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Effective Recognition and Protection of Non-Binary Gender Identities in the Council of Europe Framework

A Critical Analysis of Third Gender Marker Options From a Human Rights Law Standpoint

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ABSTRACT

Non-Binary gender identity is slowly growing in visibility across the globe. In at least seven Member States of the Council of Europe, some judicial, administrative or legislative bodies have already started organising a form of legal recognition for gender identities outside of the binary through the creation of "third" gender categories and "X" gender markers. This trend is growing fast and the European Court of Human Rights should pronounce itself soon on a potential positive obligation to organize such recognition in the case of *Y v. France* (pending). In this context, this research reflects on the foundations and flaws of the organisation of gender registration in the Council of Europe Member States. The main focus in this sense is put on the human rights law framework of the Council of Europe and specifically the right to respect for private life (Article 8 of the European Convention on Human Rights (E.C.H.R.)), the prohibition of inhuman and degrading treatment (Article 3 E.C.H.R.) and the freedom of expression (Article 10 E.C.H.R.) in light of the prohibition of discrimination (Article 14 E.C.H.R.). Furthermore, it reflects critically on the recent legal developments that led to the use of "X" gender markers to highlight their inadequacy. In doing so, it points towards the possible abolition of gender registration – or at the very least its suppression from identity documents.

KEYWORDS

Non-binary; Transgender; Legal Gender Recognition; LGBTQ+; Human Rights

EDITORIAL NOTE
Although this manuscript meets the word criteria for the inclusion in the "Articles and Essays" Section, it has been placed in the "Notes" Section for Editorial reasons. Such decision aligns with our Editorial Guidelines, which advocate for a nuanced approach to content classification and presentation.

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INTRODUCTION

In a letter of the 3rd of July 2020, the Dutch Government announced that it would remove the mention of gender from identity documents (not including passports) by 2024/2025.[1] This development comes after over a decade of national developments regarding the recognition and protection of gender identities outside of the male and female binary. Indeed, starting in 2014 with Denmark, a total of seven European countries have now recognised a "third" legal gender category taking the form of an "X" gender marker added to the pre-existing "M" and "F" options.

This article approaches those developments intending to expose their inadequacy in trying to create effective recognition and protection for non-binary persons in Europe. In doing so, it questions the establishment of the gender binary in European societies to expose its inconsistency and its detrimental consequence on the respect and inclusion of all in our societies. Moreover, it uses those conclusions to argue for the fundamental character of legal recognition in accessing protection.

Building on this, it presents the existing legal framework at the European level, focusing mostly on the European Convention on Human Rights and the subsequent case law of the European Court of Human Rights. More specifically, it argues that the existing approach to gender identity under the right to respect for private life (Article 8 E.C.H.R.) is inappropriate. Additionally, it limits the development of legal recognition and protection for non-binary individuals. This Chapter then proposes different avenues in defining the rights of recognition of non-binary persons: the right to not be subjected to inhuman or degrading treatment (Article 3 E.C.H.R.) and the freedom of expression (Article 10 E.C.H.R.).

Then, it introduces the details of all seven European states having created a "third" legal gender category to analyse the causes of those developments and the shortcomings they present for the recognition and protection of non-binary individuals in practice.

Finally, this thesis proposes an alternative to the "X" gender marker in the abandonment of gender as a legal category altogether, or less drastically, the suppression of gender markers on identity documents. This last option being the one recently endorsed by the Dutch and Belgian Governments, this thesis provides an

[1] *See* Ingrid van Engelshoven, Ministerie van Onderwijs, Cultuur en Wetenschap [Ministry of Education, Culture and Science], *Tweede Kamer Voortgangsbrief aanpak onnodige sekseregistratie* [*House of Representatives Progress letter approach unnecessary sex registration*], Rijksoverheid (July 7, 2020), https://www.rijksoverheid.nl/documenten/kamerstukken/2020/07/03/tweede-kamer-voortgangsbrief-aanpak-onnodige-sekseregistratie (Neth.).

analysis of the risks attached to such a development while also exposing the large benefits it would bring to the trans*, non-binary and inter* communities.

SETTING THE SCENE

> Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone's humanity. No one should have [their] dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order.[2]

Those words pronounced by the Caribbean Court of Justice in 2018 set the perfect introduction to this research in establishing the importance of fostering inclusive societies. Such an outset can lead to a myriad of discussions, from the denunciation of racist biases to the call for the of Lesbian, Gay, Bisexual, Transgender, Questioning or Queer and Intersex [hereinafter L.G.B.T.Q.I.*] identities in public spaces. It is through this diversity approach that this research will discuss the inclusion of non-binary gender identities within the protective system of the Council of Europe and its Member States. It presents itself as a response to the recent developments in seven Member States which created legal frameworks to recognise non-binary gender identities through the creation of a "third" or "X" gender marker. This development stems from the long-term fight for the de-medicalisation of trans* identities through the condemnation of sterilization and other medical requirements for legal gender recognition procedures. In slowly separating the conception of one's gender identity from their biological body and sex characteristics, the legal sphere is in the process of creating more opportunities for the inclusion of persons who do not fit the gender binary altogether. Non-binary persons, who do not identify as male or female but rather as an in-between, a combination of both or neither, are thus for the first time in European states given some form of legal recognition. While such a development is a step to be celebrated in the way it has raised awareness and given visibility to the non-binary community, it is flawed in multiple ways and national systems have implemented very different procedures that vary in terms of inclusivity. To this end, this research will ask the following questions: Are third gender-marker options (X), introduced by various European states, providing effective

[2] Mc Ewan et. al. v. Advocate General of Guyana, Caribbean Court of Justice [CCJ], ¶ 1 (Dec. 13, 2018). (pronouns were adapted from "his or her" to "their" in the spirit of gender inclusivity).

recognition and protection for non-binary individuals in light of the European Convention on Human Rights [hereinafter E.C.H.R.] framework? And if not, what better (more sensitive and inclusive) legal approaches at the national level, supported by the European level, can be recommended when analysing the issue through a queer lens?

STRUCTURE OF THE RESEARCH

To explore this issue, I will first set the ground by showing the nuanced character of the concept of gender. Following this, the second Chapter will explore the importance of the legal recognition of non-binary gender identities to ensure protection for all. Then, I will detail the legal framework relevant to this case study by first looking at the existing jurisprudence of the European Court of Human Rights [hereinafter E.Ct.H.R.] under the right to private life. This approach will be completed by an analysis of other potential avenues for the recognition of non-binary gender identities under the European Convention, namely the prohibition of degrading and ill-treatment and the freedom of expression taken in conjunction with the principle of non-discrimination. Following this, I will discuss the practicalities of the various "X" gender marker systems existing in European states and the inadequacies and missed opportunities inherent to them. Finally, I will put forward the alternative option of abolishing gender on identity documents or as a legal category altogether. This research will conclude with an analysis of the impact of queer identities, such as non-binary gender identities, can have in providing a more inclusive and efficient system of recognition and human rights protection.

1. THINKING OF GENDER IDENTITY AND THE BINARY AS A CRISIS

As an introduction to this study, this first Chapter aims to provide definitions for its subjects (non-binary individuals) and the dynamics at play around their existence in our current social constructions. Moreover, this Chapter's purpose is to provide arguments supporting the necessity of legal recognition of non-binary persons as separate subjects of law in ensuring the creation of appropriate protective measures. Hence, it will first provide a definitional analysis of non-binarity, gender identity, and the gender/sex conceptual division and its weaknesses. Then, it will assess the need for specific recognition as a first step towards effective protection through an assessment of the

particularity of non-binary issues, including the convergence and divergence with already existing rights movements and an analysis of the specific harm suffered by non-binary persons.

1.1. DEFINING GENDER OUTSIDE OF THE BINARY

Thinking about the binary is an exercise that challenges much more than the mere gender binary of male and female. Or rather, more than the direct influence of this binary system on gender identity and gender policies, but on the whole of our social institutions. For instance, there is a strong binary incentive in establishing gender identity and sex as well as sexual orientation. Where gender and sex have been divided between female and male, sexual orientation relies on a similar binary opposition between heterosexual and homosexual. Deconstructing such binaries has been the work of human rights scholars and defenders for decades and has successfully resulted in the legal recognition, for example, of bisexuality. Similarly, the last decade has seen more tolerance and legal recognition regarding the status of inter*[3] persons as a remarkable disruption of the binary of biologically assigned sex.[4] However, when it comes to gender within the European territories and others, there is a serious lack of awareness or any meaningful socio-legal development in breaking the male/female binary. In this context, non-binary individuals, whose experience of gender does not align with the gender, usually male or female,[5] that was assigned to them at birth,[6] are significantly left out.

[3] I will use the term "inter*" in this redacted way all across this research as it is more inclusive than others and has been reclaimed by the community.

[4] United Nations [hereinafter U.N.] and regional experts have defined inter* in the following terms:

> Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty.

Office of the High Commissioner for Human Rights, Intersex Awareness Day – Wednesday 26 October. End violence and harmful medical practices on intersex children and adults, U.N. and regional experts urge, OHCHR (Oct. 24, 2016), https://www.ohchr.org/en/2016/10/intersex-awareness-day-wednesday-26-october?LangID=E&NewsID=20739.

[5] This is not to exclude inter* individuals whose experience of gender is fundamentally impacted by the non-binarity of their "primary and secondary sex characteristics" as defined (often wrongly) by medical professionals upon birth.

[6] *See e.g.* the definition provided by the U.N. High Commissioner for Refugees [hereinafter U.N.H.C.R.], Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

> Transgender describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth. Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual. Transgender individuals dress or act in ways that are often different from what is generally expected by society on the basis of their sex assigned at birth. Also, they may not appear or act in these ways at all times.

This is even furthered by the influence of the binary system even within the trans* community. In this sense, the trans* community does not simply include binary trans* individuals, meaning persons who identify as the opposite gender according to the male/female socially enforced gender binary. Rather, it equally includes persons whose gender identity does not fit this binary division, qualified as non-binary persons. The non-binary community itself, as a sub-part of the trans* community, is inherently diverse as well – ranging across a spectrum that goes from male to female, but also including individuals whose gender identity is not fixed and can vary over time (genderfluid) as well as individuals whose identity is outside the spectrum altogether (agender). Following this, there are various experiences of what it means to be non-binary. Some individuals will feel the need to change their names, and appearance, or else, while others will not. Similarly, some non-binary persons might experience physical gender dysphoria[7] and undergo surgeries and hormone replacement treatment to feel more comfortable in their bodies while others will not.[8]

Before diving in depth into the specificities of legal recognition and protection of non-binary individuals, it is necessary to establish the analytical framework for this study. There are no legally established definitions of non-binarity. However, falling under the broader umbrella of gender identity, it is relevant to note the largely accepted definition of gender identity within the legal sphere contained in the Yogyakarta Principles and expressed through the following words as a first foundation.

> Gender Identity is understood to refer to 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.[9]

Incidentally, it is interesting to note that this definition does not include a binary aspect of gender and is therefore useful in the definition of non-binary issues.

[7] Gender dysphoria refers to the physical and mental discomfort linked to the gender assigned at birth for a trans* person. It can present both in relation to the individual's relations to their body and in their social relations and external perception of their gender. *See generally*: DILCRAH & Transat, *Comprendre Les Transidentités: Un Guide à l'usage Des Personnes Cis* 13 (2021), https://www.dilcrah.fr/wp-content/uploads/2022/02/GUIDE_COMPRENDRE-LES-TRANSIDENTITES-TRANSAT-NUMERIQUE-27-12-2021.pdf (Fr.).

[8] *See, e.g.,* Kylin Camburn, *9 young people explain what being non-binary mean to them*, GLAAD (July 14, 2019), https://legacy-glaad.org/amp/9-young-people-explain-what-being-non-binary-means-them.

[9] Yogyakarta Principles, Mar. 2007.

From an analytical point of view, feminist studies and gender studies have theorized "gender" as an alternative to the previously dominant concept of "sex".[10] In doing so, a division was established between sex, as a biological, unchangeable, attribute of the person and gender, as a socially constructed and performed sense of internally felt connection to one's identity.[11] In a sense, gender has been understood as the social translation of sex. This is still the position adopted by the World Health Organization[12] and the Council of Europe.[13] In a time where non-binary individuals are gaining more visibility in mainstream media as well as in the political and legal sphere, it is necessary to rethink this division. Following the position of Judith Butler, it can be argued that, if gender is the social translation of sex, once one is born and assumes a social character and thus, a gender, sex is deprived of all meaning or better, absorbed by gender.[14]

Moreover, one may also argue that sex itself is a social construct. Indeed, the strict binary of bodies is not rooted in a biological reality. All bodies are different. Even within bodies that fit the established list of criteria for "male" or "female" bodies, variations appear in all forms, hormone levels, bone density, weight, height, and more. It can be defended that such categories are broad as they are used to encompass large groups of individuals and thus allow for such fluidity in the application of its criteria. However, going further, it appears clearly that, with the existence of inter* individual, this binary is not only arbitrary but also inefficient in categorizing the reality of the variety of human sex. Furthermore, the existence of trans* individuals' capacity to modify their bodies to fit a sex category that they were not assigned at birth shows that such categories are permeable. This ties back to Butler's argument that upon birth the concept of gender absorbs the concept of sex. Indeed, if one can change their bodies to match their gender identity when discrepancies appear, then sex and gender can be interchangeable. Additionally, it's worth mentioning that in certain cases, transgender individuals may experience fluctuations in hormone levels even prior to initiating hormone replacement therapy.[15]

However, it is necessary to limit the debate on the division of sex and gender and their opposition to some extent. Such discussions are necessary to understand the roots

[10] *See generally* Simone de Beauvoir, The Second Sex (1949).
[11] *See generally* Judith Butler, *Sex and Gender in Simone de Beauvoir's Second Sex*, Yale French Stud. 35 (1986).
[12] *See* World Health Organization, *Gender and Health*, https://www.who.int/health-topics/gender#tab=tab_1.
[13] *See* Eur. Consult. Ass., *Gender Equality Commission Commission pour l'égalité de genre*, *Gender Equality Glossary* 10, 20 (Mar. 2016). See also Eur. Consult. Ass., *Convention on preventing and combating violence against women and domestic violence*, art. 3 (2011).
[14] *See* Judith Butler, Bodies That Matter: On the Discursive Limits of "Sex" (1993).
[15] These changes can occur as a response to their socially experienced gender identity. *See e.g.*; Ai-Mn Bao & Dick Swaab, *Sexual differentiation of the human brain: Relation to gender identity, sexual orientation and neuropsychiatric disorders* 32 Frontiers in Neuroendocrinology 214 (2011).

of identity and the exclusion of those who do not fit the socially built binary system. Nevertheless, it should not impact the legal framework. In this sense, this everlasting debate has created a focus on defining the exact substance of both of those terms and is driving the legal community away from the necessary discussion on what the definitions should be in a context-specific, protection-oriented, legal framework.[16] In this respect, it is interesting to note that, within the Rome Statute, the only ground for persecution defined under Article 7 is gender and yet gender persecution is the least developed framework.[17] By taking the front stage, those approaches to gender and sex have put the individual in the shadow, erasing that there are human beings to whom the definitions of those terms do not matter as much as they require active protection against discrimination, both directly and indirectly, based on their gender identity. Defining gender and sex is not only unachievable as it differs in experience for every individual, but also not necessary to the development of effective protection for non-binary individuals. Moreover, it might even create obstacles as there are movements utilising the distinction between sex and gender as a tool to object to the recognition of non-binary identities.[18] This is made evident by the push of Trans* Exclusive Radical Feminists [hereinafter T.E.R.F.s] for a separate definition of sex and gender to limit the rights of trans* persons whose sex will then be considered to be the one they were assigned at birth rather than the one they are socially living as, regardless of their biological status. Such an argument is often rooted in the need to protect "real" women against the intrusion of men in their safe spaces. In this sense, it argues that, contrary to Simone de Beauvoir's famous saying, one does not become a woman but as to be qualified as one upon birth. Such a movement is fundamentally dangerous as it not only argues for the discrimination, if not persecution, of gender non-conforming individuals. This is a

[16] *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 933 (2019).

[17] See recent developments within the International Criminal Court with the creation of a Policy Paper on Gender and Sexual Based crimes in 2014 and the ongoing work on a report on gender persecution in 2022 Press Release, Int'l Criminal Court, *The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for Gender Persecution under the Rome Statute*, ICC-CPI-20211220-PR1637 (Dec. 20, 2021).

[18] On the exclusion of non-binary individuals by other members of the trans* communities, see specifically the argument made that when entering mainstream societies, minority groups are still held to *mainstream standards* hence have to comply with what is deemed acceptable by society as a whole. This creates a "trans enough" narrative that is inherently harmful to non-binary identifying individuals by its focus on medical transition and compliance with binary gender norms. *See* Luke Armitage, *Explaining Backlash to Trans and Non-binary Genders in the Context of UK Gender Recognition Act Reform*, J. Int'l Network for Sexual Ethics & Pol. 11, 25-26 (2020). See similarly the example of the T.E.R.F.S.who do not recognise the existence or the legitimacy of trans* individuals identities by arguing that the utilization of gender as a concept creates a risks for "real" women whom are defined by their biological sex only. The idea that comes back in those exclusionary movements is the utilization of the socially constructed aspect of gender in order to discredit its validity. In this sense, they rely on the immovability of sex as a "determinate biological" characteristic. Since most non-binary individuals were biologically assigned as either male or female at birth, those movements tend to negate their very existence. When they do, non-binary identities are often approached as "non-threatening" to the established binary with no real tangible existence other than being a political statement. *See also* Dianne Otto, *Queering Gender [Identity] in International Law*, 33 Nordic J. Hum. Rts. 299 (2015).

perfect example of how the socially constructed binary, would it be understood in terms of gender, sex or both as one, is harmful. Indeed, this movement does not solely attack the rights of trans* and non-binary individuals but also turns a blind eye, or sometimes explicitly supports, the continuation of sex reassignment operations on inter* infants and children to attempt to have their body fit the list of binary sexual characteristics that are decided to be needed to fit the boxes of male or female. Such operations are, most times, unnecessary to the good development of the child and have been defined as torture by multiple U.N. bodies including the Committee Against Torture.[19] Moreover, this movement equally harms the development of women's rights as it tends to limit the definition of "woman" to biological characteristics.

Having established that the binary division of sex and/or gender is socially constructed. It is fundamentally relevant to reflect on the origin of such a construction to understand its goal and socio-historical meaning. While some argue that it forms through the self, as a direct expression of one's internal feeling of identity, it is impossible to disconnect it from gender norms that were themselves put into existence by multiple sociological and anthropological, hence artificial, dynamics. Thus, gender would better be understood as the process through which an individual constructs their identity, not as an independent and internal process, but rather as interactive developments of the self in reaction to pre-established language and norms.[20] In this sense, gender is fundamentally linked to the development of culture. Putting this in a more practical context, the experience of gender in different parts of the world is drastically different. Europe, built on strong patriarchal structures, relies on a binary that opposes the man, providing and strong, to the woman, caring and inferior.[21] In that context, gender identities that diverge from the norm are repressed. This is theorized by Butler in putting forward the idea that, in such societies, gender is built not as a characteristic in itself but as an oppositional mechanism. In this sense, a woman is a woman because she is not a man and vice-versa. Thus, the construction of gender is enacted through exclusionary means.[22] Similarly, she argues that the individual builds their identity within a system that strictly regulates the human in opposition to the inhuman. Therefore, "it is not enough to claim that human subjects are constructed, for the construction of the human is a differential operation that produces the more and the

[19] *See 50 UN Reprimands for Intersex Genital Mutilation – and Counting . . .*, StopIGM.org (Oct. 26, 2016), https://stopigm.org/iad-2016-soon-20-un-reprimands-for-intersex-genital-mutilations/.

