



NON-BINARY GENDER REGISTRATION MODELS IN EUROPE

Report

on third gender marker or no gender marker options

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Introduction

Over the last decade, many essential developments relating to the protection of human rights have taken place in the field of gender registration. Next to the progressive elimination of requirements for gender recognition in some countries, several states in South East Asia, Oceania and North America have followed the example set by Nepal in 2007 to recognize non-binary gender identities.¹ In addition, developments in countries such as Malta and the Netherlands initiated a discussion regarding the question why gender presents a relevant legal category to the extent that it is registered in the civil registry and defines one's legal personhood. The aim of this report is to provide an overview of the different legal gender registration models which somehow cause a break in the static registration of gender as binary, and recognize gender identities as considerably more diverse as is understood under the auspices of the two categories, namely women and men. It will focus on the legalistic and bureaucratic aspects of implementing these models in order to provide a clear picture how states can avoid unintended consequences when introducing non-binary gender categories, or, conversely, no longer registering gender for various purposes. The report provides some stance into how non-binary gender registration models affect the human rights, the well-being and social acceptance of non-binary persons. Yet, in order to obtain further conclusive knowledge regarding this topic, more far-reaching qualitative research is necessary.

Since this report serves as a background study for the development of its own policy regarding non-binary gender registration models by ILGA-Europe, it concentrates on possible developments in member states of the Council of Europe (CoE). Nonetheless, it also discusses examples from other regions in order to determine possible best practices and lessons-learned for the European framework. As things in the field of (non-binary) gender registration are rapidly changing these days, I will be solely discussing developments up until 1 June 2018.

Methodology

¹ *Pant v Nepal* [2007] Supreme Court Division Bench Nepal Writ No. 917 of the Year 2064 BS.

As enlightened in Appendix 1 on Interview Methods, I conducted in total six Skype interviews and one interview via email between May 14th and June 8th 2018. These Skype interviews were held with five representatives of trans and intersex rights organizations and movements in Europe and Central Asia, as well as one policy-maker from Malta. The interview conducted via email was with a legal academic from the Netherlands. All interviews followed a semi-structured format, with the questions being sent to the interviewees prior to our in-person conversation. Five requests for interviews, or such intended for reception of particular information, remained unanswered. These unanswered requests were addressed to two state institutions, two representatives of human rights organizations and one practicing lawyer, respectively.

In addition to interviews, I exchanged emails with several people who provided me with valuable information, notably one trans rights activist from New Zealand. I have taken on further extensive desk research and drew on research I had previously conducted for my M.A. and PhD theses. The study *Gender Diversity in Law*², carried-out by the German Institute for Human Rights, is worth highlighting given it has provided me with crucial knowledge on the current developments concerning non-binary gender registration models in Germany and elsewhere.

A note on terminology

The report will predominantly use *non-binary* as an umbrella term to refer to all gender identities which somehow differ from the notions of women and men. I also opted for calling legal gender categories other than *female* and *male* “non-binary” instead of “third gender”. This is in line with the opinion held by the Dritte Option, a German alliance advocating the introduction of additional gender category, which points out that calling new gender categories “third genders” implies that only three gender identities exist (women, men and a third one). In contrast, calling them non-binary gender categories proposes no finite number of identities.³

² Nina Althoff, Greta Schabram and Petra Follmar Otto, ‘Gender Diversity in Law: The Status Quo and the Development of Regulatory Models for Recognizing and Protecting Gender Diversity (English Summary)’ (German Institute for Human Rights 2017); Nina Althoff, Greta Schabram and Petra Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (Deutsches Institute für Menschenrechte 2017).

³ Dritte Option, ‘Statement Der Kampagne „Dritte Option“ Zur Anstehenden Gesetzesreform’ (2018) para 3(b).

A survey on non-binary persons in the UK, conducted in 2014, revealed that people use many different terms to refer to their non-binary gender identities. The 985 respondents provided more than 27 self-descriptions, including agender, androgyne, bigender, femme, genderfluid, genderfuck, genderqueer, neutrois, polygender and third gender. The most commonly used self-descriptions were non-binary (63%), genderqueer (43%), trans/transgender (37%), genderfluid (31%) and agender (28%).⁴ The survey also reported that 15% of the respondents did not consider themselves as trans and 20% were unsure.⁵ Moreover, “88% of respondents said they did not consider themselves to be intersex, with 8% answering ‘unsure’ and 4% answering ‘yes’”.⁶ The survey report does not state the exact question resulting in the latter answers or clarifies whether the question specified what “considering themselves as intersex” exactly means, whether it refers to having a variation of sex characteristics and/or identifying with an “intersex gender identity”. However, the glossary of the report notes that intersex is defined as umbrella term for “people who are born with variations of sex characteristics, which do not always fit society’s perception of male or female”⁷ and is not the same as “gender identity”.⁸

The results of the abovementioned survey thus demonstrate that a large diversity exists among non-binary persons in the UK, and this is likely also the case in other countries and regions of the world. Consequently, using one term, non-binary, in this report certainly does no justice to the large diversity of people identifying with a gender other than female or male. At the same time, there is a lack of a suitable linguistic alternative and the open-ended literal meaning of the term provides me with the flexibility to encompass a variety of identities, as well as discuss gender registration models which contest the assumption that only two gender identities are in existence.

One problem, reflected in some of the legal models discussed later on, is that certain law-makers assume that *all* trans persons and/or *all* intersex persons are non-binary. This wrongful assumption can lead to adverse situations where intersex and trans persons are forcefully registered with a non-binary gender or no gender (e.g. intersex children in Germany), or can

⁴ Vic Valentine, ‘Non-Binary People’s Experiences in the UK’ (Scottish Trans Alliance, Equality Network 2015) 9.

⁵ *ibid.*

⁶ *ibid.* 20.

⁷ Valentine (n 4) 91.

⁸ *ibid.*

change their legal gender only to a non-binary category, not from F to M and *vice versa* (e.g. in Bangladesh). Intersex rights activists have stressed the fact that like all humans, intersex persons have a variety of gender identities, including binary and non-binary ones. Assuming that all persons with an intersex body also automatically identify with a non-binary or intersex gender identity is essentialist and harmful to intersex persons.⁹

Structure of the report

The report is divided into four main chapters, each discussing different but interrelated ways of reducing the reliance on gender binary within public gender registration. Chapter 1 discusses the elimination of gender markers from identity cards, which, in principle, leaves the registration of binary genders at the civil registry unchanged, yet reduces the significance of legal genders for identification purposes, and, consequently, for societal organization. The developments in the Netherlands serve as a main case study for this discussion. Chapter 2 focuses on the introduction of third gender markers in identity cards without introducing “third” genders for all legal purposes. The discussion revolves mainly around the recent change in Malta, which allows X markers on identity cards, passports and residence permits.¹⁰ Chapter 3 debates the changes necessary for the introduction of a non-binary legal gender for all legal purposes. The current developments in Germany will constitute the heart of the discussion. Chapter 4 is divided into three main sections, each analyzing the abolishment of the mandatory gender registration for certain groups. The first section examines which effects were created if the public gender registration were abolished altogether for one and all. The second section selects Malta, Germany and the Netherlands as case studies to discuss the elimination of children’s gender registration. The third section analyses the possibility of making the gender registration optional for adults via reference to recent developments in Germany.

⁹ Dan Christian Ghattas, ‘Standing up for the Human Rights of Intersex People – How Can You Help?’ (OII Europe, ILGA-Europe 2015) 19; Organisation Intersex International Australia, ‘Intersex People and Identification Documents’.

¹⁰ Yannick Pace, ‘Malta Introduces “X” Marker on Passports, ID Cards and Work Permits’ *MaltaToday* (5 September 2017) <http://www.maltatoday.com.mt/news/national/80228/malta_introduces_x_marker_on_passports_id_cards_and_work_permits> accessed 26 May 2018.

1. Eliminating gender markers from identification documents

Principle 31 of the Yogyakarta Principles +10 demands that gender information will be progressively eliminated from identity cards and that gender will become irrelevant in processes of personal status registration.¹¹ Some countries, notably the Netherlands, are in the process of revising the ways in which gender information is recorded and used for communicating with its residents. In 2014, researchers of the University of Utrecht carried-out a study on the possibility of eliminating the public gender registration, an act initiated

Yogyakarta Principles plus 10

Principle 31:

THE RIGHT TO LEGAL RECOGNITION

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

STATES SHALL:

- A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;
- B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;
- C. While sex or gender continues to be registered:
 - i. Ensure a quick, transparent, and accessible mechanism that legally recognizes and affirms each person's self-defined gender identity;
 - ii. Make available a multiplicity of gender marker options;
 - iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;
 - iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

¹¹ The Yogyakarta Principles plus 10. Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles 2017 Principle 31. TGEU explicitly endorses Principle 31. See: TGEU, 'TGEU Position Paper on Gender Markers' (19 July 2018) <<https://tgeu.org/tgeu-position-paper-on-gender-markers/>> accessed 29 July 2018.

by a parliamentary motion.¹² This study revealed that there are *per se* no restraints under international law for eliminating the civil registration of gender, but that several fields of Dutch law, such as family law (e.g. on marriage and parenthood), would need to be revised given their differentiation according to gender.¹³ As a result of this research, the Dutch government committed to limiting the registration of legal genders wherever possible.¹⁴ Thus far this commitment has been implemented by omitting gender information from public transport cards (“OV-chip cards”). In addition, a number of Dutch educational institutions made the decision to eliminate gender markers from their student cards and implement a gender-neutral communication with their students.¹⁵ Some cities, such as Amsterdam, the Hague and Utrecht, have further announced to eliminate unnecessary questions related to one’s gender from all government forms and/or render any official communication with its citizens gender-neutral.¹⁶

The above-listed measures exhibit that the Netherlands have commenced a profound reconsideration of how data on gender is collected and used for governmental purposes, which includes abolishing gender markers on some personal documents, like public transport cards and student cards. Other countries, such as Australia, began to be similarly aware that gender information is often collected even when irrelevant for the purpose at hand. Australian guidelines on the recognition of sex and gender issued in 2013 state that “all departments and agencies that collect sex and/or gender information must not collect information unless it is necessary for, or

¹² Marjolein van den Brink and Jet Tigchelaar, *M/V En Verder: Seksregistratie Door de Overheid En de Juridische Positie van Transgenders* (Ministerie van Veiligheid & Justitie 2014).

¹³ Marjolein van den Brink and Jet Tigchelaar, ‘English Summary. M/F and beyond Gender Registration by the State and the Legal Position of Transgender Persons’ [2014] Ministerie van Veiligheid & Justitie.

¹⁴ Tweede Kamer der Staten-Generaal, ‘Modernisering Gemeentelijke Basisadministratie Persoonsgegevens (GBA), Brief van de Minister van Veiligheid En Justitie En de Minister van Onderwijs, Cultuur En Wetenschap’ Vergaderjaar 2016–2017, 27 859, Nr. 99 5.

¹⁵ Ministerie van Veiligheid en Justitie, ‘Government Opts for Less Registration of Gender’ (23 December 2016) <<https://www.government.nl/latest/news/2016/12/23/government-opts-for-less-registration-of-gender>> accessed 10 March 2017; Tweede Kamer der Staten-Generaal (n 14) 7–8. The elimination of gender information from OV-Chip and students cards are rather “cosmetic” changes since the administration of both types of cards has access to the central registry, which also provides gender information. Nevertheless, regular staff of the public transport agency, such as ticket controllers, and of universities cannot ascertain the holder’s gender from the cards.

¹⁶ Janene Pieters, ‘Amsterdam Municipality Goes Gender-Neutral in Speeches, Letters’ *NL Times* (26 July 2017) <<http://nltimes.nl/2017/07/26/amsterdam-municipality-goes-gender-neutral-speeches-letters>>; ‘Genderneutrale Taaltips Voor Gemeenteambtenaren’ (*Gemeente.nu*, 26 July 2017) <<https://www.gemeente.nu/dienstverlening/communicatie/genderneutrale-taaltips-gemeenteambtenaren/>> accessed 19 August 2017; Tweede Kamer der Staten-Generaal (n 14) 5.

directly related to, one or more of the agency’s functions or activities”¹⁷. In a report on gender registration, the German Institute for Human Rights (GIHR) further explains that most German governmental forms registering gender do not, in fact, require any gender information per se.¹⁸

Despite the Netherlands increasingly limiting gender markers on IDs, they still face constraints under international regulations when it comes to passports. Current guidelines on machine-readable travel documents by the International Civil Aviation Organisation (ICAO), a specialized United Nations agency, requires countries to include gender markers, expressed as F, M or X, on passports.¹⁹ These ICAO guidelines were transposed into EU law through regulation 2252/2004 on biometric passports, which compels all EU passports to be in line with ICAO regulations.²⁰ As a consequence, EU member states do not have the option anymore to issue passports without any gender marker, which, for example, Germany provided for to trans persons until 31 December 2005.²¹ Thus, if the Netherlands wishes to leave out gender information from passports, they could only do so by stating an X marker on all passports. However, as discussed in detail in 2.2., people with X markers on passports have faced obstacles concerning the online reservation systems for check-in at certain airline companies, and, conversely, when entering certain countries. Thus, countries allowing an X marker, such as Malta, often provide their citizens with the option of obtaining two passports; one with a binary gender and another with an X marker.²²

¹⁷ Australian Government, ‘Australian Government Guidelines on the Recognition of Sex and Gender’ (2013) 6.

¹⁸ Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 43.

¹⁹ International Civil Aviation Organization, ‘Machine Readable Travel Documents. Part 4 — Specifications for Machine Readable Passports (MRPs) and Other TD3 Size MRTDs’ (2015) Doc 9303 14.

²⁰ Council Regulation No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States 2004 [L 385/1] Preamble (3), Annex para 2.

²¹ Deutscher Bundestag, ‘Drucksache 16/306. Antwort Der Bundesregierung Auf Die Kleine Anfrage Der Abgeordneten Irmingard Schewe-Gerigk, Wolfgang Wieland, Volker Beck (Köln), Weiterer Abgeordneter Und Der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 16/148 – Probleme Bei Der Reisefreiheit Für Transsexuelle Bürgerinnen Und Bürger’ (2005) 1; Interview with Dan Christian Ghattas (23 May 2018).

²² Interview with Gabriella Calleja (22 May 2018).

International Regulations concerning Gender Markers on Passports

- **International Civil Aviation Organization:**
 - Doc 9303, Machine Readable Travel Documents. Part 4 (2015), p. 14: the sex of a passport's holder must be specified with F, M or X (in English, French, Spanish) or single initial commonly used in the language of the State where the document is issued
- **Europe Union:**
 - Council Regulation No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, Preamble para 3: the ICAO Doc 9303 (see above) shall be taken into account on machine readable travel documents issued by member states of the EU

While under current international guidelines and EU law gender markers in form of F, M or X must remain on passports, states are free to abolish gender markers from other identity cards. In fact, a few other jurisdictions other than the Netherlands began to eliminate gender markers from different IDs.²³ In addition, some countries, such as Austria for health cards and Greece, Germany, Italy and Serbia for IDs, have never introduced gender markers for certain cards in the first place. Further still, most driving licenses issued by member states of the CoE display no gender markers. Nevertheless, gender is often still registered in the registry for driving licences. For example, Dutch driving licences display no gender markers. However, once one changes their legal gender on their birth certificate, one must also inform the licence registration and apply for a new licence since the old one becomes invalid with an official change of legal gender.²⁴

Lacking a gender marker on an ID does not necessarily mean that a person's legal gender is not indicated on the card. There are several other ways of displaying a person's legal gender assignment. For example, German personal identity cards contain no gender markers since, according to the German regulations governing naming rights, a person's first name should

²³ Ministry of Government and Consumer Services, 'Gender on Health Cards and Driver's Licences' (*news.ontario.ca*, 29 June 2016) <<https://news.ontario.ca/mgs/en/2016/06/gender-on-health-cards-and-drivers-licences.html>> accessed 8 February 2017.

²⁴ Interview with Marjolein van den Brink (31 May 2018).

indicate the person's gender.²⁵ In many Eastern European languages, not only are first names highly gendered but last names may also differ according to one's legal gender assignment (e.g. Witkowski for legal men and Witkowska for legal women). Another way to indicate a person's legal gender on an identity card is to display a social security number, which contains a certain digit referring to a (binary) gender. For example, the ninth digit in the Swedish social security number, which is needed practically in all public actions, like opening a bank account, displays a person's legal gender, an even number for women and an odd one for men.²⁶ In addition to many Scandinavian countries, many Eastern European countries also contain gendered personal identity numbers.²⁷ Abolishing gender markers from IDs must therefore be complemented by allowing gender-neutral names and reducing gender for identification purposes in a more general manner, such as displaying it in social security numbers.

