Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition

Jens T. Theilen*

Research Associate, Walther Schücking Institute for International Law, University of Kiel

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Abstract

Western societies have traditionally acknowledged only two genders, male and female. Yet as a recent judgment by the German Federal Constitutional Court shows, this is beginning to change, and claims for legal gender recognition of non-binary persons are increasingly being made. Drawing on insights from comparative law, this article argues that whether legal moves beyond the binary are desirable or not depends in large part on the rationale that undergirds them, and examines several potential rationales. At its best, legal gender recognition for non-binary persons should aim to foster self-determination within a larger social fabric of existence, both by supporting non-binary persons in day-to-day interactions and by challenging the self-evidence of the gender binary. By reference to the case-law of the European Court of Human Rights on transgender rights, the article examines whether such a rationale could already be said to lie latent in European jurisprudence.

Introduction

On 10 October 2017, the German Constitutional Court ruled that it is unconstitutional to retain legal gender markers so long as they are restricted to only male and female, with no affirmative designation possible beyond these two options.[1] This judgment constitutes a particularly emphatic intervention within a broader development, in legal systems across the globe, to acknowledge the limits of the gender binary. Explicit recognition of non-binary or otherwise gender-variant persons[2] had previously found its way, for example, into the legal systems of Australia, Bangladesh, India, Nepal, New Zealand, Pakistan and parts of the US, with contestation or reform of the binary system also reported to be ongoing in many other states. Such developments are usually quite limited in scope (restricted, for example, to certain issues such as passports, census categories or birth certificates) or plagued by a lack of proper implementation beyond initial, often judicial, pronouncements—but they nonetheless serve to showcase that non-binary persons are slowly being written into legal existence.[3]

With the judgment of the German Constitutional Court as well as recent policy changes in Malta, the move beyond the gender binary has now arrived in Europe. Further challenges by way of judicial

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[1] German Federal Constitutional Court, App. No.1 BvR 2019/16 decision of 10 October 2017; for more context, see fn.28 below.

[2] In what follows, I will use only the term "non-binary". Not all persons outside of the gender binary identify with this term (or even accept the dichotomy between binary and non-binary); its use here is not intended to be prescriptive.

[3] To borrow a phrase from A. Sharpe, *Transgender Jurisprudence. Dysphoric Bodies of Law* (London and New York: Cavendish, 2002), p.80.

proceedings are ongoing, for example, in Austria, Belgium and the UK[4]; and there is hope that the German judgment will push the courts seized of these cases to rethink the binary assumptions which, until now, have so often been taken for granted within Europe. Against the backdrop of these ongoing challenges and the questions they open up for courts across Europe, this article will reflect on the rationale of legal gender recognition for non-binary persons in relation to previous European jurisprudence on transgender rights. Building on the judgment of the German Constitutional Court and other judicial pronouncements in favour of non-binary recognition from outside Europe and using the case-law of the European Court of Human Rights as a foil,[5] I will discuss whether moving beyond the gender binary constitutes a simple extension of previous rationales for legal gender recognition or whether it necessitates a more radical shift in thinking about how and why we retain legal gender markers.

Legal sex or legal gender: confronting (bio)logic

Within Europe, the landmark case for transgender rights is commonly considered to be the judgment by the European Court of Human Rights in *Goodwin*, which established a right to legal gender recognition as part of the right to private life (art.8 of the ECHR) as well as the relevance of the gender thus recognised for the purposes of marriage (art.12 of the ECHR).[6] Yet while this ruling obliged the State Parties to provide for *some* kind of legal gender recognition, it took the view that the "appropriate means" for doing so fall within their margin of appreciation,[7] and subsequent judgments have mostly rubber-stamped various barriers to recognition.

For present purposes, it is particularly relevant to note that, in *Goodwin*, the Court itself restricted its ruling to "post-operative transsexuals".[8] In other words, while acknowledging a person's gender identity may be the driving factor behind legal gender recognition, a right to such recognition remains dependent on bodily modification by way of hormone therapy and surgery. On this approach, legal gender recognition remains grounded in a concern with anatomy which Alex Sharpe has dubbed (bio)logic.[9] As Damian Gonzalez-Salzberg summarised it with regard to the Court's position at the time, legally relevant gender is "no longer determined by an immutable 'biological' truth of the body, but it is found in the surgically modified anatomy of the transsexual genitalia".[10]

A similar concern with (bio)logic may be found in various cases ostensibly establishing legal gender recognition for non-binary persons—although, given the continued focus on anatomy, it may be more accurate to speak of "legal sex" than "legal gender".[11] This is perhaps most clearly in evidence in the case of *Norrie*, in which the High Court of Australia ruled that it was permissible to change the applicant's

[4] For updates on the latter, see *https://elancane.livejournal.com* [Accessed 25 May 2018].

