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Lessons from a Fair Adjudication of Third Gender Markers: A Comparison of Canadian, English, French, and European Judicial Perceptions of Non-Binary Gender Markers

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Summary

Abstract

Le richieste di riconoscimento delle designazioni non binarie sui documenti anagrafici hanno raggiunto le corti supreme in Inghilterra e Francia, nonché la Corte europea dei diritti dell'uomo. Queste corti, considerando il riconoscimento non binario come politicamente sensibile hanno cautamente rimandato alle posizioni governative. L'articolo sostiene che poiché le designazioni non binarie sono state adottate in circostanze di minor conflitto, le relative sentenze forniscono un modello di aggiudicazione più equo. Basandosi sulla teoria di Hirschl, secondo cui le corti sostengono strategicamente gli interessi egemonici quando aggiudicano questioni politicamente salienti, il saggio compara le giurisdizioni europee con quella canadese per mostrare come le pressioni esterne modellino le decisioni giudiziarie. Attraverso la teoria della narrazione giuridica, l'articolo esamina i principali filoni narrativi costruiti dai giudici, dimostrando come i giudici europei abbiano strategicamente travisato le persone non binarie per legittimare interessi egemonici a differenza dei giudici canadesi.

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Recent challenges seeking the recognition of non-binary designations on vital records have reached apex courts in England and France, as well as the European Court of Human Rights. These courts, viewing non-binary recognition as politically sensitive, cautiously deferred to government positions. This paper argues that since non-binary designations were adopted with less controversy in Canada, Canadian judgments provide a fairer model of adjudication. Drawing on Hirschl's theory that courts strategically uphold hegemonic interests when adjudicating politically salient questions, the paper compares European jurisdictions with Canada to show how external pressures shape judicial decisions. Through legal narrative theory, it examines the master narratives constructed by judges, demonstrating how European judges strategically mischaracterised non-binary people to legitimise hegemonic interests unlike Canadian judges.

1. Introduction

The issue of gender categories' legal boundaries is fiercely debated in the United Kingdom and France, leading to high-profile constitutional cases[1]. Recent challenges seeking the recognition of third gender categories have risen to the highest courts of these nations and the European Court of Human Rights[2]. This paper argues that socio-political factors have influenced these courts to adopt cautious, deferential approaches, contrasting with the more assertive stance of Canadian courts that better protects non-binary claimants' rights[3].

Hirschl's theory may explain the cautious European approach, suggesting that courts are more likely to produce meaningful social reform only when external factors favour it or when market incentives encourage compliance[4]. Absent these conditions, courts maintain hegemonic interests rather than diffuse power or foster redistributive politics when adjudicating politically salient topics, using "prudent and/or strategic judicial behavior" rather than simply applying rights provisions or procedural justice norms[5].

In Canada, where non-binary claimants mostly reached settlements with provincial governments without lengthy legal battles, socio-political factors were conducive to reform. This contrast with Europe highlights strategic judicial behaviour in Europe and promotes causal claims "concerning legal institutions and the ways in which they interact with the social and political environment in which

1 *Scottish Government v AG* 2023 SC 89 (OH); G. Schön, "*Le Conseil d'État saisi d'un recours pour l'autodétermination des personnes transgenres"* (12 March 2024, Deshoulières Avocats) < https://www.deshoulieres-avocats.com/autodetermination-des-personnes-transgenres/> accessed 3 August 2024.

2 English case saga: *R (on the application of Elan-Cane) v SoS for the Home Department* [2021] UKSC 56 ("UKSC"); [2020] EWCA Civ 363 ("EWCA"); [2018] EWHC 1530 (Admin) ("EWHC"); French case saga: Case 76888/17 *Y v France* [2023] ("*Y v France*"), *Cour de cassation, civile, Chambre civile* 1, 4 mai 2017, 16-17.189 ("*Cour de cassation*"); *Cour d'appel d'Orléans,* 22 mars 2016, 15/03281 ("*Cour d'appel*"); *Tribunal de Grande Instance de Tours, Deuxième Chambre Civile* 20 août 2015 ("*TGI*").

3 Quebec case saga: *Centre for Gender Advocacy v. Attorney General of Quebec* [2021] QCCS 191 ("Quebec First Instance"); [2021] QCCA 1300 ("Quebec CA"); [2016] QCCS 5161 ("Quebec Raw Data"); *T.A. v Manitoba (Justice)*, 2019 MBHR 12 ("MBHR"); *T.A. v. Ontario (Transportation)* [2016] HRTO 17 ("HRTO").

4 R. Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts,* in *Annual Review of Political Sciences*, 2008, no. 11 p. 93; R. Hirschl, *Towards Juristocracy,* Cambridge, Harvard University Press, 2004.

5 R. Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide,* in *Fordham Law Review*, 2006, no. 75, p. 721; R. Hirschl, *The Judicialization of Mega-Politics*, *ivi*.

they operate[6]…".

One element of this judicial strategy is what Papke calls "master narratives", simplified restatements of facts in appellate decisions that reflect dominant societal values[7]. While this political influence is clearer in the U.S. Supreme Court, where individual judges' biases are more evident, in England and France, rulings on third gender categories take on a "superjudge" voice, presenting the case not just as a legal matter but as a broader statement about non-binary people[8]. The 'god trick,' where judges appear to view cases "from above, from nowhere" obscures the underlying power relations that shape their decisions[9].

