



No-bodies Human Rights. An Interdisciplinary Exploration of Bodies in Human Rights

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ARTICLE



ABSTRACT

One can hardly imagine human rights – aimed to guarantee minimum requirements for a dignified life for all – without human bodies. In legal thinking, however, the corporeal is often remarkably absent, or overshadowed by abstract, disembodied conceptualisations of ‘the’ human being and his (more than her, or their) presupposed autonomy. In this contribution we explore how the body figures in human rights conceptually, legally and empirically. We ask how diverse bodies are differently protected by human rights. Through legal theoretical analysis and two empirical case studies (on respectively transgender and intersex persons’ experiences with gender registration, and sex workers’ social exclusion during the COVID-19 pandemic), we explore what the concepts of autonomy, dignity and equality mean for different (kinds of) bodies. We conclude that autonomy, although heavily criticised in its abstracted understanding, is a paramount human rights value for individuals whose bodies or sexuality are perceived as non-conforming. It can support their self-actualisation and help them fight unjust government interference with their bodies or sex(ed) lives. Negative obligations of states, such as those deriving from the right not to be discriminated against or tortured, and the right to self-determination are crucial to fight embodied inequalities, and ensure that every-body can effectively claim their human rights.

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Human rights are conceived as *naturally inhering in the human person*. Exactly how nature creates or confers rights is rather obscure, at least in non-theistic theories. Nonetheless, *such a natural basis seems essential* to distinguish human rights from other types of rights.¹

With human rights referring to rights which people hold because they are human, one would think that the human body would appear central stage in human rights thinking. After all, how can we even begin to conceptualise having human rights without starting from a physical human body? However, as becomes clear from the above quote, the role of ‘nature’ in our being human and having rights is ‘rather obscure’. How human bodies are, concretely, linked to the human rights we hold, is a highly relevant question though. With human rights being meant as minimum requirements for a dignified life, the individual and social stakes are high.

Donnelly, cited above, has a very abstract notion of ‘human nature’ that grounds human rights.² He rejects a *descriptive* account of human nature (like basic human needs or capabilities) as evoking human rights, and instead considers a *prescriptive*, moral account of human possibility: ‘Human rights are less about the way people are’, he contends, ‘than about what they might become’, although he admits that there are ‘natural’ outer limits of human possibility.³ Donnelly thus speaks about human rights as *moral* rights primarily, that ask for political and legal action. In that way, moral human rights can become *legal* rights, without losing their critical moral (and political) potential. This approach departs from a universalized, abstract and standard human being whose physical body is relegated to the background. Approaches in this line might easily marginalise the body, rendering bodily aspects of a dignified life invisible or of less worth. Furthermore, they could overlook how the diversity of human bodies, and their unequal living conditions, may impact ‘what people might become’.

In this article⁴ the ‘natural’, bodily aspects of human beings within human rights are put centre stage, instead of at the outer limits. Our analysis captures three analytical levels: the *moral* conceptualisation of the human (body) that underlies human rights; how our bodily existence appears in *legal* human rights; and how these rights *empirically* work out on a diversity of bodies. Whereas the first two levels concern legal (and) theoretical reflections, the last level mainly builds on insights from the social sciences. We explore in an interdisciplinary way what an *embodied* understanding of legal subjects, with attention to the variety of physical bodies, could add to human rights thinking.

A first look at international human rights law reveals that the body is not that absent; consider, for example, the right to life, the prohibition of torture and the rights to food, clothing and housing; rights that refer in most direct ways to physical, bodily needs. Furthermore, in specific human rights instruments it appears that ‘the’ human being is not always universal; sometimes it turns out to have *particular* bodily characteristics. For example, the right of the child ‘to be cared for by his or her parents’ is directly impacted by the child’s (unique) bodily, physical and mental needs, that are very different from those of (most) adults. A closer look at the body in human rights – and, thus, at our physical, corporeal existence – might not only give a richer image of human beings behind human rights, and consequently of human rights obligations, but may also better account for the diversity of human bodies and the extent to which human rights protect these bodies equally.

The moral and legal concepts of autonomy and human dignity are central in our exploration. Although ‘the’ autonomous person seems to become an abstract and disembodied human being, and therefore receives severe criticism from human rights scholars, we will show through two empirical cases that autonomy and dignity (still) seem essential to being human. These values support (embodied) self-actualisation in current ‘fluid’ times, in which identities are

¹ J Donnelly, ‘Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights’ (1982) 76(2) *The American Political Science Review*, 303, 305. Emphasis added by the authors.

² J Donnelly, *ibid*, 15.

³ In the ‘natural’ outer limits of human possibility, the physical body seems to appear in an empirical (and rather negative) sense: the physical body limits human possibilities. See Donnelly (n 2), 15.

⁴ This article benefitted from the valuable input of Wendy Schrama and Lorena Sosa, and from the editing work of Kim Schuurman, for which we express our gratitude.

constantly (re)constructed in the face of global mobility, narcissistic consumerism and the impact of everyday (social) media. The value of autonomy in human rights helps us resist and contest (state) practices negatively and unjustly impacting on our bodies. This is all the more relevant in light of research in the field of social sciences from the last (roughly) four decades,⁵ showing that socio-economic, political and cultural processes of inclusion and exclusion have corporeal dimensions. Inequality impacts differently on different bodies, which we call here ‘embodied inequality’. This process affects people’s capabilities to claim human rights effectively; in-depth understanding of how diverse bodies are unequally situated in life is therefore of paramount importance in human rights studies. The concept of embodied inequality gives insight into whether and how human rights ‘work out’ (de facto) the way they were intended to (morally and de jure).

In sum, in this article we aim to contribute to the thinking about human rights by exploring the question as to how the body figures in human rights conceptually, legally and empirically, and how bodies are differently protected by human rights. To this end we first discuss – in Section 2 – how an abstract and ‘generalised’ body appears in general human rights instruments, aiming to protect values such as (negative and positive) liberty, dignity and equality. We discuss how this generalized body has been criticised from feminist and postmodernist points of view for pushing away or aside the specificity of our physical bodies; the abstracted body turned out to be less inclusive than initially intended. We then introduce theoretical approaches that try to rethink this abstracted ‘human’, arguing for recognition of diverse vulnerabilities of our physical bodies.

From this legal theoretical reflection we turn, in Section 3, to the question how the empirical changes of the last decades have affected our thinking about the body, particularly with respect to human rights. We look at how the conceptualization of the human body has changed, and how fluidity and social construction – as well as the ‘make-ability’ – of the body have evoked new questions on human autonomy, dignity, and government meddling with our embodied identities and intimate lives. We discuss how ideas about the body as (socially) constructed within a field of unequal power relations affect our thinking on the human rights we hold.

The following two Sections (4 and 5) delve into two concrete case studies of ‘non-conforming’ bodies: the first on intersex and transgender individuals, whose experiences contest medical categorisation of human bodies into binary legal registration systems at birth; the second on sex workers’ unequal treatment throughout the COVID-19 pandemic by the (Dutch) state’s moral disciplining techniques. We depart from (respectively) the legal academic discipline and a social scientific, criminological approach; whereas the first case emphasises the legal dimensions (de jure) of intersex and transgender persons’ claims to their sex/gender identities, the second highlights how government disciplining can reduce individuals’ capabilities to effectively *claim* their human rights in their actual lives. Together, the cases offer insights into the question to what extent (and how) bodies are morally constructed and disciplined into ‘normal’ bodies with standard protection, and at what cost. Moreover, we will see how earlier notions of autonomy, liberty, dignity and the right to private life acquire new meanings in current times.

In Section 6 we conclude and discuss both our theoretical and our empirical findings. What kinds of bodies (and bodily experiences) do human rights protect, facilitate, or normalise and what kinds of bodies do they marginalise – and to what effect? We will discuss what thinking ‘from the body’ may have to offer to the study of human rights, and whether bodily reflections should be part of continuous constructive critique in the field.