[5] For a very cautious move beyond the binary within the broader Council of Europe system, see Parliamentary Assembly, Resolution 2048 (2015) at 6.2.4. Another possible point of reference is the legal order of the EU, which—similarly to the case-law of the European Court of Human Rights—is currently phrased or interpreted predominantly within the gender binary but also carries the potential for its subversion. On both aspects (in the context of intersexuality), see e.g. M. Travis, "Accommodating Intersexuality in European Union Anti-Discrimination Law" (2015) 21 *European Law Journal* 180. I will, however, mostly leave EU law aside here—it is difficult to discern clear rationales for legal gender recognition in the case-law of the European Court of Justice since it deals with civil status law only obliquely, through the lens of other areas of law (e.g. in cases relating to equality in pensions). See very clearly in that regard the recent opinion of Advocate-General Bobek in *MB v Secretary of State for Work and Pensions* (C-451/16), 5 December 2017, particularly at [22]-[29], [76], [79] and [98].

[6] *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 447.

[7] *Goodwin* (2002) 35 E.H.R.R. 447 at [93]; see J.T. Theilen, "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe", in G. Schreiber (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven* (Berlin, Boston: de Gruyter, 2016), p.378; P. Dunne, "'Recognizing Identities, Denying Families': Conditions for the Legal Recognition of Gender Identity in Europe", in C. Casonato and A. Schuster (eds), *Rights On The Move—Rainbow Families in Europe* (Trento: University of Trento, 2014), p.296.

[8] *Goodwin* (2002) 35 E.H.R.R. 447, e.g. at [90], [100], and [108]; confirmed in *Stella Nunez v France* (App. No.18367/06), decision of 27 May 2008; contrast Inter-American Court of Human Rights, advisory opinion OC-24/17 of 24 November 2017, e.g. at [127] and [146].

[9] Sharpe, *Transgender Jurisprudence. Dysphoric Bodies of Law* (2002), particularly chs 3 and 4.

[10] D.A. Gonzalez-Salzberg, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights" (2014) 29 *American University International Law Review* 797, 817; see also R. Sandland, "Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights" (2003) 11 *Feminist Legal Studies* 191, 200.

[11] While I take sex to be socially constructed (see e.g. S.J. Kessler, *Lessons from the Intersexed* (New Brunswick, N.J.: Rutgers University Press, 1998)), I use it here as a reference to biology (and anatomy in particular) in the way legal discourse commonly does.

legal sex from "male" to "non-specific".[12] It did so on the basis of the applicant's submission that "the purpose of the Register is to state the truth about matters recorded in the Register to the greatest possible extent" and that, in light of the applicant's "ambiguous" sex, "it would be to record misinformation in the Register to classify her as male or female".[13] As Neuman Wipfler has argued, the High Court thus sees legal gender as a form of truth-acknowledgment, while "locating the truth of gender in a person's genitals".[14]

There are many drawbacks to such an approach. Let me highlight just one: the connection to the terminology applied to the non-binary option. Before appeal to the High Court, the New South Wales Court of Appeal had ruled that besides "non-specific", other "appropriate identifications such as '*intersex*', '*androgenous*', [sic] or '*transgender*', being words that appear to be recognised designations of sexual identity, may be registered".[15] While this is a relatively vague proclamation, the reference to "identifications" and "designations of sexual *identity*" as well as the mention of the term "transgender", which is commonly connected more to gender identity and expression than to biology and anatomy,[16] inject an element of identity-based self-declaration into the Court of Appeal's approach. The High Court's ruling, by contrast, remains firmly grounded in (bio)logic throughout. Accordingly, it rejected the multiplicity of possible terms proposed by the Court of Appeal and instead allowed *only* the term "non-specific" to cover all those persons whose sex is considered to be "ambiguous".[17] Some non-binary persons may well accept or even prefer such a designation, but as the developments in the German legal system mentioned below will demonstrate, many will not find it sufficient—as Wallbank has noted, its vagueness makes it appear not so much as "a 'third' Legal Sex, but a catch-all Legal Sex indicating no Legal Sex classification or a Non-Sex Legal Sex".[18]