[20] *See generally* Judith Lorber, *The Social Construction of Gender, in* The Inequality Reader 318 (David B. Grusky & Szonja Szelenyi eds., 2018).

[21] *See* 488 Robert Bahlieda, *The Legacy of Patriarchy, in* The Democratic Gulag: Patriarchy, Leadership and Education 15 (2015) (Switz.).

[22] *See* Butler, *supra* note 14.

less "human", the inhuman, the humanly thinkable".[23] This analysis is fundamental to understanding the position of non-binary individuals who actively diverge from this system. In doing so, rather than being perceived as simply breaking a strict gender binary norm, they are implicitly but automatically stripped of their "human" capacity. This is especially striking when compared to cultural approaches that recognise individuals existing outside of the binary as almost divine figures such as the position of Two-Spirit individuals in indigenous tribes.[24] In this sense, through those processes, non-binary identities can be said to have been rendered "culturally unintelligible" to mainstream Western and European societies.[25] In this sense, when legally approached, non-binary identities tend to not be truly understood for what they mean to the individual in question but rather as a, sometimes acceptable, modern fad. This might be due to the erasure of non-binary individuals in Western history.[26] It can then be argued that non-binary individuals are not approached as an in-between in the gender binary but rather as either under or above it – either as less human or as divine figures.

The consequence of this is fundamental to the further study of the approach adopted by European states in building recognition and protection for non-binary persons. As will be exposed in further Chapters, the inherent binary imposed on individuals in the construction of their inner self is omnipresent in the understanding of non-binary identities by governments and is heavily reflected in their choice of policy. Moreover, the very choice of recognition and protection policies, especially the "X" gender marker itself will be demonstrated to be deeply influenced by the view of non-binary individuals as less-worthy subjects of society.[27]

[23] *Id.*; *See also* Armitage, *supra* note 18, at 15.

[24] *See* Native Center for Behavioral Health, *Native LGBTQ+/ Two Spirit People,* https://www.nativecenter.org/_files/ugd/e6acf4_5b2045f52b9247bf86205e2263b5c434.pdf (last visited Dec. 8, 2023).

[25] *See* Judith Butler, *Doing Justice to Someone: Sex Reassignment and Allegories of Transsexuality, in* The Transgender Studies Reader 183 (Susan Stryker and Stephen Whittle eds., 2006).

[26] Western history has long erased the existence of gender diverse persons. A fundamental example of this is the very low number of reports on the fate of trans* and gender non-conforming individuals during World War II. It is mistaken to take from this that they were not targeted, arrested, or killed by Nazi forces. However, it is interesting to reflect on the complete invisibilisation of their existence, when it is evident that they were indeed targeted, either as homosexuals for most female presenting individuals, or sometimes even as spies for male presenting persons. This is developed further in Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 Nw. J. Hum. Rts. 1, 29-35 (2021).

[27] *See infra* Chapter 2.

1.2. THE NEED FOR SPECIFIC RECOGNITION OF NON-BINARY IDENTITIES

1.2.1. LEGAL RECOGNITION AS THE STARTING POINT FOR PROTECTION

Elaborating on the previous observation, legal recognition of non-binary identities is fundamentally necessary to bring non-binary individuals within the scope of human understanding. It is the only way to, in a legal sense, push for the integration of those persons into society. However, just as will be developed later in this paper, gender recognition does not solely imply the need for a third gender marker but rather a recognition of the fluidity of gender by the state. In this sense, it could also be attained by the suppression of gender as a legal category altogether if accompanied by a comprehensive anti-discrimination approach that includes non-binary identities. Doing so would allow for the further development of a protection system adapted to their needs. In this sense, you cannot protect what you do not recognise as existing.

The importance of legal recognition can be shown by analogy with other rights movements. For instance, the legal recognition of women as a separate group and as specific subjects of law was the momentum needed for the expansion of the protection of women's rights. The same goes for the rights of lesbians and homosexuals. In this sense, legal recognition, by adopting a rights discourse, allows for the creation of specific rights systems in accordance with the particular characteristics and associated needs of said groups.[28] We note for example the large impact of the Convention on the Elimination of all forms of Discrimination Against Women [hereinafter C.E.D.A.W.] on the rights of women and the way in which they are treated in societies.[29] Instruments like this one, or case law of international and regional human rights bodies, have helped shape the social recognition of minorities such as women, lesbian, gay, and bisexual individuals, ethnic and racial minorities, disabled persons, etc, by creating a framework of legal recognition as specific and complete subjects of law with their full entitlement to protection of their human rights. Therefore, legal recognition can be envisaged as a way to pursue change and palliate to systematic historical neglect of marginalised groups.[30]

The consequences of the absence of legal recognition can be more clearly illustrated through the study of the case of homosexual persons which can easily be analogically applied to the situation of non-binary individuals – and any other minority

[28] *See* Mahnaz Afkhami, *Identity and Culture: Women as Subjects and Agents of Cultural Change, in* From Basic Needs to Basic Rights: Women's Claim to Human Rights (Margaret A. Schuler. ed., 1995).

[29] For more detail on the impact of C.E.D.A.W., *see Global Success: CEDAW Women's Rights Treaty*, National Organization For Women, https://now.org/resource/global-success-cedaw-womens-rights-treaty/ (last visited Nov. 19, 2023).

[30] *See* José Reinaldo De Lima Lopes, *The Right to Recognition for Gays and Lesbians*, Int'l J. on Hum. Rts. 61, 72 (2004).

group. Lima Lopez, in a study on the right to legal recognition, notes two distinct consequences of such a denial: physical violence meaning the absence of protection against physical acts of violence against a person, and non-physical violence which can be separated into two forms. First, it impacts the individual as an "exclusion from the sphere of rights" which in itself denies the individual access to their personal and social autonomy as well as complicates their capacity to interact with others. Second, it causes a strong form of disrespect which is then easily translated into discriminative, degrading treatment of members of those particular social groups.[31] Thus, the absence of legal recognition – or even more strongly, the explicit denial of legal recognition – is a strong incentive for further exclusion and discrimination by society as a whole: "[U]nder the silence of the legal system. . .an intolerance is cultivated".[32]

Putting this back in perspective of the study of non-binary persons' claim for legal recognition, it appears that, when put into legal language, the framing of non-binary individuals as inhuman in opposition to a human binary, can be translated into a distinction between deserving and undeserving subject of law.

From a legal perspective within the Council of Europe, legal recognition has been flagged as a necessary step in preserving and protecting the human rights of "trans and gender diverse persons".[33] The U.N. Independent Expert on Sexual Orientation and Gender Identity recognises that the denial of legal recognition of gender creates a negative environment in all aspects of life for persons concerned, ranging from the right to health, and housing to freedom of movement and residence. Furthermore, it fuels discrimination and violence against trans and gender-diverse persons – hence including non-binary persons.[34] Moreover, the U.N. Independent Expert includes in their attached Recommendations, the necessity to organise legal recognition for non-binary identities specifically.[35]

[31] *Id.* at 70-71.
[32] *Id.* at 74.
[33] "Trans and gender diverse" is the term adopted by the European Commission to refer to trans* and non-binary persons. It is necessary to note that this formulation is inappropriate as gender diverse does not have a clear meaning and in itself would involve trans* persons both binary and not. *See* European Commission, Directorate-General for Justice and Consumers, Legal Gender Recognition in the EU - The journey of trans people towards full equality 173-96 (2020).
[34] *See The Struggle of trans and gender diverse persons,* Office of the High Commissioner for Human Rights (2022), https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons.
[35] *Id.*

1.2.2. DIVERGENCE AND CONVERGENCE WITH ALREADY ESTABLISHED RIGHTS MOVEMENTS

The development of non-binary rights is adjacent, if not connected, to multiple other rights movements, particularly women's rights, sexual orientation minorities, inter* persons rights as well as the (binary) trans* movement itself. However, it is necessary to expose the divergences between those movements and the non-binary claims to define the need for specific legal protection for non-binary individuals.

First, as mentioned previously, the feminist movement clearly intersects with the interests of the non-binary community through its fight to deconstruct gender norms. However, this is also to be considered a divergence. In many ways, women's rights advocates work to rip apart the socially established gender roles that are attributed to men and women but in doing so, they do not necessarily question the gender binary itself.[36] In other ways, many may feel that the expansion of gender beyond the binary might be detrimental to the fight for women's rights in itself countering the efforts made to provide for a clear and strict definition of what a woman is.[37] However, another relevant development in the field of women's rights is Article 5 of the C.E.D.A.W. which tackles directly the need for states to "modify the social and cultural patterns of conduct of men and women" and harmful gender stereotypes.[38] This provision is interesting in the sense that it shows a questioning of the harm caused by socially entrusted social norms regarding gender. However, it remains fundamentally binary.

Second, the intersection with the fight for sexual minorities is similarly double-folded. First of all, it is necessary to recall that gender identity and sexual orientation are different concepts which are not co-dependent. Thus, persons who identify as non-binary gender-wise may have a variety of different sexual orientations.[39] However, there is a really interesting connection to be made between the non-binary

[36] *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 120 (2010).

[37] *See* Hadley Freeman, *Transparent's Jill Soloway: 'The Words Male and Female Describe Who We Used to Be'*, The Guardian (May 21, 2017), https://www.theguardian.com/tv-and-radio/2017/may/21/transparents-jill-soloway-the-words-male-and-female-describe-who-we-used-to-be.

[38] UN Convention on the Eradication of all forms of Discrimination Against Women, Dec. 18, 1979, art. 5, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women#:~:text=States%20parties%20are%20therefore%20obliged,stereotyped%20roles%20for%20men%20and.

[39] Additionally, it is necessary to consider that sexual orientation as a large concept is inherently binary. The definition of different identities, homosexual, lesbian or even bisexual, implicitly relies on the existence of two binary genders. In this sense, someone will identify as homosexual not only because they are attracted to the same gender but also because they identify as said gender as well. Hence, what do we do about non-binary persons in terms of linguistics.

rights movement and the fight for recognition of bisexuality. Where non-binary gender identities come to disrupt the gender binary, bisexuality can be seen as a similar disruption of the binary established between heterosexual and homosexual. In this sense, both threaten the establishment of sex as a "primary category of social organisation".[40]

Third, it is more complex to establish the relationship between the trans* communities and specifically non-binary individuals and the inter* rights movement. All indeed relate to gender identity and all relate to the disruption of the gender binary and its biological origin. It is equally true that a number of inter* persons actually identify as non-binary – but not all.[41] In a way, the new visibility given to non-binary identities may benefit the fight for inter* rights, especially in helping normalise the existence of bodies outside of the gender and sex binaries which in itself would be beneficial in the fight against inter* genital mutilations.[42] Nevertheless, the connection of those two different rights movements might be detrimental to the non-binary movement. As highlighted by Peter Dunne, it might be attractive for trans* and non-binary advocates to use the inter* example as an argument against the existence of a strict gender binary and as supporting the need for the multiplication of gender categories past male and female.[43] But, tying the legal recognition of non-binary individuals to the mere existence of inter* persons implies the determination of gender by sex characteristics. In other words, if inter* persons are given the possibility to be registered as neither male nor female because of their sex characteristics, then what is made of non-binary persons who do not present inter* variations?[44]

Finally, there might even be divergences in the interest of trans* persons as well. This is true when looking at binary trans* persons separately from non-binary individuals. For instance, a number of trans*, and inter*, persons, while disrupting the gender norms by transitioning, still identify as male or female. In this sense, the recognition of non-binary gender identities must ensure that binary trans* and inter* individuals still have access to proper protection of their preferred *binary* gender.[45]

Altogether, the non-binary rights movement takes and learns from all pre-existing movements. But it is necessary to frame it as a specific and independent claim in order

[40] Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 Stan. L. Rev. 353 (2000).
[41] *See* Sharon E. Preves, Intersex and Identity: The Contested Self 60-85 (2003).
[42] Clarke, *supra* note 16, at 929.
[43] Peter Dunne, *Towards Trans and Intersex Equality: Conflict or Complementarity?*, *in* The Legal Status of Intersex Persons 217, 237 (Jens M. Scherpe et al. eds., 2018).
[44] *Id.*
[45] Sally Hines, *What's the Difference? Bringing Particularity to Queer Studies of Transgender*, 15 J. Gender Stud. 49, 64 (2006).

not only to be true to non-binary persons' real needs but also to avoid limiting the rights of others.

1.2.3. SPECIFIC HARM SUFFERED

When it comes to documenting the specific harm suffered by non-binary persons for the reason of their gender identity, there are two paths to be examined: the social acceptance of non-binary identities, and the physical and mental harm suffered in practice by individuals regardless of this social environment.

A lot of information can be obtained by analogy through studies of the situation of binary trans* persons as they interconnect with non-binary issues in the way that they both question the socially established gender binary between male and female. However, non-binary identities are seen in a different light due to the fact that, unlike binary identities, they do not comply with the binary and are often perceived as an attempt to create a "new" gender category. Because of this, non-binary identities are very often considered less threatening to the established social order as they are seen as less legitimate. In this sense, non-binary persons are likely to be more accepted socially when their identity is not linked to any "political claim" regarding their identity.[46] This has been theorized by Burke in a study regarding the social perceptions of bisexual and biracial persons. Similarly, as non-binary persons, they can be qualified as "social group intermediaries".[47] The study shows that, overall, all intermediary groups are "perceived as less socially real than other groups",[48] putting forward the idea that those groups are both less relevant and less threatening to society as an immovable system.

However, this invisibilisation in society does not imply that non-binary persons are exempted from discrimination and violence. Establishing a global picture, the Office of the High Commissioner for Human Rights [hereinafter O.H.C.H.R] defines the harm suffered by the lesbian, gay, bisexual, transgender, queer, intersex, asexual (and more) [hereinafter L.G.B.T.Q.I.A.+] communities in terms of "multiple and intersecting forms of discrimination (including based on age, gender, ethnicity, disability and social status)" as well as "lack of access to their economic, social, and cultural rights".[49] Forms of

[46] Armitage, *supra* note 18, at 24.

[47] Sarah Emily Burke, The Excluded Middle: Attitudes and Beliefs about Bisexual People, Biracial People, and Novel Intermediate Social Groups 1 (Dec., 2016) (Ph.D. dissertation, Yale University) (ProQuest),, https://www.proquest.com/openview/626696401d172b2d628c3ef4fdfc603c/1?pq-origsite=gscholar&cbl=18750.

[48] *Id.* at 3.

[49] Office of the High Commissioner for Human Rights, Statement by Human Rights Experts on the International Day against Homophobia, Transphobia and Biphobia, (May 17, 2018) https://www.ohchr.org/en/statements/2018/05/leave-no-lgbt-person-behind?LangID=E&NewsID=23092.

exclusion and discrimination against L.G.B.T.Q.I.A.+ individuals also include poor access to education as well as increased risk of homelessness and more.[50] More specifically, non-binary persons, as part of the broader trans* community are exposed to significantly higher rates of discrimination in multiple aspects. Studies show that nearly half of trans* and non-binary persons report having been verbally harassed for their gender expression[51] in public spaces. Additionally, about one in ten report having been physically assaulted on the basis of their gender expression. [52] This is particularly strong in the case of non-binary persons who often present in androgynous ways– although it is *not* the case for all non-binary persons – and thus, visibly disrupt the gender binary. Furthermore, they are exposed to a higher risk of suicide and suicide attempts, and associated mental health conditions, especially at young ages – ranging from forty per cent to fifty per cent of trans* and non-binary teenagers having attempted suicide at least once.[53] Similarly, trans* and gender-diverse persons report significantly higher rates of sexual violence.[54] Because of the priorly established social exclusion of non-binary persons, there is evidence that non-binary-identifying individuals are subjected to increased discrimination compared to their binary-identifying counterparts.[55] In this sense, non-binary persons are erased from society, but, when they are visible, especially through their gender expression, they are immediately at higher risk of discrimination and violence.

2. THE INCLUSION OF NON-BINARY CLAIMS TO RECOGNITION AND PROTECTION UNDER THE COUNCIL OF EUROPE FRAMEWORK

In this Chapter, I will explore the existing framework for the expansion of non-binary legal recognition and, more importantly, protection under the Council of Europe. In other words: in what aspects are the non-binary identities protected under the Council

[50] *Id.*

[51] Human Rights Campaign defines "gender expression" as the "[e]xternal appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine".*See Sexual Orientation and Gender Identity definitions*, Human Rights Campaign, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited Nov. 19, 2023).

[52] Sandy E. James et al., The report of the 2015 U.S. Transgender Survey (2016).

[53] *See* Russell B. Toomey et al., *Transgender Adolescent Suicide Behavior*, in Pedriatics Vol. 142 Issue 4 (2018), https://publications.aap.org/pediatrics/article-abstract/142/4/e20174218/76767/Transgender-Adolescent-Suicide-Behavior?redirectedFrom=PDF.

[54] *See supra* note 45.

[55] Armitage, *supra* note 18, at 25.

of Europe framework, and specifically the E.C.H.R., and in what ways are their identities an obstacle to reaching equal treatment and the effective realization of their human rights? And following this, what are potential avenues in creating a protective framework for non-binary persons under this framework? In order to answer those questions, I will first explore the idea of a right to non-binary legal recognition under the existing Council of Europe framework before looking into potential avenues for further developments that have not yet been acknowledged by the Court itself but have been rising in other jurisdictions.

2.1. A RIGHT TO NON-BINARY LEGAL RECOGNITION?

2.1.1. ESTABLISHED FRAMEWORK AND LEGAL SOURCES OF RIGHTS AND PROTECTION

Defining a right to legal recognition for non-binary gender identities is not as obvious as it could appear. To this day, the Council of Europe framework does not provide for any binding instrument or case law creating an obligation for states to consider non-binary legal recognition. Additionally, a word search for "non-binary" on the European Court of Human Rights case-law database came back empty meaning that no decision or document of the Court ever mentioned the term, let alone address it directly. However, this is not to say that there are no relevant developments on the matter through alternative avenues.