2 A UNIVERSAL, AUTONOMOUS HUMAN BODY...OR NOT?

2.1 GENERAL HUMAN RIGHTS: LIBERTY, DIGNITY AND EQUALITY

It is often claimed that human rights are individual liberty rights which we can claim *because* we are autonomous beings, or at least capable of autonomous choice.⁶ We are capable of

⁵ See, for example: B Turner, *The Body and Society: Explorations in Social Theory* (Blackwell, 1987); M Featherstone et al. (eds.), *The Body: Social Process and Cultural Theory* (Sage, 1991); J Lorber and L Moore, *Gendered Bodies: Feminist Perspectives* (OUP, 2006); J Low and C Malacrida (eds.), *Sociology of the Body: A Reader* (OUP, 2008); K Simonsen and L Koefoed, *Geographies of Embodiment: Critical Phenomenology and the World of Strangers* (Sage, 2020).

⁶ J Marshall, *Personal Freedom through Human Rights Law?* (Martinus Nijhoff Publishers, 2009), 6.

choosing the lives we think are good for us. Human rights in this approach are primarily meant to give protection against unlawful state interference with individual (embodied) lives when our autonomy is threatened. This underlines the fundamental value of *negative* liberty, but also of dignity. It is remarkable that these negative liberty rights mainly come into focus when human beings find themselves in extraordinary situations which undermine our autonomy, dignity and our body, such as when under torture or arbitrarily imprisoned by the state. Obviously, the ‘normal’ human being is an autonomous human being – which limits our understanding of the body to contexts of choice and to persons able to choose.

By limiting autonomy to those who have the *mental capacity* to make informed choices, it excludes – for example – young children and (elderly) people with dementia or in a coma.⁷ Although non-autonomous people are still considered human beings with inalienable human rights, apparently the physical conditions for autonomy were either largely overlooked in the initial drafting of human rights, or were presupposed with primarily one type of body in mind: a body for which autonomy, in normal circumstances, is unproblematic.

The concept of human dignity appears to capture the physical aspects of our autonomous existence particularly in these extraordinary situations. This is illustrated in the first chapter of the relatively young EU Charter of Fundamental Rights, which entered into force in 2009. The first chapter, entitled ‘Dignity’, covers not only the general right to human dignity, but also the right to life, the right to physical and mental integrity, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of slavery and forced labour. Each of these fundamental rights aims to protect bodily aspects of life or, as Beers states:

[E]ach of these rights depicts the human body as a fundamental part of one’s personality and humanity. It is precisely this symbolic unity and interconnectedness of person and body that can be identified as the underlying thought of the legal principle of human dignity.⁸

As such, dignity expresses a more fundamental value underlying human rights, namely that human beings should be treated as persons, with absolute value, and not as objects – or merely bodies – with relative value that can be owned, maltreated, bought or sold.⁹ Human rights, though, are not only meant to respect negative liberty and dignity, but also to protect *positive* liberty rights. These often involve state obligations with regard to basic bodily needs, like the right to food, safe working conditions et cetera, to enable people to enjoy their liberty, make their own – autonomous – choices, live the way they wish and become who they want to be. Thus bodies are protected in positive obligations and social and economic rights, as well. As these positive state obligations often require distributive policies (e.g. with regard to housing), these rights are not always justiciable and the accessibility and availability is often conditional (for example, dependent on need).

Nonetheless, both negative and positive obligations arising from human rights can be considered moral principles and legal mechanisms that everyone needs in order to live a meaningful and dignified life. There were good reasons to conceptualise human rights as abstract from diverse empirical bodily needs and capacities at the time of the drafting of human rights, just after the two World Wars. The equal, inalienable and universal character of human rights would ensure legal inclusion and basic rights for everyone, strengthened with prohibitions of discrimination on the basis of bodily and non-bodily identity markers, like sex, colour, religion, political opinion et cetera. Abstracted, disembodied human rights arguably highlight the moral nature of human beings, and abstractions, or general concepts, could be a way to ensure liberty for everyone – and as such offer inclusion, neutrality or equality. Irrespective of one’s body (being newborn, of old age, somewhere in-between), skin colour, sexual characteristics, (dis)ability et cetera, one has and may claim (equal) rights.

⁷ E Wicks, *The State and the Body: Legal Regulation of Bodily Autonomy* (Hart Publishing, 2016), 4.

⁸ B van Beers, ‘The Changing Nature of Law’s Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person’ (2017) 18(3) *German Law Journal*, 558, 578.

⁹ Dignity is also prominently connected to human corporeality in the Council of Europe’s Convention for the Protection of Human Rights and of the Human Being with regard to the Application of Biology and Medicine (‘Oviedo Convention’) (opened for signature 4 April 1997, entered into force on 1 December 1999) CETS no. 164.

However, the implicit bias in human rights suggesting that ‘the’ (normal) human being is an autonomous, rationally thinking and self-sustaining being who is only vulnerable to human rights violations in extraordinary situations, was severely criticised from the 1960s onwards. Feminist and postmodernist thinking and more recently critical disability studies rejected the paradigm in social sciences that perceived human beings as (‘normally’) rational thinking creatures. This viewpoint had reduced the human body, so to speak, to its (thinking) head. Postmodernism rejected generalised human experience and the previous over-appreciation of the mind over the body,¹⁰ while feminist scholars positioned bodies as being constructed through hegemonic, masculine structures in society. They demanded attention for the gendered experiences of women, and their subordination in different spheres of life.¹¹ Disability studies, in their turn, criticise the rational and individualist paradigm which, according to them, denies personhood in the case of cognitive impairment and marginalises both carers and the cared-for as subjects of rights.¹²

The critique impacted substantially on human rights thinking, and legal thinking in general. The absence in law of, for example, specific female bodily characteristics – like the potential to be pregnant – was brought forward as an issue that needed to be addressed. The inclusivity and ‘universality’ of human rights were, in other words, now questioned. Their underlying, abstract conceptualisation of human beings was not neutral; it was biased, privileging some bodies over others. The understanding of the human body as generally (or ‘normally’) autonomous, healthy and free to choose, was obviously not applicable to everyone.

Universalizing or normalizing one type of body or bodily experience – as if everybody is interchangeable – thus carries the risk of neglecting ‘embodied diversity’ and renders marginalised forms or aspects of human corporeal conditions exceptional or even deviant.¹³ Feminist scholar Bottomley, for example, indicates that even abstract human rights notions that include the body, like ‘bodily autonomy’ and ‘bodily integrity’, as well as the presumption of a unitary subject, are difficult to uphold when considering pregnancy and maternal-foetal relations.¹⁴ In the same way, Naffine notes that the rational individual subject in human rights law seems to be adult and ‘individuated and therefore sexed (at least in the sense of never pregnant, as this compromises individuation’.¹⁵ The discussion on such ‘biases’ in the ‘universalised’ human being behind human rights has not lost its relevance, rather to the contrary: contemporary calls for (legal) recognition of embodied diversity make the issue paramount in contemporary human rights debates (which we will further embark on in the first case study, Section 4).

The focus on autonomy in human rights thinking can, furthermore, easily prioritise the mind and rationality over the body – submitting the body (as instrument) to the control of the mind.¹⁶ As said, this poses problems for persons with cognitive impairments and marginalises the

¹⁰ M Casper and L Moore, *Missing Bodies: The Politics of Invisibility* (New York University Press, 2009), 6. Although some would argue that poststructuralism (as part of the broader movement of postmodernism) did not escape an overly abstract taking on the body – seeing everything, including bodies, as ‘text’ – this reading of French poststructuralism as anti-materialist has been criticised. It goes beyond the scope of this article to go deeply into this but see, for example, the insightful blog J Jones, ‘Post-Structuralism, Butler and Bodies’ (*Jane Clare Jones*, 18 July 2018) <<https://janeclarejones.com/2018/07/18/post-structuralism-butler-and-bodies/>> (last visited 9 October 2023).

¹¹ See for example: J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 2006); J Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge, 2011). See for an overview of developments in the field of feminist scholarly engagement with the body: C Shilling, ‘Sociology and the body: classical traditions and new agendas’ (2007) 55(1) *The Sociological Review*, 1, 1.

