

## **Framing gender identity registration amidst national and international developments: Introduction to 'Bodies, identities, and gender regimes: Human rights and legal aspects of gender identity registration'**

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***Introduction***

The right not to be discriminated against irrespective of gender (identity) may clash with state practices to attribute and register a legal gender to individuals. These labels, particularly as state and non-state actors currently make use of them, impact the possibilities that individuals have to enjoy human rights. While information on legal gender is used for many different purposes, including emancipation and anti-discrimination policies, it also serves to impose different rights and responsibilities that fall along sex and gender lines. The effects of such practices are especially felt by those who do not, or do not always, fit neatly into existing legal categories, including trans, queer, non-binary and intersex individuals and communities.

Questions regarding sex and gender registration have been increasingly raised by NGOs, international organisations and agencies, academic scholars and even some nation-states. Thus far, the majority of attempts to change the existing system seem to focus on expanding the definitions of male and female or eliminating the binary construction of gender as a legal category. Abolition of the practice of categorisation as such has received far less attention, even if the Yogyakarta Principles Plus 10 (YP+10) seem to move in that direction.<sup>2</sup> So-called ‘third options’ are also increasingly debated. While on the one hand, the third box may hold potential for disrupting the hegemony of the ‘man’/‘woman’ divide, on the other hand it could risk reproducing this very same dichotomy by sustaining the binary as a stable logic of categorisation from which to divert while simultaneously emphasizing the necessity of categorisation more generally (Cooper 2019; Davis 2017; Mak 2012; Wipfler 2016; see also various articles in this issue). The role of categories and categorisation then comes to the foreground in relation not only to the sex/gender imperative, but also to the intersection of various identity-based categories that play out in people’s lives, including race, ethnicity, sexuality, class, age, and citizenship (Crenshaw 1989, 1991). As many of the contributions in this special issue highlight, when analysing sex and gender registration, it therefore remains important to investigate how such processes of categorisation work and travel across, and are constitutive of, physical and symbolic borders, and go on to have wide-ranging impacts.

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<sup>2</sup> Compare Principle 31 and its predecessor Principle 3(b). Available at <https://yogyakartaprinciples.org/>. For a discussion of these principles, see Holzer (this issue).

The scope of this practice is not limited to the domestic level. International human rights treaty bodies, for instance, systematically ask for gender-segregated data, and International Civil Aviation Organisation (ICAO) regulations prescribe that passports contain a sex/gender marker (ICAO 2012; see also Quinan & Bresser 2020). The practice of asking for and collecting information on gender is also not limited to national and international bodies, but is often used by providers of goods and services. Arguably, this practice is connected to state registration practices in various ways, including by states giving non-state actors access to registered data, as well as by state legitimisation and public acquiescence to the practice of asking for information on sex and gender as such. Thus, sex and gender registration and legal gender labels affect people of all genders and therefore must be regarded as an issue of global justice.

Given this contemporary landscape, it becomes critical to analyse the systematic attribution and registration of legal gender. This special issue questions what effects such practices may have on well-being and quality of life for individuals of all genders – but specifically those who identify as transgender and non-binary – and investigates potential shifts in national and international narrations of sex and gender from legal, social, cultural and political perspectives. With this aim in mind, this inaugural issue of the *International Journal of Gender, Sexuality and Law* aims to offer a critical multi- and transdisciplinary angle on contemporary debates around sex and gender registration and identification by bringing together reflections on what future possibilities may be desirable, including the introduction of options such as X, third gender, and unspecified, as well as the complete abolishment of sex and gender registration altogether.

## ***Background***

Sex and gender are a primary formal and informal organising principle in most, if not all, societies. Because they are typically regarded as binary, those who do not fit these strict boxes are often excluded or marginalized. This may range from cis-identifying individuals who step outside their prescribed gender roles to trans and intersex individuals who may be confronted with the restrictions of this binary conception on a daily basis. These forms of exclusion significantly affect people's well-being, quality of life and human rights. The ways in which binary sex and gender structure daily life also becomes important to consider in terms of employment and labour, as specific jobs are built on ingrained ideas about gender and sex and have ramifications for trans individuals seeking to fill these positions. In Germany, for example, the occupation of

police officer is thoroughly sexed and reliant upon a binary framework. When applying to become an officer, males and females each undergo a different type of medical examination. For female police officers, a regulation forbids breast implants; meanwhile, male police officers must have at least one functioning testicle.<sup>3</sup> Moreover, specific hormone treatments are forbidden for anyone seeking to become a police officer in Germany. In their enactment of institutional regimes, these regulations can be seen as exclusionary and discriminatory towards trans and intersex individuals as well as those whose bodies do not or no longer 'match' norms established by the state (Molitor and Zimenkova 2019).