A starting point to tackle legal gender recognition [hereinafter L.G.R.] under human rights law is the Yogyakarta Principles.[56] While it is not directly a Council of Europe instrument, it is the most influential international law document[57] when it comes to the rights of L.G.B.T.Q.I.A.+ persons. In this sense, the Principles constitute a comprehensive compilation of the principles followed by international and European law on matters of gender identity, sexual orientation and sex characteristics. The principles deliberately use gender-neutral language in order to highlight the principle of universality of human rights – although not textually mentioning "non-binary".[58] In this sense, the rights and principles expressed are to be applied to all persons without distinctions and do not provide specific guidelines on the protection and rights of particular groups.[59] This is particularly interesting when looking at the rights of

[56] Yogyakarta Principles, *supra* note 9; Yogyakarta Principles Plus 10, Nov. 10, 2017.

[57] *See* Paula L. Ettelbrick & Alia Trabucco Zerán, *The Impact of the Yogyakarta Principles on International Human Rights Law Development A Study of November 2007 – June 2010: Final Report* 52-55 (Sept. 10, 2010) (unpublished manuscript) (on file with author).

[58] Yogyakarta Principles, *supra* note 9, at Principle 1 – The Right to the Universal Enjoyment of Human Rights.

[59] *See* Sheila Quinn & International Commission of Jurists, *An Activist's Guide to The Yogyakarta Principles* 23 (2010), https://yogyakartaprinciples.org/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf.

non-binary persons. Because of the neutral language, they can be included fully under the ambit of the principles. Moreover, the principles introduce the necessity to avoid requiring individuals to have to categorize themselves into specific identity boxes that might not represent their identity accurately. To this end, the Yogyakarta Principles approach sexual orientation and gender identity as fluid and thus consider that forcing an individual to exist within limited and unrepresentative legal categories consists in the perpetuation of an oppressive system.[60] Those principles are relevant so far as they have been accepted and recognised by the Council of Europe.[61]; A.P., Garçon and Nicot v. France, App. No. 79885/12, 52471/13 and 52596/13, ¶ 111 (Apr. 6, 2017), https://hudoc.echr.coe.int/spa#%22itemid%22:[%22001-172913%22. Note that the Yogyakarta Principles and their updated version do not have a binding effect but can be considered to have strong authoritative value in the field of sexual orientation and gender identity and human rights. In this context, the Committee of Ministers of the Council of Europe put forward a Recommendation on "measures to combat discrimination on grounds of sexual orientation and gender identity" in 2010 which included principles derived from the Yogyakarta Principles, particularly the universality of human rights. Moreover, it highlighted the idea that "neither cultural, traditional or religious values, nor the rule of the dominant culture, can be invoked to justify discrimination on grounds of sexual orientation and gender identity".[62] Although contained in a non-binding document, this could be a good stepping stone in creating a framework for the recognition and protection of non-binary persons.

The Council of Europe framework extended further on the issues in the decade following this first Recommendation. Three documents need to be mentioned: the 2015 Resolution on "Discrimination against transgender people in Europe",[63] the 2017 Resolution on "Promoting the human rights of and eliminating discrimination against intersex people"[64] and the 2022 Resolution on "Combating rising hate against [lesbian, gay, bisexual, transgender, and intersex] [hereinafter L.G.B.T.I.] people in Europe".[65]

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[60] *Id.*

[61] *See* Ettelbrick & Trabucco Zerá, *supra* note 57, at 52-55; *Silvan Agius et al.*, *Human Rights and Gender Identity Best Practices Catalogue*, ILGA Europe *8-10* (2011), https://www.ilga-europe.org/files/uploads/2022/04/Human-Rights-Gender-Identity-Best-Practice-Catalogue.pdf. *See also* references made to the Principles by the E.Ct.H.R. in cases such as Hämäläinen v. Finland, App. No. 37359/09, ¶ 16 (July 16, 2014), https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-145768%22

[62] Council of Europe Committee of Ministers, *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*, (2010), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a.

[63] Eur. Parl. Ass., *Discrimination against Transgender People in Europe*, 15th Sess., Doc. No. 13742 (2015), https://assembly.coe.int/nw/xml/Xref/Xref-XML2HTML-en.asp?fileid=21630&lang=en.

[64] Eur. Parl. Ass., *Promoting the Human Rights of and Eliminating Discrimination against Intersex People,* 35th Sess., Doc. No. 14404 (2017), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&.

[65] Eur. Parl. Ass., *Combating Rising Hate against LGBTI People in Europe*, 3rd Sess., Doc. No. 15425 (2022), https://pace.coe.int/en/files/29712/html.

The first one, while largely focused on trans* rights within the gender binary, puts the focus on the importance of self-determination as a guiding principle in L.G.R. procedures.[66] Even more striking, the resolution calls for states to "consider including a third gender option in identity documents for those who seek it".[67] This paired with the call for the amendment of all medical requirements in L.G.R. procedures[68] points to the potential opening of non-binary legal gender recognition for all. Furthermore, the Resolution supports the development of a *right to gender identity* in High Contracting Parties from which should flow a right to legal gender recognition for all, in line with the universality principle: *"The Assembly welcomes, in this context, the emergence of a right to gender identity, first enshrined in the legislation of Malta, which gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity".* [69]

The second Resolution focuses explicitly on the rights of inter* persons. As defined previously, the inter* rights and the non-binary rights movements are separate and should be treated as such.[70] However, in the absence of direct reference to non-binary gender identities in the Council of Europe framework, it is relevant to look at the principles it upholds for adjacent issues. To this end, the Resolution tackles issues of L.G.R. for inter* persons falling outside of the gender binary in the following terms: "*Ensure, wherever gender classifications are in use by public authorities, that a range of options are available for all people, including for those [inter*] persons who do not identify as either male or female*".[71] Because it equally underlines the importance of self-determination as a guiding principle in such procedures, this mention of non-binary legal categories for gender becomes relevant for all persons. It can be argued that non-binary persons are not directly mentioned in those documents because of a lack of social visibility as a group rather than because of a voluntary exclusion on behalf of the authorities. In this sense, the document remains useful in defining a legal approach to the legal recognition and protection of non-binary persons who are not inter*.

The latter is interesting because of how recent it is. While not containing particular mentions of LGR or non-binary gender identities, it urges states to "prevent further backsliding, and to work actively to promote full respect for the rights of [L.G.B.T.I.] people".[72] This recent re-commitment to the development of recognition and

[66] Eur. Parl. Ass., *supra* note 63, ¶ 6.2.1.
[67] *Id.* ¶ 6.2.4.
[68] *Id.* ¶ 6.2.1.
[69] *Id.* ¶ 5.
[70] *See supra* Section 1.2.2.
[71] Eur. Parl. Ass., *supra* note 64, ¶ 7.3.3 (emphasis added).
[72] Eur. Parl. Ass., *supra* note 65, ¶ 7.

protection for L.G.B.T.I. persons is fundamental in defining the direction in which the Council of Europe and its Court are going. In other words, this showed a seemingly deep commitment to the protection of all individuals regardless of their sexual orientation and gender identity that would be contradicted by a refusal to provide effective recognition and protection to non-binary persons.

This was recently turned over by the decision of the E.Ct.H.R.in the case of *Y v. France*.[73] The case related to the refusal of French authorities to grant an intersex applicant the change to a neutral gender registration on their birth certificate as well as a neutral gender marker in the form of an 'X' on their identity documents. In its decision, the E.Ct.H.R. found no violation of Article 8 E.C.H.R. and thus sided with the French Government in saying that it did not come within the State's obligation under the E.C.H.R. to organize the registration of gender outside of the binary. The judgement based itself largely on the idea that such a matter was highly controversial in European states and thus it did not fall under the scope of the Court's ability to impose such major social changes in the absence of a "European consensus". In doing so, the Court decided that the interest of the state in preserving its binary system of registration outweighed the interests of the individual to see their identity properly registered. This is a regrettable take of the Court following a promising development towards inclusive and protective understandings of human rights for intersex and non-binary individuals. Moreover, it is largely reflected in the form of the hypocrisy of the state in maintaining an unrealistic binary division of gender as pointed out by Judge Šimáčková in her dissenting opinion:

> And what are the State's arguments? You were not born male or female, but the law does not allow it. Therefore you must adapt your body (even if you will suffer) and your soul (even if you will feel humiliated) to correspond to the laws adopted by the State. I find this interference so serious that I believe it violates the applicant's right to respect for private life.[74]

Interestingly enough, the Court does make some remarks that are not so negative. Particularly, it rejected the argument of the French *Cour de Cassation* [Court of Cassation] in saying that the fact that the Applicant could be perceived as male by an outside observer, which matched the "male" registration of his gender, indicated that there was a balance of interest. The E.Ct.H.R. further underlined that the appearance of the Applicant could not be used to deduce their felt gender identity and reiterated that gender is an essential aspect of an individual's intimate identity and recognised the

[73] Y v. France, App. No. 76888/17 (Jan. 31, 2023), https://hudoc.echr.coe.int/eng?i=001-222780.
[74] *Id.* ¶ 1 (Judge Šimáčková, dissenting).

harm that may be suffered by individuals whose identity is erased by their national administration.[75]

This decision remains a significant backlash on the development of protection for non-binary gender identities. This is particularly due to the fact that the case of *Y v. France* concerned an inter* person whose body had been proven to not conform to the expected criteria of male and female anatomy. Thus, it further closes the door for non-binary persons who do not have such "biologically receivable proof". In a sense, inter* persons can be seen as the "perfect subject" for states to understand the need to expand their understanding of gender as they are, starting at birth, not fitting the categories that the states persist on maintaining. However, the states, with the support of the Court stand now in a position to refuse the recognition of gender outside of the binary in civil registries and identification documents while still recognizing that such a refusal may create serious harm to the concerned individuals, and goes as far as supporting and advocating for the "normalization" of inter* persons in order to make their natural bodies fit unnatural and socially constructed categories of gender.[76]

2.1.2. THE CHRISTINE GOODWIN V. THE UNITED KINGDOM CASE AND SUBSEQUENT CASE-LAW: IMPLICATIONS FOR NON-BINARY LEGAL RECOGNITION

When it comes to the right to L.G.R. in the Council of Europe framework, the most relevant document is the decision of the Grand Chamber of the E.Ct.H.R. in the *Christine Goodwin v. the United Kingdom* case in 2002. In this decision, the Court upheld the existence of a right for a trans* person (in this case a trans* woman) to see their gender marker legally changed to match their internally felt gender identity. In doing so, the Court reiterated that gender identity constituted an "important aspect of personal identity".[77] In this sense, it considered that the absence of legal gender recognition procedures constituted a "serious interference with the private life" under Article 8 of the Convention and could not be considered a "minor inconvenience arising from a formality" as argued by the British Government.[78] Moreover, the Court went as far as stating that requiring a person to exist within a gender category that does not match

[75] *Id.* ¶ 83 (majority opinion).
[76] Organisation Intersex International Europe [OII], *Comment on Y v. France ECHR decision* (Feb. 22, 2023), https://www.oiieurope.org/comment-on-y-v-france-echr-decision/.
[77] *See*, Dudgeon v. the United Kingdom, App. No. 7525/76, ¶ 41 (Oct. 22, 1981), https://hudoc.echr.coe.int/?i=001-57473, in Christine Goodwin v. the United Kingdom, App. No. 28957/95, ¶ 71 (July 11, 2002), https://hudoc.echr.coe.int/fre?i=001-60596.
[78] Christine Goodwin v. the United Kingdom, ¶ 71.

their lived experience of gender creates a position of "vulnerability, humiliation and anxiety" deriving from the "conflict between social reality and law" they are experiencing.[79]

This case aimed at redressing harm suffered by binary trans* persons and created a positive obligation for states to create effective procedures of L.G.R. Thus, it does not mention non-binary identities nor does it touch upon the possibility of opening gender registration to more categories than the established binary "male" and "female" categories. However, one could argue that the underlying principles the Court applied in this case, in line with those contained in the aforementioned Yogyakarta Principles and Council of Europe Resolutions, could and should be applied similarly to the case of non-binary persons. It has been shown by the Court's decision in *Y v. France* that the moment has not yet come to see this implemented. The argument does not lose in value but it is necessary to take a step back in view of the current jurisprudence of the Court which seems to directly contradict its previous approaches and the potential implication they could have had, and still may have in the future. The Court recognises the harm caused by the inability to see one's gender identity accurately recognised and represented by the law and on their identity documents as a serious breach of the right to private life under Article 8 of the Convention. Furthermore, it recognises the importance of self-determination in the determination of one's legal gender. Hence, if applied to a non-binary person, it would be the logical conclusion to extend the reasoning of the Court in the *Christine Goodwin* case in order to include gender identity outside the binary as well.[80] The Court has extended its stance on gender identity as a ground for discrimination in another few cases and through slightly different avenues: creating an enhanced duty to protect under Article 3 in conjunction with Article 14[81] and establishing a higher threshold of "particularly serious reasons" to justify interferences with the "right to gender identity".[82]

However, national developments in the United Kingdom following the *Christine Goodwin* case seem to have been substantiated the opposite way. In the case of *Elan-Cane*[83] decided by the British Supreme Court in 2021, the following question was asked to the Court:

[79] *Id.*

[80] *See* Neela Goshal, *Transgender, Third Gender, No Gender: Rights Perspectives on Laws Assigning Gender, Part II*, Opinio Juris, (Sep. 4, 2020), https://opiniojuris.org/2020/09/04/transgender-third-gender-no-gender-rights-perspectives-on-laws-assigning-gender-part-ii/.

[81] Identoba and Others v. Georgia, App. No. 73235/12, ¶¶ 63-64 (May 12, 2005), https://hudoc.echr.coe.int/fre?i=001-154400.

[82] P.V. v Spain, App. No. 35159/09, ¶¶ 63-64 (Nov. 30, 2010),https://hudoc.echr.coe.int/tkp197/view.asp?i=002-736.

[83] R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent) [2021] UKSC 56 On appeal from: [2020] EWCA Civ 363 (Eng.).

> Does [A]rticle 8 of the European Convention on Human Rights . . . either taken in isolation or read together with [A]rticle 14, impose an obligation on a contracting state, when it issues passports, to respect the private lives of individuals who identify as non-gendered, by including a nongendered ("X") marker for the passport-holders gender, as an alternative to the markers for male and female?[84]

The Court decided in the negative, defining that the case law of the E.Ct.H.R., and specifically the case of *Christine Goodwin*, did not imply an obligation for the state to open L.G.R. to non-binary categories. It clearly states that "there is no judgment of the European Court of Human Rights which establishes a positive obligation to recognise a gender category other than male or female, and none which would require the Secretary of State to issue passports without any indication of gender".[85] Interestingly enough, the Court recognises that the identity of the individual as non-binary ("non-gendered") falls under the ambit of their private life and is protected by the Convention.[86] However, it does not deduce from it a right to protection of said identity. What becomes particularly important in this decision is the margin of appreciation left by the E.Ct.H.R.to the states on the application of certain of their obligations under the Convention. The British Court mentions the decision of the E.Ct.H.R.in the *Hämäläinen* case in which it defined the factors to be taken into account when defining the extent of the state's margin of appreciation: the existence of a consensus among High Contracting Parties to the Convention, the relative importance of the interests at stake, and the existence of moral or ethical issues linked to the case.[87] Because of the absence of a European consensus regarding non-binary legal gender recognition, the British Court deduced a large margin of appreciation. Since this judgment, the E.Ct.H.R.has notably recognised the right for one to define their gender identity which would likely have influenced the obligations of the United Kingdom in a case like *Elan-Cane.*[88] Furthermore, developments in other Member States regarding the creation of a "third" or "X" gender marker and thus a non-binary form of L.G.R. could have been used for the opposite arguments in substantiating an emerging European trend.[89] In the eyes of the E.Ct.H.R., the threshold in defining such a European trend has not yet been reached as was illustrated by its decision in the case of *Y v. France*. However, the further development of such frameworks

[84] *Id.* at 1, "questions raised by the appeal".
[85] *Id.* § 30.
[86] *Id.*
[87] Hämäläinen v. Finland, App. No. 37359/09, ¶ 67 (July 16, 2014), https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-145768%22].
[88] *L. v Lithuania*, App. No. 27527/03 (Sept. 11, 2017), https://hudoc.echr.coe.int/?i=001-82243.
[89] See *infra* Chapter 3 for the analysis of the national frameworks having recognised a form of non-binary L.G.R.

in High Contracting Parties may eventually, and hopefully, lead to a shift in the Court's position.

This opens a debate about the interpretation of the E.Ct.H.R.'s case law on matters of gender identity and specifically of the implications of the *Christine Goodwin* decision. Indeed, the discussion lies on whether deducing protection for non-binary persons under the *Christine Goodwin* decision would be going "beyond" the state's obligation under the Convention and therefore within the discretion of the state or if, on the contrary, refusing recognition of non-binary persons in light of the existence of this judgment would be "against" the state's obligations. It is clear in the E.Ct.H.R.'s case law that states are given the *opportunity* – and not the obligation – to provide a higher standard of protection on the national level than provided by the Convention framework.[90] In this sense, the British Court argued in the *Elan-Cane* case that it did not go "against" its obligations by deciding the case in the negative but that it merely refused to go "beyond" its obligations by expanding the *Christine Goodwin* jurisprudence.[91] This could easily be argued the opposite way as recognition of non-binary gender identities would be in line with the Convention's aim and purpose. However, in the absence of clear decisions of the E.Ct.H.R. targeting directly the issue of non-binary gender registration, it will be tedious to build a case that would not be struck down because of the margin of appreciation argument. However, the emerging trend on the national level of opening a third legal gender category in the form of an "X" could soon prove to be influential on the stance of the Court.

2.2. OTHER POTENTIAL AVENUES: ARTICLES 3 AND 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

While we wait for the E.Ct.H.R. to take on a case on whether non-binary persons should be included under the reading of the *Christine Goodwin* judgment, and therefore under the ambit of Article 8 of the Convention, it is possible to consider other avenues and rights that could be used in the fight for non-binary recognition and protection. Expanding on this, it is necessary to reflect on the very adequacy of Article 8 to deal with this issue. The case of *Christine Goodwin* discussed priorly is the first case the Court decided positively on this matter and its decision under Article 8 has been highly influential in defining the legal avenue for the defence of gender identity-related rights. This legal basis is as weak as the rights under Article 8 are qualified and not absolute. Thus, the state can argue for

[90] European Convention of Human Rights art. 53, Nov. 4, 1950.

[91] Lewis Graham, *Going beyond, and Going against, the Strasbourg Court*, Uk Constitutional Law Association (Jan. 11, 2022), https://ukconstitutionallaw.org/2022/01/11/lewis-graham-going-beyond-and-going-against-the-strasbourg-court/.

the refusal of legal gender recognition when "proportional" to the public interest. In this context, it is interesting to argue that the denial of L.G.R. could be argued as a violation of the individual's rights on different bases, either as an (almost) absolute right[92] under the prohibition of cruel, inhuman, and degrading treatment (Article 3 E.C.H.R.) or through another, more respectful avenue, namely the right to freedom of expression (Article 10 E.C.H.R.). However, to replace those arguments in the current context, this Subchapter will also reflect on the meaning of the Court's decision in the cases of *Y v. France* and *A.H. and others v. Germany* for the future of the protection of trans*, non-binary and inter* rights by the E.Ct.H.R.