1.1. Effects of reducing the dissemination of gender information

Eliminating gender markers from identity documents could prevent the situation that gender markers do not reflect a person's gender identity. In addition, it could alleviate a lot of stress for trans and intersex persons to become scrutinized for having a gender expression or a physical appearance that is considered "non-matching" the gender marker on IDs. Cis persons, including intersex persons identifying with the gender that was assigned to them at birth, whose gender expression and/or physical appearance do not conform to normative gender expectations could be equally relieved from some public scrutiny. Not having gender markers on IDs could be in particular beneficial in regions where gender non-conforming persons are often subjected to unnecessary and invasive security checks.²⁸ In addition, it could be of service to all persons who consider gender identity to be a private issue, thus refusing to reveal it publicly. Experiencing

²⁵ Interview with Richard Köhler (17 May 2018); Germany, Allgemeine Verwaltungsvorschrift zum Gesetz über die Änderung von Familiennamen und Vornamen 1980 [NamÄndVwV] para 67. In fact, the German Constitutional Court ruled in 2008 that, despite the aforementioned administrative rule, parents have the right to give their child a non-gendered first name. See: *1 BvR 576/07*.

²⁶ Jacob Palme, 'Swedish Social Security Numbers' (6 August 1998) <<https://people.dsv.su.se/~jpalme/society/swedish-social-security-no.html>> accessed 22 May 2018.

²⁷ Another way to show the legal gender assignment on identity cards is to give the cards another look depending on one's gender. For example, only in 2016, Turkey ended the policy to issue blue IDs for men and pink IDs for women. See: 'Distribution of Biometric Turkish ID Cards Begins' *Hürriyet Daily News* <<http://www.hurriyetdailynews.com/distribution-of-biometric-turkish-id-cards-begins-96822>> accessed 7 June 2018.

²⁸ Interview with Sanjar Kurmanov (30 May 2018).

gender identity as a private issue, for example comparable to the experience of being catholic or Muslim, and not wanting to disclose it through identification documents can concern everybody, including trans and cis persons (e.g. intersex persons who identify with the gender assigned to them at birth but whose gender expression and/or physical appearance do not conform to normative gender expectations). Being officially identified with one gender can feel like being put into a “box”, which restricts one in developing their identities, expressions and behaviors freely. The aforementioned Dutch study’s authors, Marjolein van den Brink and Jet Tigchelaar, argue in this context that gender should be considered more and more as a sensitive personal identity marker and one covered by data protection laws.²⁹ The latter is echoed by Transgender Europe in its Position Paper on Gender Markers, published in 2018..³⁰

Consequently, one way of reducing the dissemination and collection of personal gender information would be to expand privacy protection laws in order to include gender information. For example, the EU General Data Protection Regulation (GDPR), in force since 25 May 2018, prohibits that a number of personal identity markers, which could lead to discrimination or other negative consequences, are revealed. The protected identity features do not cover gender but include racial or ethnic origin, political opinions, religious beliefs, trade union membership, health condition, sex life and sexual orientation.³¹ The general prohibition of processing this sensitive data is subject to various exceptions, such as when the subject concerned provides explicit consent and if the processing is necessary for safeguarding the rights of the subject or another person (e.g. regarding social protection), for substantial public interest, for scientific or statistical purposes and for reasons of public health.³² These exceptions would ensure that if gender was also a sensitive personal identity marker, it could still be used for collecting gender disaggregated data, affirmative action and the safeguarding of rights and services.

²⁹ Marjolein van den Brink and Jet Tigchelaar, ‘Gender Identity and Registration of Sex by Public Authorities’ (2015) 2 European Equality Law Review 29, 40.

³⁰ TGEU (n 11).

³¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) Preamble 75, Art. 9(1).

³² *ibid* Art. 9(2).

Reducing the dissemination and recording of gender information in the Netherlands does not in itself abolish the civil status registration of (binary) genders. For certain purposes, for instance when people come in contact with gender-specific laws (e.g. affirmative action laws or prison allocations), one's legal gender as registered in the civil registry matters.³³ However, if gender is less important for official identification purposes, it could become also less relevant for the organization of society in general, such as concerning the education of children (e.g. gender-divided games). This could benefit society at large, especially children, since they could develop their own personalities, including identity, expressions, sexual orientations and interests, with fewer constraining gender norms.

1.2. The rationale of having gender markers on IDs

As mentioned above, the ICAO prescribes the mentioning of gender markers, expressed in form of an F, M or X, on international travel documents in its guidelines.³⁴ In a review conducted in 2012, the ICAO addressed the question whether these guidelines on displaying gender on passports are still necessary in the time of biometric and electronic travel documents.³⁵ It concluded that the costs of removing the requirement to include gender markers on passports outweighs the benefits. Nevertheless, it also held that “there is still a significant opportunity for ICAO in changing the mandatory requirement in the future”³⁶. This means that countries wishing to eliminate gender markers from passports can lobby the ICAO to revise its guidelines.³⁷

³³ An exception to this is the law establishing parenthood of trans women in the Netherlands. The legal parental role of trans women becoming a biological parent is not derived from their legal gender but their reproductive functions. This results in the situation that a trans woman who is registered with the female gender in the civil registry and who begets a child is officially registered as the child's *father* and not as *mother*. On the contrary, trans men recognized with their self-identified gender and giving birth to a child are registered as the child's father in the Netherlands. See: Marjolein van den Brink and Jet Tigchelaar, ‘The Equality of the (Non) Trans-Parent: Women Who Father Children’ in Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt (eds), *Equality and human rights nothing but trouble? Liber amicorum Titia Loenen* (Netherlands Institute of Human Rights 2015).

³⁴ International Civil Aviation Organization (n 19) 14.

³⁵ International Civil Aviation Organization, ‘A Review of the Requirement to Display the Holder's Gender on Travel Document’ (ICAO 2012) TAG/MRTD/21-IP/4 20/11/12.

³⁶ *ibid* 5.1.

³⁷ Interview with Köhler (n 25).

The ICAO review states in several instances that gender markers on passports are used to identify passengers.³⁸ A similar review conducted by the UK Passport Office also stresses that gender is used as an identification criterion,³⁹ namely, that a gender marker is expected to provide information about a person’s gender identity and gender expression. However, a person’s gender marker, and gender identity, or expression do not necessarily “match” in a binary logic and it would be cisnormative to assume they always do. This point is problematic for many trans and intersex persons, as well as for cis persons whose gender expression does not conform to normative gender expectations. They should not depend on the perceptions and bias of the officers in charge of evaluating those documents. Thus, using gender as identification criteria polices and scrutinizes any gender non-conforming person and does not take into account that gender expression is malleable and interpreted differently according to period and space. Functions of biometric and electronic travel documents, such as facial recognition, fingerprint recognition and iris recognition, constitute alternative means to gender for identifying persons. Yet, facial recognition can be equally problematic for people transitioning. In addition, fingerprint and iris recognition must also be subject to data protection restrictions, since storing people’s fingerprints and iris patterns together with information on gender markers as displayed on their passports can expose persons who change their gender marker to scrutiny. For example, the US stores the fingerprints alongside information on gender markers of people entering the country. This means that the data recorded in the US electronic system and connected to the fingerprints of a person who has changed the legal gender and/or name and who is re-entering the US will not match the information presented on the person’s passport.⁴⁰ Thus, if used for identification purposes, biometric information should not be recorded in connection with information on people’s gender marker.

Additionally, including gender information on health cards does not necessarily indicate the sex-specific services a person might be in need of. In fact, connecting the provision of health services

³⁸ International Civil Aviation Organization (n 35) 2, 4.

³⁹ HM Passport Office, ‘Gender Marking in Passports: Internal Review of Existing Arrangements and Possible Future Options’ (2014) 2 <<https://uktrans.info/research/53-legal-research/71-gender-marking-in-passports-internal-review-of-existing-arrangements-and-possible-future-options>> accessed 26 February 2017.

⁴⁰ Interview with Ghattas (n 21).

to one's legally-registered gender creates difficulties for trans and intersex in several European countries. For example, intersex persons who are legally registered as male have faced difficulties in accessing sex-specific healthcare for women (e.g. visits to gynaecologists) in countries such as Germany and Belgium. In other countries, such as France, the provision of health care services seems to be unconnected to one's legal gender but rather to one's corporal needs.⁴¹ The issue here is not necessarily whether health cards display gender markers but whether the reimbursement of gender-specific health care services is dependent upon a person's legal gender. The fact that some countries, such as Austria, contain no gender information on health cards, additionally exhibits that gender markers on health cards are, indeed, largely unnecessary.

The British review regarding gender information on passports also claims that gender markers are helpful in choosing the correct pronouns and titles in official communication (e.g. Ms, Mr), as well as to ensure that body searches at borders and airports are carried-out by a person of the same gender.⁴² Once again the assumption is that legal gender markers always correlate with one's self-identified and lived gender. In addition, it goes on to show how important it is that an elimination of gender markers from IDs goes hand in hand with a more profound reconsideration of the usage of gender for official purposes. This would entail rendering official communications gender-neutral, as is currently the case in some Dutch cities. It would also entail ensuring that a traveler's self-identified gender counts for choosing the person conducting a body search, as opposed to a person's legal gender.

The British Passport Office states further that another rationale for keeping gender markers on British passports is that they can ensure people's access to gender-specific services as well as serve as a legal gender verification proof for trans persons. In some instances, gender markers on IDs can indeed assist people in securing access to gender-divided spaces and services.⁴³ For example, trans women, who are legally recognized with their self-identified gender, could rely on their IDs in case they will be denied access to women-only spaces, such as changing rooms in private swimming pools. A comprehensive anti-discrimination law which prohibits

⁴¹ *ibid*; Dan Christian Ghattas, Barbara Unmüßig and Jana Mittag, *Human Rights between the Sexes: A Preliminary Study on the Life Situations of Inter*individuals* (Heinrich-Böll-Stiftung ed, 1. Aufl, Heinrich-Böll-Stift 2013) 32.

⁴² HM Passport Office (n 39) 2.

⁴³ Interview with Vic Valentine (8 June 2018).

discrimination on the grounds of gender identity and gender expression in any field, and which codifies trans' persons' right to access spaces and services on a self-determined basis, would only partially rectify this situation due to the practical obstacles one faces when claiming rights through court procedures. Suing the private service provider, which, for the most part, entails a lengthy and costly court proceeding, would not provide immediate relief to the denial of access, and, therefore, would not provide an adequate short-term solution.

Incidentally, another issue discussed by the UK review concerns the argument that gender markers on passports might be necessary for proof of one's legal gender with regards to laws creating a distinction among people based on their gender.⁴⁴ However, in countries with a functioning civil registry, which is arguably the case in all member states of the CoE, proving one's legal gender could be performed by relying on the gender entry in the civil registry. Consequently, using an ID or passport as proof of one's legal gender would not be necessary.

Finally, in its review, the ICAO also discussed the issue of gender markers on passports being helpful to the collection of gender disaggregated data regarding travelers.⁴⁵ This data can be useful for recognizing gender inequalities in personal mobility and movement.

1.3. Conclusions

The Netherlands and a few other countries are becoming progressively aware of the distressing effects gender markers can have for gender non-conforming persons whose gender markers do not “match” their gender expression by binary logic. This is why some scholars and activists began to call out for privacy-protection laws intended to also cover the personal characteristics of gender.⁴⁶ At the same time, gender markers on identity cards can at times be utilized as a practical tool to secure access to gender-divided services and spaces, especially for trans and

⁴⁴ The UK review discusses the British nationality law which makes a difference between mothers and fathers of children born before 1983. See: HM Passport Office (n 39) 5.

⁴⁵ International Civil Aviation Organization (n 35) 5.

⁴⁶ Brink and Tigchelaar, 'Gender Identity and Registration of Sex by Public Authorities' (n 29) 40; Interview with Köhler (n 25).

intersex persons.⁴⁷ While countries can freely decide whether they want to remove gender information from various kinds of identity cards, they are still required to include gender markers in the form of F, M or X on passports under current ICAO guidelines.⁴⁸

2. Third gender markers on identification documents

Some countries around the world have introduced the possibility of changing the legal gender marker to an X on certain IDs, while still keeping binary genders in the civil registry. This means people can display an X on their IDs, at times also including the passport, yet their binary gender registered in the civil registry count for the gender-specific rights and duties' allocation (e.g. marriage, military conscription etc.). In this sense, these countries have not introduced a “third” legal gender for *all* legal purposes but for identification purposes alone. The X marker could provide relief to non-binary person, persons not identifying with any gender at all and persons currently transitioning.

As discussed later on, it is crucial that X markers are accessible on a self-determined basis, without having to fulfil restrictive requirements. They must also not be assigned forcefully on anybody, who does not explicitly wish to obtain an X marker.

Malta and Denmark are, so far, the sole European countries to allow X markers on IDs. Denmark introduced the X marker alongside a gender-recognition reform in 2014, with Malta following suit in September 2017.⁴⁹ Some non-European countries and regions allow X markers on identification documents,⁵⁰ which, at times, signifies that these countries have introduced non-binary legal gender for all legal purposes, as will be discussed in the next chapter. In the United Kingdom, a person identifying as “non-gendered” has fought for a passport bearing an X marker for 20 years. This person’s appeal against the government’s refusal to issue such a passport ended

⁴⁷ Interview with Valentine (n 43).

⁴⁸ International Civil Aviation Organization (n 19) 14.

⁴⁹ TGEU, ‘Third Gender Marker Options in Europe and Beyond’ (9 November 2017) <<https://tgeu.org/third-gender-marker-options-in-europe-and-beyond/>> accessed 27 May 2018.

⁵⁰ Ministry of Government and Consumer Services (n 23); Statistics New Zealand Tataurangi Aotearoa, ‘New Zealand Statistical Standard for Gender Identity’ (2015).

up at the High Court, which declined the appeal in June 2018.⁵¹ The presiding judge at the High Court did recognize that the non-issuance of passports with X markers infringes the applicant’s right to private life, as protected under Article 8 of the ECHR. However, he considered this infringement as proportionate and as serving the legitimate aim of ensuring an administratively coherent system of gender recognition and maintaining security.⁵² In addition, he doubted the emotional value of changing the gender marker to an X on passports for “non-gendered” persons, since other documents, including the birth certificate, would continue to reflect binary genders.⁵³

The X marker is by far the most common non-binary gender marker on identity cards, but some countries also provide other third letters. For example, Nepal allows an O, standing for “other”, as gender marker, while T, referring to “transgender”, can be displayed on Indian passports.⁵⁴ Some non-binary activists in Europe, such as in Ireland, wish to have the marker NB for non-binary on identification documents.⁵⁵ The problem with non-binary gender markers other than X is that they are not internationally recognized by current ICAO guidelines. Other countries are therefore not required to accept travel documents with gender markers other than F, M or X.

Most countries who introduced X marker, such as Canada and New Zealand,⁵⁶ or non-binary gender categories for all legal purposes, such as Australia and India,⁵⁷ are common-law countries. One reason for this could be that common-law countries do not usually have one central registry,

⁵¹ *R (on the application of Christie Elan-Cane) v Secretary of State for the Home Department* [2018] High Court of Justice CO/2704/2017.

⁵² *ibid* 130.

⁵³ *ibid* 115.

⁵⁴ J Lester Feder, ‘U.S. Has No Process For Accepting Transgender Passports, State Department Confirms’ *BuzzFeed* (7 May 2015) <<https://www.buzzfeed.com/lesterfeder/us-cant-process-transgender-passports-state-department-confi>> accessed 28 May 2018; Kyle Knight, ‘Nepal’s Third Gender Passport Blazes Trails’ (*Human Rights Watch*, 26 October 2015) <<https://www.hrw.org/news/2015/10/26/nepals-third-gender-passport-blazes-trails>> accessed 27 May 2018.

⁵⁵ Interview with Köhler (n 25).

⁵⁶ Government of Canada, ‘Minister Hussen Announces Major Step Forward in Gender Equality by Making Changes to Passports and Immigration Documents’ (*gcnews*, 24 August 2017) <https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/08/minister_hussen_announcesmajorstepforwardingenderequalitybymakin.html> accessed 7 July 2018; Statistics New Zealand Tataurangi Aotearoa (n 50); ‘Information about Changing Sex / Gender Identity | New Zealand Passports’ <<https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>> accessed 6 February 2017; ‘Updating Your Licence’ <<https://nzta.govt.nz/driver-licences/renewing-replacing-and-updating/updating-your-licence/>> accessed 13 June 2018.

