TOWARD A PERFORMATIVE UNDERSTANDING OF SEX/GENDER IN LAW: CONSIDERING GENDERLESS IDENTITY DOCUMENTS

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Introduction

Before Professor Frug – a self-acclaimed postmodern feminist writer – was murdered on her way to Harvard Law School on April 4, 1991, she had been working on *A Postmodern Feminist Legal Manifesto.*[1] She wrote: "The proliferation of women's legal rights during the past two decades has liberated women from some of the restraining meanings of femininity. (…) Despite these significant changes, there remains a common residue of meaning that seems affixed, as if by nature, to the female body. Law participates in creating that meaning"[2]. Almost thirty years of scholarship and international human rights advocacy later, this dissertation argues that the common residue of restraining meaning legally affixed to the (female) body is nothing less than the very fact of being categorized (female). Time has come to let go of sex/gender as a meaningful identity category to be displayed at each and every one's convenience on identity documents because it sustains what Butler calls the "heterosexual matrix"[3] as the ideological base for gender injustice. Indeed, as Butler indicates: "the law produces and then conceals the notion of « a subject before the law » in order to invoke that discursive formation as a naturalized foundational premise that subsequently legitimates that law's own regulatory hegemony"[4].

(Personal) identity is a complex and unstable given, informed by many factors, which may include culture, history, politics, religion, class, ethnicity, occupation, disability, language, sexual practice and law.[5] Legal identity, as part of one's personal identity, is often referred to as 'civil status' in civil law systems and is constituted by the law's classification of individuals in a predefined set of legally recognized identity categories.[6] Still today, in most jurisdictions,

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[1] M.J. FRUG, "A Postmodern Feminist Legal Manifesto (An Unfinished Draft)", *Harvard Law Review*, 1992, vol. 105, pp. 1045-2008.
[2] M.J. FRUG, *ibidem* note 1, p. 1049.
[3] I will elaborate on this term in Chapter II. At this stage, it suffices to say that for Butler, "The term heterosexual matrix (…) designate[s] that grid of cultural intelligibility through which bodies, genders, and desires are naturalized. I (…) characterize a hegemonic discursive/epistemic model of gender intelligibility that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable gender (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality". See, J. BUTLER, *Gender Trouble – Feminism and the Subversion of Identity*, 2007, Routledge, New York, p. 208.
[4] J. BUTLER, *ibidem* note 3, p. 3.
[5] Moreover, one could argue that the elements of this non-exhaustive list are interconnected and influence each other. See, B. RYAN, "Introduction – Identity Politics: The Past, the Present, and the Future" in B. Ryan (ed.), *Identity Politics in the Women's Movement*, New York University Press, New York, 2001, p. 2.
[6] M.L. ASTRADA, S.B. ASTRADA, "Reexamining the Integrity of the Binary: Politics, Identity, and Law", *University of Maryland Law Journal of Race, Religion, Gender and Class*, 2017, vol. 17, p. 179.

sex is one of them.[7] Indeed, the law typically requires new arrivals to be registered as male or female at birth and presumes these then legally gendered bodies to have a culturally defined corresponding gender identity[8] and sexual orientation[9].[10] Pervasive heterosexuality therefore assumes female bodies to become women and desire men and male bodies to become men and desire women.[11] Once the body is gendered, corresponding rights, responsibilities, freedoms, and obligations are defined and specified for it.[12] For example, the female body has a right to found a family with the male body, sanctified through the institution of civil marriage.[13] It also has the right to be treated in the same way as the male body.[14]

Thus, most jurisdictions, including the international legal order,[15] attribute a pre-configurated (hetero-)sexual identity to individuals based on their genitals[16] and thereby (un)consciously

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[7] A.J. Neuman Wippler, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", *Harvard Journal of Law and Gender,* 2016, vol. 39, p. 496.

[8] What exactly is meant by 'gender' has been amply debated. However, it seems suitable to presume that the term gender encompasses both gender roles, or gender expressions, as well as gender identity. The former notions refer to "the societal expectations assigned to gender; they are the parts or personas that males and females are expected to play in societal settings. (...) At this point, it is helpful to recognize that gender roles are created by external processes or outside forces". In contrast, the latter concept is linked to "internal processes associated with gender". See, S. Hanssen, "Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law", *Oregon Law Review*, 2017, vol. 96, p. 285. Furthermore, the Preamble to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, available at <http://yogyakartaprinciples.org/> (last consulted March 2, 2019), defines gender identity as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms". This definition of gender identity is now increasingly recognized by international intergovernmental organizations as their working definition. I will further comment upon both the Yogyakarta Principles and their definition of gender identity in Chapter I.

[9] For the purpose of this dissertation, I will use the definition of sexual orientation enshrined in the Preamble to the Yogyakarta Principles: "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender".

[10] C. Visser, E. Picarra, "Victor, Victoria or V? A Constitutional Perspective on Transsexuality and Transgenderism", *South African Journal of Human Rights*, 2012, vol. 28, n°3, p. 506; California Law Review, "Notes on Conflation: Foreword", *California Law Review*, 1995, vol. 83, n°1, pp. 12-14.

[11] As J. Halley argues: "Compulsory heterosexuality produces not only heterosexuals, but also men and women". See, J. Halley, *Split Decisions: How and Why to Take a Break from Feminism*, Princeton University Press, Princeton, 2006, p. 137. More specifically, "The institution of a compulsory and naturalized heterosexuality requires and regulates gender as a binary relation in which the masculine term is differentiated from a feminine term, and this differentiation is accomplished through the practice of heterosexual desire. The act of differentiating the two oppositional moments of the binary results in a consolidation of each term, the respective internal coherence of sex, gender, and desire." See, J. Butler, *ibidem* note 3, p. 31.

[12] M.J. Frog, *ibidem* note 1; Harvard Law Review, "Patriarchy is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender", *Harvard Law Review*, 1995, vol. 108, p. 1993-1999.

[13] Universal Declaration of Human Rights (UDHR), adopted 10 December 1948, UNGA Res 217 A(III), article 16; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed November 4, 1950, as amended by Protocol n°14, entered into force June 1, 2010, article 12.

[14] UDHR, adopted 10 December 1948, UNGA Res 217 A(III), article 2; ECHR, as amended, article 14.

[15] D. Otto, "Queering gender [identity] in international law", *Nordic Journal of Human Rights*, 2015, vol. 33, n°4, p. 302.

[16] P. Cannoot, "Let it be: het recht op persoonlijke autonomie van personen met intersekse/DSD", *Tijdschrift voor Seksuologie*, 2017, vol. 41, n°2, p. 88.

conflate sex, gender, and sexual orientation.[17] This cultural and legal heterosexual command (often referred to as heteronormativity[18] or compulsory heterosexuality[19]) not only pressures bodies to exhibit heterosexual desires but also, as we shall see, to behave in line with oppositional binary gender identities and to corporeally recognize and identify themselves in an asymmetrical way, that is, to be sexed.[20] Consequentially, "some sub-identities that have not been integrated are subjugated, and exist on the periphery of the binary, while others are in essence silenced because they are unable to be expressed in the dominant context"[21]. Deviants of the heterosexual command are not only subjugated and silenced but, in addition, they are often punished through prosecution or discriminatory practices.[22] Yet, that punishment is needed in order to keep the regulatory framework in place already indicates that it is, in reality, regulated and thus not naturally evident.[23] Indeed, the fact "that culture so readily punishes or marginalizes those who fail to perform the illusion of gender essentialism should be sign enough that on some level there is social knowledge that the truth or falsity of gender is only socially compelled and in no sense ontologically necessitated"[24]. As such, queer theorizing dictates that "the point is always to demonstrate how the mainstream is like the margins and not vice versa"[25]. By doing so, third wave queer feminists have debunked natural and binary sex/gender and exposed the social constructedness of both notions.[26]

That conclusion led certain feminist legal theorists to denounce the law's complicity in legitimizing gender binarity as a sort of universal truth grounded in nature.[27] Instead, they argue that the uncritical acceptance of a biological conception of sex/gender premised on a natural binarity amounts to a particular gender ideology, which the law upholds in favor of

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[17] California Law Review, *ibidem* note 10, p. 12.
[18] According to K. McNeilly, heteronormativity "denotes the institutional, cultural, and legal norms which reify and entrench heterosexuality and dominant forms of sex/gender/sexuality/desire". See, K. McNeilly, "Gendered Violence and International Human Rights: Thinking Non-discrimination Beyond the Sex Binary", 2014, *Feminist Legal Studies*, vol. 22, p. 266.
[19] Adrienne Rich institutionalized the term in her paper titled "Compulsory Heterosexuality and Lesbian Existence". See, A. Rich, "Compulsory Heterosexuality and Lesbian Existence", *Signs*, 1980, vol. 5, n°4, pp. 631-660.
[20] R.A. Wilchins, *Read My Lips: Sexual Subversion and the End of Gender*, Riverdale Avenue Books, Riverdale (NY), 2013, p. 65.
[21] M.L. Astrada, S.B. Astrada, *ibidem* note 6, p. 187.
[22] M. O'Flaherty; J. Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles", *Human Rights Law Review*, 2008, vol. 8, pp. 208-214.
[23] Harvard Law Review, *ibidem* note 12, p. 1987.
[24] J. Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory", in K. Conboy, N. Medina, S. Stanbury (eds.), *Writing on the Body: Female Embodiment and Feminist Theory*, Columbia University Press, New York, 1997, p. 411.
[25] Harvard Law Review, *ibidem* note 12, p. 2007.
[26] M. Davies, "Queer Property, Queer Persons: Self-Ownership and Beyond", *Social and Legal Studies*, 1998, vol. 8, n°3, p. 346.
[27] D.B. Cruz, "Disestablishing Sex and Gender", *California Law Review*, 2002, vol. 90, n°4, p. 1011.

those it benefits.[28] As a result, the law not only sponsors concrete or material injustice but also discursive gender violence. For example, with regard to material gender injustice, one could point to the fact that legal systems premised on a biological conception of sex/gender often deny intersex individuals[29] to have their sex factually speaking correctly registered on their birth certificate[30], which is conducive to enforced conventional sex-affirming surgeries at birth.[31] Moreover, such legal systems legitimize torture[32], arbitrary detentions[33], *de facto* or *de iure* restrictions on freedom of expression and assembly[34], and housing, employment, health care, and other types of discrimination against transsexual[35] and transgender[36] individuals

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[28] D. Cooper, F. Renz, "If the State Decertified Gender, What Might Happen to its Meaning and Value?", *Journal of Law and Society*, 2016, vol. 43, n°4, p. 489-495.

[29] For a definition of intersexuality, see: European Commission, *Trans and intersex equality rights in Europe: a comparative analysis*, 2018, p. 34, available at <https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf> (last consulted February 2, 2019): "intersex individuals are people who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure". Thus, "Intersex people differ from trans people as their status is not gender related but instead relates to their biological makeup (genetic, hormonal and physical features) which is neither exclusively male nor exclusively female, but is typical of both at once or not clearly defined as either". See, European Commission, *Trans and intersex people: discrimination on the grounds of sex, gender identity and gender expression*, 2012, p. 12, available at <http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF> (last consulted February 2, 2019).

[30] D.C. Ghattas, "Human Rights between the Sexes: a preliminary study on the life situations of inter* individuals", in Heinrich Böll Stiftung (ed), *Publication series on Democracy*, 2013, vol. 34, p. 7, available at <https://www.boell.de/sites/default/files/endf_human_rights_between_the_sexes.pdf> (last consulted February 2, 2019).

[31] A. Fausto-Sterling, "The Five Sexes – Revisited", *Sciences*, 2000, vol. 40, n°4, pp. 18-24.

[32] UN General Assembly, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, July 3, 2001, A/56/156, describing in paragraph 17 that members of sexual minorities are often subject to torture and other cruel, inhuman or degrading treatment "in order to 'punish' them for transgressing gender barriers or for challenging predominant conceptions of gender roles".

[33] OHCHR, Report of the Office of the High Commissioner for Human Rights, Discrimination and Violence Against Individuals Based on their Sexual Orientation and Gender Identity, May 4, 2015, A/HRC/29/23.

[34] European Union Agency for Fundamental Rights, *European Union lesbian, gay, bisexual and transgender survey*, 2014, p. 79, available at <https://fra.europa.eu/en/publication/2014/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-main> (last consulted February 2, 2019).

[35] For a definition of transsexuality, see: European Commission, *Trans and intersex people: discrimination on the grounds of sex, gender identity and gender expression*, 2012, p. 12, available at <http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF> (last consulted February 2, 2019): "Transsexual people identify with the gender role opposite to the sex assigned to them at birth and seek to live permanently in the preferred gender role. This is often accompanied by strong rejection of their physical primary and secondary sex characteristics and a wish to align their body with their preferred gender. Transsexual people might intend to undergo, be undergoing or have undergone gender reassignment treatment (which may or may not involve hormone therapy or surgery). Men and women with a transsexual past fully identify with their acquired gender and seek to be recognised [sic] in it without any references to their previous sex and/or the transition process that they undertook to align their sex with their gender."

[36] Trans or transgender is "an umbrella term that describes people with diverse gender identities and gender expressions that do not conform to stereotypical ideas about what it means to be a girl/woman or boy/man in society. 'Trans' can mean transcending beyond, existing between, or crossing over the gender spectrum. It includes but is not limited to people who identify as transgender, transsexual, cross dressers or gender non-conforming (gender variant or gender queer)." See, B. Picard, "Gender Identity: Developments in the Law and Human Rights Protections", *University of New Brunswick Law Journal*, 2018, vol. 69, pp. 128-129. Transgender individuals differ from transsexual individuals (although the latter may identify as a sub-group of transgenders) in

because they are said to transgress the natural order.[37] With regard to discursive gender violence, one may argue that legal systems advancing a biological conception of sex/gender encourage or oblige any individual, whether cis-gender[38] or not, to conform, perform and embody conventionally accepted gender identities[39] and thereby also render unintelligible the life and gender experiences of queer[40] individuals.[41]

In order to tackle these gender-based types of injustices, human rights defenders supporting sexual minorities (who are most directly affected by the hegemonic heterosexual system of gender) strategically "[used] the extremes to show that the categories that define the norm are themselves untenable"[42] and demanded genderless identification documents (including national ID cards, driver licenses, and internationally recognized passports) in Courts[43],

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the sense that they do not necessarily wish to physically alter their body in order to reflect their preferred gender, nor do they necessarily reject their physical primary and secondary sex characteristics. See, C. VISSER, E. PICARRA, *ibidem* note 10, p. 514 and AMERICAN PSYCHIATRIC ASSOCIATION (APA), *What is Gender Dysphoria?*, 2016, available at <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last consulted February 2, 2019).

[37] See, OHCHR, *Living Free and Equal*, 2016, HR/PUB/16/3, available at <https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf> (last consulted February 2, 2019) and M. O'FLAHERTY; J. FISHER, *ibidem* note 22, pp. 208-214. For a less doctrinal perspective on the accumulation of prejudice faced by transsexual individuals, see J. WEISS, "The Gender Caste System: Identity, Privacy, and Heteronormativity", *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues*, 2001, vol. 10, pp. 132-134.

[38] "Cis-gender refers to individuals who self-identify with the gender that was assigned to them at birth. Cis-gender is derived from the Latin word 'cis' ('on this side of')". See, EUROPEAN COMMISSION, *Trans and intersex equality rights in Europe: a comparative analysis*, 2018, *ibidem* note 29, p. 35.

[39] With regard to cis-gender individuals, M.J. Frog has described how legal rules, which "directly or indirectly penalize conduct that does not conform to a particular set of sexual behaviors" induce female bodies to engage in monogamous, heterosexual and submissive sexual relationships because they "create economic and safety incentives for women to marry and to remain sexually faithful in marriage". See, M.J. Frog, *ibidem* note 1, pp. 1062-1064. With regard to individuals outside the binary, or transsexual individuals, K. Reineck explained that (talking about anti sex-discrimination laws): "Only people who fit into the two neat boxes the law accommodates – cisgender men who experience manhood in a traditionally masculine way and cisgender women who experience womanhood is a traditionally feminine way – are protected under a doctrine that, at the same time, condemns sex stereotypes". Thus, in order to claim the law's protection, people other than cis-gender either need to adjust their behavior to conventionally recognized binary gender roles, or face "invasive inquiries about their anatomy, medical history, and personal life and often results in the court adjudicating the plaintiff's sex over their objections". See, K. REINECK, "Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Non-Binary People", *Michigan Journal of Gender and Law*, 2017, vol. 24, pp. 289-290 and 273.

[40] As M. Davies has noted, "'Queer' is a term that has been used in a variety of different ways". Still, she defines it as "[indicating] some deviation or position of marginalisation [sic] from whatever is regarded as sexually conventional". See, M. DAVIES, *ibidem* note 26, p. 331.

[41] M.L. ASTRADA, S.B. ASTRADA, *ibidem* note 6, p. 187-188; K. MCNEILLY, *ibidem* note 18, p. 266.

[42] HARVARD LAW REVIEW, *ibidem* note 12, p. 2007-2008.

[43] Claims for genderless identity documents or third gender markers were filed in Australia, New-Zealand, Canada, Nepal, India, the UK, France, the Netherlands, the USA, Pakistan, Germany and Austria. A reference and analysis of the several pertinent domestic legal cases is provided in Chapter I, Section B, and the Annex.

through (inter)national policy advocacy,[44] and through legal reforms[45]. While it at first sight might seem utopian or extreme to argue in favor of genderless identity documents, several developments both in international and national law[46] indicate that States will eventually cease to certify sex/gender, as they did with race, disability, religion, and political affiliation. Given sex' and gender's contingency, potentially oppressive character, and the fact that a biological "binary approach (...) ignores scientific reality"[47], they have become irrelevant categories for legal identity. Indeed, most recently, the Austrian Constitutional Court followed its German counterpart and ruled that along M and F, both the absence of any gender marker and a third gender category 'X', 'other' or 'unspecified' should be legally recognized options available to the individual with regard to their sex/gender entry in the national civil register.[48] The German Constitutional Court cited and based itself on the German Ethics Council's opinion, which noted that "as a basis for future decisions on legislation, the purposes of compulsory registration as provided by current law should be evaluated. A review should be undertaken to determine whether the recording of a person's sex in the civil register is in fact still necessary"[49]. In line with the report, the Court remarked that "the entry under civil status law in itself only takes on specific significance for gender identity because civil status law requires that a gender must be stated in the first place"[50].

So far, however, most legislators and judges favorable to the idea have only accepted to establish or recognize a third gender category in the form of 'X', 'Other', 'Unspecified', 'Inter', or 'Indeterminate', rather than to abolish gender markers altogether.[51] Although categorial

[44] For an example of international advocacy led by civil society organizations, see the Malta Declaration delivered at the end of the Third International Intersex Forum, 2013, available at <https://oiieurope.org/malta-declaration/> (last consulted February 2, 2019). For an example of organized and effective grass-root domestic activism, see the Canadian Gender-Free I.D. Coalition, available at <http://gender-freeidcoalition.ca/index.html> (last consulted February 2, 2019).

[45] For example, see the Danish Proposal n° L.182 of April 30, 2014, to amend the Act on the Central Register of Persons, which recognizes the possibility for transsexual individuals to have a third option gender marker 'X' on their passport. The proposal was enacted on June 11, 2014 and is available at <https://www.ft.dk/RIpdf/samling/20131/lovforslag/L182/20131_L182_som_fremsat.pdf> (last consulted February 2, 2019).

[46] A proper analysis of these developments is provided in Chapter I.

[47] A.R. CHANG, S.M. WILDMAN, "Gender In/sight: Examining Culture and Constructions of Gender", *The Georgetown Journal of Gender and Law*, 2017, vol. 18, p. 57.

[48] Austrian Constitutional Court (Vfgh), 15 June 2018, G77/2018-9, available at <https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_77-2018_unbestimmtes_Geschlecht_anonym.pdf> (last consulted March 2, 2019).

[49] German Constitutional Court (BVerfG), Order of the First Senate of 10 October 2017, 1 BvR 2019/16, §5, English translation available at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html> (last consulted February 2, 2019).

[50] BVerfG, *ibidem* note 49, §46.

