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Renz, Flora (2020) *Genders that don't matter: Non-binary people and the Gender Recognition Act 2004*. In: Raj, Senthoran and Dunne, Peter, eds. *The Queer Outside in Law: Recognising LGBTIQ People in the United Kingdom*. Palgrave Socio-Legal Studies . Palgrave, pp. 143-164. ISBN 978-3-030-48829-1.

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Genders that don't matter: Non-binary people and the Gender Recognition Act 2004

Flora Renz, University of Kent

Abstract

In July 2017 the UK government committed to “streamlining” the process for a legal change of gender in England and Wales. At present, the legal recognition of a change of gender is conditional upon applicants submitting two detailed medical reports certifying their diagnosis with “gender dysphoria”, as well as a number of documents that attest to the “permanence” of their so-called “new” gender. In addition, legal recognition is limited to those applicants who identify – at least for the purpose of the application process – with a binary system of sex/gender. Drawing on comparable legal frameworks, this chapter will consider the limitations of the current legal framework regarding non-binary people, as well as the potential changes proposed more recently.

Introduction

Trans¹ and non-binary² people are increasingly becoming the focus of much current research in, amongst other areas, sociology, medicine and law. There is also a growing social and cultural awareness of diverse gender identities as evidenced by the still rare, but increasingly frequent, inclusion of trans characters in mainstream television programmes such as *Hollyoaks*³), *Orange is the New Black* and *Transparent*⁴ to name but a few. The US *Time* magazine argued in 2014 that society has reached the “Transgender Tipping Point” with trans rights becoming the new civil

¹ I am using “trans” rather than “transgender” or “transsexual” to accommodate a variety of identity categories that may not necessarily align with a binary understanding of sex and gender, encompassing identities such as genderqueer and agender more readily than the medically defined “transsexual”.

² I am using non-binary to capture a variety of identities that do not align with a binary understanding of sex/gender.

³ Kilkelly, Daniel. May 15 2014. "Exclusive: Hollyoaks writer Jonathan Larkin talks Blessing transgender story." *Digital Spy*. Accessed 1 May 2018. url: <http://www.digitalspy.co.uk/soaps/s13/hollyoaks/scoop/a571199/hollyoaks-writer-jonathan-larkin-talks-blessing-transgender-story.html#~pbO13BrV0BgVIX>

⁴ Hughes, Sarah. 23 January 2015. "Transparent season one is free for a day – here's why you should watch it." *The Guardian*. Accessed 20 April 2015. url: <http://www.theguardian.com/tv-and-radio/2015/jan/23/transparent-season-one-free-on-amazon-for-a-day>.

rights frontier.⁵ However, in most of these contexts trans and non-binary people, and the social/legal issues affecting this group disproportionately, such as the legal regulation of sex/gender,⁶ are still treated as marginal or outliers in terms of their specific concerns regarding legal recognition and protection. At the same time while there is increasing public awareness of people who do not identify with a binary understanding of gender, this is only slowly being translated into legal and policy debates, although several states⁷ have recently begun to offer legal recognition for non-binary identities.⁸

In England and Wales until the Gender Recognition Act 2004 (GRA) came into force, trans people were unable to legally change their birth certificates and other documents to accurately reflect the way they experienced their gender identity. Previous case law defined sex and gender in primarily biological and absolutely binary terms and made several highly problematic assumptions about trans people. For example, it assumed that trans people were intentionally deceiving either potential partners or indeed the state, by wanting to access marriage rights while being in same-sex relationships.⁹ The GRA has supposedly revolutionised gender rights in the UK by moving away from a biological understanding of sex/gender and by making it possible for trans people to change their birth certificates, gain access to legal rights, and as a result

⁵ Steinmetz, Katy. 29 May 2014. "The Transgender Tipping Point." *Time Magazine*. Accessed 1 May 2018. url: <http://time.com/135480/transgender-tipping-point/>

⁶ While sex and gender are commonly understood as distinct concepts, with sex referring primarily to biological factors and gender being used to describe the social and cultural interpretation of these factors, in the context of legal regulation these two concepts are often conflated (see e.g. *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin)* para. 96) or due to linguistic and cultural reasons do not exist with the same level of distinction in other jurisdictions (see, e.g. Dunne, Peter, and Jule Mulder. 2018. "Beyond the Binary: Towards a Third Sex Category in Germany?" *German Law Journal* 19 (3):627-648., p.632). Therefore I will be using sex/gender as an umbrella term to capture this ambiguity.