⁵⁷ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] High Court of Australia HCA 1; *National Legal Services Authority v Union of India and others* [2014] Supreme Court of India writ petition (civil) No. 400 of 2012 and writ petition (civil) No. 604 of 2013.

where personal status information is stored, but obtain different records for different purposes, such as for passports and birth certificates respectively. Civil-law countries, on the other hand, have usually one central registry, which provides all other public systems (e.g. universities, insurances) with personal status information.⁵⁸ It is, therefore, arguably easier for common-law countries to allow a change of gender marker to an X on one identification document while leaving the gender marker unchanged on another document, or, conversely, in the civil registry. Nonetheless, the example of Malta and Denmark, both not common-law countries, shows that civil and mixed legal systems can as well find ways to allow a gender marker on identification documents which is different from the one recorded in the civil registry. Germany further provides the option to receive a passport with a (binary) gender marker other than the one noted in the civil registry, if the person concerned has changed their first name but not (yet) their legal gender.⁵⁹ This ensures that persons can travel with a gender marker which is correspondent to their gender identity/expression.

2.1. The X marker in Malta

Effective May 2018, nine months after the introduction of the X marker in Malta, two persons changed their gender marker to an X on their IDs, with one of these two persons doing so on their passport as well. In principle, people in Malta are required to have the same gender marker on all their documents, which is why it is surprising that only one person has changed the gender marker to an X on their passport, while two person have done so for the ID. The reason for this could be that one of the two persons concerned does not have a passport. If the gender marker is changed on one document, it is still not changed automatically on another, and it is up to the applicants to pursue this action in two offices, one for passports and one for IDs, respectively, albeit both located in the same building.⁶⁰ In addition to IDs and passports, residence permits can also exhibit an X marker, while Maltese drivers' licenses continue to display no gender

⁵⁸ Marjolein van den Brink, Philipp Reuß and Jet Tigchelaar, 'Out of the Box? Domestic and Private International Law Aspects of Gender Registration: A Comparative Analysis of Germany and the Netherlands' (2015) 17 *European Journal of Law Reform* 282, 284.

⁵⁹ German Passport Act (Passgesetz, PassG) 1986 Section 4 Passport specimens; Interview with Ghattas (n 21).

⁶⁰ Interview with Calleja (n 22).

information at all. The only requirement for changing the gender marker on a passport, identity card and/or residence permits it by taking an oath in the presence of a notary in addition to filling-out the application form.⁶¹

The X in Malta stands for “undeclared”, meaning referring not to a “third” gender but to the non-registration of a gender. The change to an X marker on IDs in Malta does not impact the gender marker on the birth certificate, which becomes relevant when a person with an X marker comes across a gender-differentiating law. However, not many laws in Malta differentiate according to gender.⁶² When it comes to sex-specific healthcare services, persons with X markers might experience similar problems than trans and intersex persons with binary gender markers, such as not being able access certain services that do not correspond to their gender marker (e.g. gynecologist visits for trans men).⁶³ This is why it is crucial for anti-discrimination laws to cover gender identity, gender expression and sex characteristics in all spheres of life, including public and private actions. Malta’s Gender Identity, Gender Expression and Sex Characteristics Act (2015) (*hereinafter* GIGESC Act) explicitly prohibits any form of discrimination based on gender identity, and, furthermore, holds that public services “must promote equality of opportunity to all, irrespective of sexual orientation, gender identity, gender expression and sex characteristics”⁶⁴. In addition, the Maltese MEAE is currently working on “Sex and Gender Guidelines”, which will proposedly serve as an information material source for public and private institutions.⁶⁵

No significant changes in the Maltese civil registry system were needed for introducing the X marker, since the option to register children’s gender as “undetermined” already existed before.⁶⁶ Thus, “U” in civil registries now stands either for “undetermined”, in case of children, or “unspecified”, in case of adults who change the legal gender to an X. Both are expressed as an X marker on identification documents, as “U” would not be recognized by the ICAO. The 2015 GIGESC Act made it further mandatory for all public institutions to provide the gender category

⁶¹ Pace (n 10).

⁶² Interview with Calleja (n 22).

⁶³ *ibid.*

⁶⁴ Malta, Gender Identity, Gender Expression and Sex Characteristics Act 2015 [No. XI of 2015] para 13(2).

⁶⁵ Interview with Calleja (n 22).

⁶⁶ *ibid.*

“other”, standing for “undetermined” and now also “unspecified”, next to “female” and “male” on official forms.⁶⁷

The situation in Denmark is relatively similar to the one in Malta but the effectiveness of an X marker is reduced due to the Danish social security number which continues to reflect a binary gender in its last digit (even digits stand for female and odd digits for male gender). Since 2014, adults in Denmark can change the gendered digit of their social security number from odd to even without fulfilling any requirements, except for a six-month waiting period.⁶⁸ However, the social security number of persons with an X marker on their ID or passport continues to display a binary gender in its last digit.⁶⁹

2.2. Implications on cross-border movements

As stated above, the X on passports is an officially-recognized gender marker by the ICAO and should therefore be accepted by all 192 ICAO member states. Nonetheless, some policy makers and activists have expressed concern that, in practice, some countries discriminate against people with X markers on passports at borders and, conversely, when considering visa applications.⁷⁰ Indeed, some persons with X markers have reported obstacles at border controls⁷¹ and the Department of Foreign Affairs and Trade of Australia’s website warns that travelers with X markers could face difficulties when attempting to enter another country.⁷² Members of the *Khawaja Sira* community in Pakistan have expressed fear that Saudi Arabia would not allow them entering the country for religious pilgrims in case they have a third legal gender. In fact, already *Khawaja Sira* with binary legal genders face difficulties in travelling to Saudi Arabia and in performing religious rituals according to the gender they usually practice religion, which, in

⁶⁷ *ibid.*

⁶⁸ Denmark, Motion to amend the Act on the (Danish) Civil Registration System (English translation) 2014 [L 182] Art. 1(1).

⁶⁹ Interview with Köhler (n 25).

⁷⁰ Scottish Trans Alliance, ‘Non-Binary Myth-Busting Answers’ <<http://equalrecognition.scot/non-binary/>> accessed 21 May 2018.

⁷¹ Interview with Ghattas (n 21).

⁷² Australian Government, Department of Foreign Affairs and Trade, ‘Lesbian, Gay, Bisexual, Trans and Intersex Travellers’ <<http://smartraveller.gov.au/Pages/lgbti-travellers.aspx>> accessed 21 May 2018.

fact, are mainly rituals performed by men.⁷³ While these accounts show that persons with X markers have encountered obstacles in travelling in some countries, there are also reports of persons with X markers travelling to other countries, like to the United Kingdom, without experiencing any problems.⁷⁴ Thus, whether persons with X markers in travel documents face any difficulties in cross-border movements likely depends on the country concerned as well as the personal attitudes of the security personnel at the border controls. Furthermore, more research is needed to better understand whether persons with X markers in passports make the same or other experiences with invasive body searches and prolonged interrogations than binary trans and intersex persons.⁷⁵

One major difficulty that persons travelling with an X marker on passports face concerns the check-in at airline companies since many electronic reservation software do not provide non-binary gender options. Many also require choosing among binary titles, such as Mr or Ms/Mrs, unless they provide a gender-neutral option (e.g. Dr) or the option to state no title.⁷⁶ Having a non-binary gender marker on a passport can have additional implications on visa applications. Even more so is the case when the marker is not X but a third letter, one not recognized by the ICAO. For example, there have been reports that visa applications to the U.S. by a person from India with a T (standing for “transgender”) on their passport could not be processed since the electronic system did not provide any gender option available other than F and M. The applicant in question therefore ticked the box F, which led to a data discrepancy on the visa application and passport alike.⁷⁷ Nonetheless, the fact that non-binary gender markers do not *necessarily* create

⁷³ Muhammad Azfar Nisar, ‘(Un)Becoming a Man: Legal Consciousness of the Third Gender Category in Pakistan’ (2018) 32 *Gender & Society* 59, 70.

⁷⁴ Interview with Valentine (n 43).

⁷⁵ ‘Travelling as a Trans Person Is Exhausting and Dangerous. For Trans People, Airport Confrontations Are More than Embarrassing, They Can Also Be Incredibly Physically Threatening.’ *VICE* (11 November 2015) <<https://www.vice.com/sv/article/4wb8jw/travelling-as-a-trans-person-is-exhausting-and-dangerous>>; Interview with Kurmanov (n 28); Hida Vilorio, ‘Fear of Flying—or at Least the TSA—While Intersex’ *The Daily Beast* (18 March 2017) <<https://www.thedailybeast.com/articles/2017/03/18/fear-of-flying-or-at-least-the-tsa-while-intersex>> accessed 11 June 2018; Open Society Foundation, ‘License to Be Yourself: Responding to National Security and Identity Fraud Arguments’ (2016) see e.g. page 4.

⁷⁶ Jack Byrne, ‘Email’ (22 May 2018).

⁷⁷ Feder (n 54).

difficulties for a visa application is shown by the story of a Nepalese activist, who travelled with the gender marker O, referring to “other”, on their passport to several countries in Asia.⁷⁸

One way for countries to ensure that people with an X marker on travel documents could travel without facing major obstacles and discrimination is to issue two passports, one with an X marker and one with a binary gender. Malta provides this possibility.⁷⁹ Countries introducing an X gender marker could also officially inform other countries about this measure by ways of sending diplomatic notices to foreign governments or addressing the issue in multilateral organs, of the likes of the ICAO, the CoE and the EU.

2.3. Conclusions

Some countries, like Malta and Denmark, have introduced the possibility to exchange the binary gender marker with an X on identity cards, including passports, while keeping binary genders on birth certificates and, accordingly, in the birth registry.⁸⁰ This means that in cases where the access to a certain service, such as health care or rights, is connected to one’s legal gender, the gender registered in the birth registry counts, while the X marker on ID cards is irrelevant. Having an X marker on passports can create some difficulties for travel, specifically since many airline companies provide binary options only for filling-out the gender information or titles.⁸¹ Some persons with a non-binary gender marker on passports other than X, like T in the case of an Indian passport, have also reported difficulties in receiving a visa since many electronic visa applications do not recognize non-binary gender markers.⁸² At the same time, there are also reports of persons travelling with non-binary gender markers on passports, like O or X, without facing any problems when entering other countries.⁸³ Thus, non-binary gender markers on travel documents do not create any problems *per se* in cross-border movements, but countries can nonetheless prevent possible complications for their nationals by allowing persons to hold two

⁷⁸ Knight (n 54).

⁷⁹ Interview with Calleja (n 22).

⁸⁰ TGEU (n 49).

⁸¹ Byrne (n 76).

⁸² Feder (n 54).

⁸³ Knight (n 54); Interview with Valentine (n 43).

passports, one with a binary gender marker and one with a non-binary one, informing foreign governments about X markers and pushing for multilateral agreements.

3. Non-binary legal gender categories for all legal purposes

Several countries and regions around the world have already introduced non-binary gender categories for all legal purposes. These include jurisdictions like Australia (2015)⁸⁴, Bangladesh (2013)⁸⁵, California (2017)⁸⁶, India (2014)⁸⁷, Nepal (2007)⁸⁸, New York (2016)⁸⁹, Ontario (2018)⁹⁰ and Pakistan (2009)⁹¹. While non-binary categories in most of these jurisdictions are open for *all* persons whose gender identity is neither female nor male, some seem to restrict access to intersex persons. For example, body characteristics which do not fit the typical

⁸⁴ *NSW Registrar of Births, Deaths and Marriages v. Norrie* (n 57).

⁸⁵ Aaron Day, 'Bangladesh: Third Gender Hijra to Be Recognised in Official Documents' *Pink News* (11 December 2013) <<http://www.pinknews.co.uk/2013/11/12/bangladesh-third-gender-hijra-to-be-recognised-in-official-documents/>> accessed 15 February 2017; Mohosinul Karim, 'Hijras Now a Separate Gender' *Dhaka Tribune* (11 November 2013) <<http://archive.dhakatribune.com/bangladesh/2013/nov/11/hijras-now-separate-gender>> accessed 15 February 2017.

⁸⁶ Legislative Council California, Senate Bill No. 179 2017.

⁸⁷ *National Legal Services Authority v. Union of India and others* (n 57).

⁸⁸ *Pant v. Nepal* (n 1).

⁸⁹ Sam Levin, 'First US Person to Have "intersex" on Birth Certificate: "There's Power in Knowing Who You Are"' *The Guardian* (11 January 2017) <<https://www.theguardian.com/world/2017/jan/11/intersex-rights-gender-sara-keenan-birth-certificate>> accessed 27 January 2017.

⁹⁰ Ontario government, 'Changing Your Sex Designation on Your Birth Registration and Birth Certificate' (2 May 2018) <<https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate>> accessed 16 May 2018.

⁹¹ *Dr Muhammad Aslam Khaki & another v SSP (Operations) Rawalpindi & others* [2009] Supreme Court of Pakistan Constitution Petition No. 43 of 2009; Zeeshan Haider, 'Pakistan's Transvestites to Get Distinct Gender' *Reuters* (23 December 2009). New Zealand is often described as having introduced a "third" gender, since it allows an X gender marker on passports, standing for "indeterminate/unspecified" gender, and to display "indeterminate" as gender information on driver licenses. However, the only non-binary option on birth certificates, an "I" considered as referring to "indeterminate", is used for registering infants whose sex is "unclear". This is often the case for stillborns and less often for intersex infants. Intersex adults can apply to change their binary gender marker to an "I" only if they can prove that their sex characteristics were "indeterminate" at the time of birth. Thus, the "indeterminate" option on birth certificates is not accessible to most non-binary persons. See: "Information about Changing Sex / Gender Identity," New Zealand Passports, accessed June 13, 2018, <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>; "Updating Your Licence," NZ Transport Agency, accessed June 13, 2018, <https://nzta.govt.nz/driver-licences/renewing-replacing-and-updating/your-licence/>; Human Rights Commission New Zealand, "To Be Who I Am/Kia Noho Au Ki Toku Ano Ao. Report of the Inquiry into Discrimination Experienced by Transgender People," 2008, 7.32; R v The Registrar General of Births, Deaths and Marriages cited in Human Rights Commission, "Human Rights in New Zealand. Ngā Tika Tangata O Aotearoa." (Auckland, 2010), 313.

definition of female and male seem to be crucial for being legally recognized as *hijra*, often called, and not entirely correctly, “third genders”, in Bangladesh.⁹²

Most of the above-mentioned jurisdictions still demand the fulfilment of some restrictive requirements prior to allowing people to change their legal gender. For example, in Ontario, trans persons, including non-binary persons, must provide statements from psychologists in order to access gender recognition procedures⁹³ and “sex affirmation procedures”, which include sterilization, are mandatory in Australia for this said purpose.⁹⁴ California, on the other hand, simplified its gender recognition procedure at the same time by introducing non-binary legal genders in 2017. It now allows people to change their legal gender unconditionally, demanding only the submission of an affidavit stating that the change has no fraudulent intentions.⁹⁵ Depending on the country, receiving identification documents with a non-binary gender marker can also be subject to practical obstacles and malfunctioning bureaucracies. For example, despite the recognition of “transgender persons’ right to decide their self-identified gender”⁹⁶ in India, Indian civil registries still often deny trans persons, including *hijra*, the provision of identity cards which display their self-identified gender.⁹⁷ Thus, ensuring that the legal recognition of gender identities outside the binary not only remains a promise on paper but becomes reality demands the implementation of quick, easily-accessible, and transparent gender recognition procedures based on self-determination.

International law, including European law, has barely recognized the existence of gender identities outside the two mutually-exclusive boxes, namely women and men. An exception to this is the Inter-American Court of Human Rights, which recognized in an Advisory Opinion, published January 2018, that “some people do not identify themselves as either male or female or

⁹² Adnan Hossain, ‘The Paradox of Recognition: Hijra, Third Gender and Sexual Rights in Bangladesh’ (2017) 0 Culture, Health & Sexuality 1, 10–12. In addition, Sara Kelly Keenan, in intersex person, obtained a new birth certificate with the gender marker “intersex” issued by the state of New York in 2016. Until now, it remains unclear whether also non-intersex persons can ask for a change of gender marker to a non-binary gender category. See: Levin (n 89).

⁹³ Ontario government (n 90).

⁹⁴ Birth, Deaths and Marriages Registration Act, New South Wales 1995 paras 32A, 32B(b).

⁹⁵ Legislative Council California Senate Bill No. 179 (n 86).

⁹⁶ *National Legal Services Authority v. Union of India and others* (n 57).

⁹⁷ International Commission of Jurists, ‘Briefing Paper India: The Transgender Persons (Protection of Rights) Bill, 2016’ (2016).

identify themselves as both”⁹⁸. The Court further stipulated that, according to the American Convention on Human Rights (ACHR), “those who identify themselves with diverse gender identities must be recognized as such”⁹⁹; hence, acknowledging the right of non-binary persons to be officially recognized with their gender identity. Even though the Court’s jurisdiction is limited to its member states in the Americas and the ACHR differs from European human rights treaties, the Court’s reasoning could still serve as an example for European courts when being addressed with related issues in the future.