[51] A few exceptions exist. See Annex.

expansionism may be a legitimate strategy to unravel the binarity of sex/gender and well-suited to remedy the forms of gender injustice experienced by various transsexual and intersex individuals, certain scholars have noted that "advocates must recognize the ways that these arguments re-entrench gender as an ahistorical and apolitical, natural, pre-existing fact that ought to be correctly recorded on government documents"[52]. It thus perpetuates a biological, be it non-binary, conception of sex/gender. Arguably, legally recognizing a third gender category would better align law with scientific reality and potentially do away with the material gender injustices certain intersex and transsexual individuals face. However, as long as the law requires mandatory sex registration premised on a binary or non-binary biological conception of gender, it will continue to sustain the hegemonic (and therefore oppressive) heterosexual matrix, which consciously and unconsciously affects both cis- and transgender people and results in material and discursive gender injustice for everyone.[53]

Effectively ensuring gender emancipation, that is, remedying both the material and discursive forms of gender injustice experienced by *all* bodies[54], requires incorporating a performative rather than a biological understanding of sex/gender in law[55] as theorized by queer feminists. A performative conception of gender departs from the idea that bodies are historical loci of cultural meaning rather than mere facticity.[56] Indeed, as an "intentionally organized materiality"[57], the body is always already being inscribed and inscribing itself with discursively formed meaning; its acts, movements and ways of being-in-the-world (Heidegger-wise) render determinate historically circumscribed possibilities of being (for example, male or female) and thereby constitute or realize these historical possibilities of being. Therefore,

[52] A.J. Neuman Wippler, *ibidem* note 7, p. 523.
[53] D. Cooper, F. Renz, *ibidem* note 28, p. 484 and 487.
[54] The American Psychological Association (APA)'s August 2018 *Guidelines for the Psychological Practice with Boys and Men* indicate that not only members of sexual minorities and women but also cis-gender boys and men face gender role strain and gender role conflict, defined as "problems resulting from adherence to rigid, sexist, or restrictive gender roles, learned during socialization, that result in personal restriction, devaluation, or violation of others or self". Indeed, "Although boys and men, as a group, tend to hold privilege and power based on gender, they also demonstrate disproportionate rates of receiving harsh discipline (...), academic challenges (...), mental health issues (...), physical health problems (...), public health concerns (...), and a wide variety of other quality-of-life issues". More specifically, "researchers have demonstrated that men experience conflict related to four domains of the male gender role: success, power, and competition (a disproportionate emphasis on personal achievement and control or being in positions of power); restrictive emotionality (discomfort expressing and experiencing vulnerable emotions); restrictive affectionate behavior between men (discomfort expressing care and affectionate touching of other men); and conflict between work and family relations (distress due to balancing school or work with the demands of raising a family). The *APA Guidelines* are available at <https://www.apa.org/about/policy/boys-men-practice-guidelines.pdf> (last consulted February 2, 2019).
[55] D. Otto, *ibidem* note 15, p. 318, K. McNeilly, *ibidem* note 18, p. 265, D.R. Gordon, "Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?", *California Law Review*, 2009, vol. 97, p. 1724.
[56] J. Butler, *ibidem* note 24, pp. 402-403.
[57] J. Butler, *ibidem* note 24, p. 403.

"there is neither an 'essence' that gender expresses or externalizes nor an objective ideal to which gender aspires; because gender is not a fact, the various acts of gender create the idea of gender, and without those acts, there would be no gender at all. Gender is, thus, a construction that regularly conceals its genesis"[58]. Butler argues that this hiding ensures that "the authors of gender become entranced by their own fictions whereby the construction compels one's belief in its necessity and naturalness. The historical possibilities materialized through various corporeal styles are nothing other than those punitively regulated cultural fictions that are alternately embodied and disguised under duress"[59]. Furthermore, "when the sex/gender distinction is joined with a notion of radical linguistic constructivism, the problem becomes even worse, for the 'sex' which is referred to as prior to gender will itself be a postulation, a construction, often within language, as that which is prior to language, prior to construction."[60] According to this vision, bodily (sex) differences are not denied nor said to be the result of culture. However, "culture promulgates an ideal which includes standards of normality for our bodies and how we think about them. At the same time, this ideal forces our bodies into those standards. 'Sex' is a continuing process"[61], both biologically and epistemologically or discursively deeply problematic[62] (as respectively proven by the existence of intersexuality and queer or transgender identities). Thus, under a performative lens, gender is that which is continuously and incessantly (re)produced by the corporeal movements of bodies that have learned to recognize themselves as sexed and live up to these socially constructed regulatory ideals, rather than a pre-existing identity expressive of sex, i.e. affixed to a biologically determinable male or female body.

As Halley states: "In a utopian world, one would burn down gender. But inasmuch Butler regarded that as impossible (…), feminism should promote gender trouble. And how could gender be troubled? We can't not repeat it, but we could seek to repeat it wrong"[63]. Subversive gender practices not only set bodies free both from restrictive gender roles but also "reveal that gender produces the illusion that male and female bodies exist in nature"[64] and facilitate catharsis as a necessary step toward reform for greater gender justice. Gender non-conforming, transgender, and intersex individuals have been troubling gender for quite some

[58] J. Butler, *ibidem* note 24, p. 404.
[59] J. Butler, *ibidem* note 24, p. 404.
[60] J. Butler, *Bodies That Matter: On the Discursive Limits of "Sex",* Routledge, New York, 1993, p. 5.
[61] J. Weiss, *ibidem* note 37, p. 161.
[62] J. Weiss, *ibidem* note 37, p. 162.
[63] J. Halley, *ibidem* note 11, p. 138.
[64] J. Halley, *ibidem* note 11, p. 138.

time.[65] Cis-gender bodies now have the opportunity to draw upon their insights and together, in the interest of all, strive to abolish mandatory sex registration on official identity documents since only that option is in line with a performative understanding of sex/gender and would more readily allow for rebellious gender embodiments. Indeed, only when the law goes beyond the 'X' framework, it will cease to adhere to a biological conception of gender (albeit a non-binary one) and thereby quit to perpetuate, sustain, and reinforce the heterosexual matrix. So long as the law engenders bodies, so long as it sexes bodies, it will be complicit in justifying both material and discursive gender violence, detrimental to all.[66]

The steady pace with which claims for genderless identity documents have emerged around the world in the past few years, the increased (inter)national attention to, and acceptance of sexual minorities' rights, including "reforms which attenuate gender-based forms of differentiation, such as same-sex marriage and shared parental leave"[67], suggests that States where the question has not yet been raised are very likely to be confronted with it in the (near) future. And as the saying goes, forewarned is forearmed. Existing research regarding the possible future (abolition) of gender markers has either been written from a strictly doctrinal perspective or only gave a brief account of the philosophical frameworks that provided inspiration (although in most cases, it is possible to detect an underlying performative, rather than biological, understanding of gender and thus an implicit acceptance of queer feminist theorizing).[68] This dissertation aims to provide the philosophical or theoretical framework underlying the various claims for genderless identity documents that have recently been made in several national courts, as well as in parliaments and on the streets. My hope is that, if provided with the necessary conceptual tools to make sense of these claims, judges, lawmakers, and the general public will better understand and appropriately accommodate them given that they are not only in the interest of sexual minorities but in the interest of society at large since they serve gender equality.

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[65] See, C. QUEEN, L. SCHIMEL, K. BORNSTEIN, *PoMoSexuals: Challenging Assumptions about Gender and Sexuality*, Cleis Press, San Francisco, 1997.
[66] D. OTTO, *ibidem* note 15, p. 318; A.J. NEUMAN WIPPLER, *ibidem* note 7, p. 492; W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review*, 2015, vol. 15, p. 2.
[67] D. COOPER, F. RENZ, *ibidem* note 28, p. 485.
[68] For examples, see: M. VAN DEN BRINK, J. TIGCHELAAR, *M/V en verder: Sekseregistratie door de overheid en de juridische positie van transgenders*, 2014, available at <https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf> (last consulted February 2, 2019); INTERNATIONAL CIVIL AVIATION ORGANIZATION, *A Review Of The Requirement To Display The Holder's Gender On Travel Documents*, 20 November 2012, TAG/MRTD/21-IP/4, available at <https://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-21/Tag-Mrtd21_IP04.pdf> (last consulted February 2, 2019); D.B. CRUZ, *ibidem* note 27, pp. 1054-1061; A.J. NEUMAN WIPPLER, *ibidem* note 7; B. PICARD, *ibidem* note 36, pp. 135-137.

In order to do so, I will first demonstrate the (implicit) gender binarity and biological conception of sex/gender enshrined in international law (Chapter I, Section A). In Section B, I will provide an overview of the recent developments in the international, European, and various domestic legal orders, which mark the beginning of a performative account of sex/gender in law. I am not implying that these developments indicate that the law has now turned away from a biological conception of sex/gender. However, they do suggest that the rigid biological and binary sex/gender vision traditionally present in law faces the beginning of erosion.

In Chapter II, I dive into feminist legal theory. Although feminists have always been eager to disjoin sex and gender and thereby condemn the social construction of femininity as inferior to masculinity, first and second wave feminists (legal theorists) continued to adhere to a biological and binary conception of sex, as Section A will relate. In Section B, I will comment on black and queer feminists' anti-essentialist critique, emerging in the 1990s and eventually leading to a performative understanding of sex/gender.

Finally, in Chapter III, I apply this theorizing to the current practice of mandatory binary sex/gender registration and argue that States may in all seriousness want to consider halting to certify sex/gender on identity documents. I will also refute several of the socio-political and legal arguments set forth against the abolition of sex/gender registration and conceptualize the State's future regulation of gender whenever and if mandatory sex/gender registration becomes passé.

Methodologically speaking, I performed interdisciplinary research by adopting the 'law as humanities' approach, which combines the legal discipline with other interpretative sciences such as philosophy and gender studies. Since both the legal discipline and philosophy are normative sciences, the used method(s) tend to be similar, i.e. they draw valid inferences from the analysis of (legal) texts. As any legal research methodology other than the disciplinary one, the 'law as humanities' methodology considers that a mere legal or doctrinal analysis does not suffice to unravel the sense of the matter. Hence, my research involved not only doctrinal analysis of the above-mentioned case law and various legal texts but also conceptual or theoretical analysis of the notions of "sex" and "gender" by sameness, cultural, radical, anti-essentialist and queer feminist jurisprudence. I then confronted the legal primary sources with the various strands within feminist jurisprudence and found that the law has so far been

relying on a biological conception of sex/gender as developed by sameness, cultural and radical feminists. Subsequently, I concluded by abductive inference that the recent legal developments and claims for genderless identity documents were inspired by queer feminist theory. Finally, I applied these queer feminist insights concerning the performativity of sex/gender to the doctrinal analysis performed before and was able to answer my research question of how to best make sense of the recent legal claims for genderless identity documents.

Chapter I. Biological sex/gender in law: a solid rock facing erosion

Almost all contemporary legal systems around the world – and by extension also the international legal order – categorize individual legal persons as biologically male or female.[69] Where civil registers are held, the civil registrar is often required to determine the newborn's sex, typically based on inspection of its genitals.[70] The law thereby rests upon an "idealized, Platonic, biological world, [in which] human beings are divided into two kinds: a perfectly dimorphic species"[71]. Indeed, infants with so-called natural male primary sexual characteristics, chromosomes and gonads are labeled M(ale) and expected to embody masculinity (i.e. to be *men*), while infants with so-called biological female primary sexual characteristics, chromosomes and gonads are labeled F(emale) and excepted to embody femininity (i.e. to be *women*).[72] For the law, there are no in-betweens; males are innately men and desire females, which are inherently women and desire men.[73] Sex and gender (or better even, sex/gender) intuitively intertwine, as if a gift of God himself.[74]

Whereas intersexuality, transsexuality, and gender queer identities have existed throughout history, it can be argued that these phenomena only recently became problematic for (international) law. As Visser and Picarra noted, prior to the 1950s, when surgical sex reassignment was not yet possible, these matters were dealt with by culture. Indeed, "whether it is the Sererr of the Pokots of Kenya, the Xaniths of Islamic Oman, the Mahu of Tahiti, or even the Sekrata of Madagascar, the story is essentially the same: transsexuality was a fact of life, and a place in society was made for the gender dysphoric to be themselves"[75] – or, in western societies, to be excluded and sent to the margins of social existence.[76] However, once individuals underwent sex reaffirming surgery (SRS), they also needed "an amendment of the

[69] C. Visser, E. Picarra, *ibidem* note 10, p. 516.
[70] S.M. Lake, "The Right to Gender Self-Identification Post-Obergefell", *The Western Michigan University Cooley Journal of Practical & Clinical Law*, 2018, vol. 19, p. 296.
[71] A. Fausto-Sterling, *ibidem* note 31, p. 20
[72] Scientific literature seems to agree that there are currently eight factors determining "sex", namely chromosomes, antigens, gonads, hormones, internal morphology, external morphology (which includes the presence of a penis or vagina), phenotype, assigned sex, gender of rearing and finally sexual identity (see, J. Greenberg, "Defining Male and Female: Intersexuality and the Collision between Law and Biology", *Arizona Law Review*, 1999, vol. 41, p. 278). Yet, generally, for the purposes of establishing a birth certificate, "the existence of a penis or a vagina is deemed to settle the sex of the person whose body is at issue". See, California Law Review, *ibidem* note 10, p. 20.
[73] California Law Review, *ibidem* note 10.
[74] D.B. Cruz, *ibidem* note 27, p. 1003.
[75] C. Visser, E. Picarra, *ibidem* note 10, p. 515.
[76] See, S. Stryker, "(De)Subjugated Knowledges: An Introduction to Transgender Studies", in S. Stryker, S. Whittle (eds.), The Transgender Studies Reader, Routledge, New York, 2006, pp. 1-18.

legal identity established by the biological sex recorded at birth on [their] birth certificate"[77], which on its turn raised other legal question such as whether post-operative transsexual individuals could remain married to their partner (as they had been before the SRS), given the at the time universal prohibition of same-sex marriages.[78]

In certain legal orders, solutions have been found for the legal complexities that transsexuality seemed to create. However, they remain premised on a biological conception of sex/gender, which means that gender (identity) is perceived as being based in, or acting upon a naturally given, that is fixed, and binary sex.[79] Indeed, forced sterilization and SRS often remain preconditions for a legal sex change, indicating that in law, gender (identity) is linked to biologically, seemingly easily determinable, and oppositional sex.[80] Section A of this Chapter analyzes the traces of this biological conception of sex/gender in international treaty provisions (sub-section 1) and international soft law (sub-section 2). Recently, however, several legal developments pertaining to identity documents on the national, European, and international level have challenged this biological understanding of sex/gender, i.e. its naturalness or stability and binary interpretation. These developments indicate that the law's biological conception of sex/gender, long taken as an undisputed, foundational premise, faces the beginning of erosion as outlined in Section B.

Section A. Natural, oppositional and hierarchized sex: a cornerstone of international law

Although Picara and Visser state that "*all legal systems in the world* have developed from the basic premise that the legal subject is immutably either biologically male or female from

[77] C. VISSER, E. PICARRA, *ibidem* note 10, p. 516.
[78] For a well-known example in the US legal order, see *Littleton v. Prange*, 9 S.W.3d 223, 223 (Tex. App. 1999), in which the Texas Court of Appeals had to confront "the deeper philosophical (and now legal) question [of whether] a physician [can] change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth? The answer to that question has definite legal implications that present themselves in this case involving a person named Christie Lee Littleton". Christie Lee Littleton was a post-operative transsexual male to female, who married and lived with her husband Jonathan. When he died, she brought a claim as his surviving spouse, which led the Court to assess whether or not their marriage had been valid. In the end, the Court considered Christie to be male because of her XY chromosomes despite the fact that she had been living as a female throughout her life and had undergone sex reassignment surgery. The Court concluded that as a male, she could not have been legally married to Jonathan, another male, and therefore dismissed her claim as his surviving spouse.
[79] D. OTTO, *ibidem* note 15, p. 302.
[80] In 2016, 21 out of the 41 European States that allowed legal sex change required sterilization as a precondition for legal gender recognition, while many other States require a medical diagnosis of gender dysphoria (before SRS as a requirement) prior to legal sex change. See, R. KÖHLER, J. EHRT, C. COJOCARIU, *Legal Gender Recognition in Europe*, TGEU (ed.), 2016, pp. 23 and 25, available at <https://tgeu.org/wp-content/uploads/2017/02/Toolkit16LR.pdf> (last consulted February 15, 2019).

birth"[81], arguing that a biologically oppositional and hierarchized conception of sex/gender is to be found in (*the*) law is a statement so general, abstract or broad that any meaningful attempt to demonstrate it would necessitate either jurisdictionally delimitating the scope of the analysis or assessing all legal systems around the world. Undeniably, this is an impossible task. Leaving aside cultural relativist criticisms of international law, I therefore decided to specifically focus on international law since that branch of law aspires in its essence to be universal. Indeed, it is the law to be applied inter-nation-ally, that is, "[applying] equally to all parties or states"[82] and consequentially to most individuals throughout the world. Hence, by describing how a biological conception of sex/gender is deeply embedded in international law, I am able to (at least to a certain extent) legitimately claim that *the* law conflates sex, gender, and sexual identity and thereby attributes a (hetero-) sexual identity to individuals, which makes it complicit in sustaining the heterosexual matrix as the ideological basis for gender injustice (cf. Chapter II). Indeed, national legal systems theoretically ought to conform to international law, meaning that if a biological conception of sex/gender is found in international law, one should be able to find traces of it in domestic orders too.

International law has traditionally been very reluctant to accept that "neither sex or gender exists prior to regulatory discourses which make certain permutations of gender intelligible (normal) and dismiss others that fall outside the m/f binary, in various ways, as abnormal"[83]. In line with Otto, I argue that this is precisely because international law is one of the regulatory discourses that institute a biological conception of sex/gender, as will be elaborated in Chapter III. Indeed, "identity categories tend to be the instruments of regulatory regimes"[84] and as will be demonstrated in the following sub-sections, international law has traditionally recognized sex as an identity category to be defined dualistically (one is either a man or a woman) and asymmetrically (masculinity is superior to femininity), which is moreover grounded in nature (i.e. which is not socially constructed but can simply be found through physical examination).[85]

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[81] C. VISSER, E. PICARRA, *ibidem* note 10, p. 516 (emphasis added).
[82] A. ROBERTS, *et al.*, "Comparative International Law: Framing The Field", *The American Journal of International Law,* 2015, vol. 109, p. 467.
[83] D. OTTO, *ibidem* note 15, p. 300.
[84] J. BUTLER, *ibidem* note 60, p. 15.
[85] D. Otto provides a useful schema in D. OTTO, *ibidem* note 15, p. 302:

International law's historical approach to sex/gender*: legitimated by (bio)logic*
m/f (dualism) – nature
m>f (hierarchy/asymmetry) – nature

Thanks to feminist lobbying, the term "gender" has been formally included in international law's vocabulary since the 1995 Fourth Conference on Women in Beijing. To a certain degree, this led the international community to recognize that the alleged hierarchy between men and women is the result of nurture rather than nature and, by consequence, that gender is socially constructed.[86] Although the asymmetry or hierarchy between women and men has (effectively) been challenged in part due to this recognition and because international human rights law prohibits discrimination on the basis of sex, the naturalness and dualism of sex underpinning international law have gone unchallenged and are maintained, as will be indicated in the following sub-sections.[87] Indeed, the idea that gender is to be found in (or constructed upon) a biologically fixed sex, which is perceived as naturally binary, guides several hard law and even soft law provisions that aim at promoting the rights of sexual minorities and gender justice.

(1) Stable and dualistic sex in treaty law

An explicit example of the law as regulatory discourse adhering to a biological conception of sex/gender is found in Article 7 §3 of the *Rome Statute of the International Criminal Court*, which stipulates that "the term '*gender*' refers to the two *sexes*, male and female"[88]. Moreover, the drafters deemed it necessary to add in the same paragraph that "the term 'gender' does not indicate any meaning different from the above". This suggests that the Rome Statute does not only understands gender as that which is to be found in dualistically defined biological sex (i.e. that it equates gender with sex) but also that it requires, imposes, or forcefully restricts its subjects to identify themselves either as men because they are said to be male or as women because they are said to be female. O'Brien, an academic intersex advocate, concludes that "the highly prescriptive biological determinism in this Statute expressly denies the possibility of any sex other than male or female (…) with departures from [the] definition impermissible"[89].

[86] D. Otto, "Holding up Half the Sky, but for Whose Benefit: A Critical Analysis of the Fourth World Conference on Women", *Australian Feminist Law Journal*, 1996, vol. 6, p. 11.
[87] D. Otto schematizes this in D. Otto, *ibidem* note 15, p. 305:

International law's 'feminist' approach to sex/gender: *social constructivism acts upon biological base*
maintain m/f (duality) – nature
challenge m>f (hierarchy) – nurture

[88] Rome Statute of the International Criminal Court, adopted July 17, 1998, entered into forced July 1, 2002, Article 7, paragraph 3, UNTS, vol. 2187, p. 94.
[89] W. O'Brien, *ibidem* note 66, p. 5.

