used as an analytical tool to display the argumentation of the Court and in particular to study the development of the discussion. I have used the concept of chains of equivalence, which is a tool for visualising how expressions are linked together in a certain discursive context where they enforce each other.

The empirical research material consists of the cases from the European Court of Human Rights where individuals have claimed their rights have been breached as a consequence of their transgender identity. I have then extracted passages from the judgement or dissenting opinions where the Court or separate judges speak in favour of a right to live in accordance with one's gender identity, that is, the gender you perceive yourself as. I have then categorised the extracts thematically based on which argument that is used in support of the right to live freely as the gender one prefers.

Based on the empirical findings, I conclude that the European Court has increasingly acknowledged transgendered individuals' rights to decide their gender identity. This right has emerged within the framework of the right to privacy in Article 8, but it is always articulated in combination with other rights as a support.

# Abbreviations

*The European Convention for the Protection of Human Rights and Fundamental Freedoms* referred to as:  
*the European Convention on Human Rights, the European Convention or the Convention*

*The European Court of Human Rights* referred to as:  
*the European Court or the Court*

# 1 Introduction

In this chapter I will introduce the problem my thesis evolves around and then move on to describe how I will carry out my research.

## 1.1 Problem

Persons who are in gender transition or have undergone such transition are likely to run into difficulties due to their legally unclear status. Society is characterised by a strict dichotomy between female and male and therefore problems may emerge when a person tries to break out of these given boundaries. Some ten cases have been brought before the European Court of Human Rights where applicants claim their human rights have been violated by their respective state due to their transgender identity.

In this study I would like to investigate how the right to privacy, as stated in the European Convention on Human Rights, has come to include, or possibly include, a right for individuals to live in accordance with their decided gender identity. By studying the cases regarding rights of transgendered individuals that have come before the Court I hope to see if there has been a transition in favour of a right for the individual to live out her or his preferred gender identity. By carrying out an in-depth linguistic analysis I hope to catch the normative process, which the Court practices via their judgements.

## 1.2 Theory

My study objects are cases from the European Court on Human Rights regarding rights for transgendered individuals. In these cases, I will try to identify the expressions, which are used in favour of the right for the individual to decide her or his own gender identity. How does the Court and individual judges reason on this issue? Since I intend to use written material in the form of case law, I need a theoretical tool suitable for text analysis.

Discourse analysis is an empirical analysis method based on a relativist orientation, which means that what is referred to as reality, in fact is perceived by discourse analysts as a description of a believed reality. Within the discourse analysis, it is meant that all actions take place within a *discourse*, a context that must be understood in order to analyse the object or an action within the same correctly. The discourse is a constructed system with meanings that exist in a particular social context. The basis of

discursive research lies in interpreting language and its meaning, the theory can however be extended to also comprising social phenomena. Through this way of analysis, an understanding can be developed for how discourses influence and set the limits of how we act. (Howarth 1995 p. 115ff.)

The point of *discourse analysis* is not to reveal the discourse or find the “true” meaning behind people’s words or ways of acting. Instead discourse analysis is a tool for understanding and visualising a discourse and its social consequences. (Winther Jørgensen and Phillips 2000:28) One can say that the discourse analysis will help exposing the myths about society that exist and what general assumptions within society that are perceived as objective truths. (Winther Jørgensen and Phillips 2000:47)

There are various perspectives on discourse analysis; I will apply the *discourse theory* developed by Ernesto Laclau and Chantal Mouffe. Their main point is, like for all discourse analysts, that the meaning of the social world is constructed by discourse. This meaning can never be finally set since the language is constantly changing. Everything in society is generated within discourses according to Laclau and Mouffe. In addition to this, the discourse is also not an isolated entity, but always in transition due to the contact with other discourses. To become the superior interpreter of the language the different discourses are constantly struggling with each other. The main goal is to achieve hegemony for the own discourse’s interpretation. (Winther Jørgensen and Phillips 2000:13)

The theory is beneficial to my topic since my intention is to interpret cases concerning a specific topic, that is persons in gender transition. Discourse theory is a good tool for visualising the discourse on privacy, and gender identity in particular, within the European Court of Human Rights by analysing the language and argumentation used. Discourse theory catches the struggle over meaning and what I want to catch is the struggle to define and see the extent of the right to live out as the decided gender, which has been raised more and more over time in the cases regarding rights of transgendered individuals.

The discursive context of my study is the right to privacy, which is provided in the European Convention of Human Rights. Within this context there is an emerging idea of the right to decide one’s own gender identity. This idea is my main study object, but to display and define its content, I must also examine which other ideas that are associated to the right.

## **1.3 Research Design**

In this section I will elaborate on how I practically intend to conduct my research and how I will deal with my material.

### **1.3.1 Method**

The discourse analysis provides an overall methodological solution. It includes philosophical assumptions regarding society as a social construction and the language as a vital part of this construction. Besides this philosophical side, the analysis also provides guidelines on how to process collected data. (Winther Jørgensen & Phillips 2000:10)

My main way of dealing with my research material is to identify the expressions, which have pushed the development of the conventional *right to privacy* forward towards the possible inclusion of an extended right for transgendered individuals to live in accordance with the decided gender identity. I will then look at how these expressions are linked together with each other in a chain of equivalence and thereby give a meaning to the discourse.

Taking on a social constructive theory like the discourse analysis means that one as a researcher accepts this approach, which automatically implies that there is no objective research, including one's own work. The discourse theorists Laclau and Mouffe, whose theory I will use, have not dealt with this problematic issue; instead their theory is actually presented as an objective research tool. Winther Jørgensen and Phillips discuss this fact and conclude that the philosophical problem regarding social constructivism and objectivity may well be insolvable. However, there are ways to make one's discourse analytical research valid by applying a transparent research method. They also suggest that the researcher always openly explains and considers his or her relation to the discourse and what impact the own research might have on the same. (2000:29)

Everything is, within discourse theory, contingent and it is important for the researcher to see beyond her or his own perceptions of what is objective and contingent. A good way to distance yourself from the currently prevailing norms is to make a comparative study, for instance a comparison between cultures or between different periods of time. (Winther Jørgensen & Phillips 2000:44)

I intend to carry out my research in a manner, which makes it possible for the reader to easily follow my way of reasoning, see what assessments I have made in order to also assess my work better. Regarding the comparative element, I will be looking at cases from a period of time of over fifteen years to visualise a possible change in practice. Even though the disposition of the empirical material is thematic, there is also a clear chronological comparative element.

### **1.3.2 Material and Delimitations**

Below, I will explain what material I have used for what purposes and how I have chosen to limit my study.

### **1.3.2.1 Theoretical Material and Delimitations**

To my thesis, I will apply discourse theory as described in Marianne Winther Jørgensen's and Louise Phillip's book *Diskursanalys som teori och metod*. As a complementary source I will also use Jacob Torfing's book *New Theories of Discourse* and shorter excerpts from some further works. Discourse theory is a very complex analytical tool and I will only be describing the elements that are necessary for my study. I will also only be touching upon these components which all have deep underlying philosophical dimensions.

Since the discourse theory includes a fundamental idea that objectivity is created, it examines, not the objective reality, but how we create what is perceived as reality. So, as a discourse theorist I must stay aware of this and emphasise that I will be examining the created discourse and not the objective reality on right to privacy. (Winther Jørgensen & Phillips 2000:40)

For the brief background on the European Convention on Human Rights and the right to privacy I will use well known works on the topic by Danelius and Ovey and White, as well as some complementary books.

### **1.3.2.2 Empirical Material and Delimitations**

My empirical material consists of case law from the European Court of Human Rights between 1986 and 2003. I will analyse cases where the Court assesses national judgements regarding rights of persons in gender transition. I started by going through all of the Court's cases dealing with the rights of transgendered individuals, that is 12 cases between 1980 and 2006, but since I have been interested in statements supporting the emergence of a right to live in accordance with the decided gender identity, I have omitted cases of inadmissibility and the ones where the Court does not discuss gender identity in any way relevant to my purpose. I consider the selection of cases as accurately depicting the European Court's view on the right to gender identity for transgendered individuals.

I have extracted the parts of the judgements where gender identity is explicitly discussed by the Court as a whole or by dissenting judges. The text extracts of relevance have then been organised thematically based on which expression supporting the right to live in accordance with the decided gender identity it conveys.

My study aims at providing an in-depth analysis of the European Court of Human Rights' way of discussing gender identity in cases regarding transgendered individuals. I believe cases constitute an authoritative material, which is highly interesting for such a critical study, which a discourse analysis implies. The judgements express the will of the Court and are highly influential not only on the respondent country for which it is

binding, but also on all of the other contracting states, which is basically the whole of Europe.

In the cases, the Court as a whole makes statements regarding the applicants' gender identity but there are also opinions delivered by separate judges, I have included both these kinds of statements since I believe them to be equally interesting for my study. Separate opinions, which at a first may be supported by a minority, can later become the opinion of the majority. Including these separate opinions is therefore motivated since they seem to have influenced the Court as a whole in a longer perspective when it comes to the issue of gender identity.

I will not go into the merits of the cases but just use the extracts, which are beneficial for my study. I have however chosen to include a brief summary on the content of the cases in the beginning of the analysis chapter.

### **1.3.2.3 General Delimitations**

I am interested in studying which notion of gender identity that the European Court conveys, my study is however strictly social scientific and does for example not include any medical or psychological aspects of transgenderism. I will only be looking at how the Court expresses the possible notion of a right to decide one's gender identity based on the conventional right to privacy and not seek to explain the phenomena of transgenderism as such or go into any medical or psychological discussions.