As further discussed in 3.1.3, EU gender equality law, including judgments by the Court of Justice of the European Union (CJEU), relies particularly on binary language. When it comes to the Council of Europe institutions, the European Court of Human Rights (ECtHR) has never been confronted with a claim for recognition by a non-binary person, but it’s worth mentioning that the Parliamentary Assembly of the CoE called in a resolution on discrimination against transgender persons upon its member states to “consider including a third gender option in identity documents for those who seek it”¹⁰⁰ in 2015. Similarly, in 2017, a resolution on intersex persons’ rights recommends that a range of gender registration options should be made available, including some for persons who identify neither as female nor as male.¹⁰¹ The Commissioner for Human Rights of the CoE and the Fundamental Rights Agency of the EU have also spoken out for reconsidering the binary gender model for the registration of intersex persons.¹⁰² Principle 31 of the Yogyakarta Principles +10 calls out for the availability of multiple options of gender markers,

⁹⁸ *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* [2017] Inter-American Court of Human Rights Advisory Opinion OC-24/17 17.

⁹⁹ *ibid* 115.

¹⁰⁰ Council of Europe Parliamentary Assembly, Resolution 2048 (2015), Discrimination against transgender people in Europe 2015 [Doc. 13742] para 6.2.4.

¹⁰¹ Council of Europe Parliamentary Assembly, Resolution 2191 (2017), Promoting the human rights of and eliminating discrimination against intersex people [Resolution 2191 (2017)] para 7.3.3.

¹⁰² The European Union Agency for Fundamental Rights, ‘The Fundamental Rights Situation of Intersex People’ (2015) FRA Focus 8; Council of Europe Commissioner for Human Rights, ‘Human Rights and Intersex People’ (2015) 9. In addition to the examples provided, the United Nations Development Programme addressed human rights concerns of “third” gender identities, including the difficulties to get legally recognized, in a discussion paper on transgender health and human rights. See: United Nations Development Programme, ‘Transgender Health and Human Rights’ (2013) Discussion Paper 2, 25–27.

next to limiting the registration of gender on identity cards and as part of the civil status registration.¹⁰³

3.1. The German developments concerning non-binary legal gender categories

The introduction of non-binary gender categories is also discussed in several European countries. The most successful example so far is a petition by Vanja, an intersex person in Germany, who embarked on demanding the right to be registered with the gender category “inter/divers” at a civil registry office in the town Gehrden. The case ended up at the German Constitutional Court, which held in November 2017 that the current binary gender registration in Germany is unconstitutional and that the German legislators must rectify the current non-binary persons’ discrimination by the end of 2018.¹⁰⁴ While the exact modelling of the law is up to the legislators, the Court provided two possible scenarios for implementing its verdict: First, Germany could introduce a “third” non-binary legal gender category next to the existing two categories. And, second, it could abolish the registration of gender for civil status purposes altogether and for everybody.¹⁰⁵

Shortly before the German Constitutional Court’s verdict in 2017, the GIHR released a report written by request of the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (*hereinafter* “Ministry of Family”), in which it already proposed the recognition of non-binary persons.¹⁰⁶ The report included a draft amendment to the German personal status law, which, in turn, would introduce a non-binary gender category titled “other gender”¹⁰⁷ and make one’s legal gender registration optional for children and adults alike. The Ministry of Family

¹⁰³ The Yogyakarta Principles plus 10. Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (n 11) Principle 31 (C)(ii).

¹⁰⁴ *1 BvR 2019/16* (Bundesverfassungsgericht [engl. Federal Constitutional Court]).

¹⁰⁵ *ibid* 13, 43.

¹⁰⁶ Bundesministeriums für Familie, Senioren, Frauen und Jugend, ‘Schutz Und Akzeptanz von Geschlechtlicher Vielfalt. Schlussfolgerungen Des Bundesministeriums Für Familie, Senioren, Frauen Und Jugend Aus Der Arbeit Der Interministeriellen Arbeitsgruppe Trans- Und Intersexualität’ (2017).

¹⁰⁷ In German: “weitere Geschlechtsoption”. See: Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 69.

requested the report with the aim to inform the inter-ministerial working group on “Inter- and Transsexual people”¹⁰⁸, established to discuss necessary legislative reforms with other relevant ministries.¹⁰⁹ Since the ministries involved could, apparently, find no consensus regarding the necessary changes, the Ministry of Family published its own position, advocating the introduction of another legal gender category among other reforms shortly before the last parliamentary elections in Germany in 2017.¹¹⁰

The mandate for drafting the German personal status law amendment in the course of 2018, as a result of the Constitutional Court’s verdict, lies with the Ministry of Interior, currently led by the conservative party Christian Social Union in Bavaria (CSU). The law must thenceforth be adopted by the German Bundestag (“Federal Parliament”) and the German Bundesrat (“Federal Council”) before entering into force.¹¹¹

3.1.1. Demands concerning the amendment of the German personal status law

The media disclosed in early-May 2018, that the Ministry of Interior completed a first draft for the amendment of the personal status law, which foresees the introduction of a “third” gender category only accessible to intersex persons, who must provide medical attestations proving that they are intersex. In addition, the draft law would name the new gender category “weiteres”¹¹², which translates into “additional” or “other” in English.¹¹³ These elements all contradict the

¹⁰⁸ In German: “Inter- und Transsexualität“. See: *ibid* 9.

¹⁰⁹ Bundesministeriums für Familie, Senioren, Frauen und Jugend, ‘Zusammenfassung Der Forschungsergebnisse Und Erkenntnisse Des Bundesministeriums Für Familie, Senioren, Frauen Und Jugend (BMFSFJ) Aus Der Begleitmaterial Zur Interministeriellen Arbeitsgruppe „Inter- Und Transsexualität“ (IMAG). Begleitmaterial Zur Interministeriellen Arbeitsgruppe Inter- & Transsexualität - Band 12. Berlin’ (2017) 3.

¹¹⁰ Bundesministeriums für Familie, Senioren, Frauen und Jugend (n 101).

¹¹¹ Interview with Moritz Dritte Option (14 May 2018).

¹¹² After the redaction of this report, the German Ministry of Interior published a new version of the draft amendment which replaces the term “Weiteres” with “divers”. The rest of the draft law remains largely the same as in the previous draft amendment discussed in this report. See: ‘Kabinett beschließt Änderung des Personenstandsgesetzes’ (*Bundesministerium des Innern, für Bau und Heimat*, 15 August 2018) <http://www.bmi.bund.de/SharedDocs/kurzmeldungen/DE/2018/08/geburtenregister.html;jsessionid=C421AAAE19E25E883CB4C8D6FD3682E.1_cid364?nn=10001204> accessed 10 September 2018.

¹¹³ Juliane Loeffler, ‘Wir veröffentlichen den Gesetzentwurf für ein drittes Geschlecht in Deutschland’ *BuzzFeed* (13 June 2018) <<https://www.buzzfeed.com/de/julianeloeffler/dritte-option-intersex-minimalloesung-seehofer>> accessed

demands made for the law by local interest groups representing non-binary persons, like the Dritte Option, which supported Vanja’s lawsuit, and Aktion Standesamt.¹¹⁴ Both Dritte Option and Aktion Standesamt clearly request a law that is open for *all* non-binary persons, be they intersex or not, which is not linked to any medical assessments.¹¹⁵ Dritte Option further argues that the exact wording of the new category should be the decision of each individual. If this is not possible, it should be titled “divers”, and individuals should be able to add a second positive term so that a person’s gender marker could say, for example, *divers/inter* or *divers/variant*.¹¹⁶ Moritz from the Dritte Option confirmed media reports that the Ministry of Interior has not consulted with any interest groups representing non-binary persons for the drafting of the law.¹¹⁷

The Dritte Option also officially endorsed the GIHR proposal which foresees the introduction of a non-binary legal gender category and making gender registration generally optional. The proposal further holds that children above the age of 14 can request a change of legal gender autonomously, while prior to this age they should still require their parents’ approval. If parents do not approve the change for their under-14-years-old children, a family court can be called upon to decide on behalf of the child.¹¹⁸

Creating the new legal gender category open for all non-binary persons in Germany, whether intersex or not, is significant since it rejects the wrongful assumption that one’s body determines one’s (legal) gender. Allowing the access of a non-binary gender category only to intersex persons or persons who underwent certain gender affirmation treatment has been also described as actually strengthening the gender binary. For example, Gina Wilson argued in this context that

23 July 2018; Referentenentwurf des Bundesministeriums für Inneres, für Bau und Heimat, Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben 2018 Art. 1.

¹¹⁴ Dritte Option, ‘Stellungnahme Der Kampagnengruppe Dritte Option Zum Referentenentwurf: Gesetzesentwurf Widerspricht in Fast Allen Punkten Den Bedarfen Der Betroffenen’ (7 March 2018) <<http://dritte-option.de/wp-content/uploads/2018/07/Stellungnahme-Referentenentwurf.pdf>>.

¹¹⁵ Dritte Option, ‘Statement Der Kampagne „Dritte Option“ Zur Anstehenden Gesetzesreform’ (n 3); ‘Aktion Standesamt 2018 Zum IDAHOBIT’ (2018).

¹¹⁶ Dritte Option, ‘Aufruf an die Community’ (2 February 2018) <<http://dritte-option.de/>> accessed 16 May 2018.

¹¹⁷ Interview with Dritte Option (n 111); Juliane Loeffler, ‘Exklusiv: Ein neuer Gesetzesentwurf für Inter-Personen bleibt weit hinter Forderungen von Fachverbänden zurück’ *BuzzFeed* (8 May 2018) <<https://www.buzzfeed.com/de/julianeloeffler/exklusiv-gesetzentwurf-fuer-intergeschlechtliche>> accessed 16 May 2018.

¹¹⁸ Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 69.

“a third sex category can be seen as a way of purifying the existing two sexes by allowing people who are anatomically ‘impure’ to be assigned otherwise”¹¹⁹. This statement refers to a verdict in New South Wales, Australia, granting the applicant Norrie the right to change the legal gender to “non-specific” based on the argument that the official gender marker must reflect Norrie’s body, which was “indeterminate” due to previous gender affirmation treatment.¹²⁰ By this reasoning, only persons with “indeterminate” bodies can access non-binary gender categories. Thus, it is important that another gender category, in Germany and elsewhere, creates another *option*, one which can be accessed by everybody but where nobody is pressured into doing so. Otherwise, the category restricts gender diversity instead of fostering it.

Making non-binary gender category freely accessible as opposed to a forcefully-assigned category is also crucial for trans persons who identify with binary genders. Some trans persons in Eastern Europe and Central Asia have voiced their concern that introducing a “third” gender category could mean they will be forcefully assigned to this category without any future option to change their legal gender within the binary.¹²¹ This could also have implications for their access to healthcare since insurance companies might argue that gender affirming treatment to make the body appearance correspond to a binary gender is not necessary anymore as trans persons are “third” genders.¹²² In fact, state officials in Central Asia have made remarks stipulating that a “third” legal gender category could encompass *all* trans persons.¹²³ The fear of misrepresentation and forceful categorization of all trans persons as non-binary does not come out of the blue. For example, in Bangladesh, trans persons cannot change their legal gender from F to M or *vice versa* but their only option is to apply for the recognition as *hijra*.¹²⁴ Similarly, the Draft Transgender

¹¹⁹ Gina Wilson, ‘On Norrie v NSW Registrar of Births, Deaths and Marriages’ (*OII Australia - Intersex Australia*, 22 June 2013) <<https://oii.org.au/22681/norrie-v-nsw-registrar-of-births-deaths-and-marriages/>> accessed 9 April 2017.

¹²⁰ *NSW Registrar of Births, Deaths and Marriages v. Norrie* (n 57) [46].

¹²¹ Interview with Kurmanov (n 31).

¹²² Anonymous, ‘Email’ (10 July 2015).

¹²³ Interview with Kurmanov (n 28).

¹²⁴ ‘Bangladesh: Transgender Men Fear for Their Safety’ (*Human Rights Watch*, 19 January 2018) <<https://www.hrw.org/news/2018/01/19/bangladesh-transgender-men-fear-their-safety>> accessed 13 June 2018; Zhan Chiam, Sandra Duffy and Matilda González Gil, ‘Trans Legal Mapping Report: Recognition before the Law’ (ILGA World 2017) 2nd edition 27.

Persons (Protection of Rights) Bill 2016 in India defined *all* trans persons as non-binary,¹²⁵ which contradicts the *NALSA judgment (2014)* by the Indian High Court recognizing trans persons' right to self-determination.¹²⁶ While the Standing Committee on social justice and empowerment rejected the definition in 2017, it remains unclear whether and how the government will revise the draft.¹²⁷ Until the adoption of the Bill or another law clarifying the conditions under which a person can request a legal change of gender, trans persons, including *hijra*, have to deal with requirements that differ from document to document and region to region.¹²⁸

3.1.2. Necessary legislative changes

The GIHR report presents the results of a text-search of all statutory legal provisions in Germany that are conceptually linked, directly or indirectly, to gender/sex. The inventory reveals that a considerable amount of German laws still differentiates according to gender. Most of these gender-specific laws are based on a binary understanding of gender, which means they exclude persons with a legal gender category other than female or male from their scope.¹²⁹ Thus, in order to ensure the legal certainty of persons with non-binary legal genders, it would be required to specify their position towards these laws, or, conversely, render them gender-neutral. Relevant German laws concern regulations on the establishment of parenthood, civil partnerships and

¹²⁵ The Transgender Persons (Protection of Rights) Bill, 2016 (draft) [Bill No. 210 of 2016] para 25.

¹²⁶ International Commission of Jurists (n 97) 2–3; *National Legal Services Authority v. Union of India and others* (n 57).

¹²⁷ Rohan Abraham, 'All You Need to Know about the Transgender Persons Bill, 2016' *The Hindu* (30 November 2017) <<http://www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece>> accessed 13 June 2018; 'Rights & Wrongs — on Transgender Persons Bill' *The Hindu* (9 December 2017) <<http://www.thehindu.com/opinion/editorial/rights-wrongs/article21339721.ece>> accessed 13 June 2018; Smriti Kak Ramachandran, 'Centre to Reintroduce Transgender Bill with Suggested Changes' *Hindustantimes* (19 February 2018) <<https://www.hindustantimes.com/india-news/centre-to-reintroduce-transgender-bill-with-changes-suggested-by-mps-panel-and-rights-groups/story-V3waQoU4kEdeJl6iJHnydL.html>> accessed 13 June 2018.

¹²⁸ Chiam, Duffy and González Gil (n 119) 29–30.

¹²⁹ Althoff, Schabram and Follmar Otto, 'Gender Diversity in Law: The Status Quo and the Development of Regulatory Models for Recognizing and Protecting Gender Diversity (English Summary)' (n 2) 6. A similar inventory was done for Dutch laws in 2014. See: Marjolein van den Brink and Jet Tigchelaar, *Bijlage 7 Een Inventarisatie van Nederlandse Wetgeving Met Sekse Specifieke Aanduidingen of de Term 'Geslacht'. M/V En Verder Sekseregistratie Door de Overheid En de Juridische Positie van Transgenders*. (Ministerie van Veiligheid & Justitie 2014).

marriage¹³⁰, equality and non-discrimination, compensating historical disadvantages (e.g. gender-specific retirement age for people born before 1952), maternity protection, conscription to the military and public service obligations, gender-divided sanitary rooms, gender-divided prisons and body searches, and the procedures for recording and communicating people’s gender (e.g. gender markers on IDs and forms).¹³¹ The draft law for introducing another gender category in Germany, as made public by an online newspaper, does not seem to include any legislative changes in these areas.¹³²

The GIHR report discusses that some laws include binary language, such as using male and female pronouns, without creating any gender-specific legal consequences. The inclusion of female pronouns next to male ones usually aims at making women visible to the law, since historically only male pronouns and male-gendered terms were in use to refer to humans in general. These binary terms do not demand an immediate replacement of terms inclusive of non-binary gender identities but can be interpreted according to international human rights law as encompassing all persons irrespective of their gender. In the future, however, these terms should be progressively replaced by a gender-inclusive vocabulary.¹³³

The report by the GIHR proposes concrete amendments for various fields of law, including civil law (e.g. marriage, parenthood), penal law (e.g. prisons) and gender- equality law, to ensure that the introduction of a new gender category would not create any legal gaps and leave non-binary persons in situations of uncertainty. It explains that some of the clarifications for binary laws can be reached by applying the provisions *by analogy* to non-binary persons. An example for this concerns the establishment of motherhood, where the law prescribes that “the mother of a child is

¹³⁰ With the introduction of same-sex marriage in Germany, marriage can now be contracted “between two people of the same or different gender”. This makes marriage also possible for non-binary persons but uncertainty exists with regards to persons without any legally registered gender, as discussed in 4.2. and 4.3. See: German Bundestag, Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts 2017 Art 1, para 2.

