

# Legal Gender Recognition

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A review of the legislation in Malta and Romania -  
as EU Member States



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## Abstract

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This thesis project focuses on legal gender recognition in the context of Malta and Romania as European Union's Member States. Moreover, the project offers a deeper insight into the legal gender recognition situation within the European Union, provides information about the situation of transgender and intersex people in Europe, along with their rights, and explains how the Union is involved in providing a more equal environment for them. Besides, it also gives an insight of the Maltese and Romanian situation concerning legal gender recognition, since their accession to the EU, and how the Europeanization process has or still impacts their related legislation.

Filtering, and analyzing it carefully, the legislative documents of the two cases, Malta and Romania, leads to the conclusion that while both states are EU Members since 2004, respectively 2007, legal gender recognition legislation is comparable; but it can be argued that the history of the two states has had an effect in shaping it, just as the cultural and social aspects have.

Withal, it can be argued that opening up to the process of Europeanization depends on a case-by-case basis. Some countries are more open to change, globalization and uniformity, while others are more rigid, but the reasons for such things can oscillate as well between different aspects (culture, economy, history etc.)

*Keywords:* legal gender recognition, gender identity, European Union, Malta, Romania, transgender, LGBTI, non-binary gender, Council of Europe

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## Abbreviations

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CDDH: Steering Committee of Human Rights of the Council of Europe

CoE: Council of Europe

EU: European Union

EC: European Commission

ECRI: European Commission against Racism

ECtHR: European Court of Human Rights

ECPI: Euroregional Center for Public Initiatives

EP: European Parliament

GI: Gender Identity

GID: Gender Identity Disorder

ILGA-Europe: International Lesbian, Gay, Bisexual, Trans and Intersex Association in Europe

LGBTI: Lesbian, Gay, Bisexual, Transsexual/Transgender, Intersex

NB: Non-binary

SSU: Same-Sex Union

TEU: Treaty on European Union

TGEU: Transgender Europe

ToA: Treaty of Amsterdam

UN: United Nations

WPATH: World Professional Association for Transgender Health

## Introduction

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*“Homophobia is a human made construct, fed by political, religious, legal and even pseudo-medical justification.”*

- Volker Turk in Johnson T., 2016:154

Social identity theory tells us that from all times, people liked to classify themselves according to social categories, like religious affiliation, status, organizational membership, gender and others. These social classifications usually serve for defining people around us, but also to give individuals a personal identity, as they view themselves (Ashforth & Mael, 1989). When it comes to gender for example, Western culture has divided this term into two poles: male and female; even though this is based on someone's physicality. Despite these two poles, according to many studies, there are people that identify themselves outside of this binary (Healey, 2014), as it will be seen in the next chapters.

*'Transsexual'* was firstly used in 1923 by sexologist Magnus Hirschfeld who was studying about homosexuality, cross-dressing and cross-gender, and who was wishing to normalize homosexuality (Cannoot, 2019).

*“The transsexual phenomenon”* (1966) of Harry Benjamin is a work that is count as the basis of today's gender nonconformity issues. The author believed that a transsexual's body must match that person's gender identity, using medical treatments or sex reassignment surgeries, rather than the too-used psychotherapy. Benjamin's view is that medical treatments should only be applied to “true” transsexuals, which are only correctly diagnosed by specialized psychiatrists. Hence, that was the starting point for transsexuality to be seen as pathological. So the medical approach, which has been in place since 1960, has been the way to deal with the incongruity between the biological sex of a person and their gender, thus offering the opportunity to shift from 'man' to 'woman' and vice versa (Benjamin et al., 1966).

Transgender issues have made their way into mainstream media in the recent years. Past decade showed that, both nationally and internationally, matters such as transgender rights and gender nonconformity have occupied high positions on political agendas as legal problems and violations of human rights. In some countries all over the globe, laws have given importance to the cases where transsexual people desired for legal and physical changes of their gender and sex, offering legal accommodation to them, that for some people concluded on their gender identity being brought to the real light. But in many other countries, such changes are not possible, and are hampered by some

psycho-medical requirements, that can approve if gender dysphoria or transsexuality exists, so it can move on to sex reassignment treatment or compulsory sterilization, which is also known as *'legal pathologization of gender nonconformity and trans identities'* (Cannoot, 2019:15).

Although this pathologization has long been criticized, the option to exclude it has been ignored, and over the past decade it has been demonstrated on numerous occasions that compliance with psycho-medical requirements is a violation of human rights, to personal autonomy and / or body integrity (Cannoot, 2019).

Before being changed to 'gender identity disorder' in 1994, transsexuality was included in the Diagnostic and Statistical Manual (DSM) of Mental Disorders of the American Psychiatric Association back in 1980. The last version of this manual, DSM-5, still considers as pathological, situations in which a person's gender identity does not correlate with their sex assigned at birth. To be mentioned that in DSM-4 there was a shift from 'gender identity disorder' to 'gender dysphoria', just so it could be clear that gender nonconformity it is not in fact a mental disorder, while 'gender dysphoria' means "*clinically significant distress associated with the condition of gender incongruence*", which is transsexuality (Cannoot, 2019:17). However, legal gender recognition offers the possibility, for people that do not identify themselves as the gender assigned at birth, to have their real gender identity reflected on their official documents (Köhler et al., 2013).

It is not new to say that trans people face daily problems (boarding on an airplane, applying for jobs etc.) because of their official documents that do not show who they really are, and all this may sometimes lead to harassments, unfounded suspicion and even violence towards them (Köhler et al., 2013).

The whole idea behind gender-recognition procedures is to give legal recognition to trans people for expressing their true gender. Besides being an administrative act, gender recognition can also give the opportunity for trans people to dignity and respect, by participating fully in the daily society's activities and life (Council of Europe, 2015a).

If we take a close look at European Union's context, we find that the legislation is quite 'friendly' when it comes to legal gender recognition. In one document about the standards on Combating Discrimination on Grounds of Sexual Orientation or Gender Identity, the Council of Europe is guiding its Member States to "*take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way*" (Council of Europe, 2011:12). Quick meaning that the time between the moment of application and



the moment of being granted recognition should be as short as possible, as the extension of the decision period may suggest a violation of that person's right to privacy. Transparent meaning that implementing the law should be very clear, describing exactly how name change is possible and how the sex of that person is being recorded. And accessible meaning that procedures of legal gender recognition should be ensured to all transgender people that are in seek of it, despite medical condition, age, status etc. (Köhler et al., 2013).

Moreover, since the European Union is somehow trying to unify the Member States, by imposing similar norms and policies, only some states are relying on the union's demands and adopting its policies / norms. An example would be the situation of legal gender recognition in the Member States of the EU. The rules for applying this procedure differs in quite large proportions when it comes to comparisons between certain countries, such as Malta and Romania. According to ILGA-Europe's analysis<sup>1</sup>, Malta ranks first among EU Member States in the context of legal gender recognition and bodily integrity, with 99.25% in favor of respecting human rights and full equality, while Romania is ranked 23rd, with a percentage of 17.50%.

Thus, taking into account the fact that both countries have passed the Europeanization process preceded by the accession to the Union and are still subject to a post-accession Europeanization, curiosity arises from the fact that their legislation in the field of LGR is different, as well as the statistics on discrimination, although they have agreed on the European rules in this regard. Moreover, these countries have joined the EU at different times of the enlargement processes, which have undergone legislative changes for LGBTI<sup>2</sup> rights, as it will be described later in this paper.

Thus, legal gender recognition is a quite complex legal aspect in today's European Union, considering its diversified culture, that can be understood through a deeper insight into the subject. While explaining the social, cultural and legal framework of legal gender recognition through chronological and descriptive points of view for each Member State would be hard and extensive, the author chooses to focus on two examples: Malta and Romania. Also, considering the short arguments presented above, which will further be described within this project, the research question is therefore:

***How is legal gender recognition shaped in countries such as Malta and Romania as EU Member States, considering the European standards set after the fifth enlargement period?***

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<sup>1</sup> Available on <https://rainbow-europe.org/country-ranking#eu>;

<sup>2</sup> The LGBT abbreviation is commonly used. The LGBTI abbreviation will be used in this project, since the 'I' (which stands for 'intersex') is also addressed along the LGR issue;

In order to be able to take a closer look at the issues chosen in this project, it is essential to make sure we know what gender identity, non-binary gender and legal gender recognition are, so the following subchapters will provide a presentation of the three terms with their common and international meanings.

## Gender identity

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*“Gender is a quintessential element of human identity.”*

- Egan & Perry, 2001:451

It can be said that this topic has gained popularity among specialist studies along the years and it is quite hard to agree on a widely accepted and precise definition of what ‘gender identity’ means. In Mehta’s (2015) article can be found different definitions on gender identity, collected from various authors with extensive knowledge in the field, such as: *“how a person feels inside”* (Reisner et al. 2015 in Mehta 2015:490), *“how masculine or feminine a person is”* (Vantieghem et al. 2014 in Mehta, 2015:490), *“gender ... defined as ‘butch’ and ‘femme, erotic rolls, masculinity and femininity of behavior”* (Brewer and Hamilton, 2016 in Mehta, 2016:490), just to name a few. In contrast to all the definitions attributed to the term, many studies have also been found where no definition for ‘gender identity’ was given, because the authors considered that the meaning of the term is widely known (Drury et al. 2014; White and Gardner, 2009; Yoon and Kim, 2014).

Definitions mentioned by international organizations which advocate for the rights of LGBTI people are also important to be mentioned. The one formulated by TGEU was concise enough to be mentioned here, and states that gender identity refers to the identity assigned by each individual to one's own person, as it internally feels, and may or may not match the sex assigned at birth. This also includes one's personal sense of the body, that may suffer medical modifications for bodily appearance or functions (Köhler, 2016).