¹² See for example: F Felder, ‘What Does the CRPD Tell Us About Being Human?’ in F Felder et al. (eds.) *Disability Law and Human Rights* (Palgrave Macmillan, 2022); M Michael & K Soldatic, ‘Rights, Justice and Flourishing: The Uses and Limitations of Human Rights’ in F Felder et al. (eds.) *Disability Law and Human Rights* (Palgrave Macmillan, 2022). See also: C Riddle, *Human Rights, Disability and Capabilities* (Palgrave Macmillan, 2017).

¹³ C Dietz et al., ‘Nobody, Anybody, Somebody, Everybody: A Jurisprudence of the Body’ in C Dietz et al. (eds.) *A Jurisprudence of the Body* (Palgrave Socio-Legal Studies, 2020).

¹⁴ A Bottomley, ‘The Many Appearances of the Body in Feminist Scholarship’ in A Bainham et al. (eds.) *Body Lore and Laws: Essays on Law and the Human Body* (Bloomsbury Publishing plc, 2002), 132, 145.

¹⁵ N Naffine, ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66(3) *Modern Law Review*, 364.

¹⁶ See Wicks (n 7), 9–10. See also R Collier, ‘Male bodies, Family practices’ in A Bainham et al. (eds.) *Body Lore and Laws: Essays on Law and the Human Body* (Bloomsbury Publishing plc, 2002), 155.

lived experience of persons with disabilities. Moreover, feminists have indicated the gendered implications of this hierarchical division, associating women with bodies, emotions, passivity and the private domain of the family, and men with the mind, rationality, activity and the public sphere (as will be illustrated in the second case study in Section 5).¹⁷ What both the movement for the rights of persons with disabilities and feminist insights have taught us is that an abstracted vision of ‘the’ human being does not include everyone always (in the same ways). An increasing awareness that general human rights instruments, containing civil and political as well as economic and social rights, might not sufficiently enable everybody to live lives of choice, dignity and well-being, led to the realisation that persons with different bodies might need different protections and entitlements.

2.2 SPECIFIC HUMAN RIGHTS FOR DEVIANT AND VULNERABLE BODIES

The comprehension that the underlying, standardised imagined human being in human rights might not capture everybody’s (and every body’s) lived experience, nor address everyone’s needs equally, resulted in the adoption of specific anti-discrimination treaties, like the International Convention on the Elimination of All Forms of Racial Discrimination (1965) and the Convention on the Elimination of All Forms of Discrimination against Women (1979). Moreover, intersectionality was put on the agenda,¹⁸ indicating that a single dimension of discrimination only (like gender or race) makes us neglect the fact that, for example, black women face other types of discrimination than white women. On the labour market for example, black women may face a greater risk of dismissal, while white women may hit the glass ceiling of their career opportunities more often. By ignoring such intersections (of e.g. gender and race), discrimination law cannot always offer sufficient protection. The insight that human beings are not similarly situated and face different bodily risks, is illustrated in the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (2014). It recognises that bodily integrity and safety is a serious risk for many women in a context that differs from the places and relations where men’s bodies risk violence.

This development of drafting specific human rights instruments with additional rights for specific groups is continuing,¹⁹ with bodily aspects popping up and challenging existing human rights law. Consider, for example, the additional human rights guarantees for persons that are seen to belong to what are known as ‘vulnerable groups’. These include ‘new’ groups, like elderly persons, HIV positive persons and people with AIDS, Roma/Gypsies/Sinti and lesbian, gay and transgender people.²⁰

Many scholars would probably consider special human rights treaties and additional guarantees for women, children and persons with disabilities and (other) persons of vulnerable groups an asset. The special protection instruments specify and target the protection, and give additional guidance to states in ensuring that everyone enjoys their rights at an equal level to others. At the same time, however, this ‘splintering of human rights into highly prescribed rights for highly defined categories’²¹ can be seen as problematic as well. All these different categories could be perceived as indicating a deviance from the dominant, ‘normal’ body in general human rights instruments, which is adult, male, able-bodied, straight, white, cisgender et cetera, and which is only or primarily vulnerable to human rights violations in extraordinary situations. ‘Fixing’ this bias in the conceptualisation of human beings (and their bodies) by drafting explicit protections

¹⁷ See Wicks (n 7), 13–14; Collier (n 16), 151.

¹⁸ K Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43(6) *Stanford Law Review* 1241, 1241.

¹⁹ For a young child, not all general human rights are relevant (yet), while other specific rights are more relevant for them, like the child’s best interests to be taken into account in decisions made by adults. Persons with disabilities need provisions to participate in society and live independently, which able-bodied people do not, et cetera.

²⁰ For a critical analysis of those human rights guarantees, see Fa Ippolito and S Iglesias Sanchez (eds.), *Protecting vulnerable groups: the European human rights framework* (Hart Publishing, 2015); see for a policy approach: ‘The Human Rights Protection of Vulnerable Groups’ (Icelandic Human Rights Centre) <<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/the-human-rights-protection-of-vulnerable-groups>> (last visited 9 October 2023).

²¹ See Michael and Soldatic (n 12), 73.

2.3 TOWARDS A MORE DIVERSE, VULNERABLE AND INCLUSIVE HUMAN BODY

Instead of drafting specific rights and additional guarantees, some scholars try to *rethink* the conceptualisation of the human being underlying human rights, and work towards a fuller, more inclusive conception. Wicks, for example, tries to do this by:

[P]utting the body back into the equation, it is the embodied self who is autonomous rather than the disembodied mind. This does not represent a privileging of the body over the mind because an autonomous decision about the body will still require a mind capable of making informed decisions. Nor does this entirely ignore the distinction between mind and body. Rather it gives long overdue recognition to the *interaction* between the two.²²

Wicks, in other words, seeks solace in a reappraisal of the body as essential to an autonomous self. What that reappraisal should concretely look like in legal praxis does not become fully clear, though, nor *how* we can ‘put the body back into the equation’.

Other authors, as well, put the original focus on autonomy into perspective. Fineman, for example, considers a legal subject demarcated by universal *vulnerability* and inevitable social *dependency*, a more full reflection of the human condition than does a fixation on autonomy, rationality and liberty.²³ She points to the vulnerability that goes along with developmental changes during one’s lifetime that are intrinsic to the body. These bodily changes can indicate (for children growing up) increased, as well as (for elderly, ill, disabled persons or persons with HIV or AIDS or for women in menopause) decreased capabilities and capacities over time.²⁴ These efforts to reconceptualise the human being in human rights show a stronger awareness that this human being is embodied and does not make autonomous choices in a vacuum but, rather, is situated in certain power constellations and dependent on other human beings, and on the surrounding world. In the empirical case studies we will, however, push the argument further and contend that it is precisely this awareness of our vulnerability and interdependence that makes human autonomy all the more relevant. Before we get to that, however, we will take a closer look at another developing perception of the body in current times: that of the ‘makeable’ body.

3 MAKEABLE, FLUID BODIES AND IDENTITIES, AND THEIR LEGAL DISCIPLINING

Besides an increased awareness that embodied human beings are situated human beings, we have simultaneously witnessed a certain ‘fluidisation’ and ‘make-ability’ of the body in current times. Although physical bodies are subject to social categorisations and power positions which we cannot just change at will, they are – in a material sense – also increasingly ‘makeable’ and ‘non-fixed’ due to increased (technological, social and cultural) possibilities to ‘make’ our own identities and bodies. Medical technology allows *some* people – as this possibility is, again, unequally distributed – to change different aspects of their bodies: one can modify (parts of) one’s body in line with one’s desired identity, undergo medical treatment in order to change a sick or less-abled body (or body part) into a healthy one, or use artificial reproductive technology to create families where bodily propensities would not have allowed that previously. Social science scholars claim that since the second half of the 20th century, the body became central

²² See Wicks (n 7), 15.

²³ M Albertson Fineman, ‘Reasoning from the Body: Universal Vulnerability and Social Justice’ in C Dietz et al. (eds.) *A Jurisprudence of the Body* (n 13), 21, 33. See also Mooney, who suggests that human rights only make sense if we recognise that we are all embodied and all absolutely unique, that we rely on each other and on the natural environment: A Mooney, *Human Rights and The Body: Hidden in Plain Sight* (Routledge, 2014), 3, 5; and see A Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave, 2010).