¹³¹ Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 32–43.

¹³² Loeffler (n 113).

¹³³ Althoff, Schabram and Follmar Otto, ‘Gender Diversity in Law: The Status Quo and the Development of Regulatory Models for Recognizing and Protecting Gender Diversity (English Summary)’ (n 2) 6; Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 31.

the *woman* [emphasize added] that gives birth to it”¹³⁴. German courts have clarified that a trans man giving birth to a child is, by analogy, also considered as the legal mother.¹³⁵ This would likely be also the case for a non-binary person giving birth to a child.¹³⁶ The easiest solution to include all people in German parental laws and to ensure their right to self-determination is therefore to make the law gender-neutral. The above was also proposed by the GIHR, which recommends exchanging the terms “mother” and “father” with “parent”, and the terms “woman” or “man” with “person” in the law concerning establishing parenthood.¹³⁷

Nevertheless, not all gender-specific laws can be applied to non-binary persons by analogy and, therefore, rendered gender-neutral. For example, German laws prescribe that body searches must be carried-out by “the same gender” and that women and men must be accommodated in different prison facilities.¹³⁸ Applying these provisions by analogy to non-binary persons seems unrealistic, and in part also undesirable, since it would mean that non-binary persons would need to be placed in separate prison facilities and searched only by other non-binary persons. Thus, the GIHR proposes amending the German penal law and policy law to guarantee that, in the case of incarceration, non-binary persons can choose whether they want to stay in a women’s or men’s prison, and that they will be searched by a woman or another non-binary person.¹³⁹

Most countries that have introduced non-binary legal gender categories, such as Australia and India, have done so by means of court decisions, since they are common-law countries. This has led to a situation where non-binary gender categories were introduced without amending some of the aforementioned gender-specific laws, consequently leaving persons with legal genders other than female or male in situations of legal uncertainty. These uncertainties are even exacerbated in countries with a low level of formal gender equality, where many laws still discriminate LGBTI

¹³⁴ Translated from German into English. Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 32.

¹³⁵ *XII ZB 660/14* (Bundesgerichtshof [engl Federal Court of Justice]).

¹³⁶ Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 33.

¹³⁷ *ibid* 76.

¹³⁸ *ibid* 37.

¹³⁹ *ibid* 80–81. Interesting to note is the decision by the report’s authors to make *women*, in addition to non-binary persons, in charge of carrying out body searches on non-binary persons.

persons and/or make a difference between women and men. For example, in India, it remains unclear how legally recognized *hijra* and other non-binary communities are affected by so-called “anti-sodomy laws” which prohibit homosexual intercourse as part of the colonial legacy.¹⁴⁰ Recent qualitative studies on the implementation of third genders in Pakistan also show that the loss of male privileges in the Pakistani patriarchal legal system discourages members of the non-binary *Khawaja Sira* community to change their legal gender from male to a “third” category. To illustrate, adopting a “third” category means in most cases giving up inheritance rights, since men get a higher portion of inheritance than women or “non-men” in Pakistan.¹⁴¹

Australia resolved one major uncertainty for persons with non-binary genders, namely the question whether and whom they can marry in Australia, with the adoption of the 2017 Marriage Equality Act. Prior to the Act, marriage was “the union of a man and a woman”¹⁴² while now it is possible between “two people”.¹⁴³ As opposed to countries where non-binary legal gender categories were introduced from one day to another, German legislators have time to draft a law that considers all legislative changes which must go hand in hand with the introduction of an additional gender category.

3.1.3. Anti-discrimination protection and equality laws

The GIHR report also showed that German anti-discrimination and gender equality law relies in part on binary language. It therefore proposes to explicitly include gender identity, gender expression and sex characteristics as prohibitive grounds in the German anti-discrimination law, as well as to alter all references to “equality between men and women” with “equality between all genders” in the main equality law. In addition, equality regulations, including affirmative action laws, should also encompass intersex and trans persons, including non-binary persons, next to

¹⁴⁰ Sandip Roy, ‘What The Supreme Court Clarification On Third Gender Means For LGBTQ Indians’ *Huffington Post India* (7 January 2016) <<http://www.huffingtonpost.in/2016/06/30/what-the-supreme-court-clarification-on-third-gender-means-for-l/>> accessed 15 February 2017; International Commission of Jurists, “‘Unnatural Offences’: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity’ (2017) 26.

¹⁴¹ Nisar (n 73) 70–72.

¹⁴² Australian Marriage Act 1961 s 5.

¹⁴³ Australia, Marriage Amendment (Definition and Religious Freedoms) Act 2017 [No. 129] para 3.

women.¹⁴⁴ The explicit coverage of gender identity, gender expression and sex characteristics according to German anti-discrimination law is also important to ensure that persons with a non-binary legal gender are not discriminated against when trying to access certain spaces (e.g. bathrooms), services (e.g. health services) and rights (e.g. parenthood). This is intended by Malta’s GIGESC Act (2015), which explicitly prohibits any form of discrimination based on gender identity, as discussed above.¹⁴⁵

EU law on gender equality also relies largely on a binary understanding of gender and includes binary language. For example, even though EU directive 2006/54/EC “applies to discrimination arising from the gender reassignment”¹⁴⁶, it focuses on equal opportunities of *men* and *women*. Thus, taking the wording of the Directive literally would probably denote that discrimination based on sex, as also prohibited by the EU Fundamental Rights Charter,¹⁴⁷ covers only those of “female sex” or “male sex”, and trans persons that have undergone body alterations. However, the *EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity* states that the “the Commission should issue guidelines specifying that transgender and intersex persons are covered under ‘sex’ in Directive 2006/54/EC”¹⁴⁸. *Transgender* and *intersex* are hereby not defined in a binary way, nor is any reference made to body alterations. In addition, the German Constitutional Court cites case-law by the CJEU¹⁴⁹ to argue that persons whose gender is neither female nor male are covered by anti-discrimination protection on the grounds of “gender/sex”.¹⁵⁰ Thus, a teleological interpretation of the reference “gender reassignment” in EU directives and the jurisprudence of the CJEU, sidelong more recent

¹⁴⁴ Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 35, 78–79.

¹⁴⁵ Malta Gender Identity, Gender Expression and Sex Characteristics Act (n 64) para 13(2).

¹⁴⁶ European Parliament and the Council of the European Union, Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) 2006 para 3.

¹⁴⁷ Charter of Fundamental Rights of the European Union 2000 [2000/C 364/01] Art. 21(1).

¹⁴⁸ European Parliament, ‘European Parliament Resolution of 4 February 2014 on the EU Roadmap against Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity (2013/2183(INI))’ (2017) 2017/C 093/04 para C(ii).

¹⁴⁹ *P v S and Cornwall County Council* [1996] Court of Justice of the European Union Case C-13/94.

¹⁵⁰ *I BvR 2019/16* (n 104) [63].

developments concerning gender identity in European human rights law¹⁵¹, would probably support an inclusive application of EU anti-discrimination law covering non-binary persons. However, as the EU roadmap clearly points out, there is a need for codifying intersex persons' and trans persons' right to non-discrimination, specifically one covering non-binary persons. This will be the task of the CJEU since neither gender identity nor sex characteristics are mentioned in EU primary law: the Treaty of Lisbon's article 19 expressly mentions only six grounds: "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

On the other hand, the anti-discrimination protection gained from the European Convention on Human Rights (ECHR) could be more inclusive of non-binary persons. The ECtHR clarified in its case-law that discrimination related to "gender identity" is covered by Article 14 of the Convention.¹⁵² Thus, denying persons with non-binary gender identities' rights guaranteed to women and men by the Convention would likely be considered a discrimination. An exception to this is the right to marry, since the Court has so far ruled that states may lawfully restrict marriage to a union between a *woman* and a *man*.¹⁵³ The accessory nature of Article 14 of the Convention, inferring that the prohibition of discrimination applies only to rights granted by the Convention, makes it nonetheless necessary to codify anti-discrimination protection for all trans persons, including non-binary persons, in domestic and EU law alike. Whether "gender identity" is also part of the anti-discrimination grounds covered by Protocol 12 of the ECHR, which provides a general prohibition of non-discrimination, has not been clarified by the Court. However, applying the judgments on Article 14 by analogy to Protocol 12 makes it probable that the 20 countries that have ratified the Protocol (as of May 2018) contravene their legal obligations when allowing for discrimination against trans persons, including non-binary ones.¹⁵⁴ The Court has yet to clarify whether sex characteristics is a prohibitive anti-discrimination ground by the ECHR.

¹⁵¹ *AP, Garçon and Nicot v France* [2017] European Court of Human Rights Application no. 79885/12, 52471/13, 52596/13.

¹⁵² *Identoba and Others v Georgia* [2015] European Court of Human Rights Application no. 73235/12 [96].

¹⁵³ *Chapin et Charpentier v France*, [2016] European Court of Human Rights Application No. 40183/07; *Schalk and Kopf v Austria* [2010] European Court of Human Rights Application no. 30141/04.

¹⁵⁴ 'Chart of Signatures and Ratifications of Treaty 177. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (*Treaty Office*, 30 May 2018) <<https://www.coe.int/en/web/conventions/full-list>> accessed 8 June 2018.

Moritz from the Dritte Option stressed further that introducing an additional gender category demands not only legislative changes in other legal fields, as discussed above, but also the implementation of awareness measures for sensitizing the public.¹⁵⁵ More specifically, schools must be informed about the introduction of another gender category and the rights and needs of non-binary students. Furthermore, civil registry offices must be properly informed and trained to ensure that people do not encounter any obstacles in changing their gender to a non-binary category. The GIHR report presents results of a civil registries' survey, which exhibits that many German civil registers are reluctant to register a newborn without any legal gender (further discussed below). For example, some registers responded to birth registration documents that leave gender markers blank by asking doctors to determine a binary gender or unnecessarily delaying the registration.¹⁵⁶ As discussed above with the example of India, the provision of identity cards showing gender markers other than female or male also depends on the proper implementation of a country's law by bureaucratic institutions such as civil registers. Thus, in order to ensure that non-binary persons in Germany do not face the same reluctance or lack of understanding on the part of civil registers when requesting a change of their legal gender, civil registers need to be properly informed and trained accordingly.

3.1.4. Implications on cross-border movements

Another important aspect that German legislators must consider is how can the security and safety of persons with non-binary legal gender be secured when traveling and residing in other countries. In addition to the problems one can encounter with an X marker on passports, as aforementioned, the introduction of non-binary legal genders for all legal purposes creates other problems such as: How are non-binary legal genders recognized in other countries? What is the legal position of persons with non-binary legal genders when coming in contact with gender-specific laws in other countries? For example, in Latvia, whom can they marry where the

¹⁵⁵ Interview with Dritte Option (n 111).

¹⁵⁶ Althoff, Schabram and Follmar Otto, 'Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt' (n 2) 19–20.

Constitution holds that marriage is “a union between a man and a woman”¹⁵⁷? Answering these questions is mainly an issue of private international law, which aims to resolve disputes between private entities crossing international borders. Considering our example above, it would mean that Latvian private international law rules would determine how a person with a non-binary legal gender is recognized in Latvia and whom they could consequently marry.

Malta is, to my knowledge, the only country so far that explicitly recognizes a “gender marker other than male or female, or the absence thereof, recognized by a competent foreign court or responsible authority”¹⁵⁸. As discussed by Susanne Lilian Goessl, some other jurisdictions have rules on whether they recognize a change of legal gender conducted in another country, which, depending on their wording, might also apply to non-binary genders.¹⁵⁹ For example, Goessl argues that Ireland could likely recognize non-binary gender categories from other countries since the Irish Gender Recognition Act holds that it recognizes the change of legal gender abroad as long as it was legal in all other jurisdictions concerned.¹⁶⁰

Van den Brink and Tigchelaar discuss what happens in cases where no specific rules in private international law on gender recognition exists. What would happen if a person with the gender “non-specific” from Australia moves to the Netherlands? Would the Netherlands recognize the person’s legal gender? The first step to determine the answer to this question would be to identify the jurisdiction that governs gender determination in this case. In the Netherlands, the law on gender recognition, the Dutch Transgender Act, considers an applicant’s nationality as the basic principle governing the application. This has been interpreted as implicitly endorsing the “nationality principle” as the one determining gender registration in cases of private international law disputes. Thus, it is the domestic law of a person’s country of nationality that is applicable. For our example this would mean that the Netherlands would recognize the gender “non-specific”

¹⁵⁷ The Constitution of the Republic of Latvia Art. 110. Even countries that provide for same-sex marriage use often binary language in their marriage laws. For example, the UK holds that same-sex marriage is a “marriage between two men” or “marriage between two women”. See: UK Marriage (Same Sex Couples) Act 2013 2013 Part 2, para 5(3).

¹⁵⁸ Malta Gender Identity, Gender Expression and Sex Characteristics Act (n 64) para 9(2).

¹⁵⁹ Susanne Lilian Goessl, ‘From Question of Fact to Question of Law to Question of Private International Law: The Question Whether a Person Is Male, Female, or ... ?’ (2016) 12 *Journal of Private International Law* 261, 266–267.

¹⁶⁰ *ibid* 266, 267; Ireland, Gender Recognition Act 2015 2015 para 11.

of Australian nationals and would register them with an X in the Dutch registry of residents.¹⁶¹ Gender determination in cross-border cases depends therefore on the private international law rules of the country concerned. Every case requires a specific analysis of applicable law in itself and only future practice will show how non-binary legal gender categories are recognized by other countries abroad.

Uncertainties to the legal situation of persons with non-binary persons abroad are in particular prevalent in countries with a high level of formal gender inequality and where many laws make a distinction between women and men. Laws that discriminate between women and men in certain countries include inheritance rights, labor rights and the right to pass on the nationality to children and spouses.

The recognition of civil status from foreign countries not only concerns gender but also other personal markers, like marital status and date of birth. The International Commission on Civil Status (ICCS) was founded after WWII as an intergovernmental organization with the goal to foster cooperation among European countries on the exchange of information and recognition of civil status documents (e.g. birth certificates). In 1999, it adopted the “Convention on the recognition of decisions recording a sex reassignment”, which entered into force in 2000 and was intended to ensure the recognition of changes of legal gender among European countries. However, the Convention reflects harmful assumptions of gender recognition, arguing that a country must only recognize a change of legal gender done abroad if physical “adaptations” were also conducted.¹⁶² This, along with the low number of countries ratifying the Convention (referring only to Spain and the Netherlands),¹⁶³ makes the Convention an unusable instrument for fostering gender recognition among European countries. And yet, it shows that multilateral agreements are worth considering for ensuring the recognition of non-binary gender categories outside Germany. These could be done under the framework of the CoE or the EU, which is seemingly more effective than the ICCS, consisting of 15 member states only.

¹⁶¹ Brink, Reuß and Tigchelaar (n 58) 288–290.

¹⁶² Convention relative à la reconnaissance des décisions constatant un changement de sexe 2000 para 2(a).

¹⁶³ ‘Conventions CIEC: État Des Signatures, Des Ratifications et Des Adhésions Au 7 Novembre 2017’ (Commission Internationale de L’État Civil).

In addition to multilateral lobbying, it is important that countries' authorities inform their LGBTIQ community about possible challenges they might encounter in other countries, such as when travelling with X markers on passports. As discussed above, the Department of Foreign Affairs and Trade of Australia provides some information on travelling with X markers on its website. The German Ministry of Foreign Affairs usually provides information regarding the legal situation and societal acceptance of LGBTI persons in other countries, which needs to be complemented with information on the acceptance of X markers on passports. Two other aforementioned ways can ease the travel of persons with non-binary legal genders. First, countries can issue two passports, one with a binary gender marker and one with a non-binary one. And second, countries can officially inform other countries about the introduction of non-binary gender categories through a diplomatic note.

3.1.5. Social effects of non-binary legal gender categories

The ruling by the German Constitutional Court has undoubtedly already increased the visibility of non-binary persons. Most German and many European and international media outlets reported on it, an action which initiated a European discourse on the insufficiency and oppressiveness of the gender binary. For example, Richard Köhler, Deputy Executive Director of Transgender Europe, explained that the Berlin Equality Body was approached by other institutions asking for information on how to include non-binary gender options on forms and contracts following the ruling.¹⁶⁴ The UK study on non-binary persons further shows that non-binary persons are often affected by mental health problems and low self-esteem due to their lack of social visibility and legal recognition.¹⁶⁵ Legal recognition could provide some relief to this. The judges at the Indian Supreme Court recognizing *hijra* also aimed to reduce the societal marginalization of *hijra*, who are disproportionately affected by poverty, by publicly recognizing them as legitimate legal subjects with constitutional rights.¹⁶⁶ However, the abovementioned example of Pakistani *Khawaja Sira*, who largely keep their M marker instead of changing it to a

¹⁶⁴ Interview with Köhler (n 25).