Using legal archaeology and comparative methods, this paper conducts a detailed case study comparison of Canadian and European third-gender rulings. It employs Montgomery's close-reading method to unearth the assumptions and biases of judges, revealing how political factors shape their decisions[10]. The comparison with Canadian case law serves to promote the "common mode of comparative constitutional law […] geared toward self-reflection or betterment through analogy, distinction, and contrast," searching for the right solution "to a given constitutional challenge" a polity is struggling with[11].

England and France are apt comparators because third gender categories are contentious in both jurisdictions, the cases revolve around analogous legal arguments, and the ECtHR's adjudication of the French case and potential adjudication of the English case enriches the analysis of judicialization by including international institutional dynamics. While the English claimant identifies as non-gendered and was registered female at birth and the French claimant identifies as intersex and was registered male at birth but born intersex, such dissimilarity will help contrast the socio-political influences on adjudication.

This paper contends that while third gender categories are politically salient in Europe, they are less politically charged in Canada. As a result, Canadian courts have been able to enact meaningful reform without resorting to cautious judicial behaviour. This comparison reveals that Canadian adjudication has been fairer to non-binary claimants by avoiding reliance on judges' biases and instead focusing on rights-based outcomes.

By engaging in a negative hermeneutic function, this paper exposes how European courts' master narratives uphold dominant power structures (2) and contrasts this with the fairer Canadian model for adjudicating third gender categories (3).

2. A Deferential Conception of the Case Narrative

Jones and Montgomery assert that "judicial preference" for one narrative of a case over another con-

6 R. Hirschl, *Case selection and research design in comparative constitutional studies*, in *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford, OUP, 2014.

7 D. Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, in *Narrative and The Legal Discourse: A Reader in Storytelling and the Law*, Deborah Charles Publications, 1991.

8 *Ibid*.

9 D. Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, in *Feminist Studies*, 1988, no. 14, p. 575.

10 C. Jones and J. Montgomery, *Competing Narratives in a Case Biography: A Tale of Two Citadels*, in *Journal of Law and Society*, 2020, no. 47, p. 412.

11 R. Hirschl, *Case selection and research design in comparative constitutional studies*, *ivi*.

fers "an immediate advantage" on one side[12]. This section employs a case study comparison of English and French case sagas to argue that most courts favoured respondent states, resulting in an unduly modest outcome for the claimants.

Jones and Montgomery analyse competing narratives in a case, likening them to sieges, with cases "being a small skirmish in the assault on a citadel[13]." Here, two narratives emerge: the siege either sought to break down barriers to legally and socially recognised self-determination or to subject democratically endorsed policies to rights-based scrutiny. Most judges gave limited credence to the claimants' narrative by distorting their *fait accompli* (accomplished fact) or realisation of their desired self.
The claimants' *fait accompli* (2.1) was distorted by judges who erroneously judged that the claimants did not embody their desired gender based on their appearance (2.2), medical history (2.3), or family history (2.4).

2.1. The *Fait Accompli*

Both the English and French claimants initially presented a similar narrative, emphasising their physical embodiment of their gender and unwavering pursuit of self-determination despite obstacles.

Both claimants attached their gender identity to their bodies: the French claimant identified their gender with their intersexuality and the English claimant underwent two gender-affirming surgeries[14]. Such circumstances are relatively rare. Gender-affirming surgeries require screening for gender dysphoria and only 0.05% to 1.7% of the world's population is born intersex, most of whom identify as female or male[15]. As such, these circumstances may refute psychosocial anxieties that view gender non-conformity as a potent threat to children's wellbeing, the normative family, or heterosexual expectations[16].

Their narrative reflects a resilient construction of identity. Both claimants were in their sixties at the start of proceedings and spent decades of adhering to norms which they perceived to define non-gendered or intersex identities such as androgyny[17]. Their persistent pursuit contrasts starkly with alternative conceptualisations of third genders such as Dembroff's anti-essentialist definition of nonbinary whereby "even conformity to nonconformity - cannot be a requirement of nonbinary identity[18]".

This persistence aligns with legal requirements for gender transition in each country such as living as the desired gender and, in England, swearing that the change is permanent[19]. This suggests authenticity and may counter criticisms of gender non-conformity as fleeting or deceptive[20].
Despite its strengths, this narrative was distorted by some judges who questioned the claimant's *fait accompli* based on appearance, undermining their quest for self-determination as gender non-conforming individuals.

12 C. Jones and J. Montgomery, *ivi*.

13 *Ibid*.

14 EWHC (n 2) [2]; *Y v France*, (n.2) [5].

15 UKSC (n 2) [43]; *Y v France*, (n.2) [28], [33].

16 J. Butler, *Who's Afraid of Gender?*, UK, Allen Lane, 2024; A. Sharpe, *Transgender Jurisprudence*, Routledge, 2002.

17 *Y v France* (n 2) [5]-[6]; EWHC (n 2) [2]-[4].

18 R. Dembroff, *Beyond Binary: Genderqueer as Critical Gender Kind,* in *Philosophers' Imprint*, 2020, n. 20, p. 1.

19 Gender Recognition Act (GRA) 2004, ss 2(1)(b), 2(1)(c); *C. Civ* art. 61-5.

20 J. Butler, *Who's Afraid of Gender?*, *ivi*.

2.2. The Appearance Test

Apart from the ECtHR and the first instance French court, all other courts disregarded expert or witness testimony regarding the claimants' physical appearance, opting instead for their own assessments. This approach undermined the claimants' embodiment of identity thereby significantly influencing case outcomes (2.2.1). Reliance on this test lacks principled basis, as it reflects paternalistic assumptions about the claimants' best interests (2.2.2) and contradicts the essence of the *fait accompli* principle (2.2.3).