In light of its recent case-law, it seems unlikely that the European Court of Human Rights could rely on such "sex classification" rather than truly establish legal gender recognition for non-binary persons. While it has never formally abandoned its reliance on (bio)logic, its judgment in *AP, Garçon and Nicot* found a violation of art.8 of the ECHR because legal gender recognition was made conditional on "sterilisation surgery or on treatment which, on account of its nature and intensity, entailed a very high probability of sterility".[19] Surgical intervention in general is not explicitly discussed, nor is the judgment's relation to the notion of "post-operative transsexuals" as encountered in *Goodwin*—but the importance of physical integrity is stressed throughout the judgment,[20] and it is difficult to imagine how the previous approach could be upheld without risking inconsistency. Unless the Court adopts a highly regressive stance, then, it cannot mirror *Norrie* in perpetuating (bio)logic and treating the recording of anatomical "truth" as the rationale of legal gender recognition for non-binary persons.

[12] High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

[13] *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [30].

[14] A.J.A. Neuman Wipfler, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents" (2016) 39 *Harvard Journal of Law and Gender* 491, 514; see also R. Wallbank, "Australia", in J.M. Scherpe (ed.), *The Legal Status of Transsexual and Transgender Persons* (Cambridge et al.: Intersentia, 2015), p.518.

[15] NSW Court of Appeal, *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [205] (per Beazley ACJ, emphasis in original).

[16] See, e.g. the description of the term given by S. Stryker, "My Words to Victor Frankenstein above the Village of Chamounix: Performing Transgender Rage", in S. Stryker and S. Whittle (eds), *The Transgender Studies Reader* (New York: Routledge, 2006), pp.254–255; and, on its tension in relation to "intersex", P. Currah, R.M. Juang and S. Price Minter, "Introduction", in P. Currah, R.M. Juang and S. Price Minter (eds), *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006), p.xv.

[17] High Court of Australia, *Norrie* [2014] HCA 11 at [31] and [35].

[18] Wallbank, "Australia", in Scherpe (ed.), *The Legal Status of Transsexual and Transgender Persons* (Cambridge et al.: Intersentia, 2015), p.520.

[19] *AP, Garçon and Nicot v France* (App. Nos 79885/12, 52471/13 and 52596/13), judgment of 6 April 2017 at [120].

[20] *AP, Garçon and Nicot v France* (App. Nos 79885/12, 52471/13 and 52596/13) at [123], [127] and [131]-[133]; see also at [130] which speaks of "medical treatment" in general, and considers it to not be "the subject of genuine consent" when enforced as a precondition to legal gender recognition; still, the clear and presumably deliberate restriction of the judgment to the issue of sterilisation, e.g. at [120] and [135], leaves room for doubt as to the Court's future approach.

From an "anomalous position" to an "affirmative designation"

Yet while the landmark judgment in *Goodwin* remained mired in (bio)logic, it also made indication of other rationales for legal gender recognition besides recording anatomical "truth". One of the most often and enthusiastically quoted passages from that judgment states that lack of legal gender recognition leads to a "conflict between social reality and law" which "places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety".[21] Besides noting the use of the pronouns "he or she", which confirm the binary outlook of the European Court of Human Rights, we may also ponder the reference to "social reality". For many trans men and women, this is an intelligible concept—they will, at some point during or after their transition, pass as male or female, respectively, and by obtaining legal recognition of their gender, the chance that they will be unwillingly outed as trans is greatly reduced. They can thus, as Paul Kavanagh put it, achieve "the freedom, like everyone else, to slip quietly into the crowd".[22]

This is an important rationale, and slipping quietly into the crowd should certainly be an option for those who wish it. Yet even within the gender binary, this rationale by no means covers all trans men and women, particularly those whose "social reality" is less clear-cut because they do not conform to gender stereotypes regarding their conduct and appearance.[23] Most legal regimes, including courts that have traditionally been quite active in combatting restrictive regimes of legal gender recognition, continue to accept preconditions relating to the visual appearance of trans persons as legitimate,[24] thus forcing them to create an ostensibly coherent "social reality" which contrasts with their legal classification before they are allowed to change the latter.