As stated by Hartung (2019) it is essential to understand the difference between the terms ‘sex’ and ‘gender’ and separate them when using it, because the explanations for the two terms can involve different forms. DSM-5 is the first edition of its kind to differentiate between the definitions of these two, as follows: *“sex differences are variations attributable to an individual’s reproductive organs and XX or XY chromosomal complement. Gender differences are variations that result from biological sex as well as an individual’s self-representation that includes the psychological,*

*behavioral, and social consequences of one's perceived gender*" (APA, 2013 in Hartung, 2019:391). Although the two terms do not have the same meaning, they have been used with interchangeable meanings in sociological sciences and their research (Westbrook & Saperstein, 2015 in Hartung, 2019). For example, psychopathological research is hampered by the imprecise use of the two terms, because there is the impulse to use the term 'sex' only in the context of sexual intercourse, and the term 'gender' in the context in which a person is referred to as a man or a woman (Caplan & Caplan, 2009 in Hartung, 2019). In other words, the lack of correctly assigned definitions differentiating biological sex (XX, XY or intersex) from gender identity (male, female, transgender or gender fluid) is responsible for impediments to psychopathological research (Hartung, 2019), because linking gender to the biological aspect can suggest the fact that gender is a rigid matter of a person's identity (Charlesworth, 2016).

The author of the project finds it important to mention that even UN, in the way of promoting human rights, as a supranational power, has brought up distinctions between the two concepts, 'sex' and 'gender', following some feminist knowledge defined 'sex' as "*a matter of biology*" and 'gender' as "*the constructed meaning of sex and the designation of social roles*" (Charlesworth, 2016:137). Otherwise, the International Criminal Court offers a definition of 'gender' that makes reference to the social, saying that it is "*the two sexes, male and female, within the context of society*" (Charlesworth, 2016:138). This definition is not linked to sex, but according to it, in social context, gender is binary.

In her article, Mehta (2015) is also talking about what Wood and Eagly (2015) have done when trying to better shape the definition of gender identity, and that is, they identified two traditions for it: one is identity which is based in the feminine or masculine traits, and the other is gender self-categorization. The research on gender-typed personality attributes have made people analyze their identity by using masculine (e.g. strong, violent) or feminine traits (e.g. gentle, caring). The approach of the two authors is based on the assumption that femininity and masculinity are kept stable over time and "*they are irresponsive to the context*" (Smith, 1999). But some personality psychologist have been skeptical about the stability of traits over time, because they think that these traits vary depending on contextual factors (Fleeson 2004 in Mehta, 2015), and if this is true, for a person's behaviour to be influenced by context or situations, then it means that their behaviour would not be consistent over time and place (Fleeson 2004; Funder 2006 in Mehta 2015). And this would cause for the general traits of a person to lose their significance and utility at the same time (Fleeson 2004 in Mehta 2015).

On the other hand, the second tradition considered by Wood and Eagly (2015) is gender self-categorization, or as they call it “*gender-self concept*”. The two authors describe the self-categorization of gender as “*the descriptive or prescriptive categorization of oneself as female or male, along with the importance of this categorization for one’s self-definition*” (Wood and Eagly 2015 in Mehta, 2015:493), and this is different from the other type of identification presented in the lines above because the person gets to self-label his/hers gender identity and not answer to attributes selected by the researcher’s belief (Wood and Eagly, 2015).

To end this subchapter by summarizing it, it is worth mentioning how Malta is defining gender identity in its legislation. The Gender Identity, Gender Expression and Sex Characteristics Act of 2015 define gender identity as follows: “*gender identity’ refers to each person’s internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, a modification of bodily appearance and/or functions by medical, surgical or other means) and other expressions of gender, including one’s name, dress, speech and mannerisms*” (Article 2). Of course, same would go for the case of Romania, but it seems that this legislation does not make use of what gender identity is.

It can be noticed that the majority of studies, including the ones enumerated above, refer to gender as binary, namely male and female, and studies that speak of non-binary gender are an insignificant number.

## Non-binary gender: historical overview

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*“Non-binary genders ask us to believe in the possibility that some people have the capacity to simply tell us who they are”*

- Richards et al., 2017:288

This subchapter will provide a historical overview of the non-binary gender, precisely because, at a common sense, gender is believed to be known as binary only, male and female.

Most commonly we think about genderqueer or non-binary gender people, as people that are not male or female, but actually, according to Richards et al. (2017) things are more complicated than that. Usually, the two terms make reference to a person’s gender identity, but not to their physicality assigned at birth. However, intersex people are not excluded, nor people that have a disorder in sexual development and identify themselves according to this. Indifferent of their sex assigned at birth, there

are different types of non-binary people, like “*people who identify as a single fixed gender position other than male or female*”, gender fluid people, people with no gender and people who disagree with the idea of gender (Richards et al. 2017:5).

More briefly presented, the term ‘non-binary’ is used with the intent to describe the people’s gender identities that fall outside the gender binaries formulated within society. Non-binary genders are “*a complex series of identities*” and cannot be described as singular (Clucas and Whittle, 2017).

As mentioned in “*Genderqueer and Non-binary Genders*” (2017), it is usually very difficult to measure the population that is non-binary gender. To give one example, an analysis of the literature in UK covering this area says that non-binary is “*an umbrella term for any gender (or lack of gender) that would not be adequately represented by an either/or choice between ‘man’ or ‘woman’*” (Titman, 2014 in Richards et al., 2017:5).

In the following lines there will be shortly presented some historical examples on the fact that gender has not always been binary, like: Neapolitan femminielli, English mollies, Albanian sworn virgins and eunuchs.

Little known ‘femminielli’, are rooted in the Neapolitan culture. It is historically believed that the city of Naples was set as feminine and even in this patriarchal structure, men were allowed to experience the feminine side in the context of the gendered religious rituals (Zito, 2013 in Richards et al. 2017). Femminielli, even if assigned male at birth they were sharing some traits with the transgender female prototype (gender-affirming surgeries, accessing hormones or getting female names), and the only way to distinguish between them was through identity politics or certain cultural practices. While for women was not very common to wear trousers, and for men to play *tombola* (a game similar to bingo; it was believed that wearing trousers at a game would bring bad luck), the only way for the femminielli to get integrated into the society was if they were counted as a third gender. Some scholars argue that we do not find any femminielli left in the society today (Vincent and Manzano, 2017).

The term ‘molly’ goes back to the eighteenth century and was used to describe men who felt attracted to other men, and were engaged in gendered practices (this separated them from the rest of the men that were count as belonging to a third category). They had practices of marriage between mollies, taking female names or rituals of giving birth called ‘*lying-in*’ (Norton, 2009), that today has been cross-culturally perceived as ‘*couvade*’ (Klein, 1991 in Richards et al., 2017). The mollies were also suffering from ‘*social death*’ because of the stigma brought up from their dressing style and ‘*sinful perversion*’. Sub-cultural associations of men who have sex with men were created because

the mollies' gender, presentation and behaviors were excluded from the general population. The identity or experience of mollies cannot be summed up only to homosexuality or transgenderism, because they are also heterogenous and each had distinguishable characteristics (Vincent and Manzano, 2017).

From a historical point of view, gender's dependency on sexual orientation may suggest the idea that social interactions are of major importance in locating the individual as a subject of gender (Richards et al., 2017).

In the old Albanian tribes it was a cultural, social and financial blessing to have a son, because it was considered that sons can further carry the family's name and they can also inherit the land properties: *"families lacking a son would lose their property as their family name became extinct"* (Vincent and Manzano, 2017:16). Hence, in this desperate situation, such families were trying to avoid losing properties by socially constructing a son. This was happening either at birth or when an older son was "gone", which meant that after years, the biological woman, after being socialized according to her sex, rebuilds herself into a 'social men'. It is admitted that the practice of sworn virginity is almost nonexistent today (Grémaux, 1993).

As probably known, 'eunuchs' refers to castrated men. They are found in different cultures, performing different jobs. For example, looking back at the Ottoman Empire we can see that many of the male slaves were actually eunuchs, and in the Chinese and Roman circumstances, eunuchs were able to function as powerful civil helpers (Vincent and Manzano, 2017). But according to the old Byzantine society's definition on this term, it includes *"anyone who did not, as well as could not, produce children, including men who were born sterile, men who became sterile through illness, accident or birth defect, men who were lacking in sexual desire and men and women who embraced the celibate life of religious reasons"* (Ringrose, 1993), thus demonstrating that the current definition of the 'eunuch' is actually much broader than is acknowledged.

Moreover, it is questionable if eunuchs were actually men or not, but castration appeared as an objective to socially build positions for women or men who did not find their place in that society or were considered inappropriate. Despite the fact that the eunuchs were often perceived as lacking in power or courage, or without stoicism, they were found to be accepted and often even in positions of power. Going back to the Byzantine Empire, we find that the eunuchs were often educated people, which had specific functions within the imperial courts. The above presented example demonstrates the fact that it was common to believe that maleness is related to masculinity. This has been brought

to this form through many processes, and many of them are of cross-cultural significance (fertility, physicality, etc.), although they are of different importance (Vincent and Manzano, 2017).

These remarks demonstrate that throughout European history, gender has been passed through a multitude of different systems, and although many have been linked to stigma and discrimination, it is important to see how gender has varied and become brought up as “normal“ in many cases (Richards et al., 2017).

As of non-binary activism, it is believed that is not something new, and the roots of NB activism are in old trans, queer and bisexual movements and some forms of feminism. The authors say that is important to have intergenerational communication to keep such aspects as constant learning. Moreover, NB activism overlie the field research work, precisely to demonstrate that this activism is backed up by real evidence of the non-binary (Richards et al., 2017).

## Legal gender recognition

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Documents of identification are a basic and genuine need for everyone and must reflect one’s self. In the absence of such documents (ID-card, passport etc.) active participation in society can be slowed down (Köhler, 2016). Many people belonging to the trans community are facing discrimination, harassment, unfounded suspicion and sometimes even violence because of the gendered information in these documents (Köhler, 2013). It is not new for trans people to be accused of fraud and of using falsified documents, and all these facts are mostly leading to constant discomfort and humiliation (Köhler, 2016).

*“Gender identity is one of the most intimate aspects of private life.”*

- ECtHR, 2003

For most of the transgender people, not having identification documents matching their gender identity, true self, can be count as a lack of respect because their intimacy is being invaded, and their gender identity is put out in the public sphere constantly (Köhler, 2016).

As stated in one of the Transgender Europe’s (TGEU) documents, legal gender recognition is the official recognition of someone’s gender identity on official documents and public registries, and it includes a multitude of procedures that are undertaken so that gender markers and names can be

changed on documents. Unfortunately, these procedures are still limited for trans people in some of the European countries (Köhler, 2018).