Although sex is typically registered as male or female, legal and administrative practices as well as biological, social, and cultural understandings of sex and gender as binary are increasingly subject to debate worldwide. In recent years, respect for transgender rights has given rise to numerous global legislative and policy-level reforms. Some countries have relaxed the possibility for changing one's legal sex without physical changes or without expert declarations (e.g., Argentina, Denmark), while in others the options M (male) and F (female) have been extended to include other possibilities on legal and travel documents. In some countries, the requirement to decide on the sex of intersex babies has been lifted, either temporarily or indefinitely (e.g., the Netherlands, Germany, Malta). In 2011, Australia adopted the category of 'X' ('undetermined/unspecified/intersex') as a marker in passports for transgender and intersex individuals or for those not wishing to identify their gender. A number of additional countries (e.g., New Zealand, Pakistan, Nepal, Bangladesh, India, Denmark, Malta, Canada) have also introduced third-gender and non-binary possibilities in IDs and travel documents, of which the 'X' marker in the sex/gender field has become the most common. In Belgium, the Constitutional Court quashed the recent Trans Act, both because of its binary gender construction and because of the perceived irrevocable nature of a change of gender (Aguirre-Sánchez-Beato et al.; Cannoot and Decoster, this issue). Courts in Austria, Germany and the Netherlands have also paved the way for genders outside the male-female binary. These and other developments will have reverberations worldwide. Thus far, no country has decided to abolish sex registration as such, although in 2019 the Australian state of Tasmania made optional the recording of gender in birth certificates (on the public responses to this bill, see Richardson-Self, this issue; see also Clarke 2019).

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<sup>3</sup> Police service regulation (PDV 300) 'Medical assessment of the suitability for police service and police service capability' (RdErl. D. MI from 7. 11. 2012 - P 25.41-12 504.1.12 - (Nds. MBl. P. 1107).

This issue of trans and intersex rights and well-being is currently high on international agendas, particularly as they relate to LGBTQI rights (Monro 2019). This was clearly indicated, for instance, when the UN Human Rights Council appointed an Independent Expert on violence and discrimination based on sexual orientation and gender identity in 2016 (see also Cannoot and Decoster, and Russell, this issue).<sup>4</sup> International attention is further evidenced by the 2018 landmark advisory opinion of the Inter-American Court of Human Rights on gender identity and same-sex marriage (Inter-American Court 2018). In terms of human rights, gender identity issues are currently also at the forefront of initiatives and discourses in Europe (FRA 2020; Holzer 2018; Van den Brink and Dunne 2018). Such discussions are often initiated by LGBTQI organisations, who typically invoke human rights standards and discourses of inclusion and exclusion. Non-state actors are increasingly taking action as well, with some universities now registering students as 'neutral' upon request,<sup>5</sup> and social media platforms like Facebook offering myriad options for self-identifying one's gender (Quinan 2017). However, the option to refuse any definition or label is rarely provided, with Germany being one of the few exceptions (see Cannoot & Decoster, this issue).

### *Legal change and structural transformation*

The fact that the relevant legal frameworks worldwide have been founded on a binary conception of sex and gender poses a challenge for scholars of law and gender. This is, to some extent, in turn a reflection, confirmation and (cyclical) strengthening of societal perceptions of sex/gender: even if one changes the upper layer of the system (i.e., the practice of registration and labelling itself), this will not automatically result in changes to underlying and connected systems (e.g., sex-segregated prisons, binary-based health care practices, access to family law) (Clarke 2019; see also Aguirre-Sánchez-Beato, Closon and Rorive; Richardson-Self; Venditti, this issue). This,

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<sup>4</sup> See various reports by the UN Independent Expert on Violence and Discrimination based on sexual orientation and gender identity, available at: <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/AnnualReports.aspx>. Last accessed 13 June 2020.

<sup>5</sup> For news coverage of this option that is increasingly being offered by universities, see, e.g., <https://www.cbsnews.com/news/harvard-university-colleges-gender-free-pronouns-transgender-genderqueer-students/>; [https://www.queer.de/detail.php?article\\_id=34168](https://www.queer.de/detail.php?article_id=34168). Last accessed 13 June 2020.

combined with different perceptions and ideas on what sex/gender equality demands and should look like, leads to different strategies, options and choices for future directions, but also to the possibility of limited results or even backlashes. Results and solutions are incomplete, both in the sense of not getting everything one is hoping for and in the sense of achieving something that may be beneficial for one specific group but not for all who are disadvantaged or excluded by the existing system. In this way, the outliers are doubly damaged: they are still not included, and while the excluded group becomes smaller, the 'in-group' becomes even larger and thus more dominant, thereby resulting in confirmation and solidification of the norm rather than structural change.

In this special issue, several contributions highlight how legislative changes tend to be built upon what exists rather than a critical questioning of whether that foundation is still suitable (see Aguirre-Sánchez-Beato et al.; Braunschweig; Easterbrook-Smith; Venditti). This is also true in individual litigation, as highlighted by Camminga in this issue. Thus, changes often result in confirming dominant standards and existing systems, rather than challenging those standards and norms. By allowing minimal changes, the system shows itself to be flexible and benign, like an earthquake-resistant building; however, the system, in effect, remains the same (cf. Franke 2015 on the perils of marriage equality; see Otto 2015 on the way in which the original Yogyakarta Principles uncritically embraced (bio) logic and heteronormative family forms).