⁷ See, e.g. Chokshi, Niraj. 25 August 2017. "Canada Introduces 'X' as a Third Sex Category for Passport Holders." Accessed 1 December. url: <https://www.nytimes.com/2017/08/25/world/america/canada-passport-x.html>. Wong, Curtis M. 17 October 2018. "Arkansas Has Been Offering a Nonbinary Gender Option on State IDs for Years." *HUFFINGTON POST*. Accessed 1 December 2018. url: https://www.huffingtonpost.com/entry/arkansas-gender-neutral-state-id-option_us_5bc79f75e4b0d38b5874a669;

Australian Government. July 2013. Australian Government Guidelines on the Recognition of Sex and Gender. Commonwealth of Australia; Bundesministerium des Innern, für Bau und Heimat. 2018. Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben. Berlin.

⁸ See also Clarke, Jessica. forthcoming 2019. "They, Them and Theirs." *Harvard Law Review* 132 (3).

⁹ See, e.g. Sharpe, Alex. 2007. "Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category." *Feminist Legal Studies* 15 (1):57-84; Whittle, Stephen. 2006. "The Opposite of Sex is Politics—The UK Gender Recognition Act and Why it is Not Perfect, Just Like You and Me: FORUM." *Journal of Gender Studies* 15 (3):267-271.

enjoy protection against discrimination.¹⁰ However, this legal framework is now more than 15 years old and has changed very little in this time. For instance, the GRA currently makes no accommodations for people who do not identify with a binary understanding of gender. In this chapter I will first consider some of the current legal reform proposals under discussion in England and Wales, before considering alternative approaches from other jurisdictions, specifically using the examples of Australia and Germany. I will finally consider the limitations of both the current reform proposals and existing legal frameworks.

Reforming the Gender Recognition Act 2004

To situate the issue of reforming the GRA it is crucial to first understand the existing framework of the GRA. It should be noted that at its inception the GRA covered sex/gender markers on a variety of identification documents such as passports and driving licenses, however, in the intervening years these documents have become “easier” to change and no longer require a person to go through the process set out in the GRA. Currently, in England and Wales anybody who wants to obtain a Gender Recognition Certificate (GRC) to legally change their sex on their birth certificate has to meet four specific conditions. Applicants have to be 18 or over, they have to be diagnosed with gender dysphoria, they need to prove that they have lived in the “new” gender for 2 years prior to the application and lastly need to swear that they will remain in that gender for the rest of their lives.¹¹ The most important part of the GRC application process is contained in sections 5-7 of the application form.¹² These sections implement the evidentiary requirements set out in s.3 of the GRA. Specifically, this part of the application form asks applicants to provide evidence to prove that they have lived in their gender for the last two years prior to applying for a GRC. The application form here explicitly refers to the applicant's "new" gender.¹³ Although this term may be used simply for linguistic ease and to avoid confusion, it

¹⁰ See, e.g. Sharpe, Alex. 2009. "Gender Recognition in the UK: A Great Leap Forward." *Social & Legal Studies* 18 (2):241-245.

¹¹ ss. 3-4 Gender Recognition Act 2004. On the difficulties of enforcing the permanence requirement see Grabham, Emily. (2010) Governing Permanence: Trans Subjects, Time, And The Gender Recognition Act. *Social & Legal Studies* 19(1): 107-126.

¹² HM Courts & Tribunal Service. (November 2016) T450 - Application for a Gender Recognition Certificate

¹³ Ibid, p.6

nevertheless implies two underlying rationalities. Firstly, that the applicant has not always been that gender, which is a type of reasoning that contradicts the lived experience of many trans people who would argue that they have in fact always been that gender, but have not been recognised as such by society at large. Secondly, that there is a specific point at which one changes from one gender to another with no acknowledgement that there may be an in-between position or a more gradual change or even a context dependent move back and forth between these categories. As such from the outset the GRA is underpinned by an understanding of sex/gender as a binary dichotomy. Within the language of the GRA there are clearly only two options and a person has to be able to show evidence of their life as one or the other to successfully navigate this process. Overall, both the language and the requirements of the GRA mean that the recognition process privileges certain narratives - those that support a stable, fixed and, most importantly, binary model of sex/gender identity, over others that are effectively deemed unworthy of recognition. As such individuals who do not identify as solely either male or female are not able to obtain legal recognition of their gender identity under the present system and although other types of identification documents are no longer governed by the GRA, they nevertheless follow the same binary paradigm.