Focusing specifically on recognition of non-binary persons brings the problems involved in this approach into stark relief. Given the binary outlook which continues to be deeply inscribed into the fabric of most (Western) societies, can we even imagine what a culturally legible "social reality" for non-binary persons would look like? On the rare occasions on which a person's gender presentation differs so drastically from the common norms that they cannot be easily identified as either male or female, they will nonetheless be measured against that binary, leading to confusion at best—"you should be women, and yet your beards forbid me to interpret that you are so"[25]—or violence at worst.[26] It seems unlikely, therefore, that non-binary persons would be able to "slip quietly into the crowd".

To be sure, by adapting their gender presentation in a certain way, some non-binary persons can pass as male or female. Yet the crucial point is that a non-binary legal gender will make this *more difficult* since it will show them to be at variation from the gender binary in those situations in which legal gender becomes relevant, and thus make them stand out.[27] In other words, contrary to the argument of the European Court of Human Rights that legal gender recognition (within the binary) allows trans persons to pass as cisgender and avoid an "anomalous position", legal gender recognition for non-binary persons showcases and confirms their *difference* from dominant gender norms. Far from allowing them to "slip quietly into the crowd", it becomes, in a sense, the confirmation of a position of involuntary defiance in the face of the gender binary.

The judgment of the German Constitutional Court is particularly helpful to illustrate this shift in perspective. The crux of that case was whether a blank space, as already provided for under German law

[21] *Goodwin* (2002) 35 E.H.R.R. 447 at [77].
[22] P. Kavanagh, "Slipping Quietly into the Crowd—UK Transsexuals Finally out of Exile" (2005) 9 *Mountbatten Journal of Legal Studies* 21, 42.
[23] See critically Sharpe, *Transgender Jurisprudence. Dysphoric Bodies of Law* (2002), p.78.
[24] German Federal Constitutional Court, decision of 11 January 2011, BVerfGE vol.128, 109, 130.
[25] William Shakespeare, *Macbeth*, I.3.
[26] See generally, V. Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Chicago: University of Chicago Press, 2000), ch.6, particularly p.144 on the gender binary.
[27] Hence the importance of avoiding it for those who do not wish it; see fn.57 below.

for intersex persons,[28] provided sufficient legal gender recognition. The Constitutional Court held that it does not:

> "The blank space retains the exclusively binary model of gender and creates the impression that the legal recognition of an additional gender identity is not an option, with the entry of a legal gender instead being merely unsettled, unresolved or forgotten about. This does not constitute recognition of the applicant's own experience of gender."[29]

The legislator was instructed to adapt the regime of legal gender accordingly. Renouncing the notion of legal gender altogether would be one permissible option[30]; so long as it is retained, all current options (male, female, blank space) must likewise be retained,[31] as well as being supplemented by an additional "uniform affirmative designation" (*einheitliche positive Bezeichnung*).[32]

This notion of an *affirmative* designation (or "empowering terminology", as an Australian report put it[33]) rather than a blank space makes the point of legal gender recognition for non-binary persons particularly clear. The Constitutional Court further argued that the lack of such a designation "makes it more difficult for those concerned to move in public and be perceived by others as a person of the gender which they are" and that it contributes, in day-to-day interactions influenced by legal gender, to a lack of recognition with the same "self-evidence" (*Selbstverständlichkeit*) as male or female persons.[34] An affirmative designation, it may be concluded by way of contrast, would be a step towards empowering non-binary persons by disrupting the self-evidence of the gender binary—proactive recognition by the law "could have a powerful personally validating and socially authorising effect".[35] As with those trans men and women who do not get read as unambiguously male or female, respectively, legal gender recognition for non-binary persons thus "places the weight of the state behind the trans person" in everyday interactions,[36] and provides "an authoritative resource in situations of perceived gender misrecognition".[37]

Self-determination and social transformation

Let me further develop the matter through a different prism. Another rationale that has often been said to underlie legal gender recognition is that of personal autonomy or *self-determination*. For example, the European Court of Human Rights has cited these notions both in *Goodwin* and in a number of subsequent

[28] Paragraph 22(3) of Personenstandsgesetz (PStG), inserted by amendment of 7 May 2013, Bundesgesetzblatt 2013 I, p.1122: "If the child can be assigned to neither the female nor the male sex, then entry into the birth register is to be made without any such specification". I should note that while my focus here is on non-binary recognition, whether for those intersex persons who identify as such or for trans persons, this issue cannot resolve the most pressing concern of many intersex activists: preventing non-consensual surgeries on intersex infants; see R. Hupf, "Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital 'Normalizing' Surgery" (2015) 22 *William & Mary Journal of Women and the Law* 73.