²⁴ See Fineman (n 23), 24. Although Fineman’s theoretical approach concerns universal justice, it has been considered by scholars on human rights and vulnerability. See C Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (Hart Publishing, 2021), 25.

to people's sense of self-identity, with lifestyles focusing on bodily preservation (e.g. staying youthful) and 'modelling' of the body. According to Turner, through their active 'shaping' of the body, individuals nowadays give expression to their identity through a body-focused lifestyle in a public – and not the least in a social media – display of good health, beauty, sex, being fit et cetera.²⁵

The approach of the body as a self-made identity challenges the strictly regulated legal notion of the 'natural person' and confronts legal thinking with new questions. On the one hand, human rights law offers room for new conceptualisations of the human body. The previously mentioned, underlying concepts of autonomy and negative liberty make it basically one's own issue (not the law's) what one wants to do with one's body. On the other hand, there are limits to this rather liberal approach, which link to the legal concept of dignity: one cannot do things to one's body which severely compromise human dignity or erode one's bodily integrity without an acceptable goal. To give a blunt example: one cannot offer one's body to someone who would like to kill and eat it. Also, there is cultural (and religious) diversity with regard to ideas on whether one may offer one's body commercially to others, either for reproductive services, organ harvesting or sex. In sum, the body in human rights is not conceptualised as a 'thing' or property that one can freely make use of, but as an aspect of the dignified person.

Moreover, governments have a pragmatic (economic) concern not to facilitate endlessly everything that individuals want to change about their bodies. With medical procedures being costly, states limit access to them. With regard to the fluid and 'make-able' body, then, we can conclude that, although legal provisions allow for ever more possibilities to change one's identity and stretch the concept of being human to include ever more diverse bodies, eventually states determine the range of these possibilities. According to European human rights standards with regard to the right to private life, which covers the make-able body and one's desired appearance, governments should strike a fair balance between the competing interests of the individual and of the community as a whole, and – in the case of a negative obligation – states should pursue a legitimate aim.²⁶

We could, thus, say that law might 'follow' developments concerning what we can, will or may do to and with our bodies, but it also actively *constructs* our bodies through laws and regulations. This process includes social sorting practices, as governments need to determine who are and, more importantly, who are *not* eligible for certain legal provisions, measures and protections. As Foucault's classical works have insightfully made clear,²⁷ 'deviant' bodies are thus categorised and sorted out to receive special treatment or to be denied certain legal protections. This leads to interesting new questions in the study of human rights, which combine moral, legal and empirical dimensions. What do current legal constructions and representations of human bodies reveal about which bodies we deem in need and worthy of protection? When does law connect with biological bodily realities, and when does it use – or enforce – its own constructs? Or, to put it in Foucauldian terms: how – and according to which underlying morals – does law discipline human bodies in these times of increasing corporeal fluidity – and is this fair?

We will embark on these questions in the following two concrete, empirical case studies about, firstly, transgender and intersex people and, secondly, sex workers. Although they are included here as two unique cases of non-comparable groups of people, we did choose them on purpose. They both provide insights – in their own unique ways – into what happens, legally and socially, if bodies deviate from the presumed, 'normal' standard, or from ideas on what 'normal' bodies do. Thereby, they challenge societal norms on what a body is (or, better, should be), does (or should do) and what its place in the socio-legal order should be. As such, they challenge existing power structures, and when they do, this may translate into legal 'frictions'. In other words, both cases and the groups they represent disrupt the existing social and legal order. As such, these groups contest state disciplining of their embodied experiences.

²⁵ See Turner (n 5).

²⁶ Council of Europe/European Court of Human Rights, 'Guide on Article 8 of the European Convention' (Council of Europe, 2022), 8.

²⁷ See for example: M Foucault, *Discipline and punish. The birth of the prison* (Pantheon Books, 1977); M Foucault, *The History of Sexuality* (Pantheon Books, 1976–2018; 4 volumes).

The law's recognition of a bodily entity as a natural person is an administrative state issue. One's registration by legal authorities at birth – signifying that one becomes part of a social and legal order – is assumed to be fixed and stable, and lasting a lifetime.²⁸ There are only limited options for a self-made identity in this process, as one does not become part of the social and legal order on the basis of self-made identity, but on terms of the collective order.²⁹ Transgender persons are a challenge to the assumption of a continuous (embodied) cisgender identity. Changes during one's lifetime are possible, but only according to legal conditions, and within the pre-given categories. Non-binary and intersex persons face problems as far as they do not fit into the 'normalizing' gender/sex categories of either male or female.

A closer look at the state approach to intersex and transgender persons can help to answer the question as to which factors in human rights (may) result in a lower level of human rights protection for intersex and transgender persons' 'non-conforming bodies', compared with cisgender persons with 'normal' bodies and matching gender identities. By exploring this question, we hope to gain insight into the more general question as to what extent law facilitates peoples' claims to their own identities or lifestyles, and when it enforces its own constructs – and to what effect?

4.1 THE CONSTRUCTION OF BODIES AS NATURAL

Shortly after birth, midwives and doctors categorise babies as either 'male' or 'female' and maybe a third – sometimes temporary – category (like 'unspecified', 'ambiguous' or 'diverse'). These 'medical' decisions are generally used as sources of state registration of one's sex/gender. The suffering of many intersex and transgender persons originates in these medical categories and state registrations, as these deny the biological reality of intersex bodies or marginalise them as exceptional, non-congruent bodies.³⁰ 'In an attempt to fix their sex', intersex children are often subject to irreversible sex assignment, involuntary sterilisation and/or genital-normalising surgery, performed without their informed consent or that of their parents. These attempts to make their body conform to medically and socially constructed gender expectations render intersex children extremely vulnerable and cause severe suffering.³¹

Furthermore, the official registration of sex at birth is assumed to relate to a person's gender identity and, as such, implicitly entails a gender registration. This generally constitutes no problem for cisgender persons, but raises all kinds of problems for transgender persons, who experience a mismatch between the attributed sex/gender at birth and the way they feel about their bodies and express their identity. Without official documents matching their expressed gender identity, transgender persons can easily be suspected of using falsified documents (e.g. when using a personalised public transport document) or they may have to reveal their transgender identity against their will. This makes transgender persons vulnerable to violations of their right to privacy as well as to discrimination and violence.³² Transgender persons also have to consider to what extent they are willing to subject themselves to psychiatric and medical examinations, to hormone treatment and painful and perilous gender reassignment, with the resulting loss of reproductive functions. Moreover, a binary transgender person, who requests a change of legal identity, may face long, stringent procedures aimed at fitting into

²⁸ Leaving aside the serious problem of statelessness, a legal concept describing the absence of a recognised link between an individual and any state.

²⁹ B van Beers, *Persoon en lichaam in het recht* (Boom Juridische uitgevers, 2009), 64.

³⁰ As Shrage contends: 'People do have sex-differentiated physical structures (gonads, chromosomes, genitals, hormones, breasts, brains, body hair, etc.), but these structures do not correlate with two discrete and opposite sexes'. L Shrage, 'Does the Government Need to Know Your Sex?' (2012) 20(2) *The Journal of Political Philosophy*, 225, 226.

³¹ The UN Rapporteur, as paraphrased in the Issue Paper published by the Commissioner for Human Rights, *Human Rights and Intersex People* (Council of Europe, 2017), 31.

³² The problems of lacking matching legal documents are mentioned in: Council of Europe, *Protecting Human Rights of Transgender Persons* (Council of Europe, 2015), 5.

the legal system, if such change is possible at all. Often psychiatric verification of the underlying motivation and/or proof of medical treatments for this request is legally required, subjecting the transgender person to distressing uncertainty and lack of dignity, even when a person has already been living for a long time according to their gender identity. Non-binary transgender persons who seek legal recognition find themselves in an even more difficult situation in legal systems which only recognise the options of male/female.

Article 7 of the Convention on the Rights of the Child (CRC) provides for the right of children to be registered immediately after birth. Although this provision does not mention the attribution of sex/gender at birth, this is a widespread practice. Instead of abstraction from the body, it is determined and classified by medical professionals and legally institutionalised by state officials in two biological sexes with assumedly related genders. It is how the body is – medically, socially and legally – constructed, simplifying and inscribing sex/gender, and by whom this is done, that appears to be problematic for intersex and transgender persons.