Some potential reforms for the existing legal framework were set out by the Transgender Equality report published in late 2015 by the UK government.¹⁴ Crucially, the report notes the complete lack of legal provision for non-binary people.¹⁵ At the same time it is strongly critical of the medicalised approach of the GRA, particularly in regard to the evidentiary requirements contained therein, which are inherently exclusionary to those not willing or able to undergo specific types of gender confirmation surgery and at the same time serve to pathologise non-cisgender identities.¹⁶ Implicitly the medical aspect of the GRA also further serves to exclude people who do not identify with a binary understanding of gender, as they are less likely to undergo the full range of procedures commonly referred to as “gender confirmation surgery” and are also likely to have more difficulty accessing

¹⁴ House of Commons Women and Equalities Committee. 2015. Transgender Equality. House of Commons London: The Stationery Office Limited.

¹⁵ House of Commons Women and Equalities Committee. 2015. Transgender Equality. House of Commons London: The Stationery Office Limited, p.79

¹⁶ House of Commons Women and Equalities Committee. 2015. Transgender Equality. House of Commons London: The Stationery Office Limited, pp.79-80

appropriate medical care in the first place.¹⁷ In its recommendations, the report suggests that the GRA should urgently be updated to reflect both of these concerns. In many ways the report is ground breaking in the sense that it officially acknowledges the existence and concerns of non-binary identified people; a category that did not even rate a mention in previous official debates about the GRA in 2003 and 2013.¹⁸

The key recommendation of the report in regard to provisions for non-binary people is that the government should “look into the need to create a legal category for those people with a gender identity outside that which is binary and the full implications of this”.¹⁹ However, there is no mention of the wider legal impact such a change could potentially have. For instance, if gender identity in a legal context were going to include three categories, would this also impact other gender based legislation, such as for instance the Equality Act 2010 in regards to sex-based discrimination? Although law in England and Wales is now largely gender neutral, there are nevertheless some remaining areas where a persons legal gender can affect their treatment in law and those areas would undoubtedly be affected by any move toward a third gender category. For instance in the context of assisted reproduction the Human Fertilisation and Embryology Act 2008 includes a definition of both “motherhood” and “fatherhood” and would likely need to be significantly amended to deal with a third legal category.²⁰

At the same time the report also suggests moving towards a “non-gendered” approach for recording official information.²¹ This latter recommendation would appear to be one of the most interesting recommendations both for binary and non-binary identified individuals, but it is sadly not developed further other than the suggestion

¹⁷ see e.g. Beek, Titia F., Baudewijntje PC Kreukels, Peggy T. Cohen-Kettenis, and Thomas D. Steensma. "Partial treatment requests and underlying motives of applicants for gender affirming interventions." *The journal of sexual medicine* 12, no. 11 (2015): 2201-2205.; Lev, Arlene Istar. "Gender dysphoria: Two steps forward, one step back." *Clinical Social Work Journal* 41, no. 3 (2013): 288-296; Vincent, Ben, and Ana Manzano. 2017. "History and Cultural Diversity." In *Genderqueer and Non-binary Genders*, edited by Christina Richards, Walter Pierre Bouman and Meg-John Barker. London: Palgrave..

¹⁸ House of Lords. 29 January 2004. "Gender Recognition Bill." 656 (31); House of Lords. 24 June 2013. "Marriage (Same Sex Couples) Bill - Committee (3rd Day)." 746 (22).

¹⁹ House of Commons Women and Equalities Committee. 2015. Transgender Equality. House of Commons London: The Stationery Office Limited, p.11

²⁰ S.33 and ss.35-39 Human Fertilisation and Embryology Act 2008

²¹ House of Commons Women and Equalities Committee. 2015. Transgender Equality. House of Commons London: The Stationery Office Limited, p.9

that gender should only be recorded “where it is a relevant piece of information”.²² In general, the introduction of an additional category for non-binary people, while perhaps beneficial to some people, is likely to raise similar concerns to those related to the existing binary gender categories. Even if this category was purely based on a “self-declaration” approach, in line with the wider proposal of the report, it would be likely to still remain exclusionary towards some people, for instance those who do not identify with any gender at all, those who do not wish to go through an official process to “confirm” their gender or those who are unable to access the application process due to economic and other reasons.²³

Although this report is not legally binding, the government, in its response to the report, has committed to reviewing the GRA with the intent to “streamline and de-medicalise the gender recognition process”.²⁴ In line with its response to the Transgender Equality report, in autumn 2017 the government launched a consultation regarding the GRA without making any commitments toward accommodations for non-binary people.²⁵ At the same time the Scottish government has proposed to remove the need for medical evidence and evidence regarding the applicants gender over the two years prior to the application.²⁶ Unlike the English consultation, the Scottish consultation also considers potential options for including non-binary identities within a legal regulatory framework. At present both the proposals for England and Wales and those for Scotland are at the consultation stage with no clear timeline for implementation. Nevertheless the Scottish consultation results suggested that more than 60% of respondents thought the government should take action to recognize non-binary people.²⁷ Overall, the different consultation documents published by each government suggest that the already existing gap between the two different versions of the Gender Recognition Act is likely to widen in the future, especially if the Scottish version were to include non-binary people. In turn this

²² House of Commons Women and Equalities Committee. 2015. Transgender Equality. House of Commons London: The Stationery Office Limited., p.86

²³see also Renz, Flora. 2017. "The Gender Recognition Act 2004 and transgender people's legal consciousness." Ph.D., Kent Law School, University of Kent.