[29] German Federal Constitutional Court, App. No.1 BvR 2019/16 at [43]. (Author's translation).

[30] German Federal Constitutional Court, App. No.1 BvR 2019/16 at [50], [52] and [65]; on the merits of this option, see Grietje Baars, "The Politics of Recognition and the Limits of Emancipation through Law" (29 November 2017), *http://verfassungsblog.de/the-politics-of-recognition-and-the-limits-of-emancipation-through-law/* [Accessed 25 May 2018].

[31] German Federal Constitutional Court, App. No.1 BvR 2019/16 at [51] and [65].

[32] German Federal Constitutional Court, App. No.1 BvR 2019/16 at [65].

[33] Australian Human Rights Commission, "Sex Files: The Legal Recognition of Sex in Documents and Government Records" (The Sex and Gender Diversity Project, Concluding Paper, 2009), pp.3 and 33–34.

[34] German Federal Constitutional Court, App. No.1 BvR 2019/16 at [48]; see also, on such everyday interactions, J.T. Theilen, "Intersexualität bleibt unsichtbar: Kritische Anmerkungen zum Beschluss des Bundesgerichtshofs zu nicht-binären Eintragungen im Personenstandsrecht" (2016) 69 *Das Standesamt* 295, 299–300, citing from the legislative debates concerning para.22(3) PStG.

[35] T. Bennett, "'No Man's Land': Non-Binary Sex Identification in Australian Law and Policy" (2014) 37 *UNSW Law Journal* 847, 866–867; see also Theilen, "Intersexualität bleibt unsichtbar: Kritische Anmerkungen zum Beschluss des Bundesgerichtshofs zu nicht-binären Eintragungen im Personenstandsrecht" (2016) 69 *Das Standesamt* 295, 299–300; G. Schreiber, "Geschlecht als Leerstelle? Zur Verfassungsbeschwerde 1 BvR 2019/16 gegen die Versagung eines dritten Geschlechtseintrags" (2017) *Ethik und Gesellschaft* 1, 22.

[36] See Neuman Wipfler, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents" (2016) 39 *Harvard Journal of Law and Gender* 491, 541.

[37] D. Cooper and F. Renz, "If the State Decertified Gender, What Might Happen to its Meaning and Value?" (2016) 43 *Journal of Law and Society* 483, 496.

judgments.[38] It has likewise been taken up by other courts as the common principle underlying legal gender recognition of any kind, including recognition of non-binary persons. The German Constitutional Court based its argument on the general right to self-determination of one's personality, to which it held the legal recognition of one's gender identity to be inextricably connected,[39] while the Supreme Court of India, in its *NALSA* judgment on recognition of a "third gender", referred repeatedly to principles like personal autonomy and self-determination throughout its reasoning.[40]

If there seems to be general agreement on the importance of self-determination as a rationale for legal gender recognition, then much turns on how that concept is understood. Judith Butler has distinguished between two different conceptions: one that is "individualist, if not libertarian",[41] and one which is more sensitive to societal context. She favours the latter, arguing that "we must be part of a larger social fabric of existence in order to create who we are",[42] and that "self-determination becomes a plausible concept only in the context of a social world that supports and enables [an] exercise of agency".[43] Indeed, both the approaches discussed in the preceding section—enabling trans men and women to "slip quietly into the crowd" as well as providing legal affirmation to non-binary persons—in some way take into account the everyday context within which trans persons are situated, i.e. their interactions with other people who have a particular understanding of gender. In that sense, the two approaches are structurally similar, although they then go on to twist these interactions between an individual and society at large in very different directions (the possibility of passing and the affirmation of difference, respectively).

These differences become more prevalent when we further broaden our perspective to include the implications of a contextualised understanding of self-determination. Assuming that self-determination is only possible within "a larger social fabric of existence", Judith Butler argues that "changing the institutions by which humanly viable choice is established and maintained is a prerequisite for the exercise of self-determination", and thus that "individual agency is bound up with social critique and social transformation".[44] In other words: If self-determination is dependent on societal context, then it becomes crucial to change said context in such a way as to increasingly make self-determination possible.