The positive impact that the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*[90] has had on the lives of many women and girls did not prevent Rosenblum from affirming that "the Convention, despite its focus on women's rights, is also the preeminent treaty on gender inequality"[91]. Indeed, whereas the prohibition of discrimination on the basis of 'sex' enshrined in the Universal Declaration of Human Rights[92] (UDHR) could potentially and retrospectively have been used to combat the unequal enjoyment of rights on the basis of any aspect of (non-conventional) sexual identity, i.e. including intersexuality, transsexuality, transgender identity, and non-heterosexuality, the Preamble to CEDAW reads into this prohibition a desire to strive for "the equality of rights *of men and women*" and recalls that "discrimination against women (…) is an obstacle to the participation *of women on equal terms with men*"[93]. The Convention thereby "performs a crucial move from a universalist frame that could include different sexes to a binary one that asserts both the existence of only two sexes and the normative desirability of equality between them."[94] This is unsurprising, since "CEDAW bears the marks of a feminist structuralism that imagines an institutionalised [sic] inequality on the basis of women and men's differentially produced biological 'sex'"[95]. Indeed, one could typically read in second wave feminist legal advocacy, by which CEDAW was inspired, that "long-term domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while 'women's concerns' are relegated to a special, limited category. Because men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored."[96] CEDAW was welcomed as a treaty finally addressing violence against women, strategically done through the notion of discrimination on the basis of sex.[97] As a consequence, however, in international law, discrimination based on sex now became conceptually linked to discrimination against women.[98] Yet, by linking *sex* (discrimination) to (discrimination against) '*women'*, CEDAW

[90] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted December 18, 1979, entered into force September 3, 1981, UNTS, vol. 1249, p. 14.
[91] D. ROSENBLUM, "Unsex CEDAW, or What's Wrong with Women's Rights", *Columbia Journal of Gender and Law*, 2011, vol. 20, n°2, p. 100.
[92] UDHR, adopted 10 December 1948, UNGA Res 217 A(III), Article 2.
[93] CEDAW, adopted December 18, 1979, entered into force September 3, 1981, Preamble, UNTS, vol. 1249, p. 15.
[94] D. ROSENBLUM, *ibidem* note 91, p. 125.
[95] T. DREYFUS, "The 'Half-Invention' of Gender Identity in International Human Rights Law: from CEDAW to the Yogyakarta Principles", *Australian Feminist Law Journal*, 2012, vol. 37, p. 41.
[96] C. CHINKIN, H. CHARLESWORTH, S. WRIGHT, "Feminist approaches to international law", *American Journal of International Law*, 1991, vol. 85, p. 625.
[97] K. MCNEILLY, *ibidem* note 18, p. 271.
[98] T. DREYFUS, *ibidem* note 95, p. 41.

confuses sex and gender and thereby not only perpetuates but also re-inscribes and reinforces a biological conception of sex/gender in international law. To state it differently, although a treaty aimed at promoting gender justice, CEDAW (re)naturalized and (re)binarized sex/gender in law, which is considered by many precisely as the source of gender injustice (cf. Chapter II).[99]

A biological conception of sex/gender, i.e. the fact that gender is considered to correspond to naturally fixed and binary sex, is equally found in several conventions of the International Commission on Civil Status (ICCS), which has the task to develop conventions to harmonize rules on matters relating to civil status.[100] The *Convention concerning the Issue of Plurilingual Extracts from Civil Status Records* of 1976 affirms in Article 5 §4 that "to indicate gender the following symbols *only* shall be used: M = male, F = female"[101]. Here, again, we do not only find a naturalization of gender but also an exclusively binary conception of it. Whereas it is now commonly agreed that the terms 'man' and 'woman' relate to gender, while the terms 'female' and 'male' refer to sexes, the Convention seems to automatically link so-called biologically male bodies to the masculine and so-called biologically female bodies to the feminine, meaning that it confuses sex and gender and thus rests upon a biological conception of sex/gender. The use of the word "only" or "exclusivement" in the French version of the text (which has an even more compelling connotation) hints at the fact that for the Convention, sex is binary and does not allow any deviation. This idea was confirmed in the 2000 *Convention on the Recognition of Decisions Recording a Sex Reassignment*, which affirms in Article 2 that a Contracting Party may decide not to recognize a foreign decision recording a legal sex change in case "the physical adaptation of the person concerned has not been carried out and has not been recorded in the decision in question"[102]. Although certain European States, which ratified this Convention, now have legislation allowing for legal gender identity recognition without SRS, the Convention nevertheless requires SRS as a necessary condition for the international recognition of a legal sex change. Again, this indicates that for this treaty, gender (identity)

[99] D. Otto, *ibidem* note 15, pp. 306-309.
[100] General Assembly of the ICCS, Rules of the International Commission on Civil Status, as amended September 16, 2015, entered into force January 1, 2016, Article 1, available at <http://www.ciec1.org/SITECIEC/Page_Statuts/xBUAALPyTgxXRVFheVZhcFhCIgA> (last consulted February 16, 2019).
[101] Convention concerning the Issue of Plurilingual Extracts from Civil Status Records, adopted September 8, 1976, entered into force July 30, 1983, Article 5, paragraph 4, UNTS, vol. 1327, p. 17.
[102] Convention on the Recognition of Decisions Recording a Sex Reassignment, adopted September 12, 2000, entered into force March 1, 2011, Article 2, UNTS, I-54427, p. 6. The UNTS only provides the authentic version of the Convention, which is in French. An English version of the text is available on the ICCS' website.

equals or ought to align with sex, meaning that it is informed by a biological conception of sex/gender.

Finally, several *International Labor Organization (ILO) Conventions* aim to protect women and therefore contain gender-specific provisions. Whereas certain Conventions, such as Convention n°156, refer to 'sex' without further defining it or restricting it to a binary interpretation (nor linking it to the term 'gender'), both Conventions n°3 and n°183 walked into the trap of a biological conception of sex/gender by stating that "for the purpose of this Convention, the term *woman* signifies any *female* person"[103]. Here again, these provisions of international law confuse sex (female/male) and gender (woman/man), and thereby assert that gender is to be found in, or acts upon, physiology.

(2) Stable and dualistic sex international soft law

Although not exhaustive, the previous sub-section made clear that many provisions of treaty law, that is, law binding the Contracting Parties, are either inspired by, reproduce, or impose a biological conception of sex/gender. Likewise, such understanding of sex/gender can be found in several instruments of international soft law, even though some of these explicitly campaign for the emancipation of sexual minorities, that is, for gender justice.

The 2007 *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*[104] (Yogyakarta Principles) are the most evident instrument of soft law pertaining to the rights of sexual minorities. After several international human rights bodies started dealing with human rights abuses because of their actual or perceived sexual orientation and gender identity (SOGI), the need for a coherent and comprehensive overview of the application of international human rights law to SOGI concerns led the International Commission of Jurists and the International Service for Human Rights to organize a conference in Yogyakarta, Indonesia, where human rights experts made "an attempt to reflect these changes in a codified body of law"[105]. The experts included one former

[103] International Labor Organization (ILO), Convention concerning the Employment of Women before and after Childbirth (n°3), adopted November 29, 1919, entered into force June 13, 1921, Article 2; ILO, Convention concerning the revision of the Maternity Protection Convention (n°183), adopted June 15, 2000, entered into force February 7, 2002, Article 1.
[104] Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), adopted March 2007, available at <http://yogyakartaprinciples.org/> (last consulted March 2, 2019).
[105] D. Brown, "Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles", *Michigan Journal of International Law*, 2010, vol. 31, p. 824.

UN High Commissioner for Human Rights, thirteen current or former UN Special Procedure mandate holders or treaty body members, judges of national courts, and academics.[106] Even though right after their adoption Brown (correctly) argued that "the Principles are not a simple restatement of settled law as they purport to be, but rather a part of this process of advancement"[107], the Principles certainly exerted remarkable influence on international policy with regard to SOGI matters over the last twelve years. First, the Principles are often cited by the Human Rights Council (HRC)'s Special Procedure mandate holders in their reports[108] and they are increasingly used by Member States as a yardstick for evaluating their peers during the HRC's Universal Periodic Review[109]. Second, the European Parliament has endorsed the Principles and countries such as Argentina, Belgium, Brazil, Canada, the Netherlands, the UK, and Uruguay have welcomed them as a source of inspiration for their foreign policy.[110] Moreover, several domestic courts, amongst which the Indian[111] and Nepali[112] Supreme Court, the British High Court of Justice[113], and a Dutch court of first instance[114] have also referred to the Principles in their judgements, as have the European Court of Justice (be it in a footnote pointing out the fact that the UNHCR now relies upon the Yogyakarta Principles)[115] and the European Court of Human Rights (be it in a dissenting opinion by Judges Sajó, Keller, and Lemmens)[116]. Furthermore, the principles have inspired the Council of Europe's Committee of Ministers to adopt Recommendation CM/Rec(2010)5[117] on measures to combat discrimination

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[106] M. O'Flaherty; J. Fisher, *ibidem* note 22, p. 233.
[107] D. Brown, *ibidem* note 105, p. 824.
[108] Including the Special Rapporteur on the rights of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. See, M. O'Flaherty, "The Yogyakarta Principles at ten", *Nordic Journal of Human Rights*, 2015, vol. 33, p. 289.
[109] M. O'Flaherty, *ibidem* note 108, p. 289.
[110] M. O'Flaherty, *ibidem* note 108, p. 287.
[111] Supreme Court of India, *National Legal Services Authority v. Union of India & Ors.*, AIR 2014 SC 1863, available at <https://www.sci.gov.in/jonew/judis/41411.pdf> (last consulted March 1, 2019).
[112] Supreme Court of Nepal, *Sunil Babu Pant and Others v. Nepal Government and Others* case, available in *National Judicial Academy Law Journal*, 2008, vol. 2, pp. 261-286 or <https://www.icj.org/wp-content/uploads/2012/07/Sunil-Babu-Pant-and-Others-v.-Nepal-Government-and-Others-Supreme-Court-of-Nepal.pdf> (last consulted March 1, 2019).
[113] High Court of Justice, *R (on the application of Christie Elan-Cane) v. Secretary of State for the Home Department*, [2018] EWHC 1530 (Admin), available at <https://www.judiciary.uk/wp-content/uploads/2018/06/r-otao-christie-elan-cane-and-sshd-approved-judgment.pdf> (last consulted March 2, 2019).
[114] Rechtbank Limburg, May 25, 2018, *ECLI:NL:RBLIM:2018:4931*, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2018:4931> (last consulted February 27, 2019).
[115] European Court of Justice (ECJ), C-199/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, July 11, 2013.
[116] European Court of Human Rights (ECtHR), *Hämäläinen v. Finland*, Application n° 37359/09, July 16, 2014.
[117] Committee of Ministers, Council of Europe Recommendation CM/Rec(2010) 5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, available at <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a> (last consulted February 19, 2019).

on grounds of sexual orientation or gender identity,[118] and have also been endorsed by the Council of Europe's Commissioner for Human Rights[119].

Although more could be said about the (relative) success of the Yogyakarta Principles, for the purpose of this dissertation it is more important to point out that the Preamble to the Yogyakarta Principles defines the terms sexual orientation and gender identity in order to establish their personal scope of application.[120] Gender identity is said to be "each person's *deeply felt internal* and *individual* experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms"[121]. Although the Yogyakarta Principles disjoin sex at birth assigned and gender identity, and emphasize that everyone has a gender identity (so to prevent the conceptual linkage of *gender identity* with *trans*gender people in the same way as the international legal lexicon equated *gendered violence* with *violence against women* as if gender was experienced by women only), it has been noted that the Yogyakarta Principles in fact "still hold onto a physiological base"[122] for gender and thereby risk to perpetuate a biological conception of sex/gender. Indeed, gender (identity) is portrayed as something deeply felt, internal, and individual, an "inherent characteristic – both innate and unitary. This approach excludes those who experience their gender as shifting or multiple, as well as those who identify as some combination or blurring of male and female"[123]. By focusing on trans rights, the Yogyakarta Principles thus (unconsciously) re-establish gender binarity and by stressing its deeply felt internal nature, they fail to account for the socially constructed nature of gender, i.e. they do not "acknowledge the influence of social context on the way that gender is understood and expressed"[124]. As a consequence, the Principles "[serve] to reinstate (bio)logic which, in turn, re-naturalises [sic] the gender binary"[125]. To state it differently, a certain biological conception of sex/gender premised on the naturalness and binarity of sex/gender can be found even in

[118] M. O'Flaherty, *ibidem* note 108, p. 291.
[119] Commissioner for Human Rights, Issue Paper, *Human Rights and Gender Identity*, 2009, p. 6, available at <https://rm.coe.int/16806da753> (last consulted February 19, 2019).
[120] M. O'Flaherty, *ibidem* note 108, p. 284.
[121] Yogyakarta Principles, *ibidem* note 104, Preamble (emphasis added).
[122] D. Otto, *ibidem* note 15, p. 312.
[123] D. Otto, *ibidem* note 15, p. 313.
[124] D. Otto, *ibidem* note 15, p. 313.
[125] D. Otto, *ibidem* note 15, p. 313.

international soft law purposefully aiming to weaken the rigidity of the cultural and legal heterosexual command.

Finally, the International Civil Aviation Organization's (ICAO) – a specialized UN agency responsible for international civil aviation standards and recommended practices – *Document 9303 on Machine Readable Travel Documents*[126] has often been referred to as the main obstacle of international soft law with regard to genderless identity documents. Although ICAO guidelines are not binding, States adhere to these recommendations since they significantly facilitate air travel. The Machine Readable Travel Documents guidelines consider 'sex' as a mandatory field to be displayed on internationally valid passports. This means that if a passport does not mention the category 'sex' or a specific indicator where the sex of the passport-holder is to be displayed, the document cannot be read by machines (which decreases security and increases queuing time during identity verification procedures). In 2012, New Zealand conducted research as to the associated benefits and costs of changing the policy of mandatorily displaying sex on Machine Readable Official Travel Documents (MROTDs). It concluded that the expenses related to the adaptation of software, as well as the complications to border operations outweighed the claims of transgender passengers for genderless identity documents.[127] Therefore, unless ICAO updates its guidelines in line with the considerations set out in Chapter III, genderless passports seem unlikely to become reality in the near future.

Nevertheless, *Document 9303* does allow States to use the sex/gender marker X instead of F or M. Although the use of X may hint at a non-binary conception of sex/gender, the guidelines provide that X is used in instances "where a person does not wish his/her sex to be identified or where an issuing State or organization does not want to show this data"[128]. While the guidelines do not explicitly confuse sex and gender (as they never refer to woman or man, but only to male and female), they do adhere to a binary conception of sex. Indeed, according to the guidelines, X does not refer to a third category of sex but means that the otherwise

[126] International Civil Aviation Organization (ICAO), Machine Readable Travel Documents: Part 6 Specifications for TD2 Size, Doc 9303, 7th Edition, 2015, available at <https://www.icao.int/publications/Documents/9303_p6_cons_en.pdf> (last consulted February 16, 2019).
[127] Technical Advisory Group on Machine Readable Travel Documents (ICAO), Information paper, TAG/MRTD/21-IP/4, 2012, available at <https://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-21/Tag-Mrtd21_IP04.pdf> (last consulted February 16, 2019), p. 2.
[128] ICAO, *ibidem* note 126, p. 16.

naturally binary sex category is 'unspecified'. Thus, here too (although to a lesser extent) a biologically binary understanding of sex/gender is enshrined in international soft law.

Section B. Recent legal claims for genderless identity documents or third gender recognition: crumbling the system

As indicated in the previous section, for a long time, "the law largely [assumed], or explicitly [required], that sexes (bodies) be registered as either male, or female. Bodies that might be better described in terms of 'and', 'both' or 'neither' are unintelligible"[129]. Moreover, when it came to combat gendered inequality through law, the fight was framed as one between males and females and the overall aim was to dismantle the privilege attached to masculinity, 'naturally' embodied by male bodies. Yet, "the question that weighs increasingly heavily is whether dualism and asymmetry provide the best way to pursue the emancipatory possibilities for everyone, including ciswomen, that are opened up by the recognition that gender is primarily (if not entirely) a social category"[130]. Advocates for gender equality around the world understood that the reiteration of a biological conception of sex/gender in law overlooks "the dynamic and interwoven performative relationships between sexed bodies and identities"[131], as well as the "exclusionary and disciplinary effect of understanding sex/gender as always tied to a biological base, which prevents a full understanding of the way that sex/gender operates as a technology of power"[132], as will be discussed in Chapter II. Based on these insights, these advocates have challenged the biological conception of sex/gender in law by claiming either genderless identity documents or the recognition of a third gender category at the national level (sub-section 1), both in courts and through legislation, at the regional level (sub-section 2), and at the international level (sub-section 3). Although not fully disintegrating a biological conception of sex/gender, these legal developments concerning identity documents pave the way for incorporating a performative conception of sex/gender in law, which will be outlined in the next Chapter and better serves gender justice in the interest of all. These developments indicate that biological sex/gender as a cornerstone of international law faces erosion.

[129] W. O'Brien, *ibidem* note 66, p. 5.
[130] D. Otto, *ibidem* note 15, p. 306.
[131] D. Otto, *ibidem* note 15, p. 307.
[132] D. Otto, *ibidem* note 15, p. 307.

(1) Legal developments at the national level

Several jurisdictions have recently introduced genderless identity documents. Alternatively, they have allowed individuals to opt for a third sex/gender category, which generally takes the form of 'X'. In some these jurisdictions, the gender marker 'X' hints at the fact that the individual is of a genuine 'other' or third gender[133]; in others it means that the sex/gender entry is 'indeterminate' or 'unspecified'[134]; and in still other jurisdictions, it implies that the individual's sex/gender is 'inter' M and F[135].

Where introduced, such change in policy has been the direct consequence of transsexual, transgender, and intersex individuals challenging the practice of mandatory and binary sex/gender registration before Court, or the result of the State's willingness to meet the pleas of civil society organizations and gender equality advocates. Given that such reforms either depart from the idea that the government should not 'gender police', nor 'sex' bodies, or should at least recognize that sex/gender is not binary, they besmirch the biological conception of sex/gender upon which the international legal system and many provisions within domestic legal orders still rest, as demonstrated in the previous section. Genderless identity documents or identity documents allowing for a third sex/gender category are currently issued in Australia[136], Austria[137], Canada[138], Denmark[139], Germany[140], India[141], Malta[142],

[133] M. KUMAR SAHU, "Case Comment on National Legal Services Authority v. Union of India & Others (AIR 2014 SC 1863): A Ray of Hope for the LGBT Community", *BRICS Law Journal*, 2016, vol. 3, p. 174.
[134] A. ARDILL, "Gender: Developments in Australian Law", 2017, *The Journal Jurisprudence*, vol. 31, pp. 38-39.
[135] VERFASSUNGSGERICHTSHOF ÖSTERREICH, *VfGH Press Release G 77/2018*, 2018, available at <https://www.vfgh.gv.at/downloads/Press_release_G_77-2018_Intersex_persons_EN.pdf> (last consulted March 2, 2019).
[136] See, Annex.
[137] Vfgh, G 77/2018-9, June 15, 2018, available at <https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_77-2018_unbestimmtes_Geschlecht_anonym.pdf> (last consulted March 2, 2019).
[138] See, Annex.
[139] See, footnote 45.
[140] BVerfG, Order of the First Senate of 10 October 2017 - 1 BvR 2019/16, available at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html;jsessionid=BA94BDE52CF0A0925FA689ADF67A17FF.2_cid361> (last consulted March 2, 2019).
[141] See, Annex.
[142] See, Annex.

Nepal[143], the Netherlands[144], New Zealand[145], Pakistan[146], and the US[147]. Although mandatory binary sex/gender registration has also been challenged in the UK and France, both claims were rejected since national courts did not find this type of registration to be in breach of the European Convention on Human Rights (ECHR).[148] In the following sub-sections, the relevant case law in Germany, Austria, UK, and France will be analyzed because they are very recent developments and offer conflicting views with respect to the (non) violation of the ECHR. Unfortunately, space constraints prevent me from providing a detailed account of the legal developments in the other mentioned countries, even though a short overview is provided in the Annex to this dissertation.

(i) Germany

In 2009, the Committee on the Elimination of Discrimination against Women requested Germany to engage with civil society organizations in order to better accommodate the human rights claims of trans- and intersex people.[149] As a result, the German Ethics Council prepared a report in which it suggested that "as a basis for future decisions on legislation, the purposes of compulsory registration as provided by current law should be evaluated. A review should be undertaken to determine whether the recording of a person's sex in the civil register is in fact still necessary"[150]. As long as registration remains mandatory, however, the Council stated that legal measures should be taken to allow people to identify as 'other' and for intersex individuals "not to be registered until they have decided for themselves"[151]. As a result, Article 1 §6 b) of the Act to Amend Civil Status Law of May 7, 2013, provided that newborns should be

[143] See, Annex.
[144] In the Netherlands, Leonne Zeegers became the first Dutch citizen to obtain a passport with X as sex/gender marker on May 28, 2018, after a judge found that Article 8 of the ECHR imposes a positive obligation upon the State to recognize the applicant's non-binary gender identity. As a consequence, Dutch passports can now be issued with a third category sex/gender marker, upon court order. See, Rechtbank Limburg, May 25, 2018, *ECLI:NL:RBLIM:2018:4931*, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2018:4931> (last consulted February 27, 2019).
[145] See, Annex.
[146] See, Annex.
[147] See, Annex.
[148] High Court of Justice, *R (on the application of Christie Elan-Cane) v. Secretary of State for the Home Department*, [2018] EWHC 1530 (Admin), available at <https://www.judiciary.uk/wp-content/uploads/2018/06/r-otao-christie-elan-cane-and-sshd-approved-judgment.pdf> (last consulted March 2, 2019); Cour de Cassation, Première Chambre Civile, Arrêt n° 531 (16-17.189), May 4, 2017, available at <https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/531_4_36665.html> (last consulted March 2, 2019).
[149] Committee on the Elimination of Discrimination against Women, Concluding Observations, February 12, 2009, CEDAW/C/DEU/CO/6, §62.
[150] BVerfG, *ibidem* note 136, p. 6, §5.
[151] BVerfG, *ibidem* note 136, p. 6, §5.

registered as male or female but that the entry indicating sex/gender may be left open when an infant's sex/gender cannot be determined.

In *1 BvR 2019/16*, the German Constitutional Court found in favor of an intersex plaintiff who argued that the amended Civil Status Act violated their constitutional right to personality and equal treatment.[152] The Act was declared unconstitutional "insofar as it imposes an obligation on persons to state their gender and does not allow for a positive gender entry other than 'female' or 'male' for persons whose gender development deviates from female or male gender development and who permanently identify as neither male nor female"[153]. The Court premised its reasoning on the idea that "the assignment of gender is of paramount importance for individual identity"[154] and that the right to personality does not only protect the manifestation of masculine gender identity and feminine gender identity but also gender identities that fall outside the gender binarity.[155] Because the law under review does not allow for a positive entry other than M, F, or leaving the sex/gender entry open or blank (which according to the Court incorrectly suggests that the applicant has not yet found his/her/their gender or that he/she/they identifies as genderless), "the complainant must tolerate an entry that does not correspond to their constitutionally protected gender identity"[156]. Since legal gender recognition has an expressive and identity-building character, the State's failure to positively recognize the applicant's self-determined sex/gender while at the same time requiring sex/gender registration results in the violation of the constitutional right to personality. The Court notes incidentally that "the entry under civil status law in itself only takes on specific significance for gender identity because civil status law requires that a gender must be stated in the first place. If it did not require a gender entry, it would not specifically threaten the development and protection of personality"[157].