We will explore two insights from human rights, with regard to the legal recognition, that are of importance to respect and protect bodies of transgender and intersex persons. Firstly, we examine the promising notions of self-determination and personal autonomy for enabling one to live an embodied life according to one's choice, strengthening positive freedom. Secondly, we consider these notions of self-determination and autonomy to be of limited importance as long as the negative liberty side of human rights that should restrict medical and legal classifications as such, is not taken into account more seriously.

4.2 PERSONAL AUTONOMY AND SELF-DETERMINATION

An ambitious interpretation of the right to self-determination, as well as dignity and freedom, with regard to legal recognition is formulated in Principle 3 of the Yogyakarta Principles (YP):³³

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

The YP as such are not binding human rights law, although they do play an important guiding role as soft law principles. Increasingly, international human rights authorities as well as national legal authorities refer to the right to self-determination of intersex and transgender persons with regard to legal recognition.³⁴ The European Court of Human Rights (ECtHR), for example, recognises in the application of the right to private life (Article 8 of the European Convention on Human Rights), the right to self-determination, of which the Court considers freedom to define one's gender identity as one of the most basic essentials.³⁵ The ECtHR does not meet the ambition of Principle 3 YP completely (yet). Nonetheless, in line with Principle 3

³³ The Yogyakarta Principles were formulated in 2006 by a distinguished group of international human rights experts, and supplemented in 2017 with ten Additional Principles and State Obligations (Yogyakarta Principles Plus 10) <<http://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/>> (last visited 9 October 2023).

³⁴ See for an overview: the Third Party Intervention by the Human Rights Centre at Ghent University in collaboration with the Equality Law Clinic at the Université Libre de Bruxelles in the case *Y v France* App. no. 76888/17, Section 2.2, 31 January 2023: 'Growing recognition of legal sex/gender registration as a matter of personal autonomy and self-determination'. See also: P Cannoot, 'The right to personal autonomy regarding sex (characteristics), gender (identity and/or expression) and sexual orientation: towards an inclusive legal system' (PhD thesis, Ghent University, 2019).

³⁵ This was acknowledged by the ECtHR for the first time in 2003 (*Van Kück v Germany*, App. no. 35968/97 [2003] ECHR). See for later case law: Council of Europe/European Court of Human Rights, *Guide on case-law of the Convention: Rights of LGBTI persons* (Council of Europe, 2022), 21. In line with this right to private life is the accessibility or availability of gender reassignment surgery, although this right is not unconditional, as the state may regulate and supervise the (access to) surgery.

YP, the ECtHR has banned in 2017, in the landmark decision of *AP, Garçon and Nicot v France*, the requirement of sterilisation surgery (or a treatment with a very high probability of sterility) for legal recognition, as being a violation of the right to private life of transgender persons.³⁶ This came as a relief for all those transgender persons who were faced with the ‘impossible dilemma’ of undergoing unwanted, physically highly invasive treatments in order to receive legal recognition.

Other requirements for legal recognition that were not banned by the ECtHR, are still quite stigmatizing and intrusive for transgender persons. Think, for example, of a transgender person who already knows at a young age that her gender identity is female, although her assigned gender is male and who, after repressing her gender identity for years, starts to live as a woman in her forties, having hormone treatment and genital reconstruction surgery. In order to qualify for the treatment, she will still – after all those years – have to prove through a psychiatric diagnosis the existence of a gender identity disorder – as if she is mentally ill. Or consider the required assessment by a medical expert that would entail an intimate genital examination, in order to validate the claim of a transgender person that she had undergone gender reassignment surgery abroad.³⁷ And still – different from Principle 3 YP – the requirement to divorce (or change into a civil partnership) in a legal system without same-sex marriages, is considered to be fair if a partner decides to transition after marriage.³⁸ These requirements illustrate that medical and legal disciplining of the body is currently still very present, and affects transgender persons’ lives in very intrusive ways.

Although the case law outlined above demonstrates that the right to private life is a useful instrument for the legal recognition of transgender persons, it is not always satisfactory for the self-determination of intersex persons and transgender persons. This has to do with the interpretation of the right to private life as entailing a *positive* obligation for the state to foresee in a procedure for legal gender recognition. Yet it leaves the matter of the appropriate means of implementing this obligation to the state’s margin of appreciation. The state is allowed to give priority to general interests, provided that these are fairly balanced against individual interests of intersex and transgender persons. This leaves room for several general – disciplining – interests like the protection of heterosexual marriage, the paternalism inherent in requesting a psychiatric diagnosis, and the ‘inalienability’, ‘consistency’ and ‘reliability’ and legal certainty of mandatory (binary) civil status registration. And in a recent – first – case of an intersex person who wanted to be registered outside the mandatory binary system, the ECtHR took into consideration that a judicial recognition of a ‘neutral’ gender would have far-reaching consequences for the rules of national law, constructed on the basis of two genders.³⁹ In this way, the positive obligation of the state to respect the freedom to define one’s own gender identity is of relative significance: it remains a ‘fair’ balancing act, instead of challenging the legitimacy of the legal construction of two genders as such.

4.3 NEGATIVE LIBERTY

From the above conclusion on the relative value of the state’s positive obligations, it appears that the protection of non-conforming bodies would profit from an approach which takes a negative obligation of the state (more) seriously.

A bright spot on the horizon of such a negative obligation is the previously mentioned landmark case of *AP, Garçon and Nicot v France* in 2017. In this case, the ECtHR banned treatments with a very high probability of sterility as a requirement for the legal recognition of a transgender person’s gender identity. The ECtHR indicated that transgender persons who do not want to undergo this type of surgery are confronted with ‘the choice’ to give up their right to respect for

³⁶ *AP, Garçon and Nicot v France*, App. nos. 79885/12, 52471/13 and 52596/13 [2017] ECHR, paras 126–135.

³⁷ In this procedural issues of proof there was a wide margin of appreciation for the state. See, *AP, Garçon and Nicot v France* (n 36), paras 141–142, 149–154.

³⁸ *Hämäläinen v Finland* App. no. 37359/09 [2014] ECHR, paras 69–89.

³⁹ The ECtHR accepted the argument that the multiple legislative amendments that would be necessary to accommodate a ‘neutral’ gender, were, in principle, not a matter for the judiciary. Press Release of the ECtHR 31 January 2023 in the case of *Y v France*, available at: ‘Press Release – The authorities’ refusal to replace the term “male” by the term “neutral” or “intersex” on the applicant’s birth certificate did not breach Article 8 of the Convention’ *European Court of Human Rights* (31 January 2023) <<https://hudoc.echr.coe.int/eng?i=003-7555188-10380613>> (last visited 29 March 2023).

their physical integrity as protected by Article 8 and also by Article 3 of the European Convention on Human Rights (ECHR), prohibiting torture.⁴⁰

A bleak spot is that the ECtHR has not yet been able to decide whether medical ‘normalisation’ proceedings for intersex children fall under the scope of the prohibition of torture (Article 3 ECHR), although it did state that a medical procedure and sterilisation without any therapeutic necessity and without the free and informed consent of the patient is, in principle, incompatible with freedom and human dignity.⁴¹ The UN Rapporteur on torture is more clear on this: non-consensual surgical intervention on intersex people is a form of torture. As such it is, firstly, against the prohibition of torture and other cruel, inhuman or degrading treatment and, secondly, against the right to physical integrity. Both rights impose a negative obligation on the state: it should refrain from infringements of these ‘bodily’ human rights itself and should prevent violations by citizens.⁴²

Thus, there is a trend to acknowledge the positive right to self-determination with regard to legal recognition of transgender persons, although the ECtHR has not recognised an obligation to create a third category, outside the binary. On the national level, there is more progress.⁴³ For transgender persons, their positive right to self-determination is strengthened with negative ‘bodily’ rights concerning torture and physical integrity. These negative obligations to respect the bodily rights of intersex children are not (yet) unequivocally acknowledged.