Neither will I address the fact that rights for transgendered individuals are claimed under the conventional right to privacy and the implications of such a categorisation. I am aware of the, mainly feminist, critique that is raised regarding the dichotomy: private – public but I will not discuss this problem in my thesis. I will only look at the claims as they are put forward to the Court and more importantly; I will look at how the Court confers about these claims. I will consequently not pay any specific attention to the fact that many of the claims are made under the right to privacy and that it is under this right that a right to decide one's gender identity may have emerged.

### **1.3.3 Disposition**

My thesis is structured in a manner where I begin by describing the theoretical background, the discourse theory in chapter 2. Then, in my analysis in chapter 4, I will connect the theoretical background to my empirical material, namely case law from the European Court of Human Rights. For a better overview, I will also briefly describe the European Convention on Human Rights, the right to privacy in particular and the methods of interpretation used by the European Court in chapter 3. In chapter 5 I will then end my work by making conclusive remarks on what I have found in the analysis chapter.

I will use the Harvard citation system where the footnotes are incorporated into the text since I believe it gives a better flow to the reading. Incorporated footnotes also signal an openness and closeness to the sources, which my research is based on.

## 1.4 Definitions and Terminology

There are different views on sexual orientation and gender identity like there are different views on other human behaviours. In the past, there have been mainly two contradictory ideas. They are on one hand the *essentialist* approach, which views sexual orientation and gender identity as something innate and on the other hand the *social constructive* approach, which perceives sexual orientation and gender identity as something created in a social context. (Rosenberg 2002:23f.)

With the emergence of *queer theory* another approach to gender and sex has been brought to the table though. It is based on the idea that gender and sex are more complex terms than the essentialist and social constructivist schools have emphasised, the queer movement questions the strict dichotomy between the two schools and even the existence of the alleged and strictly biological and natural sex. Instead, it suggests that sex and gender should be seen as discursive phenomena, and within this discourse the decreed codes of gender sexualise and give meaning to the human body according to the given norms on gender and sex. The sex or gender identity is also very much created by ways of performing, there are given schemes for how to act as a gender or sex and by acting in accordance with the scheme you consequently become the gender or sex you act. This prevailing discourse on gender or sex can of course change like all discourses, when the meanings start sliding or it is challenged, and then there are also the transgendered individuals who live outside of the given norms on gender and sex since they do not meet the decreed scheme of acting as explained above. By challenging the current discourse on gender and sex, queer theory opens up to the transgendered individuals by “allowing” them to exist outside of the given standard on how to act as a gender or sex. (Rosenberg 2002:74f.)

As Rosenberg suggests, and in accordance with the queer theoretical approach, I will not differ between sex and gender as concepts in this thesis. I will however use the term gender throughout my thesis both for practical reasons but also since the term gender correlates well with the concept and phrasing of transgenderism, which I will be using.

Below I will present the main terminology, regarding transgenderism, of my thesis and also explain which terms I have chosen to use and the reasoning behind my choices.

There are various terms used to express the phenomena of gender transition and the persons who are in or have undergone such transition. The term *transgenderism* first appeared when the academic concept of gender emerged and researchers began studying and problematising the strict division of man and male behaviour on one side and woman and female behaviour on the other. As a consequence, the concept *gender identity* emerged; the term refers to the gender the individual belongs to according to her or himself. The opposite of gender identity is the *gender role*, which is how others perceive the individual's gender. Then there are various possible manifestations of gender, such as way of dressing, mannerism, gait and sexual orientation for example. Most people are *gender congruent* which means their gender identity, gender role and symbolic manifestation harmonise in the sense that they all express the belongingness to the same gender, that is either of the two: female or male gender. Then there is a minority of people who do not conform with the dichotomous female – male paradigm and may express different genders in their gender identity, gender role and symbolic manifestation. This phenomenon is referred to as *transgenderism*. The transgenderism can be manifested on various levels, from cross dressing to undergoing surgery where the physical gender features are reassigned into the features of the “biologically opposite sex”. (Bullough, 2000)

I will be using the terms *transgenderism* and *transgendered individual* in my thesis to describe the non-gender congruent individuals who are in the focus of my study. The European Court uses the term *transsexual*, to describe these individuals and therefore this term will also occur in the excerpts from the judgements. The Court does however not explain what it means by the term transsexual.

I will also be using the term *gender identity*, as explained above, while the European Court often uses the term *sexual identity* instead. As with the term transsexual, the Court does not either define the term sexual identity.

## 1.5 Previous Research

I have not come across any previous study regarding the emergence of a right to live in accordance with one's decided gender identity within a European Convention context. There is however much written about the specific cases on the rights of transgendered individuals which have come before the European Court but I have found no argumentation neither in favour of, nor against, the emergence of a right to decide one's gender identity.

I have of course benefited from previous research regarding discourse theory, and research on gender and transgender issues, I do however believe that by connecting these theories to case law from the European Court, I have surveyed a new aspect of the legal status of transgendered individuals within the framework of the European Convention.

## 2 Theoretical Background

In the following chapter I will describe my theoretical tool, the *discourse theory* more thoroughly by introducing the discourse analysis in general and then proceed to describing the discourse theory which I will use for my thesis and in particular the concept *chains of equivalence* which I will apply to my empirical material.

As I have mentioned earlier, discourse theory is a very complex instrument for research and I will only be taking advantage of a few components, where my main research tool is the concept of chains of equivalence. To understand the concept of discourse theory it is however important to know some basics about discourse analysis, which I will provide first in this chapter before I move on to the discourse theory itself.

### 2.1 Discourse Analysis

The definition of a discourse is “a certain way of speaking about and understanding the world (or a segment of the world)”<sup>1</sup>. The core of the discourse analysis is to critically analyse the structures of language and other ways of communication. The outcome will be a visualisation of underlying power structures in society. Discourse analysis is based on a social constructive point of view, which perceives language as a carrier of certain values and structures. (Winther Jørgensen and Phillips 2000:7ff.)

There are many different types of discourse analysis, I will, as mentioned above, apply discourse theory to this piece of research. Below I will start by describing the common features of the different schools on discourse, that is the social constructive approach and the view on language.

#### 2.1.1 Social Constructivism

The basis of any discourse analysis is a social constructive approach. Winther Jørgensen & Phillips (2000:11f.) use Vivien Burr’s definition to describe the essence of the social constructive theories. She lists four premises:

- 1. A critical approach to “obvious knowledge”**

There are no objective truths, and there are no objective reflections of reality. Instead, people process all new knowledge through a filter of their own categorisations of the world.

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<sup>1</sup> Author’s translation from Swedish to English.

## **2. Significance of historical and cultural context**

All views upon knowledge and the world are influenced by historical and cultural assumptions. This means that all apprehensions of the world are contingent and totally depending on its context. All actions are discursive and consequently help constructing and preserving social values and patterns. This is an anti-essentialist apprehension of the world, which opposes essentialist belief in an inherent human characteristic.

## **3. Connection between knowledge and social processes**

Our way of perceiving the world, our knowledge, is attained in social processes, like interacting with other humans. In this social context we produce and reproduce our perception of right and wrong and the world.

## **4. Connection between knowledge and social action**

Also social actions are contingent in the sense that they might be natural in a certain context and completely unthinkable in another. Consequently, acting will vary between different “worlds” which then leads to the reproduction of what is the prevalent knowledge and truth in its respective context.

Most social constructivists see the social field of acting as a rather regulated sphere where both knowledge and identities are fixated in their context even though they are contingent in a larger perspective. Critics have suggested that social constructivism is equal with social disintegration where nothing is set and everything has become completely contingent, this is however not a view that is shared by the discourse theorists. Instead they mean that a possibility to act in a certain context is very limited in reality. Despite the fact that there are no natural boundaries most individuals will act in accordance with the currently prevailing norms, because even though the norms only are social constructions, they have a very strong impact on people’s pattern of behaviour. (Winther Jørgensen & Phillips 2000:12)

## **2.1.2 Language**

A common feature in all different approaches to discourse analysis is the central view of the language. Based on structural and post-structural language philosophy, the idea is that what we perceive as reality is always filtrated through the language. Language is, in that sense, not a neutral carrier of words, statements, feelings or opinions; instead it constitutes our social reality, or, we access reality through the language. According to Winther Jørgensen and Phillips we create *representations* of reality with the help of language, which are not neutral reflectors of reality, in fact the representations help creating reality as we perceive it. The writers explain that the discourse analysts do not deny the existence of a physical reality,

however they mean that it is the linguistical representations that give a meaning to it. (2000:15)

The concept of representation comes from the idea on how identities are discursively created. The main idea is that a group, held together by their common group identity, does basically not exist before it has been expressed in words. That is the core of representation, a phenomenon represented in language is also considered as existing in a discursive context. (Winther Jørgensen & Phillips 2000:52f.)

As explained earlier, a discourse is a way of speaking about and understanding the world, or a segment of it. This description of the world is usually conveyed via the language, but depending on the discursive context the description of the same physical occurrence can differ. Winther Jørgensen and Phillips use the example of a natural disaster, which is a real physical occurrence. The disaster will however be described and explained in different ways depending on the discursive context, it can be a meteorological discourse describing it as a result of the current weather situation, others would perhaps describe the natural disaster as a result of global heating, and put in a religious context it might be explained as an act of God. (2000:15f.)

The same physical occurrence can thus be described in very different wording, all depending on the discursive context. The example above displays the central role of the language as a constructor of the social reality.

## 2.2 Discourse Theory

For my thesis, I have chosen to use the type of discourse analysis called *discourse theory* developed by Ernesto Laclau and Chantal Mouffe. As mentioned in the first chapter's material section, it is the discourse theory as described by Marianne Winther Jørgensen and Louise Phillips I will use mainly. Below, I will explain the discourse theory's scope and the components I will be using for my research.