Having found a breach of the Constitution, the Court further explains that the restriction is unlawful, illegitimate, and unproportionate. It is unlawful because "the Basic Law does not require that civil status be exclusively binary in terms of gender. It neither requires that gender be governed as part of civil status nor is it opposed to the civil status recognition of a third

[152] BVerfG, *ibidem* note 136.
[153] BVerfG, *ibidem* note 136, p. 3, §1.
[154] BVerfG, *ibidem* note 136, p. 9, §39.
[155] BVerfG, *ibidem* note 136, p. 9, §40.
[156] BVerfG, *ibidem* note 136, p. 10, §42.
[157] BVerfG, *ibidem* note 136, p. 10, §46.

gender identity beyond male and female"[158]. Indeed, it was argued that the only purpose of anti-discrimination provisions that explicitly mention "men and women" is to eliminate gender-based discrimination, and not to restrict gender recognition to a binary scheme nor to impose sex/gender registration.[159] Subsequently, the Court discards the arguments set forth by the Government, referring to the preservation of the rights of others and the financial costs associated with the change of policy. In that regard, the Court emphasized that the interest of cis-gender women and men to identify as such is not affected by the introduction of a third category since no one is forced to opt for the 'X'. Furthermore, if the aim is to press costs, it was pointed out that the legislator would better consider abolishing sex/gender registration altogether.[160]

Moreover, the Court also found an unlawful violation of the constitutional right not to be discriminated against based on gender since the Civil Status Act "treats persons who are neither male nor female unequally and disadvantages them on the basis of their gender insofar as these persons cannot be registered in accordance with their gender, unlike men and women"[161].

One can infer from the Court's decision that the German legal order now formally recognizes as legitimate those gender identities other than masculine and feminine. These identities are to be protected on an equal footing with the conventional gender identities based on the constitutional right to personality. Moreover, because the German language does not differentiate between sex and gender, the introduction of an 'X' under the *Geschlecht* entry indicates that both non-binary gender identities as well as a third actual sex have been legally recognized. This idea is reinforced by the fact that the plaintiff identified as intersexual. As a consequence, this ruling shakes up a biological conception of sex/gender (according to which gender [identity] is to be found in natural or stable and binary sex) since the Court clearly denied the binarity of sex/gender. By recognizing the expressive nature of gender and insisting on the possibility of abolishing sex/gender registration altogether, the Court leaves the door open for further incorporating in its case law a performative understanding of sex/gender, as will be explained in the next Chapter.

[158] BVerfG, *ibidem* note 136, p. 11, § 50.
[159] BVerfG, *ibidem* note 136, p. 11, §50.
[160] BVerfG, *ibidem* note 136, pp. 11-12, §§ 51 and 52.
[161] BVerfG, *ibidem* note 136, p. 13, §57.

(ii) Austria

The facts in the Austrian case *G 77/2018-9* of June 15, 2018, are similar to those in the German case. More specifically, an individual openly living and self-identified as intersex challenged the legality of the 2013 Austrian Civil Register Act, which states that an individual's sex/gender is to be registered as 'personal data' in the civil register. The applicant wanted to change their sex/gender entry from male to 'inter', which was refused by the competent civil status authorities and lower courts. As a result, they filed a complaint before the Constitutional Court arguing that such application of the Civil Register Act constituted an unlawful breach of Article 8 ECHR (unlike the German applicant, who based their claim on the German Constitution). Inspired by the German Constitutional Court, the Austrian Constitutional Court argued that "Article 8 of the ECHR (...) grants individuals with variations in sex characteristics other than male or female the constitutionally guaranteed right to have their gender variation recognized as a separate gender identity in gender-related provisions; in particular, it protects individuals with alternative gender identities against having their gender assigned by others"[162].

Indeed, the Court concluded that since the ruling of ECtHR in *A.P., Garçon and Nicot v. France*[163] case, self-determined gender identity is an element of private life to be protected by the State under Article 8 ECHR. From this consideration, the Austrian Court infers that "the right to individual gender identity also means that individuals only have to accept gender designations assigned by the state that correspond to their gender identity"[164]. According to the Court, this implies that the State should not only allow individuals to change their sex as was registered at birth but should also allow intersex infants not to be classified as male or female until they can decide for themselves.[165] However, the Court goes on to affirm that these options may still be insufficient for those who legitimately choose to affirmatively express their alternative gender identity.[166] It concludes in paragraph 26 that mandatory binary sex/gender registration constitutes "a state-appointed gender assignment" in breach of individuals' right to self-determination of gender identity as protected by Article 8 of the ECHR.[167]

[162] VERFASSUNGSGERICHTSHOF ÖSTERREICH, *ibidem* note 135.
[163] ECtHR, *A.P., Garçon and Nicot v. France*, Application N° 79885/12, 52471/13 and 52596/13, April 6, 2017.
[164] VERFASSUNGSGERICHTSHOF ÖSTERREICH, *ibidem* note 135.
[165] Vfgh, *ibidem* note 137, §23.
[166] Vfgh, *ibidem* note 137, §24.
[167] Vfgh, *ibidem* note 137, §26.

Just as the German Constitutional Court, the Court finds such State-based 'gender policing' to be an unlawful and disproportionate breach of the ECHR. Indeed, it is unlawful because the Constitution does not require sex/gender registration in the first place. If, however, the Legislator mandates sex/gender registration, it should respect the right to self-determination.[168] Although the Court recognizes the expressive effect of gender identity, it deems the public interest in the stability, consistency, and reliability of the civil register, which generate legal certainty, to be a legitimate objective on which the State can rely to require "a concrete gender designation by way of a law or regulation"[169]. Yet, despite the legitimacy of this goal, imposing a rigid binary sex/gender entry (i.e. giving only M or F as available options) does not meet the proportionality test.[170] Consequentially, the Court orders lower courts to interpret the 2013 Civil Register Act in conformity with the Constitution and Article 8 ECHR. According to the Court, the Act only requires a sex/gender entry in the civil register; it does not specify which markers are to be used. Thus, along with male/man and female/woman, there should be an option for alternative sex/gender identities. The Court notes that "a sufficiently concrete and specific term can be found by reference to the common usage of the language"[171] and hints amongst others at "inter", "divers", or "other". The option of having the sex/gender entry left blank can also be achieved through constitutional interpretation. Indeed, from the fact that the Civil Status Act indicates that the civil servant may amend the civil register in order to supplement it with missing data, it follows that the possibility of having no sex/gender entry at all is enshrined in the Act itself.[172]

By equally acknowledging the expressive character of sex/gender and at the same time allowing for both a third sex/gender category as well as leaving the sex/gender entry open, this judgment makes room for an even deeper integration of a performative understanding of sex/gender in law (like the German one), as will be discussed in the next Chapter.

(iii) France and the UK

In this sub-section, I combine the French and British perspectives on the matter since in both countries courts found, in contrast to the Austrian and Dutch courts[173], that the legal non-

[168] Vfgh, *ibidem* note 137, §23.
[169] VERFASSUNGSGERICHTSHOF ÖSTERREICH, *ibidem* note 135.
[170] Vfgh, *ibidem* note 137, §34.
[171] VERFASSUNGSGERICHTSHOF ÖSTERREICH, *ibidem* note 135.
[172] Vfgh, *ibidem* note 137, §42.
[173] See, note 138.

recognition of non-binary sex/gender identities does not constitute an unlawful breach of Article 8 ECHR. Amidst the recent developments that renounce a strict biological conception of sex/gender, it is also important to analyze instances of resistance. Despite the fact that French and UK courts hold onto a biological conception of sex/gender (and thereby perpetuate the law's complicity in advancing the heterosexual matrix which will be further detailed in Chapter II), they also indicate that the awareness of judicial actors concerning the non-binarity and not necessarily naturalness of sex/gender is rising since they do admit that mandatory binary sex/gender registration constitutes an interference with the (positive) obligation to respect and protect the right to private life under Article 8 ECHR. However, they consider that interference to be lawful because it is justified in light of the wide margin of appreciation left to the Contracting Parties given the current absence of a European consensus on the matter.

In case n°531 of May 4, 2017, the French Court of Cassation ruled against an applicant who wished to change their sex/gender entry from 'male' to 'neutral'.[174] The Court thereby upheld the lower court's reasoning, which carelessly conflates sex, gender, and sexual orientation as prescribed by a biological conception of sex/gender. Indeed, the lower court denied the applicant's request because "his physical appearance and social behavior" [175] are that of a man – as if physical sex is necessarily linked to gender identity. Even more problematic is that, in order to demonstrate the legality of mandatory binary sex/gender registration, the Court mentions a French circular letter addressed to civil servants, which, in case they are confronted with parents whose infant's sex/gender is unclear, tells them to advise the parents to ask the doctor what sex/gender the infant is most likely to have "taking into consideration the results of medical treatment"[176]. Malevolent readers might read into this piece of law a State-sponsored invitation to conventional sex-affirming surgery for intersex infants.

In any case, the Court affirmed that "a dualistic determination of sex/gender in the civil register pursues a legitimate aim since it is necessary for the social and legal organization of society, of which it constitutes *a foundational element*"[177]. As a consequence, it is logical that this

[174] Cour de Cassation, *ibidem* note 148.
[175] Cour de Cassation, *ibidem* note 148 (own translation).
[176] Ministère de la Justice et des libertés, *Circulaire du 28 octobre 2011 relative aux règles particulières à divers actes de l'état civil relatifs à la naissance et à la filiation*, §55, p. 27, available at <http://circulaires.legifrance.gouv.fr/pdf/2011/11/cir_34124.pdf> (last consulted February 26, 2019), own translation.
[177] Cour de Cassation, *ibidem* note 148 (own translation).

binarity is found in many French laws and is even legally imposed. Indeed, the Court of Appeal of Paris found in a judgment of 1979 that "even if the individual presents sexual anomalies, he or she must mandatorily be assigned to one of the two sexes, which is to be registered in the birth certificate"[178]. According to the Court of Cassation, although mandatory and binary sex/gender registration constitutes an interference with the right enshrined in Article 8 ECHR, it does not constitute an unlawful breach since the restriction appears proportionate to the legitimate aim at stake in light of the wide margin of appreciation left to the Contracting Parties in the present absence of European consensus[179].[180] As one can observe, whereas the Austrian Court found that Article 8 ECHR protects individuals from mandatory binary sex/gender registration, the French Court is of the opinion that the State is allowed to assign binary sex/gender to its citizens. In fact, "a dualistic determination of sex/gender in the civil register" is even considered necessary since the binarity of sex/gender is "a foundational element" to "the social and legal organization of society".

The British High Court equally found that the Government has a wide margin of appreciation, which allows it at present not to issue passports with an X gender marker. Indeed, "the effect of the various factors which I have had to weigh in the balance in this case leads me to the conclusion that *at present* the claimant's Article 8 right to respect for the claimant's personal life do not encompass a positive obligation on the part of the Government to permit the claimant to apply for and be issued with a passport with an 'X' marker in the gender/sex field signifying that the claimant's gender is unspecified"[181]. However, as compared to the French Court, its rhetoric is less principled. Indeed, in the British case, the judgment's outcome is premised on the fact that the Government is currently conducting research about how it can be more inclusive toward the LGBTQIA+ community, of which the results are yet unknown. As the judge notes, "the type of factors which ultimately determine the legality of any policy are dynamic and (…) although at present I am not satisfied, for the reasons which I have set out, that the current policy of [Her Majesty's Passport Office] is unlawful, part of the reasoning for this is that the comprehensive review has not been completed"[182]. The judge then continues: "it seems to me that once the review has occurred, then depending upon its outcome and

[178] Cour d'Appel de Paris, 18 janvier 1974, D. 1974. 196, conclusion Granjon; GP 1974, 1, 158 (own translation).
[179] J. GERARDS, "Pluralism, Deference and the Margin of Appreciation Doctrine", *European Law Journal*, 2011, vol.17, pp. 107-110.
[180] Cour de Cassation, Rapport n°Q1617189, available at <https://www.courdecassation.fr/IMG///Rapport%20sexe%20neutre.pdf> (last consulted March 2, 2019).
[181] Hight Court of Justice, *ibidem* note 148, §131.
[182] Hight Court of Justice, *ibidem* note 148, §152.

whether and to what extent the identification of those who consider themselves to be non-gendered is legally recognised [sic], the strength of the focused challenge in the present case may be required to be reassessed, in order to determine whether the current policy of the [Her Majesty's Passport Office] in relation to the issuing of 'X' marked passports continues to be justified"[183].

To conclude, "needing to maintain an administratively coherent system of gender recognition, maintaining security and combatting identity theft and fraud, ensuring security at national borders, and ensuring the personal safety of the passport holder"[184] are legitimate aims, which according to the British High Court justify the proportionality of restricting the applicant's right to private life by not legally recognizing non-binary sex/gender identities. However, in light of the decisions of the Austrian and Dutch courts (which find in contrast to the British Court that Article 8 ECHR imposes a positive obligation upon the Contracting Parties to recognize alternative sex/gender identities), and the increased amount of European States allowing for an X on identity documents (such as Germany, Austria, the Netherlands, Malta and Denmark, cf. Annex), it may be well be that the British and French courts will change their point of view regarding the (wide) margin of appreciation left to the Contracting Parties in the future. Their judgments, although eventually finding against the applicants, show that a performative understanding of sex/gender in law is lurking around the corner.

(2) Legal developments at the European level

At the European level, both the Parliamentary Assembly of the Council of Europe (PACE) Resolution 2048 (2015) on Discrimination against transgender people in Europe, and Resolution 2191 (2017) on Promoting the human rights of and eliminating discrimination against intersex people, contain provisions relating to identity documents, which may open up the door for abandoning a biological conception of sex/gender in law. Indeed, they call upon the Contracting Parties to either consider the introduction of a third gender category on identity documents[185] or to make sex/gender registration optional for everyone[186] (thereby

[183] Hight Court of Justice, *ibidem* note 148, §152.
[184] Hight Court of Justice, *ibidem* note 148, §52.
[185] Parliamentary Assembly of the Council of Europe (PACE), Resolution 2048 (2015) Discrimination against transgender people in Europe, article 6.2.4, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21736> (last consulted March 2, 2019).
[186] PACE, Resolution 2191 (2017) Promoting the human rights of and eliminating discrimination against intersex people, article 7.3.4, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232> (last consulted March 2, 2019).

questioning the binarity of sex/gender in law), and to abolish the requirement of medical intervention in order to legally recognize self-identified gender identity[187] (thereby questioning the idea that gender is to be found in, or acts upon biological sex). Moreover, States are called upon to "ensure, wherever gender classifications are in use by public authorities, that a range of options are available for all people, including those intersex people who do not identify as either male or female"[188]. The latter provision explicitly recognizes that even sex (let alone gender), i.e. that which is commonly seen as a pure matter of physiology, is not binary.

These resolutions were built on and have been echoed in the ECtHR's case law. In the 2002 case of *Christine Goodwin v. UK*, the Court held that the lack of legal recognition of gender identity after SRS violated the right to private life protected under Article 8 ECHR.[189] Fifteen years later, in line with Resolution 2048 cited in *A.P., Garçon and Nicot v. France*, [190] the Court stated that requiring sterilization or medical treatment as a precondition to legal gender identity recognition "amounts to a failure by the respondent State to fulfil [sic] its positive obligation to secure [the] right to respect for [the applicants'] private lives"[191]. Apart from the fact that SRS can no longer be required in order to have a legal sex change, it is promising that the Court most recently confirmed its shift from acknowledging the State's duty to legally recognize gender identity as a result of its *negative* obligation to *respect* private life to a result of the State's *positive* obligation to *protect* individuals' private life. Indeed, on January 17, 2019, the Court held in *X v. The Former Yugoslav Republic of Macedonia* that Contracting Parties *must* have a "provision in (…) domestic law that explicitly allows the alteration of a person's sex/gender marker in the civil status register"[192], or else the State is in breach of its positive obligation to ensure the right to private life of *pre*-operative transsexual individuals. As a result, one could argue that gender identity rather than, and independently of, one's genitals is now legally the final factor in determining one's sex/gender in the European legal orders.

This evolution at least to a certain extent discredits the biological conception of sex/gender in law, which at present still underlies many legal provisions, since it weakens the prominence given to so-called natural sex as a factor establishing legal identity. However, up to this date,

[187] PACE, *ibidem* note 185, art. 6.2.2.
[188] PACE, *ibidem* note 186, art. 7.3.3.
[189] ECtHR, *Christine Goodwin v. The United Kingdom*, Application n° 28957/95, July 11, 2002.
[190] ECtHR, *ibidem* note 163, §77.
[191] ECtHR, *ibidem* note 163, §135.
[192] ECtHR, *X v. The Former Yugoslav Republic of Macedonia*, Application n° 29683/16, January 17, 2019.

the ECtHR has not yet dealt with the legal recognition of non-binary, gender non-conforming, or gender queer, and third sex/gender identities on identity documents. In that regard, one should note that the various contradictory judgments of national courts outlined above suggest that it is likely that cases that challenge European States' refusal to acknowledge that identities fall outside the binary sex/gender ideology will come before the ECtHR in due time.

(3) Legal developments at the international level

At the international level, increased attention to the rights of sexual minorities has been noticed. Remarkably, in 2011, the HRC adopted the first ever UN resolution explicitly dealing with sexual orientation and gender identity (SOGI) as a stand-alone subject-matter.[193] The concerns expressed by the HRC, in its turn, led to the first official UN report on "Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity", which was prepared by the United Nations High Commissioner for Human Rights (OHCHR).[194] A follow-up was requested in the 2014 HRC Resolution 27/32[195] and eventually, in Resolution 32/2 of June 30, 2016, the HRC appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.[196] In between, the OHCHR launched the UN Free & Equal public awareness campaign, which mainly aims at fighting homophobia and transphobia.[197] Although traces of a biological conception of sex/gender remain noticeable throughout the campaigns, reports, and resolutions, the mere fact of having discussions on SOGI indicates that the uncritical acceptance of the heterosexual matrix and its biological conception of sex/gender is "under attack" in international policy-making circles. Whereas it was long accepted that bodies can be exclusively classified male or female, respectively become men and women, and desire the opposite sex/gender, homosexuality, transsexuality, and intersexuality have now explicitly become concerns for and of international human rights law. Hence, as alternative configurations of compulsory heterosexuality become increasingly accepted, acquire

[193] Human Rights Council (HRC), Resolution on Human rights, sexual orientation and gender identity, July 14, 2011, A/HRC/RES/17/19. Previously, sexual orientation and gender identity (SOGI) had only been carefully and implicitly dealt with by the General Assembly through its resolutions on extrajudicial, summary or arbitrary executions, with the first ever resolution dating back to 2003. See, UNGA, Resolution on Extrajudicial, summary or arbitrary executions, February 25, 2003, A/RES/57/214.
[194] OHCHR, Report on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, November 17, 2011, A/HRC/19/41.
[195] HRC, Resolution on Human rights, sexual orientation and gender identity, October 2, 2014, A/HRC/RES/27/32.
[196] HRC, Resolution on Protection against violence and discrimination based on sexual orientation and gender identity, July 15, 2016, A/HRC/RES/32/2.
[197] See, OHCHR, *ibidem* note 37, as well as the *Free and Equal* campaign's website: <https://www.unfe.org/> (last consulted February 19, 2019).

legitimacy, and are deemed worthy of legal protection, so too it may be assumed that public awareness will raise regarding the contingency and in no way ontologically necessary nature of heterosexual configurations and a biological conception of sex/gender. To state it differently, a performative understanding of sex/gender is likely to be progressively better understood and better adhered to. Such understanding of sex/gender is effectively slowly penetrating the debates held in the HRC surrounding SOGI, with the Independent Expert identifying in his latest report that the root cause of violence and discrimination based on SOGI rests in "a binary understanding of what constitutes a male and a female (…) or the masculine and the feminine, or with stereotypes of gender sexuality"[198], citing Riki Anne Wilchins – a well-known queer feminist activist ascribing to a performative account of sex/gender[199].

Moreover, and specifically regarding gender markers on identity documents, the Yogyakarta Principles +10 recognize in Principle 31 that "everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics"[200]. For that purpose, States shall "end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licenses, and as part of their legal personality", and "while sex or gender continues to be registered", they should amongst other things "make available a multiplicity of gender marker options"[201]. The original Yogyakarta Principles stated in their Preamble that the Principles "must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments"[202]. The Yogyakarta Principles +10 offer such revision and were adopted on November 10, 2017. Notably, "Gender Expression and Sex Characteristics" have been added to their title, which now reads as "Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics"[203]. This indicates that the drafters sought to incorporate various criticisms such as those offered in the previous section (Section A, sub-

[198] HRC, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, May 11, 2018, A/HRC/38/43, §48.
[199] See, R.A. WILCHINS, *ibidem* note 20.
[200] Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (Yogyakarta Principles plus 10), adopted November 10, 2017, available at <http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf> (last consulted March 2, 2019), Principle 31.
[201] Yogyakarta Principles plus 10, *ibidem* note 200, Principle 31.
[202] Yogyakarta Principles, *ibidem* note 104, Preamble, § 9.
[203] Yogyakarta Principles plus 10, *ibidem* note 200.

section 3) and to adapt their focus, which earlier centered on the lived experiences of transsexual individuals only. The perspectives voiced by gender queer and intersex communities have now been included. This greater emphasis on gender expression, manifested amongst others in Principle 31, hints at the fact that a performative understanding of gender (as opposed to a biological one) is also acknowledged in this instrument of international soft law. It thereby recognizes that sex/gender is not to be found in stable, pre-regulatory, biological, and binary sex. Given the (relative) success of the original Principles, it is likely that the Yogyakarta Principles +10 will also contribute to impairing the biological understanding of sex/gender in (international) law too.