To keep track on the LGBTI situation in Europe, ILGA-Europe publishes reviews<sup>3</sup> every year, which presents the most important changes on this matter. Thus, on their Rainbow-Europe page<sup>4</sup> they keep updated tables, indexes and ranks of the EU countries concerning LGBTI issues. To analyze the situation concerning legal gender recognition, on ILGA-Europe's Rainbow page it can found a table with several categories and criteria that countries need to tackle in order to reach LGR.

The following table is taken after ILGA-Europe's index on LGR and has been reduced to show only the current situation on Malta and Romania. It has also some aspects added from the 2019 TGEU index.

**Table 1.: Situation of LGR in Malta and Romania**

Criteria	Malta	Romania
<i>Existence of legal measures</i>	X	X
<i>Existence of administrative procedures</i>	X	X
<i>Name change</i>	X	X
<i>No age restrictions, name change</i>	X	X
<i>No Gender Identity Disorder diagnosis/psychological opinion required</i>	X	
<i>No compulsory medical intervention required</i>	X	
<i>No compulsory surgical intervention required</i>	X	
<i>No compulsory sterilisation required</i>	X	
<i>No compulsory divorce required</i>	X	
<i>No age restrictions</i>	X	

<sup>3</sup> Available on <https://www.ilga-europe.org/rainboweurope>;

<sup>4</sup> Available on <https://rainbow-europe.org>.



<i>Prohibition of medical intervention before child is able to informed consent (intersex)</i>	<b>x</b>	
<i>Self-determination*</i>	<b>x</b>	
<i>Gender non-binary recognition*</i>	<b>x</b>	

Source: <https://rainbow-europe.org/#1/8701/0> ;

\*As these criteria were not mentioned in ILGA-Europe’s index, they were added from the 2019 TGEU Index on LGR available on [https://tgeu.org/wp-content/uploads/2019/05/index\\_TGEU2019.pdf](https://tgeu.org/wp-content/uploads/2019/05/index_TGEU2019.pdf).

As it can be noted there is a big difference between the criteria tackled by the two countries, since an “x” is awarded when the country has met that specific criteria, legally speaking, mentioned in the table. The difference, which is set on the legal gender recognition framework, is all more surprising when noting that Malta fulfills all the legislative requirements in this regard. This difference, for an instance is one of the intriguing aspects that builds up for an **Analysis**.

### EU’s involvement in LGBTI issues

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*“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to [...] the protection of human rights.”*

- Art. 2 TEU, 2008

In the past decade, issues such as LGBTI and the rights of these people have been a controversial and outstanding subject on the international political scene. Keeping a record on this topic represents a strong instrument for the international advocacy groups, but at the same time it is also a matter for political disputes, both within and between states. Also, somehow being ‘gay-friendly’ has become like an emblem of what it implies to be European (Slootmaeckers et al., 2016).

As stated in Harwood’s (2015) paper, before the Treaty of Amsterdam (ToA), the EU had minimal involvement in the LGBTI matters, and the treaty and its provisions focused on discrimination of all kind, even the one based on sexual orientation. In 2000 a directive that compelled the Member States to ban discrimination in employment was launched (Employment Directive

2000/78/EC), which was like a starting point for the EU's Community Action Programme to Combat Discrimination, but it also put focus to amend the 1976 Equal Treatment Directive (for fighting gender identity discrimination) and to adopt the 2006 Gender Recast Directive (Directive 2006/54/EC). Also, in 2009 after the Lisbon Treaty came into force, the European Charter of Human Rights became mandatory for all its Member States, including the arrangements concerning sexual orientation discrimination (Harwood, 2015).

The short listing of directives and treaties from above can show that some of the EU's institutions were not sufficiently involved in such matters, compared to others. Moreover, in 1998 the European Parliament declared that it will refuse adherence to EU to any country that would violate the rights of the lesbians and the gays; this was after the EP adopted a resolution in 1994 for the rights of LGBTI people (Harwood, 2015).

Following this, the EP has released a set of resolutions with focus on the LGBTI community and their rights in the Member States, and in 2009 the EP requested recognition for same-sex partnerships, but only in 2014 it enforced all of this work through the Lunacek Report, that suggested a plan in the fight against homophobia and transphobia (Harwood, 2015).

*“The status of the LGBT community is a good litmus test for the status of human rights in society more broadly, precisely because it is such a vulnerable minority [...]”*

- Roth, 2014

In order to trace the evolution of LGBTI policies or mainly the legal situation on this matter within EU, Slootmaeckers et al. (2016) have analyzed it according to two interrelated categories: direct or indirect effects, and the authors are presenting them, as it follows, historically speaking. The indirect effects mentioned in Slootmaeckers et al. (2016) are:

- March 1991 - the Human Rights Democracy and Development Cooperation Policy was published. This policy aimed for including the post-communist countries in the Union, and was the first European development policy that, in the context of external relations, aimed for democracy and human rights;
- November 1993 - Treaty of Maastricht entered into force and TEU under Article J.1 codifies fundamental rights within Common Foreign and Security Policy. Signing of the Maastricht Treaty aimed for promoting, developing and consolidating of democracy, rule of law and respect for human rights and fundamental freedoms, through the external relations of the EU,

because at that time matters concerning LGBTI were not included in the EU's pledge to human rights;

- May 1999 - Treaty of Amsterdam entered into force and EC Treaty under Article 13 mentioned sexual orientation. The concept of fundamental rights within the EU was developed as a result of this treaty, and the union was offered legislative competences to fight for human rights and LGBTI rights as well. Article 13 was proposed for creating a legal basis for the EU to fight against discrimination of any kind, including sexual orientation;
- December 2000 - Charter of Fundamental Rights was adopted and Article 21(1) mentioned sexual orientation. EU adopted the Employment Directive (2000/78/EC Directive) and the Charter, both protecting sexual orientation as a basis of non-discrimination;
- December 2009 - the Lisbon Treaty entered into force that made the Charter of Fundamental Rights legally binding. Particularly, provision 8 of this treaty brought changes to Article 6 of the TEU, that applied only to the Member States that are implementing the EU legislation. This gave the Charter only a more symbolic value, because it endorses and reinforces the idea that the EU is a legitimate political actor;
- November 2010 - *Toolkit to Promote and Protect the Enjoyment of all Human Rights by LGBT people* was adopted. It was presented to the EU diplomats, with information on how to protect and promote the human rights of the LGBTI people, and had the purpose to guide the Member States capitals, embassies, EU institutions, delegations and others to properly react to violations brought to the rights of the LGTBI individuals;
- June 2013 - *Guidelines to Promote and Protect the Enjoyment of all Human Rights by LGBT people* was adopted. Because the Toolkit was not binding, it was expanded with a set of guidelines in 2013, for the EU delegations. The *Guidelines* aimed to give the EU institutions and its Member States directions “*to be used in contacts with third countries and with international and civil society organizations [...] in order to promote and protect the human rights of LGBTI persons within its external action*” (Council of the European Union, 2013:2). As of the direct effects presented in “*The Enlargement of EU and Gay Politics*” (2016), they

are:

- June 1993 - the Copenhagen Criteria and the conditionality principle was introduced. The Copenhagen European Council summit had some additions to the admission criteria for the candidate countries, such as, they had to “*have stable institutions guaranteeing democracy, rule of law and human rights (political conditions), have a functioning market economy*

(*economic conditions*), and accept established EU law and practices (*legal conditions*)” (Nenadović, 2012: 24). Although the Copenhagen Criteria did not mention LGBTI rights specifically, they made the LGBTI rights to be a scope for the accession process by introducing the requirement for the new countries to have to be part of the Council of Europe, therefore, the decriminalization of homosexuality became part of the enlargement conditions;

- November 2000 - Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation was adopted. This marked an important turning point in the matters concerning LGBTI rights within the enlargement process of the EU. It was the first document that directly prohibited discrimination based on sexual grounds and became one piece of the *acquis*, stating that every candidate country had to have legislation to protect the LGBTI people from discrimination on employment;
- October 2005 - there was a new negotiating framework for the Introduction of chapters 23 and 24. Chapter 23 that was covering judiciary and fundamental rights, gave the EU the chance to target specific critical areas, hence, fundamental rights became an essential part of the accession negotiations;
- October 2011 - a new enlargement strategy was set for the Introduction of the new approach for Chapter 23. After the negotiations for Croatia’s accession, the Commission amended Chapter 23 to build a new approach to it;
- October 2013 - a new enlargement strategy was set, where it was declared that LGBTI was a key priority in Chapter 23 of the *Enlargement Strategy and Main Challenges 2013-2014*, as the Commission calls for “*zero tolerance to homophobia, education and the proper handling of Pride parades*” (Slootmaeckers et al., 2016:26).

As it might be noted, LGBTI issues were not considered a priority in the EU 2004 and 2007 enlargement agendas, because of the lack of expertise, absence of standards and the heteronormativity among Member States, regarding this issue. But “talking the talk” was enough for the EU to give its consent about LGBTI matters. It is important to mention that ILGA-Europe had an influence on this, when it managed to reach some EU institutions, because they were not able to raise the LGBTI issues at a local stage (Slootmaeckers et al., 2016).

Today, it can be celebrated that the promotion of LGBTI rights are an important aspect of the EU enlargement and its foreign policy, but not only, because it is imperative for Member States to respect these rights as well.

## LGR: target legislation?

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This precise subchapter has the purpose to show how EU legislation for LGR is shaped, as a requirement for the Member States in the Europeanization process. Moreover, given that I have referred to the EU so far rather than to the CoE, in order to understand this passage, it should be mentioned that the Member States of the EU are also part of the CoE, along with other states. Besides, the European Union is often inspired by standards and criteria formulated by the CoE in its relations with other countries. So I will continue to talk about resolutions and legislative proposals put forward by the Council on gender identity issues in the EU, which have a great impact on the decisions taken within the European Union<sup>5</sup>.

Since it is believed that LGBTI rights are human rights (Mertus, 2007) it would be expected for the European Court of Human Rights to be involved in this issue. The Court has promulgated decisions concerning legal gender recognition in Europe. It established that States that refuse to engage in changing the gender on official documents of people who have undergone gender change, with the new one, are knowingly violating Article 8 of the European Convention on Human Rights (ECHR) which preserves respect for the right to family and private life. As for the Council of Europe Member States, it is known that most of them do not have procedures for legal gender recognition for trans people that are in seek of it (Council of Europe, 2015a).