2.2.1. QUALIFYING LACK OF LEGAL GENDER RECOGNITION PROCEDURES AS CRUEL, INHUMAN AND DEGRADING TREATMENT

The approach suggested by Bassetti brings clear relevance to the qualification of denial of legal gender recognition as a violation of the prohibition of torture, cruel inhuman and degrading treatment under international human rights law and more specifically under Article 3 of the European Convention on Human Rights.[93] He puts forward two main issues at play when one is denied recognition of their gender identity by the state: 1) further exposition to human rights violations due to the incongruence of one's perceived and lived identity with their legal identity and, 2) subsequent psychological suffering that may amount to degrading or inhuman treatment.[94]

When it comes to inhuman or degrading treatment, the case law of the E.Ct.H.R. is fruitful. However, applying this case law to the lack of L.G.R. procedures has yet to be done in court proceedings. Nevertheless, the link was made by the Inter-American Court of Human Rights in its Advisory Opinion on "Gender Identity, and Non-Discrimination of Same-Sex Couples".[95] It puts forward the idea that the refusal to recognise one's gender through adequate L.G.R. procedures creates a lack of juridical personality which in terms "harms human dignity because it is an absolute denial of a person's condition as a subject of rights".[96] This can be translated into the language of the E.Ct.H.R. fairly logically through the definition of inhuman and degrading punishment in its case law in

[92] The prohibition of torture under Article 3 has emphatically been defined as an absolute right, however, the prohibition of inhuman and degrading treatment of punishment is less extensive.
[93] Matteo E. Bassetti, *Human Rights Bodies' Adjudication of Trans People's Rights: Shifting the Narrative from the Right to Private Life to Cruel and Inhuman or Degrading Treatment*, Eur. J. Legal Stud. 291 (2020).
[94] *Id.* at 306.
[95] Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (Nov. 24, 2017).
[96] *Id.* ¶ 102.

which the Court finds violations of Article 3 when acts or policies humiliate or debase the individual, "in their own eyes or in the eyes of others".[97] Moreover, the Court has recognised the harm created by the lack of availability of L.G.R. in the *L v. Lithuania* case in which it stated that this impossibility "left the applicant in a situation of distressing uncertainty vis-à-vis his private life".[98] In this sense, the Court recognises the harm that arises when trans* persons are denied L.G.R. in forcing them to publicly disclose intimate aspects of their private lives as well as the incongruence of their legal status.[99] Where the Court's assessment falls short is that it has not, to this day, recognised this harm to be severe enough to reach the threshold it has established for inhuman and degrading treatment. This has been attributed by the Fundamental Rights Agency to general transphobia as well as a lack of awareness regarding the lived experiences of trans* persons in Europe.[100] Indeed, there is no clear legal reason as to why the Court has been underestimating the harm suffered by trans* and non-binary persons under Article 3 of the Convention. There is yet to be a successful application in framing the harm suffered by non-binary persons facing the absence of adequate legal gender recognition as a violation of Article 3 of the Convention. However, the Court has established that the threshold under Article 3 may be reached without physical violence. It may be sufficient that the victim experiences "psychological suffering" which

> causes in its victim feelings of fear, anguish and inferiority, if it humiliates or debases an individual in the victim's own eyes and/or in other people's eyes, whether or not that was the aim, if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience, or if it shows a lack of respect for, or *diminishes, human dignity*.[101]

The reference to "human dignity" particularly may be ground to include the suffering and distress felt by non-binary persons when faced with the refusal of recognition of their identity by the state apparatus. Drawing from this we can refer to Bassetti who draws the parallel between the Court's and other human rights bodies' case-law on the right to not be forced to act against one's will or religion and the right to protection

[97] Campbell and Cosans v. The United Kingdom, Apps. Nos. 7511/76, 7743/76, ¶ 28 (Feb. 25, 1982), https://hudoc.echr.coe.int/fre?i=001-57455; *see also* Tyrer v. the United Kingdom, App. No. 5856/72, ¶¶ 30-32 (Apr. 25, 1978), https://hudoc.echr.coe.int/fre?i=001-57587.

[98] *L. v. Lithuania*, Eur. Ct. H.R. (2008).

[99] Bassetti, *supra* note 93, at 307.

[100] European Union Agency for Fundamental Rights, Being Trans in the European Union: Comparative Analysis of EU LGBT survey data 78-92 (Jan. 12, 2014), https://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative-0_en.pdf.

[101] M.C. and A.C. v. Romania, App. No. 12060/12, ¶ 106 (July 12, 2016), https://hudoc.echr.coe.int/eng?i=001-161982; Aghgomelashvili and Japaridze v. Georgie, App. No. 7224/11, ¶ 42 (Oct. 8, 2020), https://hudoc.echr.coe.int/fre?i=001-204815.

against cruel, inhuman or degrading treatment. In this sense, when a person is forced to conceal their gender identity to avoid violence and discrimination or to disclose personal and intimate aspects of their gender history repeatedly because of the absence of L.G.R. by the state, it can be argued that they are then forced to act against their will.[102] This in itself should amount to cruel, inhuman or degrading treatment *per se*. Moreover, the E.Ct.H.R. and other human rights bodies have a consequent body of law and jurisprudence on concealment of sexual orientation under Article 3 in cases of asylum and *non-refoulement*. In this sense, it is considered a violation of the prohibition of torture or inhuman or degrading treatment or punishment when an individual is sent back to a country where they would face ill-treatment if they do not hide their sexual orientation.[103] When L.G.R. is not available and an individual is forced to present identity documents with an inadequate gender marker, they will be forced daily to either conceal their lived gender identity when presenting identification or to disclose their trans* identity – which are both equally harmful. Following the same logic, it should be deduced that forcing an individual to conceal their identity or to be refused the opportunity to express their identity through legal means could amount to ill-treatment in similar ways.

Following this, it is also necessary to underline the other part of this equation: non-binary persons are exposed to further risk of violence and ill-treatment when L.G.R. is not available. Indeed, as defined priorly, non-binary persons are a vulnerable group in society and the absence of appropriate legal gender recognition procedures leads to the absence of an effective system of protection under the law.[104] In this sense, it can be argued that the mention of one's gender on identity documents and in state registries does not simply constitute a person's legal status but impacts largely their "social status".[105] Therefore, as defined by the E.Ct.H.R. in the *Christine Goodwin* case, L.G.R. is not merely an administrative formality but rather is a necessary order to ensure respect and dignity for trans* persons, including non-binary persons.[106] This is supported by recent research projects that have highlighted the negative impact created by incorrect gender markers on non-binary persons' enjoyment of their social life.[107] Thus, if it was shown before that L.G.R. can lead to legal protection, the opposite is also true as the lack or

[102] Bassetti, *supra* note 93, at 307.

[103] *See e.g.*, U.N.H.C.R., *supra* note 6. At the E.Ct.H.R. level see cases like B. and C. v. Switzerland, Apps. Nos. 889/19, 43987/16 (Feb. 17, 2021), https://hudoc.echr.coe.int/fre?i=001-206153. Under the European law framework see the case of Joined cases C-199/12 to C-201/12, X, Y and Z v. Minister voor Immigratie en Asiel, ECLI:EU:C:2013:720 (Nov. 7, 2013).

[104] *See supra* Section 1.2.1.

[105] Lena Holzer, *Legal Gender Recognition in Times of Change at the European Court of Human Rights*, 23 ERA F. 165 (2022).

[106] Christine Goodwin v. the United Kingdom, App. No. 28957/95, ¶ 71 (July 11, 2002); *see also Legal Gender Recognition Archives,* TGEU, https://tgeu.org/issues/legal-gender-recognition/ (last visited Nov. 19, 2023).

[107] *See e.g.*, James et al., *supra* note 52; Holzer, *supra* note 105, at 3.

denial of L.G.R. is cause for attacks on non-binary's (and trans* persons in general) dignity and safety. There are also aggravating factors. Namely, non-binary individuals belonging to other socially vulnerable groups are exposed to a higher level of violence. For instance, non-binary persons of colour, sex workers, homeless persons, as well as persons of (or perceived of) certain religious groups.[108] This is especially because they are more likely to be subjected to identity checks. In this context, the COVID-19 pandemic has further aggravated the vulnerability of those groups by enabling the creation of more security and control checks.[109] Finally, These circumstances become even more oppressive and violence-inducing when the number of laws differentiating between (legal) genders is high in the state.[110]

Following this, Article 3 and the prohibition of inhuman or degrading treatment could be used as an avenue to push non-binary recognition through to the E.Ct.H.R. As Article 3 constitutes an almost absolute right, a decision of the Court in that sense would have a larger impact on the High Contracting Parties to the Convention and hence in creating wider, appropriate and effective recognition and protection for non-binary persons in the Council of Europe territories.

2.2.2. GENDER EXPRESSION AND THE RIGHT TO FREEDOM OF EXPRESSION

Including the right to legal gender recognition under the right to freedom of expression has yet to be achieved in the E.Ct.H.R. case law. However, it has increasingly been considered under other systems and human rights documents. Most relevantly, the Yogyakarta Principles, cited before, which establish international standards regarding the rights and freedoms of L.G.B.T.Q.I.+ persons, define a right to freedom of opinion and expression in Principle 19: "Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means".[111]

Pursuing this Principle, states are called to take "all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood".[112] This Principle interprets the right to freedom of expression as including the right for all persons, and in our case study of non-binary persons, not

[108] *See I Just Try to Make It Home Safe*, HUMAN RIGHTS WATCH (Nov. 18, 2021), https://www.hrw.org/report/2021/11/18/i-just-try-make-it-home-safe/violence-and-human-rights-transgender-people-united.
[109] Holzer, *supra* note 105, at 5.
[110] *Id.* at 3.
[111] Yogyakarta Principles, *supra* note 9, at Principle 19 (emphasis added).
[112] *Id.* at Principle 19-C.

only to express their identity but to see it recognised by the state through adequate procedures. By analogy, we can interpret the open character of the list in the words of "any other means", as well as the mention of the "choice of name", to include L.G.R. and choice of legal gender marker. Thus, Principle 19 of the Yogyakarta Principles can serve as a legal basis for a form of state responsibility in providing effective and adequate legal gender recognition and registration procedures for all genders, including those outside of the binary.

The Inter-American Court of Human Rights takes a similar approach in its 2017 Advisory Opinion.[113] In this non-binding document, the Court states that it "considers that the right to identity and, in particular, the manifestation of identity, is also protected by Article 13, which recognises the right to freedom of expression".[114] It goes on by including gender expression within the scope of this Article:

> [A] lack of recognition of gender or sexual identity could result in indirect censure of gender expressions that diverge from cisnormative or heteronormative standards, which would send a general message that those persons who diverge from these "traditional" standards would not have the legal protection and recognition of their rights in equal conditions to persons who do not diverge from such standards.[115]

Even more specifically than the Yogyakarta Principles, the Inter-American Court points directly at L.G.R. as a right under the right to freedom of expression in conjunction with the right to be free from discrimination on grounds of gender identity. In doing so, the Court emphasizes that gender identity is not merely a private matter but the right to see it respected and recognised extends into the public space.[116] This view is equally supported by the U.N. Committee on the Rights of the Child[117] and the U.N. High Commissioner for Human Rights.[118]

The Indian Supreme Court rendered a judgment in the *National Legal Services Authority (NALSA) v. Union of India* case based on the same legal basis.[119] It defined the

[113] Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (Nov. 24, 2017).
[114] *Id.* ¶ 96.
[115] *Id.* ¶ 97; *see also* Inter-Am. Comm'n H.R., Observation presented by the Commission on February 14, 2007, ¶ 49.
[116] *See* Eduardo J. Arrubia, *The Human Right to Gender Identity: From the International Human Rights Scenario to Latin American Domestic Legislation*, 33 Int'l J. L. Pol'y & Fam. 360 (2019).
[117] U.N. Commitee on the Rights of the child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, ¶ 34 (Dec. 6, 2016).
[118] U.N. Office of the United Nations High Commissioner for Human Rights (O.H.C.H.R.), Living Free & Equal: What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, ¶¶ 86-87, HR/PUB/16/3 (2016).
[119] National Legal Services Authority (NALSA) v. Union of India & Ors., 2014 INSC 275 (SC) (Ind.).

right to "expression of [one's] self-identified gender"[120] for a non-binary person as a fundamental aspects of the right to freedom of expression. Following this, it instructed the Government to organize the legal recognition of a third gender for non-binary persons.[121]

Put together, those legal approaches and case law point to a viable avenue in bringing about L.G.R. procedures for non-binary persons under the right to freedom of expression. As of today, the E.Ct.H.R. has yet to hear a case on this matter under Article 10 of the Convention, but would it be faced with it, the existing international jurisprudence quoted could facilitate the development of an obligation to recognise and protect non-binary identities in High Contracting Parties. More specifically, the Court could be expected to expand on its stance on the right to not have to conceal a fundamental part of one's identity.

The current case law of the E.Ct.H.R. under Article 10 concerning the principle of freedom of expression is extensive but does not mention gender expression as a protected principle under this article – yet. In light of the developments in other jurisdictions exposed priorly, it is interesting to look at the current case law and position of the Court in defining violations of freedom of expression to show in which ways gender expression could see itself integrated under the principle. For a violation of freedom of expression to be justified in the eyes of the Court, it must be proven lawful under national law, to have a legitimate aim and to be necessary in a democratic society.[122]

For the first criterion, one can assess that the refusal to recognise one's gender expression as equally valid to socially accepted gender identities – taking the form of traditional masculinity and femininity – amounts to discrimination based on gender which is considered unlawful in most states. Thus, in a state where gender-based discrimination is unlawful, the justification under Article 10 that the refusal to recognise diverse gender expressions could be deemed not receivable. It is harder to argue that there would be an obligation for states to recognise diverse gender expression through that avenue. But it may be sufficient to prove the negative.

For the second criterion, the difficulty lies in establishing that the arguments that states could, and most likely would raise, are not sufficient or receivable in dismissing the right of gender-diverse persons to see their gender expression respected and thus officially recognised by the state. In this sense, states would probably use arguments along

[120] *Id.* § 62.
[121] *Id.* § 74.
[122] *See* Eu. Ct. H.R., Guide on Article 10 of the European Convention on Human Rights – Freedom of Expression 10.

the lines of the necessity to protect traditional values and establish the gender binary as a legitimate aim. The case law of the Court on this criteria shows that it tends to overlook it to the benefit of a strict evaluation of the third criterion. For the purpose of this analysis, we will then discuss the potential blockages under the third criterion, assuming that the Court would find them non-receivable, it would likely use the same language in rejecting the legitimate aim argument.

The last criterion is the need to prove that the restriction is "necessary in a democratic society". To do so, the state must show that there is a "pressing social need" justifying the restriction. In this sense, the Court evaluates the weight of the interests of the individual against those of the states. Assuming that the Court would see the harm caused by the absence of legal gender recognition, it would thus recognise the extent of the restriction this refusal or absence of recognition represents on non-binary persons' right to freedom of (gender) expression. It is particularly in defining this overriding interest that the Court may find useful references in the case law of other jurisdictions which have paved the way. Thus stating that the interest of the state in preserving a status quo in the gender binary is not significant enough to justify the violation of non-binary persons' fundamental right to see their freedom of (gender) expression protected and respected.

However, it is necessary to come back to the recent decision of the Court in the case of *Y v. France* in which it decided that the similar balancing act of interests under Article 8 did not play to the advantage of the individual as there was no "European consensus" concerning the question of non-binary legal gender recognition. In this sense, the Court decided that the margin of appreciation of the states under Article 9 was broad and allowed for their refusal to create a third gender marker regardless of the harm suffered by the individual. In light of this judgement, the Court would likely have a similar stance if asked to assess this question under Article 10. However, this does not take from the importance of defending gender expression as part of freedom of expression as the Court's position on the matter is nowadays clearly obstructed by the absence of state support for gender non-conforming persons which says nothing of their true existence and suffering. There is a long way to pave the way for appropriate and effective human rights protection for all persons.

2.2.3. CURRENT STANCE OF THE COURT: THE RETURN OF THE "EUROPEAN CONSENSUS" ARGUMENT AND THE MOVE AWAY FROM EFFECTIVE PROTECTION OF L.G.B.T.Q.I.A.+ RIGHTS

In the current state of the Court's case law, it appears that the Court is not ready to take a step forward in establishing protection for non-binary and gender-diverse persons. Particularly, the Court is stepping back on defining protective measures by using the "European consensus" argument, as was reiterated in the case of *Y v. France* concerning the recognition of a third gender marker for a French inter* person, but also in the case of *A.H. and others v. Germany* in refusing the recognition of a trans* mother as the 'mother' of her child regardless of her gender marker officially being female.[123] This does not take away from the importance of reframing the legal discussion around the question of gender identity and expression under the Convention. However, it is unlikely that the Court will make any significant decision in protecting the interests, but also the fundamental human rights, of non-binary, trans* and inter* persons any time soon. While the Court seemed to be making a move from the "European consensus" argument in deciding matters of L.G.B.T.Q.I.A.+ rights in its Grand Chamber decision in the case of *Fedotova and others v. the Russian Federation* (2023) in redefining the threshold from a "consensus" to a simple "ongoing trend".[124] Using this new broader approach, the Court narrowed drastically the margin of appreciation of states. It recognised the data brought by the Russian Federation regarding the lack of social support for same-sex partnerships on its territory, however, it pointed out that the refusal to recognise same-sex relationships would constitute a violation of the "underlying values of the Convention".[125] In doing so, the Court recognised that even in the absence of a clear consensus among European states regarding the legal recognition of same-sex relationships, the rights of the minority could not be a "condition on its being accepted by the majority".[126] In doing so, it underlined that this approach had the aim of ensuring that the rights of minorities under the Convention, in this case, same-sex couples, could not be limited by states even when negative public opinion still existed. This decision signals a potential change in the approach of the Court to L.G.B.T.Q.I.A.+ questions. However, it appears clear from the decision in the case of *A.H. and others v. Germany* and *Y. v.* France that, if the Court has reached enough confidence to support the rights of

[123] Tissandier-Nasom, E., *The refusal of recognition of transgender legal motherhood in the ECtHR's case of A.H. and others v. Germany* GHRD (2023), https://ghrd.org/uploads/reports/pdf/49705f0add4c5a9e8759ec5bc3f183f3.pdf.
[124] Tissandier-Nasom, E., *Fedotova and others v. the Russian Federation: an Overdue Decision on Same-Sex Relationship Recognition*, GHRD, https://ghrd.org/uploads/reports/pdf/f08d59e3121e09a8a6ca3d8fb384f1e0.pdf.
[125] Fedotova and Others v. Russia, Apps. Nos. 40792/10, 30538/14, 43439/14, ¶ 52 (Jan. 17, 2023), https://hudoc.echr.coe.int/fre?i=002-13971.
[126] *Id.*

same-sex couples,[127] it still has a long way to go in being a real support and effective remedy to the harm and violations suffered by transgender persons in the Council of Europe.[128]

Those recent developments show a lack of commitment from the European Court of Human Rights in standing for the protection of gender-diverse individuals which echoes a strong anti-trans* movement worldwide. As we see the rights, and lives, of trans* and non-binary individuals threatened in every corner of the map, it is deplorable that the E.Ct.H.R., a human rights body, fails to deliver judgment that upholds the very principles of its Convention to the benefit of a political agenda of states. Even looking at the established positive obligations to respect one's gender identity under Article 8, the Court is showing a lack of commitment in refusing to extend that obligation, and the protection attached to it, to parenthood in the case of *A.H. and others v. Germany* and the recognition of non-binary gender identity in *Y v. France*.