²⁴ Government Equalities Office. July 2016. Government Response to the Women and Equalities Committee Report on Transgender Equality, pp.10-11

²⁵ Government Equalities Office. 2017. "New Action to Promote LGBT Equality." Accessed 02 October 2017. url: <https://www.gov.uk/government/news/new-action-to-promote-lgbt-equality>.

²⁶ Scottish Government. 09 November 2017. "Review of the Gender Recognition Act 2004 [Consultation]." Accessed 05 May 2018. url: <http://www.gov.scot/Publications/2017/11/5459>.

²⁷ The Scottish Government. November 2018. Review of the Gender Recognition Act 2004: Analysis of responses to the public consultation exercise - Report. Edinburgh, p.81

would create geographically uneven entitlements to legal recognition for trans and non-binary people living in different parts of the UK.

While the exact scope, if any, of parliamentary attempts at including non-binary people is currently unclear the High Court simultaneously considered a case for judicial review of the current gender marker system for UK passports.²⁸ In *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin)* the High Court was asked to determine whether it is lawful not to have an alternative gender option, specifically an ‘X’ designation, for those who do not identify as either male or female. The claimant in this case identified as “non-gendered” and was therefore trying to obtain a passport that reflected this fact, as an ‘X’ gender marker is a pre-existing option that the International Civil Aviation Organisation uses as a shorthand to indicate that gender is “unspecified”.

Despite ultimately not succeeding in terms of gaining recognition for non-binary identities, this case is nevertheless instructive in how such claims become construed in a legal context. When summing up the facts of the case Mr Justice Jeremy Baker describes Elan-Cane’s identity primarily defined through medical treatment while also noting the “importance” on a personal level of official recognition.²⁹ Although the wider negative consequences of identifying outside the binary and of not having legal recognition are highlighted,³⁰ gender here becomes primarily constructed as an individual matter or an individual rights claim. However, more broadly the judgement highlights that gender is an important part of a person’s “personal and social identity”, which suggest that gender here is understood as at least to some extent relational, i.e. that being a specific gender or no gender at all is derived from relations and interactions with others.³¹ Nevertheless, in relying on Article 8 of the European

²⁸ It should be noted that while existing reform proposals are primarily aimed at reforming the Gender Recognition Act 2004, this does not inherently affect gender markers on passports, which can be changed regardless of one’s legal gender on one’s birth certificate.

²⁹ *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin)*, para 2-4

³⁰ *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin)*, para 65-67

³¹ *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin)*, para. 102 cf. Fenstermaker, Sarah, and Candace West. *Doing gender, doing difference: Inequality, power, and institutional change*. Routledge, 2013

Convention on Human Rights, Elan-Cane’s claim ultimately becomes framed in the language of the right to a private life and as something that is ultimately determined through and vital to personal identity.³² As such gender here is primarily conceptualised as something that is and should be recognised as doing otherwise, as argued for instance by Judith Butler, leads to the impossibility of “persist[ing] (in my being) without norms of recognition that support my persistence”.³³ In some ways this approach, despite potentially justifying a fundamental re-writing of existing legal categories, does little to unsettle existing conventional understanding of what it means to be a “man” or a “woman” in law, but simply considers the introduction of a separate third category while leaving the others untouched.

The High Court’s judgement ultimately acknowledges that “the claimant has a justifiably strong personal interest in gaining full legal recognition as being a non-gendered individual”, but suggests that this is a separate issue from the challenge to the current passport policy.³⁴ Part of the basis for the rejection of the claimant’s arguments seems to be the fact that this case focuses on passports rather than birth certificates, the latter of which are argued to be “of fundamental importance in recording and establishing the applicant’s gender identity”, while passports apparently are not despite being the far more commonly used form of identification.³⁵ As a result of this and the fact that the government’s review of potential reforms has not been concluded the court ultimately ruled that Article 8 of the European Convention of Human Rights did not impose a positive obligation on the government to accommodate people who do not identify as either male or female. However, the judgement strongly suggests that this could be reconsidered if the government does not sufficiently consider accommodations for non-binary people in their consultation.