2.2.1. Decisive Effect on Case Outcomes

The French *Cour d'appel* initially introduced the 'appearance test', asserting that Article 8 of the European Convention on Human Rights (ECHR) mandated either no gender designation or modification in cases of discordance between legal gender and social behaviour and physical appearance[21]. Despite ample evidence, including psychological evaluations, indicating the claimant's social ambiguity, the court deemed them male, leading to the dismissal of their Article 8 appeal[22].

Subsequently, the *Cour de Cassation*, the French government in *Y v France*, and the UK Supreme Court all employed the appearance test to refute the claimants' Article 8 assertions. This test surfaced in discussions about the proportionality of states' failure to adopt measures of a nature to guarantee effective respect of the claimants' private life[23].

Arguing that public and private interests were balanced or that the interference was proportional, the courts and the French government stated that the discrepancy between the claimant's legal gender and their self-perceived gender would not be perceived by others thereby not affecting them to such a great extent[24]. The UK Supreme Court elucidated this argument by overtly comparing the claimant's situation with that of Miss B in *B v France*, stating that the discrepancy between B's feminine appearance and her male identity papers made using her identity papers more demeaning and distressing than for the non-gendered claimant[25]. The *Cour de cassation* and the French government may have covertly implied this comparison.

While these cases seemingly hinged on the margin of appreciation afforded to respondent states on this issue, the appearance test greatly influenced case outcomes. The UK Court of Appeal explained that the approach to positive obligation and fair balance taken from Strasbourg jurisprudence looks at "three key factors": those relating to "the identity in question (the individual)", "the state and its systems (coherence)" and the "position in other states in the Council of Europe (consensus)[26]." Since the appearance test undermined the first factor, it gave respondent states an immediate advantage.

The test's influence on the UK Supreme Court outcome was more modest since the court overruled dicta in *Re G* which held that even if the ECtHR would consider that the Member State had a

21 *Cour d'appel* (n 2).

22 *Ibid*.

23 *Cour de cassation* (n 2); *Y v France* (n 2) [57],[79]; UKSC (n 2) [40]-[41].

24 *Ibid*.

25 UKSC (n 2) [40] citing ECtHR, 25 March 1992, *B v France.*

26 EWCA (n 2) [54].

wide margin of appreciation, a domestic court could find a violation of the ECHR.[27] However, this was not true for the French appellate courts. The *Cour d'appel* asserted the potential for a violation even within the wide margin of appreciation granted to Member States[28]. The *Cour de cassation* upheld this stance, focusing primarily on domestic institutional propriety and only tangentially referring to the margin of appreciation "in addition" to this[29]. As such, French courts were willing to make determinations within the national margin of appreciation, but the appearance test extinguished this possibility.

The decisive effect of this test is undesirable because it is underpinned by paternalistic assumptions regarding the claimant's best interests.

2.2.2. Paternalistic Assumptions

The comparison to Miss B reflects paternalistic assumptions regarding the claimants' best interests. Firstly, courts presume that blending into cisgender society, as seen in Miss B's case, benefits the claimants. Yet, the claimants desire recognition within a third gender or sex category. The French claimant's psychologist notes that such recognition would repair a profound identity injury[30]. Similarly, the English claimant values acknowledgment as non-gendered[31].

Secondly, courts assume that being perceived as male or female poses acceptable harm to the claimant. However, both suffer from gender dysphoria, with the French claimant likening physical changes which fostered dysphoria to "sufferance, internal rape[32]." Thus, they likely experience similar distress to transgender individuals when their legal gender is recognised, exacerbating dissatisfaction with their perceived genders. As such, this test's application is flawed.

2.2.3. The Spirit of the '*Fait Accompli*'

In ECtHR jurisprudence, the concept of *fait accompli* denotes a claimant's "adaptation" to their desired gender[33]. Whilst seldom mentioned explicitly, this guiding principle initially restricted legal recognition to "a carefully constructed class" of transgender people who have undergone sex reassignment surgery[34]. Courts' reliance on the appearance test in cases involving third gender categories mirrors this concept and is similarly exclusive. However, it contradicts the essence of the *fait accompli*, which, paradoxically, safeguards self-determination.

The notion of *fait accompli* emerged to uphold self-determination. Initially implicit, it gained prominence through dissenting opinions, and gradually permeated the court's majority opinions.

27 UKSC (n 2) [71].

28 *Cour d'appel* (n 2).

29 *Cour de cassation* (n 2).

30 *Y v France* (n 2) [11].

31 EWHC (n 2) [4].

32 *Y v France* (n 2) [5]; UKSC (n 2) [43].

33 ECtHR, 27 September 1990, *Cossey v UK*, Opinion of Judge Martens, [2.6.3], [2.7].

34 P. Cannoot, *The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition*, in *Netherlands Quarterly of Human Rights*, 2019, no. 37, p. 14.

The first instance of the court addressing whether the ECHR guarantees recognition of one's desired gender saw the notion implicitly surface[35]. Although the case was dismissed for failing to exhaust domestic legal remedies, the European Commission argued for the recognition of the claimant's gender identity, citing "his changed physical form, his physical make-up, and his social role[36]." At the beginning of the ECtHR's case law on transgender rights, the notion of appearance was thus used to argue claimants' cases rather than dismiss them.