3. ORGANISING RECOGNITION: THE "X" GENDER MARKER AS A MISSED OPPORTUNITY

As exposed priorly, the need for legal recognition is primordial to the development of a complete and effective framework of protection for non-binary individuals. In this sense, national systems have been faced with a challenge: how to recognise non-binary individuals' gender identity within their administrative registries and official documents? Most Council of Europe Member States do not offer any option of the sort. However, interesting developments have taken place in select countries taking the form of the addition of a third gender marker titled "X" - namely Austria, Belgium, Denmark, Germany, Iceland, Malta, and the Netherlands. This Chapter will present an exposé of the different systems those States have opted for in recognizing gender outside of the binary before reflecting on the real impact of such systems in practice on non-binary individuals.

[127] Which is even debatable as there has yet been no application of the *Fedotova* jurisprudence. It is possible that the Court took such a progressive decision in this specific case which concerned the Russian Federation after its exit from the Council of Europe, thus making it a symbolic decision.

[128] *See* Fedotova and others v. the Russian Federation, ¶ 52.

3.1. PRACTICALITIES OF NATIONAL FRAMEWORKS: EXPOSÉ OF LEGISLATION AND CASE-LAW IN FORCE IN COUNCIL OF EUROPE MEMBER STATES

During the last decade, a clear trend has been developing in European States adopting the "third" or "X" gender marker option as a step in creating a framework of recognition and later on protection for individuals who do not fall within the gender binary. This development was first rendered possible by a switch in the approach to legal gender that was brought about by the Council of Europe Resolution 2048 (2015) which notably seeks to abolish medical requirements such as sterilization, medical treatment or mental health diagnosis from the process of legal gender recognition.[129] While not directly linked to non-binary gender recognition, this has for effect of making states get rid of the congruence between sex characteristics and gender identity in their legal conceptions. In doing so, it creates a space for non-binary identities to even exist within legal systems that were long centred around the binarity of sex and gender – hence excluding inter* persons as much as non-binary persons. Moreover, in the case of *Van Kück v. Germany*[130] in 2003, the E.Ct.H.R. recognised the freedom to determine one's gender identity as an essential part of the principle of self-determination under Article 8 of the E.C.H.R. However, we are far from a binding piece of law from the Council of Europe which would oblige states to organize non-binary gender registration. Thus, the states that did create a framework have done so in slightly different ways, influencing and inspiring each other over time. While all creating a similar outcome, an "X" on identification documents (and/or birth registration), we can separate the different systems into three sub-categories depending on how the State understands the dichotomy of bodily sex characteristic (or "biologically assigned sex") and legal gender.

3.1.1. WEAK LINK BETWEEN BODILY SEX CHARACTERISTICS AND LEGAL GENDER: THE NETHERLANDS, ICELAND, AND BELGIUM

The first group of countries, constituted of the Netherlands, Belgium, and Iceland have enacted gender registration systems which rely on the separation of sex and gender understood respectively as biological and social. In this sense, the Netherlands and Iceland have opened the possibility to register gender under "X" – as a third category separate from the previously recognised binary categories of "male" and "female" – to

[129] Eur. Parl. Ass., Res. 2048, ¶ 6.2 (Apr. 22, 2015).
[130] Van Kück v. Germany, 2003-VII Eur. Ct. H.R., ¶ 73.

all individuals without a requirement of physical medical certification.[131] The State recognises that there is no need for sex to be in congruence with the individual's gender identity and, that gender identity should be given priority in the definition of the individual's legal personality in all aspects of their social life. Thus, both non-binary persons and inter* persons can access non-binary gender registration equally.

Nevertheless, it is fundamental to note that the Netherlands still does require a certificate from a designated expert confirming the person's conviction of their gender identity. In practice, this does create a serious blockage to access to administrative transition for trans* and non-binary persons in the Netherlands. Already in 2013 when the new law was being approved by the Dutch Senate, Human Rights Watch warned that such a requirement, coupled with the very limited number of persons designated as experts under this law, may create a considerable strain on the system and produce very long waiting list for persons requesting this certificate to be able to then access L.G.R.[132] In 2022, this warning has never rung more true with waiting list to access a first assessment by gender experts in the Netherlands is of minimum two years.[133]

The Netherlands introduced its first "X" gender marker in a decision of the *Rechtbank Limburg* [Limburg District Court] in May 2018[134] which was then confirmed by the *Rechtbank Amsterdam* [Amsterdam District Court] in July 2021. The case concerned a non-binary applicant who applied for a name change as well as a change of their gender marker to an "X" or other neutral denomination. The public prosecutor in the case thought that, since an "X" gender marker option had never been granted before, it was the initiative of the legislative to decide on such a policy change.[135] Ultimately, the Court decided that the request was in essence analogous to one of a trans* binary person requesting a change of their gender marker to the "opposite sex" in order to see their gender identity represented on their legal documents.[136]

The interesting point about the Dutch case is the way in which the approach to gender neutrality evolved through the examination of the case which concerned an

[131] *See The Netherlands: Victory for Transgender rights,* Human Rights Watch (Dec. 19, 2013, 11:00 PM), https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights#: :text=The%20new%20law%20will%20allow,personal%20autonomy%20for%20the%20decision. This new law got rid of the requirement for hormone and surgery documentation to access legal gender recognition. It does still require a certificate by an expert regarding the mental state of the person.

[132] *Id.*

[133] *See Radboud University and Radboud university medical center research team issues recommendations for better transgender care in the Netherlands*, RADBOUDUMC (May 9, 2023), https://www.radboudumc.nl/en/news-items/2023/radboud-university-medical-center-research-team-issues-recommendations-for-better-care#: :text=In%202022%2C%20people%20with%20a,could%20be%20explained%20and%20solved.

[134] Rechtbank Limburg [Rb] [Limburg District Court], 28 mei 2018, Case C/03/232248 / FA RK 17-687, ECLI:NL:RBLIM:2018:4931 (Neth.).

[135] *See* Rechtbank Amsterdam [Rb] [Amsterdam District Court], 21 juli 2021, Case C/13/669890 / FA RK 19-4520, ECLI:NL:RBAMS:2021:3732 (Neth.).

[136] *Id.* § 4.3; see *infra* Annex 2 for text in Dutch.

inter* person having undergone multiple feminizing surgeries that left them unable to prove their inter* status. While the Court first ordered chromosome tests in order to recognise their non-binary identity, it then shifted its approach to defining gender identity as a separate concept. Moreover, the doctor in charge of the medical assessment of the Applicant's status declared that the chromosome test could not be carried out as it could not be considered helpful in defining gender identity which the Court was trying to establish.[137] In this sense, the Court shifted from an approach that was based largely on sex characteristics and would have closed off neutral gender registration to non-binary individuals and opted for an inclusive and open-to-all system based on self-determination.

Iceland has followed a similar path in allowing non-binary persons access to gender-neutral registration without conditions through the Gender Autonomy Act.[138] There are specific elements of the Icelandic system which need to be mentioned. Specifically, the Act goes further in adapting national law as it also creates the possibility for individuals registered as "X" to take a gender-neutral family name which translates to "the child of" instead of the previously binary "daughter of" or "son of". While the gender-neutral registration part of the provisions points to an open system, it is interesting to note that this option is only open to individuals registered as "X", hence excluding individuals registered as either male or female.[139] Moreover, Icelanders will only be allowed to change their gender marker once. This raises the question of inclusivity in practice, especially regarding individuals who may have changed their gender marker prior to the creation of the gender-neutral option but who may wish to see themselves referred to as such.

It is to be noted that the Gender Autonomy Act, which creates this opportunity as well as additional recognition and protection for trans* and inter* persons, was passed with an eighteen-month delay to adapt the national registration system. Hence, the "X" gender marker was open only in January 2021, leaving a very short time to evaluate the practical application of the right.

[137] *See* Pieter Cannoot, *De Knuppel in Het Genderhok: Op Weg Naar M/V/X in de Nederlandse Geslachtsregistratie?* [The Bat in the Gender Loft: on the way to M / V / X in the Dutch Gender Registration?], Tijdschrift Voor Familierecht [Journal of Family Law] 49 (2019) (Belg.).

[138] Act on Gender Autonomy 2020, Act No. 80/2019 as amended by Act No. 159/2019, No. 152/2020 and No. 154/2020, https://www.government.is/publications/legislation/lex/2020/05/08/Act-on-Gender-Autonomy/ (Iceland).

[139] *See* Gender and name registration, Þjóðskrá [Registers], https://www.skra.is/english/e-delivery/gender-and-name-registration/ (Iceland) (last visited May 26, 2022).

This comes after the 2017 new "Legal Gender Recognition Law"[140] which introduced a conceptual recognition of the separation of sex and gender by suppressing medical requirements such as sterilization in legal gender recognition procedures. It equally puts self-determination as the central concern in all procedures regarding trans* individuals. However, it strangely upheld the male/female gender binary by not engaging with non-binary issues or organizing any gender-neutral legal recognition. However, in 2019, the Belgian Constitutional Court rendered a judgment declaring the 2017 "Legal Gender Recognition Law" unconstitutional as the lack of a third gender option discriminated against non-binary persons.[141] Additionally, the law only allowed for individuals to change their gender marker once which the Court also declared discriminatory towards gender-fluid individuals. As a concluding point, the Court urged the Government to legislate on the matter through one of the two following options: the recognition of a third gender marker or the abolishment of gender markers as an element of legal identity and civil status. The Court has left the implementation of this judgment to the will of the Government. In the most recent development, the Belgian Federal Government has announced that gender markers will be taken off of identity cards in the near future.[142] Belgium wrestled with the idea of establishing an "X" gender marker in developing its new law on gender. However, the Government leaned towards the suppression of gender markers from identification documents, while still maintaining gender registration in the civil registries which cannot be accessed by the public directly. This echoes the constant attachment to the gender binary in administrative services but does recognise the need to create space for individuals who do not fit said binary in the social realm by getting rid of public displays of gender registration status. In 2021, it was made public that a group of Ministers within the Government had started work on a law proposal to enact such a change in the 2022 agenda.[143] In March 2023, the Belgian Committee of Ministers approved a law proposal getting rid of the irreversible character of the legal gender change procedure allowing individuals to change their

[140] Wet van 25 juni 2017.tot hervorming van regelingen inzake transgenders wat de vermelding van een aanpassing van de registratie van het geslacht in de akten van de burgerlijke stand en de gevolgen hiervan betreft [Law on the Reform of Regulations on Transgender People as Regards the Indication of an Adjustment of the Registration of Sex in the Civil Status Records and Its Consequences] (Belg.), B.S., July 10, 2017, https://www.ejustice.just.fgov.be/eli/wet/2017/06/25/2017012964/staatsblad.

[141] CC [Constitutional Court], June 19, 2019, n° 99/2019, https://www.const-court.be/public/f/2019/2019-099f.pdf (Belg.).

[142] *See La Belgique étudie la suppression de la mention de genre sur la carte d'identité* [Belgium Studies the Deletion of the Mention of Gender on the Identity Card], Têtu (Nov. 30, 2021), https://tetu.com/2021/11/30/europe-genre-non-binaire-belgique-etudie-suppression-mention-sexe-carte-identite/ (Belg.).

[143] *See* Par Belga, *Le gouvernement fédéral supprime le genre de la carte d'identité* [The Federal Government Deletes Gender From the Identity Card], Le Soir (Nov. 30, 2021, 6:40 AM), https://www.lesoir.be/409408/article/2021-11-30/le-gouvernement-federal-supprime-le-genre-de-la-carte-didentite.

name and legal gender multiple times during their life. This is an important step in recognizing the rights of non-binary persons in showing an understanding and inclusivity of the fluidity of gender, slowly shifting away from binary views.

A relevant development regarding those countries stems from the propositions of the Belgian Constitutional Court. Indeed, news reports point to the idea that the Dutch Government is currently entertaining the idea of getting rid of gender markers on identification documents as well.[144] This marks a logical follow-up to the effective distinction between bodily sex characteristics and legal gender and the consecration of self-determination and respect for all gender identities. However, it does not constitute a complete suppression of gender as a form of legal registration as it would remain, with three options (M/F/X), in the administrative registries and, presumably, on the individual's birth certificate and other official documents such as passports.

3.1.2. WEAK LINK BETWEEN BODILY SEX CHARACTERISTICS AND LEGAL GENDER BUT INCOMPLETE IMPLEMENTATION: MALTA AND DENMARK

Following the same reasoning as the first group of States, Malta and Denmark have recognised the possibility for all persons to access a non-binary gender registration without requiring any medical certification or any congruence between gender and the "sex" of the applicant. In this sense, it can be argued that those States are following in the footsteps of the first group and will soon better their system of gender registration to be as inclusive as possible. Indeed, the current frameworks leave details untouched which can have a serious impact on the effective recognition, and later on protection, of non-binary persons wishing to change their gender marker.

In this sense, under the Government's "L.G.B.T.Q.I. Plan of Action" (2015-2017),[145] the Maltese Government introduced the possibility of registering one's gender with an "X" in November 2017. In order to obtain the change, individuals must take an oath in the presence of a notary and fill in the required form. The change only concerns identification documents such as I.D. cards and passports[146] – meaning that it is

[144] Ingrid van Engelshoven, Ministerie van Onderwijs, Cultuur en Wetenschap [Ministry of Education, Culture and Science], *Tweede Kamer Voortgangsbrief aanpak onnodige sekseregistratie* [House of Representatives Progress Letter approach unnecessary sex registration], Rijksoverheid (2020), https://www.rijksoverheid.nl/documenten/kamerstukken/2020/07/03/tweede-kamer-voortgangsbrief-aanpak-onnodige-sekseregistratie (Neth.).

[145] *LGBTQI Plan of Action (2015–2017),* Minister for Social Dialogue, Consumer Affairs and Civil Liberties (2015), https://meae.gov.mt/en/documents/lgbtiq%20action%20plan/lgbti%20action%20plan%20lo%20res.pdf (Malta).

[146] *See Legal Gender Recognition and Bodily Integrity*, Human Rights Directorate (last updated Dec. 12, 2020), https://humanrights.gov.mt/en/Pages/LGBTIQ%20Equality/Legal%20Provisions/Legal-Gender-

not mentioned in any form on the birth certificate of the applicant which will continue to disclose the binary gender the person was assigned as birth. Moreover, the "X" was chosen to stand for "undeclared". Thus, it does not so much constitute the recognition of a third gender category but rather codifies the non-registration of gender. In this sense, the mention of a binary gender/sex on the birth certificate of the individual will be referred to when coming across gender-differentiating laws.[147]

The Danish system works in a similar manner. On November 28th, 2014, Denmark passed an executive order aimed at simplifying the legal gender change rules which included the possibility to register one's gender under "X".[148] The impact on individuals is comparable to Malta's framework but is limited in practice as the binary gender assigned to the individual prior to the change remains reflected on their social security number[149]. Indeed, within the Danish social security system, "male" is assigned a number ending with an odd digit and "female" with an even one. Individuals have recognised the right to have their social security number changed to reflect their gender identity but only within the limits of the binary. This means someone could have their social security number changed from M to F or F to M but someone whose gender is registered as "X" would still have to carry a binary social security number.[150]

3.1.3. CLOSE LINK BETWEEN BODILY SEX CHARACTERISTICS AND LEGAL GENDER: GERMANY (UNTIL 2022) AND AUSTRIA

Finally, Germany (until 2022 bill[151]) and Austria follow a similar system which can be qualified as closed for non-binary individuals. Indeed, both systems have recognised the possibility to register one's gender as X rather than M or F. However, this opportunity is strictly reserved for inter* persons who can prove, medically, their inter* status.

Recognition-and-Bodily-Integrity.aspx#:%7E:text=The%20'X'%20marker%E2%80%8B%20was,Maltese%20ID%20Card%20or%20Passport.&text=Choosing%20to%20have%20an%20'X,gender%20on%20these%20identity%20documents (Malta).

[147] *See* Lena Holzer, *NON-BINARY GENDER REGISTRATION MODELS IN EUROPE: Report on third gender marker or no gender marker options,* ILGA-Europe 78 (2018), https://ilga-europe.org/files/uploads/2022/04/non-binary-gender-registration-models-europe.pdf.

[148] Justitsministeriet [Ministry of Justice], Bekendtgørelse om ændring af bekendtgørelse om pas m.v. [Executive Order on Amendment of the Executive Order on Passports etc.], BEK nr 953 af 28/08/2014, https://www.retsinformation.dk/eli/lta/2014/953 (Denmark).

[149] Even if not commonly mentioned on identity documents, the social security number is part of documents the individual will have to disclose on a regular basis.

[150] *See* Holzer, *supra* note 147, at 20.

[151] We note that Germany's position on the matter has been drastically changed by the "Self-Determination Act" first introduced in 2022. However, for the sake of the argument, it is interesting to reflect on its approach prior to the introduction of the Bill. A reflection on the impact of the bill will be developed at the end of this Section.

More specifically, on December 14th 2018, the *Deutscher Bundestag* [German Federal Parliament] and the *Deutscher Bundesrat* [German Federal Council], passed a law which introduced a third gender marker option under the term "diverse" to be added to the pre-existing "male" and "female" categories. This was initially made possible by a decision of the *Bundesverfassungsgericht* [Federal Constitutional Court] on October 10th 2017. The Court held that inter* persons should be allowed to register their gender outside of the existing binary categories. The decision links sex characteristics, and thus the inter* status of the applicant, their gender identity, to their legal gender.[152] More specifically, the Court reads the provision on the prohibition of discrimination based on gender.[153]

This shows with no doubt that the Court, whose opinion is the essence of the parliamentary decision, views gender identity as the direct translation of (biological) sex. The opportunity for "diverse" gender registration is only given to inter* persons because they have been recognised as not fitting into the "male" and "female" sex categories. Following this logic, a medical certificate is required to access the right.

An interesting development in the German case is the addition of a fourth option by a recent Court decision consisting of the optional suppression of the gender marker from the person's identity documents. This means you could either present a document mentioning an "M", "F", "X" or no marker.[154] This points towards a slight departure from the direct connection between (biological) sex and gender as it seems to recognise the possibility of having no gender and hence a dissociation of gender identity with the sex assigned at birth. This approach by the Court could mean the start of Germany's transition from a closed system to a more inclusive one in echo of the Belgian Constitutional Court's developments. Furthermore, Germany already does not display gender on identity cards. In this sense, the upholding of the medical requirements seems backwards and inconsistent which points to its potential suppression shortly.