The main point of discourse theory is of course similar to the other schools on discourse analysis but there are also features that are specific which I will describe more thoroughly in this section. The focus is however on the contingency of all social phenomena, that their meaning is constantly changing and can not be completely fixated. This leads to an ongoing struggle for the power to label to the social phenomena, which consequently also is a struggle to define the meaning of words and occurrences. This process towards a fixation of meaning is obviously in vain since the core feature of the discourse theory is the contingency of everything, still there is a constant competition towards fixation which can occur on a temporary basis. The discourse theorist's task is to describe the struggle towards fixation of meanings. (Winther Jørgensen & Phillips 2000:32)

The language is of great importance since it is a significant tool for expressing meanings within a discourse. It must however not be forgotten, that the language is not neutral; it is highly subjective as stated in section 2.1.2 on the language.

## 2.2.1 Terminology

The discourse theory includes a wide set of terms, below I will list and explain the ones crucial to my study as Winther Jørgensen & Phillips (2000:33ff.) and Torfing (1999:298ff.) describe them. These are the, by me, most frequently used terms, which will occur throughout the thesis. There are also some terms, which are not used that frequently but by understanding them it is easier to grasp the concept of discourse theory.

Below I will explain them separately, but by understanding the discourse specific terms, the whole concept of discourse theory becomes apprehensible. I have intentionally left out some terms from this list since they are not necessary for understanding the main notion of discourse theory. Instead, some more intricate terms are introduced in their respective context in the thesis.

*Discourse.* A fixation of meaning within a certain social context that sets the limits of what is perceived as possible to say and do within the same.

*Sign, signified, signifier.* The signs are expressions (signifiers) carrying a specific content (signified). A sign therefore includes the expression or label itself together with the perceived meaning or concept of the expression.

*Moments.* Signs that are temporarily fixed within a discourse.

*Elements.* Signs that not yet have a fixed meaning. There is a constant struggle to make elements into moments.

*Floating signifiers.* Signs, which different discourses compete for with the intention to define them.

*Contingency.* The possibility of endless meanings, which are both undefined and unpredictable due to its lack of finitude.

*Hegemony.* The stage when one prevailing discourse sets the standard on issues like norms, values, views and perceptions.

*Closure.* Signs in a discourse that are temporarily fixated, this stage is called closure. However, the closure stage is not lasting since the basis of discourse theory is all things' contingency. The closure is therefore only

temporary, but may well be perceived as the only possible meaning during the time of the closure.

*Nodal point.* A privileged sign in a discourse, other less significant signs evolve around the nodal point.

*Master signifier.* The equivalent of the nodal point in an identity context.

*Quilting points.* Common term for the central signs in a discourse, like nodal points or master signifiers, which do not have a strong meaning on their own but instead gain meaning when associated with other signs.

*The field of discursivity, constitutive outside.* The fictive place where all surplus meanings of signs exist. That is, the signs which are not incorporated in a discourse at the time. A discourse can always be defined by what it is excluding; this means that discourses also are negatively defined since what they are, also means they are not “the opposite”. It is not clear, whether Laclau and Mouffe see the field of discursivity as restricted only to meanings that relate to the sign or if all the meanings in the world exist there.

## 2.2.2 Scope

The discourse theory can be used to study not only texts, but also the entire social field. Laclau and Mouffe believe that social structures are organised in the same way as the language, which I described above in section 2.1.2. (Winther Jørgensen & Phillips 2000:42f.). It is however also possible to research non-linguistic practices and objects, it is thus not necessary to have an outspoken or written statement to be able to carry out a discourse analysis. (Winther Jørgensen & Phillips 2000:58)

The discourse can be seen as a structure in which entangled signs are fixated and together define the discourse. This is due to the fact that all social actions are comprised of discursive processes. (Winther Jørgensen & Phillips 2000:36f.) Laclau and Mouffe mean that everything is a discursive phenomenon, there is nothing neutral “non-discursive” standing on the side. It is therefore possible to study anything with the help of discourse theory. (Winther Jørgensen & Phillips 2000:41)

Laclau and Mouffe mean that we act as if the reality was established in an organised manner, and in the same way we perceive society and our identities as essentially created. However, the discourse theory assumes that everything is contingent; and consequently both society and identities are floating. (Winther Jørgensen & Phillips 2000:40) The social phenomena are therefore never quite completed or final and for the discourse analyst it is important to study these processes and the changes within the discourse and also the interaction between discourses. (Winther Jørgensen & Phillips 2000:31)

### 2.2.3 Contingency and Objectivity

The notion of *contingency*, which I have mentioned a few times already, is very central for Laclau and Mouffe (Torfing 1999:50f.) and it is also an important component of the earlier described social constructivism, which is fundamental in discourse theory. Everything is contingent in the world of Laclau and Mouffe and everything can therefore also change into anything. (Winther Jørgensen & Philips 2000:62)

Despite the contingency of everything in the society, there is also a strong element of continuity. I touched upon this issue when I described the social constructivism in section 2.1.1. Since the social sphere is very structured, radical changes rarely occur. Instead the discourses are very slow evolving since our way of thinking always is limited by the structures we are aware of. Winther Jørgensen and Philips write that all articulation and societal constructions are possible, but not necessary. That is consequently why there are usually not any drastic changes of meanings in a discourse. (2000:45f.)

According to Laclau and Mouffe, society is an impossible construction. Like everything else, they also perceive society as contingent, temporary fixation might however occur. The purpose of apprehending society as a determined structure is for all of us to make our actions and society seem meaningful, even though it, according to Laclau and Mouffe, is only a temporary fixation and will thus look different in the future. (2000:46f.)

The view on contingency in discourse theory is closely linked to the view on *objectivity*. There is nothing considered as pre-existing or given within discourse theory, a social and physical reality is recognised but the reality is always filtrated through discourse. This is a notion that also corresponds with the basics of social constructivism, which does not either recognise any objective realities. (Winther Jørgensen and Phillips 2000:42)

A discourse is the object of constant struggle, this struggle may be more or less intense which means that sometimes the meaning of a discourse seems fixated; we simply believe it only can be perceived in one way. This status is labelled an *objective discourse*. This objectiveness is not of an inherent character but a result of an earlier process where one meaning of a discourse has been successfully included and other meanings consequently excluded. Nevertheless, the discourse is always contingent and in the end, it will always change meanings, even if it seems to be both fixated and objective for a shorter period of time. This pseudo-objectivity successfully disguises other possible interpretations. (Winther Jørgensen & Phillips 2000:43f.)

## 2.2.4 Struggle for Power

The concept of *power* is also central within discourse theory, and the concept's content is also very much debated. A broad definition allows a greater understanding of its implications, power should therefore not be perceived as merely a higher-level of authority exercising repressive power. (Torfing 1999:155) Instead, the idea of power within discourse theory refers to the power to determine how society should be established, and what is important in society. The theory is consequently not referring to power as something people exercise over each other; but it is basically what it is that creates the social order by force. (Winther Jørgensen & Phillips 2000:44f.)

The exercise of power is closely connected to the constant struggle over meaning, which I touched upon in the previous section. It is an important component of discourse theory and the struggle takes place both within a discourse to define the signs within but also between discourses to become the prevailing one. (Winther Jørgensen & Phillips 2000:36)

The status of *hegemony* is achieved when alternative interpretations of reality are successfully oppressed. Laclau & Mouffe have borrowed the term from Gramsci who used it to describe how the ruling classes would conceal the true interests of the people. This advantageous situation would then be used to exercise power over the people. (Winther Jørgensen & Phillips 2000:39) Torfing describes the stage of hegemony as a result of articulation

*Articulation* describes the way elements relate to each other, it is only when an element is associated to another sign it gets its meaning. For example the word *body* has versatile meanings but if it is associated to another sign, like in *body and soul*, it is put in a religious discourse. This action of combining signs is referred to as an articulation. (Winther Jørgensen & Phillips 2000:35)

The state of hegemony is reached when a discourse provides a solid platform, which will secure an absolute influence over both political and moral-intellectual leadership. This stage is reached by the exercise of force and repression and is consequently carried out in a context of conflict and antagonism. Hegemony is thus the situation when we have a prevailing discourse, which dictates the agenda on issues of norms, values, views and perception. It is thereby forcing all other actors to discuss the world on the terms laid out by the hegemonic discourse. These opposing actors must thereby accept this description of the world even if they do not agree with it and put forward their arguments in the context of the hegemonic discourse's description of reality. (Torfing 1999:101f., 302)

## 2.2.5 Chains of Equivalence

Discourse theory is inspired by Jacques Lacan's theory on the individual and its struggle to seek her or his identity. Like society, the individual's

identity is never finally structured even though it constantly strives to become a complete entity. During a period of socialisation, a young person is exposed to different possible images to identify her or himself with. Through these images an identity emerges, but the subject will always feel an ambiguity since the images he or she is trying to resemble cannot be exactly copied. Due to this complexity an individual is constantly going to feel ambivalent since he or she is constantly positioned between different identities (discourses). Winther Jørgensen and Phillips describe this torn state of mind as an “engine” for continued struggle towards finding oneself. (2000:49f.)