Judge Marten's dissent in *Cossey* framed the claimant's *fait accompli* as an expression of self-determination[37]. He stated that the principle of human dignity and human freedom underlies the Convention and implies "that a man should be free to shape himself and his fate in the way that he deems best fits his personality[38]." Applying these notions to the case before him, he stated that "a transsexual [...] is prepared to shape himself and his fate," and goes through "ordeals" doing so[39]. While this stance excluded transgender people who did not undergo surgery, it laid the groundwork for the expansion of broader principles.

The notion of self-determination figured in the majority opinion in *Pretty v UK*[40]. The court acknowledged its novelty but deemed the notion of personal autonomy to be "an important principle underlying the interpretation" of Article 8's guarantees[41]. The same year, this notion was applied to protect the right "of transsexuals to personal development[42]…" In *Van Kück*, the concept was applied to safeguard the rights of transgender people with "the applicant's freedom to define herself" as female deemed "one of the most basic essentials of self-determination[43]." Even dissenting opinions acknowledged the "clearly established" and "undoubted" right to gender self-determination in the court's jurisprudence[44].

In *X and Y v Romania*, the court finally strengthened the principle of self-determination by no longer considering its manifestation to be confined to sex reassignment surgeries[45]. The notion of self-determination which was once shrouded in a strict interpretation of the *fait accompli* broke free.

This evolution underscores that while the appearance test may appear progressive by eschewing surgical criteria, it regresses by disregarding the essence of the *fait accompli*. From Judge Marten's opinion onwards, consideration of the *fait accompli* aimed to recognise claimants' strides towards self-determination.

The appearance test callously overlooked this journey, concomitantly undermining claimants' commitment to self-determination. For example, the UK Supreme Court stated that passports had no purpose in recognising the claimant's "innermost thoughts[46]." In contrast, the ECtHR acknowledged this journey from the claimant's assignment as male at birth, the societal pressure they faced to "pre-

35 Case 7654/76 *Van Oosterwijck v Belgium* (1980).

36 *Ibid*; *Van Oosterwijk* Report of 1 March 1979, B.36 (1983), p. 26 cited in J. Marshall, *Sexual Identity* in *Personal Freedom through Human Rights Law?*, Martinus Nijhoff (ed), International Studies in Human Rights, 2009.

37 *Cossey* (n 33).

38 *Ibid*.

39 *Ibid*.

40 ECtHR, 29 April 2002, *Pretty v UK* [61].

41 *Ibid* [61].

42 ECtHR, 11 July 2002, *Goodwin v UK* [90].

43 ECtHR, 12 June 2003, *Van Kück v Germany* [73].

44 *Ibid*, Opinion of Judges Carbral, Barreto, Hedigan, and Greve [1], [16].

45 ECtHR, 19 January 2021, *X and Y v Romania* [160], [167].

46 UKSC (n 2) [39].

tend to be a man", and their involuntarily adopted male characteristics through medical treatment[47].

The ECtHR's rejection of the appearance test aligned with the spirit of *fait accompli* and self-determination. While it criticised the test for overlooking the claimant's intersex reality, the bulk of its criticism emphasised that commitment to self-determination should be the determining factor.[48] The court argued that identity goes beyond mere appearance and is a private aspect of life, not reducible to "the appearance that this person dons in the eyes of others[49]." While still considering evidence of the claimant's identity, the court also considered how the claimant forged their identity *despite* external refusal to recognise it[50].

This approach championed the spirit of the *fait accompli* and the expansion of Article 8 from protecting individuals from "fascist and communist inquisitorial practices," to "the freedom to live the life of one's own choosing," among other things[51]. It has already been cited before the *Conseil d'Etat* to argue for the right to binary gender self-determination eschewing the existing requirement to 'live' as the desired sex which, in practice, is argued to reduce to an appearance test[52].

Ultimately, the appearance test's disregard for the claimants' *fait accompli* weakened claimants' narratives, favouring respondent states and revealing the inherently political nature of adjudicating third gender categories. An additional illustration of this phenomenon is evident in the judicial scrutiny of the English claimant's medical backgrounds.

2.3. Medical History

The UK Supreme Court analysed the English claimant's medical history to challenge their embodiment of their non-gendered identity, particularly focusing on a hysterectomy performed by the NHS as a treatment for gender dysphoria[53]. Despite ECtHR precedent suggesting that denying legal recognition after providing gender reassignment surgery is illogical, and despite the UK Supreme Court's own emphasis on the coherence of administrative and legal practices across public bodies, the court made a distinction between the claimant's hysterectomy and the "long and difficult process of transformation which was undergone by transsexuals as a result of gender reassignment surgery[54]".

The court was wrong to urge caution because the claimant received a surgery undergone by many women "without alteration to their gender," by contrast with gender reassignment surgery[55]. The fact that many receive the same procedure with different motivations should not meaningfully distinguish the procedure from a gender reassignment surgery for two reasons.

First, it misunderstands the nature of gender-affirming surgeries, which do not determine gender and are not solely for transgender individuals. The legal recognition of one's gender no longer relies on the completion of gender reassignment surgery so no surgery alone can determine someone's gen-

47 *Y v France* (n 2) [88].

48 *Ibid*.

49 *Ibid*.

50 *Ibid* [10]-[11].