Moving beyond two categories in other jurisdictions

³² *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin), para. 103-108.*

³³ Butler, Judith. 2004. *Precarious Life: The Powers of Mourning and Violence*. London & NY: Verso., p.32

³⁴ *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin), para. 113*

³⁵ *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin), para. 116*

As the legal framework for gender recognition in the UK is currently under review and legal challenges have so far been unsuccessful, it seems fruitful to consider how other jurisdictions have attempted to engage with rights claims beyond binary gender categories. Specifically, in this section I will consider the diverging approaches taken in Australia and Germany in providing some type of legal recognition for non-binary people.

a) Australia

One obvious comparator for considering legal inclusion of non-binary people, which was also raised in *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin)* is Australia. Australia is in many ways representative of a number of jurisdictions including parts of Canada,³⁶ parts of the US³⁷ and New Zealand³⁸, that permit the use of an 'X' gender marker on various ID documents. Australia was one of the earliest adopters of the 'X' gender marker and since 2013 has permitted any adult who wishes to do so, to use 'X' as a gender marker for all federal documents including passports.³⁹ The government guidance specifies that 'X' "refers to any person who does not exclusively identify as either male or female" and therefore in principle opens this category up to encompass a variety of different gender identities. This model is also in line with the one proposed by Elan-Cane in the judicial review case discussed in the previous section.

Arguably an X marker could potentially accommodate a variety of different identities and effectively serve as a catch-all for everyone not identifying as solely male or female. However, the Australian government reserves the right to demand various

³⁶ Strong, W. 15 July 2017. "Transgender N.W.T., residents can now change birth certificates to reflect gender." CBC News Accessed 15 May. url: <http://www.cbc.ca/news/canada/north/nwt-transgender-legislation->

³⁷ Levin, Sam. 15 June 2017. "Huge validation!: Oregon becomes first state to allow official third gender option." *The Guardian*. Accessed 1 October 2017. url: <https://www.theguardian.com/us-news/2017/jun/15/oregon-third-gender-option-identity-law>.

³⁸ Te Tari Taiwhenua/Internal Affairs. 15 February 2018. "Information about Changing Sex / Gender Identity." Accessed 15 May. url: <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>.

³⁹ Australian Government. July 2013. Australian Government Guidelines on the Recognition of Sex and Gender. Commonwealth of Australia.

types of evidence to “confirm” a person’s gender identity.⁴⁰ Additionally, the X marker is at least on an official level intended to only be available for trans and intersex people, or “sex and gender diverse” people as per the government materials, and does not seem to be intended, for instance, for someone simply wishing to not disclose their gender identity.

Parallel to the change in Australian policy that allowed for the use of ‘X’ gender markers the Australian High Court also considered a case brought against the New South Wales Registry of Births, Deaths and Marriages by Norrie based on their refusal to permit the use of a “non-specific” sex marker.⁴¹ The High Court judgement starts by recognising that “not all human beings can be classified by sex as either male or female.⁴² However, again, similarly to the Elan-Cane case, Norrie’s identity is primarily defined in terms of medical treatment and procedures. Norrie herself⁴³ argued that the recording of her sex marker was a matter of recording the “truth” and avoiding “misinformation.⁴⁴ Unlike the framing of arguments in the Elan-Cane case then, here, the recognition of a new sex/gender marker is not solely requested on the basis of avoiding harm caused by a lack of recognition, but instead is based on an appeal to factual accuracy. This is taken up in the judgement, which describes the task of the registrar as being to “[record] the facts supplied”.⁴⁵ Sex/gender here is understood as a matter of fact that can be determined through medical evidence as well as the “good faith declaration” by the respondent in this case. Again, this primarily conceptualises sex/gender as an individualistic or personal matter. This may be partially due to the nature of legal disputes, which favour rights’ based arguments made by individuals, but it nevertheless also ignores other competing understandings of gender that would center its social, relational or even oppressive dimensions. Similarly, due to its specific focus the judgement leaves other sex/gender categories

⁴⁰ Australian Government: Department of Foreign Affairs and Trade. N.D. "Sex and gender diverse passport applicants." Accessed 15 May 2018. url: <https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>.

⁴¹ NSW Registrar of Births, Deaths and Marriages v. Norrie [2014] Case S273/2013, High Court of Australia.

⁴² NSW Registrar of Births, Deaths and Marriages v. Norrie [2014] Case S273/2013, High Court of Australia, para. 1

⁴³ Norrie is referred to by female pronoun’s in her submission to the High Court and the judgement notes that she wished to be referred to with female pronouns and as such this chapter will follow this.