Within a discourse there are one or a few *nodal points* in the centre, a nodal point is a special sign which sets the standard for the other signs and decides their boundaries. The other signs are always put in relation to the nodal point, which is rather meaningless if it is not associated with other signs. Winther Jørgensen and Phillips use “democracy” as an example of a nodal point within the political discourse and “the people” as an example of a nodal point in the national discourse. (2000:33) These signs are clearly central expressions which get their meanings in a discursive context, that is in association with other signs. In an identity context, Lacan has labelled the equivalent to nodal points *master signifiers*. They are also central floating signifiers but instead of organising a discourse they organise identities, which different discourses strive to decide the meaning of. (Winther Jørgensen and Phillips 2000:50) Both nodal points and master signifiers constitute so-called *quilting points* in the discursive organisation where the nodal point organises the discourse and the master signifier organises identities. (2000:57)

Torfinn explains how the known discourse theorist Slavoj Žižek identifies the nodal point within a discourse: the nodal point “[...] is rather the word which, *as a word*, on the level of the signifier itself, unifies a given field, constitutes its identity”. So even if the nodal point itself is not equivalent to the word with most meaning in the context, it is the one, which ties the words together and gives them a joint meaning. The nodal point is an empty signifier, which means it does not carry a strong meaning on its own but get its content from the contextual signs. (1999:98)

The concept *chains of equivalence* originates from Lacan’s ideas on identity. The chain is the result of the relational constitution of identity where the individual allows her or himself to be represented by several signifiers in a chain where one central sign stands out. The sum of the chain’s components, which is the result of the discursive processes, creates the individual’s identity. (Winther Jørgensen & Phillips 2000:50f.)

In other words, a *chain of equivalence*, is created when several signifiers combined constitute a meaning or an identity, it does not have to be concerning identities like in Lacan’s original model. There is also an element of negative definition, as in discourse in general, since signifiers excluded from the chain describe what is not its meaning or identity.

(Winther Jørgensen & Phillips 2000:50f.) The negatively defined meaning is meaning constructed in *difference*, the opposite of equivalence. Meanings are in most cases, however, established both by difference and equivalence. (Torfing 2005:14)

A chain of equivalence does not have to be constituted of linguistic components only. Since discourse theory is suitable for analysing all societal phenomena these can of course also be incorporated into a chain of equivalence. (Winther Jørgensen & Phillips 2000:58)

The nodal point or the master signifier is in the centre of the chain; where they catch the floating signifiers without set meaning and incorporate them into the chain of equivalence where their meaning consequently becomes fixated. Torfing describes with an example (1999:98f.)

[...] when we quilt the floating signifiers through 'Communism', for example, 'class struggle' confers a precise and fixed signification to all other elements: to democracy (so-called 'real democracy' as opposed to 'bourgeois formal democracy' as a legal form of exploitation); to feminism (the exploitation of women as resulting from the class-conditioned division of labour); to ecologism (the destruction of natural resources as a logical consequence of profit-orientated capitalist production); to the peace movement (the principal danger to peace is adventurist imperialism), and so on.

I have turned Torfing's example into a model, which illustrates the concept of chains of equivalence. The model is divided into three sections: A, B and C. Section A represents the discourse, Section B is the quilting point and Section C is representing the floating signifiers which have been fixated to the quilting point and thereby organises the discourse:



# 3 European Convention for the Protection of Human Rights and Fundamental Freedoms

*The European Convention for the Protection of Human Rights and Fundamental Freedoms*, from now on referred to as the *European Convention on Human Rights*, *European Convention* or *the Convention*, is a regional European instrument for the protection of human rights, which binds the contracting state parties. The Convention, together with additional protocols, contains a catalogue of rights, which was drafted by the member states of the Council of Europe after the Second World War with the purpose “to lay out the foundations for the new Europe which they hoped to build on the ruins of a continent ravaged by a fratricidal war of unparalleled atrocity”. (Merrills and Robertson 2001:1).

## 3.1 The European Court of Human Rights

*The European Court of Human Rights* in Strasbourg, hereinafter also *the European Court* or *the Court*, safeguards the compliance with the Convention. The Court’s judgements are only binding on respondent states but other state parties usually take guidance in the Court’s precedents. The court is however not bound by its own judgements, (Cameron 2002:54f.) something that will be shown in the cases regarding rights for transgendered individuals later. Ian Cameron explains that the Court on several occasions has stressed that the Convention is a “living instrument which must be interpreted in the light of present-day conditions” (2002:64).

In one of the cases regarding the right to decide one’s gender identity, Judge Van Dijk gives his opinion on the Court’s possibility to not only keep up with society but to also actually autonomously define concepts such as sex:

I cannot see any reason why legal recognition of reassignment of sex requires that biologically there has also been a (complete) reassignment; the law can give an autonomous meaning to the concept of “sex”, as it does to concepts like “person”, “family”, “home”, “property”, etc.

**Sheffield and Horsham v. the United Kingdom (1998) dissenting opinion of Judge Van Dijk Para 8**

Hans Danelius explains the Court’s principles of interpretation further; the conventional rights are to be interpreted dynamically, that is in the light of societal progress in the member states. In issues concerning privacy, the

court will be especially careful and compare regulations in the contracting states to see if there is a European standard. If there is a lack of such consensus the states are often given a larger margin of appreciation in the issue concerned. Rights in the area of privacy will therefore grow quite slowly in the European context since the Court pays great attention to the situation in the member countries trying to find a common ground on the emergence or development of a right. (2007:47, 51) Van Dijk and van Hoof refer to this concept as the *evolutive interpretation* and underline that the Convention must be interpreted in the light of the contemporary society. (1998:78)

According to Article 45 of the Convention the Court is to state the reasoning behind its decision in the judgement, same Article also states that judges who do not share the majority's meaning are entitled to give a separate, concurring or dissenting opinion, which is amended to the judgement. (van Dijk & van Hoof 1998:218)

## **3.2 Article 8, Right to Respect for Private and Family Life**

*Article 8 – Right to respect for private and family life*

*Everyone has the right to respect for his private and family life, his home and his correspondence.*

*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The right to privacy, as laid out in Article 8, is, according to Danelius, broad and difficult to define precisely. There are several other rights in the Convention that also concern private life and therefore should be considered *lex specialis* in relation to Article 8, which consequently covers the right to privacy not covered by the specialised articles of the Convention. One has to study the Court's decisions to comprehend the development and current scope of the right since it is so broad in its original writing. (2007:301f.)

The main notion of the right to privacy is for the state to not interfere in the individual's private sphere. This is not merely a negative obligation but state can also be demanded to take action under the scope of Article 8 by for example granting an acceptable protection for the individual's privacy in national legislation. (Danelius 2007:302)

The right to privacy has been developed immensely since the drafting of the Convention in a large amount of cases before the European Court. According to Clare Ovey and Robin White there also lies a great potential within Article 8 which consequently still can be developed further. (2006:241) Also the Court has explicitly stated in the *Niemetz* and *Peck* cases that it will not provide an exhaustive definition of what constitutes private life as protected by Article 8. The Court has however made some statements regarding what the right to privacy does cover: “[...] important elements of the personal sphere as ‘gender identification, name and sexual orientation and sexual life’.” The Court also includes “physical and moral integrity of the person” in the right to privacy. (Ovey & White 2006:246)

It is possible to make exceptions from the State’s obligation to guarantee privacy to individuals. Such exceptions must however be: prescribed by law, in the interest of the public or individuals as described in the Article’s second paragraph, and thirdly, any exception must also always be necessary in a democratic society. It is for the Court to decide whether these requirements are met and in issues not specifically regarding more technical issues like evidence, or deciding what is in the interest of a democratic state, but issues of more principal or moral character, for example the legal status of homosexuals, the court will, as also described above, mainly look at the legislation of the member countries to see if there is a common policy, if not, the court has historically tended to give the states a larger margin of appreciation according to Danelius (2007:304ff.)

## 4 Analysis

In this chapter I will apply my theoretical background to the empirical material, that is the cases from the European Court on Human Rights concerning rights of transgendered individuals. First, I will give a brief background on the various cases on transgenderism that have come before the Court, then identify the nodal point and its surrounding signs, and then proceed by analysing the text extracts. Finally I will conclude the chapter by visualising the chain of equivalence as I have identified it.

### 4.1 Cases on Rights for Transgendered Individuals in the European Court of Human Rights

Studying the European Court's cases on the rights of transgendered individuals gives, according to Ovey and White, a good sense of the Court's interpretation principles as well as how the Court interprets the Convention in the light of temporary society. (2006:274)

In 1986, 1990 and 1998 cases regarding the right to alter birth registers were brought before the Court by British citizens who had undergone gender transition and upon request to the British authorities had been denied updating their birth certificates accordingly. In all three cases the European Court ruled in favor of the United Kingdom. The Court meant that the state had not neglected its obligations under Article 8 by denying the applicants to have their birth certificate altered and consequently there had been no unlawful interference in the applicants' right to privacy. The Court also supported its judgment by pointing at the lack of a common European ground in cases of acknowledging the "new" gender of transgendered individuals. Case by case, the majority of the Court in favor of this conclusion did however decrease and in 2002 a fourth and fifth claim against the United Kingdom was brought before the Court. In these cases, *Goodwin v. United Kingdom* and *I. v. United Kingdom*, the Court ruled that there was a European trend "[...] in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexuality of post-operative transsexuals." Consequently the United Kingdom was now in breach of Article 8 and obliged to let transgendered individuals have their birth certificates rectified. (Ovey & White 2006:274ff.)

In the *Goodwin* and *I.* cases the Court also stated that determination of gender not only can be made on the basis of biological criteria since modern science nowadays allow people to "[...] both physically and socially [...] be assimilated as closely as possible to the gender in which they perceive they properly belong." (Ovey & White 2006:277)

## 4.2 Identifying the Discourse and its Components

Winther Jørgensen and Phillips reason on how to initiate a thinking process to identify a discourse, they suggest localising the quilting points first, then proceed by looking at how these quilting points are linked to other signs. The quilting points do not carry any own meaning; they are merely empty signs, which are given a meaning in relation with other signs in the so-called chain of equivalence. (2000:57f.)

The writers also suggest how one concretely can identify the quilting point, the nodal point, within the discourse. You can pinpoint the nodal point or points by localising the privileged and centred signs within the discourse. Localising the discourse itself and the nodal point is necessary to be able to show the changes in the discourse structure and to display the reproduction, questioning or restructuring of meanings within. (Winther Jørgensen and Phillips 2000:36f.) That is, finding those specific expressions that have been charged and recharge with meaning and thereby have led forward to a change. These expressions have together given meaning to the nodal point by being united in a chain of equivalence.