Similarly, the *Verfassungsgerichtshof Österreich* [Austrian Constitutional Court] held that inter* persons should be granted the possibility to register their gender as other than "male" and "female" in a way that conforms with their gender identity.[155] Consequently, inter* persons are now allowed to register as either "inter", "other" or "X". In doing so, it

[152] Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], Oct. 10, 2017, 1 BvR 2019/16, §§ 1, 35 (Ger.).

[153] *Id.* § 36.; *see infra* Annex 2 for original text in German.

[154] Since 2013, Germany has created a "blank" option for gender registration, nevertheless this option was not open to non-binary persons but rather reserved for inter* infants whose gender identity could not be determined at birth in order to let the parents/doctors come to a conclusion in the months following the birth. Bundergerichtshof [BGH] [Federal Court of Justice] Apr. 22, 2020, XII ZB 383/19, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=106062 (Ger.).

[155] Verfassungsgerichtshof [VfGH] [Constitutional Court], June 15, 2018. Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 77/2018-9 (Austria).

recognised that limiting the term "gender" in the Austrian Constitution to binary genders would amount to a violation of Article 8 of the European Convention on Human Rights which has constitutional status in Austria.[156] The Austrian decision referred directly to the decision of the German Constitutional Court, particularly putting forward the idea that "gender assignment. . .typically plays a key role both in a person's self-perception and in the way this person is perceived by others".[157] This sentence in itself seems to point at the possibility of opening gender categories to non-binary persons. However, Austria stays in line with the German approach by connecting directly gender to sex. In this sense, the use of the word "gender" by the Court is to be understood as referring to biological sex as it is only understood when the biologically defined sex and gender categories are in congruence – hence an inter* person identifying outside of the binary.

In June 2022, the German Government first introduced a "Self-Determination Act" which enacts a move towards self-identification for all without medical gatekeeping of any sort and includes access to the diverse category and "X" marker.[158] The Bill opens the possibility for adults and minors over fourteen years of age to change their registered gender and/or name freely once a year, every year. The Government introduced the Bill to highlight that "in many areas, society is further ahead of legislation. As a [Government], we have decided to create a legal framework for an open, diverse and modern society".[159] This is an interesting take as it echoes directly the basis of this research in arguing that gender is a largely fluid social construct that belongs in the social sphere and is not intelligible efficiently by the legal system. In allowing for this change, Germany pulls itself above other systems and recognises fully the rights of all to see their gender identity recognised by the State, including when it may vary over time with the possibility to change one's registered gender once a year. Nevertheless, a discussion on the appropriateness of the practice of registering gender is necessary and will be carried out later on in this paper. Indeed, while such a system of self-identification is what is hoped for in light of the current route taken by European states in creating third-gender categories, it may not be the adequate answer to the infinite variability of human experiences of gender.

[156] *See Austria: Court Allows Intersex Individuals to Register Third Gender Other Than Male or Female*, Library of Congress (July 6, 2018), https://www.loc.gov/item/global-legal-monitor/2018-07-06/austria-court-allows-intersex-individuals-to-register-third-gender-other-than-male-or-female/ (Austria).

[157] Verfassungsgerichtshof [VfGH] [Constitutional Court] June 15, 2018. Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 77/2018-9 (Austria), § 31.

[158] *See* Kirsten Sibbald, *Germany Introduces New Gender Recognition Procedure : Proposal would replace antiquated system*, Human Rights Watch (Oct. 21, 2022, 1:22 PM), https://www.hrw.org/news/2022/10/21/germany-introduces-new-gender-recognition-procedure.

[159] *See* Emily Chudy, *Germany to introduce landmark self-ID law as part of sweeping reform of LGBTQ+ rights*, PinkNews (Aug. 09, 2022), https://www.thepinknews.com/2022/08/09/germany-trans-rights-self-id/.

3.1.4. COMPARATIVE TABLE: RECOGNITION OF A "THIRD" GENDER CATEGORY IN STUDY COUNTRIES

	"X" gender marker available		De-pathologisation of L.G.R.		Avenues through which "X" option was created	Documents on which the "X" or neutral gender appears
	For inter* persons	For all incl. non-binary persons	Diagnosis	Medical transition*		
Austria	June 2018	×	Required	Required	Judicial	Identity documents, administrative registries and birth certificate
Belgium**	June 2019 (Judgment not yet implemented)		Not required January 2018		Judicial	Identity documents, administrative registries and birth certificate
Denmark	November 2014		Not required September 2014		Legislative	Identity documents *(except social security number)*
Germany	December 2018	×	Required	Required	Judicial	Identity documents, administrative registries and birth certificate
Iceland	May 2020		Not required June 2019		Legislative	Identity documents, administrative registries and birth certificate
Malta	September 2017		Not required December 2016		Legislative	Identity documents
The Netherlands**	May 2018		Required***	Not required December 2013	Judicial	Identity documents, administrative registries and birth certificate

(*).[160]

(**). Those countries are currently moving towards the suppression of gender markers on identity documents (excl. passports).

(***).[161]

[160] Hormone therapy, surgery, sterilisation.

[161] A bill was presented to the Dutch Parliament to abolish the diagnosis requirement for L.G.R. procedure on the 3rd of May 2021 but has yet to be discussed. *See* "Wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het veranderen van de voorwaarden voor wijziging van de vermelding van het geslacht in de akte van geboorte" [Amendments to Book 1 of the Civil Code in Connection with Changing the Conditions for Changing the Indication of the Sex in the Deed of Birth], Tweede Kamer der Staten-Generaal [Second Chamber of the Parliament] (2021), https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2021Z07392dossier=35825 (Neth.).

3.2. THE "X" GENDER MARKER AS A MISSED OPPORTUNITY IN CONSECRATING RECOGNITION AND PROTECTION FOR NON-BINARY INDIVIDUALS

Recognising a "third gender" option in legal gender registration may directly increase the social visibility of non-binary persons. Additionally, the introduction of the "X" gender marker by Denmark and others has allowed for the initiation of a European discussion on the inadequacy and unnecessariness of the gender binary.[162] This corroborates the observation made in Chapter 1 that legal recognition of gender identity is fundamental in protecting non-binary persons – see for instance the United Kingdom survey showing that non-binary persons' mental health and self-esteem is directly affected by the absence of legal recognition and social visibility.[163] In this sense, the establishment of an "X" marker creates a space for non-binary persons to exist in the legal sphere by officially recognising their "position [as a] person within the legal system".[164] Moreover, it may facilitate data collection regarding non-binary persons to build affirmative action to respond to specific issues the community faces.[165]

However, several drawbacks may be associated with the creation of an "X" legal gender category. Therefore, we will first look at the overall inappropriateness of third-gender markers as a response to the need for non-binary inclusion in law and society, before going more in-depth into the risks and dangers such an approach may entail for the concerned individuals.

3.2.1. OVERALL INAPPROPRIATENESS

An interesting illustration to introduce the inappropriateness of "X" gender markers is the case of Pakistani *Khawaja Sira*, a non-binary identifying community which, despite having the possibility since 2018 to register their gender as "X" has, in the majority, chosen to keep their "M" gender marker.[166] Following this, it can be argued that the benefits of opening up legal recognition outside of the binary may be purely symbolic if

[162] *See* Holzer, *supra* note 147, at 39.

[163] *See* Vic Valentine, Non-binary People's Experiences in the UK (2016); Greta R. Bauer et al., *Intervenable Factors Associated with Suicide Risk in Transgender Persons: A Respondent Driven Sampling Study in Ontario, Canada*, BMC Pub. Health (2015).

[164] Press Release No. 95/2017, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Civil Status Law Must Allow a Third Gender Option (Nov. 8, 2017), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html (Ger.); *see also* Clarke, *supra* note 16, at 937.

[165] *See* Clarke, *supra* note 16, at 937.

[166] *See* Holzer, *supra* note 147, at 39.

it entails further precarity and even loss of rights.[167] In other words, recognition through an "X" marker may be "purely expressive" in that it only aims to accommodate non-binary identities so far as it does not disrupt the binary in other institutional settings.[168] This is perfectly illustrated by the case of Denmark. In creating an "X" gender marker, the state opens a form of legal recognition for non-binary persons which appears beneficial on the surface, but in reality does not extend to respect in all aspects as, for example, a binary gender remains mentioned and accessible to all on the individual's social security number. Thus, in such cases, the creation of a "third gender" category can be seen as a small concession of the majority to integrate non-binary individuals while preserving the binary where it serves its interests. More specifically, it might also be linked to the perceived costs of accommodating the system for non-binary persons which can act as a political deterrent to creating full effective recognition and protection outside of the binary.[169] Additionally, it is necessary to consider that the choice of the "X" gender marker might be one of convenience as well as it was pre-existent in most countries in different contexts.[170] For instance, it is a routinely established procedure in the Netherlands to register children under "X" when the sex/gender cannot be defined directly at birth.[171]

Furthermore, the "X" gender marker does not create effective recognition for all non-binary persons. By adding an "X" category to the previously recognised "M" and "F", the states only expand the list of legally accepted gender classifications from two options to three. As established priorly, "non-binary" needs to be understood as an umbrella term which covers a multitude of specific gender identities. In this sense, a single "X" option may not encompass all non-binary identities.[172] While it may satisfy some non-binary individuals, it appears clear that it does not adequately represent persons who do not identify with one fixed gender (gender-fluid), no gender at all (agender) or even persons who define their gender identity as a mix of male and female. While one could argue that the "X" is a starting point for opening up more alternative gender categories in the future, it needs to be noted that the law is not an instrument made to deal with infinite variations.[173] For instance, a system like the one adopted by

[167] *Id.*
[168] *See* Clarke, *supra* note 16, at 939.
[169] *See id.*
[170] *See*, *e.g.*, Holzer, *supra* note 147, at 19 (reference to Malta).
[171] *See* Marjolein van den Brink & Jet Tigchelaar, *M/F and beyond Gender Registration by the State and the Legal Position of Transgender Persons (English Summary)*, Ministerie van Veiligheid & Justitie [Ministry of Security & Justice] (2014), https://repository.wodc.nl/bitstream/handle/20.500.12832/2087/2393-summary_tcm28-73314.pdf?sequence=4&isAllowed=y (Neth.).
[172] *See* Holzer, *supra* note 147, at 40.
[173] *See* Clarke, *supra* note 16, at 939.

social media platforms such as Facebook/META[174] where one can fill in freely a blank space defining their gender identity, is hardly viable for the legal sphere. Indeed, states and legal authorities are usually averse to what Clarke qualifies as "inauthenticity and disuniformity".[175] A counter-example to this may lie in the approach taken by Tasmania which allows individuals to self-determine their gender identity without any medical gate-keeping and without limitation on the category they wish to see reflected on their documents. However, it is fundamental to note that Tasmania remains a small state with a small population which makes the management of such an administrative diversity more plausible. Nevertheless, it remains an approach that may come in handy when arguing for the unnecessary character of gender as a legal category. Indeed, it shows that there is no need for the state to have certainty regarding the possible gender categories in the civil status (since individuals can fill in a blank space as they please) while still having a very developed anti-discrimination system which provides effective protection for trans* including non-binary persons and inter* persons. In a sense, the infinite possibilities of gender categories have a similar effect on the gendered basis of the legal system as the suppression of gender as a legal category.

Inauthenticity refers to the risk of fraud that could arise when individuals are allowed to make claims regarding their identity without a fixed framework controlled by the state. More specifically, when affirmative action, organized to diminish the harm and disadvantages suffered by a specific community, is being combined with a form of self-determination, authorities may have concerns that one might attempt to benefit from such advantages on a fraudulent basis.[176] This argument is omnipresent in the discourse about trans* and non-binary person's existence in society – see for example the often-mentioned argument that men might fraudulently assert themselves as female to enter women's bathrooms or participate in women's sports. To this end, elective systems of self-determination for gender identity registration do not allow the state to ensure that an individual will truthfully "belong" to the category they assert themselves to be and thus ensure that the individuals will take on the burden as much as the advantages that come with being in such a legal category.[177]

The second obstacle is the lack of uniformity that a free-elective system for gender registration would create for the state legal system. Clarke draws the connection

[174] *See* Meta Diversity, Facebook (Feb. 26, 2015), https://www.facebook.com/MetaDiversity/posts/774221582674346.

[175] *See* Jessica A. Clarke, *Identity and Form*, 103 Calif. L. Rev. 747, 767 (2014).

[176] *See*, *e.g.*, Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 Mich. J. Race & L. 367, 369 (2006) (studies made regarding the complicated regulation of Hispanic and Native Americans categories in the United States).

[177] *See* Clarke, *supra* note 175, at 768.

between such an approach and the *numerus clausus* principle in property law.[178] In this sense, the legal system offers a limited number of options when registering the individual's gender identity for similar administrative purposes as there are limited standard forms for property registration. This is not to disregard that individuals may identify in an array of manners but to highlight that this multitude may not always be intelligible legally as it entails a more individualized approach to legal registration which, once again, implies a higher administrative cost both in terms of money and time.[179] Following this, the state's interest in recognizing infinite, or even simply some additional, gender categories is overpowered by the burden it would place on its administrative and legal branches.

The response of states to those obstacles has so far been to limit the recognition of non-binary individuals to "one-third" gender category – thus limiting the cost and maintaining a form of control over the criteria of accession to the category as well as the extension of said recognition.

Finally, it may be added that the choice of the letter "X" or the category of "unspecified" gender is fundamentally disrespectful to non-binary persons regardless of their overall inappropriateness. Florence Ashley states in her article regarding the introduction of the "X" gender marker in Canada that they "would not be satisfied with 'X' as a gender marker".[180] They go on to argue that the "X" marker, when referring to an "unspecified" gender category, is fundamentally not in line with the demands of non-binary individuals in the sense that it does not effectively create a third category but implies that one's gender remains either male or female but simply that the person does not wish to disclose which one of the two. Going back to the discussion on the social visibility of non-binary persons about the established binary of sex and gender (i.e., Chapter 1), the choice of "X" as the mark of a "third gender" reflects directly how non-binary persons are perceived as inferior subjects of law. In grouping all non-binary identities under this concept of "unknown" gender, the law implies that "non-binary" is on the same level of specificity as "male" and "female". However, those are specific gender identities that are comparable to specific non-binary identities such as agender or genderfluid. To this end, the antonym of non-binary is binary and not "male" and "female".[181] Therefore, in limiting legal gender categories to "M", "F" and "X", states subsume all non-binary gender identities within one unspecified category and, more

[178] *Id.* at 769.
[179] *Id.*
[180] *See* Florence Ashley, *'X' Why? Gender Markers and Non-Binary Transgender People, in* Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons 33 (Isabel C. Jaramillo & Laura Carlson eds., 2021) (Switz.).
[181] *Id.* at 38.

specifically, openly classify them as less deserving than binary categories of gender.[182] This echoes directly how non-binary identities are perceived socially in the European States.[183] To this needs to be added the obvious observation that the choice of the letter "X" as the marker for non-binary persons is a further illustration of the approach of states to non-binary identities as it is commonly used in all languages to designate anonymity.

3.2.2. FURTHER RISKS AND COUNTER-PRODUCTIVENESS

More than concerns linked to the inadequacy of the "X" option as a source of recognition for non-binary persons, it may also be counterproductive as it may create new risks for individuals concerned. Thus, while supposedly being the first step towards effective protection, it may in reality bring new challenges to the security and dignity of non-binary persons. Two main areas of concern arise the reinforcement of stereotypes, violence and stigma and the growing power of the state over personal matters of gender identity.

Firstly, the "X" gender marker is likely to create further marginalisation and discrimination, if not direct violence, against non-binary persons. Indeed, it needs to be considered that the mere creation of this third category may reinforce stereotypes by creating exclusionary social categories – even within the non-binary community.[184] In this sense, it creates a new "package" of stereotypes for what is meant to characterize a non-binary person.[185] For instance, there is a risk of seeing the non-binary community itself classifying persons from legitimate to illegitimate as part of the community depending on whether they have changed their gender marker to "X" or not.

Moreover, even when individuals decide freely to change their gender marker to "X", the mere mention of a gender-neutral category on their identification documents will likely bear stigma. Even in societies where non-binary persons were considered holy and divine in tradition, the legal recognition of a third gender has contributed to the subordination of those groups and an increase in discrimination against them.[186] Take for example the *Hijras* community in India.[187] Supporting this, I found, after asking over

[182] *See* Dylan Amy Davis, *The Normativity of Recognition: Non-Binary Gender Markers in Australian Law and Policy*, *in* 24 Gender Panic, Gender Policy 227, 250 (Vasilikie Demos & Marcia Texler Segal eds., 2017).

[183] *See supra* Section 1.1.

[184] *See* Clarke, *supra* note 16, at 939.

[185] *See* Mary A. C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L. J. (1995).

[186] *See* Dipayan Chowdhury & Atmaja Tripathy, *Recognizing the Right of the Third Gender to Marriage and Inheritance Under Hindu Personal Law in India*, BRICS L. J. 43, 48-49 (2016).

[187] *Id.* As a framework of reference, Pakistan created an "X" gender marker in 2018 and India has had a form of three-category gender registration model since 2005 (modified in 2009).

100 individuals who self-identified as non-binary[188], that a strong majority declared that they would not feel *safe* having an "X" mentioned on their identification documents.[189] Responses to the open question in the questionnaire reveal that most non-binary individuals do not believe that their societies are safe for non-binary persons and that the "X" mentioned on their identification document would put them in danger of discrimination and violence if exposed to the wrong persons.[190]

3.3. RESULTS OF THE SURVEY CARRIED ON DURING THIS RESEARCH

	I feel inadequate with the mention of M/F gender markers on my identity documents	I want the mention of an "X" on my identity documents	I want the mention of any gender taken off my identity documents	I would feel safe with the mention of an "X" on my identity documents
Disagree	1% (1)	24% (25)	1% (1)	29,8% (31)
Somewhat disagree	7,8% (8)	15,4% (16)	1% (1)	27,9% (29)
Neutral	2,9% (3)	18,3% (19)	6,8% (7)	16,3% (17)
Somewhat agree	33,3% (34)	22,1% (23)	12,6% (13)	15,4% (16)
Agree	54,9% (56)	20,2% (21)	78,6% (81)	10,6% (11)

This echoes the point made in Chapter 1 regarding the vulnerability of non-binary persons in European societies. Adding to this all daily occurrences when one is required to show an identification document, including when coming in contact with law enforcement, it is clear that having an official mark of their non-binary gender identity could expose individuals to increased risks of discrimination and hate-motivated violence. Moreover, this goes back to the idea of a right to not have to conceal one's gender identity, as it is a fundamental part of one's identity, to ensure one's safety articulated in Chapter 2.