51 J. Marshall, *ivi*, citing ECtHR, 13 June 1979, *Marckx v Belgium*, Opinion of Judge Fitzmaurice [7].

52 G. Schön, *ivi*.

53 UKSC (n 2) [43].

54 UKSC (n 2) [62], [43], [44] citing *B v France* (n 25) [63] and *Goodwin* (n 42) [77]-[78].

55 *Ibid*.

der[56]. As such, medical experts are not "empowered to discern, direct, and enact the determination of sex[57]." This is reflected in NHS documents which use "gender surgery" rather than "reassignment surgery[58]".

Gender-affirming treatments are not only available to gender non-conforming people, but commonly available to cisgender people. Treatments such as reconstructive mammoplasty are frequently used to treat cisgender patients whose arguments evoke gender dysphoria to the extent that this treatment is now an "accepted" and "expected" component of breast-cancer surgical care[59]. A such, there is no strict dividing line between treatments undergone by "transsexuals" and cisgender people.

Second, the court's differentiation between the claimant's medical history and transgender experiences is unfounded. A hysterectomy is a "major operation," with a long recovery time like that of a vaginoplasty, which causes infertility, and, when used to treat health problems, is only considered after less invasive treatments have been tried[60].

The court's determination of the hysterectomy echoes Judge Valticos's antiquated dissenting views in *B v France* which criticised the claimant for undergoing surgery "lightly" and "voluntarily" in a way that trivialised "irreversible surgical operations," and distinguished her from a "genuine transsexual[61]." Judge Pettiti's dissenting opinion levied criticism that her operation was not verified as genuine and irreversible by a qualified medical team and that there was no psychological treatment, protracted observation, or at least no evidence of such because the operation was done abroad[62]. Yet, the UK Supreme Court's reasoning is even less convincing because none of these arguments apply to the English claimant.

While arguments tying NHS treatment to government responsibility for a gender-neutral passport have merit, they risk discouraging healthcare provision to gender non-conforming individuals[63]. From a reformist standpoint favouring a de-medicalised transition process, NHS recognition of gender identity should not influence transition outcomes. However, the UK Supreme Court's emphasis on the claimant's medical history to undermine their identity was unfounded.

The judicial scrutiny of the claimant's medical background unfairly favoured the respondent state, as did the judicial consideration of the French claimant's family life.

2.4. Family Life

The *Cour d'appel* determined the claimant's gender based on their male physical appearance and "social behaviour," citing their marriage and adoption as evidence[64]. The court did not elucidate how

56 *X and Y v Romania* (n 45).

57 T. Schall and J. Moses, *Gender-Affirming Care for Cisgender People*, in *Hastings Center Report*, 2023, no. 53, p. 15.

58 NHS, 'Treatment: Gender Dsyphoria' (NHS, 18 May 2020), inhttps://www.nhs.uk/conditions/gender-dysphoria/treatment/, accessed on 16 November 2023.

59 T. Schall and J. Moses, *ivi*.

60 NHS, 'Hysterectomy' (NHS, 11 October 2022) <https://www.nhs.uk/conditions/hysterectomy/> accessed 12 February 2024; NHS, 'Vaginoplasty Feminising Surgery' (NHS, 27 July 2021), https://www.leedsandyorkpft.nhs.uk/our-services/wp-content/uploads/sites/2/2021/10/v3_vaginoplasty-leaflet_gender_dysphoria.pdf, accessed on 16 November 2023.

61 Sharpe, *ivi*, citing *B v France* (n 25), Opinion of Judge Valticos.

62 *B v France* (n 25), Opinion of Judge Pettiti.

63 UKSC (n 2) [45].

64 *Cour d'appel* (n 2).

these facts illustrated male behaviour so this section examines two potential flaws in this connection, which was endorsed by the *Cour de cassation*[65].

First, the court may have implied that, since only heterosexual marriage and adoption were legal at the time these events transpired, and since the claimant is married to a woman, the claimant had declared themselves to be male. Judge Valticos (dissenting) relied on a similar line of reason in *B v France*, stating that Miss B was a man because she "had performed [her] military service[66]."

This reasoning implies that the claimant should have forfeited their rights to marry and adopt to gain recognition. These rights are enshrined in Article 12 of the ECHR and *Goodwin* provides authority for the proposition that there is no "justification for barring the transsexual from enjoying the right to marry under any circumstances[67]." Whilst the court found no violation in the case of *Parry v UK* whereby applicants in marriages subsisting their transition were required to terminate their marriage in order to obtain a Gender Recognition Certificate, this decision relied on the applicants' ability to continue their relationship through a civil partnership which carried almost the same rights and obligations[68]. Yet, the French claimant was married before the French civil partnership law was adopted[69]. As such, making the recognition of the claimant's gender conditional on their forfeiture of their right to marriage violates the respect of their Article 12 right.

Second, the court may have implied that the claimant adopted a male role by marrying and starting a family with a woman. This conflates gender and sexuality and reflects bias favouring conformity to heterosexual norms. Such reasoning, rooted in "homophobic anxiety," denies recognition to those whose autobiography fails to conform to a script that, "presumes heterosexual desire[70]".

The judicial scrutiny of the claimant's family life undermined their identity, favoured the respondent state, and prompts the need for fairer adjudication of third gender categories in England and France.

3. A Template for Fairer Adjudication of Third Gender Categories

Canadian case law offers a model for the fairer adjudication of third gender categories by demonstrating a thorough understanding of non-binary people's daily lives (3.1), acknowledging their suffering (3.2), and focusing on their autonomy (3.3).