The same tendency may occur due to another phenomenon. Many of the developments related to sex and gender recognition have been achieved by individual litigation, with applicants often supporting their arguments by referencing human rights. Despite the fact that individual litigation may at times trigger broad movements, one disadvantage is that even if it may solve the individual problem, generally there will be little attention paid to the impacts on a larger group or community (Holtmaat 2004). Although legislators are expected to take into account broader perspectives and the interests of others (as well as public interests, however defined), they may have more on their minds (the covid-19 pandemic being just one example) and therefore very often choose the easy way out. In other words, the more complex the problem, the more fervent the search for easy solutions. A prime example of this dynamic is illustrated by the German case in which the *Bundesverfassungsgericht* (Federal Constitutional Court) ordered the legislator to find a solution for people who do not feel comfortable with a male, female or blank marker (for more on this, see Cannoot and Decoster; Holzer; Venditti, this issue).

By definition, individual litigation must also stay quite close to the system as it currently exists. It is virtually impossible to bring a case without invoking existing norms or law. Moreover, the more radical the claim for inclusion (or even exclusion, as some people advocate for no registration rather than being accepted into a system that many argue is problematic), the higher the tension that may rise for the court that must decide. Particularly when human rights standards are at stake, courts must carefully balance progressive interpretation that does justice to the individual with the indispensable support of states for their judicial interpretations beyond that particular individual case (cf. the withdrawal of an increasing number of African states from their acceptance of direct individual and NGO access to the African Court on Human and Peoples' Rights) (De Silva 2019).

Courts are generally reluctant to overthrow entire systems and prefer incremental change (cf. Gerards 2018). One 'safety valve' for the wholesale upheaval of national systems is that the starting point for the assessment of human rights compliance is that states, as sovereign entities, are entitled to organise their societies as they please. The restriction imposed by human rights law is that state regulations should not disproportionately interfere with people's human rights.<sup>6</sup> Thus, governments are free to assign gender to their population, as long as they ensure that 'mismatches' do not disproportionately interfere with people's right to respect for their private lives. In other words, rather than examining whether assigning gender to the population as such constitutes a failure to respect private life (a violation of a negative obligation), only the level of 'bother' caused by the absence of an appropriate option to change one's assigned gender may constitute a violation of a positive obligation to allow people to lead 'normal' lives. A similar approach is visible in a 2018 case submitted by a trans woman against Italy. The woman could not change her first name as long as she was legally male because Italian name law prescribes 'male names' for legal males, and 'female names' for legal females. Although clearly problematic from a sex and gender equality perspective, the Court did not examine whether the Italian name law as such constituted a violation of private life (which, admittedly, they were also not asked to do). Rather, it looked into the question of whether Italy's refusal to make an exception was a violation of a *positive* obligation to secure respect for the

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<sup>6</sup> See, e.g., ECtHR, *AP, Garçon and Nicot v. France*, (appl.nos. [79885/12](#), [52471/13](#) and [52596/13](#)), 6 April 2017 on sterilisation as a condition to change legal gender. Compare *Marckx v Belgium* (appl.no. 6833/74), 13 June 1979 on the distinction between married and unmarried mothers to establish affiliation with their children.

woman's private life.<sup>7</sup> This approach also fuels the abovementioned issue regarding the lack of attention paid to the broader impacts of change in that individual litigation tends to ignore the impacts on the larger group concerned. Several articles in this issue (see, e.g., Aguirre-Sánchez-Beato et al.; Venditti) make a similar argument that only the exceptions regarding gender assignment and registration are regulated, confirming rather than undermining the 'normalcy' of the practice. The exceptions, as usual, confirm the rule (Mak 2012).

This special issue negotiates this dynamic, with some contributors focusing on strategies for change that remain within the system (see Camminga; hartline; Geurts and Nieder; Mills; Moleiro and Pinto), while others move beyond (Aguirre-Sánchez-Beato et al.; Braunschweig; Cannoot and Decoster; Holzer). Moreover, others might be read as genuinely pessimistic about the possibilities of change (e.g., Venditti). This pessimism, however, may serve as a good motivator to look *beyond* the current system and to advocate for the abolition of registration or for a complete overhaul of the system by, for instance, changing it to a system of self-identification (see Easterbrook-Smith) or opting-in (see Richardson-Self). An example of a more radical vision of the future is also seen in Russell's plea to abolish sex-segregated practices of prison systems worldwide, if not the prison system as such.