¹⁶⁵ Valentine (n 4).

¹⁶⁶ *National Legal Services Authority v. Union of India and others* (n 57) [126, 129(1)].

“third” category, shows that the symbolic benefits of non-binary gender categories are low if they can result in the loss of rights (e.g. inheritance rights) and precarious access to services.

Another positive aspect of recognizing that female and male gender categories are insufficient in describing the variety of existing gender identities is that it could enhance a process of de-pathologization and de-medicalization of intersex bodies. This could, in turn, reduce the number of genital surgeries currently performed on intersex children.

On the other hand, some people are skeptical whether introducing a “third” gender category solves the problem that each legal gender category creates normative exclusions and demarcates boundaries between “legitimate” and “illegitimate” identities. The diversity of non-binary persons makes it unlikely that all non-binary gender identities can be subsumed under one “third” category.¹⁶⁷ In addition, non-binary legal gender categories do not per se recognize that some people identify with multiple gender categories, do not identify with any gender or do not want to reveal it to the public.

3.2. Other European developments concerning non-binary legal gender categories

In addition to Germany, other European countries have also been confronted with court cases where individuals demand their right to be legally registered with a non-binary legal gender. One case in France seemed to be initially successful since, in 2015, the District Court of Tours decided that the plaintiff can change the legal gender to “*sexe neutre*”.¹⁶⁸ The Appeal Court of Orléans, however, revised this decision and declared that only binary genders can be registered in the civil status registry. This position was supported by the Court de Cassation, which ended the case by rejecting the plaintiff’s demand in May 2017.¹⁶⁹ International media initially reported the

¹⁶⁷ Interview with Köhler (n 25).

¹⁶⁸ *TGI Tours, 20 août 2015* (Tribunal de Grande Instance de Tours).

¹⁶⁹ *Sexe neutre et état civil* (French Court de Cassation).

plaintiff’s plans to continue the fight for a non-binary gender category in front of the ECtHR,¹⁷⁰ yet no public information indicates that the plaintiff ended-up submitting a complaint at the ECtHR within the mandatory six months period following the last domestic decision.

Likewise, an Austrian case, where an intersex person appealed the decision to deny the change of legal gender to the category “inter” by a civil registry office, ended up at the Austrian Constitutional Court. Since the Constitutional Court nursed some concerns regarding the constitutionality of the Austrian binary gender registration, it initiated a judicial review procedure in March 2018.¹⁷¹ The results of the judicial review, published in late June 2018, confirmed that the current Austrian Personal Status law does not limit the public gender registration to binary options but must be interpreted to allow for the registration of a gender category other than female or male.¹⁷² The decision further held that nobody can be forcefully assigned to a legal gender category and that persons with “legitimate reasons” may remain without any legally registered gender.¹⁷³ The Court did not determine the exact terms for a “third” gender category but mentioned “diverse”, “inter” or “open” as possibilities.¹⁷⁴ The judgment did further not clarify the requirements and procedure necessary for accessing the new gender category; thus, it remains unclear whether it will be open to intersex and non-intersex persons alike. These important details need to be determined by future action of the legislators or civil registries themselves.¹⁷⁵

Another relevant court ruling in 2018 concerns a decision by the Dutch Limburg District Court in Roermond allowing an intersex person to receive a birth certificate noting “undetermined gender”.¹⁷⁶ The verdict is based on 1:19(d) of the Dutch Civil Law, further discussed in 4.2.2,

¹⁷⁰ Mila Petkova and Benjamin Pitcho, ‘Le refus de la France de reconnaître un “troisième sexe” est dramatique pour les personnes intersexuées’ *Le Huffington Post* (13 November 2017) <https://www.huffingtonpost.fr/mila-petkova/le-refus-de-la-france-de-reconnaitre-un-troisieme-sexe-est-dramatique-pour-les-personnes-intersexuees_a_23275421/> accessed 16 May 2018.

¹⁷¹ *E 2918/2016-29* (Austrian Constitutional Court).

¹⁷² *G 77/2018-9* (Austrian Constitutional Court).

¹⁷³ *ibid* 18, 42.

¹⁷⁴ *ibid* 37.

¹⁷⁵ *ibid* 39; Lukas Golla, ‘Ö / Gender: VfGH bestätigt Recht auf Anerkennung der persönlichen Geschlechtsidentität, aber kein 3. Geschlecht’ (*IEF*, 3 July 2018) <<https://www.ief.at/oe-gender-vfgh-bestaetigt-recht-auf-anerkennung-der-persoenlichen-geschlechtsidentitaet-aber-kein-3-geschlecht/>> accessed 6 July 2018.

¹⁷⁶ *C / 03/232248 / FA RK 17-687* (Limburg District Court in Roermond).

which says that intersex children whose sex is “doubtful” shall receive a birth certificate with “undetermined gender”. The legal effects of this decision are not entirely clear since it could still be appealed by the Dutch government and other lower courts are not bound to follow the example.¹⁷⁷ It remains further ambiguous whether and how the decisions could affect non-intersex persons who wish to be registered with a non-binary gender category.

Whereas, thus far, all European examples discussed concern intersex persons challenging the binary gender registration, non-intersex trans persons who identify with a non-binary gender have also embarked on demanding their legal recognition in various European countries. For example, one individual petitioned the Irish Department of Social Protection to be recognized as non-binary in the civil registry. This request was rejected but will most likely be appealed by means of a court procedure.¹⁷⁸

In November 2017, the Scottish government came up with an announcement considering equal recognition of non-binary persons by passing a statutory law altering the current gender recognition procedure.¹⁷⁹ A public consultation process concerning a reform of the gender recognition law, also including a discussion on non-binary legal gender categories, terminated in March 2018. Scotland can pass a law on gender recognition independently from the UK government since it is in its legal capacity to issue its own birth certificates. In spite of this, since the UK government retains the authority over the issue of passports and some IDs, it is unclear whether persons with non-binary legal genders recognized in Scotland could also receive these IDs and passports with X markers. The latter depends upon whether the UK would recognize the non-binary legal gender categories originating in Scotland.¹⁸⁰

3.3. Conclusions

¹⁷⁷ *ibid*; Interview with Brink (n 24).

¹⁷⁸ Naomhán, ‘Sorry, You Do Not Exist. Please Try Again.’ (*Tirnanogender: A Journey to Androgyny*, 5 May 2017) <<https://tirnanogender.wordpress.com/2017/05/05/sorry-you-do-not-exist-please-try-again/>> accessed 17 May 2018.

¹⁷⁹ Scottish Government, ‘Review of the Gender Recognition Act 2004’ (9 November 2017) <<http://www.gov.scot/Publications/2017/11/5459/347312>> accessed 21 May 2018.

¹⁸⁰ Interview with Valentine (n 43).

Over the past few decades various countries and regions have introduced non-binary legal gender categories for all legal purposes.¹⁸¹ Many of these jurisdictions, however, still demand applicants to fulfil restrictive requirements before allowing them to change their legal gender to a non-binary category.¹⁸² Germany is currently in the process of implementing the ruling passed by the Constitutional Court in November 2017, which orders German legislators to address the legal invisibility of non-binary persons.¹⁸³ As reported by the media, the German Ministry of Interior compiled together a draft law that, once implemented, would allow intersex persons to change their legal gender to the category “additional/other” upon receipt of medical attestations.¹⁸⁴ As discussed further in 4.2.2, the draft law would further amend paragraph 22(3) of the German personal status law to require that intersex newborns are either registered without any legal gender or with the category “additional/other” in the civil registry.¹⁸⁵

This draft contradicts the demands by intersex and trans rights activists in Germany, who advocate for a freely-accessible gender category for intersex and non-intersex persons alike without the requirement for any mandatory provision of medical certificates and without being forcibly assigned to intersex newborns. In addition, the wording of the new category should not be stigmatizing or othering, of the likes of “additional/other”, but an inclusive and positive term, like “diverse”.¹⁸⁶ Once the German legislators decide to introduce a “third” legal gender category, it must also amend other laws that differentiate according to gender, like family law, in order to avoid any legal uncertainties and gaps. In addition, German anti-discrimination law should explicitly cover discrimination on the grounds of gender identity, gender expression and sex characteristic in order to ensure nobody is discriminated based on a non-binary legal gender.¹⁸⁷ An effective anti-discrimination law is, however, insufficient in preventing discrimination and stigmatization of non-binary persons, hence large-scale sensitizing and awareness raising

¹⁸¹ See e.g.: *Pant v. Nepal* (n 1); *NSW Registrar of Births, Deaths and Marriages v. Norrie* (n 57); Ontario government (n 90).

¹⁸² See e.g.: Birth, Deaths and Marriages Registration Act, New South Wales (n 94) paras 32A, 32B(b).

¹⁸³ *I BvR 2019/16* (n 104).

¹⁸⁴ Loeffler (n 117). *ibid.*

¹⁸⁵ Referentenentwurf des Bundesministeriums für Inneres, für Bau und Heimat Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben (n 108) Art. 1.

¹⁸⁶ Dritte Option, ‘Statement Der Kampagne „Dritte Option“ Zur Anstehenden Gesetzesreform’ (n 3).

¹⁸⁷ Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 30–43.

measures are necessary.¹⁸⁸ Countries introducing non-binary legal gender categories, such as Germany, should further undertake efforts to ensure the recognition of these legal gender categories in other countries. Multilateral action for developing specific private international law rules on this issue, the issuance of two passports and the sending of diplomatic notes to inform other countries about non-binary legal gender categories are remedies to ensure the safe travel of persons with non-binary legal genders. As displayed by the effects created by the German Constitutional Court ruling, the introduction of non-binary legal gender categories can enhance the public discourse on and visibility of non-binary persons. At the same time, a “third” gender category will never be capable of reflecting all non-binary gender identities, and, thus, fails to recognize persons with multiple gender identities, such who do not identify with any gender or such who perceive their gender identity as a private issue that they do not wish to publicly reveal.

4. Eliminating the public gender registration

Thus far no country has abolished the public gender registration altogether, but several countries began making exceptions to the mandatory gender registrations for certain groups. The first section in this chapter discusses hypothetically what would happen if a country, such as Germany, would eliminate the mandatory public gender registration for everybody. The second section discusses laws that either allow parents to register their newborn without any legal gender, as is the case in Malta, or mandate parents to do so for their intersex child, as is the case in Germany and the Netherlands. The third section analyses recent court decisions in Germany which are creating the possibility for adults to delete their gender marker in the civil registry and remain legally genderless.

4.1. Eliminating the public gender registration for everybody

The German Constitutional Court addressed two ways of resolving the legal invisibility of non-binary persons, either by introducing a “third” legal gender category or by eliminating the public gender registration altogether. It presumed that the binary gender registration is discriminatory

¹⁸⁸ Interview with Dritte Option (n 111).

against non-binary persons only when gender is generally recorded as part of the civil status registration. If nobody's gender was formally registered anymore, then the non-registration of non-binary gender identities would not be discriminatory.¹⁸⁹

As discussed above, media reports indicate that the German Ministry of Interior opted for introducing another gender category instead of abolishing the public gender registration altogether.¹⁹⁰ Still, the German ruling fostered the discussion about the reasons to why gender is registered as part of the civil status registration. The draft law on introducing another legal gender category in Germany, as published by an online newspaper, discusses briefly the alternative measure of abolishing the registration of gender in the civil status registry altogether. As argument against the abolishment of the public gender registration, it notes that several laws are directly connected to one's legal gender. One example it names in this context is the ICAO regulations that prescribe the mentioning of gender markers in form of F, M or X on travel documents. Another example discussed concerns the different provisions that apply in case that same-gender or different-gender couples divorce and there is a conflict of law with a foreign jurisdiction (e.g. because one person lives abroad).¹⁹¹

As of yet, no country has abolished the public gender registration for all purposes and, to the best of my knowledge, no international legal body has ever discussed this option. However, intersex and trans rights activists call out increasingly for reconsidering the registration of gender as part of the civil status. The Malta Declaration, which is the Third International Intersex Forum outcome document, held in 2013, claims that “[i]n the future, as with race or religion, sex or gender should not be a category on birth certificates or identification documents for anybody”¹⁹².

¹⁸⁹ *1 BvR 2019/16* (n 104) 1, para 3.

¹⁹⁰ Loeffler (n 117).

¹⁹¹ Referentenentwurf des Bundesministeriums für Inneres, für Bau und Heimat Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben (n 113) 7.

¹⁹² Third International Intersex Forum, ‘Malta Declaration’ (2013) <<https://oii-europe.org/malta-declaration/>> accessed 28 May 2018. OII Europe has officially endorsed the Malta Declaration. See: Interview with Ghattas (n 21).

As discussed above, Principle 31 of the Yogyakarta Principles +10, endorsed by Transgender Europe, supports a similar approach.¹⁹³

The Malta Declaration points out that it is debatable why gender continues to be registered as a legal category while other social categories, like ethnicity, are rarely used for civil status purposes in Europe.¹⁹⁴ In some European countries, like Germany and Austria, religion can still be registered in the civil registry if desired.¹⁹⁵ In Germany, if religion is registered in the civil registry, it is also displayed on the birth certificate.¹⁹⁶ In Austria, on the other hand, birth certificates never display one's religion, even if it is registered in the civil registry.¹⁹⁷ In very rare cases in Europe, religion creates different rights and duties for citizens. For example, in Bosnia and Herzegovina, a person's religion determines the political office for which one can run as a candidate. The ECtHR condemned this as a violation of the principle of non-discrimination (Art. 14; Protocol 12, Art. 1) and the right to stand for free elections (Protocol 1, Art. 3).¹⁹⁸

4.1.1. Legal definitions of genders

As long as laws make a difference among people based on social categories, such as religion, ethnicity or gender, these categories need to be legally demarcated. The conditions that make a person a woman or a man are hardly ever explicitly defined in laws. Depending on the country, it is within the discretion of medical personnel, civil registries and/or parents to make a cross in the

¹⁹³ The Yogyakarta Principles plus 10. Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (n 11) Principle 31 (A); TGEU (n 11).

¹⁹⁴ Elizabeth Mamacoz, 'Are South Africans Ready for Gender-Neutral Birth Certificates?' *W24* (30 April 2018) <<https://www.w24.co.za/Wellness/Mind/are-south-africans-ready-for-gender-neutral-birth-certificates-20180430>> accessed 28 May 2018.

¹⁹⁵ Germany, Personenstandsgesetz [engl. personal status law] 2007 para 21(4); Austria, Bundesgesetz über die Regelung des Personenstandswesens [engl. personal status law] [Personenstandsgesetz 2013 – PStG 2013] para 11(4).

¹⁹⁶ Germany Personenstandsgesetz [engl. personal status law] (n 195) para 59(5).

¹⁹⁷ Austria Bundesgesetz über die Regelung des Personenstandswesens [engl. personal status law] (n 195) para 54.

¹⁹⁸ *Sejdić and Finci v Bosnia and Herzegovina* [2009] European Court of Human Rights Application nos. 27996/06 and 34836/06.

box of F or M on application forms for birth certificates.¹⁹⁹ Thus, the appearance of a baby’s genitals usually defines a person’s initial legal sex registration.²⁰⁰ Once a person’s legal sex is registered, it can be challenged through gender recognition laws later on, in case that these laws exist in the country in question. The requirements necessary to access gender recognition could therefore be seen as laying out certain definitions of what makes a person a woman or a man.

When it needs to be determined whether a person is a woman or a man with regards to gender-specific laws, spaces and services, the state usually relies on a person’s gender as registered in the civil registry. However, some institutions are moving towards a model of self-identification for determining the eligibility of gender-specific services and rights. For example, Women’s Colleges in the U.S. increasingly accept trans women, including those who are (still) legally registered as male, and, at times, also non-binary persons.²⁰¹ Similarly, Canada amended its prison policy recently to ensure that trans prisoners are housed in facilities that correspond to their *self-identified* gender rather than their legal gender.²⁰²

If genders were to be eliminated, all current gender-specific laws would need to be rendered gender neutral. Nonetheless, institutions would still need to develop their own definitions of gender categories for affirmative action purposes. Self-identification, such as for the admission to women’s colleges, can be counted as one, presumably the most promising, option for defining genders. While US colleges use self-declarations also for determining the applicants’ eligibility for ethnic quota, some Brazilian universities have put in place controversial “race boards” which

¹⁹⁹ For an overview of birth registration procedures in Australia, Germany, India, Nepal, New Zealand and the United Kingdom, please see: Brink and Tigchelaar, *M/V En Verder: Seksregistratie Door de Overheid En de Juridische Positie van Transgenders* (n 12) 126–187.