I aim at recreating the chain of equivalence to catch a possible change in the discursive context of the right to privacy and the emergence of a right to live in accordance with one's preferred gender identity in the European Court of Human Rights.

## 4.3 The Expressions

Below I will list the expressions, or in discourse language, the signs, which occur in the cases to support and emphasise the meaning of the right for the individual to live in accordance with her or his decided gender identity.

By identifying linguistical patterns in the judgements I hope to frame the possible transition where the European Court moves towards supporting the emergence of a right to decide one's gender identity. I will therefore list the expressions used in support of such a right, divided thematically based on which argument that is used as a basis for claiming the right to decide gender identity.

The expressions are quoted as they appear in the judgments. For the sake of clarity, I have however italicised the respective expression that the quote refers to. In this sense the quotes have been modified but it is only the text style that has been altered.

### 4.3.1 Privacy and Family Life

Within this context of right to privacy there are arguments in support of a right for the individual to decide her or his gender identity based on the right to privacy itself. It is claimed in the arguments below that the right to live in accordance with one's preferred gender identity derives from the conventional right to a private life in Article 8. In one case the right to family life, Article 12, is also associated to the right to privacy. In this specific argument the dissenting judges see the acknowledgement of identity and parenthood as an obligation since the State earlier had permitted gender reassignment surgery.

With that also goes a markedly increased recognition of the importance of *privacy*, in the sense of being left alone and having the possibility of living one's own life as one chooses. These tendencies are certainly not new, but I have a feeling that they have come more into the open especially in recent years.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judge Martens** Para 5.5

Furthermore, the right to *privacy* and the right to live, as far as possible, one's own life undisturbed are increasingly accepted.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judges Palm, Foighel and Pekkanen** Para 3

The second point - having regard to the facts of the case and the principle of legal certainty and even foreseeability - is that since the State permitted X to undergo hormone treatment and then, after he had gone through the required procedure and undergone psychological tests, permitted and even financed irreversible surgery, issued documents mentioning his new sexual identity and authorised Y (after an acknowledgment of paternity prescribed by law had been obtained from X) to undergo artificial insemination which led to the birth of Z and a second child since, it must accept the consequences and take all the measures needed to enable the applicants to live normal lives, without discrimination, under their new identity and with respect for their right to *private and family life*.

**X, Y and Z v. the United Kingdom (1997) partly dissenting opinion of Judge Casadevall, joined by Judges Russo and Makarczyk** Para 6

Personally, I would not characterise the issue of the legal status of post-operative transsexuals as one of minorities, but rather as one of *privacy*: everyone's right to live one's life as one chooses without interference [...]

**Sheffield and Horsham v. the United Kingdom (1998) dissenting opinion of Judge Van Dijk** Para 2

It is not a sufficient answer to this important development that the scientific community cannot agree on the explanation of the causes of transsexualism or that surgery cannot – and perhaps will never be able to – lead to a change in the biological sex. Respect for *privacy* rights should not, as the legislative and societal trends referred to above demonstrate, depend on exact science.

**Sheffield and Horsham v. the United Kingdom (1998) joint partly dissenting opinion of Judges Bernhardt, Thór Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu**

The applicant had already had recourse to less drastic means, such as hormonal treatments. To prolong her situation, which had already lasted quite a time (see paragraphs 11 and 26 of the judgment), would, in my view, have amounted to treatment not in keeping with “respect” for *private life* under Article 8. It is a most intimate and private aspect of a person’s life whether to undergo a gender reassignment operation, and therefore the courts, in considering the necessity of an operation should take into account, as one of the decisive factors, the wishes of the transsexual.

**Van Kück v. Germany (2003) concurring opinion of Judge Ress Para 4**

### 4.3.2 Right to (Sexual) Identity

The dissenting judges below emphasise the right to an identity as an important right of the individual that has to be respected. When speaking of the right to identity it is presented as an emerging concept, which is being more and more taken into account in society in general. It is also used here as the ground for claiming that the individual is entitled to decide which gender he or she wants to belong to.

A person’s identity is something that comes from within and people should also be granted the right to express their identity openly according to the excerpts below. The identity is also recognized as something of vital importance to the individual and her or his development of personality.

There is an ever-growing awareness of the essential importance of everyone’s *identity* and of recognising the manifold differences between individuals that flow therefrom.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judge Martens Para 5.5**

There is a growing awareness of the importance of each person’s own *identity* and of the need to tolerate and accept the differences between individual human beings.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judges Palm, Foighel and Pekkanen Para 3**

[...] and everyone's right to act and be treated according to the *identity* that corresponds best to one's innermost feelings, provided that by doing so one does not interfere with public interests or the interests of others. Even if there were only one post-operative transsexual in the United Kingdom claiming legal recognition of the reassignment of his or her sex, that would not make the claim any weaker.

**Sheffield and Horsham v. the United Kingdom (1998) dissenting opinion of Judge Van Dijk** Para 2

The Court and a dissenting judge also use the expression *sexual identity* and means that this has to be regarded as a right of the individual. What they mean precisely by sexual identity is however not defined, but I assume it is referring to the gender the individual considers her or himself as. In the context of sexual identity it is also emphasised that it is the individual who chooses his or her identity. This choice must however be respected by others even if they would find it inconvenient for any reason.

Notable here is that this argument first was expressed by a dissenting judge in 1998 and was then used by the majority of judges in the 2002 judgement which was the one recognising the right for transgendered individuals to have their new gender registered by the national authorities.

[...] live in dignity and worth in the same society in accordance with the *sexual identity* chosen by them at great personal cost.

**Sheffield and Horsham v. the United Kingdom (1998) dissenting opinion of Judge Van Dijk** Para 6

[...] live in dignity and worth in accordance with the *sexual identity* chosen by them at great personal cost.

**I. v. the United Kingdom (2002) and Christine Goodwin v. the United Kingdom (2002)** Para 71

### 4.3.3 Dignity and Worth

The right to live out your personality as a transgendered individual is in these quotes claimed to be a core human right relating to the rights to dignity and worth. The basis of claiming that there is a right to dignity and worth, which allow individuals to live as the gender he or she chooses, is not found explicitly in any binding human rights instruments. The judges and the Court instead find these rights implied in the European Convention as being a core principle or in the essence of the Convention, they can also be found in the Preamble of the Universal Declaration of Human Rights.

There is also a chronological pattern here where the argument first is expressed by dissenting judges to later be picked up by the Court as a whole in the 2002 judgements.

I think that these indeed are the essential points. The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for *human dignity* and human freedom.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judge Martens** Para 2.7

Moreover, it is a vital element of the “*inherent dignity*” which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.

**Sheffield and Horsham v. the United Kingdom (1998) dissenting opinion of Judge Van Dijk** Para 5

Even if one accepts that full legal recognition of gender reassignment poses certain problems for the English legal system and for society at large, and in specific situations for certain third parties, keeping the system as it is now, with its serious and continuous consequences for the private lives of post-operative transsexuals and the distress involved, in my opinion cannot be considered as an attitude on the part of the British Government that is proportionate to the aims pursued: legal certainty and consistency for the protection of the rights of others; society and individual third parties may be required to accept a certain inconvenience to enable their fellow citizens to live in *dignity and worth* [...]

**Sheffield and Horsham v. the United Kingdom (1998) dissenting opinion of Judge Van Dijk** Para 6

Nonetheless, the very essence of the Convention is respect for *human dignity* and human freedom.

**I. v. the United Kingdom (2002) and Christine Goodwin v. the United Kingdom (2002)** Para 70

Moreover, the very essence of the Convention being respect for *human dignity* and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security (see I. v. the United Kingdom, § 70, and Christine Goodwin, § 90, both cited above).

**Van Kück v. Germany (2003)** Para 69

#### **4.3.4 Freedom, Liberty and Security**

Also in this section there is a clear development over time, the right for the individual to choose her or his gender is first expressed in terms of freedom,

liberty and security by dissenting judges and then picked up by the Court as a whole in the 2002 judgements.

As stated above the right to decide one's gender identity is in this section connected to the notion of freedom, liberty and security. It is thus meant that the individual has a fundamental freedom according to the European Convention to make such a decision, it is said to be an underlying essential right. When it comes to liberty the dissenting judge connects the conventional right to liberty in Article 5 to the right to privacy in Article 8 to support the right for transgendered individuals to live in accordance with the chosen gender identity. This right is also supported with the argument of the right to physical and moral security, which should be granted to transgendered individuals in the same way it is granted any other person in society.

I think that these indeed are the essential points. The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and *human freedom*.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judge Martens** Para 2.7

The right to self-determination has not been separately and expressly included in the Convention, but is at the basis of several of the rights laid down therein, especially the *right to liberty* under Article 5 [...]

**Sheffield and Horsham v. the United Kingdom (1998) dissenting opinion of Judge Van Dijk** Para 5

Moreover, the very essence of the Convention being respect for human dignity and *human freedom*, protection is given to the right of transsexuals to personal development and to *physical and moral security* (see I. v. the United Kingdom, § 70, and Christine Goodwin, § 90, both cited above).

**Van Küick v. Germany (2003)** Para 69

### 4.3.5 Respect and Tolerance

Another argument used in favour of the individual's right to choose her or his gender identity is the notion of tolerance and respect for all individuals. It is stated that we in society must tolerate and respect how other people chose to live their lives even though it might be at odds with the lifestyle of the majority.

With that goes a growing *tolerance* for, and even comprehension of, modes of human existence which differ from what is considered "normal".