This aspect is entirely lacking within the case-law of the European Court of Human Rights, which accepts a right to legal gender recognition in some contexts, but only in such a way that it *does not challenge broader societal gender norms such as the gender binary*.[45] By way of contrast, consider the *NALSA* judgment: Justice Sikri, in particular, argued that legal recognition of the "third gender" can only constitute the "beginning" of a broader movement to "a dignified life of transgender people".[46] Sometimes, he notes, "a change in the law precedes societal change and is even intended to stimulate it"; in order to bring about a "complete paradigm shift"—i.e. to move beyond the gender binary in the broader societal context—law

[38] *Goodwin* (2002) 35 E.H.R.R. 447 at [90]; *van Kück v Germany* (2003) 37 E.H.R.R. 51 at [73]; *YY v Turkey* (App. No.14793/08), judgment of 10 March 2015 at [102]; *AP, Garçon and Nicot v France* (App. Nos 79885/12, 52471/13 and 52596/13), judgment of 6 April 2017 at [93]; see also Inter-American Court of Human Rights, advisory opinion OC-24/17, esp. at [88] and [127].

[39] German Federal Constitutional Court, App. No.1 BvR 2019/16 at [45].

[40] Supreme Court of India, *National Legal Services Authority (NALSA) v Union of India*, Writ Petition (Civil) No.400 of 2012, esp. at [74]; see also e.g. at [20], [61], [67]-[68] and [70] (per K.S. Radhakrishnan, J) and at [114], [121] and [123] (per A.K. Sikri, J).

[41] J. Butler, "Undiagnosing Gender", in *Undoing Gender* (New York and London: Routledge, 2004), p.85.

[42] Butler, "Undiagnosing Gender", in *Undoing Gender* (2004), pp.100–101.

[43] J. Butler, "Introduction: Acting in Concert", in *Undoing Gender* (New York and London: Routledge, 2004), p.7.

[44] Butler, "Introduction: Acting in Concert", in *Undoing Gender* (2004), p.7.

[45] See Gonzalez-Salzberg, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights" (2014) 29 *American University International Law Review* 797, 826; Sandland, "Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights" (2003) 11 *Feminist Legal Studies* 191 and 201; E. Bjorge, "Sexuality Rights under the European Convention on Human Rights" (2011) 29 *Nordic Journal of Human Rights* 158, 183; see also, more generally, S. Cowan, "Looking Back (To)wards the Body: Medicalization and the GRA" (2009) 18 *Social and Legal Studies* 247, 248; L. Westbrook and K. Schilt, "Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System" (2014) 28 *Gender and Society* 32, 52; Travis, "Accommodating Intersexuality in European Union Anti-Discrimination Law" (2015) 21 *European Law Journal* 180, 191.

[46] Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012 at [114] (per A.K. Sikri, J); the applicant in the judicial proceedings before the German courts has similarly confirmed that legal gender recognition "is, of course, only a first step": "'Ich bin weder Mann noch Frau'. Vanja über die Kampagne für eine dritte Option" (5 January 2015), *http://www.taz.de/!5024783/* [Accessed 25 May 2018].

must play a "more pre-dominant role".[47] Justice Radhakrishnan similarly argued in the very first paragraph of the judgment that the "moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, *a mindset which we have to change*".[48]

Tying these various strands of argument together, I would argue that one important rationale of legal gender recognition for non-binary persons which can be excavated from various judgments at the national level is the idea of fostering self-determination within what Butler calls "a larger social fabric of existence".[49] On that approach, legal gender recognition constitutes legal affirmation of non-binary identities even as it recognises that their struggle does not end with law,[50] but that self-determination can only take place within a broader societal context and the gender norms which it imposes. An "affirmative designation" for those non-binary persons who wish it, as proposed by the German Constitutional Court, would ideally both support them in day-to-day interactions in which legal gender becomes relevant and, in doing so, serve to challenge the gender binary and bring about societal change more generally.