²⁰⁰ In some cases, parents have an interest in registering a specific legal gender which might not correspond to the appearance of a baby’s genitals. For example, the birth registration introduced by Napoleon in the Netherlands required parents to bring their newborn to the civil registry since during these times, some babies with a male body anatomy were registered as girls in order to avoid their conscription to the military later on. See: *ibid* 11–12.

²⁰¹ ‘Admission of Transgender Students’ (*Mount Holyoke College*, 2 September 2014) <<https://www.mtholyoke.edu/policies/admission-transgender-students>> accessed 29 May 2018; ‘Mission and Gender Policy’ (*Wellesley College*) <<http://www.wellesley.edu/news/gender-policy>> accessed 29 May 2018.

²⁰² The Correctional Service of Canada (CSC), Canadian Human Rights Commission (CHRC) and Prisoners’ Legal Services (PLS), ‘Joint News Release - Changes to the Way Transgender Offenders Are Accommodated in Canada’s Federal Prison System’ (31 January 2018) <<https://www.chrc-ccdpc.gc.ca/eng/content/joint-news-release-changes-way-transgender-offenders-are-accommodated-canadas-federal-prison>> accessed 8 June 2018.

inspect affirmative action applicants.²⁰³ In Australia, Aborigines and Torres Strait Islanders wishing to access indigenous-specific services and programmes may be required to prove their aboriginality by providing several self-declarations and attestations from indigenous communities and institutions.²⁰⁴ The Brazilian and the Australian model would be both problematic for gender affirmative action since relying on inspection boards or attestations from communities and/or institutions for determining a person's gender would contradict the principle of self-determination.

4.1.2. Implications on data collection

One major argument against the elimination of the public gender registration concerns the difficulty to collect gender disaggregated data if the state no longer records gender. For example, the legal gender registration is used to collect statistics about disparities between women and men in the field of employment, such as concerning the gender pay gap. Dan Christian Ghattas, Executive Director of Organisation Intersex International Europe (OII Europe), pointed out that data collected based on one's legal gender registration is flawed since intersex and trans persons often possess legal gender markers which do not correspond with their lived gender role. Additionally, gender disaggregated data mostly fails to reflect issues of intersectionality or minorities within a group.²⁰⁵ Hence, if the public gender registration were abolished, gender disaggregated data should be obtained same as data on ethnic and religious disparities, mainly collected through surveys by public and private statistics offices.

The legal gender registration can be currently used for collecting gender disaggregated data if the institution concerned has access to the civil registry, which mainly is the case for public and certain state-authorized institutions. Private institutions can draw data collection from gender

²⁰³ Cleuci de Oliveira, 'Brazil's New Problem With Blackness' *Foreign Policy* (5 April 2017) <<https://foreignpolicy.com/2017/04/05/brazils-new-problem-with-blackness-affirmative-action/>> accessed 6 July 2018.

²⁰⁴ 'Proof of Aboriginality' (*Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)*, 27 November 2015) <<http://aiatsis.gov.au/research/finding-your-family/before-you-start/proof-aboriginality>> accessed 15 March 2017.

²⁰⁵ Interview with Ghattas (n 21).

markers on identification documents, which at times differ from the gender registered in the civil registry. Using IDs as proof for one's legal gender works only until the cards contain gender information, which is less and less the case in countries like the Netherlands. In order to avoid the loss of a considerable amount of gender disaggregated data if the public gender registration were eliminated, public institutions would need to find other ways to collect these data.

Aside of using gender markers, one option to collect gender disaggregated data is to rely on *self-identification* in surveys. For example, in most countries, gender disaggregated data on schooling, such as gender gaps in drop-out quotes, is currently derived by using children's legal gender registration as an indication for the children's lived gender. If public gender registration would no longer exist, another way to receive gender disaggregated data on schooling would be to ask school children to fill-out surveys in which they declare their gender identity. Using self-identification has the advantage of one being able to declare another gender every time they are asked, choose not to declare any gender and pick from multiple options. Simultaneously, relying solely on surveys and no longer using legal genders for data collection would probably increase the number of times a person is asked to declare their gender identity. While this might not be so problematic if multiple options fitting your self-identified gender are provided, it still contradicts the goal to reduce the importance of gender for official purposes, as discussed in chapter 1.

An additional, rather problematic way to collect gender disaggregated data is by means of *perception*, namely assuming gender expression as an indicator for gender identity. The problem of inferring a person's gender identity from their gender expression lies in the subjectivity of one's judgment, which likely reproduces stereotypical assumptions regarding how genders are expressed and can lead to errors in the collection of gender identity.

4.1.3. Identity politics without legal gender categories

As discussed above, the ruling by the German Constitutional Court initiated a public discourse on non-binary persons and increased their public visibility. This goes to show that the introduction of a "third" legal gender can transfer social legitimacy upon people who do not (exclusively) identify as male or female. Abolishing the public gender registration would likely fail to do this

given that non-binary persons would be institutionally no more visible than they are in the binary gender registration. For certain people, being publicly recognized by their gender identity can also be an important element in manifesting their identity. The above is true especially for some trans and intersex persons, including non-binary persons, who might find relief and pride in having their identity reflected in gender markers. The UK survey on non-binary persons shows that only 41% would support the elimination of public gender registration altogether, whereas 73% of the 895 survey participants would favor the introduction of a “third” gender category.²⁰⁶ Vic Valentine, Policy Officer at Scottish Trans Alliance, reported that some trans persons feel that legally-registered genders are necessary to ensure their access to gender-specific rights, services and spaces.²⁰⁷ Feminist legal scholars have pointed out that the women’s rights discourse has been essential for making women visible in the eyes of the law and ensuring their rights, yet, at the same time, it has reinforced the gender binary and the idea that women and men are clearly distinct, mutually-exclusive and the sole gender identities.²⁰⁸ Thus, relying on legal gender categories to make non-binary persons visible in the eyes of the law might ensure their rights but also strengthens the perception that gender is legitimately a state-controlled category structuring legal relationships.

On the other hand, abolishing the public registration of gender would reduce the control of the state in defining one’s gender identity, which will possibly resolve many human rights challenges for LGBTI persons. One’s (legal) gender would no longer matter in the question whether someone could get married to another person or adopt a child, and gender recognition procedures, including restrictive requirements, would become obsolete. Since parents would be no longer required to register their newborns’ sex, the risk that intersex children are subjected to genital mutilations in order to make their body conform to social bodily norms would likely be reduced. However, the risk would be clearly not eliminated since abolishing the public gender registration would not necessarily implement a prohibition of intersex genital mutilations, which would still need to be outlawed through specific laws, alongside educating society, so as to ensure the right

²⁰⁶ Valentine (n 4) 73.

²⁰⁷ Interview with Valentine (n 43).

²⁰⁸ Dianne Otto, ‘Feminist Approaches to International Law’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 497.

to physical integrity and self-determination of intersex children and adults. In addition, numerous other human rights' challenges related to sexual orientation, gender identity, gender expression and sex characteristics, such as anti-discrimination protection, health law, refugee status determination and poverty, would persist even if legal genders were abolished.²⁰⁹

4.1.4. Implications on cross-border movements

Where travel abroad is concerned, persons without any legally-registered gender would face similar obstacles to those of people with a “third” legal gender. This is the case because the public gender registration would unlikely be eliminated globally at once, but some countries or regions (e.g. EU) would need to be the pioneers. Thus, countries without public gender registration would be initially an exception, which is why their citizens could face difficulties in states that retain the public gender registration.

Under current ICAO guidelines, countries would be required to reflect a blank gender registration with an X marker on passports. This could possibly create difficulties with visa applications and airline check-ins alike. Furthermore, the recognition of non-binary persons in foreign jurisdictions would need to be determined through the local private international law rules on a case-by-case basis.

4.2. Eliminating the public gender registration for children

Whereas no country has yet abolished the public gender registration for all purposes, Malta introduced in 2015 the possibility for parents to postpone the gender registration of their

²⁰⁹ The assignment of legal parental roles based on a person's reproductive function is also not automatically abolished when gender is not registered anymore. For example, a male-identified person with no legal gender could still be considered as the “mother” if the person gives birth to a child.

newborns until the child’s 18th birthday.²¹⁰ Some countries, notably Germany and the Netherlands, also devise provisions for postponing the gender registration of intersex newborns in case doctors would not “determine” a binary sex.²¹¹ The implication is, thus, that, in principle, some children could already grow up without any legal gender. In addition, the GIHR proposed in its draft for amending the aforementioned German personal status law that newborns in Germany should *generally* be registered without any gender, by which they are given the choice to register a gender in the civil registry later in life.²¹² These models are discussed in greater detail in the following sections.

4.2.1. Malta’s example and the proposal by the German Institute for Human Rights

With the adoption of the GIGESC Act in 2015, Malta became the first country worldwide to explicitly grant parents the choice to register or not register their newborn’s gender as part of the birth registration. However, children must register a (binary) legal gender by their 18th birthday at the latest, which means that in Malta only children, but not adults, can remain without any legal gender.²¹³ Until the time of writing, no parents in Malta have as of yet made use of the possibility to postpone the gender registration of their newborn.²¹⁴

The gender of children without any legally registered gender is recorded as “undetermined” in the civil registry, which is displayed as an X on IDs and passports. The possibility to initially leave the gender marker blank in the birth registration, already existed prior to the adoption of the GIGESC Act in. It was used, for instance, for premature babies whose sex organs were not fully developed, which means that a binary sex was difficult to discern.²¹⁵ If children below the age of 16 wish to change their gender entry from “undetermined” to a binary gender, they need to obtain

²¹⁰ Malta Gender Identity, Gender Expression and Sex Characteristics Act (n 64) para 7(4).

²¹¹ Germany Personenstandsgesetz [engl. personal status law] (n 195) para 22(3); Dutch Civil Code Art 1:19d(1).

²¹² Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 65, 69.

²¹³ Malta Gender Identity, Gender Expression and Sex Characteristics Act (n 64) para 7(4).

²¹⁴ Interview with Calleja (n 22).

²¹⁵ *ibid.*

a court decision. If they are 16 years old or older, they can apply to a notary. This procedure is the same as changing the legal gender within the binary, from female to male and vice versa.²¹⁶

In Malta, there are generally no laws that make a distinction between children based on gender. Still, there are in existence some gender-specific services and spaces, such as gender-divided schools. It is unclear how these gender-divided spaces and religious institutions (e.g. concerning baptism, confirmation) would react to children without any legally registered gender.²¹⁷ Since the number of children registered without any legal gender is assumed to remain low, policy-makers did not expect that this measure would have an impact on the collection of gender disaggregated data on children (e.g. gender gaps in school drop-out ratios).²¹⁸

Countries with laws which create a distinction between girls and boys would need to render these laws gender-neutral, or, conversely, specify their impact on children with no legally-registered gender. Examples for laws treating boys and girls differently in some countries are those pertaining to the legal age of marriage, consent and majority. Gender-differentiating laws for children barely exist in the CoE member states, but a few still remain. For example, the law of the Vatican creates a distinction between boys and girls with regards to marriage, since girls can marry at the age of 14 whereas boys must be at least 16.²¹⁹ In Poland, the legal age of marriage is 18, yet a family court can exceptionally allow *girls* above 16 to marry.²²⁰ Thus, at least with regards to the law in the Vatican, lawmakers would need to specify the legal situation of children without any legal gender if they ever decide to introduce the option of postponing children's gender registration – an unlikely option given the Vatican's strong support for upholding the gender binary. In addition, laws differentiating according to gender among minors could become relevant if children with an X marker from Malta travel to other countries. Private international law rules would once again come into play in determining the situation of children with no registered gender abroad.

²¹⁶ *ibid.*

²¹⁷ *ibid.*

²¹⁸ *ibid.*

²¹⁹ Vatican, Code of Canon Law Can. 1083 §1.

²²⁰ Poland, Family and Guardianship Code 1964 para 10(1).

The GIHR proposal for amending the German personal status law takes a marked step further than the Maltese law by recommending that newborns are *generally* not registered with a legal gender.²²¹ They can nonetheless decide at a later stage in life to register a gender in the civil registry. This reinverts the *status quo* as compared to the situation in Malta, where, in general, children are registered with a legal gender, but parents can decide to opt out of this registration. The German proposal also foresees that some adults will remain legally genderless, since there is no upper limit as to when children must register their legal gender. In addition, people should retain the already-existing possibility to delete their gender registration at any given time, as discussed in greater detail in section 4.3.

According to the GIHR proposal, if children want to register their gender in the civil registry, they can do so with a simple self-declaration if they are above the age of 14 and of full legal capacity. If they are below the age of 14, or possess no full legal capacity, they need the consent of their guardians. If the guardians refuse the consent, a family court can be called upon to make this said decision.²²²

Since the model proposed by the GIHR would probably result in almost all children being registered without any legal gender, except for those who explicitly want to register a gender already during childhood, the collection of gender disaggregated for children would be more strongly-impacted than in Malta, where so far no child possesses a blank gender registration. On the one hand, binary gender markers (F or M) could be assumed as a stronger proof for one's self-identified gender than is currently the case, since both children and adults would *choose* to be registered with a marker instead of being *assigned* one. On the other hand, for the purpose of collecting gender disaggregated data, additional surveys would be necessary to equally understand gender identities and lived gender roles of children who are not registered with a legal gender.

²²¹ Althoff, Schabram and Follmar Otto, 'Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt' (n 2) 65, 69.

²²² *ibid* 69, para 2(3).

4.2.2. The gender registration of intersex children in Germany and the Netherlands

In 2013 Germany introduced a new provision in its personal status law, paragraph 22(3), which maintains that “a child who cannot be assigned to the female sex nor the male sex”²²³ must be registered without any legal gender in the birth registry. The child’s legal gender can be subsequently registered by providing a medical certificate which declares their binary sex.²²⁴ Despite having presumably had the intention to reduce the number of medically unnecessary genital surgeries performed on children,²²⁵ the amendment of the German personal status law in 2013 has been strongly criticized for forcibly outing and “othering” intersex children, and, consequently, making them prone to stigmatization.²²⁶ The mandatory nature of the law, which creates an *obligation* to register their intersex children without any legal gender, could put even more pressure on parents and doctors to assign the child to a binary sex since they want to avoid the forced outing caused by blank gender registration. This, in turn, can enhance the risk that children concerned are subjected to intersex genital mutilations. Part of the problem lies also in the fact that it is up to doctors to decide on the child’s sex assignment, while intersex rights activists advocate for a decision based on the principle of self-determination where children are the ones making the decision, as opposed to doctors or parents.²²⁷ The draft law on introducing another legal gender category, as published by an online newspaper, would slightly amend paragraph 22(3) of the current personal status law in Germany. It would add that if the sex of a

²²³ Translated from German into English. Germany Personenstandsgesetz [engl. personal status law] (n 195) para 22(3).

²²⁴ *ibid* 27(3)(4); Germany, Allgemeine Verwaltungsvorschrift zum Personenstandsgesetz [in engl. General Administrative Regulation on Personal Status Law] [PStG-VwV] 27.8.1.

²²⁵ Brink, Reuß and Tigchelaar (n 58) 286.

²²⁶ OII Australia, ‘German Proposals for a “Third Gender” on Birth Certificates Miss the Mark’ (20 August 2013) <<https://oii.org.au/23183/germany-third-gender-birth-certificates/>>; OII Germany, ‘PM: Mogelpackung Für Inter*: Offener Geschlechtseintrag Keine Option. Pressemitteilung Der Internationalen Vereinigung Intergeschlechtlicher Menschen (IVIM) / Organisation Intersex International’ (7 February 2013) <<http://www.intersexualite.de/index.php/pm-mogelpackung-fur-inter-offener-geschlechtseintrag-keine-option/>>; Hida Viloría, ‘Why Intersex Germans Aren’t Crazy About Germany’s Third Gender Law’ (1 November 2013) <<http://hidaviloria.com/why-intersex-germans-oppose-germanys-third-gender-law/>>; Dritte Option, ‘Stellungnahme Zur Änderung Des §22 PStG’ <<http://dritte-option.de/stellungnahme-zur-pstg-aenderung/>>.