**Cossey v. the United Kingdom (1990) dissenting opinion by Judge Martens** Para 5.5

[...] the need to *tolerate* and accept the differences between individual human beings.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judges Palm, Foighel and Pekkanen** Para 3

The notion of respect is used below in a slightly different context compared to the previous quotes. It is here referring to the tolerance the state should exercise towards its citizens who are requesting to have gender reassignment surgery sanctioned by the state. The judge in question is in favor of the individual's right to get such assistance if he or she can show a real desire to undergo gender transition. Judge Ress means that the wish of the individual should be respected by the state in these cases.

This does not mean that in the case of every transsexual surgery should be assumed to be necessary, but if a transsexual has, over quite a long period, undergone treatments of a different kind, such as psychotherapy (see paragraph 16 of the judgment), the individual has done everything necessary to come finally to the conclusion, which has to be *respected*, that only a gender reassignment operation would be helpful and thus necessary in his or her case.

**Van Kück v. Germany (2003) concurring opinion of Judge Ress** Para 4

### **4.3.6 Autonomy, Development and Self-determination**

There are also arguments in the chain based on the notion of a right for the individual to decide her or his gender identity itself.

In the quotes below the argumentation is based on a right for the individual to shape herself or himself in accordance with their inner wishes. Some mention this right to self-determination as a right deriving from the right to privacy while it is considered an implied human right by others. Dissenting Judge Van Dijk is very detailed in his reasoning where he explains that there is a basic right to self-determination, that is to be legally recognised as the gender the individual chooses to live as. This right is said to derive from the right to liberty and the right to privacy.

Also in this section there is a clear pattern of arguments and expressions first being used by dissenting judges and then later on they can be found in the majority's view.

Human dignity and human freedom imply that a man should be free to *shape himself* and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judge Martens** Para 2.7

Thirdly, and most importantly, what is at stake here is the fundamental right to *self-determination*: if a person feels that he belongs to a sex other than the one originally registered and has undergone treatment to obtain the features of that other sex to the extent medically possible, he is entitled to legal recognition of the sex that in his conviction best responds to his identity.

**Sheffield and Horsham v. the United Kingdom (1998) dissenting opinion of Judge Van Dijk** Para 5

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 [...]. 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.

**I. v. the United Kingdom (2002) and Christine Goodwin v. the United Kingdom (2002)** Para 70

Article 8 also protects a right to *personal development*, and the right to establish and develop relationships with other human beings and the outside world [...] Likewise, the Court has held that although no previous case has established as such any right to self-determination as being contained in Article 8, the notion of *personal autonomy* is an important principle underlying the interpretation of its guarantees [...]

**Van Kück v. Germany (2003)** Para 69

### 4.3.7 Distress, Pain and Suffering

The argument put forward in this section is slightly different compared to the previous ones. It is not an immediate support for the right to live in accordance with one's decided gender identity, but more a reasoning about the recognition of transgenderism. The arguments here are based on distress, pain and suffering and the Court means that a person who tolerates the physical distress, pain and suffering of gender reassignment surgery has then proved to have a real will to belong to the opposite gender than her or his original. It can be interpreted as a vague support of the right to decide one's gender identity but in these quotes the right is not connected to the expressed will of the individual but to the physical pain he or she has had to go through in order to have a gender reassignment surgery.

Also in this section the pattern is clear, the argumentation is first expressed by dissenting judges and then by the court as a whole.

The operations Mr. Rees underwent and the concomitant anguish and *suffering* show how real and intense was his desire to adopt a new sexual identity as far as possible.

**Rees v. the United Kingdom (1986) dissenting opinion by Judges Bindschedler-Robert, Russo and Gersing** Para 2

Yet some legislatures and some courts have taken another course. They have realised that post-operative transsexuals are tragic human beings who have already *suffered* so much that their request for full legal recognition of their new sexual identity should be granted, as far as is reasonably possible.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judge Martens** Para 2.6.1

He is prepared to shape himself and his fate. In doing so he goes through *long, dangerous and painful* medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the fait accompli he has created. He demands to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated without discrimination, on the same footing as all other females or, as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons, for in the light of what has been said in paragraphs 2.2 and 2.4 above such a refusal can only be qualified as cruel.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judge Martens** Para 2.7

Sexual identity is not only a fundamental aspect of everyone's personality but, through the ubiquity of the sexual dichotomy, also an important societal fact. For post-operative transsexuals sexual identity has, understandably, a very special and sensitive importance because they acquired theirs deliberately, at a high cost in mental and bodily *suffering*.

**Cossey v. the United Kingdom (1990) dissenting opinion by Judge Martens** Para 3.4

The considerations set out in Judge Martens's dissenting opinion in the Cossey case remain wholly applicable to the present case. When a person has undergone *gruelling* medical treatment, hormone therapy and dangerous surgery, and when his physiological sex has been brought into harmony, as far as possible, with his psychological sex, it is right and proper for his new identity to be recognised not only by society but also in law. "... refusal [of such recognition] can only be qualified as cruel."

**X, Y and Z v. the United Kingdom (1997) partly dissenting opinion of Judge Casadevall, joined by Judges Russo and Makarczyk** Para 4

The cases disclosed a wider range of situations in which difficulty and embarrassment may be caused to post-operative transsexuals in the United Kingdom than had been demonstrated to the Court in the Rees and Cossey cases. In both those cases, the second of which was decided as long ago as 1990, the Court had expressed its awareness of the seriousness of the problems facing transsexuals and the distress which they *suffer*.

**Sheffield and Horsham v. the United Kingdom (1998) concurring opinion of Judge Sir John Freeland Para 1**

What is undisputed is that the *harsh and painful path* of gender reassignment surgery may lead to an improvement in the medical condition of the transsexual.

**Sheffield and Horsham v. the United Kingdom (1998) joint partly dissenting opinion of Judges Bernhardt, Thór Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu**

The present applicants have undergone, following appropriate medical advice and counselling, *painful and gruelling* gender reassignment surgery. This has undoubtedly involved substantial hardship and, as in the case of Miss Sheffield, the dislocation of personal relationships. When required to prove their identity in certain situations they are placed in a situation where they are obliged to choose between hiding their new sex – which may not be either possible or lawful – or revealing the truth about themselves and facing humiliating and possibly hostile reactions.

**Sheffield and Horsham v. the United Kingdom (1998) joint partly dissenting opinion of Judges Bernhardt, Thór Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu**

Nor, given the numerous and *painful* interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment.

**I. v. the United Kingdom (2002) and Christine Goodwin v. the United Kingdom (2002) Para 81**

The Court reaffirms its statement in I. v. the United Kingdom and Christine Goodwin (see paragraph 52 above) that, given the numerous and *painful* interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment.

**Van Kück v. Germany (2003) Para 59**

## 4.4 Chain of Equivalence

All of the above listed expressions form a chain of equivalence where the right to decide one's gender identity constitutes the core issue which organises the discourse. In this section I will apply the theoretical concept of chains of equivalence to my empirical material, the extracted arguments.

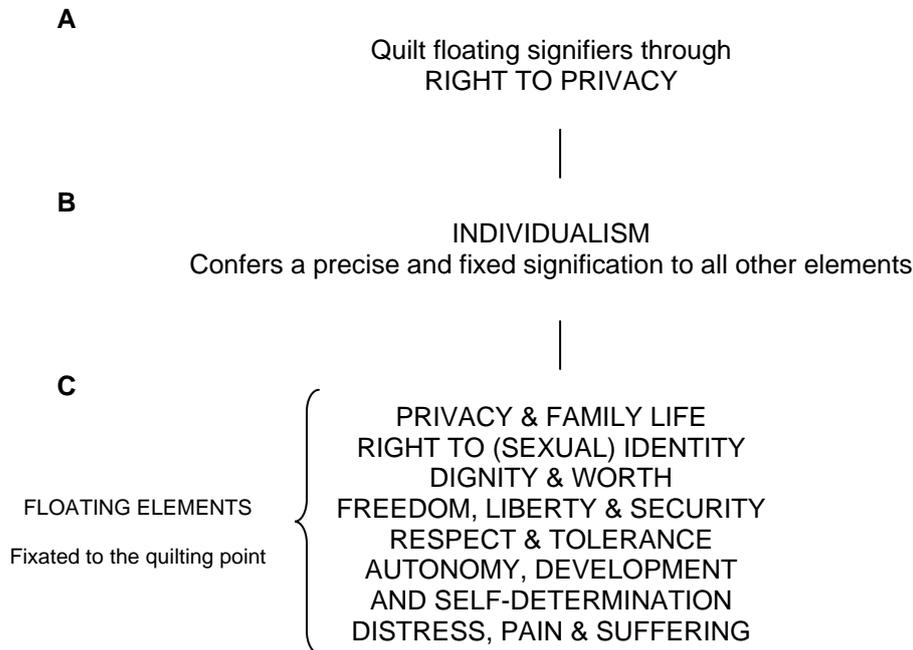
### 4.4.1 The Components of the Chain

The central issue of this discourse is the notion of the right to live in accordance with one's decided gender identity; the nodal point is however not necessarily a sign that is the "richest" in the chain of equivalence. By not demanding that the nodal point is the "richest" sign, it means that it does not have to, in itself, convey the superior meaning of the whole chain. (Torfing 1999:98)

However, when the nodal point is displayed, it is also possible to see how the discourse is organised and which discursive actions that have taken place up until today. That is, how floating elements have been incorporated into a chain of equivalence to establish a joint meaning. (Winther Jørgensen & Phillips 1999:57f.)

I would like to insert my empirical findings into the model from section 2.2.5 but I have not been able to see one clear nodal point standing out in the material. Instead I can see many optional ways to reason and consequently form the model with different nodal points in the centre. Below I will present three possible chains of equivalence with different nodal points: individualism, gender autonomy and the right to privacy. I am however certain that it is possible to find many other plausible constructions but I will limit myself to these three ones.