A negative obligation of the state with regard to legal sex/gender registration would strengthen sex/gender autonomy even more: instead of balancing public and private interests, burdening people who do not fit into the medical and state categories with everyday inconveniences, psychiatric or medical examinations, and risks of torturous surgery, the question of the legitimacy of state regulation of sex/gender identity fully comes under the spotlight. Thus, instead of allowing governments to freely assign (binary) sex/gender categories to their population, as long as they ensure that ‘mismatches’ do not unfairly (read: disproportionately) interfere with people’s right to respect for their private lives, the question becomes whether assigning sex/gender to the population as such constitutes a failure to respect private life (a violation of a negative obligation).⁴⁴ This more radical effort to allow for more diversity in our moral conceptualisations of the human body underlying human rights could normalise that diversity and strengthen each person’s self-defined gender identity – one of the most basic aspects of self-determination, dignity and freedom. An approach that starts with negative liberty, but is supplemented with positive liberties in order to meet bodily needs and vulnerabilities, could possibly respect and protect every body.

5 IN SEARCH OF INCLUSION AND EQUALITY: CRIMINALISATION OF SEX WORKERS’ ‘DANGEROUS’ BODIES IN PANDEMIC TIMES

Whereas the case in Section 4 has established the insight that governments may at times draw legal (bodily) boundaries where one may question whether this is legitimate, we now want to dive deeper into the question as to how such boundary drawing may affect individuals’ capabilities to effectively claim their human rights. In other words: how does state disciplining

⁴⁰ *AP, Garçon and Nicot v France* (n 36), para 131; *X and Y v Romania* App. nos. 2145/16 and 20607/16 [2021] ECHR, para 165.

⁴¹ The ECtHR did not decide on such a claim for admissibility reasons in *M v France* App. no. 42821/18 [2022] ECHR. See also: C Derave & H Ouhnaoui, ‘M. v. France: Recognising the existence of intersex persons, but not (yet) their bodily integrity’ (*Strasbourg Observers*, 14 February 2023) <<https://strasbourgobservers.com/2023/02/14/m-v-france-recognising-the-existence-of-intersex-persons-but-not-yet-their-bodily-integrity/>> (last visited 9 October 2023).

⁴² The UN Rapporteur, as mentioned in the Issue Paper (n 31), 31.

⁴³ See the website of ILGA-Europe for developments in this area in Germany, Malta, Iceland, Belgium and Greece. <<https://www.ilga-europe.org>> (last visited 9 October 2023). In the Netherlands for example, the judiciary has accepted legal recognition of adult non-binary transgender persons, considering self-determination more important than the reliability of state registration and using the statutory provision for intersex babies analogously. See, M van den Brink & J Tigchelaar, ‘Een sneeuwbal effect in het recht: hoe geboortegeslacht genderidentiteit m/v werd en uitdijt naar een x’ (2022) 41 *Tijdschrift voor Familie- en Jeugdrecht*, 196, 196.

⁴⁴ Compare C Quinan et al., ‘Framing gender identity registration amidst national and international developments: Introduction to “Bodies, identities, and gender regimes: Human rights and legal aspects of gender identity registration”’ (2020) 1(1) *International Journal of Gender, Sexuality and Law*, 1, 7.

of ‘deviant’ bodies (or bodily practices) concretely impact the realisation of the human rights of these concerned groups?

We will explore this through the case of Dutch sex workers; more particularly, we will look into their social exclusion during the COVID-19 pandemic. In this extraordinary period an increased appeal was made on government protection measures – in a health, financial, and social sense. The borders between who belongs to the national community and ‘deserves’ our protection and who does not, were therefore under severe pressure. What happened to sex workers in this period can be seen as a test case about what human rights can potentially mean for groups that are perceived as deviating from societal norms and risk social exclusion. Moreover, it can give insights into what barriers governments – intentionally or not – may put up through their disciplining and social sorting efforts, for groups trying to claim their human rights.

5.1 THE CONSTRUCTION OF ‘PROPER’ SEXUALITY

Sex work, and the sexuality of (female) sex workers, has been controlled and disciplined by governments throughout time and place. With sex traditionally being related to reproduction (and reproduction, in turn, to family property), the stakes were high as far as controlling (female) sexuality was concerned. In Europe, moral reform movements at the end of the 19th and beginning of the 20th century targeted prostitutes or ‘fallen’ women, who were seen as the opposite of ‘civilised’ wives and mothers. The proper, moral place of women was the private sphere, where they should take care of reproductive tasks. Sex workers were, thus, seen as out of place and immoral; they were (visibly) roaming around in the streets unchaperoned, and squandered their reproductive potential. This perception impacted on government regulatory approaches towards sex work – or prostitution, as it was commonly called.⁴⁵

The issue, moreover, has always been severely gendered: with the male sex drive traditionally being seen as ‘natural’, men who enjoy the services of a prostitute have not been severely frowned upon, nor socially sanctioned, for a long time. If anyone was to be blamed and punished for prostitution, it would be the prostitute herself, who lured men into vice.⁴⁶ Female prostitutes, thus, were approached by governments as ‘morally deviant’, and their bodies were treated as dangerous to the social order. Even if tolerated in a public space – after all, they were a ‘necessary evil’ – they were morally cast out, which is reflected in the, historically, highly resistant public stigma. Notwithstanding changing political landscapes ever since, and irrespective of a great diversity of prostitution policy regimes worldwide, this stigma is still very much alive and widespread. Female sex workers’ bodies have been, and still are associated with dirt, danger and amorality, and sex workers are often perceived of as ‘unworthy’ of provisions and services for which other citizens qualify.⁴⁷ The latest reflection of this stigmatizing trope, and of government disciplinary tactics to address the supposed danger, is the approach of sex workers as ‘infectious’ by the Dutch government during the Covid-19 pandemic.⁴⁸

5.2 STIGMA AND THE VALUE OF A DIGNIFIED LIFE: SEX WORKERS’ BODIES AS ‘INFECTIOUS’

When the COVID-19 pandemic hit Dutch society in 2020, leading in March of that year to the first social distancing measures, sex workers in the Netherlands had to abandon their work for several months. Moreover, they did not qualify for government financial support schemes which ‘normal’ employees, or most self-employed people, could apply for. This caused severe economic, health and social stress among sex workers in the Netherlands. However, what many

⁴⁵ The words ‘sex worker’ and ‘prostitute’ reflect a polarization in public and academic debate. ‘Sex worker’ is used by those who see sex work primarily as work, and strive for sex workers’ equal rights with other workers. ‘Prostitute’ is used by those who find prostitution exploitative per se, regardless of the conditions, because of the gender inequality in patriarchal societies. We use ‘sex worker’ as we depart from the first point of view, except when referring to earlier days, when ‘sex worker’ as a word did not yet exist.

⁴⁶ See e.g. C Bernheimer, *Figures of Ill Repute: Representing Prostitution in Nineteenth-Century France* (Duke University Press, 1997).

⁴⁷ In the Netherlands, for example, sex workers still have difficulties opening bank accounts or getting mortgages. See also: B Oude Breuil, ‘Protecting Whom, Why, and from What? The Dutch Government’s Politics of Abjection of Sex Workers in Times of the COVID-19 Pandemic’ (2023) 24 *Human Rights Review*, 217, 217.

⁴⁸ This case is based on an earlier and more elaborate article on Dutch sex workers in pandemic times, see Oude Breuil (n 47).

sex workers found the most difficult aspect of this period of severe societal stress,⁴⁹ was the increase in public stigma. This was reflected in – and corroborated by – newspaper articles that appeared in the Dutch media soon after the lockdown started. The articles had headings such as ‘Over 150 sex workers advertise online with unsafe Corona practices’, ‘Many sex workers continue [their work], Corona or not’, and other, similar claims, thereby invoking the infamous stigma of sex workers as irresponsible, offering ‘unsafe’ sexual services to their clients.⁵⁰ They were, in sum, represented in the media as a source of contamination and a danger to public health.⁵¹ Although these media representations were nuanced to some degree in later articles, in which sex workers’ conditions of severe financial distress due to lack of government support were explained, the tone had been set.