⁴⁴ NSW Registrar of Births, Deaths and Marriages v. Norrie [2014] Case S273/2013, High Court of Australia, para.30

⁴⁵ NSW Registrar of Births, Deaths and Marriages v. Norrie [2014] Case S273/2013, High Court of Australia, para.36

unchallenged in favour of allowing the use of an alternative sex/gender marker for Norrie and others in New South Wales.

b) Germany

Although X is perhaps the most common alternative category to the traditional M/F binary the German Constitutional Court (BVerfG) recently ruled in favour of a different option in its decision on German birth registers (*1 BvR 2019/16 (2017)*).⁴⁶ This decision was in response to a complaint brought by an intersex person against the existing law requiring gender registration on the basis of a binary female/male system. Germany's personal status law had already been amended in 2013 in order to allow parents of intersex children to avoid or delay registering a gender marker on the child's birth certificate that may be or become inaccurate.⁴⁷ The complainant, represented by the campaign group Die dritte Option ("the third option"), argued that this constituted a "negative" recognition of non-binary individuals, as the gender marker was left blank, and was therefore a form of gender-based discrimination.⁴⁸

In its 2017 decision the BVerfG agreed with the complainant and argued that the current birth/gender registration system violated the right to the free development of a person's identity as encompassed in Article 2 of Germany's Basic Law. Having one's gender identity accurately recognised in law is therefore a fundamental right that the government needs to accommodate. More specifically, the BVerfG ruled that the

⁴⁶ The BVerfG, likewise, had already acknowledged in previous decisions the right to determine one's own gender identity within the context of existing (binary) gender options. In fact, the BVerfG arguably established the right to determine one's own gender identity already in its 1978 'first transsexuals decision' (*1 BvR 16/72 (1978)*) which established that a transsexual person had the right to have their gender changed in the birth registry to correspond to the gender to which they belonged in their 'psychic and physical constitution' (par 50). More recently, the Court has made this right explicit. In a 2008 decision (*1 BvL 10/05 (2008)*), the Court recognised the existence of a constitutional 'right to recognition of one's self-determined gender identity' (*Recht auf Anerkennung der selbstbestimmten geschlechtlichen Identität*) in invalidating the legal provision requiring the dissolution of a pre-existing marriage as a precondition for legal recognition of a new gender identity (par 40). See, further, *1 BvL 3/03 (2005)* (par 47), *1 BvL 1, 12/04 (2006)* (par 67), *1 BvR 3295/07 (2011)* (par 51) and Dunne, Peter, and Jule Mulder. 2018. "Beyond the Binary: Towards a Third Sex Category in Germany?" *German Law Journal* 19 (3):627-648.

⁴⁷ Die dritte Option. 02 September 2016. "Verfassungsbeschwerde." Accessed 2 May 2018. url: http://dritte-option.de/wp-content/uploads/2013/06/Dritte-Option_Anonymisierte-Verfassungsbeschwerde-2016.pdf.

⁴⁸ The group, it should be noted, reasoned that it was necessary to seek a positive, third, non-binary registration option (and not the abolition of gender registration) in order to obtain a ruling that would take the place of the existing option to not register a newborn child, with its accompanying administrative protocols that were viewed as creating a pressure for medical/surgical intervention in order to secure a registration rather than a non-registration.

government needs to provide a “positive” third gender option, likely to be either “inter” or “divers”, that acknowledges non-binary identities in a positive way rather than erasing them from documents entirely. Although the case itself was brought by an intersex person, the text of the judgement suggests that this decision could in principle apply to anyone.⁴⁹ This cases raises parallels to both *Elan-Cane* and *Norrie*, as the BVerfG focuses both on the need for “accuracy” or “truth” regarding a person’s sex/gender, as well as the idea that sex/gender is a fundamentally constitutive part of a person’s identity and personality and therefore needs to be legally recognised.

Although it is currently unclear to what extent the UK government will recognise non-binary identities, it seems likely that an equivalent to Australia’s X marker will be introduced in the long term, especially considering the positive views on non-binary recognition expressed in Scotland.⁵⁰ This would be in line with the arguments advanced in *Elan-Cane* judicial review case and would likely be the easiest administrative option as X is already a recognised passport marker unlike any potential alternative option. Interestingly this option would potentially be subject to the same critique advanced by the BVerfG in its most recent case. Although the BVerfG specifically criticised the option of simply leaving the gender marker blank, using an ‘X’ for unspecified as per the original aviation authority guidance arguably follows the same spirit by classing those who use it as inherently other.