### *Interdisciplinary approaches to assessing the impacts of sex/gender registration*

In light of this dynamic and changing international climate, an interdisciplinary approach is crucial to examining (1) the consequences that the systematic attribution and registration of legal gender by states and other actors have on individuals in general and trans and non-binary persons in particular, and (2) possible alternatives to such registration practices. The articles that comprise this special issue come from a range of disciplines, including law, gender studies, sociology, anthropology, political sciences, public health, philosophy and media studies, amongst others. An intimate knowledge of both the law and the different discursive systems that inform it proves central, and the multi- and transdisciplinary perspective that this publication cultivates allows for mapping the fundamentally entangled shifts in systems of meaning and law-making with regard to sex and gender against the backdrop of contemporary modern and postcolonial nation states. This approach also allows for an integration of empirical data, combining theoretical endeavours with fieldwork in

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<sup>7</sup> ECtHR, *S.V. v Italy* (appl.no. [55216/08](#)), 11 October 2018.



order to research how such discursive shifts, systems and meanings may be felt in people's daily lives. In other words, how does legal registration of gender and sex (and recent changes to such administrative practices) affect people's lives 'on the ground' (Spade 2008, 2011; see also hartline; Moleiro and Pinto, this issue)? How does quality of life change depending on if – and how and when – documentation reflects one's gender identity? What new human rights issues do such changes bring about? How do laws and practices of human rights advocacy transform under new social conditions? How does the invocation of human rights, as opposed to other possible arguments, affect such changes to registration practices? How do global developments with respect to law and gender identity interact in and with local contexts? These are just a few of the timely and urgent questions with which the articles in this special issue grapple (see also Roundtable Discussion, this issue).

The contributions also engage with the legal and social justice-related aspects of these issues, including relationships between gender identity registration and global justice; aspects of human rights and groups affected by (the abolition of) gender registration; analyses of why states register gender and for what purposes they use this information (for an overview of such purposes, see Van den Brink and Tigchelaar 2014); empirical investigations of the impact of gender registration and categorisation practices of states, non-states and international organisations; and analysis of non-binary gender markers in identity documents. Many contributions also balance the theoretical with the practical by negotiating the development of theoretical frameworks for assessing the effects of registration practices with individual and collective strategies to cope with the consequences of legal gender labels or to resist state practices of registration (e.g., Aguirre-Sánchez-Beato et al., hartline, Moleiro and Pinto). Some contributions also explore the possibilities and liabilities of abolishing gender registration practices and reflect on possible injustices and human rights violations that may inadvertently result from such abolition (e.g., Braunschweig; Cannoot and Decoster, Roundtable Discussion).

### *The Role of Identity*

The notion of identity, which has been explored at length by different schools of thought (e.g. Clarke 2015; Erikson 1968; Gamson 1995; Giddens 1991; Tajfel and Turner 1986), plays an important role in any discussion of gender. As a concept, identity is differently framed in different social systems (e.g., law, medicine, policing, education). Thus, in the subsequent articles, understandings of identity are

theoretically and empirically addressed from various and varying perspectives and disciplines. When focusing on the practical intersections of identity and their effects on relationships between citizens and the state (Richardson 2015), it becomes clear that these complexities cannot be captured through official ascriptions and documentation, which, as detailed above, are often built on binary conceptions of sex and gender. At the same time, changes are necessary in order to improve the well-being and human rights for those who identify as queer, trans, non-binary, agender and gender-fluid (Waites 2009). Especially challenging for state regulations of gendered policy aspects (including, but not limited to, marriage, adoption, employment and state support) is the fact that identities are, as lived experiences, hybrid and changing. That is, this notion of identity as fluid may come into conflict with sex and gender registration practices, which may imply a stable and unchanging conceptualization of personhood, especially when a state uses this registration to intervene in a person's private life or releases sex-specific regulations (see Aguirre-Sánchez-Beato et al. and Cannoot and Decoster, this issue). Here, we face a theory/praxis dilemma. Theories of identity are clear that identity and belonging cannot be regarded as being as stable as other details registered by the state in identity documents (e.g., height, fingerprints, eye colour, date and place of birth). Yet on the level of practice, policies that rely on stable aspects of identity ascribed to individuals seem to be essential for interactions between the citizen and the state.

Thus, it is critical to look at both gender identity and gendered identities not as one-dimensional but as occupying multi-level dimensions that intersect with other vectors of identity, including race, ethnicity, sexuality, class and age, amongst others (Amelina and Lutz 2019; Anthias 1998; Cho et al. 2013; Crenshaw 1989, 1991; Fredman 2016; Verloo 2013). When sex/gender markers and gender identity do not 'match', tensions with formal identity characteristics registered in official documents can arise. For example, the official sex/gender marker may contradict a felt sense of gender, resulting in discrimination and oppression. Again, the question arises: why is it necessary to register sex/gender in official documents at all (Wipfler 2016)? Here also lies the question of for whom and for what purposes might it be necessary to actually know an individual's sex and/or gender.