The stigmatising media discourse was not countered by government discourse, rather the contrary: whereas the Dutch government relied on the responsibility, togetherness, solidarity and sensibility of ‘ordinary’ citizens in reaction to the ‘intelligent lockdown’, sex workers were excluded in several ways from this strategy. While most sectors were asked to prepare their own social distancing plans in preparation for the reopening of their businesses, for example, plans that were developed within the sex work sector were ignored. Sex workers were not invited to discuss the consequences of government policies vis-à-vis sex workers, and an urgent letter by a national sex work support platform, indicating the dire circumstances in which sex workers now lived and asking for a government reaction, was left unanswered by Dutch politicians for two months.⁵² In sum, sex workers were not approached as individuals with autonomy and agency, able to take responsible decisions during the pandemic; rather, they were objectified, stigmatised and paternalised into non-autonomous individuals without intrinsic value.

The increased stigmatisation and social exclusion of sex workers because of their work – a job that is, we emphasise, *legal* in the Netherlands – and associating them with (risks of) diseases, lack of hygiene, and irresponsible behaviour in times of a pandemic, erodes the fundamental value of a dignified life. According to this value, human beings should be treated as persons, with absolute value. This is severely impacted when sex workers are reduced to infectious bodies, social health risks, or seen as irresponsible and outcast citizens.

5.3 THE RIGHT TO WORK AND INCOME, AND THE RIGHT TO NOT BE DISCRIMINATED AGAINST

The increased stigma that befell sex work(ers) during the COVID-19 pandemic, was accompanied by government measures and (in)actions which prevented sex workers from exercising their right to work and income. Lockdown measures, of course, restricted many people from exercising their right to private life, which encompasses the right to form and develop relationships with other human beings, including relationships of a professional or business nature.⁵³ The protection of health could justify these restrictive measures. Those occupations known as ‘contact occupations’⁵⁴ were among the ones hit hardest, as the lockdown of their businesses lasted the longest.

⁴⁹ B Oude Breuil, “‘The need is bigger than the fear’; Skin hunger, sex work and stigma in quarantine times” in D Siegel & R Alexander (eds.) *Notes From Isolation: Global Criminological Perspectives on Coronavirus* (Eleven International Publishing, 2021), 265.

⁵⁰ J Vermaen ‘Ruim 150 sekswerkers adverteren online met onveilige corona-adviezen’ *Pointer* (1 April 2020) <www.pointer.kro-ncrv.nl/artikelen/ruim-150-sekswerkers-adverteren-online-met-onveilige-corona-adviezen> (last visited 1 April 2023); ‘Veel sekswerkers gaan door, corona of niet’ *Volkskrant* (01 April 2020) <<https://www.volkskrant.nl/nieuws-achtergrond/veel-sekswerkers-gaan-door-corona-of-niet~bf7c68f5/>> (last visited 1 April 2023); ‘Sekswerkers massaal beboet in Limburg’ *De Telegraaf* (29 May 2020) <<https://www.telegraaf.nl/nieuws/429998726/sekswerkers-massaal-beboet-in-limburg>> (last visited 9 October 2023).

⁵¹ The association of sex workers with illnesses and unhygienic circumstances is not new. For example, in 19th century France, when cholera and syphilis epidemics hit French society, sex workers were the first to be perceived as dangerous to public health, threatening to contaminate bourgeois citizens. They were submitted to repressive government health measures, such as forced health checks or being confined in ‘maisons closes’ that functioned under police supervision. See: A Corbin, ‘Commercial Sexuality in Nineteenth-Century France: A System of Images and Regulations’ (1986) 14 *Representations* 209, 209; Bernheimer (n 46), 38.

⁵² Oude Breuil (n 47).

⁵³ See, for example, *Antović and Mirković v Montenegro* App. no. 70838/13 [2017] ECHR, para 42.

⁵⁴ ‘Contact occupations’ were defined as occupations in which close interpersonal contact is inevitable, like hairdressing, nail styling, physiotherapy et cetera. They were the first to undergo a full lockdown during the pandemic.

However, whereas employers and the self-employed in other economic sectors could count on government financial support for the duration of this lockdown, sex workers mostly could not. They could not benefit from the funds which the Dutch government made available for employers to be able to continue paying their employees who were now inactive at home, nor did they qualify for the support which the government offered to the self-employed.⁵⁵ This left most sex workers in conditions of severe economic deprivation. When sex worker organisations lobbied to address their unjust exclusion, political representatives refused to redress the situation.⁵⁶ Moreover, sex workers were not allowed to reopen their businesses when all other contact occupations were, whilst political leaders were unable, or unwilling, to explain why. Sex workers were thus deprived of their right to private life and work and income, and they received unequal treatment compared to other people having contact occupations.

Unequal treatment, according to the case law of the ECtHR on Article 14 ECHR, is only allowed when there is a legitimate aim and when the means are reasonably proportionate to the aim pursued. There was, definitely, a legitimate aim to the lockdown, namely preventing a pandemic virus from spreading any further. However, it is unclear why sex workers, in the furtherance of that goal, should be treated differently from other contact occupations. How was their work more contagious than that of, for example, a hairdresser, physiotherapist or dentist? In a press conference, Prime Minister Rutte tried to explain it as follows, when asked ‘what is the difference between a hairdresser and a sex worker?’:

With sex workers you deal with, of course, the special nature of that occupation, uh ... namely that you are very near one another uh ... with also all the risks of uh ... transmission of the virus ... because of the nature of the work.⁵⁷

Prime Minister Rutte, here, could not provide any substantial evidence that sex work created additional risks to contamination – nor did he try. His reference to the ‘nature’ of the occupation – without further explanation of that ‘nature’ – refers at best to underlying presumptions about the work sex workers do, how bodies figure in that work, and how this implies imminent dangers and risks. These presumptions are unverified here or are based on insufficient understanding of the profession. At worst, it refers to a stigma that is convincing enough to *not feel a need* to look deeper into the issue. In other words: moral judgments have taken the lead here in interpreting sex work as more ‘risky’, ‘dangerous’ and ‘infectious’ than other contact occupations, and in believing that sex workers are unable to sensibly address that risk. General assumptions and prevailing social perceptions thus played a crucial role in the unequal treatment. Such empirically unsubstantiated arguments are insufficient justifications for a difference in treatment.⁵⁸

Besides the unequal treatment being unsubstantiated and, thus, unlawful, it is also very much the question whether the treatment which sex workers received was *proportionate*: not only were sex workers denied government support, they also suffered increased repressive law enforcement interventions following the lockdown. Sex workers reported frequent police controls at their premises (to where some had moved their sex work activities as clubs and escort bureaus were in lockdown), risking heavy fines on top of their financially dire circumstances. Sex workers trying to work together from their homes, in order to earn some income and be more safe, were arrested for ‘running an illegal brothel’.⁵⁹ Moreover, local authorities in some big cities, like Amsterdam and Rotterdam, ‘bothered’ sex workers with SMS messages stipulating that they were not allowed to work, while two mayors even investigated

⁵⁵ This has been more extensively explained by Oude Breuil (n 47).

⁵⁶ See for the reaction of the State Secretary of the Ministry of Justice and Security to questions asked about this situation: Kamervragen (Aanhangsel) 2019–2020 no. 2416 (10 April 2020) <<https://zoek.officielebekendmakingen.nl/ah-tk-20192020-2416.html>> (last visited 1 April 2023).

⁵⁷ Prime Minister Rutte, press conference 23 February 2021 <<https://www.gids.tv/video/308675/video-dit-is-het-belangrijkste-verschil-tussen-een-kapper-en-sekswerker-volgens-mark-rutte>> (last visited 1 April 2023).

⁵⁸ Compare *Konstantin Markin v Russia* App. no. 30078/06 [2012], para 127, where such stereotypes on the basis of sex played a role. In the case of sex workers, generalisations on sex/gender or the status of sex workers appear to play a role.

⁵⁹ See: ‘Illegaal bordeel opgerold in Haagse Schilderswijk’ *Omroep West* (10 April 2020) <www.omroepwest.nl/nieuws/4029704/Illegaal-bordeel-opgerold-in-Haagse-Schilderswijk> (last visited 1 April 2023).

the possibility of entirely closing down websites where sex workers advertised.⁶⁰ We conclude that the government measures – in their totality – were disproportionate, and added additional (and unnecessary) stress to sex workers’ lives. The measures undermined sex workers in their right not to be discriminated against with regard to their exercise of the right to private life and in their access to employment and government support. In this way, sex workers’ autonomy, more than that of other workers, was heavily curtailed and their negative and positive liberty limited.