In order to better this situation, the Council of Europe adopted Recommendation CM/Rec(2010) 5 of the Committee of Ministers to Member States back in 2010, that aimed for countering discrimination based on sexual orientation and gender identity, as it can be noted in the paragraphs 20, 21 and 22 of its appendix:

*20. Prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.*

*21. Member States should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; Member States should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.*

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<sup>5</sup> <https://www.coe.int/en/web/portal/european-union>

22. *Member States should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognized in accordance with paragraphs 20 and 21 above, the right of transgender persons to marry a person of the sex opposite to their reassignment sex is effectively guaranteed.*

Two years after the Recommendation was adopted, the Steering Committee of Human Rights (CDDH) of the Council of Europe has sent a questionnaire to the Member States of the Council to find out if they have taken steps into implementing procedures for legal gender recognition. The report, eventually drawn up in 2013, showed that 39 states of the 47 members of the Council of Europe responded to the questionnaire, including Malta and Romania. Among the countries that replied to the questionnaire, half of them indicated that they are working on these changes, or even intend to do so, also including Romania. As for Malta, it is among the countries that indicated that they are on the brink of change to be able to grant full legal gender recognition to its trans citizens. Following these, the European Commission against Racism and Intolerance (ECRI) has also committed to urge the states and making recommendations for the development of legislation favoring legal gender recognition and gender reassignment, to be consistent with international standards (Council of Europe, 2015a).

In 2015, the Parliamentary Assembly welcomes a new resolution covering the matter of transgender people in Europe, Resolution 2048 (2015), which states that gender identity is a right that *“gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity”* (Council of Europe, 2015b:1).

As it is likely to be known, in most CoE Member States, procedures concerning legal gender recognition are a cumulation of criteria that trans people must meet before they can benefit from changes of names or gender on the official documents. Criteria that, according to the Committee of Ministers of the Council of Europe, should be reconsidered in order to dissolve abusive conditions (CM/Rec (2010)5, Appendix, paragraph 20).

Same Recommendation that was presented before, CM/Rec(2010)5, enumerate in its Explanatory Memorandum part which are the abusive conditions for legal gender recognition to be reached, such as: irreversible sterilization, preliminary surgical procedures, hormonal treatment, in some cases the person has to prove that will be able to live for a long time in the new gender that has been chosen, age, civil status (CM/Rec (2010)5).

Although states can determine themselves the criteria, they grant legal gender recognition for, the Court continued to promote how important it is to reconsider such criteria, in order to set harmony

between the community and the interests of the individuals (*Hämäläinen v. Finland*, No. 37359/09 (2014)). Examples of good practices can be noted when talking about medical requirements, because some of the CoE states have followed the recommendations of the Commissioner for Human Rights who has strongly suggested that sterilization or any other compulsory medical treatments should be dissolved when considering legal gender recognition. Therefore, Resolution 2048(2015) is the proof that the Assembly decided to put pressure on its Member States to revoke sterilization/castration, other compulsory medical treatment or mental health diagnosis in the way of achieving legal gender recognition for either intersex or trans individuals (Council of Europe, 2015a).

Another problematic aspect that comes up when analyzing the possibility of LGR is the civil status. It is understandable that in countries where same-sex unions (SSU) are not allowed, full LGR would be harder to achieve, since, for example, a trans person who is part of a heterosexual marriage would go for a gender change, would bring a challenge to legislators and that is precisely the legal SSU. Again, the Commissioner for Human Rights has suggested that such restrictions should be removed, and a transgender person should be allowed stay within that marriage. Same suggestions go for countries where trans individuals, as parents, would undergo gender changes will lose the custody of their children, that comes as a result for the forced divorce (Council of Europe, 2015a).

The EU Parliament has also adopted a resolution back in 2014 through which commits to offer indications to its Member States on how to counter homophobia and discrimination based on sexual orientation and gender identity (P7\_TA(2014)0062, Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity).

However, the specifications made above do not cumulate, obviously, all legislative proposals made by either the EU or the COE for its Member States after the fifth enlargement of the EU, which leaves room for mentioning some other few legislative recommendations on LGBTI matters, which are quite important in this case: Recommendation No. R(97) 20 of the Committee of Ministers to Member States on “hate speech”, Recommendation 1915(2010) of the Parliamentary Assembly - Discrimination on the basis of sexual orientation and gender identity, Recommendation 211(2007) of the Congress of Local and Regional Authorities of the Council of Europe on freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons, Resolution OING D (2008) RES1 of the Human rights Grouping of the Conference of International Non-Governmental Organizations on human rights defenders working for the rights of lesbian, gay, bisexual and transgender persons.

As we have seen in this subchapter, the Council of Europe, as a model for the legislation of the EU Member States, is very committed to this problem. He succeeds to demonstrate an interest in the LGR issue by making legislative proposals in this direction, so that its Member States can shape their internal legislation to the benefit of the trans citizens, for an adequate response to human rights, the rights to private life and family, as it is proposed by Article 8 of the European Convention on Human Rights.



## Literature Review

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The fact that the research question is very concise (although it would be considered an advantage), in this case, finding specialized literature on LGR is quite a challenge. There is literature to describe gender identity, non-binary gender, Europeanization, queer theory etc., but the specific literature that glides on the LGR in Malta or LGR in Romania is quite hard to find. Therefore, the literature references will not include LGR-related issues in Malta or Romania.

Specialized literature shows that the multitude of requirements for gender recognition in many European countries which came to court have led to legislative changes (Dunne, 2017), like official LGR in Denmark (2014), Belgium (2017), France (2016), Germany (2018), Malta (2015) and other countries (Council of Europe, 2011). However, the legislative changes in these countries were not only due to the high number of court applications for gender recognition, other issues were involved, namely pressure from the EU for uniformization with the European legislation and pressure from the LGBTI international advocacy networks, just to the some of the important drivers.

Looking at a study from UK we notice that about 5% of the LGBTI youth identify themselves as something else than male or female (METRO Youth Chances, 2014 in Richards, 2017), arguing that choosing such an identification is the result of this becoming more common among the young population. A study from U.S. that included a sample of 6000 transgender people, reached the conclusion that 13% of them chose “*a gender not listed here*” as an option when stating their gender, and around 860 of them wrote their gender using their own terms to describe it (Harrison, Grant & Herman, 2012).

It is more common for people to identify and understand their experiences according to practices that do not include a binary identification of gender, because such understandings of gender are more easily available through alternatives from social media. From here it can be noted that it is quite impossible to measure non-binary gender people accurately because their gender is constantly shifting (Richards et al. 2017).

Another aspect that makes this measurement so difficult is that, whilst some people chose to identify as non-binary, from using a specific non-binary gender mark or just refusing to tackle one of the gender options in a form, a lot of people go through a non-binary experience. A study conducted by Joel, Tarrasch, Berman, Mukamel and Ziv in 2013 shows that at least one third of the general population felt at some point in their lives that they were the both genders, the other gender or no

gender at all. In despite of all these numbers, these people also need legal protection, as well as endocrinological and psychosocial assistance for the cases where these people undergo surgeries, because as Richards et al. say, “*communities should be supported and not exploited*” (Richards et al. 2017:6).

In the chapter “Historical and Cultural Diversity” of Richards’ et al. book, we find a historical overview that tell us about some European identities, like Italian femminielli, English mollies, Albanian sworn virgins or examples of eunuchs, as also described above. They were not necessarily discriminated because they were belonging to the “other” and not to the male or female category. Bringing these examples into question targets two aspects. First is to make the previous approach of gender binary be considered as a ‘constant’, and the second one is to show that the idea of non-binary gender is not a Western phenomenon (Richards et al. 2017).

## Methodological Considerations

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In order to fit the interest of this topic, certain methodological considerations have been made. The way of approaching this project proposes as a single purpose the in-depth and comprehensive answering to the research question. Moreover, in this chapter the methodological considerations of the *Legal Gender Recognition: a review of the legislation in Malta and Romania as EU Member States* thesis project will be presented. The purpose of this chapter is to offer the reader the opportunity to understand the structure of this project, but also to see the choices which have been made in order for this research to take place. Thereby, I will first present which are the objectives of this project. Secondly the choice of focus will be explained, offering details about the chosen subject. Thirdly, details about the research strategy will be given, followed by details on how the materials used in this project have been gathered. Lastly the limitations encountered in carrying out this project will be presented as well.

### Thesis objective

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The overall objective of this project is formed around the wonderings I have concerning the situation of legal gender recognition in Malta and Romania as EU Member States, and the implications of the Europeanization process. From here it can be deduced the idea according to which Europeanization has had an impact on LGR in these two countries, therefore a sub-‘research question’ can be formulated: *Has the process of Europeanization impacted any aspects of legal gender recognition in Romania and Malta?*

The main objectives of this project are to describe the way in which legal gender recognition has been drawn in the legal context of Malta and Romania, with socio-historical and cultural-historical implications as well, being filtered through the process of Europeanization. This means analyzing their situation before and after joining the European Union, because, as it will further be explained in this paper, Europeanization as a process does not stop after the EU accession. However, since the research question sets a clearer delimitation, the analysis will focus more on the changes of legislation after the fifth enlargement period of the EU, namely 2004/7.

Moreover, the broad objective of this project is to join research in the field to provide insight about what LGR implies, but also to give examples of good and not so good practices. Although this research is not meant to cover the gaps the literature on this subject has.

As the ultimate objective, although of minimal importance, this research can be used both for academic purposes and for informing the general public in mitigating the curiosity about the situation of LGR Malta and Romania as EU Member States.

## Choice of focus

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As it could be taken from the previous pages, the focus of the project falls on shaping the legal gender recognition in the case of Malta and Romania, as European Union's Member States. The main reason for which legal gender recognition was addressed in this project is because is a topic of current interest. Legal issues related to gender identity and discrimination based on sexual orientation have increased in the last decade. Analysis studies on such cases have widened their number, becoming a point of interest for researchers in the field, as legislation caught another contour, and is more and more often in the political debates on EU's table.

It is precisely the belief that the rights of LGBTI people are not sufficiently respected, (fact demonstrated in several studies), that gave birth to initiatives of the LGBTI advocacy networks to fight for legislative changes in their belonging countries, but also at a European level, for example, the case of ILGA-Europe. Thus, making legal gender recognition a good enough reason to be addressed and debated on the political scene.