Human rights, like any other set of rights, are rights created by humans and humans are always already affected by their social environment, their past, their present, and their anticipated future.[204] Except maybe for certain outmoded positivists, it is now irrefutable that social sciences such as law do not operate in a vacuum.[205] As Halewood states: "knowledge is neither universal nor categorical but situated, embodied, and plurivocal"[206]. When the drafters of the UDHR (all of them being men save Eleanor Roosevelt) conceptualized the universal subject of international human rights law, they could only have been informed by their own lived experiences *as men in the 1950s*. As a consequence, the UDHR apprises that all individuals, as part of the universal subject of international human rights, ought to act "towards one another in a spirit of *brother*hood"[207] and should have an effective remedy "for acts violating the fundamental rights granted *him* by the Constitution or by law"[208]. Moreover, women do not seem to commit crimes, given that "everyone charged with a penal offense" is apparently *he* who is "presumed innocent until proved guilty according to law in a public trial at which *he* has had all the guarantees necessary for *his* defense"[209].

Seventy years later, feminist academics behold no difference; the universal subject of international human rights law remains ideologically premised on a male heterosexual cis-gender perspective.[210] Indeed, in international law, there are men and there are the 'Others'.[211] When international lawyers talk about gendered violence, they think of violence against women and CEDAW. When progressive international lawyers talk about violence based on gender identity, they think of violence against transsexuals and the Yogyakarta Principles.[212] Remarkably, neither CEDAW nor the Yogyakarta Principles seem to textually imply that the heterosexual cis-gender male in fact also experiences gender (and, in fact, also faces discursive gender violence, as will be demonstrated below) and that he, in fact, also has a

[204] S. Rinofner-Kreidl, "Fathoming the Abyss of Time: Temporality and Intentionality in Husserl's Phenomenology", in A.T. Tymieniecka*, Phenomenology World-Wide*, Springer, Dordrecht, 2002, p. 137.
[205] J. Vranken, "Exciting Times for Legal Scholarship", *Recht en Methode in onderzoek en onderwijs*, 2012, vol. 2, n° 2, p. 52.
[206] P. Halewood, "Embodiment & Perspective: Can White Men Jump", *Yale Journal of Law and Feminism*, 1995, vol. 7, p. 15-16.
[207] UDHR, adopted 10 December 1948, UNGA Res 217 A(III), Article 1.
[208] UDHR, adopted 10 December 1948, UNGA Res 217 A(III), Article 8.
[209] UDHR, adopted 10 December 1948, UNGA Res 217 A(III), Article 11.
[210] D. Otto, *ibidem* note 15, pp. 308-309; T. Dreyfus, *ibidem* note 95, p. 44.
[211] See, S. De Beauvoir, *The Second Sex*, trans. H.M. Parshley, Penguin Books, Middlesex, 1972, pp. 16-17.
[212] W. O'Brien, *ibidem* note 66, p. 13: "Just as to speak of gender is to speak of women, so too is it that to speak of gender identity is to speak of LGBT identities".

gender identity. This blindness reveals the heteronormative nature of law: if *specific* provisions are necessary to protect the *specific* gendered needs of those for whom the human rights of the 'universal' subject alone do not suffice and if those people turn out to be women and members of sexual minorities, then the needs of the 'universal' subject addressed by international human rights law are nothing but those of a man.[213]

This type of reasoning illustrates feminist legal theory (FLT) at its core. As a specific branch of legal theory merging the legal discipline with feminism, FLT seeks to dismantle the systemic gendered biases in law and then suggests reforms to achieve greater gender justice.[214] The idea that the law supports the unequal, gendered *status quo* of power relations and dynamics is a common baseline for all feminist legal theorists.[215] They pursue the same aim of introducing legal reforms in view of gender equality[216] but strong disagreement exists as to the optimal strategy to be followed.[217]

First and second wave feminists have challenged the hierarchy between men and the Others, that is, between masculinity and femininity, through the notions of non-discrimination and equality but remained faithful to a biological conception of sex/gender,[218] as will be outlined in Section A. Indeed, "for Beauvoir, sex is immutably factic, but gender acquired, and whereas sex cannot be changed – or so she thought – gender is the variable cultural construction of sex, the myriad and open possibilities of cultural meaning occasioned by a sexed body"[219]. Third wave queer feminist (legal) theorists, on the contrary, understood that FLT's "task (...) requires us to think 'beyond the conceptual limits of the present' in order to reconstruct the subjects of rights, and rights themselves, in new and different ways"[220]. If the previous Chapter hinted at the biological conception of sex/gender still present in international law, which has gone unchallenged by first and second wave feminists, Section B of this Chapter aims to provide the readers with the necessary conceptual tools to "reconstruct the subjects of rights" in a way that alters and halts the material and discursive gender violence faced by those not

[213] W. O'Brien, *ibidem* note 66, p. 13.
[214] L. Francis, P. Smith, "Feminist Philosophy of Law", in E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, winter 2017 edition, available at <https://plato.stanford.edu/archives/win2017/entries/feminism-law/> (last consulted March 20, 2019), Introduction.
[215] L. Francis, P. Smith, *ibidem* note 214, 1.1. Rule of Law.
[216] N. Levit, R. Verchick, *Feminist Legal Theory (Second Edition): A Primer*, NYU Press, New York, 2016, p. 12.
[217] N. Levit, R. Verchick, *ibidem* note 216, p. 12.
[218] See, note 87.
[219] J. Butler, *ibidem* note 3, p. 152.
[220] T. Dreyfus, *ibidem* note 95, p. 35.

embodying conventional white masculinity. Such reconstruction is premised on a performative understanding of sex/gender and realizes gender equality and justice for all more fully. Indeed, drawing upon queer feminist theory, I intend to sketch out a performative conception of sex/gender, which visualizes gender trouble, that is, subversive gender practices destabilizing the identity categories of 'man' and 'woman' as the valid strategy towards emancipation.

Section A. Liberal, difference, and radical feminist legal theorists: advancing oppression by advocating emancipation

First wave, also called sameness or liberal feminists challenged the *biology is destiny* paradigm and sought to achieve formal equality by emphasizing that *in essence* women and men are alike – if existing at all, "perceived differences between the sexes were not biologically inherent, but were rather learnt [sic] through social stereotyping"[221]. Liberal feminists are often associated with the Suffragette movement, ending around the 1930s since they advocated for women's full participation in the public sphere[222] and challenged their status as second-rate citizens.[223] They contended that women would be able to emancipate by means of individual choices in the private sphere too if only they were given the same opportunities as men. Therefore, the aim was to replace explicitly discriminatory laws by gender-neutral ones, as sex was above all a criterion to be left behind.[224] Although the sameness movement has successfully opened many doors for girls and women, "one flaw in this symmetrical approach is that its emphasis on similarity disadvantages women on issues related to pregnancy, childbirth, and allocation of property at divorce"[225], specifically said women's issues.

Second wave feminists, amongst whom cultural or difference feminists and radical feminists are classified, institutionalized the *the personal is the political* mentality[226] and the *women's rights are human rights* slogan.[227] Given women's specificities, they contend that mere formal equality does not fill the bill since it only helps women to the extent that they conform to male standards.[228] They elaborate majestic theories concerning women's biological or cultural

[221] D.R. GORDON, *ibidem* note 55, p. 1741.
[222] N. LEVIT, R. VERCHICK, *ibidem* note 216, p. 12.
[223] L. FRANCIS, P. SMITH, *ibidem* note 214, 2. Formal Equality and Formal Citizenship.
[224] M.A. FINEMAN, "Feminist Legal Theory", *American University Journal of Gender, Social Policy and Law*, 2005, vol. 13, p. 15.
[225] N. LEVIT, R. VERCHICK, *ibidem* note 216, p. 15.
[226] M.A. FINEMAN, *ibidem* note 224, p. 15.
[227] K. MCNEILLY, *ibidem* note 18, p. 274.
[228] N. LEVIT, R. VERCHICK, *ibidem* note 216, p. 15.

particularities and advocate for legal reforms which take these sex/gender differences into consideration.[229] Rather than gender-neutral laws, they favor gender-conscious policies as the adequate strategy for gender equality.[230] Such reforms are necessary because the State's functioning and laws are said to be axed around male needs, male concerns, and a masculine way of thinking since they are embodied and created by men.[231] Based upon this insight, difference and radical feminists reject the liberal private/public distinction as it is said to maintain and advance the patriarchy, i.e. the 'rule of fathers' (to be understood as the rule of men over women). Indeed, "by locating reproduction within the private realm and equating it with the natural order rather than the social order, liberal theory treats the male/public and female/private spheres as fundamentally and irrevocably different, thereby licensing men's exploitation of women in the family sphere"[232]. Hence, *the personal is the political* and hence the need for *women*'s *rights as human rights*, tackling specific women's issues such as domestic violence in the private sphere.

Radical feminists' theories are most known by reason of MacKinnon's advocacy. According to MacKinnon, the source of women's oppression is to be found in sexuality as "a social construct of male power: defined by men, forced on women, and constitutive of the meaning of gender"[233]. Indeed, from a young age, women are socialized in such way that they need to readily consent to having sex with men even if they do not desire so, or else men will forcefully rape them anyway, abandon them, or turn them down. In the long term, this socialization ensures that women "consent to undesired sex not because they feel coerced but because eschewing their own desires has become a habit"[234]. Next, radical feminists argue that women not only submit to men's desires out of habit but because they have come to desire submission itself.[235] Years of conditioning ensure that male dominance and female submission become something arousing, something titillating for women and thus, "women have, under this theory, adopted the interests of patriarchy as their own desires"[236]. As a result, sexuality is "a pervasive dimension of social life (...) along which gender occurs and through

[229] D.H. Currie, "Feminist Encounters with Postmodernism: Exploring the Impasse of Debates on Patriarchy and Law", *Canadian Journal of Women and Law*, 1992, vol. 5, pp. 65-66.
[230] N. Levit, R. Verchick, *ibidem* note 216, p. 17.
[231] D.H. Currie, *ibidem* note 229, p. 66.
[232] D.H. Currie, *ibidem* note 229, p. 67.
[233] C.A. MacKinnon, *Toward a Feminist Theory of State*, Harvard University Press, Cambridge, 1991, p. 128.
[234] S. Wells, "Feminism, False Consciousness, & Consent: A Third Way", *The Georgetown of Journal of Gender and Law*, 2017, vol. 18, p. 254.
[235] S. Wells, *ibidem* note 234, p. 255.
[236] S. Wells, *ibidem* note 234, p. 255.

which gender is socially constituted; (...) Dominance eroticized defines the imperatives of its masculinity, submission eroticized defines its femininity"[237]. Through patriarchal society's inescapable heterosexual conditioning, penetrable *female* bodies become *women* (which is the condition of being submissive to men) and *male* bodies having the capacity to penetrate become *men* (which is the condition of being dominant toward women).[238] Since this socialization (eventually resulting in women desiring their own often unconscious oppressed condition) happens through mediums such as advertisement and pornography, radical feminists strive for legal reforms that, for example, prohibit images that portray "the servility and the display, the self-mutilation and requisite presentation of self as a beautiful thing, the enforced passivity [and] the humiliation"[239] of women.[240]

Although they aimed for emancipation, black and queer feminists (grouped together as the third wave feminist movement) soon castigated their predecessors for their inadvertent essentializing impulse, which resulted in the (un)conscious exclusion of those falling outside the heterosexual cis-gender middle class white standards. First and second wave feminist grand theories often universalize women's experiences and unite them under a common factor constituting femininity in an attempt to conceptualize oppression and emancipation. However, "this tactic transforms what was originally a claim about the contingency of current social arrangements into an assertion of immutable essence of the female subject"[241] of which the validity is defied by black and queer women's experiences.[242] As for the queer experience, a theory of gender which grounds the oppression of women and the constitution of femininity in the unconscious desire for male dominance, i.e. in heterosexuality (itself dependent on the notion of binary and natural sex), makes little sense because the fact that lesbian women are left out of the analysis "[emphasizes heterosexuality's] contingency and thus also the contingency of the power relations it brings"[243]. As a consequence, "the construction of the category of women as a coherent and stable subject [is] an unwitting regulation and reification of gender relations (...) precisely contrary to feminist aims"[244].

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[237] C.A. MacKinnon, *ibidem* note 233, p. 128.
[238] C.A. MacKinnon, *ibidem* note 233, p. 137.
[239] C.A. MacKinnon, *ibidem* note 233, p. 130.
[240] L. Francis, P. Smith, *ibidem* note 214, 4. Violence Against Women.
[241] Harvard Law Review, *ibidem* note 12, p. 1974.
[242] For a powerful critique of second wave feminism, which became a foundational paper within the black feminist movement, see: A.P. Harris, "Race and Essentialism in Feminist Legal Theory", *Stanford Law Review*, 1990, vol. 42, pp. 581-616.
[243] M. Davies, *ibidem* note 26, p. 344.
[244] J. Butler, *ibidem* note 3, p. 7.

In the words of Halley: "radical or cultural feminisms seem to only produce us as compliant subjects of sexuality. We have the strange impression that these feminisms may assist in producing the very social formation they purport to critique and dismantle"[245]. At the core of queer feminists' critiques lies the idea that essentializing feminisms such as MacKinnon's in fact reproduce oppression because they force subjects or bodies into the category for whom liberation is pursued (namely the white middle-class heterosexual woman) in order to be(come) a represented or intelligible and thus legitimate subject. Indeed, "feminist critique ought also to understand how the category of 'women', the subject of feminism, is produced and restrained by the very structures of power through which emancipation is sought. (…) There may not be a subject who stands before the law, awaiting representation in or by the law. Perhaps, the subject, as well as the invocation of a temporal 'before', is constituted by the law as the fictive foundation of its own claim to legitimacy"[246].

The previous Chapter indicated that the law assumes bodies to be naturally *either* male *or* female and are to be registered as such at birth based on their genitals. Moreover, these then legally sexed bodies are presumed to become *men* and *women* desiring the respective other sex/gender. But queer feminists contend that gender is not found in or based on nor does it act upon sex as an apolitical, stable and binary category, which is prior to discourse, naturally uniting all women and men in one corresponding group desiring one another. Rather, sex is "the *political* category that founds society as heterosexual"[247], instituted amongst other aspects through language, grammar, and law. Queer feminist theory conceives sex as "an obligatory injunction for the body to become a cultural sign, to materialize itself in obedience to a historically delimited possibility"[248]; it is "neither invariant nor natural, but it is a specifically political use of the category of nature that serves the purposes"[249] of the heterosexual matrix producing the conventional gender ideologies (i.e. one is either a man desiring fragile, emotional, nurturing, penetrable women because one is male *or* one is a woman, desiring protective, rational, bread-winning, leadership-oriented penetrating men because one is female)[250] as will be further clarified in the next section.

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[245] J. HALLEY, *ibidem* note 11, p. 124.
[246] J. BUTLER, *ibidem* note 3, p. 4
[247] M. WITTIG, *The Straight Mind and Other Essays*, Beacon Press, Boston, 1992, p. 5 (emphasis added).
[248] J. BUTLER, *ibidem* note 3, p. 190.
[249] J. BUTLER, *ibidem* note 3, p. 153.
[250] L. FRANCIS, P. SMITH, *ibidem* note 214, 1.1. Rule of Law.

Hence, queer feminists conceptualize sex as a regulatory ideal which instructs bodies how to perceive themselves. It is an essentialized and essentializing category in which subjects' perception of their unique physical features are mandatorily unified, same-nised in a binary scheme, serving to naturalize the political, oppositional, and hierarchized category of gender.[251] As a result, "there is no distinction between sex and gender; the category of 'sex' is itself a gendered category, fully politically invested, naturalized but not natural"[252]. In the words of Butler: "gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which 'sexed nature' or 'natural sex' is produced and established as 'prediscursive', prior to culture, a politically neutral surface on which culture acts"[253].

Section B. Queer feminism, the heterosexual matrix and performative sex/gender

Departing from lesbian experiences, queer feminists have defied the possibility of a universal unity between all women premised on sex, as well as the idea that women's subordinated position stems from (hetero)sexuality since certain bodies labeled female do not socialize in such way as to desire male domination and internalize submission but still face oppression. The previous section also clarified how queer feminist theory indicates that "gender is not what culture creates out of my body's sex; rather, sex is what culture makes when it genders my body"[254]. As a result, a central claim of queer feminism is that "woman" or "female" are themselves socially constructed notions and that the source of oppression rather lies in these identity categories themselves.[255] Indeed, "women" does not refer to but produces a group of bodies *soi-disant* united through so-called natural sex as the Other of "men" and thereby, (together with the notion of "men") constitutes a regulatory ideal. Moreover, if ever bodies wish to be intelligible or legitimate subjects in contemporary society where heterosexuality (premised on the existence of binary and natural sex) remains the norm, they need to live up to these regulatory ideals, as will be demonstrated below. However, if there is no unifying, natural, or evident connecting factor, constitutive of femaleness, then "strictly speaking, a woman cannot be said to exist"[256]. Assuming then that there is no such thing as a woman, or

[251] In Wilchins' words: "Gender is not what culture creates out of my body's sex; rather, sex is what culture makes when it genders my body". See, R.A. WILCHINS, *ibidem* note 20, p. 58.
[252] J. BUTLER, *ibidem* note 3, p. 153.
[253] J. BUTLER, *ibidem* note 3, p. 10.
[254] R.A. WILCHINS, *ibidem* note 20, p. 58.
[255] J. KNOUSE, "From Identity Politics to Ideology Politics", *Utah Law Review*, 2009, n° 3, p. 751.
[256] J. KRISTEVA, "Woman Can Never Be Defined," trans. Marilyn A. August, in E. MARKS, I. DE COURTIVRON (eds.), *New French Feminisms*, Schocken, New York, 1981, as referred to in J. BUTLER, *ibidem* note 3, p. 1.

even women, as subjects for whom liberation is (to be) sought, does feminism still hold legitimacy?

The postmodern dilemma, as it is often referred to in feminist literature,[257] led certain authors to "take a break from feminism"[258] or to argue that "feminism, like humanism, is a fiction"[259], which eventually resulted in the establishment of queer theory as an independent discipline.[260] Others like Butler found another solution to "feminism's definitional heterosexuality"[261]. Rather than rejecting feminism because of its heterosexual bias, they explained the bias: heterosexuality has been inescapable, as if it were a law, an injunction from the heterosexual matrix "both for people existing in the world, and for feminism"[262]. To put it bluntly, radical and cultural feminists were trapped by the heterosexual matrix, mandated by still-present compulsory heterosexuality, and (queer) feminism's task should be the construction of "critique of the categories of identity that contemporary judicial structures engender, naturalize and immobilize"[263] in service of it.

For Butler, the heterosexual matrix designates "that grid of cultural intelligibility through which bodies, genders and desires are naturalized"; it refers to "a hegemonic discursive/epistemic model of gender intelligibility that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable gender (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality"[264]. Thus, the heterosexual matrix, affecting epistemology, law, culture, and politics produces what has been referred to as a biological understanding of sex/gender in Chapter I. In its purest form, the heterosexual matrix conditions individuals to believe that sex and conventional gender coincide, that bodies labeled female are by essence what Victorian gender roles socialize women to be(come) and that they naturally desire men. First and second wave feminists have fought hard to convince the public at large that sex and gender are two different things and they correctly pointed out gender's socially constructed nature. However, they have not been able to set themselves free from the heterosexual matrix'

[257] D.H. Currie, *ibidem* note 229, pp. 72 and 78.
[258] J. Halley, *ibidem* note 11, p. 10.
[259] D.H. Currie, *ibidem* note 229, p. 78, talking about C. di Stephano in "Dilemmas of Difference: Feminism, Modernity, and Postmodernism", in L. Nicholson, *Feminism/Postmodernism,* Routledge, New York, 1989, p. 63.
[260] J. Halley, *ibidem* note 11, p. 135.
[261] J. Halley, *ibidem* note 11, p. 137.
[262] J. Halley, *ibidem* note 11, p. 137.
[263] J. Butler, *ibidem* note 3, p. 7.
[264] J. Butler, *ibidem* note 3, p. 208.

hegemonic idea that bodies are naturally divided into two distinct groups, i.e. from "the position that there is a natural or biological female who is subsequently transformed into a socially subordinate 'woman', with the consequence that (…) sex is before the law in the sense that it is culturally and political undetermined, providing the 'raw material' of culture"[265]. It is important to note here that third wave feminists do not deny bodily diversity (between 'males' and 'females'; in between 'males' and 'females'; or between 'males', 'females', and other [un]labeled bodies such as for example intersex bodies). On the contrary, precisely because they celebrate bodily diversity, they recognize that "material bodies are negotiated through everyday practice and are themselves a site of power"[266].