3.1. Miss B Goes to Canada: Understanding the Daily Struggles of Non-Binary People

Canadian courts, unlike their UK and French counterparts, recognised the significant harm caused by gender non-conforming legal documents. While the UK Supreme Court cited *B v France* to argue that

65 *Cour de cassation* (n 2) [8].

66 D. Gonzalez-Salzberg, *The Court's Conception of Gender,* in *Sexuality and Transsexuality under the ECHR,* Hart Publishing, 2019 citing *B v. France* (n 25) [61].

67 *Goodwin* (n 42) [103].

68 ECtHR, 28 November 2006, *Parry v UK.*

69 *Loi n°99-944 du 15 novembre 1999 relative au pacte civil de solidarité.*

70 Sharpe, *ivi*, p. 298.

Miss B, a transgender woman, experienced greater distress than non-gendered claimants due to the mismatch between her feminine appearance and male identity papers, Canadian courts took a different stance[71]. They acknowledged that both non-binary and transgender people suffer similar challenges from gender non-conforming vital documents, relying on expert and claimant testimony rather than assumptions.

First, Canadian case law acknowledged the mismatch between reality and gender non-conforming documentation by framing the claim as one for accurate documentation. For one, the Quebec Court of Appeal stated that changing the designation of sex relates to the "reality of transgender or non-binary people[72]." Elsewhere, the Manitoban judgment highlighted that denying non-binary sex designations forces individuals to either be without a birth certificate or accept an inaccurate one, which the court found to be systemic discrimination[73]. The Quebec first instance judgment held that, for transgender and non-binary people alike, accurate gender confirms their identity and inaccurate gender creates confusion about their true identity in situations where school administrators or employers verify that the person presenting the document fits the gender description[74]. As such, gender non-conforming documents prevent non-binary individuals from proving their identity or entitlement to legal rights and government services[75].

Canadian courts also acknowledged the harm caused by these inaccuracies which evokes the situation of Miss B, where misidentification led to distress and social harm. The Quebec first instance case which included transgender, non-binary, and intersex claimants acknowledged that when transgender or non-binary people use birth certificates to register for school, apply for jobs, or rent apartments, they reveal their transgender status because their sex designation does not match their gender expression[76]. As such, non-binary and transgender people face similar risks of violence and discrimination when their gender does not match their legal documents, discouraging them from applying for jobs or leaving unsatisfying employment[77]. Alongside these risks, the Manitoban judgment also referred to the risk of ridicule which may limit transgender and non-binary people's outside activity[78].

Crucially, the Quebec first instance court specifically cited examples of both transgender and non-binary people's similar negative experiences using inaccurate documentation. The judgment cites a transgender claimant who, when picking up mail addressed to the male name on her identity document, explains that she is his sister rather than disclosing that she is transgender[79]. Similarly, the judgment cites a non-binary claimant avoiding daycare registration for his child to prevent disclosing his gender identity, fearing poor treatment for his child[80]. In both cases, inaccurate documentation risks 'outing' the claimant and creates a distressing situation akin to that of Miss B.

Finally, the Quebec first instance court made it easier for non-binary people to prove the similarity of their situation to Miss B's by rejecting the idea that non-binary individuals should endure the

71 UKSC (n 2) [40] citing *B v France* (n 25).

72 Quebec CA (n.3) [96]-[98].

73 MBHR (n 3) [45], [51].

74 Quebec First Instance (n 3) [36]-[37], [16].

75 *Ibid* [198].

76 *Ibid* [9], [37].

77 *Ibid* [3].

78 MBHR (n 3) [25].

79 Quebec First Instance (n 3) [119].

80 *Ibid* [314].

consequences of inaccurate documents to prove eligibility for correction. It emphasised that the government cannot expect transgender or non-binary people to change their gender identity to benefit from the law, highlighting the circular logic in requiring them to change their identity to prove it[81]. The Quebec Court of Appeal also elaborated on the importance of removing outdated requirements, such as undergoing medical treatments or living for two years under the desired sex appearance, which risk placing transgender people in a state of discrimination and vulnerability since they must suffer the consequences of inaccurate documentation whilst they complete the requirements for correction[82].

In conclusion, Canadian courts took a more attentive approach, thoroughly understanding the daily lives of non-binary people rather than drawing an artificial line between the experience of non-binary and transgender people based on paternalistic assumptions.

3.2. A Deep Understanding of the Suffering Non-Binary People Face

The English and French courts have a limited understanding of the suffering non-binary individuals face since they decisively focused on one facet of non-binary people's suffering. Their cases turned on the idea that the claimants' discrepancies between legal and self-perceived gender are not widely noticed by others, and, as such, the policy to refuse gender conforming documentation rests on an acceptable balance of public and private interests or constitutes a proportional interference to the claimants' right to respect of private life[83]. In contrast, Canadian courts deeply understood the multifaceted challenges non-binary people endure when their vital documents fail to reflect their true gender.

First, Canadian courts gave proper credence to the suffering caused by the symbolic consequences of non-binary people's lack of legal recognition. The Quebec first instance court drew attention to the fact that the act of birth is "an authentic act that carries the authority, legitimacy, and power of the State[84]." By misidentifying non-binary individuals, such an act offends the principle of self-determination by delegitimising their identity. The judgment cited a claimant's testimony that "without legal recognition […], he feels that there is no place for him in this world," and stated that this sentiment was shared by most witnesses and linked to an alarming rate of suicidal ideation and attempts[85]. For example, this sentiment is echoed by the testimony of an intersex claimant cited by the court who, in her 60s, is said to always have kept a busy work schedule "to keep her mind off hurting herself to end the pain of living in a world that does not acknowledge her existence[86]."