When it comes to tensions that may arise between theory and practice, on the one hand it could be argued that because identities are fluid, they can never be put into the sorts of (binary) formalisations that nation-states strive for through the practice of documenting and registering gender (Butler 1993, 1999, 2004; Katyal 2017). This impossibility produces a permanent conflict that cannot be abolished as long as

sex and/or gender are being registered and are thereby playing a role in state/citizen interactions. On the other hand, it could also be asserted that gender-related provisions are necessary as long as patriarchy persists (on the limitations of a legal third-gender category within a patriarchal sociolegal order, see Nisar 2018). This special issue aims to get at this tension by complicating the discussion around abolishing gender registration and the use of gender markers in identity documents.

Bringing together state registration and felt sense of gender, a further dimension of identity is intimately connected to citizenship (Hines 2009). Here, the concept of sexual citizenship (Richardson 1998, 2000; Sabsay 2012) is key, in particular the ways in which it gets at the negotiations that occur between being a member of both a nation-state and a queer community. Trans and queer individuals might negotiate their national belonging and community belonging differently depending on the ways in which they are either included in or excluded from the legal frameworks to which they are subjected. A systemic reflection on these differences is not only a task for theory but also remains a crucial aspect when addressing human rights disparities for gender and sexual minorities.

### *A new legal material turn?*

Just as identity is a central theme in broad discussions of gender registration, the physical body also plays a significant role. Deconstructing what one means by 'the body' and reflecting on the changeability and flexibility of corporeality could be an essential step in developing the sensitivity of nation-states' (and their executive authorities) towards human rights with regards to gender identity (Yogyakarta Principles; see also Holzer, this issue). This dynamic also calls for a renewed interest in corporeal materiality without the sorts of backlashes seen thus far that end up reinforcing the binary. In this respect, this special issue prompts the question: does the preoccupation with gender identity registration call for a new 'legal material turn' – that is, a literal turn toward the material conditions of bodies (Bennett 2015; McLaughlin 2006)?

Possibilities for bodily changes on a material level do, however, provoke challenges for legal and executive systems (Baars 2019). When a nation-state allows for legal changes to gender and to medically supported transition, other aspects of gender-sensitive legislation (including laws related to marriage, parenthood,

adoption and divorce) may be challenged, and the question of legal discrepancies or individual integrity of the person before the law may arise.<sup>8</sup> For instance, German legislation allows for same-sex marriage but does not permit both married partners to be automatically registered as parents of a child that is birthed by one of the said individuals *unless* the relationship is legally framed as heterosexual. Hence, if the 'female' within a heterosexual couple gives birth to a child, there are no legal hurdles to the 'male' being accepted as a parent (regardless if the individual is cis or trans or if the child is born with the aid of reproductive technologies) (Buschner & Bergold 2017). In other words, in a legally sanctioned 'heterosexual' marriage, the male is automatically the legal father of the child, irrespective of biological 'fatherhood'. If the couple is 'homosexual', the individual who does not give birth must resort to 'step-parent adoption' (Van den Brink et al. 2015). As the name suggests, this is the procedure that step-parents must undergo and involves medical and financial checks and visits by child services to verify the integration of the 'step-parent' into the child's life. So, despite the fact that German legislation allows both for gender beyond male and female and for same-sex marriage, parentage laws remain entirely structured in binary heterosexual terms (cf. Mills, this issue). Here, the materiality of reproduction (which is itself framed as binary) sharply intersects with the legal system (which takes heterosexuality as the norm), creating an inequality before the law.<sup>9</sup>

In further investigating how the materiality of trans and queer bodies is made visible within the law and within legal decisions, theoretical approaches must also reflect on the question of the legal integrity of an individual after bodily changes (e.g., hormone replacement therapy, sex reassignment surgery). Systematic difficulties have, for example, been documented in the military and police when authorities have had to accommodate for transition. Even though they clearly possess the same education and competencies, soldiers or police officers whose bodies do not correspond to binary conceptions of sex and gender have been targeted and constantly monitored, potentially violating individual integrity (Mezey 2019; Molitor and Zimenkova 2019).

A recurrent line of thought throughout this issue gestures towards the necessity of theorizing a material turn in legal studies and – in turn – a legal material turn in

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<sup>8</sup> For critical remarks on German legislation by the Working Group on Parentage Law within the Federal Ministry of Justice and Consumer Protection, see BMJV 2017.

<sup>9</sup> Interestingly, even German citizens who are registered as same-sex parents in other European states where parental status is accorded to both partners cannot both register as parents within the German birth registration system.

queer and trans studies. The materiality of bodies and changes to identity registration may also lead to clashes with gate-keepers (see Moleiro and Pinto; Geurts and Nieder, this issue). If interaction between citizens and state authorities becomes partly obscured when citizens change their registered gender identity, we must ask how the state can become flexible and responsive to fluidity and changeability. The question of who is seen to hold the (ultimate?) expertise within the legal system becomes crucial, which is then mirrored by the next-level challenge of incompatibilities between different nation-states' perspectives that impact the lives of citizens depending on geopolitical context.