Secondly, by creating a new "gender category", the "X" gender marker laws follow the traditional legal and social constructive norms for gender categories. As exposed before, if men are only men because they are not women and vice-versa, then it is the same for non-binary as a category.[191] To this end, legal categories are created through normative exclusions and thus organise the opposition between what belongs in

[188] Keeping in mind that non-binary is an umbrella term, hence most participants also mentioned the specific gender identity they identify with which impacts the way in which they think of the "X" gender marker as it might be more or less aligned with the way they perceived their non-binary identity.
[189] *See infra* results of my questionnaire in Annex 1.
[190] *See infra* results of my questionnaire in Annex 1.
[191] *See supra* Section 1.1.

a certain category and what does not.[192] In other words, the creation of legal gender categories creates the separation between the "legitimate" and the "illegitimate" gender identities. In doing so, it equally creates a responsibility for authorities in charge of the law to exercise a form of control over who is "truly" non-binary and who is not. By analogy, Clarke refers to the developments of racial categorising which, in practice, did not create more liberation or empowerment for racial minorities but rather was implicitly used as a tool of subordination.[193] Furthermore, as mentioned earlier in this Chapter, the state's willingness to accommodate the law to include new categories, such as non-binary persons when it comes to gender, is largely limited by the cost and effort required to render it effective. In this sense, there is one more consideration to add to the equation when reflecting on the state's interest in creating a third gender category: the "lesser" cost. Indeed, because legal categories need be of a limited amount, the state concedes that one extra category is necessary, regardless of the administrative cost its creation might incur, to avoid the other option which would represent a much larger legal and administrative deconstruction: the suppression of gender from administrative registration or legal documents. The inclusion of non-binary persons in this new "third" category, however inadequate it might be in practice, replies to a social need and demand of a certain part of society and in consequence reduces the pressure on the state to give up its power to control gender identity through law.[194] Thus, in creating a third gender category, the state creates the illusion of inclusion while increasing its power of control over an individual's core identity. It can be argued that, where access to legal gender change is fully organised around individual self-determination, there is no intent of control on behalf of the state. However, such systems, like in Malta, only give the individual freedom within the classifications the state has deemed legitimate. This is further supported by the example of Denmark where the individual is free to self-determine their gender but only to the extent that it does not encroach on other state prerogatives such as the binary gender differentiation for matters of social security. In this sense, it is exaggerated to consider that those systems rely completely on self-determination, also since some still require a diagnosis to even access L.G.R. procedures.[195] In this sense, it may be inaccurate to say that they rely on pure self-determination, however, in practical terms, they offer significantly more accessible and protective L.G.R. procedures while thriving towards full self-determination. In addition, this same reasoning is even more evident in systems that limit access to the "X"

[192] *See* Holzer, *supra* note 147, at 40.
[193] Case, *supra* note 185; Clarke, *supra* note 16, at 940.
[194] *See* Paisley Currah, *Transgender Rights Without a Theory of Gender ?,* 52 Tulsa L. Rev. 441, 445-46 (2017); Clarke, *supra* note 16, at 940.
[195] *See supra* Comparative Table in Section 3.1.4.

gender marker to inter* persons with a medical certificate requirement (Germany, Austria). Indeed, in such systems, the state exercises explicit control over who may receive the third gender marker, creating a clear normative framework regulating non-binary bodies even stricter than it regulates male and female sex classifications. Going back to the argument made in Chapter 1, non-binary persons are once again put outside the norm, only allowed to qualify as legal persons when they fit the framework organised by the state – which is either fairly accessible in self-determination-based systems, or almost impenetrable. In light of this, it can be argued that the "X" gender marker allows the state to somehow "domesticate" non-binary identities.[196] In other words, it includes non-binary in the norm to exercise control over its limits and implications.

Following the observations and conclusions made in this Chapter, it is legitimate to ask: then what is the better option? Indeed, all said above is not to deny the serious claim for legal recognition and protection for non-binary persons, but simply to show that the "X" gender marker, as the option favourited by European states so far, is neither appropriate nor desirable in responding to this claim. Rather, it points toward the other option, as put forward by the Belgian Constitutional Court[197]: the suppression of gender registration or official documents.

4. ENACTING THE END OF GENDER ON IDENTITY DOCUMENTS OR AS A LEGAL CATEGORY

In this last Chapter, I will explore an alternative avenue for the adequate legal recognition of non-binary identities and subsequent effective protection: the suppression of gender markers or gender registration altogether. After looking at the benefits of such an approach and the legal basis pre-existing for it, I will equally expose the risks inherent to such an approach, particularly in the context of gender equality.

[196] *See* Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 Colum. L. Rev. 1399, 1399 (2004).

[197] *See* Federale Overdheidsdienst Justitie, *25 juni 2017.- Tot Hervorming van Regelingen Inzake Transgenders wat de Vermelding van een Aanpassing van de Registratie van het Geslacht in de Akten van de Burgerlijke Stand en de Gevolgen Hiervan Betreft,* ejustice.just.fgov.be (Jul. 10, 2017) [Law on the Reform of Regulations on Transgender People as Regards the Indication of an Adjustment of the Registration of Sex in the Civil Status Records and Its Consequences], https://www.ejustice.just.fgov.be/eli/wet/2017/06/25/2017012964/staatsblad.

4.1. REMOVING GENDER FROM IDENTITY DOCUMENTS OR REGISTRIES

As of today, no European states, or any other state, have enacted the total suppression of gender in civil registration.[198] However, Germany does not display an individual's gender on their identity cards (not passports). In this sense, the decision of the German Constitutional Court which empowered the State to create the "X" gender marker is a great starting point.[199] In its decision, the Court pointed out that there were two ways to answer the applicant's request and to ensure the proper legal recognition of non-binary persons: the creation of a third gender category or the suppression of gender registration altogether.[200] To this end, the Court highlights that the system of gender registration is only discriminatory against non-binary persons when it is a mandatory[201] part of the public registration. Therefore, if the State were to get rid of gender as a legal category there would no longer be any issue arising regarding any potential lack of legal recognition for all gender identities. However, the suppression of gender as a legal category is a tricky question. First of all, it can refer to very different applications in practice: the suppression of gender markers from (all or some) identity documents while maintaining gender as an identifier in civil registries and other official documents – which Germany did subsequently –, or the suppression of gender as a legal category altogether meaning the state would give up all access to individual's gender information. While both attain a form of gender neutrality that would protect non-binary individuals in their daily lives from having to conceal or disclose their gender identity, the first option is limited as the state retains power over gender as a legal category, meaning it could be used for various purposes such as affirmative action but also gender differentiating laws. To shed light on the possible vices and virtues of getting rid of gender on identity documents or as a whole, it is necessary to first look at the arguments put forward by states, particularly Germany, in rejecting the option. Then, this Subchapter will expose the absurdity of "gender markers"[202] and present the existing legal basis to support the end of gender as a legal category.

When it was faced with the Constitutional Court judgment, the German Government had to enter a discussion on the necessity of gender markers or even of

[198] *See* Holzer, *supra* note 147, at 44.
[199] *See* BVerfG, 1 BvR 2019/16, Oct. 10, 2017, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/10/rs20171010_1bvr201916.html.
[200] CC [Constitutional Court], Juin 19, 2019, n° 99/2019, https://www.const-court.be/public/f/2019/2019-099f.pdf.
[201] This points to another possibility for the state: making gender registration optional. However, the risks and inherent issues with this options are similar to the ones attached to the "third" or "X" gender marker as will be exposed further later on in this Chapter.
[202] *See* Ashley, *supra* note 180, at 40.

gender as a useful legal category altogether. The draft document for the law that later on introduced the "X" gender marker, presented the obstacles to picking the second option – the suppression of gender markers.[203] Its main argument in doing so was two-fold. First, German law relies on gender in several areas and the suppression of gender would require the amendment and re-writing of a considerable part of the national legislation, something that the Government was not inclined to do.[204] Second, the Government relied on its commitment to the U.N. International Civil Aviation Organisation [hereinafter I.C.A.O.] which sets international standards for air travel and therefore passport requirements. The currently enforced I.C.A.O. standards require the mention of a gender marker ("sex") on passports[205] – while allowing for a third option in the form of an "X", it does not allow the suppression of gender from passports and other machine-readable documents compatible with international travel.[206] Interestingly enough, the I.C.A.O. requirement of gender has been questioned before but was upheld to this day. Through a review discussion of the gender marker requirement started by the Government of New Zealand, the I.C.A.O. argued that the removal of gender from machine-readable travel documents would engage too high of a cost for border control agencies and states to upgrade all software to be able to process new documents that do not show a gender marker.[207] However, the I.C.A.O. does see the benefits of removing gender makers in theory as it does highlight that it would create a safer travel environment for trans* persons, it would ensure the issuance of fewer incorrect documents since less information would need to be collected and finally it would show the I.C.A.O. as a trailblazing organisation.[208] Simply, it does not consider that those benefits outweigh the costs of enacting the change just yet.

[203] Referentenentwurf [Draft Bill]. Bundesministeriums für Inneres, für Bau und Heimat [Federal Ministry of the Interior, Building and Homeland]. Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben [Draft law amending the birth register] (n 113) 7, https://www.bmi.bund.de/SharedDocs/downloads/DE/gesetzestexte/gesetzesentwuerfe/entwurf-aenderung-personenstandsgesetz.pdf?__blob=publicationFile&v=1 (Ger.); *see also* Holzer, *supra* note 147, at 45.

[204] For instance, see the differentiation in regime for divorce depending on gender.

[205] This requirement is limited to passports and machine readable travel documents, hence it does not exclude the suppression of gender from other identity documents. However, Germany relied on these provisions and the necessity for harmony between all identity documents. Interestingly, this is how the Dutch Government justified the possibility of moving forward with the abolition of gender markers on identity documents (excl. passports).

[206] Int'l Civil Aviation Organisation (I.C.A.O.), Machine Readable Travel Documents, Part 6: Specifications for TD2 Size Machine Readable Official Travel Documents (MROTDs), at 10, Doc 9303 (2021), https://www.icao.int/publications/Documents/9303_p6_cons_en.pdf.

[207] Int'l Civil Aviation Organization (I.C.A.O.), A review of the requirement to display the holder's gender on travel documents, TAG/MRTD/21-IP/4 (Nov. 20, 2012), .https://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-21/Tag-Mrtd21_IP04.pdf.

[208] *Id.*

Going more in-depth in reflecting on the necessity of gender markers and gender as a legal category altogether, it is fundamental to point out that all arguments put forward by the Government of Germany and the I.C.A.O. are purely practical matters rather than linked to a strong belief that gender is a fundamental characteristic of the individual. It is mainly, because "that is how it's always been done". In this context, authorities just pass on the blame. The governments argue that they cannot change it because they are bound by the I.C.A.O. standards. In addition, those standards have been endorsed under the Council of the European Union Regulation 2252/2004 which makes direct reference to the I.C.A.O. in Article 2 and makes it doubly binding on the states.[209] The I.C.A.O. argues that the suppression of gender would undermine the inclusion of individuals in national settings where gender is used to differentiate between people, for instance when spaces are separated between genders.[210] An interesting parallel to establish is the one with race and religion. Indeed, gender is not the first *unnecessary* legal category to be presented on travel documents, racial and religious markers used to be mentioned on identification documents and similarly used as a means of segregating spaces.[211] Both are no longer required on travel documents in European states and, even more, are rarely considered to be legitimate ways for the state to register individuals.[212] This is also true of the mention of marital status.[213] Where a difference in opportunities is based on race or religion, the E.Ct.H.R. has usually found a violation of the prohibition of discrimination under Article 14 of the Convention.[214] Thus, proving it is not impossible to have both the suppression of such characteristics as legal categories and in such gender as well, while still effectively providing comprehensive protection based on those social markers. Just because race, religion, or even gender, are erased from civil registries or identification documents, does not mean that they are erased in the eyes of the justice system.

Moreover, the mention of gender does not provide essential information that would render the identification of a person much easier. This is particularly true in a time where facial recognition and other biometrics software are widespread nowadays

[209] Council Regulation (EC) No. 2252/2004 of 13 December 2004 on Standards for Security Features and Biometrics in Passports and Travel Documents Issued by Member States, 2004 O.J. (L 385), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R2252.

[210] *Id.*

[211] See, e.g., the separation of bathrooms, sports environment, healthcare, and others according to gender; Clarke, *supra* note 16, at 942; Clarke, *supra* note 175, at 800.

[212] In some states like Germany or Austria religion can be added to the birth certificate in later life if the individual desires it, but it is not a requirement; *see* Holzer, *supra* note 147, at 45-46.

[213] *See* Neela Goshal & Kyle Knight, *Netherlands Sees No Role for Gender Marker on ID Documents*, Human Rights Watch (July 8, 2020), https://www.hrw.org/news/2020/07/08/netherlands-sees-no-role-gender-marker-id-documents.

[214] *See, e.g.,* Holzer, *supra* note 147, at 46 the system of Bosnia and Herzegovina which used registered religion as a defining criteria when standing for election concerning which the European Court of Human Rights found a violation in the case of *Sejdić and Finci v. Bosn. & Herz.*, 104 Eur. Ct. H.R. 4 (2009).

and offer a significantly more accurate way of ensuring one is who they say they are. More than this, the mention of gender, while not particularly helpful in general, is actually detrimental to the trans* community and particularly to non-binary persons and any trans* person whose presented gender identity does not match their gender marker. In this sense, an overwhelming majority of non-binary respondents to my questionnaire (78.6%) indicated that they want the mention of gender taken off their identity documents.[215] This echoes the fact that they do not or would not feel safe holding an "X" [216] or an inadequate gender marker.[217]

While from a legal standpoint, the I.C.A.O. standards requirement is an obstacle that cannot be ignored, there is a significant legal basis to argue for its inconsistency with modern times and thus to argue for the removal of gender from identity documents or registries. First of all, it is important to mention that the I.C.A.O. standards themselves did not include gender as a mandatory mention on travel documents until the current standards were set in 1980.[218] Furthermore, the Yogyakarta Principles calls clearly in Principle 31 for the termination of gender registration:

> Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality.[219]

The position taken by the Council of Europe in its Resolution 2191 (2017) on the rights of inter* people proposes a different, and weaker, approach: "With regard to civil status and legal gender recognition . . . consider making the registration of sex on birth certificates and other identity documents optional for everyone".[220]

However, this proposal does not argue for the direct, complete, removal of gender but rather for making it an optional mention. Thus, individuals could request the removal of gender from their identity documents but it would remain mentioned on such documents of people who do not do so. This approach is very limited as it would bring back similar concerns brought up by the creation of a "third" gender marker in

[215] See *infra* Annex 1 for results of my questionnaire.
[216] See *infra* Annex 1 for results of my questionnaire.
[217] *See supra* Section 1.2.
[218] *See* Goshal & Knight, *supra* note 213.
[219] Yogyakarta Principles plus 10, *supra* note 54, at Principle 31.
[220] Eur. Parl. Ass., Promoting the human rights of and eliminating discrimination against intersex people, 35th Sess., Res. No. 2191, § 7.3.4. (2017), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&.

practice. Indeed, it is to be expected that, in such a scenario, individuals who would request the removal of gender from their documents would be in the majority of persons who feel uneasy, or unsafe, with the mention of their legal gender. Therefore, individuals who would present an identification document that does not mention a gender while others still do would be at risk of implicitly disclosing that they are non-binary or, at the very least, would be presumed to be. Then all concerns regarding the unwanted disclosure of gender identity exposed in Chapter 3 would arise again. Additionally, it needs to be mentioned that the removal of gender from identity documents and further the suppression of gender as a legal category altogether, is one of the predominant demands from the wider trans* and inter* communities. For instance, it was heavily supported in the Malta Declaration[221] which puts forward the conclusions of the Third International Intersex Forum held in 2013. This points to the idea that all concerns expressed priorly concerning the inadequacy of the creation of a "third" gender category would be resolved through the suppression of gender.

Therefore, the removal of gender markers from identity documents would provide relief to non-binary individuals, and many other trans* or inter* persons, while not creating real obstacles to the control of identity by authorities.[222] It might be argued that the suppression of gender in registries may impact the functioning of the state in other ways, notably regarding the collection of data or affirmative action based on gender. While those concerns will be addressed in the next part of this Chapter, the main conclusion here is that the removal of gender from identity documents could be enacted given the existing legal basis and would provide immediate relief for non-binary individuals – while states slowly move towards the suppression of gender altogether.[223] This is what seems to be aimed for by the Dutch and Belgian Governments which should enact the removal of gender markers from identity documents (excl. passports) in the (hopefully) near future. This leaves open the question as to how they will organise compliance with the I.C.A.O. regulations if they are not changed by then. Most likely, and quite counter-productively, it is probable that individuals will have a mention of gender on their passport while no longer having it on their national identity cards – like the current German framework. Additionally, it could be argued that the I.C.A.O. regulations do not prevent states from registering a third gender marker (X) *per se*. This can explain

[221] *See* ILGA & ILGA Europe, *Malta Declaration (International Intersex Forum)* (Dec. 2013), https://nnid.nl/gevorderdenniveau/malta-statement/.

[222] See for the case of Germany, while the suppression of gender markers on identity cards may provide for such relief, it is still limited by the medicalized approach to transitions and inter* status that pathologizes trans*, non-binary and inter* persons.

[223] It is to be noted that even with a significant soft law basis for this, both the I.C.A.O. and European Union regulations/legislation would have to be amended in order to allow for this change which in practice always proves to be tedious.

in part why states may have leaned towards this option rather than investing in the deconstruction of gender as a legal category altogether. However, this is not a way to explore in this paper since, as shown previously, this third category does not provide the complete, effective and dignified recognition and protection needed by non-binary individuals.

4.2. CONSIDERING THE RISKS AND POTENTIAL OBSTACLES TO THE SUPPRESSION OF GENDER FROM REGISTRATION SYSTEMS OR IDENTITY DOCUMENTS

The registration of gender and, even more, its mention on identity documents is detrimental to non-binary individuals and to the trans* and inter* communities in general. It has also been shown in the previous part of this Chapter that the suppression of gender (on I.D.s) is not an unreachable goal in the Council of Europe. However, it is necessary to also evaluate the potential negative consequences such a change could incur. Two main concerns arise on two different levels. First, the legal implications for the functioning of national systems, particularly regarding the collection of data and cross-border movements. Second, on a general scope, the risks that abandoning the registration of gender might imply for the organisation of affirmative action and the fight against gender-based violations of human rights.

4.2.1. LEGAL IMPLICATIONS: DATA COLLECTION AND CROSS-BORDER MOVEMENTS

At the national level, the suppression of gender as a legal category or the suppression of gender markers on identity documents might be complicated to achieve as states will likely argue that it would create an obstacle to the protection of rights and the monitoring of the population. More specifically, the main concerns that have arisen are the impossibility of collecting gender-disaggregated data in the absence of gender registration or gender markers, the obstacles it might create for individuals in situations of cross-border movement to a third country that has not enacted the abolition of gender registration – or with an airline company similarly bound by the I.C.A.O. – and more broadly the suppression of gender from travel documents as a violation of the I.C.A.O. standards.

Concerning the difficulties, it would cause to the collection of gender-disaggregated data, the example of race and ethnic data points to the possibility

of doing so without gender being a legal category. If statistic offices cannot rely on legally registered gender or gender markers on identity documents to obtain data on the population's gender composition, they may do so through other means, mainly self-identification through surveys. This renders it possible for all individuals to declare their real gender identity without being limited by the categories recognised by the legal framework. Moreover, it is to be noted that the collection of gender-disaggregated data based on legal gender has traditionally not been fully accurate in itself to the extent that it does not account for trans* persons whose legal gender marker is not (yet) in accordance with their gender identity and for the condition of intersex persons.[224] This is even more impactful in states that do not recognise at least a third gender option as it implies that all persons identifying outside of the binary are wrongly registered and thus the data drawn from registration is falsified in turn.