The implications of different rationales

I have treated different rationales for legal gender recognition of non-binary persons separately for the sake of analytical clarity, but it is important to note that, in practice, they do not usually appear in such a clear-cut manner. For example, while *Norrie* most strongly emphasises the rationale of recording anatomical "truth", elements of (bio)logic also shine through in the judgments of the Supreme Court of India and the German Constitutional Court. The prior classifies hijras as "third gender" in part because they "do not have reproduction capacities as either men or women"[51] which, as Aniruddha Dutta has noted, "homogenizes the hijra community in reductive biological terms" and poses issues of both over- and under-inclusiveness[52]—even though other passages in the same judgment contain a strong rhetoric in favour of self-declaration regardless of biological status.[53] The reasoning of the German Constitutional Court similarly refers to general notions of self-determination which build on its previous case-law concerning trans persons and can thus be read in a broad manner—yet, in light of the facts of the case, the ruling is formally restricted to intersex persons or, as the Court puts it, "persons whose sex development exhibits variations compared to male or female sex development".[54] It thus remains to be seen how inclusive the legislator's response will be.[55]

Despite these amalgamations, I would argue that legal gender recognition for non-binary persons will take a different form depending on which rationale(s) mainly underpin(s) it. Of the possible rationales canvassed above, for example, a focus on recording anatomical "truth" will lead to a relatively static

[47] Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012 at [119] (per A.K. Sikri, J).

[48] *NALSA* Writ Petition (Civil) No.400 of 2012 at [1] (per K.S. Radhakrishnan, J; emphasis added); these statements are in line with (and no doubt the product of) the Court's activist self-perception (see e.g. M. Guruswamy and B. Aspatwar, "Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court", in D. Bonilla Maldonado (ed.), *Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013)), but their gist could just as well be applied to legal reforms without judicial input.

[49] See fn.42 above.

[50] See also Currah, Juang and Price Minter, "Introduction", in Currah, Juang and Price Minter (eds), *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006), p.xxiii; L.M. Giosa, M.V. Schiro and P. Dunne, "Argentina", in J.M. Scherpe (ed.), *The Legal Status of Transsexual and Transgender Persons* (Cambridge et al.: Intersentia, 2015), p.584; ACT Law Reform Advisory Council, "Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT" (2012), pp.48–49.

[51] Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012 at [11] (per K.S. Radhakrishnan, J).

[52] A. Dutta, "Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights" (2014) 5 *Journal of Indian Law and Society* 225, 230; for this reason and others, the judgment has been received very critically by local activists: see, e.g. Gee Imaan Semmalar, "Gender Outlawed: The Supreme Court Judgment on Third Gender and Its Implications" (19 April 2014), *https://roundtableindia.co.in /index.php?option=com_content&view=article&id=7377:because-we-have-a-voice-too-the-supreme-court-judgment-on-third-gender-and-its-implications &catid=120&Itemid=133* [Accessed 25 May 2018]. See also, more generally, E.B. Towle and L.M. Morgan, "Romancing the Transgender Native: Rethinking the Use of the 'Third Gender' Concept", in S. Stryker and S. Whittle (eds), *The Transgender Studies Reader* (New York: Routledge, 2006).

[53] Particularly Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012, fifth directive.

[54] German Federal Constitutional Court, App. No.1 BvR 2019/16, first operative paragraph.

[55] See also Chris Ambrosi, "Die Dritte Option: Für wen?" (29 November 2017), *http://verfassungsblog.de/die-dritte-option-fuer-wen/* [Accessed 25 May 2018].

system exclusive of those non-binary persons with genitalia that do not get read as "ambiguous"—and, in the worst-case scenario, a non-binary or "non-specific" category that is *over-inclusive* of some intersex or trans persons on the basis of their anatomy even though they identify as male or female.[56] A focus on "slipping quietly into the crowd", as found in *Goodwin*, is important to retain for those who wish it,[57] but is unlikely to lead to moves beyond the gender binary at all given the disruption this would cause. Finally, a form of recognition that seeks to foster self-determination within a larger social fabric of existence should be more fluid and lay a stronger focus on empowering forms of "affirmative designation", as well as aiming to reach beyond civil status law to also reform other areas of law and further disrupt the self-evidence of the gender binary.[58]

The different rationales are perhaps most radically in evidence if we consider *when* legal gender recognition should take place. So long as recording anatomical "truth" remains an aim of the state, the currently widespread system of registration soon after birth—usually on the basis of phenomenological sex—can be said to contribute to that aim. Yet if the rationale of legal gender recognition is to foster self-determination within a larger social fabric of existence, then classification by others, before one's legal gender can be self-designated, simply makes no sense[59]—rather, such externally imposed classifications then constitute an unnecessary "legal branding of a child", as Darren Rosenblum memorably put it.[60] Thus, if we were to take the rationale of fostering self-determination seriously, then there should arguably be no entry of a legal gender at birth, but rather at a later point when it can be based on gender identity rather than sex.