As one can sense, if it were not for the heterosexual matrix in service of compulsory heterosexuality, the absolute complementary and strict duality between male/female and man/woman (including the stability and naturalness of the hierarchized gendered power relations the matrix has been justifying over time) would turn out to be haphazard. Indeed, it is "the heterosexualization of desire [that] requires and institutes the production of discrete and symmetrical oppositions between 'feminine' and 'masculine', where these are understood as expressive attributes of 'male' and 'female'."[267] In other words, it is not biology but the heterosexual matrix that produces the notion of heterosexuality, as well as the categories of "men" and "women", and "males" and "females". This is because heterosexuality presupposes these categories since one could not speak of heterosexuality by definition without implying a dyad of subjects for whom identity and desire are dualistically styled. Hence, the heterosexual matrix not only coerces bodies to proclaim heterosexual desires but also to act in line with conventional, oppositional, and binary gender and to corporeally perceive themselves as asymmetrically sexed.

Moreover, any given transgression from the sex/gender regulatory ideals produced by the heterosexual matrix puts the coherence and the legitimacy of compulsory heterosexuality at risk. Deviations thereby potentially denounce the contingency or the in no way ontological necessity of conventional heterosexual sex/gender and its power dynamics. Indeed, "if the categories of masculinity and femininity overlap, and if feminine gender identity can coexist with the desire for a feminine object, male and female are neither opposite, nor

[265] J. BUTLER, *ibidem* note 3, p. 50.
[266] D.H. CURRIE, *ibidem* note 229, p. 73.
[267] J. BUTLER, *ibidem* note 3, p. 24.

complementary"[268]. As a result, the heterosexual matrix and its biological conception of sex/gender mandate the institutionalization of material and discursive gender violence to guarantee its survival. In other words: "the difference *between* the categories 'male' and 'female' is maintained by repressing difference *within* the categories"[269].

With regard to material gender injustice, one may for example point out that intersex infants often undergo enforced conventional sex-affirming (also called "normalizing") surgeries, even though such surgeries are not vital and intrude upon their physical integrity since their consent (or even in some instances that of their parents) is not obtained beforehand.[270] As O'Brien indicates: "the very act of surgically altering the corporeality of individuals with intersex variations demonstrates (…) a paranoid need to efface all traces of sexed ambiguity. This makes plain the fact that the sexed categories of male and female are culturally constructed and rigorously patrolled"[271]. Moreover, transsexuality is included both in the latest 2018 version of the International Statistical Classification of Diseases and Related Health Problems (ICD)[272], as well as in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V)[273], under both revised categories (from 'mental disorders' to 'sexual health conditions') and names (from 'Gender Identity Disorder' to 'Gender Dysphoria' or 'Gender Incongruence'). Although the ICD-11 reclassified gender incongruence in order to help alleviate the stigma faced by transsexual individuals, transsexuality remains encoded within the ICD so that health care services could still be provided and covered by health insurances.[274] Despite this change in approach, having transsexuality in the ICD implies that 'the condition' is medicalized (as homosexuality once was). This medicalization, premised on the view of transsexuality as a 'pathological deviation' which may be 'cured' amongst others through SRS reveals society's need to rigorously Otherize all those who potentially disrupt the heterosexual matrix's conflation of sex, gender, and sexual orientation in order to keep the socially constructed biological conception of sex/gender intact.[275] Less sophisticatedly, one can

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[268] HARVARD LAW REVIEW, *ibidem* note 12, p. 1977.
[269] HARVARD LAW REVIEW, *ibidem* note 12, p. 1976.
[270] P. CANNOOT, *ibidem* note 16, p. 88.
[271] W. O'BRIEN, *ibidem* note 66, p. 15.
[272] WORLD HEALTH ORGANIZATION (WHO), *International Classification of Diseases 11th Revision* (ICD-11), code HA60, available at <https://icd.who.int/browse11/l-m/en#/http%3a%2f%2fid.who.int%2ficd%2fentity%2f90875286> (last consulted March 17, 2019).
[273] APA, *Gender Dysphoria*, 2013, available at <https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf> (last consulted March 17, 2019).
[274] WHO, *ICD-11: Classifying disease to map the way we live and die*, 2018, available at <https://www.who.int/health-topics/international-classification-of-diseases> (last consulted March 17, 2019).
[275] J. WEISS, *ibidem* note 37, p. 180.

simply refer to social practices such as 'gay-bashing' or trans violence as forms of material gender violence perpetrated against those who defy conventional sex/gender, partially communicating the message "thou shall not deviate".[276]

With regard to discursive gender violence, one should note that "the cultural matrix through which gender identity has become intelligible requires that certain kinds of 'identities' cannot 'exist' – that is, those in which gender does not follow from sex and those in which the practices of desire do not 'follow' from either sex or gender"[277]. Indeed, as mentioned before, the heterosexual matrix commands bodies to perceive themselves as sexed, and to behave in line with conventional gender, understood as self-evidently and naturally binary, as well as to desire the opposite sex/gender. Deviant individuals, i.e. members of sexual minorities, face material or visible gender injustice, meaning that they are Otherized and asked to undergo surgery in order to conform to anatomical normativity. Furthermore, the heterosexual matrix also inflicts discursive or invisible gender violence on them in the sense that their gender identity is rendered unintelligible; their lived experiences and being are violently rendered invisible or silenced to the extent that the mainstream is not even able to comprehend them.[278] Growing up in a society which naturalizes the not so natural binarity of sex/gender, subjects socialized by the heterosexual matrix cannot genuinely conceive any alternative gendered existence or being-in-the-world other than those premised on oppositional and complementary masculinity or femininity. In Butler's words: "Precisely because certain kinds of 'gender identities' fail to conform to those norms of cultural intelligibility, they appear only as developmental failures or logical impossibilities from within that domain"[279]. Indeed, epistemologically speaking, the heterosexual matrix filters or wipes out gender queer identities. Phenomenologically speaking, then, they cannot truly acquire sense because they cannot even be authentically perceived given the matrix's influence on phenomenological structures of perception.[280] As a result, gay or lesbian couples will often be asked: "who is the man and who is the woman", while non-binary self-identifying individuals will be noticed as having "some masculine" and "some feminine" elements. Rather than having their gender identity perceived as a whole, it will immediately be restructured and divided according to or reduced to the conventional gender binarity.

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[276] See, T.A.M. VAN DER MEER, "Gay bashing - a rite of passage?", *Culture, Health and Sexuality*, 2003, vol. 5, pp. 253-266.
[277] J. BUTLER, *ibidem* note 3, p. 24.
[278] K. MCNEILLY, *ibidem* note 18, pp. 266-267.
[279] J. BUTLER, *ibidem* note 3, p. 24.
[280] J. BUTLER, *ibidem* note 24, p. 405.

But invisible gender injustice does not only concern sexual minorities. Indeed, "we are at least partially formed through violence. We are given genders or social categories, against our will, and these categories confer intelligibility or recognizability, which means that they also communicate what the social risks of unintelligibility or partial intelligibility might be"[281]. Although transgender individuals are more likely to be consciously confronted with the discursive violence produced by the heterosexual matrix, *all* bodies, whether cis-gender or not, are affected by it as the matrix urges them to conform, perform and embody conventional sex/gender if they wish to avoid the social risks of being perceived as "effeminate" or "unfeminine". Hence, it limits their ways of being, expressing and living. This conditioning, as will be further explained, perpetuates in its turn "the value given to the gender stereotype of the truly 'masculine' male typically considered as the norm against which all other configurations are unfavourably [sic] measured"[282] as well as gender role strain[283].

Queer theorizing suggests, however, that "the logic of punishment may be the undoing of the very categories the regulatory structure sets out to protect"[284]: if sex/gender/desire naturally aligned as prescribed by a biological conception of sex/gender instigated by the heterosexual matrix, there would be no need to socially control, Otherize, or punish those who do not conform in the form of material and discursive gender violence. Indeed, "the very possibility of deviance, therefore, casts doubt on the stability of gender categories (…): if the relationship between sex, gender and sexual identity does not apply to gays and lesbians, it need not apply to anyone, and the categories of masculinity and femininity are exposed as normative fictions"[285]. Yet, if gender is not found in, nor acts upon natural and binary physical sex, how then to conceive of sex/gender?

Appropriating a long-standing tradition in phenomenology, philosophy of language, and feminist theory, Butler argues that "gender is in no way a stable identity of locus of agency from which various acts proceed; rather, it is an identity tenuously constituted in time – an identity instituted through a stylized repetition of acts (…) of the body and, hence, must be understood as the mundane way in which bodily gestures, movements, and enactments of various kinds constitute the illusion of an abiding gendered self"[286]. In contrast to a biological

[281] J. BUTLER, *Frames of War: When is Life Grievable?*, London, Verso, 2009, p. 167.
[282] C. VISSER, E. PICARRA, *ibidem* note 10, p. 509.
[283] See, note 54.
[284] HARVARD LAW REVIEW, *ibidem* note 12, p. 1987.
[285] HARVARD LAW REVIEW, *ibidem* note 12, pp. 1987 and 1989.
[286] J. BUTLER, *ibidem* note 24, p. 401.

conception of sex/gender, which links gender (identity) to physical substance, Butler suggests thinking of sex/gender as "a performative accomplishment which the mundane social audience, including the actors themselves, come to believe and to perform in the mode of belief"[287].

In order to fully grasp a performative understanding of sex/gender, it might be useful to note that the phenomenological tradition conceptualizes the body as a historical site of materialized and ever materializing cultural meaning rather than as mere facticity.[288] Indeed, bodies are an "intentionally organized materiality"[289] in the sense that they come to embody "a set of historical possibilities"[290]. They are always already determined by, while at the same time engraving themselves with, discursively created sense. Their acts, movements, and ways of being-in-the-world render determinate certain possibilities of being (for example, male or female; member of the upper class or member of the working class), which are always delimited by the historical present. In this way, they (re)produce and thus realize these historical possibilities of being in the present. Doing so, they be(come) or are they, meaning that the "I", the "we" or the "they" merely *is* what the materiality of the "I", the "we", or the "they" *does*. Indeed, subjects (i.e. intentionally organized materialities) can be said to have agency in the sense that they render historical possibilities of being determinate but in no case should they be conceived of as *a priori*, disembodied, pre-existing, substantial entities, or identities. In the words of Butler: "More appropriate, I suggest, would be a vocabulary that resists the substance metaphysics of subject-verb formations and relies instead on an ontology of present participles. The 'I' that is its body is, of necessity, a mode of embodying, and the 'what' that it embodies is possibilities. But here again the grammar of the formulation misleads, for the possibilities that are embodied are not fundamentally exterior or antecedent to the process of embodying itself"[291].

To be a woman, then, is "to have become a woman, to compel the body to conform to an historical idea of 'woman,' to induce the body to become a cultural sign, to materialize oneself in obedience to an historically delimited possibility, and to do this as a sustained and repeated corporeal project"[292]. One is a woman when one's body embodies or does the historically

[287] J. Butler, *ibidem* note 24, p. 401.
[288] J. Butler, *ibidem* note 24, pp. 402-403.
[289] J. Butler, *ibidem* note 24, p. 403.
[290] J. Butler, *ibidem* note 24, p. 402.
[291] J. Butler, *ibidem* note 24, p. 403.
[292] J. Butler, *ibidem* note 24, pp. 403-404.

circumscribed possibility of being female, severely controlled, and patrolled by the heterosexual matrix. And that body's specific embodiment (re)constitutes womanhood in the present turn, every moment or instant again, over and over. Hence, gender is not that which is found in or acts upon the body, it is that being-in-the-world which bodies performatively ever reiterate. Therefore, "there is neither an 'essence' that gender expresses or externalizes nor an objective ideal to which gender aspires; because gender is not a fact, the various acts of gender create the idea of gender, and without those acts, there would be no gender at all. Gender is, thus, a construction that regularly conceals its genesis"[293]. Butler argues that this hiding ensures that "the authors of gender become entranced by their own fictions whereby the construction compels one's belief in its necessity and naturalness. The historical possibilities materialized through various corporeal styles are nothing other than those punitively regulated cultural fictions that are alternately embodied and disguised under duress"[294]. Thus, a performative understanding of sex/gender asserts that gender is that which is everlastingly and constantly (re)generated by the corporeal acts of bodies that have learned to identify themselves as sexed and put into effect these socially constructed regulatory ideals, rather than a preceding identity voicing sex, i.e. that which would be the result of a biologically definable male or female body.

Consequentially, "it is wrong to conceive of even the most extreme gay or lesbian gender play as an imitation of the heterosexual 'original,' for heterosexual men and women are engaged in a kind of gender performance as artificial as the drag queen's. (...) All gender is an imitation for which there is no original (...) [and] the diversity of these gender performances in turn denaturalizes 'straight' gender and reveals that to be a kind of drag as well"[295]. Now fully apprehending a performative understanding of sex/gender, it should have become even clearer why the heterosexual matrix, producing a biological understanding of sex/gender, always already involves discursive violence for *all* bodies at least to a certain degree, whether or not they are cis-gender, since it oppressively restricts bodies' possibilities of being. The heterosexual matrix confines, constrains, and imprisons them, with all the gender role strain and other types of harmful psychological and even physical consequences that this implies, such as the low self-esteem which can result from not managing to comply with gendered beauty standards.

[293] J. Butler, *ibidem* note 24, p. 404.
[294] J. Butler, *ibidem* note 24, p. 404.
[295] Harvard Law Review, *ibidem* note 12, p. 1989.

Yet, if "gender is an act which has been rehearsed, much as a script survives the particular actors who make use of it, but which requires individual actors in order to be actualized and reproduced as reality once again"[296], then the possibility of defying both material and discursive gender violence (resulting from a biological conception of sex/gender as produced by the heterosexual matrix) is implied in the coerced performance itself. Precisely because gender is the re-enactment of the gender norms pre-defined by the heterosexual matrix, it only exists because and whenever it is legitimized by its repetition. It this sense, there is nothing deterministic about gender: if reiteration establishes gender, then gender can be disestablished "and errantly or not-so-errantly reestablished"[297]. Indeed, as Halley states: "In a utopian world, one would burn down gender. But inasmuch Butler regarded that as impossible (…), feminism should promote gender trouble. And how could gender be troubled? We can't not repeat it, but we could seek to repeat it wrong"[298]. According to queer feminists, subversive practices are "the redeployment of productive power to reiterate gender norms, [which] may take the form of refusing the norm, of performing the norm in a slightly modified way, [or] of asserting alternative normative possibilities for intelligibly sexed/gendered life"[299]. Doing so might help us overcome both visible and invisible gender violence, as it disrupts the mundaneness of conventional sex/gender and induces subjects to become conscious about its socially constructed character. Indeed, troubling gender "[reveals] that gender produces the illusion that male and female bodies exist in nature"[300] and thereby facilitates catharsis as a necessary point of departure in light of reforms for greater gender justice. Hence, following feminist queer reasoning, emancipation or liberation lies in "[maintaining] uncertainty, tentativeness, open-endedness, not because they are freedom in itself, but because they bring resistance into a full engagement with power"[301].

[296] J. Butler, *ibidem* note 24, p. 408.
[297] J. Butler, "Reply from Judith Butler to Mills and Jenkins", *Differences*, 2007, vol. 18, p. 182.
[298] J. Halley, *ibidem* note 11, p. 138.
[299] K. McNeilly, ibidem note 18, p. 269.
[300] J. Halley, *ibidem* note 11, p. 138.
[301] J. Halley, *ibidem* note 11, p. 131.

Chapter III. Performative sex/gender in law: abolishing mandatory and binary sex/gender registration

If "sex differences are semiotic — that is, constituted by a system of signs that we produce and interpret"[302], as the previous Chapter suggested, then "legal discourse should be recognized as a site of political struggle over sex differences"[303]. While Chapter II aimed to scrutinize a performative understanding of sex/gender in theory, I apply, in this Chapter, queer feminists' insights to the legal discipline and more specifically to the issue of mandatory and binary sex/gender registration on identity documents in order to best make sense of the recent developments set out in Chapter I and to clarify how they are a necessary first step towards greater gender justice.

As Currie noted: "Feminist scholars are beginning to take the view that as discourse, law is an important site for discursive resistance. However, the task is no longer to identify the theoretically correct 'content' of law, as reform-oriented research implies. Given the contradictory and disappointing effects of reform, analyses focus upon how dominant meanings are constructed in law"[304]. Indeed, the law is normative and thus dictates what *should be*, rather than declaring what *is*. Dreyfus has argued that "to equip a subject with legal rights, specific attributes or characteristics must be identified through which a subject becomes intelligible to the eyes of the law. By defining the categories and groups to which they belong, law engages in the discursive 'production' of its subjects. As a consequence, '[t]here is no natural subject who precedes representation in law'"[305]. Inasmuch as the law is premised on a biological conception of sex/gender (cf. Chapter I), constructed and induced by the heterosexual matrix (cf. Chapter II), I hold the law complicit in upholding and institutionalizing that same matrix. As a consequence, it has a role to play in the perpetuation of both material and discursive gender violence resulting from that matrix, as was described in the previous Chapter. As long as the law mandates binary sex/gender registration in line with a biological conception of sex/gender, it legitimizes the commonly held and hegemonic, false, and oppressive belief in so-called natural and binary sex/gender.[306] Moreover, it induces or even compels its subjects to (re)perform conventional sex/gender with all negative effects this implies. Indeed, "categories that may have begun as the artificial inventions of cadastral

[302] M.J. FRUG, *ibidem* note 1, p. 1046.
[303] M.J. FRUG, *ibidem* note 1, p. 1046.
[304] D.H. CURRIE, *ibidem* note 229, p. 73.
[305] T. DREYFUS, *ibidem* note 95, p. 38.
[306] A.J. NEUMAN WIPPLER, *ibidem* note 7, pp. 501-505.

surveyors, census takers, judges, or police officers can end by becoming categories that organize people's daily experience precisely because they are embedded in state-created institutions that structure that experience"[307].

The previous Chapter clarified how sex/gender is performed, that is, the consequence of corporeal acts ever reiterating the sexed regulatory ideals of "woman" and "man", rather than biological, that is, a pre-discursive fact "before" the law. As a result, the only viable way toward gender emancipation and justice lies in the State's decertification of (binary) sex/gender as a physical datum to be correctly recorded. This strategy would reflect a performative account of sex/gender in law and would eventually allow for the proliferation of subversive gender practices. Indeed, "if states play an important role in the interpellation of people as gendered subjects, processes of certification in which individuals are assigned a gender, and then obliged to repeat that gender across various procedures and activities, constitute a significant aspect of how gender, as a binary set of differentiated categories, is sustained and entrenched"[308]. As long as the law reproduces and mandates the actual very source of gender violence, i.e. the categories of man/male and woman/female themselves, current reforms aiming at greater gender equality (such as those facilitating legal gender recognition by abolishing mandatory physical alterations as a prerequisite for legal sex change or further anti-discrimination measures) may be considered vain.[309]

Because individuals belonging to sexual minorities affirmatively defy the validity of a biological conception of sex/gender produced by the heterosexual matrix, they are most consciously affected by the material and discursive gender violence it ordains. Hence, they have also been the most vocal in challenging this hegemonic heterosexual cultural system of gender, which produces not only heterosexuality but also men/males and women/females. They have done so by, amongst other actions, questioning mandatory binary sex/gender registration and gendered identity documents as cornerstones of that system (as was outlined in Chapter I, Section B). As a consequence, legal reforms concerning sex/gender registration are most often envisaged from the perspective of accommodating these minorities' needs.[310] With that regard, scholars have suggested maintaining mandatory *self-defined* registration but

[307] J.C. Scott, *Seeing like a state: how certain schemes to improve the human condition have failed*, Yale University Press, New Haven, 1998, pp. 82-83.
[308] D. Cooper, F. Renz, *ibidem* note 28, p. 487.
[309] K. McNeilly, *ibidem* note 18, p. 275.
[310] D. Cooper, F. Renz, *ibidem* note 28, p. 484.

introducing a third gender category (also called categorical expansionism)[311]; allowing to (temporarily) leave the sex/gender entry open; making registration optional (possibly in combination with the two aforementioned options); or finally abolishing sex/gender registration altogether.[312]

The first three options would effectively meet the human rights claims of sexual minorities but risk maintaining their Otherized status.[313] Indeed, a (mandatory) third category for all those who do not fit the M or F box might reinforce rather than smoothen the sex/gender binary.[314] Moreover, if the law is determined to adhere to a biological conception of sex/gender, it should for the sake of scientific validity enact one of these reforms since they better align the law and physiological reality given that scientific expertise regarding intersexuality now unequivocally established that even so-called natural sex is not binary.[315] However, only the latter option (and to a lesser degree the third one also) truly is in the interest of everyone because it does away with State-certified discursive gender violence affecting all subjects as intentionally organized materialities prey for the dominant heterosexual matrix.[316] Such reform resulting in genderless identity documents would effectively incorporate a performative understanding of sex/gender in law, prone to lead to greater gender justice since it impairs the legalized biological conception of sex/gender and its "categories of identity that contemporary judicial structures engender, naturalize and immobilize"[317]. It would, therefore, abate the State's role in legitimizing and furthering the heterosexual matrix and its material and discursive gender violence, unlike the other options, which "uncritically [accept] government officials as proper arbiters of sex. Formulating self-definition as the ultimate goal ignores the idea that gender should not only be self-defined but also self-controlled, a personal matter to be shared with people of one's own choosing, and neither assumed nor announced by others, especially not the state"[318].