Considering that a comparative analysis of the EU's Member States would take up too much space and time, the focus was limited to two examples, as mentioned above, Malta and Romania. Details about the common and distinct motives for which these two cases were chosen will be presented in the next few lines.

The main reason, which might seem obvious, is that the two countries are members of the European Union, since my interest is on LGR in EU Member States and how being part of the EU is shaping LGR. Of course, as Member States, they have gone through the process of Europeanization preceding accession, but given the continuing character of Europeanization, Member States are bound to adopt legislation if changes or additions come along, in this case, concerning LGR. And as can be seen in Table 1., there are notable differences between the two cases.

Another reason is that although these two countries joined the European Union in different years, Malta in 2004, respectively Romania in 2007, their accessions followed two big moments of EU enlargement, which were preceded by relevant legislative changes for European LGBTI rights. Thirdly, both countries are religiously speaking influenced. The degree of religiosity in both Malta and Romania is high, which implicitly would suggest that homosexuality and, to a large extent, LGBTI-related issues are not fully accepted, precisely because they do not agree with religious norms (Cârstocea, 2010). In order to advance this argument, to make it more stable, it can be said that although these are two religious countries, LGBTI issues are surprisingly different, as evidenced in Table 1., which shows how LGR procedures are allowed in Malta, while in Romania they are limited, just as data on discrimination based on sexual orientation and gender identity can be compared as well. (but more about this can be found in the chapter about)

The fact that it has the 'friendliest' legislation among the EU countries for LGR was an extra point in choosing Malta for analyzing it in this project, since it awakens curiosity about this successful performance. As listed within Table 1., Malta tackles all criteria needed for LGR to be possible for trans people.

Among the reasons with an reduced important for the choice of the two cases it can be mentioned that I speak both of the official languages (Romanian and English - one of the official languages of Malta) of the two countries, which fluidizes the process of analyzing and reviewing the official documents of the two countries concerning LGR.

Besides the reasons described above, it is worth mentioning the interest created by the historical aspects of the communism in which Romania lived until '89, aspect which in a limited way outlines the present LGBTI situation of the country, according to me.

## Choice and use of theory and concepts

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In order to explain the chosen subject and to provide a thorough understanding of it, several concepts and theories were selected. As has been seen in the previous chapter, with its related subchapters, the chosen concepts were gender identity, non-binary gender, and legal gender recognition. The reasons why the three concepts were chosen for this project will be further be explained. The concept of gender identity is the basis for the legislative changes that will be discussed in the following chapters of this project, so it is necessary to specify what gender identity is and how it is perceived by people in social context, but not only. The concept of non-binary gender has been

chosen to help deconstruct the perpetually spread social norms on the fact that gender can only be binary, male and female, as common sense would say. Also, this concept has been chosen because in the case of Malta, and other countries of the EU, recognize as other expressions of gender outside the mentioned binary. And last but not least, the concept of legal gender recognition required an implicit definition and an explanation, which is set to be the main point of this thesis. Its details have served to provide a more in-depth understanding of the situation faced by people experiencing gender identity problems.

Besides these, in the **Theoretical Framework** chapter, as you will later notice, there have been two theories chosen, namely the explanatory theory of Europeanization, as the main theory and Queer Theory, as a secondary theory used in the Analysis. The theory of Europeanization has been chosen because legislative changes in order to respect the rights of LGBTI people in many cases, as in the case of Malta, occurred especially in the EU legislative pressures, right after their strong accession to the Union. So, this theory will help, in the Analysis section, to understand how these changes were shaped under Maltese and Romania legislation. Finally, Queer Theory was chosen because I think it is the most appropriate theory to explain the conditions in which some LGBTI individuals find themselves, and why it is important for these individuals to be allowed free expression of their own person.

## Research Strategy

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The strategy for this research is a qualitative one. As it is known, the qualitative research studies in detail the meaning of the words, compared to the quantitative research, which focuses on the analysis of numbers. The present research uses document analysis as a research technique. This research technique was chosen precisely because, as Bryman describes in his book, official documents must be passed through four filters, namely: authenticity, credibility, representativeness and meaning (Bryman, 2016).

The instrument associated with this technique is the observation guide that aims to uncover certain aspects within the documents. For example, this research, which focuses on pointing out the legislation in the field of LGR in Malta and Romania as a result of Europeanization, aims to identify for both cases the following, direct and indirect factors of LGR:

- Have Malta and Romania defined in their national legislation what ‘discrimination’ is, as it is a requirement for EU Member States?

- Have Malta and Romania defined in their national legislation what gender/sex is, as it is a requirement for EU Member States?
- Have Malta and Romania defined in their national legislation what gender identity is, as it is a requirement for EU Member States?
- Have Malta and Romania prohibited discrimination on the grounds of gender reassignment in their national legislation, as it is a requirement for EU Member States?
- According to national legislation of Malta and Romania, is gender change on official documents possible?
- According to the national legislation of Malta and Romania, is name change on official documents possible?
- According to the national legislation of Malta and Romania, is GID diagnosis needed in order to achieve gender recognition?
- According to national legislation of Malta and Romania, is medical intervention compulsory in order to achieve gender recognition?
- According to national legislation of Malta and Romania, is divorce compulsory in order to achieve gender recognition?
- According to national legislation of Malta and Romania, are there age restrictions in the way for achieving gender recognition?
- According to the national legislation of Malta and Romania, is gender change allowed on the basis of self-determination?
- According to national legislation of Malta and Romania, is non-binary gender recognized?

So, in order to answer the research question, I will continue by presenting the theoretical aspects of Europeanization and what this implies. Besides, a brief mention of the Queer theory will be made, as a secondary theory that will be used in the **Analysis**. Then, to get familiar with each of the two cases I choose, I will present some information about Malta's and Romania's backgrounds. All these will be linked to the previous subchapters where concepts such as gender identity, non-binary gender, legal gender recognition were defined, as well with the issues related to European legislation after the fifth enlargement period that have been described.

Finally, the analysis will follow the structure designed by the observation guided formulated in the above lines. Each of the two cases will be discussed separately and will offer answers to the questions outlined in the guide. In addition, considering that the research question is quite descriptive, the Analysis will focus on describing how LGR is outlined in the two cases.

## Material

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In order to be able to provide an answer to the research question, it was necessary to collect relevant material for the chosen subject.

The vast majority of materials used for this project were found online via the website [www.aub.aau.dk](http://www.aub.aau.dk) which offered free access to many of it, thus fluidizing the research process (this can be called call it the main provider of material. I am talking about the materials used for **Introduction (Gender identity, Non-binary Gender, Legal gender recognition, EU's involvement in LGBTI issues), Literature Review, Theoretical Framework (Europeanization and Queer Theory)** and for the backgrounds of the two cases, Malta and Romania, because for the materials and data used for the Analysis section found on the official websites of the governments of the two countries: [www.justiceservices.gov.mt](http://www.justiceservices.gov.mt) and [www.just.ro](http://www.just.ro). As well, the official website of ILGA-Europe and TGEU were of great help when looking for materials that would show ranks and indexes of EU countries.

Besides, the material collection process has also been fluidized by the contribution of MGRM (Malta Gay Rights Movements), who have been very prompt while replying to my requests. Finally, I have also made use of search engines such as Google Scholar, Science Direct and Academia.

## Limitations

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In the process of carrying out this project I encountered a series of limitations that had an impact on this research and its results, limitations that I would like to mention.

Among the first mentions I would like to make is the fact that the specialized literature that gives explanations about the LGR situation in Romania is of an insignificant number, thus I did not had the opportunity, in the next chapters, or in the above-mentioned chapters, to refer direct to cases within that social and legal context of it. Moreover, the legislative aspects in the case of Romania, and more precisely the amendments proposed in the case of some laws or articles of the laws, are vague or difficult to track, therefore they have slowed the Analysis process.

As well, specialized literature in the case of Malta that would present the situation of LGR is also quite absent.



Besides all this, it can be added that not much literature speaks about European legislative issues regarding LGR (Europeanization of LGR) or gender identity, which as well has slowed the process of analysis in this project.

Finally, it might be worth mentioning that I, as the author of the project, am a European citizen. My gender and European background may create biases in the way of thinking about the problem formulation of LGR in the context of Malta and Romania as EU Member States.

## Theoretical Framework

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This section will provide details about the theory/approach of Europeanization that will be used in the **Analysis** part of this project to explain legislative changes for LGR in the cases of Malta and Romania. Besides this, Queer theory will also be presented here as a secondary theory for the analysis.

### Europeanization

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*“Domestic adaptation to European regional integration”*

- Graziano and Vink, 2006:7

As it may already be known, following common sense, shaping a country's internal legislation according to specific standards and for becoming a member of the European Union, or even after joining it, is it what we call Europeanization process (Swimelar, 2017).

Unions are collectivities of countries that aim to streamline, access, maneuver in a fair and efficient way the ‘goods’. It is obvious that in this context ‘goods’ can have more meanings like public good or policies, to give an example (Alesina, Angeloni and Schuknecht, 2005).

The European Union emerged as Javier Solana described it, a *“strategic culture that fosters early, rapid and when necessary, robust intervention”* (Cornwish and Edwards, 2005: 801). With its focus on human dignity and human rights, democracy, equality, freedom and rule of law (Cerutti and Lucarelli, 2008), the European Union has searched since its beginning for more union and integrity within the European countries.

The term ‘Europeanization’ (or ‘Europeanisation’), is being used with a large connotation, but generally when we make use of it, we refer to a conglomerate of interdisciplinary terms which come from sociology, economy, social anthropology, history and political science, to name a few. It is also used to describe the process of European integration through a comparative approach (Liebert, 2002).

Another way of defining Europeanisation is as a transnational process that aims to shape the policy and polity of the Member States under specific frames: *“a European dimension becomes an embedded feature which frames politics and policy within the European states”* (Wallace, 2000:370

op.cit. Liebert, 2002:6), this may suggest the fact that Europeanization is a continuous process, that shape the politics of a country even after its adherence.