### 4.4.1.1 Individualism

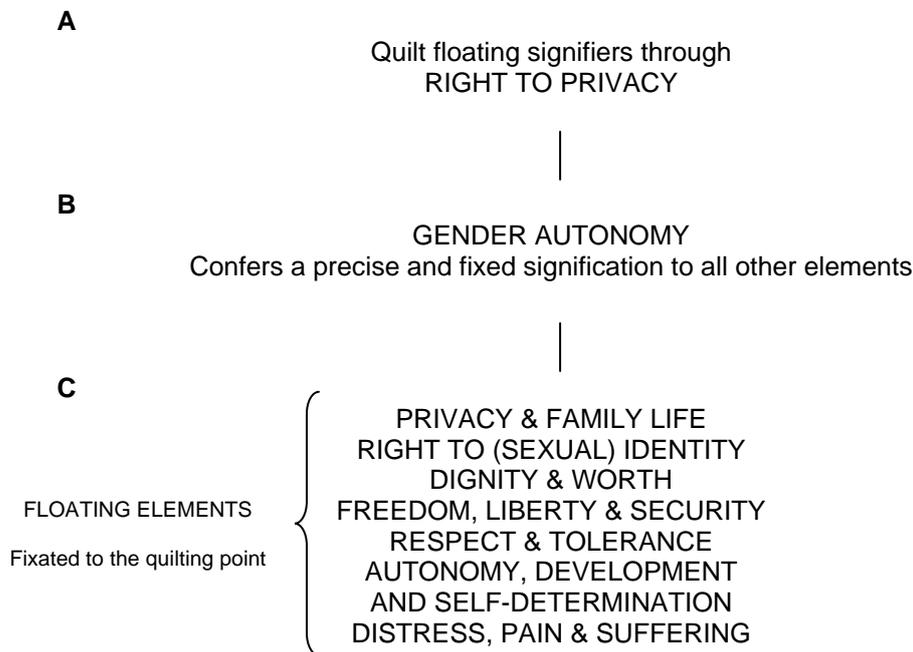


In this version of the model I have placed the notion of *individualism* in the centre. The European Convention guarantees rights for the individual in relation to the state, and the state parties are also responsible for safeguarding these rights. This means that the individual's standing is very strong and it could be on this the Court bases its argumentation. The reasoning would be that in this context of right to privacy the right to individualism is so strong that the Court could not deny a transgendered individual the right to decide her or his gender identity.

Organising the model in this form means that the notion of individualism confers a precise and fixed signification to the floating elements such as the right to sexual identity. In the context of right to privacy it can be argued that these components provides a basis for the individual's right to decide gender identity.

It is notable however that the right to liberty, which is so central in the European Convention, is not considered as enough to provide a right to gender identity on its own. Instead it is in association with the right to privacy that the right is articulated.

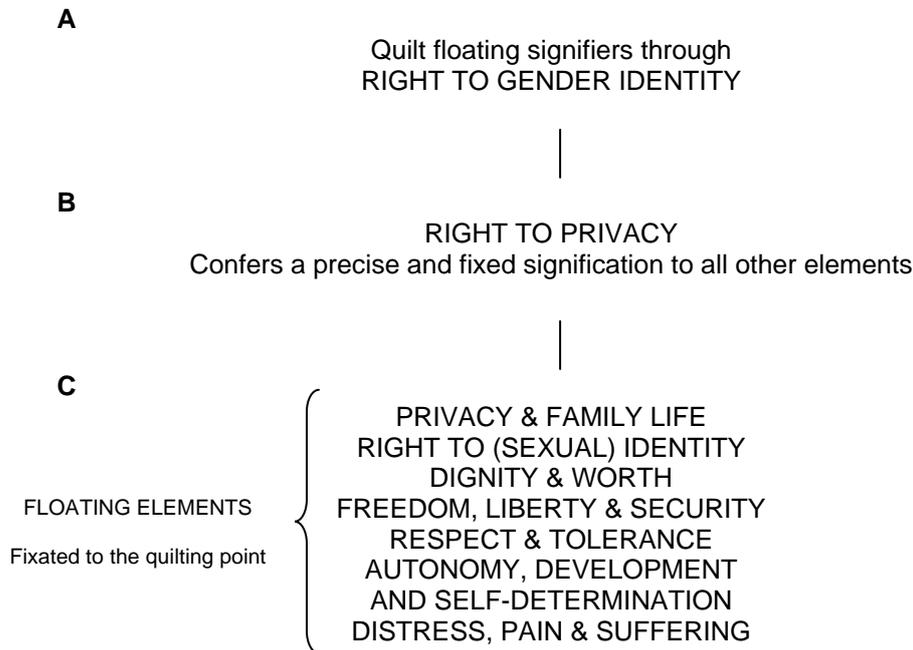
## 4.4.1.2 Gender Autonomy



The concept of *gender autonomy* is not referring to an existing or outspoken right but is introduced here by me to describe a right to decide one's own gender identity in a broad sense. That is, not only like in these cases regarding transgendered individuals' right to be legally recognised as the gender, either female or male, they identify themselves as, but a right for everyone to decide a gender identity not based on the female – male dichotomy. The expression gender autonomy is never explicitly mentioned in the judgements so when I refer to the concept I am referring to the implied autonomy which I interpret from the text excerpts when the Court or the single judges speak about the right for the individual to decide her or his gender identity and that this decision must be respected by authorities and society as a whole.

The nodal point is the organiser of the discourse, so in this case the right to gender autonomy organises the discourse of right to privacy. Structuring the signs in the model like this means that gender autonomy confers the precise and fixed signification to the floating elements. That would for example imply that the transgendered individual has a right to decide her or his gender identity in a context of right to privacy when the notion of gender autonomy is associated with for example the existing right to freedom, liberty or security.

### 4.4.1.3 Right to Privacy



This third example of possible ways to structure the empirical findings is a bit different compared to the previous two. Here I have placed the *right to privacy* in the centre of a right to gender identity discourse.

It is clear that the right to privacy has been very central when arguing for the rights of transgendered individuals. Therefore I believe it can be put as the nodal point in the larger context of for example right to gender identity. This would mean that the right to privacy, within the given discourse, confers a precise and fixed signification to a floating element such as the right to respect and tolerance. This is also a credible way of reasoning based on the Court's and individual judges' reasoning in the issue of rights for transgendered individuals.

## 4.4.2 Floating Elements

The signs in the chain of equivalence do not have a strong meaning on their own, but associated with each other and especially the nodal point, whichever that is, they characterize the discourse.

To describe the incorporation of the floating elements I will again return to Torfing's example (1999:98f.), which I used as a basis for my model:

[...] when we quilt the floating signifiers through 'Communism', for example, 'class struggle' confers a precise and fixed signification to all other elements: to democracy (so-called 'real democracy' as opposed to 'bourgeois formal democracy' as a legal form of exploitation); to feminism (the exploitation of women as resulting from the class-conditioned division of labour); to ecologism (the destruction of natural resources as a logical consequence of profit-orientated capitalist production); to the peace movement (the principal danger to peace is adventurist imperialism), and so on.

He gives examples from the discourse Communism of how the floating signifiers are incorporated and thereby also given their contextual meaning. To illustrate this incorporation procedure, I would like to transfer the examples to one of my three possible chains of equivalence, the nodal point gender autonomy within the right to privacy discourse. In the case of how gender autonomy "confers a precise and fixed signification to all other elements" it can for example be that the right to privacy and family life is here referring to the right to decide one's own gender identity instead of the classical notion of the right to privacy and family life which is to be allowed to marry freely, form a family and to not be interrupted by the state for unnecessary reasons. In the case of the argument that the notion of freedom, liberty and security would imply a right to gender autonomy it is also meant as a step aside from what is most normally perceived to be included in freedom, liberty and security like the right to not be unlawfully detained.

This way of reasoning can of course be applied to the two other possible chains as well. In the case of individualism as a nodal point it obviously implies that it is not referring to any collective rights but it is the individual who is the beneficiary of the rights in this context.

The usage of these floating elements and associating them with the nodal points does not mean that the classical notions of them are rejected like in Torfing's example. Instead they have been extended to also comprise a new right, the right for transgendered individuals to decide their gender identity.

### **4.4.3 Excluded Elements**

Since the construction of chains of equivalence contains an element of negative definition it is interesting and valuable to see what is not included in the chain. The excluded elements are threats to the discourse in the sense that they can challenge the current meaning. But they also help defining the boundaries of the discourse by clearly exemplifying what is included, and what is excluded. (Torfing 2005:14ff.)

The currently included signs have previously been in the constitutive outside where they were perceived as a threat to the prevailing discourse at the time, and due to the contingent characteristic of all societal phenomena which I described in section 2.2.3 the current discourse and meaning will be challenged and eventually also overthrown. This is all a part of the logic of discourse and discourse theory where there always is a struggle to define signs. In the discursive context of privacy we can see how the right to gender autonomy has been raised by redefining a set of signs that have been expanded.

Obviously there are a lot of expressions or signs not used by the Court or individual judges in order to support the emergence of a right to decide one's gender identity. Laclau and Mouffe do not rule out that the so called constitutive outside contains all surplus meanings excluded from the discourse, regardless if they in any way relate to the topic of the discourse at all. Taking this into consideration it would be impossible to list all of the excluded meanings of course but I would like to give a few examples of signs that do relate to the topic which are not included in the argumentation.

These elements could, for instance, be the right to not be discriminated against due to your transgender status or to associate the right to gender identity with a right to manifest your identity in the same way you are entitled to manifest your religion as a natural consequence of the right to freedom of religion.