As several contributions to this issue demonstrate, merely deconstructing the gender binary or the material aspects of gendered identities is insufficient in adapting to the legal requests of trans citizens. Challenges that may then arise not only prompt issues around personal integrity but also question who holds the power of definition. Who has the power to define who this person is in terms of gender? Camminga (this issue) demonstrates, for instance, how the strategy of arguing in a court of law that a trans man is just 'a normal man' might be successful in practice, for traditional ideas about what a man looks and acts like has, in some cases, been enough for judges – or registrars for that matter – to make their decisions.<sup>10</sup> In this sense, the way a body looks becomes more relevant than does self-identification or even medical expertise (see Geurts and Nieder, this issue). At the same time, the question of expertise clashes with the question of identity, as medical professionals are often regarded as the experts, and in the process, perpetuate a system of body-norming.

Meanwhile, it is challenging (and at times legally impossible) for institutions to acknowledge the complex relationship between body, identity, materiality and legal status (see Russell, this issue). Moreover, focusing on physical appearance pushes trans and queer lives into a binary of bodily representation in order to achieve more acceptable life conditions and simultaneously accords those in power the ability to decide which bodily expressions are acceptable. Not only is individual identity flexible and not fixed, legal integrity is negotiated in legal procedures and court decisions just as gender is being differently constructed under varying conditions. In this sense, the body in its materiality may end up playing a more central role in court

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<sup>10</sup> For an example of the complicated status that registrars may play when it comes to deciding gender, see the landmark Norrie case: *Norrie v Registrar of Births, Deaths and Marriages* [2011] 102; *Norrie v Registrar of Births, Deaths and Marriages* [2011] NSWADTAP 53; *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145; *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11. See also Baars 2019.

decisions, border-crossing procedures and gender-sensitive legal action, including adoption, marriage and detention (Grabham 2007). Given the complex relationship between corporeality, identity and legal integrity, the question of who can challenge the binary requires careful examination of how laws, norms, identities and bodily materialities intersect and mutually reinforce one another.

### *Outline of special issue*

Central to this special issue is an analysis of the tensions and interactions between legal and cultural notions of citizenship, in particular how human rights-based approaches to questions of exclusion may complicate citizenship norms, particularly as they intersect with sex/gender (Monro and Van der Ros 2018). More generally, it is worth considering why the attribution of citizenship not only depends on individual acceptance of a sex (marker), but also includes the requirement to live and express oneself in accordance with the expectations implied by that label. This is not only relevant to LGBTIQ lives, but pertains to all individuals (see Braunschweig, this issue). In this respect, this publication is especially attuned to the role that national and cultural contexts play in how sex and gender registration policies impact lives. The issue therefore maps transformations in international discourses that are felt all over the world and attempts to describe these world-encompassing discourses, supported by more detailed information on various local contexts, including Australia, Belgium, Botswana, Central and Eastern Europe, Germany, New Zealand, Norway, Portugal and South Africa. While some contributions start from a single geopolitical context or rely on national frameworks by way of illustration (see Aguirre-Sánchez-Beato et al.; Braunschweig; Camminga; Easterbrook-Smith; Geurts and Nieder; hartline, Moleiro and Pinto; Richardson-Self), others take a comparative approach that engages with multiple national contexts (see Cannoot and Decoster; Holzer; Mills; Russell; Venditti). Given that both human rights legislation and gender identity registration often belong to a particular paradigm in which sex is formulated as a kind of personal property (Clarke 2015; Cooper and Renz 2016; Katyal 2017), it is also critical to question how changing notions of gender identities impact this paradigm as a contemporary product of Western modernity. Here, it is also important to note that although non-Western contexts and practices are mentioned throughout the subsequent articles, this special issue is limited in its overwhelmingly Western focus. Future research demands looking to a broader range of geographical, cultural and political contexts in order to more fully grapple with the impacts of sex and gender registration and to imagine and enact other possibilities, legal and otherwise.

In terms of structure, this issue begins with articles that critically interrogate registration practices specifically and the gender binary more broadly. From there, it moves to a more detailed zooming in on legal perspectives through case-based analyses. While maintaining a critical perspective on the impacts of binary constructions of sex and gender, the special issue concludes with articles that take into account human rights approaches as interconnected with legislation in different geopolitical contexts. Planning this organisational aspect of the special issue prompted lively discussions amongst the guest editors.<sup>11</sup> Given that creating a table of contents with sub-sections often results in the creation of categories – a practice that the content of this special issue precisely aims to question, resist and subvert – we opted to create a narrative through this order of appearance, a story that reflects the overlapping and transdisciplinary concerns that challenge preconceptions and disciplinary views.

We open with Pieter Cannoot and Mattias Decoster's article entitled 'The abolition of sex/gender registration in the age of gender self-determination: An interdisciplinary, queer, feminist and human rights analysis'. Cannoot and Decoster argue that sex/gender registration constitutes the cornerstone of the legalisation of the heterosexual cultural system of gender. It hinders people's free expression in terms of gender, thus affecting everyone. According to the authors, abolition of registration practices is the only way to genuinely respect the emerging '(human) right to gender identity autonomy'. Even if (some of) the uses made of legal sex/gender would be accepted as legitimate, the means to achieve those purposes affect people disproportionately and therefore constitute a human rights violation. Hence, abolishing sex/gender registration is an issue of global justice and would be beneficial to all.