It can be said that the Europeanization process - that according to Swimelar (2017) is “*the adoption of policies, norms, and standards of the European Union*” - got more complex over time, and that today the potential candidates must, among others, adopt legislation that protects the rights of LGBTI people. But things were not managed this manner since the beginning, as it can be understood from this project.

This specific framework that shape the states can be defined in several forms, namely: a. in Europeanization, using their political ideas and beliefs, the Member States seek and succeed to the utmost to create common models of reference; b. domestic structures and activities aimed at incorporating "a European dimension" are shaped through Europeanization by stimulating Member States to do so; c. Europeanization sets a framework for domestic structures to look and work in a more obvious way. Using these three characteristics, it can be summarized that the process of Europeanization represents a "convergence framework" of Member States (Liebert, 2002).

Elements of social constructivism and an institutionalist perspective are considered as well when defining Europeanization. Social constructivism is emphasizing on norm diffusion, as a form of “*domestic empowerment of European norms*” (Checkel, 2001:180), while the institutionalist approach is focusing on the preparations of European institutions and on the gradual processes of changing the direction and political form in the Member States (Cowles, Caporaso and Risse, 2001).

To be mentioned that Europeanization does not have a territorial delimitation, it does not end where the borders of the Member States are met, it goes beyond that. Also, Europeanization is far from what globalization is, and that is because “*normative frameworks are deeply embedded in regionally condensed forms of institutionalization*” (Liebert, 2002:7).

As the author, Liebert (2002), suggest it, the convergence that Europeanization is working on, does not necessarily require a plan of uniformity, but a compatibility with the internal diversity, which would lead to results in fact. Or presented in a different form by certain social anthropologists, Europeanization might be an explosive political process with rapid forms of modeling territories and peoples, in the sense that it can transform “*the two principles that have shaped modern European order*” (Borneman & Fowler, 1997). While others find Europeanization to be a continuous process that boosts the governments to get shaped under European arrangements (Liebert, 2002).

## Queer Theory

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Queer theory undermines the idea that feminine and masculine characters are as real as possible, but these are just social constructs. Above all, the theory is trying to point out that every person is and should be free to decide which gender he identifies with, binary or not. Queer theory and politics emphasize that transgression has distanced itself from norms in a visible way, and these norms are then disguised in desirable, so-called “real” norms, and not just intentions (Martin, 1996 in Richards et al., 2017).

The queer "starting point" takes us back to the 1990s, when feminist, Lesbian and Gay studies followed the thoughts of Michael Foucault and Judith Butler. Queer Theory's points about human sexuality were formerly shaped by Foucault and later refined in 'psychoanalytic tradition' (Penney, 2014). Both for academics and activists, the “queer” becomes more advantageous in defining itself in front of normality than in front of heterosexuality (Warner, 1994 in Richards et al., 2017). This queer theory is trying to put down the so-long perpetuated and forced heterosexuality, and proposes an opening to something different: “queer life and queer politics were to embrace hippy, punk, anarchist, anti-capitalist, anti-social ‘rebel’ identities that oppose the regulations of the Law” (Richards et al., 2017:62).

When it comes to gender, the queer theory reconsiders what ‘man’ or ‘woman’ are, as unique and essential identities. As emblems of the ‘queer’, the trans and non-binary people who by their notable presence disagree with the constructs of gender, expose the hostility towards the predominant forces of the rigid gender norms and systems: “ ‘Queer’ can refer to: the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone’s gender, or anyone’s sexuality aren’t made (or can’t be made) to signify monolithically” (Sedgwick, 1994 in Richards et al., 2017:62).

## Background on Malta

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Malta, the small conglomerate of islands in the Mediterranean Sea, got its independence from UK back in 1964. The governance model that succeeded their independence was similar to the Westminster one, and followed a two-party system that had the Social Democrats on the left (i.e. Labor Party) and the Christian Democrats on the right (i.e. Nationalist Party). Since independence, the power was placed alternately between the two parties, and in the 1990s a third party joined the politics, the Greens, but they were not able to win seats in the Parliament. It can be said that Malta is usually split when it comes to political matters, precisely because of its polarized politics, regardless of the problem, like the referendum for divorce in 2011 or SSU in 2013, to name a few. It can be added that between 1990 and 2003, the Maltese politics has been focused on joining the EU, that brought changes for Malta's LGBTI rights (Harwood, 2015).

In 1990 they had the first attempt to join the European Community, while the nationalists were in power, but they were not able to boost their application. Back in power in 1996, the Labor Party tried to renew a vision born in 1958, that was picturing Malta as the "Switzerland in the Mediterranean". The party lobbied against full membership in the EU, and delayed Malta's application, but soon they lost power again. Oppositions within the party, which would have not been related to EU adherence, and fractures of it led to elections in 1998 that have been won by the nationalists which were pro-EU. The victory meant the reactivation of the membership request, and negotiations began in 2000. In 2003, because there was still no unanimity between the parties on EU accession, a referendum was proposed. The results showed that 53% of the votes were in favor for joining the Union. However, the issue of accession was not solved immediately after the referendum, and a month later, new elections followed, which led to the victory of the nationalists, and Malta finally joined the EU in May 2004 (Harwood, 2015).

Taking it chronologically, Malta's first achievement towards respecting LGBTI rights was the reference in its 1964 Constitution concerning non-discrimination, where sexual orientation and gender identity were mentioned, namely: "*discriminatory*" means *affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity*" (Constitution of Malta, 1964, Paragraph 43, art. 3).

As second chronological achievement in this matter can be considered the decriminalization of homosexuality. In ILGA's 2006 "*LGBT world legal wrap up survey*" can be found a list of world's

countries and the related years in which they decriminalized homosexuality. With stupefaction it can be noted that the decriminalization of homosexuality in Malta happened back in 1973, which makes it not such a new aspect of what is defining the Maltese society (Ottosson, 2006).

Joining the European Union in 2004 was also an important step for the LGBTI people, because until then European legislation and standards had begun to regulate and take into account respect for the rights of LGBTI people, so this accession has made the country shape its legislation according to the standards imposed by the Union (Slootmaeckers et al., 2016).

The fact that Malta is a religious country or, as many researchers would call it, synonymous with Catholicism (Pace, 2012; Baldacchino, 2002; Deguara, 2018; Harwood, 2015), did not prevent its government from amending the Civil Code in 2011 so they could introduce divorce (at that time being one of the 2 countries in the world that did not had divorce legislation - Pace, 2012), after a national referendum was held, or even from proposing and adopting in 2014 a new formula of the Civil Union Act that officially made marriage between same sex people legal (Harwood, 2015). I would argue that legislative changes, such as the one just mentioned above, same sex marriage for example, would make it more likely for countries to allow legal gender recognition, since they took slowly and step by step in the legislative process, as is the case of Malta.

It is believed that since its accession to the EU, Malta continues to become a more global, open and informed society, which makes its citizens less rigid when it comes to change, keeping though a sense of national identity (Abela, 2005).

As mentioned by ILGA-Europe, one of Malta's biggest achievements in LGBTI matters, besides legalizing same-sex marriage, is the adoption of the Gender Identity, Gender Expression and Sex Characteristics Act in 2015, that can also be entitled the Legal Gender Recognition Act. The parts of the act will be widely discussed in the **Analysis** section of this project (Holzer, 2018).

## Background on Romania

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Romania, often portrayed as a very difficult democracy (Crowther, 2010), after the fall of communism, as well as other post-communist countries, had to pass through the EU's pre-accession process. The desire to meet the accession requirements was created by the apparent benefits of the membership to the European Union, thus creating a political motivation for change (Spendzharova & Vachudova, 2012).

During the transition of Romania there were two important turns that changed the political course that was up to follow. The first turn was the bloody revolution from December 1989, that put an end to Ceaușescu's dictatorship. And the second turn happened in 1996 when Romania assigned power to the liberal opponents, who planned a new reform. The election of Traian Băseșcu in 2004, was believed to be a third turn in the transition, but it somehow marked a close end to the transition to democracy (Crowther, 2010).

The way in which the transition from dictatorship to democracy has happened, did not make the transition to the latter one very smooth. The rapid transfer from Ceaușescu to the next non-communist president has left countless elements of communism intact within the Romanian state (Crowther, 2010). It is believed that post-communist countries are more vulnerable to corruption, precisely because of the corrupt practices of communism. The decision-making processes were shaped through bribery practices. Moreover, the accountability during communism was very low, thus making the communist countries more inclined towards corruption (Begović & Manole, 2017). Therefore, the rapid transfer mentioned in the above lines, is responsible for the difficulty of implementing laws that could have ended corruption.

The 17 years of harsh transition to democracy have finally resulted in Romania's accession to the European Union on 1 January 2007: "*Accession came after a lengthy and hard negotiation that resembled a marathon won in the last minute*" (Ciobanu, 2007:1429). The date also marks the finish line for the post-communist transition.

2001 was a good year for the LGBTI community in Romania, because after certain political confrontations, the decriminalization of homosexuality was reached as pressure was made by the European Council in the approach of Romania's accession to the European Union (Cârstocea, 2010). That goes without saying that discrimination towards this category of people persisted, because it is not easy to change the mentality of people who had to obey the law of criminalizing homosexuality since 1937. Moreover, the homosexuality biases are being fed by the Romanian Orthodox Church,

who strongly opposes the homosexual practices, which do not conform to religious norms (Popp, 2014). After the fall of communism, the Orthodox Church has played a great role, both in political and social life of the Romanian society. As the major religion in Romania, Orthodoxy had the initiative to shape the democracy, and worked along with the post-communist State to impose some of its vision. One of the areas where it managed to put its hands on is sexuality. Hence, defining according to religious norms what is the accepted sexual behavior, and which is the deviant one in the society (Turcescu & Stan, 2005).

According to Dragoman (2011) Romania is one of the most religious countries in Europe (Halman & Draulans, 2004; Noms & Inglehart, 2004 in Dragoman, 2011). Buhuceanu's (2003) studies show that from the middle of the 19th century to the 1930s, in Romania homosexual people were treated, legally speaking, the same as heterosexual people, and that the rise of communism has brought changes (Buhuceanu, 2003 in Andreescu, 2011).

One of the recent issues related to the matter of LGBTI in Romania is the autumn referendum of 2018, which wanted to change the definition of the family within the Constitution. The modification foresaw the transition from "*the family is based on the freely agreed marriage between spouses*" to the formulation of "*the family is based on the freely agreed marriage between a man and a woman*" (ILGA-Europe, 2018).