In rejecting such a negative designation the BVerfG relied on its interpretation of gender as an inherent if not constitutive part of one’s personality, one that has ‘outstanding significance’ both to the individual and others.⁵¹ As the right to a free development of one’s personality is a constitutional right under German law the government therefore has a positive obligation to ensure that people can fully express their gender identity and are protected in doing so. A negative gender marker that only applies to specific group of people is an inherent violation of this principle and serves to other those who use it. Using this type of argument specific to the German law, but also prevalent in other trans jurisprudence, which increasingly focuses on

⁴⁹ On this potential ambiguity of the scope of the judgement.see also Dunne, Peter, and Jule Mulder. 2018. "Beyond the Binary: Towards a Third Sex Category in Germany?" *German Law Journal* 19 (3):627-648, p.642

⁵⁰ The Scottish Government. November 2018. Review of the Gender Recognition Act 2004: Analysis of responses to the public consultation exercise - Report. Edinburgh.

⁵¹ 1 BvR 2019/16 para. 38-39

gender as primarily a private aspect of one's identity, rather than the article 8 claim advanced by *Elan-Cane*, allowed the court to construct all gender identities as of worthy of protection, development and recognition.

Nevertheless the BVerfG leaves a number of key issues unaddressed. Specifically, German law and language are both strongly intertwined with a binary understanding of sex/gender. For instance two German cases that were decided parallel to the BVerfG decision challenged the current legal system of registering the parents of a newborn child. Under German law a change of a person's first name is only permissible under exceptional circumstances including in cases of a change of sex/gender as codified in the *Transsexuellengesetz* (Transsexual Law) and treated as effectively equivalent to a change of a person's legal sex/gender status. Therefore in both cases the question for the court was not only to consider the specific parental role (mother/father) that should be assigned to the respective parents on the birth certificate, but also which first name should be used for the parent due to the gender specificity of German naming regulations.⁵² Both claimants had legally changed their sex and name prior to having their children but the courts refused both claimants applications to be listed in a parental role that matched their changed legal sex and further ruled that the claimants had to be registered under their previous first name in order to avoid a mismatch between parental status and the gender indicated by their names. Due to the lack of gender neutral terminology in both German society and jurisprudence,⁵³ introducing a third gender category that is more than purely symbolic is likely to require significant further legal amendments.

The German government in December 2018 implemented the BVerfG decision, by adding a new paragraph § 45b to the *Personenstandsgesetz* (Personal Status Law). This amendment allows the change of a person's legal sex/gender status to "divers" as a third option or the removal of this status marker, but is limited to intersex people who can provide medical evidence that attests to "a variant of sex development" (translated from German).⁵⁴ With this the government has seemingly chosen the most

⁵² *Az. XII ZB 660/14* (2017) and *Az. XII ZB 459/16* (2017)

⁵³ For instance in *Az. XII ZB 660/14* (2017) the judgement highlights that the legal status of motherhood is solely defined through the capacity to give birth to the child in question.

⁵⁴ Bundesministerium des Innern, für Bau und Heimat. 2018. Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben. Berlin.

narrow interpretation of the BVerfG decision, but nevertheless fails to address what the effect of this will be on remaining legal provisions that currently depend on a binary model.

Beyond the specific criticism advanced by the German constitutional court against negative gender markers, and the criticisms made against the restrictive interpretation of the German government of the BVerfG decision,⁵⁵ there is a further theoretical criticism of extending the existing legal gender recognition framework to include a third option. Having access to legal recognition and legal protection of one's identity status is undoubtedly beneficial, even if only in symbolic terms.⁵⁶ While the introduction of a third gender category or gender marker would rectify the explicit exclusion of non-binary people from the existing legal recognition process, the introduction of such a third category can also be read as the introduction of a new normative category for the purpose of assimilation of currently non-normative genders.⁵⁷ As Jasbir Puar suggests a rights based approach to trans and other gender non-conforming bodies is to some extent always an attempt at normalisation and generally exclusionary to those who are unable to meet specific official standards or requirements: "This trans(homo)nationalism is therefore capacitated, even driven, not only by the abjection of bodies unable to meet proprietary racial and gendered mandates of bodily comportment, but also by the concomitant marking of those abjected bodies as debilitated."⁵⁸

Hence, the current legal trend toward adding additional legal categories to an existing system of legal gender recognition to accommodate non-binary identities may suggest that following Judith Butler new genders are becoming or are made intelligible

⁵⁵ Die dritte Option. 13 December 2018. "Statement zur beschlossenen PStG-Reform: Ein Schritt nach vorn, aber noch kein verfassungskonformes Gesetz." Accessed 20 December 2018. url: <http://dritte-option.de/statement-zur-beschlossenen-pstg-reform-ein-schritt-nach-vorn-aber-noch-kein-verfassungskonformes-gesetz/>.