### **4.4.4 Argumentation Structure**

There was a rather distinct chronological pattern regarding most of the arguments used. First, an argument was raised by one or several dissenting judges in minority, their argumentation was however not a part of the majority's judgement, which of course has the main norm setting power. After a period of time the arguments first raised by dissenting judges were adopted by the Court as a whole and were consequently also incorporated in the authoritative judgements. This clearly displays the careful procedure within the European Court where rights raised within the right to privacy are slow evolving due to the fact that the Court is very cautious in so called "moral issues". Progressive ideas in this area are not incorporated without thorough scanning of the member states' practices.

The arguments put forward in support of a right to decide one's gender identity often consist of combined expressions. That means one paragraph in a judgement or dissenting opinion might express support based on for example both the right to dignity and the right to liberty. Sometimes the expressions are entangled in each other, and therefore some paragraphs occur several times. Sometimes the expressions are also explicitly mentioned together with the right to privacy but even when it is not, the right to privacy must be regarded as the constantly underlying discursive foundation, within which all actions and articulations take place.

# 5 Conclusion

My research task was to examine if there had been a development in the European Court towards acknowledging a right for individuals to decide their gender identity, and if that was the case, how was the emergence of the right established. As a research tool I chose discourse theory and in particular the concept chains of equivalence, which would help me display the arguments used in support of the right to live out one's gender identity.

When studying the cases on rights for transgendered individuals I discovered several categories of arguments used in favour of a right to decide one's gender identity, which I have presented in my analysis chapter. The expressions form a chain of equivalence in which they enforce each other and create a common meaning.

Given that I have chosen to conduct my research from a social constructive perspective, what I have studied is the created reality, not an essentialist reality since social constructivists reject the concept of an inherent reality. The choice of theory or perspective has of course influenced the result of my research, as I just pointed out I cannot claim to have studied a God-given reality. Another consequence of my chosen perspective is that I cannot offer any solution based on discourse theory, it is a tool for visualizing a discourse and its meanings. I can however point out some of the consequences of the discursive practices, which can be used as a continued basis of critique or analysis. (Winther Jörgens and Phillips 2002:184)

## 5.1 The Discourse Perspective

One of the basic premises in discourse theory is the concept of contingency, which is closely related to the social constructivist thought. The notion of contingency is that everything is floating, no meaning or structure is set forever, and it can always change. Due to the contingency of everything there is a constant struggle towards the fixation of meaning, that is the exercise of power over the social order by defining signs and challenging other discourses. A central task for the discourse theorist is to describe this struggle. In this study I focused on the specific concept of chains of equivalence, which is a tool for understanding the character of the discourse by displaying the chain of associated meanings it is equivalent to. (Winther Jørgensen & Phillips 2000:58)

The central ideas of contingency and the struggle for power are however underlying factors even if I have focused on the chains of equivalence. It is of course a discursive process, which has led to the extension of the conventional right to privacy. And it is also an exercise of power to redefine

the discourse so that it also comprises the right for transgendered individuals to decide their gender identity. This challenges the current order and is obviously dismaying for those who were satisfied with that. A discourse can contain several nodal points and even if an emerging one does not banish other nodal points from the discourse it can of course be seen as an act of antagonism. The emergence of a new nodal point, or in this case a right, might be drawing attention from other rights or devalue them.

In this study, the empirical material did not provide one sovereign chain of equivalence with one clear nodal point in the centre. I therefore presented three alternative chains, which existence I found possible to argue in favour of. It may however also be the case that the material is not applicable to the concept of chains of equivalence at all. Regardless, I have extracted and sorted the passages of judgements and dissenting opinions where the European Court or individual judges speak in favour of the right for transgendered individuals to decide their gender identity. When studying the arguments used by the Court or judges it became clear that they were based on a few rights or other central ideas. There was also a clear chronological pattern, which I described in section 4.4.4, where many of the arguments in favour of the right to gender identity for transgendered individuals were first articulated by dissenting judges but were later adopted by the Court and was thereby made into court practice. Even if the findings did not provide a clear chain of equivalence I believe that they are equally interesting and the discourse theory has been beneficial for processing the material, analysing it in terms of contingency, objectivity and power and visualising the combination of arguments.

## 5.2 Problematic Issues

Even though I have not addressed the issue of establishing a right for transgendered individuals as a right to privacy I find the critique very interesting and valid. I believe it is highly problematic to label for example the right to live openly and recognised as a bisexual, gay, lesbian or transgendered individual as a “moral right” covered by the right to privacy. To live in accordance with your gender identity or sexual orientation should according to me not be seen as something private, since that implies it is something disguised and a less important right compared to the “public” rights. Questioning the division private – public is part of an existing discussion, which does not fit into the scope of my study; this does however not make the discussion less interesting and relevant for my topic.

The right to privacy is of *lex generalis* character in relation to the specialised articles in the European Convention. Article 8 consequently has a reputation of being a kind of catch-all article and therefore it has come to comprise rights, which have been found desirable to fit into the conventional scope, but at the same time they have not been considered to fit into an existing *lex specialis* article. In the case of the emergence of a right to decide one’s gender identity it has been claimed under the right to

privacy but, as we have seen, with the support of a range of other rights. As I pointed out in the previous chapter, the right can apparently not be raised under the right to liberty, but when claimed under the right to privacy, the claim can be supported with the help of the right to liberty.

It is possible that applicants and judges are aware of this, possibly more theoretical dimension of the right's character, but that they are adapting to the practical circumstances. That is, the applicant's main goal is obviously for the Court to favour their claim and that means that you will point at a breach of the article where it is most likely to get the Court's approval. My critique is therefore not directed towards the claimants who are mostly entitled to seek judicial remedy in a way so they are most likely to get a positive result.

In this context, I would also like to mention the limitation, which is set by the language itself. My social constructive approach and efforts to put forward a gender-neutral approach is linguistically limited. There is no gender neutral pronoun in the English language as an alternative to he or she and therefore I have used the existing vocabulary even though it seems a bit reactionary given that the context of the thesis is displaying the right to decide your gender identity and questioning the female – male dichotomy, and thereby perhaps also abolish gender as a primary identification factor. This is however impossible to convey linguistically in the English language due to the lack of a gender-neutral personal pronoun referring to a person.

### **5.3 The Research Question**

To conclude I should answer the question initially proposed. Has there emerged a right for individuals to live in accordance with their decided gender identity? Considering what I have written in my conclusion so far, I think that it is obvious that my answer is yes to a certain degree. That is, the European Court has clearly said that the member states must officially recognise the “new” gender of persons who have undergone gender reassignment surgery. I think this is a basic step towards a right to decide one's gender identity but I cannot see it as a very progressive statement. What the Court has done is to update its practice to the level of the member states when it comes to recognising gender status, and it is probably unlikely that the European Court would go out on a limb and expand this little right to gender identity into a large and progressive right to gender identity when, as far as I know, it is not the practice in any member states.

It can, based on the presented cases, probably also be questioned exactly how much of a right to decide one's gender identity that the Court has allowed. To have your gender identity officially recognised after having undergone gender reassignment surgery is not a decision solely based on the individual's wishes. Due to the fact that state sanctioned gender reassignment surgery is rigorously regulated, the individual's desire is

thoroughly assessed. In the end this means that the right to decide one's gender identity is quite limited in practice, it only applies to individuals who have undergone gender reassignment surgery, who considers themselves as having changed between the two acknowledged gender statuses: female or male, and want to have the change recognised by public authorities.

Even though I believe a little right to gender identity is better than none, it would be interesting if the Court would discuss the notion of gender and problematise the strict female – male dichotomy.

The argumentation used by the judges or whole Court is expressed in the specific context of each case regarding transgendered individuals, I do however think that the arguments can be taken out of this practical context and be studied on a more theoretical level. They convey the European Court's notion of gender and gender identity and therefore give a hint of what might be expected in the future, and then possibly not only for persons who have undergone gender reassignment surgery. Recognising a small right to gender identity is hopefully a step in the direction towards increased gender self-determination for all individuals.

## **5.4 Personal Thoughts for the Future**

On a more visionary level I would like to add this section to express some personal thoughts and questions that have come to my mind during the writing of the thesis.

I would not only like to see a discussion of gender and gender identity but also implementation of a new way of thinking. I believe that gender-neutral legislation is a sensible starting point since that would minimise the legal problems for transgendered individuals. By abolishing gender as a legal factor there would, for example, be no legal need for registering persons by their gender. There may still be for example cultural or social reasons for keeping the gender variable but I think it is an interesting thought. To continue the hypothetical reasoning on the necessity of public registration of gender, another scenario could be keeping the gender variable but due to the right to decide one's own gender identity letting the individual decide under which gender he or she would like to be registered. The following question is then, which gender variables there would be to choose from? Are there only the female and male genders to chose from, or should there be an option in the middle, and perhaps a fourth for those who do not consider gender a factor, or a fifth for those who do not care to share their gender identity?

I think that if we are to accept an increased right for the individual to decide her or his gender, the only reasonable way to go is to also abolish gender as a factor in legislation and registers. By letting the individual own the right to decide her or his gender identity, the choice must be respected regardless of

what it is and instead of ending up in a complicated and quite unnecessary discussion of the allowed types of gender identity, all persons choices would be just a question for themselves.

I understand that the level of free choice in this issue can be limited and I do also realise that this discussion is on a very theoretical level. It is likely that we are all strongly influenced by the current discourse on gender and gender identity and that many persons would consider themselves being female or male with certainty. But I do also think that the current discourse needs to be challenged to allow us to start thinking in new directions where there is a right to decide one's gender identity for everyone in all situations. A right, which also could include the right to choose not to comply with the given gender dichotomy: female – male, and even to have the right to not be defined as a gender at all. Even if it would be considered as central, in a cultural and societal context, to preserve the current norms on gender and gender identity, I cannot see any legal justification for maintaining this structure in public registers or any other exercise of public authority.

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