## Analysis

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*“Where the rights of LGBT people are undermined, you can be sure that the rights of other minorities and critical members of civil society will soon also be in jeopardy.”*

- Roth, 2014

This section is aiming to give an answer to the research question ***How is legal gender recognition shaped in Malta and Romania as EU Member States, considering the European standards set after the fifth enlargement period?***, while analyzing laws, policy changes, European plans, national plans, statistics, literature reviews, and others, concerning legal gender recognition in Malta and Romania as part of the European Union.

Each case will be taken separately and be analyzed according to field legislation concerning legal gender recognition (even legislation that influences this matter in an indirect way) since their accession to the European Union, thus shaping the Europeanization of Malta and Romania in the context of LGR.

As presented in one of the previous chapters, Europeanization is a continuous process. In the context of the candidate countries, this process begins when the decision to join the EU is taken, thus starting to modify legislation and other legal procedures to meet the Union's standards. However, this process does not cease immediately after the success of joining the EU. The process is continuous and lasting, given the constant proposals for legislative changes within the EU.

Considering the specification made in the research question with reference to the fifth period in the EU enlargement process, the analysis will take into account the legislative proposals in the field of LGR after 2004/7, which is actually the period when the two countries acceded to union, precisely Malta in 2004 and Romania in 2007.

Starting from the facts presented in the **LGR: target legislation?** chapter, namely the Recommendation CM/Rec (2010)5, the assessment questionnaire proposed by the Council of Europe and the Resolution 2048 (2015), one may notice that a new trend has been born in Europe. In fact, following these legislative initiatives, many countries such as Denmark, Sweden, Finland, among which Malta as well (since 2015), have adopted legislation to justify LGR based on self-determination. These countries do not require that the trans person present evidence of a diagnosis of gender disorder or psychological analysis so as to achieve gender recognition (Council of Europe, 2015a). We are about to know such aspects after analyzing the two cases.

Taking into account that all the points to follow in the observation guide mentioned in the **Research Strategy** foresee that the legislative aspects of the two countries follow EU standards, there will be listed important pieces of European legislation that will be useful for this section.

In order to impose anti-discrimination standards in its member countries, the European Council defends its citizens through Directive 2006/78/EC, when it comes to discrimination at work on grounds of religion or belief, disability, age and more importantly sexual orientation. In addition to this the EC also has Directive Proposal (COM (2008)462) against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace.

European legislation does not cover trans-related issues concerning name change on official documents, but since it is considered that a person's name is a basic aspect of someone's identity, and implicitly of private life, this is protected under Article 7 and 8 of the ECHR.

European legislation covering the possibility of gender change on official documents is under the Parliamentary Assembly of the Council of Europe Resolution 2018(2015) "Discrimination against transgender people in Europe", Committee of Ministers Recommendation (2010) on measures to combat discrimination on grounds of sexual orientation and gender identity, and under the PACE resolution 2048 (2015) (Köhler, 2016). This may also include the recommendations to remove compulsory surgical intervention, medical intervention, sterilization, divorce and age restrictions, since these legislative pieces proposes a quick, transparent and accessible way to reach legal gender recognition. Moreover, self-determination of gender identity is recommended under the PACE Resolution 2048 (2015).

Further, the two cases will be discussed separately, and their legislative aspects related directly and indirectly to LGR will be analyzed, according to the observation guide mentioned in the **Research Strategy**.

After consulting the legislative documents of both countries, the following issues have been addressed.

## Europeanization of LGR in Malta

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As mentioned in the Legal Gender Recognition chapter, Malta can be proud of its legislation in place to satisfy its trans and intersex citizens. Among other European countries that were subject to a report assessing the existence of LGR legislation, Malta fulfills all the conditions to offer full LGR to people in seek of it.

Most of the answers given to the questions set in the guide will use passages from the Gender Identity Act<sup>6</sup>, since it is the basic legislation of LGR in Malta (it can also be named Legal Gender Recognition Act).

- Has Malta defined in its national legislation what discrimination is, as it is a requirement for EU Member States?

Yes. For starting this analysis, the Constitution of Malta has been approached in the search of a definition for what discrimination is. It has been found that under Article 45(3) in the 1964 Constitution of Malta discrimination is defined under legal terms. It also fits the interest of this project and includes mentions of sexual orientation and gender identity: “*‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, color, creed, sex, sexual orientation or gender identity*” (Constitution of Malta 1964), as required by EU legislation.

- Has Malta defined in its national legislation what gender/sex is, as it is required for EU Member States?

No. Maltese legislation does not specifically have gender/sex defined or differentiated in its national legislation, but in the Gender Identity Act, under Article 2, Chapter 540 of the laws of Malta, gender identity (but the definition of it will be given in the following lines).

- Has Malta defined in its national legislation what gender identity is, as it is required for EU Member States?

Yes. In order to formulate an answer for this question, we need to consult the Gender Identity Act, where we can find under legal terms what gender identity is: “*‘gender identity’ refers to each person’s internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, a modification of bodily appearance and/or functions by medical, surgical or other means) and other expressions of gender, including one’s name, dress, speech and mannerisms*”

Maltese legislation also includes under the Gender Identity Act, Article 13, discrimination based on gender identity:

*(1) Every norm, regulation or procedure shall respect the right to gender identity. No norm or regulation or procedure may limit, restrict, or annul the exercise of the right to gender*

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<sup>6</sup> Shortly mentioned here. It can be found under the title of Gender Identity, Gender Expression and Sex Characteristics Act 2015, Chapter 540 of the Laws of Malta.

*identity, and all norms must always be interpreted and enforced in a manner that favors access to this right.*

*(2) The public service has the duty to ensure that unlawful sexual orientation, gender identity, gender expression and sex characteristics discrimination and harassment are eliminated, whilst its services must promote equality of opportunity to all, irrespective of sexual orientation, gender identity, gender expression and sex characteristics.*

- Has Malta prohibited discrimination on the grounds of gender reassignment in its national legislation, as it is required for EU Member States?

Yes. Gender reassignment discrimination is explicitly prohibited under Maltese legislation, to be more precise under Article 45(3) of the Constitution as follows: “*‘discriminatory treatment’ means any distinction, exclusion, restriction or difference in treatment... of a person who underwent or is undergoing gender reassignment*”. Moreover, according to the Gender Identity Act, gender change on official documents is legal. All this being in place as it is required by the EU legislation.

- According to the national legislation of Malta is gender and name change possible on official documents?

Yes. As the legislation on the possibility for benefiting of gender or name change on official documents, Malta provides, within the same Gender Identity Act, the following: “*is shall be the right of every person who is a Maltese citizen to request the Director to change the recorded gender and, or first name, if the person so wishes to change the first name, in order to reflect that person’s self-determined gender identity*” (Article 4, paragraph 1).

- According to the national legislation of Malta are GID diagnosis, medical intervention or divorce needed in order to achieve gender recognition?

No. Furthermore, the Gender Identity Act also makes remarks about GID diagnosis, medical intervention and divorce towards reaching gender recognition, and that is: “*the person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity*” (Article 3, paragraph 4).

- According to the national legislation of Malta are there any age restrictions in the way for achieving gender recognition?

Yes. Here we meet one of the impediments that transgender teenagers encounter, although surprisingly in Malta, and that is the age limit, because legally, under age of 18, people are limited in

gender-related change and need their age and maturity to be evaluated, as specified in the Gender Identity Act.

- According to the national legislation of Malta is gender recognition allowed on the basis of self-determination?

Yes. As probably noted in the previous lines, to be more precise under the section for gender change and name change, Article 4(1) of the Gender Identity Act states that gender recognition can take place under a person's self-determination: "*...in order to reflect that person's self-determined gender identity*".

- According to the national legislation of Malta, is non-binary gender recognized?

Yes. And finally, under the same Maltese Act we can find that gender identity, other than male and female, it is legally recognized, as follows: "*a gender marker other than male and female, or the absence thereof, recognized by a competent foreign court or responsible authority acting in accordance with the law of that country is recognized in Malta*" (Article 9(2)).

As it can be seen, Malta's LGR is shaped in the context of the laws and articles mentioned above, offering the possibility for trans and intersex people, to opt for gender change whenever in need.

It is also worth arguing that, according to Queer Theory, Malta, through its legislation, has chosen to give each individual the opportunity to identify their own gender, not being restricted by criteria such as sterilization, surgery, or others. To recall this, Queer Theory argues that each individual should be free to pronounce his own gender identity, without pressures and restrictions, which makes reference to the right to a private life, as stated in Article 8 of the...

Besides, all legislative aspects concerning LGR in Malta, presented above (name change, GID, medical intervention, divorce, self-determination etc.) follow EU legislation, as previously mentioned, namely, Recommendation CM/Rec (2010)5, PACE Resolution 2048(2015) and Parliament Assembly of the Council of Europe Resolution 2018(2015).

All these European legislative documents setting standards to be followed by Member States in view of LGR were adopted after the fifth enlargement period of the Union (2004/7). In addition, it is important to recall that Europeanization is, on the whole, an adaptation to and modification of the Member States' internal legislation, European legislation and standards. Considering these arguments, one can conclude that the legislation on gender recognition in Malta has undergone a Europeanization.

The fact that Malta adopted the Gender Identity, Gender Expression and Sex Characteristics Act, came as a reason for celebration for the LGBTI community. This Act was born not only as a result of pressures from certain European standards, but also from pressures made by national and international LGBTI advocacy networks, like MGRM and ILGA-Europe, just to name a few (ILGA-Europe, 2015). Besides, the surprise was even greater given the degree of religiosity of this society.

## Europeanization of LGR in Romania

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From a legal point of view, LGR, in the context of Romania as a member state of the EU, is shaped as it will be detailed in the following lines, following the same structure as was used for the case of Malta.

- Has Romania defined in its national legislation what discrimination is, as it is a requirement for EU Member States?

Yes. The Constitution of Romania does not define what discrimination is, but such a definition we find under Ordinance 137/2000 (republished 2007), as follows: *“discrimination means any distinction, exclusion, restriction or preference on the basis of race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, chronic non-contagious disease, HIV infection, affiliation to a disadvantaged category, and any other criterion the purpose or effect of restricting, removing the recognition, use or exercise, on an equal basis, of human rights and fundamental freedoms or of rights recognized by law in the political, economic, social and cultural spheres or in any other sphere of public life”* (Article 2(1)). As can be observed, gender identity is not mentioned within this definition, meaning that gender identity is not protected under law in front of discriminatory behavior.