⁵⁶ See, for example, the issue of third gender recognition in Nepal: Bochenek, Michael, and Kyle Knight. 2012. "Establishing a third gender category in Nepal: process and prognosis." *Emory Int'l L. Rev.* 26:11-41

⁵⁷ See also the critique of this by Surya Monro, e.g. Monro, Surya. 2002. "Transgender Trouble: Legislation Beyond Binaries?" *Res Publica* 8 (3):275-283; Monro, Surya. 2005. "Beyond male and female: Poststructuralism and the spectrum of gender." *International Journal of Transgenderism* 8 (1):3-22; Monro, Surya. 2007. "Transmuting Gender Binaries: the Theoretical Challenge." *Sociological Research Online* 17 (1).

⁵⁸ Puar, Jasbir. 2017. *The Right To Maim: Debility, Capacity, Disability*. Durham and London: Duke University Press, p.35

through legal recognition.⁵⁹ As this is a developing area, at the moment it is difficult to assess whether the introduction of a third gender category can challenge a binary, categorical understanding of gender or whether it instead simply reifies a tripartite system of gender categories to replace the existing binary system. Introducing a third gender marker for official legal documents also does little to challenge the pervasive gendering of both public and private spaces, which routinely serves to impose gendered norms on those entering these spaces.⁶⁰

In this process of providing a stable and legally intelligible and recognisable category, there also seems to be a concurrent process of implicitly stabilising and reifying the other two sex/gender categories. It is notable that the new German category “divers” seems to suggest that while this new third option may contain a multitude of different identities, the other two are conversely limited to two clear identities with no room for diversity of genders. Similarly, the more common X marker has been defined by the Australian government as applying to “sex and gender diverse” people, again implicitly suggesting that the other two categories do not cover such diversity. This is of course not to suggest that having access to a third gender marker is not both practically and symbolically meaningful to people, but it nevertheless raises the question of whether this third category mainly serves to channel gender non-conformity away from the two pre-existing categories rather than offering a wider challenge to the legal categorisation of sex/gender as a whole.⁶¹

Concluding Thoughts

Finally, the introduction of these new categories also raises the question as to who will choose these new gender markers. Official discussions in various jurisdictions such as the UK and Germany suggest that the campaigns for a third gender marker are primarily advanced by a very small group of trans, non-binary and intersex people, seemingly an even smaller minority than those interested in a change of legal gender

⁵⁹ Butler, Judith. 1999. *Gender Trouble: feminism and the subversion of identity*. London & NY: Routledge, p.122

⁶⁰ Doan, Petra L. 2010. "The tyranny of gendered spaces – reflections from beyond the gender dichotomy." *Gender, Place & Culture* 17 (5):635-654.

⁶¹ See also Cooper, Davina, and Flora Renz. 2016. "If the State Decertified Gender, What Might Happen to its Meaning and Value?" *Journal of Law & Society* 43 (4):483-505.

more generally.⁶² For instance in *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin)* the evidence cited in the judgement suggests that only about 7,000 people in the UK identify as non-binary, with an even smaller subset wishing to use a third gender marker. Similarly, the German BVerfG assumed the new gender marker was primarily desired by intersex people who do not identify with the gender-binary, a likely even smaller group. As such the official understanding of a third or non-binary gender option is still that this is an exception granted to a minority group, with the default, or “normal”, gender options remaining as male and female. However, in principle these new options could be taken up by a much wider range of people. For instance, although the exact scope of the new German law is currently limited, the BVerfG has previously ruled various medical requirements for a change of one’s gender marker unconstitutional. It therefore seems possible that further legal challenges will be brought to remove some of the restrictions on the new third gender option going forward. Considering that the number of people identifying as non-binary seems to be increasing,⁶³ is it possible to imagine a future legal landscape in which a third gender option becomes the default or “normal” option? And if so, is this then merely a step toward ultimately removing legal gender entirely?

⁶² Cooper, Davina, and Flora Renz. 2016. "If the State Decertified Gender, What Might Happen to its Meaning and Value?" *Journal of Law & Society* 43 (4):483-505.

⁶³ Harrison, Jack, Jaime Grant, and Jody L. Herman. 2012. "A gender not listed here: Genderqueers, gender rebels, and otherwise in the National Transgender Discrimination Survey." *Lgbtq policy journal at the harvard kennedy school* 2:13-24.

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