Leaving queer feminist insights aside, one could equally recommend halting State-sponsored sex/gender assignment from a purely doctrinal or legal positivist perspective since such

[311] A.J. Neuman Wippler, *ibidem* note 7, p. 507.
[312] M. van den Brink, J. Tigchelaar, *ibidem* note 68, p. 58.
[313] M. van den Brink, J. Tigchelaar, *ibidem* note 68, p. 58.
[314] Commissioner for Human Rights, Issue Paper, *Human Rights and intersex people*, 2015, p. 40, available at <https://rm.coe.int/16806da5d4> (last consulted March 19, 2019).
[315] A. Fausto-Sterling, *ibidem* note 31, p. 21.
[316] D. Cooper, F. Renz, *ibidem* note 28, p. 484; A.J. Neuman Wippler, *ibidem* note 7, pp. 491-492.
[317] J. Butler, *ibidem* note 3, p. 7.
[318] A.J. Neuman Wippler, *ibidem* note 7, p. 501.

reform would do away with all *strictly legal* problems currently arising from mandatory sex/gender registration.[319] These include legally recognized transgender men giving birth (possible in countries where sterilization has been abolished as a requirement for the legal recognition of one's gender identity), which tests the validity of the *mater semper certa est* principle used in many legal systems to establish kinship.[320] Another example of legal inconsistencies resulting from mandatory binary sex/gender registration to which the decertification of sex/gender could be an answer is the impossibility of legally prohibiting conventional sex-affirming surgeries carried out on intersex infants (even though such a ban is mandated by international human rights law since these practices are considered torture) while at the same time requiring these infants to be registered as *either* male *or* female, which they are not.[321]

Furthermore, although the claims for genderless identity documents today still face both legal and social obstacles outlined below, the various legal developments on the national, regional, and international level outlined in Section B of Chapter I insinuate that the law starts displaying some openness toward a performative understanding of sex/gender by which such claims are inspired. Indeed, the German Constitutional Court affirmed that the German Basic Law orders the recognition of gender identities outside the binary because of its "expressive effect"[322], while *en passant* suggesting to the Legislator that nothing in the Constitution actually mandates the registration of sex/gender, without which, it argues, the issue of a potential breach of the constitutional right to personality by mandatory binary sex/gender registration would not even occur.[323] Likewise, the Austrian Constitutional Court and Dutch Court of first instance found mandatory binary sex/gender registration to be "a state-appointed gender assignment" unlawfully breaching Article 8 ECHR and also recognized sex/gender's expressive nature.[324] One could read into the Courts' recognition of sex/gender's expressive character their understanding of the performativity inherent to sex/gender as that which is constituted by subjects' bodily movements and ways of being-in-the-world, rather than that which is a purely biological matter. Moreover, although the French Court of Cassation unfortunately refused a male applicant to have their sex/gender entry changed to 'neutral'

[319] M. VAN DEN BRINK, J. TIGCHELAAR, *ibidem* note 68, p. 58.
[320] A. FAUSTO-STERLING, *ibidem* note 31, p. 22.
[321] P. CANNOOT, *ibidem* note 16, p. 92.
[322] BVerfG, *ibidem* note 136, p. 10, §47.
[323] BVerfG, *ibidem* note 136, p. 10, §46.
[324] Vfgh, *ibidem* note 137, §26; Rechtbank Limburg, *ibidem* note 138.

because "his physical appearance and social behavior"[325] are that of a man, one could argue that by doing so, the Court in fact affirmed that masculine sex/gender is constituted by "appearance and social behavior", i.e. that it is a styled corporeal performance (even though the Court in the end refused the troubling of sex/gender because its binarity is "a foundational element" to "the social and legal organization of society"[326] and thus a legitimate aim justifying the proportional measure of mandatory binary sex/gender registration).

Also, PACE Resolution 2191 (2017) recently called upon Member States to render sex/gender registration optional for everyone and the ECtHR just seriously destabilized the biological conception of sex/gender enshrined in law by annihilating the prominence given to so-called natural sex as the primary factor defining one's legal sex/gender in its 2019 *X v. The Former Yugoslav Republic of Macedonia* ruling.[327] Besides, the Court has more than once repeated that the two out of three elements of sexual identity, namely one's gender identity and sexual orientation are not only protected elements under Article 8 ECHR[328] but should also be considered "essential [aspects] of individuals' intimate identity, not to say of their existence"[329]. As a consequence, some commentators have argued that it is likely the Court would recognize the right to private life and self-determination to also apply to one's sex as the third element of sexual identity.[330] While that plea has been formulated to argue that conventional sex-affirming surgeries performed on intersex infants violate their guaranteed rights under Article 8, it equally supports the idea that mandatory sex/gender registration as either male or female is an unlawful breach of that right resulting in the existence of a positive obligation for States to either recognize non-binary gender identities or to abolish sex/gender registration altogether. Although the current wide margin of appreciation would surely empower the Contracting Parties to justify mandatory binary sex/gender registration as for now (and in the few years to come), evolutions such as those taking place in Austria, Denmark, Germany, Malta, the Netherlands, and even the UK, combined with the above-mentioned PACE Resolutions, bring to mind that such a legal interpretation of the right to private life does not seem unlikely to *eventually* become the ECtHR's position. Additionally, "if self-attestation is an accepted standard for changing the sex designation on one's birth certificate", as is more or

[325] Cour de Cassation, *ibidem* note 148 (own translation).
[326] Cour de Cassation, *ibidem* note 148 (own translation).
[327] ECtHR, *X v. The Former Yugoslav Republic of Macedonia*, *ibidem* note 192.
[328] ECtHR, *Van Kück v. Germany*, Application n° 35968/97, June 12, 2003, §69; ECtHR, *Schlumpf v. Switzerland*, Application n° 29002/06, January 8, 2009, § 77; ECtHR, *Y.Y. v. Turkey*, Application n° 14793/08, June 10, 2015, § 56.
[329] ECtHR, *A.P., Garçon and Nicot v. France*, *ibidem* note 163, §123.
[330] P. Cannoot, *ibidem* note 16, p. 90.

less the case since *X v. The Former Yugoslav Republic of Macedonia,* "it makes little sense presumptively to assign a legal sex to an infant who cannot attest to anything at the time the document is created"[331].

Finally, the Independent Expert on protection against violence and discrimination based SOGI appointed by the HRC either relied on or was at least inspired by a performative understanding of sex/gender since he cited a well-known queer feminist author in his latest report. In addition, the updated version of the Yogyakarta Principles explicitly urges States to end (binary) sex/gender registration in Principle 31, potentially in response to the criticisms the original principles received for perpetuating a biological conception of sex/gender. To a certain extent, the principles thereby incorporate a performative conceptualization of sex/gender in international soft law.

Although these developments do not overthrow the biological conception of sex/gender in law, they do suggest that legal reforms taking into consideration or premised on a performative understanding of sex/gender are likely to flourish in the future, which may eventually lead us to overcome the current persisting social and legal hurdles impeding the issuance of genderless internationally valid passports and national identity documents. One of the obstacles to genderless passports are the ICAO's Guidelines on MROTDs, described in Chapter I, which require a positive sex/gender entry be it M, F, or X. This soft law instrument is often codified into hard law, such as for example in European Regulation (EC) n°2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by EU Member States, which provides that "the passport or travel document shall contain a machine-readable biographical data page, which shall comply with Part 1 (machine-readable passports) of ICAO Document 9303" [332]. As a consequence, this regulation mandates a positive sex/gender entry and thereby constitutes a clear legal obstacle to genderless passports for European Union citizens. Even outside the European Union, most States willing to reform their sex/gender registration system in light of greater gender justice opted to introduce a third category rather than abolishing registration altogether as a consequence of the ICAO's Guidelines on MROTDs.[333]

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[331] A.J. Neuman Wippler, *ibidem* note 7, p. 529.

[332] Regulation (EC) n° 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, Annex, *Official Journal of the European Union L* 385 of December 12, 2004, p. 1.

[333] For example, this was the case for Canada and New Zealand (which reviewed the ICAO's Document 9303 Guidelines in order to see whether it could issue genderless passports). See, Annex.

The 2012 cost-benefit analysis of a potential reform of the ICAO Guidelines carried out by New Zealand concluded that the financial expenditures related to the adaptation of software and the complications to border operations outweighed claims for genderless passports, which would be more inclusive and ensure that transgender passenger no longer face awkward situations during identity checks or that their perceived sexual identity mismatches their legal one.[334] Apart from the financial aspect, "maintaining security and combatting identity theft and fraud" or "ensuring security at national borders" are arguments governments often invoke in order to justify the laws mandating binary sex/gender registration.[335] Moreover, it is frequently argued that the State's decertification of sex/gender would deny it agency to ensure "public order", to enact and rely on already existing sex/gender specific provisions such as affirmative action or other anti-discrimination measures[336], or to implement certain policies in fields such as public health (by for instance sending out an invitation for breast cancer screening to all women in the country).[337]

Having a closer look at these arguments, however, it seems that they are above all unfounded and unnecessary but understandable resistances to change stemming from the deeply embedded heterosexual matrix (which indicate that the time for genderless passports is not ripe as of yet). Indeed, in the US state of Rhode Island, sex/gender is not registered at birth[338], while in Malta[339], Germany, and Austria,[340] the registration of an infant's sex/gender can be postponed until they can self-determine their sex/gender at a later stage. In certain Canadian provinces, sex/gender markers are no longer displayed on several identity documents[341] nor is a sex/gender marker found on German national identity cards (although it is registered in the Civil Status Register)[342]. All along, no concerns of "public order" have arisen in these jurisdictions. Moreover, twelve countries mentioned in Chapter I, Section B, currently issue passports with an 'X' sex/gender marker. If these countries managed to "maintain security and

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[334] TECHNICAL ADVISORY GROUP ON MACHINE READABLE TRAVEL DOCUMENTS (ICAO), *ibidem* note 127, p. 2.
[335] Those were amongst others the arguments set forth by the British Government in the case HIGH COURT OF JUSTICE, *R (on the application of Christie Elan-Cane) v. Secretary of State for the Home Department*, *ibidem* note 113, §52, discussed in Chapter I, Section B.
[336] A.J. NEUMAN WIPPLER, *ibidem* note 7, p. 539.
[337] P. CANNOOT, *ibidem* note 16, pp. 92-93.
[338] J. WEISS, *ibidem* note 37, p. 175.
[339] See, Annex.
[340] See, Chapter I, Section B.
[341] See, Annex.
[342] FEDERAL MINISTER OF THE INTERIOR, BUILDING AND COMMUNITY, *Data on the ID card*, available at <https://www.personalausweisportal.de/EN/Citizens/German_ID_Card/Features/Data_Card/Data-on-the-card_node.html> (last consulted March 19, 2019).

combat identity theft and fraud" and despite the issuance of passports with a third sex/gender category still "ensure the security at national borders", this argument might rather be a fallacy tackling an issue which actually is not one. Along the same line, I believe the public interest in the stability, consistency, and reliability of the civil register, which generates on its turn legal certainty[343], to be better served in case one's sex/gender is not registered at all. Indeed, because of its *de facto* fluidity, inconsistency, and socially constructed nature, the law will never be able to consistently and reliably record one's as demonstrated in Chapter II not-so-stable sex/gender. As a consequence, mandatory sex/gender registration only troubles rather than provides for legal certainty.

With regard to the allegedly excessive financial burden set forth to oppose either the abolition of sex/gender registration and display on identity documents, or the introduction of a third category, one could refer to both the German and Austrian Constitutional Courts, which affirmed that "bureaucratic and financial costs during a transitional period does not justify denying the option of a further gender entry (...) given the interference with fundamental rights that arises from being ignored by law in one's own gender identity"[344]. In addition, the fact that Nepal and India, which the World Bank respectively considered low-income and lower-middle-income economies[345], were amongst the first countries to introduce a third sex/gender category suggests that however real, the financial burden is not unbridgeable.

Furthermore, it is true that certain legal provisions explicitly mention "men and women" or are gender-specific, such as those mentioned in Chapter I, Section A, or Articles 2 and 3 of the Treaty on the European Union, which both refer to "equality between women and men"[346]. However, arguing that they mandate the registration of sex/gender and oppose the introduction of a third sex/gender category (as people classified as such would then fall outside their scope of application)[347] is primarily a textual interpretation testifying a spiteful formalistic approach to law that can easily be overcome by a teleological reading as the

[343] These arguments were mentioned in the Austrian and French cases discussed in Chapter I, Section B. See, VERFASSUNGSGERICHTSHOF ÖSTERREICH, *ibidem* note 135 and COUR DE CASSATION, *ibidem* note 148.
[344] BVerfG, *ibidem* note 136, p. 12, §52.
[345] WORLD BANK, *World Bank Country and Lending Groups*, available at <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (last consulted March 19, 2019).
[346] Consolidated version of the Treaty on European Union, *Official Journal C 202,* June 7, 2016, p. 13, Article 2 and Article 3.
[347] M. VAN DEN BRINK, J. TIGCHELAAR, *ibidem* note 68, pp. 58-59.

German and Austrian Constitutional Courts have validated.[348] Indeed, when used outside of the context of anti-discrimination laws, on the one hand, the rationale behind the employment of these terms could only have been to inclusively designate all members of the polity. Taking the intent of the drafters of such provisions into consideration then, judicial interpreters should not have a hard time applying these provisions to those now legally classified as 'X'. Within the context of provisions targeting gender equality, on the other hand, "the purpose of [such provisions] is mainly to eliminate gender-based discrimination against women, but its aim is not to enshrine gender identity in civil status law or to rule out introducing another gender category in addition to 'male' and 'female'"[349].

The latter comment allows me to equally refute the legitimate concern, often brought forward by second wave feminists, according to which the abolition of sex/gender registration prevents the State from addressing the gender disparities existing between women and men or from implementing certain policies regarding public health. Indeed, how could one engage with an issue, if one cannot even name it. Such an argument is inspired by the debate held within the discipline of critical race theory (CRT) concerning the appropriateness of "colorblind" versus "race-conscious" policies as the adequate strategy to overcome racial inequalities. In the US, colorblindness has been heavily politicized since CRT scholars view "traditional claims of legal neutrality, objectivity, color-blindness, and meritocracy as camouflages for the self-interest of dominant groups in American society"[350]. As a consequence, many scholars advocating for sex/gender abolition feel a need to assert that their advocacy "does not encourage a gender-blind society or assert that gender is an unimportant part of individual identity. On the contrary, (…) gender is too important and too individualized to serve as a site for governmental categorization"[351]. While sex/gender abolition might at first sight appear an extreme form of gender-neutral policy, one should bear in mind what Cooper and Renz have correctly pointed out: "reforming the current system so gender is no longer assigned does not mean the state necessarily withdraws from recognizing gender identities or from recognizing gender as a relation of inequality"[352] and consequentially act upon it.

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[348] BVerfG, *ibidem* note 136, pp. 11-12, §50-51.
[349] BVerfG, *ibidem* note 136, p. 11, §50.
[350] R. DELGADO, quoted in P. Monaghan, "Critical Race Theory: some startling analyses", *Chronicles of Higher Education*, 23 June 1993, available at <https://www.chronicle.com/article/Critical-Race-Theory-Some/70760> (last consulted March 19, 2019).
[351] A.J. NEUMAN WIPPLER, *ibidem* note 7, p. 494.
[352] D. COOPER, F. RENZ, *ibidem* note 28, p. 488.

In this respect, one should note, first, that if the concern is to genuinely combat gender-based forms of discrimination, people falling outside the gender binary are inadequately protected under current laws prohibiting discrimination on the basis of sex anyway, given the law's incapacity to recognize anything else than masculinity or femininity.[353] This problem could be solved by adapting "discrimination on the basis of sex" to "discrimination based on gender expression".[354] Such reform would protect both current disparate treatment of self-identified women (or men) since Chapter II indicated that conventional gender is equally performed and thus "an expression", as well as unequal treatment of those identifying and expressing themselves as gender queer. It would, moreover, be better in line with a performative understanding of sex/gender. Second, even when mandatory (binary) sex/gender registration is eradicated, States would still be able to enact gender-specific provisions (i.e. use the terms 'women' and 'men') as well as measures fighting gender-based forms of discrimination because "State law can regulate gender identity in several ways beyond the mere certification of someone's sex"[355]. Indeed, one way to easily solve the issue regarding the scope of application of gender-specific provisions in case the State halted certifying sex/gender would be to rely on the standard of self-identification.[356] Taking into account the systemic inequalities between men and women, nothing effectively prevents the State from adopting measures targeting women's historically subordinated position, upon which individuals performing femininity could then rely, be they born with physical characteristics typically ascribed to females or to males. Moreover, although States would no longer certify sex/gender, private organizations and entities, such as schools, hospitals, businesses, and sports federations might continue to factor in sex/gender for their operations and services. As a consequence, "one [way the State can continue to regulate sex/gender] is by recognizing organizations' definitional autonomy when it comes to the meaning of, say, womanhood (although once an organization has set its criteria, however informally, it may be legally compelled to treat individual applicants fairly according to its terms)"[357]. Another way that the State can still have an impact on sex/gender, and thereby use that impact to fight gender discrepancies, is on the contrary by compelling organizations to accept individuals' self-defined sex/gender independently of a specific organization's understanding of it.[358] Finally,

[353] K. Reineck, *ibidem* note 39, p. 283.
[354] A.J. Neuman Wippler, *ibidem* note 7, p. 541.
[355] D. Cooper, F. Renz, *ibidem* note 28, p. 497.
[356] A.J. Neuman Wippler, *ibidem* note 7, p. 540.
[357] D. Cooper, F. Renz, *ibidem* note 28, p. 497.
[358] D. Cooper, F. Renz, *ibidem* note 28, p. 497.

the State may adopt "regulatory frameworks which structure and limit permissible choices, for instance, by determining that certain kinds of identity criteria are legally unacceptable"[359].

These remarks equally apply with regard to the State's capacity to carry out public health programs. The State may leave definitional autonomy to hospitals and physicians regarding the way they classify patients or compel them to adopt a certain definition of "woman", "men", and "other" (or any other category) as part of a patient's medical record and then, for example, require them to invite all those labeled women for an annual breast cancer screening test. This approach allows States to carry out health or gender specific related policies without the need to have an individual legally fix or define their sex/gender.

As one can observe, there is a myriad of possibilities left to the State in order to continue fighting both material and discursive gender violence without forcing individuals to identify in line with a biological conception of sex/gender produced by the heterosexual matrix. Once mandatory (binary) sex/gender registration will have been outlawed, gender abolitionist literature has often suggested to compare sex/gender to, and treat it in the same way, as religion.[360] The analogy of religion is fitting because in many, but not all, States throughout the world, religion is not determined nor assigned to individuals by the State while it is still recognized as an important element of their identity.[361] As Cruz has demonstrated, various schools or approaches exist as to what exactly the State may and may not do in light of the freedom or disestablishment of religion, which could inform the State's respective do's and don'ts with regard to what would be a freedom of gender.[362] Under a free exercise and non-coercion approach, the "government is free to rely on and endorse religious beliefs if it does not force anyone to confess or practice them"[363], while under a neutrality, non-preferentialism, or non-endorsement approach, the "government should not appear to embrace religious beliefs or the proposition that a person's religion is relevant to his or her standing in the public

[359] D. Cooper, F. Renz, *ibidem* note 28, p. 497. For example, in the British *Jewish Free School* case, discussed by Cooper and Renz, the Court invalidated a school's decision not to accept an applicant because his mother had converted to Judaism rather than being born Jewish and thereby estimated the applicant not to be Jewish. Based on the Race Relations Act of 1976, the Court found that the school could not take into consideration children's matrilineal lineage as a criterion for determining their ethnicity. As a consequence, the "school changed its admissions policy to emphasize religious observance and participation rather than halachic Jewish status". This illustrates how the State, although not directly certifying who is Jewish and who is not, may still indirectly regulate (religious) identity.
[360] For example, see D. Cruz, *ibidem* note 27.
[361] D. Cooper, F. Renz, *ibidem* note 28, p. 499.
[362] D. Cruz, *ibidem* note 27, p. 1027.
[363] T.C. Berg, "Religion Clause Anti-Theories", *Notre Dame Law Review*, 1997, vol. 72, p. 731.

realm"[364]. The separation and privatization approach requires government to treat religion as something strictly private and cannot provide aid to certain religious beliefs.[365] Applied to sex/gender, mandatory binary sex/gender registration would be forbidden and genderless identity documents the norm.[366] Indeed, gendered identity documents are problematic from a free exercise and non-coercion point of view because they force at least certain people "into carrying and displaying an identification with a personal sex/gender designation with which [they] disagree"[367]. Neither do gendered identity documents pass the neutrality, non-preferentialism, or non-endorsement approach because they rest upon a biological conception of sex/gender and "when government singles out one gender belief system for adoption as its own, it expresses a message of endorsement that likewise violates disestablishment"[368]. For that same reason, gendered documents do not pass the separation and privatization doctrine, as they come down to the State granting aid in legitimizing a biological understanding of sex/gender, which is simply a private matter outside the realm of its concerns.[369] Even if one takes into consideration the accommodation approach, according to which the government may facilitate the exercise of religions and which is often combined with the other approaches,[370] binary sex/gender registration and identity documents do not pass the test since they facilitate individuals' ability to believe in a biological understanding of sex/gender but they do not so for those who understand that sex/gender is performed.