Furthermore, the Manitoban judge pointed out that the plight of trans and non-binary individuals was well-known in 2013/2014 and reasoned that the government's refusal to "acknowledge [the applicant's] agency and personhood" was objectively highly serious[87]. One way to understand why the judge found it relevant to mention the widespread understanding of their plight is to look at law as the site of cultural production with the level or type of recognition afforded to the claimant's group as

81 *Ibid* [109].

82 Quebec CA (n 3) [43], [45].

83 *Ibid.*

84 Quebec First Instance (n 3) [112].

85 *Ibid* [113].

86 *Ibid* [129].

87 MBHR (n 3) [77], [80].

"the site of power by which the human is differentially produced," with some humans recognised as less than human[88]. This perspective reveals the seriousness of the government's refusal since it suggests that the government knew of the plight of trans and non-binary individuals but refused to acknowledge it.

The importance of this cultural production is equally highlighted in the Quebec first instance judgment whereby the judge concluded that "by seeking to confirm whether a change in designation of sex is appropriate for a young person, the Regulation second-guesses the applicant who is the only person who can attest to their gender identity" and "makes it harder for them to have their identity and their place in society validated[89]." By focusing on transgender and non-binary people's place in society and the need for validation, the court adequately understood a facet of non-binary people's suffering.

Second, Canadian courts highlighted the historical disadvantage and discrimination faced by non-binary people. The Manitoban judge asserted that transgender, pangender, and other non-binary people are a historically disadvantaged and discriminated against population[90]. This perspective was supported by decisions from the Human Rights Tribunal of Ontario and the British Columbia Human Rights Tribunal, which highlighted the extreme social stigma, prejudice, and violence faced by transgender individuals[91].

The Quebec first instance court held that that the applicants successfully proved that "an identity document that does not properly identify transgender and non-binary people contributes to their leading vulnerable and precarious lives[92]." As a consequence, the applicants' "rights to life, security, and inviolability are also engaged," and the "designation of sex on attestations and declarations of birth discriminates against transgender and non-binary people" because it "creates and perpetuates disadvantage because of the suffering it causes[93]."

Similarly, Hamilton JA in the Quebec Court of Appeal case stated that "the starting point of the analysis is the principle that everyone is entitled to access public services[94]." He asserted that transgender or non-binary people, like people with disabilities, require special measures enabling them to exercise that right, and where "such measures do not allow them to fully participate in society, there may be discrimination[95]." He held that "the discordance between the designations appearing on their civil status documents and their true identity perpetuates, reinforces or exacerbates" their disadvantage[96]. As such, Canadian courts portrayed non-binary people as a community that has been historically disadvantaged and discriminated against.

Third, the Quebec first instance case went as far as to conclude that inaccurate documents increase the risk of suicide for transgender and non-binary people. Whilst a legal challenge questioned the link between non-conforming documents and the heightened risk of suicidal ideation among non-binary people and demanded to scrutinise the raw data used in the study, the court dismissed this

88 J. Butler, *Undoing Gender*, Routledge, 2004.

89 Quebec First Instance (n 3) [280].

90 MBHR (n 3) [24].

91 *Ibid* [25]-[26].

92 Quebec First Instance (n 3) [139].

93 *Ibid* [140]-[141].

94 Quebec CA (n 3), Hamilton JA [225].

95 *Ibid* [226].

96 *Ibid* [228].

preliminary challenge[97]. The first instance judge instead affirmed that transgender people "frequently turn to suicide to end the suffering caused by living in a world that does not acknowledge their identity and that fights their attempts to affirm it[98]." The judge highlighted the persecution and violence faced by transgender and non-binary people, causing them to withdraw from situations requiring the presentation of government-issued identity documents[99]. The judgment made it clear that transgender and non-binary people suffer from violence, persecution, humiliation, and anxiety caused by presenting gender non-conforming ID, which exacerbates their risk factors for suicide[100].

Together, these factors portray non-binary people as a vulnerable community, a depiction which becomes thematic in Canadian case law. The Manitoban judge accepted a publication ban against the disclosure of the plaintiff's identity because such a disclosure "could lead to a significant risk of injury or harm given the potential for prejudicial behavior directed towards them as a pangender individual[101]." The judge cited the "small size of the trans community" as a factor motivating this ban since "it would take only a little amount of information to glean the identity of the complainant[102]." Moreover, the Quebec case concerning the key study's admissibility, given the lack of raw data shared with the respondent, also highlights the community's vulnerability. The judge concluded that "particularly when vulnerable communities are concerned," weakening the trust between these communities and researchers is harmful[103].

Ultimately, Canadian case law's broad understanding of the multi-faceted challenges non-binary people face allowed judges to reach fairer outcomes than ones that primarily accounted for the suffering caused by the external perception of the discrepancies between the claimants' legal and self-perceived genders. The Canadian courts' approach stands in stark contrast to the English and French approach which assumed that blending into cisgender society was in the claimants' best interest, ignoring their need for recognition beyond the binary gender system.

3.3. Self-Determination as an Organising Principle

Unlike the French and English courts, which focused on external conformity through appearance tests or scrutiny of the claimants' medical history and family life, Canadian courts prioritised autonomy and respect for self-determination.