From there, the issue moves to Valeria Venditti's 'Gender kaleidoscope: Diffracting legal approaches to reform gender binary', which analyses legal processes of self-determination and inclusion of non-binary gender labels. Taking a Deleuzian approach, the article works at a conceptual level and critiques the hypostatizing tendency that marks current understanding of gender and consequently limits the

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<sup>11</sup> At one point, we even considered organising the articles alphabetically so as to not privilege one thematic or author over another. This itself prompted discussion, as it simultaneously centres the Latin alphabet. (As one of the guest editors who grew up with the Cyrillic alphabet noted, organising the articles with that alphabet would have resulted in an entirely different order.) For this reason, we restrained from creating and naming categories, and we encourage readers to find different conversations and strands than those which we have highlighted here.

scope of legal reforms. In other words, Venditti argues that change cannot happen unless we break away from a conservative system of recognition that frames gender as a given entity along which identities organize. In engaging with the issue of legal gender beyond the male/female binary, this highly topical piece proposes alternatives to current perspectives about legal recognition of gender identity.

In 'Abolishing gender registration: A feminist defence', Lila Braunschweig argues in favour of the abolition of gender markers on identity documents. The article discusses the emancipatory dimension of such a proposition not only for gender minorities but also for individuals who recognise themselves within traditional gender identities. The article highlights the discriminations resulting from practices of binary gender registration for intersex children, trans persons, and non-conforming individuals. It also responds to the issues that then arise for feminist politics, given that identity categories are also tools to achieve rights and equality. Here the article proposes a renewed conception of neutrality, not the liberal gender blindness famously criticized by feminists, but a neutrality critically reconstructed as non-assignment.

Lena Holzer explores the Yogyakarta Principles and drafters' views on sex/gender registration in 'Smashing the binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10'. These views have evolved considerably in the ten years following the original publication of the Principles. While the original Principle 3 stressed the importance of legal recognition of people's self-identified gender, its successor, Principle 31, distinguishes four possible reforms to support elimination of the gender binary, varying from no longer marking gender on identity documents to elimination of such registration practices. Using queer and feminist theories, Holzer concludes that even though all four carry limitations, they do trouble the naturalized understanding of dichotomous (legal) gender relations. Thus, the revised content of Principle 31 is welcomed, as it valorises gender diversity outside a binary frame.

In "'Change can never be 'complete'": The legal right to self-identification and incongruous bodies', Gwyn Easterbrook-Smith focuses on proposed changes to New Zealand's Births, Deaths, Marriages and Relationship Registration Bill, which would simplify the process for changing the sex recorded on a birth certificate. Drawing on a Foucauldian framework, the article applies discourse analysis to the discussion of the bill, which is supported by Carol Bacchi's 'what's the 'problem' represented to be?'



approach in order to consider the underlying justifications for recording sex on identity documents. As the article argues, while the proposal to change the process for amending birth certificates signals greater acceptance of trans identities, it still works with the assumption that registering an official gender is necessary. In addition to showing the deleterious conditions trans people experience in encounters with laws surrounding identity documents, Easterbrook-Smith pushes the conversation further by arguing that, if passed, this bill would challenge any need for sex/gender identifiers on government documents.

Sara Aguirre-Sánchez-Beato, Caroline Closon and Isabelle Rorive analyse how sex is legally certified for different categories of people in Belgium and highlights the effects of these regulations in their article entitled 'The legal certification of sex in Belgium over time. Ideological effects and practical implications'. The article uses discursive psychology as a theoretical framework to consider sex/gender categories as something constructed in (legal) discourse. The authors conduct a qualitative content analysis of the legislation and show how this legislation constructs women and men as natural categories. The article also discusses the practical implications that such legal norming has in everyday life.

In 'Assessing Norway's Gender Recognition Act of 2016: Analysing personal experiences of legal gender change', France Rose Hartline discusses the implementation of the Gender Recognition Act (GRA) in Norway. The GRA now allows one to change legal gender (male/female) without the previously required sterilisation. Drawing on a diversity of trans experiences and identities, the article asks in what ways the Act is capable of empowering those who change legal gender, and in what ways it could prove limiting or detrimental. Hartline conducted interviews with twelve individuals who changed their legal gender soon after the Act's implementation and analysed the interviews to uncover moments of empowerment and disempowerment. This allows for an exploration of the potential of legal gender recognition to shape one's personhood and citizenship in the Norwegian context.