²²⁷ ‘Sham Package for Intersex: Leaving Sex Entry Open Is Not an Option’ (*OII Europe*, 15 February 2013) <<https://oiieurope.org/bluff-package-for-inter-leaving-sex-entry-open-is-not-an-option/>> accessed 10 June 2018; Interview with Ghattas (n 21).

child is unclear, the child must be registered either without any legal gender or with the category “weiteres” (“additional/other”) in the birth registry.²²⁸

Whereas the 2013 amendment to the German personal status law was highly debated by German and international media respectively, which often wrongly described it as introducing a “third” gender,²²⁹ a similar provision has existed in the Dutch Civil Code since 1970 without ever attracting much attention.²³⁰ The Dutch provision similarly states that a child shall receive an interim birth certificate without any sex marker if the child’s sex is “doubtful”.²³¹ Same as in Germany, in the Netherlands intersex children without any legal gender would receive an X marker on passports.²³² Despite these similarities, the Dutch provision differs slightly from the German one. First, it claims that after three months the interim birth certificate is exchanged with a final birth certificate, which shall state the child’s sex if, in the meantime, it could be “determined”. Had this not been the case, the gender marker shall, yet again, be left blank on the final certificate until further notice.²³³ This provision assumes that uncertainties regarding a child’s sex can be typically resolved within the first three months. According to a non-quantitative survey conducted in the Netherlands, this expectation has been met in practice. Out of 196 surveyed registers, only 13 have registered a child’s sex as “undeterminable”, that is, one to three times during their time in office. In almost all cases, except two, the sex could be registered on the final birth certificate at the end of three months.²³⁴ Whether any intersex genital mutilations were performed to “erase” uncertainties regarding a child’s sex in these three months remains inconclusive, but I would argue probable. A second difference between the Dutch and

²²⁸ Referentenentwurf des Bundesministeriums für Inneres, für Bau und Heimat Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben (n 113) Art. 1.

²²⁹ ‘Germany Adopts Third Gender Law’ *Aljazeera* (1 November 2013) <<https://www.aljazeera.com/news/europe/2013/11/germany-adopts-third-gender-law-2013111141748757336.html>> accessed 10 June 2018.

²³⁰ Dutch Civil Code (n 211) Article 1:19d; Brink, Reuß and Tigchelaar (n 58) 285, 287.

²³¹ Dutch Civil Code (n 211) Article 1:19d(1).

²³² Brink, Reuß and Tigchelaar (n 58) 284.

²³³ Dutch Civil Code (n 211) Article 1:19d(2)(3).

²³⁴ Brink, Reuß and Tigchelaar (n 58) 286.

German law is that, in the Netherlands, no medical declaration stating a child's sex is needed for the birth registration. Thus, it is up to parents to declare their child's gender.²³⁵

4.2.2.1. Empirical evaluation of the German personal status law

The GIHR conducted an empirical evaluation of how paragraph 22(3) of the German personal status law has been implemented so far. The results exhibit that within two years, between November 2013 and November 2015, twelve newborns were registered in the birth registry without any legal sex. Two of these children were subsequently registered with a female or a male sex.²³⁶ According to medical estimations, roughly 280-300 children were born with intersex genitals in the course of those two years, meaning that only 4% of intersex newborns are actually registered without a gender marker.²³⁷ This is due to a reluctance on the part of midwives, doctors and parents to leave the gender marker blank.²³⁸ Civil registers also display hesitancy to register a child's birth with no gender information, which in a few cases resulted in them consulting with the responsible doctors or even postponing the birth registration with the aim to obtain full clarity on the child's sex before registering it.²³⁹ 95% of the 683 surveyed civil registers responded that they were informed about the new regulations on registering intersex children's birth, whereas only half of the 127 midwives, 30% of the 161 responding doctors and only 18% of doctors working at the hospital were officially informed about the personal status law amendment.²⁴⁰ The medical personnel also remarked that there is some haze regarding the medical standards determining a child's sex. There are no clear criteria as to when should a child be registered without any legal gender.²⁴¹ Another problem discussed in the survey results was that many

²³⁵ *ibid* 6.

²³⁶ Althoff, Schabram and Follmar Otto, 'Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt' (n 2) 17.

²³⁷ *ibid* 18.

²³⁸ *ibid* 18–19.

²³⁹ *ibid* 19–20.

²⁴⁰ *ibid* 19, Annex 1 5-6.

²⁴¹ *ibid* 20.

hospital forms and electronic systems do not allow the option of leaving the gender marker blank.²⁴²

The study on paragraph 22(3) of the GIHR personal status law tries also to capture opinions regarding the usefulness of the provision and how it affects the decision to undergo intersex genital mutilations. Many of the parents, doctors, midwives and civil registers who participated in the survey appreciated the possibility to postpone the gender registration of an intersex newborn.²⁴³ The main tensions surrounding the opinions on the new regulation are concerned with the aspects discussed above. On the one hand, the law alleviates pressure from doctors to assign a sex immediately after birth, but, on the other hand, it also constitutes a forced outing, which can, in turn, increase stigmatization of intersex persons and the risk of intersex genital mutilations taking place. Furthermore, the role of parents in the sex assignment of their children is controversial. Many survey participants think that parents should be somehow involved in the decision which sex should be legally assigned to the child, but, simultaneously, intersex children must also be protected from parents who wish to force them into one gender category. The question whether a blank gender registration makes being intersex more “normal” and legally accepted or whether it enhances stigmatization, was also debated in the survey responses.²⁴⁴ More on the current law’s controversies and opinions can be found in the GIHR report.²⁴⁵

4.2.2.2. Legal gaps in Germany and the Netherlands

As discussed in the example of Malta, not many laws exist in the CoE member states which distinguish between children based on their gender, but it is unclear how gender-divided services and spaces for children (e.g. schools) would react to children with no legally- registered gender. Both Dutch and German laws regarding intersex children’s sex registration assume that the non-legal gender registration is only temporary. In practice, however, these children can remain without any legal gender their entire lives since the law sets no age limit when the children

²⁴² *ibid* 21.

²⁴³ *ibid*.

²⁴⁴ *ibid* 21–23.

²⁴⁵ *ibid*.

concerned must declare a gender, as is the case in Malta. The implication would thus be that laws, which distinguish between *adult* women and men in the Netherlands and Germany, can also create legal uncertainties for intersex children without any legally registered gender. In addition, the GIHR evaluation on paragraph 22(3) discussed above shows that many civil registers are concerned about what happens to children without any legal gender when they grow up and come in contact with gender-specific laws, such as those concerning marriage and parenthood.²⁴⁶ Neither Dutch nor German lawmakers have taken measures to prevent such legal gaps for persons without any legally-registered genders. For example, it is unclear whether and whom persons with no legal gender could marry in Germany and the Netherlands, since marriage in these two countries is allowed between “two persons of different or the same sex”²⁴⁷. More on this will be discussed in the next section.

4.3. Making the public gender registration optional for adults

In its proposal for amending the German personal status law, the GIHR also discusses the option that adults can ask for the deletion of their gender registration and remain legally genderless.²⁴⁸ In fact, this possibility already exists in Germany, as clarified by various court decision during the last three years.²⁴⁹ Making the public registration optional can be regarded as a compromise between the demands of persons who do not want to be publicly identified with a (binary) gender category and those who wish to retain the public gender registration, which made up 59% of the respondents of the UK survey on non-binary persons.²⁵⁰

In its ruling from November 2017 the German Constitutional Court confirmed that paragraph 22(3) of the German personal status law, discussed above, creates the option to remove one’s

²⁴⁶ *ibid* 23.

²⁴⁷ German Civil Code 2002 para 1353(1); Dutch Civil Code (n 211) Art. 1:30(1).

²⁴⁸ Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 24.

²⁴⁹ 14 W 28/14, 85 III 105/14 (Oberlandesgericht Celle); 17 W 5/17 (Oberlandesgericht Celle); XII ZB 52/15 (Bundesgerichtshof [engl Federal Court of Justice]); 1 BvR 2019/16 (n 104).

²⁵⁰ Valentine (n 4) 73.

gender marker from the civil registry and remain with an “undetermined” gender.²⁵¹ This confirms lower courts’ previous decisions.²⁵² The Higher Regional Court of Celle was, in 2015, the first court to clarify that though paragraph 22(3) was intended to cover only intersex newborns, it can also be retrospectively applied to intersex adults who can ask for the deletion of their gender marker and receive the status of “undetermined” gender.²⁵³ In a case in 2017 the same Court subsequently decided that not only intersex adults, but also trans adults, can demand the deletion of their gender registration, since making the deletion dependent upon biological criteria, such as intersex, would contradict the principle of self-determination.²⁵⁴ By relying on previous jurisprudence, the Court determined that it is the self-identified gender that counts in this case, rather than the gender “perceived” by others.²⁵⁵

The abovementioned rulings created the situation that adults can delete their gender in Germany, yet the court cases have not clarified the requirements that an applicant may be asked to fulfil for this deletion. The GIHR study revealed that, generally speaking, civil registers do not know how to act when confronted with an application to delete one’s gender registration. 44% of the surveyed registers answered they refer the case to a court, 36% would require the applicants to provide a medical attestation, and 28% answered they would not know what to do.²⁵⁶ Though over two years have passed since the survey was conducted by the GIHR, and courts have, meanwhile, further clarified the effects of paragraph 22(3) for adults, the exact procedure for deleting one’s legal gender remains still ambiguous

As already remarked above, adults without any legal gender face legal uncertainties with regards to gender-specific laws in Germany, since German legislators did not foresee that paragraph 22(3) of the German personal status law would also be applied to adults. Furthermore, it is unclear how a blank gender registration, reflected with an X on passports, would be recognized by other countries under private international law rules.

²⁵¹ *I BvR 2019/16* (n 104) [13, 43].

²⁵² *14 W 28/14*, 85 III 105/14 (n 249); *17 W 5/17* (n 249); *XII ZB 52/15* (n 249).

²⁵³ *14 W 28/14*, 85 III 105/14 (n 249) 5.

²⁵⁴ *17 W 5/17* (n 249) 8–9.

²⁵⁵ *ibid.*

²⁵⁶ Althoff, Schabram and Follmar Otto, ‘Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt’ (n 2) 24.

In addition to Germany, two Canadian states, Saskatchewan and Ontario, now also provide the option to remove gender markers from birth certificates. A court in Saskatchewan ordered the regional government to allow the removal since the mandatory M and F on the birth certificate violates the Saskatchewan Human Rights Code.²⁵⁷ Ontario reportedly introduced the possibility to delete one's gender marker from the birth certificate alongside the recognition of a non-binary legal gender in 2018.²⁵⁸

4.4. Conclusions

Thus far, no country has abolished the mandatory gender registration altogether. If countries would take this path, gender categories like *non-binary*, *women* and *men*, would need to be defined for affirmation action. Rather than relying on legal documents as proof for people's gender, self-declarations could be used. Similarly, the reliance on the gender registered in the civil registry would need to be replaced by another way of determining people's gender for the collection of gender disaggregated data. Using large-scale surveys where people can self-declare their gender could present an alternative, but those bear the risk to gender becoming an even greater salient social category since people are asked more frequently to declare their gender than they have before. In addition, maintaining legal gender categories can, at times, be useful for identity politics since social legitimacy may be transferred upon groups, of the likes of non-binary persons, and secure their access to gender-specific services and spaces. On the other hand, abolishing legal genders could resolve many human rights challenges for LGBTI persons, like those concerning the right to marry, and alleviate pressure from parents and doctors to assign a binary gender to (intersex) children. According to current ICAO guidelines, the non-registration of a person's gender would need to be expressed with an X on identity documents and the

²⁵⁷ 'Saskatchewan Court Allows Removal of Gender from Birth Certificates' (*Saskatchewan Human Rights Commission*, 25 May 2018) <<http://saskatchewanhumanrights.ca/news/saskatchewan-court-allows-removal-of-gender-from-birth-certificates>> accessed 10 June 2018.

²⁵⁸ Leyland Cecco, 'Transgender Rights: Ontario Issues First Non-Binary Birth Certificate' *The Guardian* (8 May 2018) <<http://www.theguardian.com/world/2018/may/07/ontario-non-binary-birth-certificate-canada-transgender>> accessed 15 May 2018.

recognition of blank gender registration in foreign countries would rely on each country's specific private international laws.

In April 2015, Malta became the first country worldwide to provide parents with the option to postpone the registration of their newborn's gender until the child's 18th birthday.²⁵⁹ Up until now, that is, three years later, no parents have yet chosen this possibility.²⁶⁰ This confirms the policy-makers' predictions that the possibility to postpone newborns' gender registration would have no major impact on the collection of gender disaggregated data, given that the number of children registered without any legal gender was expected to remain low.²⁶¹ In general, Maltese laws do not make a distinction based on gender among minors, but it is vague how gender-divided services and spaces (e.g. schools), as well as religious institutions (e.g. for baptism), would react to children with no legal gender.²⁶² Other countries with laws which create a distinction among girls and boys, such as for the legal age of marriage, will need to amend these laws in order to avoid any legal gaps and insecurities. These gender-differentiating laws could also become problematic if children without any legal gender from Malta travel abroad and no clear private international law rules are in existence. The GIHR goes one step further than Malta and proposes that children are *generally* not registered with a gender at the time of birth, yet still providing the possibility to record a gender in the civil registry later in life.

Both Germany and the Netherlands practice laws that provide for the registration of intersex newborns without any legal gender if the child's sex characteristics look unequivocally neither female nor male. The German law especially has been described as harmful by intersex rights activists, since it constitutes a forced outing of intersex children which can, in turn, lead to stigmatization and even increase the risk for intersex genital surgeries to take place.²⁶³ An empirical evaluation of the German law shows that only 4% of all intersex newborns are

²⁵⁹ Malta Gender Identity, Gender Expression and Sex Characteristics Act (n 64) para 7(4).

²⁶⁰ Interview with Calleja (n 22).

²⁶¹ *ibid.*

²⁶² *ibid.*

²⁶³ OII Australia (n 226); OII Germany (n 226); Vioria (n 226); Dritte Option, 'Stellungnahme Zur Änderung Des §22 PStG' (n 226); 'Sham Package for Intersex: Leaving Sex Entry Open Is Not an Option' (n 227).

registered without any legal gender in the birth registry.²⁶⁴ Neither German nor Dutch lawmakers have foreseen any legal gaps that may arise when intersex children without any legal gender grow up and come into contact with gender-specific laws (e.g. marriage) in their adulthood.

German courts have clarified in the last three years that adults, be they intersex or not, can demand the deletion of their legal gender from the civil registry based on paragraph 22(3) of the German personal status law, which prescribes the blank gender registration of intersex newborns.²⁶⁵ The exact requirement for deleting one's legal gender are still rather ambiguous, yet it is clear that, in principle, adults can remain without any legally registered gender in Germany. Legal uncertainties and gaps, such as with regards to marriage, arising from these court decisions are yet to be resolved.

Final remarks

Legal systems of nation-states are heavily based on the gender binary, which assumes that women and men are complementary, mutually-exclusive and the only existing gender identities. Breaking out of the binary in the legal registration of genders contains, therefore, diverse effects on other fields of law, such as family and labour laws. Domestic efforts and international cooperation will, in the future, be necessary to ensure that all persons irrespective of their legal gender and gender identity will be able to access their rights and services and travel without fear of discrimination. As reflected by the ruling of the German Constitutional Court, countries in Europe are increasingly realizing that the binary gender registration contradicts the principles of non-discrimination and self-determination. This momentum opens the door to a profound reconsideration of the ways states record and register gender, and to shed light on the diversity of gender identities, in particular non-binary ones.

²⁶⁴ Althoff, Schabram and Follmar Otto, 'Gutachten. Geschlechtervielfalt Im Recht. Status Quo Und Entwicklung von Regelungsmodellen Zur Anerkennung Und Zum Schutz von Geschlechtervielfalt' (n 2) 18.

²⁶⁵ *14 W 28/14*, *85 III 105/14* (n 249); *17 W 5/17* (n 249); *1 BvR 2019/16* (n 104); *XII ZB 52/15* (n 249).

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Interview with Sanjar Kurmanov (30 May 2018)

Interview with Vic Valentine (8 June 2018)

Appendix 1: Interview Methods Table

Nr	Interviewee	Affiliation	Status	Source
1	Dan Christian Ghattas	OII Europe	Interview conducted on 23 May 2018 via skype	Sample frame
2	Richard Köhler	TGEU	Interview conducted on 17 May 2018 via skype	Sample frame
3	Gabriella Calleja	SOGIGESC Unit, Human Rights and Integration Directorate, Maltese Ministry for Social Dialogue, Consumer Affairs and Civil Liberties	Interview conducted on 22 May 2018 via skype	Sample frame, referred by Silvan Agius
4	Moritz	Dritte Option	Interview conducted on 14 May 2018 via skype	Sample frame
5	Marjolein van den Brink	Utrecht University School of Law	Interview conducted on 31 May 2018 via email	Sample frame
6	Sanjar Kurmanov	Trans* Coalition in Post-Soviet space	Interview conducted on 30 May 2018 via skype	Referred by Richard Köhler
7	Vic Valentine	Scottish Trans Alliance	Interview conducted on 8 June 2018 via skype	Referred by Richard Köhler