Although sex work is a ‘normal, legal job’ in the Netherlands and sex workers pay taxes over their earnings – and as such should have been eligible for the provisions put in place for other tax-paying employees – they were perceived as undeserving of such support. This had everything to do, we argue, with sex workers’ stigmatised bodies, which in pandemic times were seen as ‘infectious’, dangerous and risky, and which were discursively used as a legitimization for an unequal treatment. This embodied inequality led to precarious living conditions and social isolation. It prevented sex workers from claiming their economic and social rights effectively, as living conditions now forced them to focus, first and foremost, on their daily survival instead of gaining a political voice. The government’s social exclusionist (in)actions, thus, besides being unlawful, moreover had a direct (physical and mental) impact on sex workers’ possibilities to fight these unjust interventions. In addition, the persistent and increased stigma caused them to be perceived as *non-deserving* of government protection. In sum, the government’s reaction towards this (supposedly) dangerous contact occupation and sex workers’ (perceived) ‘infectious’ bodies prevented sex workers from exercising their autonomy and their right to work and income.

6 CONCLUDING NOTES ON THE BODY IN HUMAN RIGHTS

In this article, we have discussed what insights can be gained from ‘embodying’ (our thinking on) human rights, and how these rights affect every body, in all diversity. Human rights, we have argued in Section 2, have an underlying moral conception of what it means to be human, which originally departed from a universally intended – and thus, standardised – human being. This human being had an (implicit) body that appeared as vulnerable to human rights violations only in extraordinary situations. Apart from such situations, the human body was considered as ‘in control’ of an autonomous person, capable of making rational decisions, and limited only by their ‘natural outer limits’ of flesh and blood. These ‘outer limits’ were assumed to be the same for everyone.⁶¹ With some exaggeration, one could say that the human being in the first stages of the drafting of human rights consisted mainly of a (thinking) head.

This human being behind human rights turns out to be a *situated* human being: it reflects the world view, our place in it, and the power constellations at the time of the drafting of these rights, and may be at odds when conditions and insights change. From the emancipatory 1960s onwards, we see how feminist and (somewhat later) postmodernist scholars and authors writing about disability and vulnerability criticise this underlying human being as *biased*, namely (implicitly) white, masculine, adult, abled, heterosexual et cetera. It departed, they claimed, from a ‘normalised’ body that was rational, autonomous, masculine and that could take care of itself under normal circumstances. This criticism brought the rest of our human bodies – genitalia, breasts, hormones et cetera – into sharp focus and revealed that these bodies, although all vulnerable, are not universally the same. Being diverse, they need different protections – and thus different (emphases in) rights. The conceptualised and ‘normalised’ human body, under the influence of this critique, was complemented with ‘different’ (or deviant), vulnerable bodies that needed specific rights.

Governments, throughout time, have filled in the abstracted, human rights’ conceptualisation of the human being with ideas of their own on what an ‘acceptable’ body is, and which bodies are ‘out of order’ in society. Governments put forward public interests to justify embodied inequality; they set limits on whose bodies deserve respect, and who is granted governmental facilities

⁶⁰ See: ‘Burgemeester Aboutaleb: “Haal sites thuisseks uit de lucht”’ *De Telegraaf* (10 April 2020) <<https://www.telegraaf.nl/nieuws/1799234313/haal-sites-thuisseks-uit-de-lucht>> (last visited 1 April 2023).

⁶¹ Compare Donnelly’s conception of human nature, as discussed in the Introduction to this article.

and support. Governmental social sorting practices – basically determining who does and who does not belong to the national community and is entitled to its protection and provisions – are materialised into administrative and often redistributive rules and regulations. Think, for example, of sex/gender-binary registration, rules concerning whose gender-confirming health care is (not) financially supported, or administrative hurdles for bodies seen as undeserving of (financial and social) support and protection in times of societal stress. These practices have severe everyday consequences for people subjected to them, and impact directly on their bodies. They affect those with bodies considered ‘deviant’ in their *having* rights and/or in their ability to effectively *claim* these rights, and in fighting the government when it is impeding these rights. By impacting negatively on people’s ability to exert autonomy, forcing them into everyday (social) survival as a first priority, these government practices reduce people’s capacities to effectively claim their human rights.

Whilst the concept of autonomy has been severely criticised by human rights scholars, we conclude from our findings that this should not lead to downplaying autonomy as an essential aspect of being human, and as a crucial human rights value. Autonomy in its original, abstracted interpretation can, indeed, hide people’s bodily existence, prioritise the mind over the body and render the body under the control of the mind. But the cases of transgender and intersex persons on the one hand, and sex workers on the other hand, re-emphasise autonomy – that is: *embodied* autonomy – as crucial to being human. It is a vehicle for self-actualisation and can potentially liberate people from (state) practices that unjustly or disproportionately impact on the body, or on people’s intimate lives.

From our discussion we conclude that the starting point should be that the state should bring forward a legitimate aim to decide and regulate which bodies are to be considered ‘normal’ bodies, worthy of respect, protection or support, or which sexual practices are determined healthy, good, safe and acceptable. It should not be up to a state but to the individual to decide how to live their sexed and gendered embodied life, entailing a negative obligation of the state to assign one’s sex/gender or to decide what ‘healthy’ sex should look like. The state should be neutral in this respect. Not in order to hide bodies as if they are not relevant, but neutral in the sense of not assigning or categorising persons (or their sex(ed) lives) without their consent. When these negative liberties are recognised, positive obligations of the state could further facilitate these embodied lives in a fair balance between the highly private interest of bodily autonomy and public interests.

Thus the core notion of autonomy, criticised by feminists and postmodernists for not taking bodies seriously, is of utmost importance for intersex and transgender persons, as well as for sex workers, *in order to be taken seriously*. We need autonomy, precisely *because* we are interdependent and vulnerable beings; the self-defined gender, the control over one’s own body and sexuality, that are expressed in the core human rights notions of autonomy and self-determination, are crucial for defending oneself against government interference with the body. This interference can amount to infringements of two pivotal (interrelated) ‘bodily’ human rights that are highly relevant for intersex and transgender persons: the absolute prohibition of torture and the right to physical integrity. These bodily rights offer protection when their bodies are considered extraordinary and in need of being normalised – even non-consensually – by others, like parents, doctors and the state. With regard to sex workers, recognition of their autonomy can help to counterbalance existing stigma and accompanying infringements of their right to a dignified life. An emphasis on their right to autonomy could redress government paternalism which they receive as a result of their (sexualised) bodies being conceptualised as ‘dirty’, ‘infectious’, ‘dangerous’, and ‘unworthy’ of support and protection in times of severe societal stress.

Although positive rights to respect private life are very relevant to intersex and transgender persons as well as to sex workers, the cases we have discussed in this article have emphasised the paramount importance of the *negative obligations* of states: the right not to be discriminated against, the right not to be tortured, and the right to self-determination. Conditions that should limit embodied inequality – namely safeguarding that the unequal treatment is justified and proportional – were shown to be of utmost importance to prevent sex workers from becoming morally outcast and socially isolated, the sheer opposite of a dignified life.

What this exploration into the importance of ‘the body’ in (studying) human rights has taught us, above all, is that human bodies are natural and ‘fixed’ on the one hand, but also changeable and makeable on the other hand – and so are our social constructions of them. Human rights being social constructs in themselves – they are, after all, the result of human practices like debates, negotiations, claims and court decisions with cultural norms and power relations impacting on the outcome – means that in studying human rights we should take into account that the conceptualisation of ‘the’ embodied human is in a constant state of flux. We therefore maintain that reflections on the moral conceptualisations of the human body, the in/exclusivity of resulting human rights for ‘deviant’ bodies, and the empirical impact of embodied (in) equality should be a continuous and primary concern in our scholarly thinking on human rights.

COMPETING INTERESTS

The authors have no competing interests to declare.

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