First, Canadian courts emphasised respecting non-binary individuals' autonomy. The Quebec first instance court stated that for transgender and non-binary people, their sex at birth on their act of birth "confirms that, officially, they are not who they know themselves to be[104]." This principle motivated the judge to reject the argument that a newborn's sex on an act of birth is discriminatory because "newborns do not have a gender identity[105]." The act of birth looks to "a person's genitalia" ra-

97 Quebec Raw Data (n 3) [2], [4]-[5], [17].

98 Quebec First Instance (n 3) [17].

99 *Ibid.*

100 *Ibid* [117].

101 MBHR (n 3), Publication Ban [2].

102 *Ibid* [3].

103 Quebec Raw Data (n 3) [64].

104 Quebec First Instance (n 3) [8].

105 *Ibid* [21].

ther than "their name, clothing, hairstyle, and bearing," which are "determined by the person themselves[106]".

The Quebec first instance's court's focus on autonomy threaded together its various decisions. For example, the court held that excluding non-binary parents from being properly identified on their children's act of birth "undermines the respect they are owed and deprives them of full recognition[107]." The court noted that a claimant felt the term "filiation" did not "respect him as a parent[108]." The judge also seemed to accept that acts of death disclosing one's sex at birth could breach "a person's right to dignity, honour, and […] reputation[109]." Similarly, the Manitoban court stated that the claimant "adopts a wide range of gender expression in order to feel whole and complete as a person[110]".

Second, the courts took broad view of gender expression in sharp contrast to the European courts' restrictive focus on the claimants' appearances, medical histories or family lives. The Manitoban court considered the claimant's "wide range of gender expression," including clothing and interests typically associated with both male and female genders[111]. The Tribunal recognised gender identity beyond the perception of others, defining it as the "psychological self-awareness of one's conscious self in relation to gender[112]." It took an accommodating view of gender expression, including "clothing, speech, body language, hairstyle," voice, and even "choice of name and personal pronouns[113]".

Finally, Canadian judges demonstrated an empathetic approach whereby inconsistent expression of gender identity could nonetheless suffice in certain cases. The Manitoban judge acknowledged that some individuals might choose a gender expression inconsistent with their gender identity for safety, security, or social conformity reasons[114]. Similarly, in an Ontario interim ruling determining the evidence needed for the applicant to demonstrate their lived experience as pan-gender, the judge acknowledged that medical records might not fully capture how an applicant expresses gender in everyday life, noting that a person might present differently in various contexts such as before physicians versus in private life[115]. This contrasts with the French *Cour d'appel*'s rigid view, which considered a claimant's marriage and adoption choices as inconsistent with their gender identity[116].

Overall, Canadian courts' approach was more progressive and inclusive, focusing on self-determination and respect for individuals' identities, unlike the paternalistic and appearance-based standards of French and English courts. This fosters a more equitable and respectful legal framework for recognising gender identity.

106 *Ibid* [34].

107 *Ibid* [170].

108 *Ibid* [178].

109 *Ibid* [326]-[327].

110 MBHR (n 3) [3],

111 *Ibid.*

112 *Ibid* [22].

113 *Ibid.*

114 *Ibid* [23].

115 HRTO (n 3) [15].

116 *Cour d'appel* (n 2).

4. Conclusion

In conclusion, judicial narratives play a critical role in shaping legal recognition for non-binary individuals. By comparing European and Canadian approaches, it becomes evident that European courts, influenced by political sensitivity and hegemonic interests, constructed master narratives that mischaracterised non-binary people, legitimising the status quo. In contrast, Canadian judgments provide a fairer model for adjudicating third-gender categories, offering narratives that better reflect the lived experiences of non-binary individuals.

This comparison underscores the importance of challenging judicial complacency and the power dynamics inherent in legal narratives, as the stories chosen by judges not only shape the immediate outcome of cases but also influence future claims and the broader cultural understanding of gender non-conformity[117]. The qualification of the facts risks constituting a script that gender non-conforming people must follow or derive from to gain recognition in a fashion that is not dissimilar to Krafft-Ebing's story of Case 129 or Lili Elbe's Man Into Woman: An Authentic Record of a Change of Sex, both of which told transgender people what to say to get medical care "without ending up in prison [for being gay] or confined in a mental hospital"[118].

Recognising law as a site of cultural production, it is crucial that judicial decisions promote fair and inclusive outcomes, particularly for marginalised groups, rather than perpetuate exclusionary narratives that reinforce dominant power structures. Canadian cases not only provide fairer narratives but hopefully also inspire future challenges to the status quo in Europe and offer healing to marginalised groups by revealing "the facts of their own historic oppression" rather than the "comforting stories" downplaying claimants' suffering which are used by European judges to justify modest decisions[119].

117 C. Jones and J. Montgomery, *ivi*, citing R. Ingleby, *Rhetoric and Reality: Regulation of Out-of-Court Activity in Matrimonial Proceedings*, in *Oxford Journal of Legal Studies*, 1989, no. 9, p. 230; R. Ingleby, *Solicitors and Divorce,* Clarendon Press, 1992.

118 Z. Playdon, *The Hidden Case of Ewan Forbes: And the Unwritten History of the Trans Experience*, Scribner, 2021, p. 41.

119 R. Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, Michigan Law Review, 1989, no. 87, p. 2411; C. Jones and J. Montgomery, *ivi*.