Outlook

It remains to be seen, of course, how various courts across Europe will fare when confronted with non-binary applicants—or whether legislative reform proves to be the more fertile ground. With regard to regional human rights protection, art.8 of the ECHR is certainly broad enough to accommodate claims by non-binary applicants.[61] I have argued that the recent case-law of the European Court of Human Rights has laid the foundations for it to move beyond (bio)logic and that, even in *Goodwin*, it made reference to a notion of self-determination which showed an awareness of societal context. These elements could be built upon, although the latter would need to be rethought in such a way as to go beyond an emphasis only on allowing trans persons to "slip quietly into the crowd" and instead also encompass a form of "affirmative designation" that actively challenges the gender binary.

In light of the Strasbourg Court's generally cautious approach to delicate subjects involving structural change in recent years, it may seem unlikely that it would take such a progressive stance: As Merris Amos has recently put it in a different context, the Court "is not willing to be the catalyst for change".[62] Its use of European consensus as an interpretive method makes things more complicated still. In *AP, Garçon and*

[56] Neuman Wipfler, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents" (2016) 39 *Harvard Journal of Law and Gender* 491, 514; Bennett, "'No Man's Land': Non-Binary Sex Identification in Australian Law and Policy" (2014) 37 *UNSW Law Journal* 847, 859.

[57] See generally S. Ahmed, *Queer Phenomenology* (Durham, NC: Duke University Press, 2007), p.177.

[58] See, e.g. Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012 at [75] (per K.S. Radhakrishnan, J) in contrast to s.32J(1) of the New South Wales Births, Deaths and Marriages Registration Act 1995; on the difficult question of what legal gender "actually *makes possible*", see Cooper and Renz, "If the State Decertified Gender, What Might Happen to its Meaning and Value?" (2016) 43 *Journal of Law and Society* 483, 500 (emphasis in original).

[59] Neuman Wipfler, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents" (2016) 39 *Harvard Journal of Law and Gender* 491, 529.

[60] Darren Rosenblum, "For Starters, 'Unsex' the Birth Certificate" (3 November 2015), *New York Times*, *https://www.nytimes.com/roomfordebate/2014/10/19/is-checking-the-sex-box-necessary/for-starters-unsex-the-birth-certificate* [Accessed 25 May 2018].

[61] As evidenced by its preliminary interpretation in the ongoing Austrian proceedings: see Austrian Constitutional Court, decision of 14 March 2018, E 2918/2016-29.

[62] M. Amos, "Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?", in P. Kapotas and V. Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge: Cambridge University Press, forthcoming 2018), ms p.30.

Nicot, for example, it acknowledged the severe problems involved in treating transgender identities as a psychological disorder,[63] but nonetheless observed that "a psychiatric diagnosis features among the prerequisites for legal recognition of transgender persons' gender identity in the vast majority of the forty Contracting Parties which allow such recognition" and found no violation.[64] Given the relative paucity of legal gender recognition for non-binary persons in Europe so far, there is a chance that the European Court of Human Rights would make use of a similar form of argument to deny such recognition, or to restrict itself to a minimalist rationale by retreating to (bio)logic.

I hope to have made clear that such an approach would not be satisfactory. At its best, legal gender recognition for non-binary persons can foster self-determination within a larger social fabric of existence. At its worst, however, it can be used as "a way of purifying" the pre-existing categories rather than challenging them,[65] and further contribute to the stigmatisation of trans, intersex and non-binary persons. Not every legal move beyond the gender binary is progressive: Some may be harmful.

[63] See J.T. Theilen, "Depathologisation of Transgenderism and International Human Rights Law" (2014) 14 *Human Rights Law Review* 327.
[64] *AP, Garçon and Nicot v France* (App. Nos 79885/12, 52471/13 and 52596/13), judgment of 6 April 2017 at [139].
[65] Gina Wilson, "On Norrie v NSW Registrar of Births, Deaths and Marriages" (22 June 2013), *Intersex Human Rights Australia*, *http://oii.org.au/22681/norrie-v-nsw-registrar-of-births-deaths-and-marriages/* [Accessed 25 May 2018].