Carla Moleiro and Nuno Pinto analyse the enforcement and impact of the first legal gender recognition legislation in Portugal in their article entitled 'Legal gender recognition in Portugal: A path to self-determination'. The article first describes how the administrative process created by the law functioned during its initial period, and then assesses the impact of the law on the social and psychological well-being of trans people. In taking a quantitative and qualitative approach, the study is based on an

online questionnaire with trans and non-binary people and on semi-structured in-depth interviews with various selected stakeholders in the LGBTIQ+ community. Moleiro and Pinto show the positive effects that legal gender recognition has on the psychological well-being and social welfare of the participants, but also emphasise several challenges and forms of resistance to the implementation of the law.

In their article 'One for one and one for all? Human rights and transgender access to legal gender recognition in Botswana', B Camminga engages in a comparative analysis of two cases in Botswana where the High Court granted a change of legal sex, despite the law not providing for the procedure. These judgments present a historical first in the African continent. The cases differ in that one of the applicants stages her case in such a way as to attract significant media attention, whereas the other applicant presents himself as a 'regular guy'. Yet both applications are presented in a heteronormative frame, which is arguably helpful in a cultural context where the framing of gender identity as a human right is much derided. Camminga's discussion highlights the interaction between these cases, including, interestingly, how a female judge apparently only feels ready to make the judicial jump after a male colleague has paved the way.

Lize Mills focuses on one particular, still quite common, precondition for change of legal gender: the divorce requirement. Entitled 'Computer Says No: Enforcing divorce upon persons who changed their sex in Europe and South Africa', the article argues that the requirement is obsolete and presents a human rights violation. After presenting a brief overview of the development of relevant case law, Mills discusses two cases in more detail, one from the Court of Justice of the EU and one from the South African High Court. Interestingly, in the South African case it is not the law or the courts that present an obstacle to remaining married, as is the situation in all other cases, but the civil servants in the registry who blame the software for the refusal to accept a change of sex for someone who is (still) married. Mills advocates for an increased legal and institutional appreciation for the lived reality of people who do not fit the categories that have been put in place.

In "'There are only two genders – male and female...": An analysis of online responses to news of Tasmania removing 'gender' from birth certificates', Louise Richardson-Self makes an important contribution to emerging scholarship on the relationship between transgender politics, media, and public opinion. Based on quantitative and qualitative analysis of news media discussions of transgender

political issues, the article critically focuses on the political aesthetics of the affectively negative responses to the media coverage of the Tasmanian Government's decision to make the recording of gender on birth certificates an opt-in process. In conducting a 'political aesthetic analysis' of comments posted on Facebook in response to *The Australian* newspaper's coverage of the event, Richardson-Self draws on feminist, queer, and trans theories to argue that a challenge lies ahead for feminist and queer activists and scholars who must communicate more clearly to the public that sex and gender – both of which are social constructs – are not the same and that sexual dimorphism is not an unquestionable Truth.

In 'Monopoly and power implications for trans health care specialists working in a centralised setting: A qualitative study' Brogan Luke Geurts and Timo O. Nieder analyse the case study of a trans health care team in a centralised health system in Central and Eastern Europe where trans health care is often provided by a limited number of specialist teams. Based on in-depth interviews and qualitative content analysis, Geurts and Nieder argue that the team conceived trans identities and clinical needs in a medical framework correlating with the process for legal gender recognition, a dynamic that maps to similar developments across Europe. In analysing the relationship and role that gender teams have on legal gender recognition, the article also argues that comparisons could be drawn to similarly positioned teams throughout Europe regarding decision-making, power and influence.

In 'Analysis of the effects of legal sex markers in detention: Single-sex detention facilities, conversion therapy, and violations of human rights', Cianán B. Russell uses the functional definition of the concept of 'conversion therapy' (i.e., 'any treatment, practice or sustained effort that aims to change, repress and, or eliminate a person's sexual orientation, gender identity and, or gender expression') as a broader analytical framework to describe carceral practices that regulate gender identity and expression and, in particular, those implemented by sex-segregated detention facilities. The article argues that, coupled with often restrictive and sometimes impossible means for accessing legal gender recognition to change one's identity documents, single-sex detention acts as a form of conversion therapy for trans and gender diverse people by coercing detainees into adopting modes of gender expression that do not align with their gender identity.

Taking a different form, the issue's final text, entitled 'State regimes of gender: Legal aspects of gender identity registration, trans-relevant policies and quality of

LGBTIQ lives. A Roundtable Discussion' includes the voices of Davina Cooper, Alexander Kondakov, Verena Molitor, C.L. Quinan, Anna van der Vleuten and Tatiana Zimenkova, along with members of the audience. This transcribed and abridged version of a roundtable discussion took place amongst the authors at the 2019 European Conference on Politics and Gender (ECPG). In bringing together expertise from political science, law, political sociology and gender studies, this roundtable article investigates how gender, as a social process and regime, produces gender identities – often in non-deterministic and unpredictable ways – and how practices of sex/gender categorisation and gender-relevant policies of nation-states clash with gender identities. The text also offers a critical reflection on whether undoing formal legal gender categorisations could impact the gendering of social subjects.

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