To conclude, the abolition of sex/gender registration and the issuance of genderless identity documents would ensure that "gendered identities can evolve, fluctuate, be held in plural ways but also be dropped"[371], that is, truly and unrestrictedly allow for gender subversive practices to be played out in society, which are according to queer feminist theory the first step towards greater gender justice and equality. The end of state-sponsored binary sex/gender assignment would also entail winding up the law's complicity in upholding the heterosexual matrix and as a consequence its legitimization of both material and discursive gender violence that is affecting everyone. Thus, whereas categorical expansionism and focusing on self-determination might satisfy the needs of sexual minorities, genderless

[364] D. Cruz, *ibidem* note 27, p. 1045.
[365] D. Cruz, *ibidem* note 27, pp. 1048-1049.
[366] D. Cruz, *ibidem* note 27, p. 1061.
[367] D. Cruz, *ibidem* note 27, p. 1056.
[368] D. Cruz, *ibidem* note 27, p. 1059.
[369] D. Cruz, *ibidem* note 27, p. 1059.
[370] D. Cruz, *ibidem* note 27, p. 1050.
[371] D. Cooper, F. Renz, *ibidem* note 28, p. 503.

identity documents are in the interest of all members of society. Although various legal obstacles enshrined in international law currently impede the issuance of genderless passports, the socio-political and legal arguments set forth against the deliverance of genderless national identity documents or the halt of binary sex/gender registration can easily be crushed. As claims for genderless identity documents will increase in visibility and receive louder and broader support (attested by the developments laid down in Chapter I, Section B), States may want to grant these requests, since queer feminists have debunked biological sex/gender and the various legal arguments described above support such decision. In this way, the international locks towards greater gender justice might eventually be revised as well. In the meantime, optional and non-binary sex/gender registration such as currently available in Germany and Austria seems to be the best practice, even though, in the end, "instead of seeking the more precise recognition of a person's gender identity, advocates should work toward a society where the government has no interest in anyone's gender identity. (...) It would allow for complete freedom of gender expression, unhindered by the state's (in)validation of anyone's gender identity. This is the possibility that genderless ID holds."[372]

[372] A.J. NEUMAN WIPPLER, *ibidem* note 7, p. 543.

Conclusion

In recent history, advocacy for genderless identity documents, whether passports, national IDs, driver licenses, or birth certificates has become louder and increasingly visible. In most instances, members of sexual minorities, and more specifically transgender, genderqueer, transsexual, and intersex individuals demanded either the introduction of a third sex/gender category or the abolition of mandatory (binary) sex/gender registration. The increased sensitivity of the subject and various international, regional, and national legal developments suggest that reticent States will eventually also have to take a stance on the matter. For these States, for policy-makers, for judges facing these claims, and for the public at large, this dissertation sought to understand where these demands came from, to explore their rationale, and to outline the reasons for granting them.

Chapter I demonstrated how the law has thus far been premised on and reflects a biological understanding of sex/gender, which is the commonly held belief that gender acts upon, is to be found in, or is linked to natural and binary sex. As a result, most legal systems around the world require newborns to be registered as either male or female, assume these then legally sexed bodies to be(come) men and women and be sexually attracted to one another. From this perspective, gendered identity documents merely reflect a prediscursive natural order in which sexual minorities' minds and bodies should and can only be considered illegitimate (or even pathologic) deviations to be punished or straightened out. Moreover, first and second wave feminist advocacy has in recent history led to legal reforms for greater gender justice, understood as equality between women and men. Consequentially, awareness about the socially constructed character of gender and the fact that the unequal, gendered power dynamics are not justified by physiology has increased. However, the biological conception of sex/gender in law has remained unchallenged.

Chapter II made clear that third wave feminists questioned the existence of a "universal and immutable, ahistorical and unproblematic class called 'woman', unsullied by definitional, biological or cultural diversity"[373]. Indeed, Butler argued against a biological conception of sex/gender when she stated that "there is no ontology of gender on which we might construct a politics, for gender ontologies always operate within established political contexts as normative injunctions, determining what qualifies as intelligible sex, invoking and

[373] R.A. WILCHINS, *ibidem* note 20, p. 66.

consolidating the reproductive constraints on sexuality, setting the prescriptive requirements whereby sexed or gendered bodies come into cultural intelligibility"[374]. Departing from queer experiences, queer feminists defied the idea of natural and binary sex/gender. They posit instead that gender constitutes that which subjects, whom society taught to recognize and identify themselves as males or females (i.e. as sexed), relentlessly (re)produce or perform by their corporeal acts, movements, or being-in-the-world, as always already imperfect imitations of the regulatory ideals expressed by the terms "man" and "woman". To state it differently: "a straight man's relationship to masculinity is the same as that of the butch lesbian's: both imitate a phantasmic ideal"[375].

Sex is neither natural nor by definition binary; it is instead an essentialized and essentializing socially constructed notion in which always physically differing bodies are conceptually, dualistically and complementarily unified, serving to naturalize gender and heterosexuality, which eventually results in a biological conception of sex/gender. In order to survive, the heterosexual cultural system of gender requires the institutionalization of material and discursive gender violence against those subjects who fail to realize or conform to these regulatory ideals through the forms of discrimination, social stigma, enforced medical interventions, and rendering unintelligible their life experiences. This is because their existence reveals the system's contingency or in no way ontologically necessity. However, as a consequence, all subjects, whether or not they are cis-gender, face social pressure to as perfectly as possible embody conventional sex/gender. This does not only keep the unequal power balances between the concepts of "man" and "woman" alive but also leads to gender role strain and (un)conscious psychological discomfort as forms of discursive gender violence affecting everyone. As a strategy toward liberation, queer feminist legal theory suggests to "trouble gender", i.e. subversive gender practices that (deliberately) repeat the regulatory ideals imperfectly, since such gender performances may induce us to realize that gender essentialism is an illusion.

Chapter III argued that inasmuch as the law mandates binary sex/gender registration, it legitimizes a biological conception of sex/gender and thereby upholds the hegemonic heterosexual cultural system of gender. As a result, it plays a role in the institutionalization of both material and discursive gender violence affecting all bodies. Only by incorporating a

[374] J. BUTLER, *ibidem* note 3, p. 203.
[375] HARVARD LAW REVIEW, *ibidem* note 12, p. 1993.

performative understanding of sex/gender in law will gender equality and justice consequentially be better achieved, which requires the issuance of genderless identity documents.

Indeed, as long as the law sexes bodies, the State will be responsible for prompting subjects to embody conventional sex/gender, which results in the *status quo* regarding gender inequality, as well as material and discursive gender violence. Although all bodies get to deal with that violence, members of sexual minorities are more likely to be consciously affected by it since they explicitly defy or reject conventional sex/gender. This explains why they have been the most vocal in challenging mandatory binary sex/gender registration.

The introduction of a third gender category may be an adequate response to their pressing human rights concerns and certainly weakens the binarity of sex/gender. However, because it risks maintaining their Otherized status and perpetuating the belief in sex/gender as a (be it non-binary) biological fact "before" the law, the ultimate goal should be to halt State-sponsored sex/gender assignment. Indeed, "expansionist approaches to the problem of state recognition of gender identity ultimately reify sex as a natural, necessary, and defining feature of personhood"[376]. Therefore, it is only the decertification of sex/gender that most significantly impairs the legalized biological conception of sex/gender and consequentially the legally mandated discursive gender violence stemming from it, which consciously and unconsciously affects everyone. Such reform would allow subjects to more easily subvert gender ideals (since at least the law would no longer order them to be sexed) and would be consistent with the various recent legal developments scrutinized in Chapter I, which suggest that the law is slowly but surely preparing itself to move away from a biological understanding of sex/gender in view to embrace a performative one.

Queer feminist insights aside, issuing genderless identity documents can also be recommended from a doctrinal perspective since it would solve all strictly legal problems currently arising from mandatory binary sex/gender registration. Furthermore, the various legal arguments brought forward in Chapter III also support this change in policy. While there may presently be legal obstacles to the issuance of genderless passports at the international and regional level, the objections arising against the introduction of genderless national

[376] A.J. NEUMAN WIPPLER, *ibidem* note 7, p. 542.

identity cards can easily be refuted as Chapter III demonstrated. With that regard, one should note that the abolition of (binary) sex/gender does not entail that the law ought to disregard sex/gender as a relevant category. States can (and should) continue to fight material and discursive gender injustices, i.e. combat gender-based forms of discrimination, while at the same time not forcing individuals to identify in line with a biological conception of sex/gender. Finally, once national identity documents will increasingly have become less gendered, the remaining international and regional obstacles could also be reviewed as part of a shift toward a more inclusive, less oppressive international legal order built upon a performative understanding of sex/gender.

Annex

This annex provides a very swift analysis of the countries currently issuing either genderless identity documents or allowing for a third sex/gender category, which were mentioned but not discussed in the core of the dissertation. These countries are Australia, New Zealand, the US, India, Nepal, Canada, Malta, and Pakistan.

(1) Australia

In 2014, the High Court of Australia unanimously held that one should be able to register one's sex as 'non-specified' alongside 'male' and 'female'. This ruling made third gender category passports available to every individual in the Australian jurisdiction, confirming Western Australia's earlier practice of issuing passports with an 'X' gender marker, occurring for the first time in 2003 for Alex MacFarelane. See, *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 250 CLR 490, available at <http://eresources.hcourt.gov.au/downloadPdf/2014/HCA/11> (last consulted February 28, 2019). Moreover, on April 10, 2019, Tasmania passed legislation, which made gender optional on birth certificates. See, A. Humphries, E. Coulter, *Tasmania makes gender optional on birth certificates after Liberal crosses floor,* April 10, 2019, available at <https://www.abc.net.au/news/2019-04-10/birth-certificate-gender-laws-pass-in-tasmania/10989170> (last consulted April 16, 2019).

(2) New Zealand

New Zealand has been a front fighter with regard to challenging the binarity of gender and inclusive identity documents. In 2008, its national human rights institution (the Human Rights Commission) issued a report in which was suggested that providing for a third gender marker on passports (informing that the passport holder's sex/gender is 'indeterminate' or 'unspecified') would better serve the human rights interests of the transgender community. As a result, New Zealand's Passport Office changed its policy in 2012 and introduced a third sex/gender option (albeit under certain conditions). Today, any individual may apply for a passport stating 'X' under the sex/gender entry upon simple statutory declaration, without the need to amend one's sex/gender on one's birth certificate first. See, New Zealand Identity and Passport Office, *Information about Changing Sex/Gender Identity*, 2018, available at <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/> (last consulted March 1, 2019).

(3) US

In the US, Jamie Shupe filed a claim to have their gender marker changed from 'M' to 'X', which the Oregon Multnomah County Court granted in June 2016. Since a "General Judgment of Name and Sex Change" is not published, no record of this decision is publicly available, but several academic sources have confirmed Jamie's story. See, amongst other sources, K. Reineck, *ibidem* note 39, p. 281 and S. Hanssen, *ibidem* note 8, p. 293. Moreover, that same judge granted Patch in 2017 a "General Judgement of Name and Sex Change" resulting in the fact that Patch, previously Patrick Abbatiello, became the first ever citizen in the US (or the world) to be legally recognized as 'a-gendered'. See, M.E. O'Hara, *Judge Grants Oregon Resident the Right to Be Genderless*, March 23, 2017, available at <https://www.nbcnews.com/feature/nbc-out/judge-grants-oregon-resident-right-be-genderless-n736971> (last consulted March 30, 2019) and K. Reineck, *ibidem* note 39, p. 282. Finally, at the US federal level, the federal district court in Colorado found in 2016 in favor of Dana Zzyym who sued the Department of State in order to obtain a passport mentioning 'X' as their sex/gender. According to the Court, the Passport Agency for the United States Department of State's gender binary policy did not pass the arbitrary and capricious standard of the Administrative Procedure Act (APA). This was confirmed on appeal on September 19, 2018. Although Dana argued that the State's refusal to recognize their non-binary sex/gender identity violated their constitutional rights to international travels, individual dignity and autonomy, the Court deemed it unnecessary to assess these matters, as it concluded that the Passport Agency had violated the APA anyway, and thereby granted Dana relief. As a result, the *Zzymm v. Pompeo* ruling makes third gender category passports available for US citizens too. See, *Zzymm v. Pompeo*, 341 F. Supp. 3d 1248, (D. Colo. Sept. 19, 2018).

(4) India

In India, hijras or eunuchs (being individuals identifying as a third gender, that is neither male or female) have claimed identity documents recognizing them as an actual third gender, premised on the right to equality before the law and the right to equal protection of law guaranteed by article 14 and 21 of the Constitution, in *National Legal Services Authority v. Union of India & Ors.*, AIR 2014 SC 1863, available at <https://www.sci.gov.in/jonew/judis/41411.pdf> (last consulted March 1, 2019). Unlike in the western world, where intersex, transsexual, transgender, or gender queer individuals have been rendered invisible throughout history, hijras and eunuchs, "as a group, have got a strong

historical presence in [India] in the Hindu mythology and other religious texts" (§12). Indeed, the Court affirms, "We notice that even though historically, Hijras/transgender persons had played a prominent role, with the onset of colonial rule from the 18th century onwards, the situation had changed drastically. During the British rule, a legislation was enacted to supervise the deeds of *Hijras*/TG community, called the Criminal Tribes Act, 1871, which deemed the entire community of *Hijras* persons as innately 'criminal' and 'addicted to the systematic commission of non-bailable offences' [sic]. The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place" (§16). Ever since the British colonization, the hijra community has been marginalized and as a consequence, they now constitute a group in need of particular governmental attention as they face substantial discrimination in the areas of amongst others health care, employment, housing, inheritance, and voting rights. Although public programs are set up in order to remedy this, governmental actions often fail to reach the target group since many hijras and/or eunuchs do not have valid identity documents matching their gender identity, which are necessary to access the services put in place. Indeed, "Government officials have recognized the lack of identity documents as one of the main reasons for the underutilization of existing schemes aimed at transgender persons" (See, S. Narrain, "Gender Identity, Citizenship and State Recognition", *Socio-Legal Review*, 2012, vol. 8, p. 112). Undeniably, this consideration played a role in the 2014 Indian Supreme Court's decision to formally recognize a third gender category on identity documents, called 'other'.

(5) Nepal

Nepal's Supreme Court has been the first domestic court to refer to the Yogyakarta Principles as a legal base for its decision to recognize a third gender category in the 2007 *Sunil Babu Pant and Others v. Nepal Government and Others* case, available in *National Judicial Academy Law Journal*, 2008, vol. 2, pp. 261-286 or at <https://www.icj.org/wp-content/uploads/2012/07/Sunil-Babu-Pant-and-Others-v.-Nepal-Government-and-Others-Supreme-Court-of-Nepal.pdf> (last consulted March 1, 2019). The cultural context and factors pulling towards the issuance of passports with 'X' as sex/gender marker can be compared to those discussed for India mentioned above.

(6) Canada

In Canada, passports allowing for 'X' instead of 'F' or 'M' as sex/gender marker have been introduced in 2017. This change of policy was announced by Canada's Minister of Immigration, Refugees and Citizenship on August 24, 2017. See, Immigration, Refugees and Citizenship Canada, *News Release: Minister Hussen announces major step forward in gender equality by making changes to passports and immigration documents*, 2017, available at <https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/08/minister_hussen_announcesmajorstepforwardingenderequalitybymakin.html> (last consulted March 1, 2019). This change is the result of the Government's willingness to accommodate the needs of the Canadian LGBTQ2 community, after Marcella Daye, the acting manager of policy at the Canadian Human Rights Commission (being Canada's National Human Rights Institution) told the Government that "having gender-neutral identity documents like passports is the number one issue transgender Canadians have raised in recent consultations with the commission". See, The Canadian Press, *Gender-neutral ID issues on Ottawa's radar for more than a year*, 2016, available at <https://www.cbc.ca/news/politics/gender-neutral-id-issues-1.3664821> (last consulted March 1, 2019). Indeed, Rory Vandrish, a gender queer activist who is a member of the Canadian Gender-Free I.D. Coalition mentioned in footnote 44, previously launched a Human Rights Commission Complaint demanding the Government to issue genderless (as opposed to a third gender category) passports. Since these proceedings are confidential, no record is publicly available. It seems likely that the Canadian change in policy is the Government's response to and settling of this complaint, although it chose to introduce passports with a third sex/gender marker 'X' in order to comply with the ICAO guidelines, set out in Section A, Sub-section 2 of this Chapter. This is in line with what has been happening at the level of the Canadian provinces too. Indeed, Ontario previously pro-actively changed its policy after having public consultations with the communities at stake and does no longer issue health cards mentioning any sex or gender marker, while driver licenses have the 'X' option. Although British Columbia was less eager to step on board with genderless identity documents, it recently issued a health card mentioning 'U' for 'unspecified' as gender marker, in order to settle a complaint introduced before the Human Rights Tribunal. See, T. Vikander, *Why is BC Vital Stats dragging the gender markers battle to court?*, 2016, available at <https://www.dailyxtra.com/why-is-bc-vital-stats-dragging-the-gender-markers-battle-to-court-72414> (last consulted March 1, 2019). See, more generally, B. Picard, *ibidem* note 36.

(7) Malta

Since the Gender Identity, Gender Expression And Sex Characteristics Act, Article 7, §4, available at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1> (last consulted March 1, 2019), was adopted in 2015, parents may decide not to have their child's sex/gender registered, i.e. to leave the birth certificate genderless. In that case, their passport will have an 'X' as sex/gender marker. After the age of 18, Maltese citizens are required to register their sex/gender but may opt for 'X' by a sworn statement before the notary. See, Y. Pace, *Malta introduces 'X' marker on passports, ID cards and work permits*, 2017, available at <https://www.maltatoday.com.mt/news/national/80228/malta_introduces_x_marker_on_passports_id_cards_and_work_permits> (last consulted March 1, 2019).

(8) Pakistan

Identity cards with a third sex/gender category are legally made available in Pakistan since the Order of the Pakistani Supreme Court, Const. Petition n°43/2009, *Khaki v. Rawalpindi*, available at <https://www.icj.org/wp-content/uploads/2012/07/Khaki-v.-Rawalpindi-Supreme-Court-of-Pakistan.pdf> (last consulted March 30, 2019) stating in §2 that the "[National Database and Registration Authority] is required to adopt a strategy (...) to record exact status in the column meant for male or female".

Abstract

In recent times, claims challenging mandatory and binary sex/gender registration have been made in various national Courts and through (inter)national policy advocacy. The increased attention for genderless identity documents or third sex/gender options and diverse national, European, and international legal developments suggest that gradually more States will be confronted with the issue as well. It is for those States, for policy-makers, for judges facing such claims, and for society at large that this dissertation seeks to illuminate where these demands come from, how to understand them, and why to grant them.

Inasmuch as members of sexual minorities are most consciously affected by the hegemonic heterosexual cultural system of gender, which not only pressures bodies to exhibit heterosexual desires but also to corporeally recognize and identify themselves as dualistically and asymmetrically sexed (i.e. as male or female) and to behave in line with discursively formed binary gender identities (i.e. masculinity or femininity), they have been the most vocal in challenging mandatory binary sex/gender registration. However, this dissertation contends that genderless identity documents are in the interest of all since they serve gender justice.

Based on queer feminist (legal) theory, I argue that as long as the law continues to certify sex/gender by issuing (binary) gendered identity documents, it will be complicit in upholding the heterosexual matrix's biological conception of sex/gender and the material and discursive gender violence stemming from it, affecting everyone, whether or not they are cis-gender. Consequentially, gender equality and justice will be better achieved by incorporating a performative understanding of sex/gender in law, which requires to halt State-sponsored sex/gender assignment or gender policing. Leaving aside queer feminist insights, genderless identity documents can equally be recommended from a purely doctrinal perspective since it does away with all strictly legal problems currently arising from mandatory binary sex/gender registration.

Although this dissertation found various international legal obstacles to the issuance of genderless passports, the arguments brought forward against genderless national identity documents can easily be countered. With that regard, it is especially important to note that the abolition of mandatory binary sex/gender registration does not mean the law should overlook sex/gender as a legally relevant category. Indeed, this study shows that a myriad of

possibilities remains open for States to fight material and discursive gender injustice (i.e. gender based forms of disparities) without having to force individuals to identify in line with a biological conception of sex/gender. Once various States will have completely halted to certify sex/gender, the international legal hurdles to genderless passports may be revisited as well, accompanying the change toward a more inclusive, less oppressive international legal order based upon a performative understanding of sex/gender.

In the meantime, optional sex/gender registration, combined with the availability of a third category (as it currently is in Germany and Austria) seems to be the best practice. While this approach might meet the human rights claims of various intersex and transgender individuals, only genderless identity documents are genuinely consistent with a performative understanding of sex/gender (because they allow for the proliferation of gender subversive practices and because they most significantly prejudice today's legalized biological conception of sex/gender resulting in gender violence affecting everyone). Indeed, categorial expansionism holds the risk to perpetuate the idea of sex/gender as an apolitical, prediscursive category, which the government ought to correctly record, while queer feminist theory dictates that sex/gender is not natural, objective or biological nor binary.

Chapter I demonstrates how the law presently still rests upon a biological conception of sex/gender and outlines various legal developments at the national, European, and international level, which indicate that the law is getting ready to rather embrace a performative understanding of sex/gender. Chapter II dives into queer feminist theory in order further explain the link between a biological conception of sex/gender and the heterosexual matrix, as well as to clarify the performativity inherent to gender. Chapter III, finally, applies these queer feminist insights to the issue of mandatory binary sex/gender registration and the issuance of gendered identity documents.

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