- Has Romania defined in its national legislation what gender/sex is, as it is required for EU Member States?

Yes. The Gender Equality Law (2002) was amended in 2015 and managed to introduce definitions for gender/sex. Therefore, Romania legislation is defining sex as *“the combination of biological and physical features that define women and men”*, and gender as *“the combination of roles, behaviors, features and activities that society considers to be appropriate for women and men, respectively”* (Gender Equality Law, 2002, Article 4(d)). From this it can also be deduced that, legally speaking, Romanian society does not accept a gender other than the binary one.

- Has Romania defined in its national legislation what gender identity is, as it is required for EU Member States?

After analyzing the Romanian field legislation, no mentions of gender identity have been found.

- Has Romania prohibited discrimination on the grounds of gender reassignment in its national legislation, as it is required for EU Member States?

No. Unfortunately, Romanian legislation does not explicitly prohibit discrimination on the grounds of gender reassignment. But the aspects protected under the Anti-discrimination Law are gathered under an open list, and it can be said that gender reassignment is protected under this law because of the passage which states “*any other grounds*”. It can be argued that, precisely to meet the rights of trans people, a more detailed explanation is needed.

- According to the national legislation of Romania is gender change possible on official documents?

No. In the Romanian legislation there were not found mentions regarding the possibility of gender change in the official documents. Although gender recognition is based on well-grounded reasons such as sex change, being one of the few cases where legislation accepts such a thing (but even the possibility of sex change has to be filtered by a court decision). It can be argued that the possibility of gender change is missing from the Romanian legislation, as long as gender identity does not get a definition within this legislation.

- According to the national legislation of Romania is name change possible on official documents (in the context of gender recognition)?

No. Name change can only be done for reasons that do not include gender changes, and must be thoroughly justified (like divorce, when the name has vulvar meanings, or when the person wants to have the same name as his family members etc.). According to the Governmental Ordinance 41/2003 (amended 2016), in the context of LGR, name change is possible if the name of the person does not match the sex or if a person has undergone irrevocable sex change and wants the name to match the new sex: “*Claims for name change are considered to be justified in the following cases: k) when the first name is specific to the opposite sex; l) when the person was given permission to change sex through a final and irrevocable court order and required to be given a proper name, showing a medical opinion indicating the sex of the person; m) other such well justified cases.*” (Article 4(2)). Besides, only in this case there is no age restriction.

- According to the national legislation of Romania, are GID diagnosis or medical interventions needed in order to achieve gender recognition?

Yes. Romanian legislation requires strong arguments for reaching LGR, so that in court it must be proved that, the person wishing to be granted LGR, has a diagnosis of GID or underwent surgery, has been sterilized etc. (ACCEPT, 2014).

- According to the national legislation of Romania, is divorce needed in order to achieve gender recognition?

Yes. It is true that is not specifically mentioned, but according to the acknowledgments within the 119/1996 Law (amended in 2016), only in the case of sex change modifications are mentioned in the registers of marital status, and not in the case of change of gender: *“there shall be mentioned the changes in the civil status of the person in the following cases: i) the change of sex after the final and irrevocable decision of the court”* (Article 43). It can be argued that since Romania does not legally recognize same sex marriage under its Constitution (*“the family is based on the freely agreed marriage between spouses”* - Article 48(1)), but it also does not mention that marriage should be between a man and a woman. By implicit deduction it can be said that divorce is required for reaching gender recognition in Romania.

- According to the national legislation of Romania, are there any age restrictions in the way for achieving gender recognition?

After the Romanian legislation was analyzed, no mention of this matter was found.

- According to the national legislation of Romania, is gender recognition allowed on the basis of self-determination?

No. There is not a specific article in a law which says that gender recognition can be allowed on the grounds of self-determination. However, in one of the cases presented in *“Legal gender recognition of trans people in Romania”* (*“Recunoașterea juridică a identității de gen a persoanelor trans în România”*), the court used the following forms in the final decision: *“the sexual orientation and self-defined gender identity of each person are an integral part of his personality and constitute a fundamental aspect of self-determination, dignity and freedom, so no person can be forced to undergo medical procedures, including surgical ones, as a requirement for gender recognition of gender identity”* (ACCEPT, 2014).

- According to the national legislation of Romania, is non-binary gender recognized?



No. There is not a specific mention within the Romanian legislation, that gender, other than male and female is being denied, but as can be seen in the Gender Equality Law of 2002, under the definition of gender, male and female are indicated to be the only genders accepted legally.

Looking closely at the Romanian legislation in the LGR field can be said that has undergone a partial Europeanization after joining the EU. Because, it can be noticed how, the European legislative pressures (here referring to the above-mentioned legislative documents) to adopt new standards regarding the LGR situation has not been successfully accomplished. That is, Romanian legislation is not prepared to meet the demands of gender recognition without: requiring evidence of medical intervention, sterilization, divorce, age restriction, self-determination, but more so it needs bureaucracy and implications of judicial bodies to rule on such requests.

Referring back to what Queer theory entails, Romania seems to fail in aligning with this theory's principles, that is, it does not offer the possibility for its citizens legally to be able to establish their own affiliation to a certain gender.

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By making a brief comparison between the two cases, one can say that the difference between the way in which LGR is shaped in Malta's legislation and the way it is shaped in Romania's legislation is a very big one. Although both states are EU members, the legislation should be as similar as possible, taking into account the European requirements assumed in: Recommendation CM / Rec (2010) 5, PACE Resolution 2048 (2015) and Parliament Assembly of the Council of Europe Resolution 2018 2015) concerning the issue of LGR. Besides, as set out in research question, European legislative requirements enumerated above, have been addressed after the fifth enlargement period, that is to say the accession date of Malta, 2004, and Romania, 2007. So that, in the case of Malta, changes can be observed since its accession to the EU, changes that differ from those taken in the pre-accession process, which suggests that Malta's legislation is being shaped through Europeanization. But, in the case of Romania, although European standards have only been achieved in order to succeed joining the Union, it can be concluded that Romania has not approached sufficient European standards, thus being part of a partial post-accession Europeanization.

## Conclusions

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The above-formulated text that took the shape of a research project was solely aiming at providing an answer to the research question: *How is legal gender recognition shaped in Malta and Romania as EU Member States, considering the European standards set after the fifth enlargement period?*

Just to be able to answer this question, some clarifications had to be made. Taken from many authors, it has been established that gender identity is about the way one perceives its own person, as a male, female, none of them, others, or gender fluid. Besides, it has been established that gender identity is not only binary, male and female (as established through common sense) by providing historical examples in the **Non-binary gender: a historical overview** chapter: Neapolitan femminielli, English mollies, Albanian sworn virgins and eunuchs. In addition, in this chapter it was proved that non-binary gender as well as gender changes are not new aspects of our contemporary society, also through the historical examples that were given.

It can be admitted that the LGBTI topic has been a complex one since its first acknowledgement. As it was deepened and the people belonging to this community demanded more and more rights, the situation became even more complex. However, it can be said that the negotiations inside supra-state actors, like EU, seem to be settling. This is possible precisely because of its role, as a supra-state actor, that can put pressure on its Member States to change standards and norms that concern some aspects of citizens' lives, which in this case in LGR (Liebert, 2002).

The demands of trans members of society who had the courage to come to light, in the last decade have made the organizations defending the rights of these people to put pressure on authorities to make legislative changes that would lead to the "normalizing" of non-binary gender identity or gender-fluid. These requirements, increasing in number, have made, for example in the EU case, the legislation to receive the necessary outline so that the LGBTI population would be satisfied as well, having their rights respected (Council of Europe, 2013). One might say that some of the most important pieces of legislation for these changes are still recent because of the years they were adopted in: Recommendation CM/Rec (2010)5 and PACE Resolution 2048(2015). Besides, given the hierarchy within the EU, the pressures went towards national legislation of the Member States, playing in the wake of the Europeanization scenario.

The **Analysis** of the two chosen cases denotes a surprising difference between the legislative specifications of Malta and those of Romania. As demonstrated by the **Analysis**, which followed the structure of the observation guide set out in the **Research Strategy** subchapter, Malta's legislation offers definitions of discrimination and gender identities as indispensable components of LGR, while the Romanian legislations offers a definition only for discrimination. The same legislation protects discrimination based on gender reassignment exclusively in Malta, but not in Romania. Moreover, Malta's legal situation emphasizes that trans people can benefit from gender and name change in official documents, while Romanian legislation does not allow such changes, it only allows to people that have undergone sex reassignment surgeries, as a result of a final court decision, which had deep reasons to take place. The results have also shown that to reach legal gender recognition in Malta, trans or intersex people do not need to show proof of any of the following: GID diagnosis, medical intervention, surgical intervention or sterilization; but in the case of Romania, trans or intersex people need to. Besides, Maltese legislation allows its trans citizens to self-determine their gender, while Romanian legislation does not. Surprisingly, it has been discovered that Maltese legislation provides that people under 18 cannot give consent to gender change, and their maturity had to go under assessment, but it is possible after reaching this legal age. Details of this aspect were not found in the Romanian legislation. The explanation for Malta being at the top of the rank for legal gender recognition and bodily integrity, is partially set for the fact that is one of the two countries in the EU that recognized, under its national legislation, the third gender, mentioned as 'other' (Holzer, 2018). All these aspects have been mentioned and demonstrated in the analysis part of this project.

Considering the main European standards proposed after the fifth enlargement of the Union (2004/7), it can be concluded that LGR legislation in Malta has also been influenced by these standards, hence posing as a success in the process of Europeanization, which mostly represents "*the adoption of policies, norms, and standards of the European Union*" (Swimelar, 2017).

As far as the case of Romania is concerned, it fails to reach the European standards of LGR, therefore its legislation in the field is placing itself as a partial result of the process of Europeanization.

The descriptions made in the **Analysis** part lead to the idea that LGR in Malta, more than it is in Romania, is shaped under legal aspect according to European standards, which to some extents, offers an answer to the research question established as a starting point for this research.

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