Then, concerning cross-border movement, the main concern regards the difficulties that would be created for individuals whose legal personality, and particularly whose identity documents would no longer present a gender marker when they cross-border to a third country where gender registration is mandatory. Because the current I.C.A.O. standards require the mention of gender on passports, countries that get rid of gender registration would have to display an "X" on every citizen's passport. The "X" in itself could create further complications for individuals in cross-border situations, particularly for the obtention of visas and other foreign registration documents. Additionally, many electronic software used by airlines to process identity documents are not equipped to process non-binary options.[225]

An interesting point to be raised is the jurisprudence of the E.Ct.H.R. when it comes to protection across borders. In this sense, we can cite the case of *Orlandi and others v. Italy* in which the Court recognised the right to same-sex couples married abroad to see their marriage recognised in their home state (Italy).[226] Similarly, the Court has recognised a right of recognition and registration concerning adoption in a third country.[227] It is easy to deduce from this jurisprudence that the Court would most likely

[224] *See* Holzer, *supra* note 147, at 48.

[225] *See id.* at 21.

[226] *See Orlandi and Others v. Italy*, App(s). No(s). 26431/12, 26742/12, 44057/12, 60088/12, (Dec. 14, 2017), https://hudoc.echr.coe.int/fre?i=001-139934; *see also Handzlik-Rosul and Rosul v. Poland*, App. No. 45301/19 (pending) The Court of Justice of the European Union has recognised a similar right in Case C-673/16, *Coman and Others v. General Inspectorate for Immigration and Ministry of the Interior*, ECLI:EU:C:2018:385 (June 5, 2018).

[227] *See Wagner and J.M.W.L. v. Luxembourg,* App. No. 7624/01, ¶¶ 143-146 (June 18, 2017), https://hudoc.echr.coe.int/fre?i=001-81328 (Note that this judgment concerned a single mother adopting abroad and seeking recognition for her child in her country of origin, and not a L.G.B.T.Q.I.A.+ applicant. However, it establishes a strong precedent regarding the right for recognition of birth and regarding the unacceptable burden non-recognition puts on both the parent and the child). *See also A.D.-K. and Others v. Poland*, App. No. 30806/15 (pending) (the Court will approach the same question regarding the recognition of child adopted by a same-sex couple in a third country).

decide in favour of the individual's right to see their "X" gender marker recognised abroad. However, it is more complicated to assume what the Court would deduce regarding the absence of a marker on one's documents. Under the right to private life, it is reasonable to say that the Court would be likely to find a violation if an individual was forced to declare a gender when abroad if they were not registered in their state and did not wish to do so. Similarly, a difference in treatment based on gender that would incur following one's lack of a registered gender would most likely be considered a violation of Article 8 in conjunction with Article 14 of the Convention.

4.2.2. OVERCOMING THE RISK OF GENDER-BLIND LAWS

Another concern when conceptualizing the end of gender registration is the impact it would have on the approach to gender discrimination. In this sense, a gender-neutral registration could translate into "gender-blind" laws. The term gender blind is defined by the Council of Europe as "ignoring/failing to address the gender dimension (as opposed to gender-sensitive or gender neutral)".[228] In this context, "gender blind" refers to the way legislation could fail to address discrimination on the grounds of gender as a result of the absence of registration of gender. Policies or legislation built that way would have a detrimental effect on the rights and protection of all gender minorities, particularly girls, L.G.B.T.Q.I. and non-binary persons. Indeed, they would risk being blind to the differences in opportunities and responsibilities imposed on different groups based on their gender identity.[229] However, there are multiple ways to define this issue and especially, there are different ways of conceptualizing the consequence of the end of gender registration on the protection of gender minorities. Firstly, it is fundamental to remember that gender marker and legal gender personality do not equate to gender. In this sense, the suppression of gender from the *legal* framework does not mean its enforced suppression in the *social* sphere as well. Just because gender would no longer be registered by the state does not imply a generalised enforced androgyny.[230]

However, the end of gender as a legal category comes with the impossibility of the state using registered gender as a way to determine who necessitates increased protection from the state – for instance, in fighting gender-based violence. In this context, Davis points out that "gender-based violence eradication requires recognition

[228] *See* Council of Europe, *Gender Equality Glossary* 35 (2014), https://edoc.coe.int/en/gender-equality/6947-gender-equality-glossary.html.
[229] *See generally* European Institute for Gender Equality: *"gender blindness"*, https://eige.europa.eu/thesaurus/terms/1157 (last visited June 13, 2022).
[230] Clarke, *supra* note 16, at 940-41.

and redress for the underlying discrimination that dictates greater freedom for some while curtailing them for others".[231] What is fundamental to consider in this context is the necessity to maintain a discrimination approach to gender regardless of whether it is legally registered or not. When laws are written in a gender-blind manner, there is a serious risk that governments will use them to avoid dealing with gender-based violence and discrimination. For instance, where assault is prohibited under general law, the state might point out that such a provision encompasses gender-based assault when in practice such an interpretation fails to take into account the patriarchal, discriminatory roots of violence against vulnerable gender groups.[232] Similarly, the acknowledgement of gender discrimination by the state is fundamental in developing a protective framework for minorities. Historically, the recognition of women's struggle has been decisive in qualifying certain acts such as marital rape, as crimes. Consequently, if the law ignores gender as a source of discrimination, it implicitly enforces socially constructed gender stereotypes that harm all individuals who are not perceived as cisgender men.[233] As pointed out by Bunch and Davis[234], the deep roots of the patriarchy have rendered gender-based violence a seemingly unavoidable occurrence rather than being understood as a tool used by those in power to maintain what they define as "patriarchal interests, anti-gender rights ideology, and authoritarianism".[235] In doing so, any form of gender-based violence or discrimination tends to be defined as a women's rights issue solely, therefore significantly invisibilising L.G.B.T.Q.I.A.+ and gender non-conforming persons. It is fundamental here to remember that the development of women's rights had for objective of the achievement of equal rights for women and not the creation of new rights tailored to women. All, regardless of their gender identity, have a right to safety and protection against gender-based violence and discrimination, but women were recognised as a particularly vulnerable group and thus emphasis was put on including women textually as the subject of human rights to combat the inequality they were faced with due to patriarchal prejudice. In this sense, the development of women's rights has never been and should never be a hindrance to the development of rights of other gender minorities, and vice-versa.

[231] Davis, *supra* note 26, at 23.
[232] *See* C.E.D.A.W., List of Issues and Questions In Relation to the Second Periodic Report of the Syrian Arab Republic, §10, U.N. Doc. CEDAW/C/SYR/Q/2 (2013) (questioning the Syrian government on measures taken to address domestic violence); Government of Syrian Arab Republic, Replies of the Syrian Arab Republic, §§11- 13, U.N. Doc. CEDAW/C/SYR/Q/2/Add.1 (Jan. 22, 2014); Davis, *supra* note 26, at 24.
[233] *See* Davis, *supra note* 26, at 27.
[234] *See* Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 Hum. Rts. Q. 486 (1990). Davis, *supra* note 26, at 27.
[235] *Id.*

Therefore, the abandonment of gender as a legal category needs to be done in a way that would not mean the state's total blindness to the existence of gender. Thus, it would need to be approached as the mere end to the legal classification of individuals by gender and hence treating gender in a similar way to race, ethnicity or religion. Then, it would not necessarily imply the end of the protection against gender discrimination in the same way that the end of racial/ethnic markers did not end the fight against racial and ethnic discrimination. To this end, the state would adopt a model that Cruz qualified as "non-endorsement and pluralism" that has been applied to religion in many countries.[236] In doing so, the legal system protects all gender identities without giving any particular endorsement to specific identities and thus, without establishing boundaries on what is and what is not legally recognised. Such an approach would mean the acknowledgment of the existence, and importance, of gender as (often hostile) social classification and hence the continuation of the prohibition of gender discrimination and all gender-based violence. An interesting development in this sense was the shift in feminist discourse from "violence against women" to "gender-based violence".[237] In refocusing the discourse from a women-only issue to a more general gender framework, the term includes acts of violence against all persons regardless of their gender or of the gender of the perpetrator, but for the reason of their real or perceived gender.[238] In doing such an analysis, it is fundamental that a gender discrimination approach be taken in order to expose the contextual causes of gender-biased actions. Omitting the gender discrimination present for instance in cases of sexual violence would amount to gender blindness and create a dangerous analysis which may reinforce the gender prejudice and difference in treatment that has historically been enforced on women, L.G.B.T.Q.I.A.+ persons and gender non-conforming persons.

Such an approach applied to all of the legal frameworks at the national and Council of Europe level would enable effective protection against gender-based discrimination and violence without having a system of registration of gender. Moreover, this approach would be beneficial to all as it would allow for the broadening of the approach to gender discrimination to include all gender identities and expressions, thus including non-binary persons, and also giving more visibility to men and L.G.B.T.Q. persons victim of sexual and gender-based violence. Similarly, it would help to diminish the stigma on sexual and gender-based violence and gender stereotypes that are generally detrimental to the position of women and female-presenting individuals in

[236] *See* Clarke, *supra* note 16, at 944.
[237] *See generally* Davis, *supra* note 26, at 27.
[238] *See generally* Julie Goldscheid, *Gender Neutrality and the "Violence Against Women" Frame*, 5 U. Mia. Race & Soc. Just. L. Rev. 307 (2015).

society. Altogether, the end of gender registration, and at the very least ending its mention on identity documents, is fundamental to end state control of gender.[239] In this context, if the state does not need to classify individuals based on their gender, it also has no purpose in policing gender identities and expressions and assigning gender labels according to hetero-cis-normative and binary norms.

CONCLUSION

Concluding this research is a complicated endeavour because of the dynamic and ongoing character of the developments regarding the legal recognition and protection of non-binary gender identities in the Council of Europe's legal sphere. However, I believe this thesis has demonstrated a strong basis for creating further legal recognition and protection in a safe, inclusive and dignified way for all individuals in and outside of the gender binary. The quote from the Caribbean Court of Justice with which I introduced my reasoning resonates with a much larger project than the limitation of inclusivity of legal gender recognition. Indeed, as it was argued all along this research, the current avenues chosen by both the European Court of Human Rights and national systems focus on including queer identities within the boundaries of what is seen as "natural" and "normal". In this context, it has been argued that the functioning of the Western nation-state needs to be challenged in order to redefine normality and nature and open the way for the full inclusion of non-binary individuals and queer identities in the social and legal spheres.[240] In trying to achieve this inclusion, the majority of queer advocacy in the legal system has been hyper-focused on the establishment of legal recognition in order to include queer gender identities in an extended binary system – through "third" or "X" gender marker options. However, this fails to question the inadequacy of the system to begin with and the normative framework within which queer identities are discussed.[241] The E.Ct.H.R. has yet to even mention the term "non-binary" in any decision. Furthermore, the position of the Court, in only addressing gender identity issues through the right to private life in conjunction with the prohibition of discrimination, acts as a limitation on the potential of the Convention rights as the legal basis for the development of a more inclusive and protective framework. Nevertheless,

[239] *See* Clarke, *supra* note 16, at 942-43.
[240] *See* Dianne Otto, *Resisting the Heteronormative Imaginary of the Nation-state: Rethinking Kinship and Border Protection*, *in* Queering International Law 236, 241 (Dianne Otto ed., 2017).
[241] *See* Ratna Kapur, *The (Im)possibility of Queering International Human Rights Law*, *in* Queering International Law, *supra* note 240, at 131.

the Council of Europe remains a community of states which also need to process such a significant change within their national systems if there is to be any proactive change on the ground. The study of the national systems that have started this reflection and developed more inclusive gender registration frameworks has shown a slow but steady propagation of the discussion over the foundations of the gender binary and the (non-)necessity of gender as a legal category. In this aspect, the "third" or "X" gender marker options created in those states constitute a strong commitment to making European states more inclusive of non-binary gender identities. However, it has been argued in Chapter 3 of this research, that those systems are flawed and, while the intent behind them is commendable, they fail to create effective recognition and to provide non-binary persons with the dignity, privacy and protection they need. Rather, they organise the domestication of non-binary gender identities and create what Lena Duggan qualifies as the "new homonormativity",[242] which installs a gender binary normativity. In this sense, we can go back to the work of Judith Butler in stating that "thinkability" is the fundamental basis for the understanding of one's lived experience of humanity in politics and society, nevertheless, the state has control over the limits of that "thinkability".[243] Thus, there is a strong need for the restructuring of the approach to gender, which could be achieved by the *regularisation* of queerness and gender identity through the abandonment of gender as a legal category. In suppressing gender as a legal category for persons, the state may stop classifying gender expressions, sexual orientations, and relationships in terms of gender and more specifically, through the lens of the gender binary. In this sense, sexual orientation cannot be defined without gender – one's sexual orientation is defined by which *gender* they are attracted to. Thus, the abandonment of gender does not solely impact the position of non-binary persons and non-conforming gender expression but rather would have an impact on the broader binary hetero-cis-normative framework of the state. To this end, the fight for inclusion of non-binary and queer identities in fundamentally hetero-cis-normative societies implies striving towards what Dianne Otto qualifies as "rethinking kinship ties" from militaristic and nationalist to queer and inclusive.[244] To do so, the inclusion and the visibility of queer identities and particularly gender identities outside of the binary is fundamental in breaking down traditional kinship and separating it from the Malthusian couple[245] incentive (heterosexual, monogamous and reproductive) that acts as a

[242] *See* Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, *in* Materializing Democracy 175, 190 (Russ Castronovo et al. eds., 2002).
[243] Judith Butler, Undoing Gender 106 (2004).
[244] *See* Otto, *supra* note 240, at 251.
[245] *See generally* Michel Foucault, The History of Sexuality (Robert Hurley trans., 1978).

foundation for Western states.[246] In putting forward the possibility of abandoning gender as a legal category, the last part of this research, seeks to push the state towards its duty as a protector of all without distinctions and the acceptance of all forms of lived experiences of gender. Furthermore, this research, and queer approaches to international law in general, aim to open space on the front of the stage for the questioning of the hetero-cis-normative framework that underpins Western societies. In the words of Dianne Otto: "[J]ust as feminist curiosity exposed international law's gendered framework, and postcolonial curiosity its European underpinnings, queer curiosity makes visible its (hetero)sexual ordering that is so taken for granted that it is considered 'natural'".[247] If "third" or "X" gender markers and other developments may have provided for temporary relief to the exclusion and harm suffered by non-binary persons, only the eradication of this bias will ensure complete equality for and integration of queer gender identities, orientations and expressions in the legal and social frameworks. To do so, human rights law has offered legal avenues, through Article 8 E.C.H.R., and promises to keep moving forward, even slowly, to reach the full equality and inclusion of all gender identities within the Council of Europe. However, in light of the recent decisions of the E.Ct.H.R. in the cases of *Y v. France* and *M.A. v. Germany,* it appears that the Court has taken a backwards approach in cases of sexual orientation, gender identity, gender expression and sex characteristics [hereinafter S.O.G.I.E.S.C.] matters. While it could have used such cases, particularly *Y v. France*, to develop the obligations of states to protect non-binary and intersex person's rights to identity, it has sided with states in leaving a large margin of appreciation and retracting in the "European consensus" argument to avoid having to legislate on matters of S.O.G.I.E.S.C. identities. This is a regrettable take that points a still long way to the creation of effective recognition and protection of non-binary gender identities in the Council of Europe. Nevertheless, non-binary persons will continue to exist on European soil, argue for the recognition of their identity, and hopefully enact positive change shortly.

ANNEX 1. RESULTS OF THE QUESTIONNAIRE CARRIED OUT IN THE SCOPE OF THIS STUDY

This research was carried out between October 2022 and June 2022 through an online questionnaire I created and disseminated through queer spaces – hence the

[246] *See* Otto, *supra* note 240, at 241.
[247] Otto, *supra* note 18, at 2.

overrepresentation of non-binary persons. It was first created as a way to grasp how the non-binary community had, or would, receive the possibility of having an "X" gender marker on their identity documents.

Total number of entries: 101

1. **Where are you from?**

EUROPE: **100%**

- The NL: 34 **33,6%** of total
- France: 40 **39,5%** of total
- Belgium: 5 **5%** of total
- Austria: 3 **3%** of total
- Portugal: 5 **5%** of total
- Switzerland: 3 **3%** of total
- Germany: 11 **10,9%** of total

2. **How do you identify?**

Non-Binary: 96 **95%** of total

- Non-Binary: 40 **41,7%** of NB **39,6%** of total
- Genderqueer: 11 **11,5%** of NB **10,9%** of total
- Genderfluid: 11 **11,5%** of NB **10,9%** of total
- Agender: 11 **11,5%** of NB **10,9%** of total
- NB transfem/demigirl: 7 **7,3%** of NB **7%** of total
- NB transmasc/demiboy: 14 **14,5%** of NB **13,9%** of total
- Bigender: 2 **2,1%** of NB **2%** of total

Questioning: 4 **4%** of total
Cisgender male: 1 **1%** of total
Results:

	I feel inadequate with the mention of M/F gender markers on my identity documents	I want the mention of an "X" on my identity documents	I want the mention of any gender taken off my identity documents	I would feel safe with the mention of an "X" on my identity documents
Disagree	1% (1)	24% (25)	1% (1)	29,8% (31)
Somewhat disagree	7,8% (8)	15,4% (16)	1% (1)	27,9% (29)
Neutral	2,9% (3)	18,3% (19)	6,8% (7)	16,3% (17)
Somewhat agree	33,3% (34)	22,1% (23)	12,6% (13)	15,4% (16)
Agree	54,9% (56)	20,2% (21)	78,6% (81)	10,6% (11)

N.B.: The questionnaire contained an open box for "[a]dditional views on the legal recognition of non-binary identities" of which the result will remain hidden for reasons of anonymity. The views expressed in this part were taken into consideration in formulating an answer to the question at hand in this thesis.

ANNEX 2. NATIONAL LEGISLATION QUOTES

- THE NETHERLANDS Rechtbank Amsterdam [Rb] [Amsterdam District Court], 21 Juli 2021, Case C/13/669890 / FA RK 19-4520, ECLI:NL:RBAMS:2021:3732 (Neth.).

> 4.3. De rechtbank is van oordeel dat het onderhavige verzoek tot wijziging van de geslachtsaanduiding op dezelfde wijze dient te worden benaderd als die welke is omschreven in de artikelen 1:28a-c BW, voor mensen van zestien jaar en ouder die de - door een deskundige getoetste en onderschreven - overtuiging hebben tot "het andere geslacht" te behoren. Deze artikelen voorzien niet in de mogelijkheid om te kiezen voor een non-binaire geslachtsaanduiding, waarmee naar het oordeel van de rechtbank in deze artikelen een ongerechtvaardigd onderscheid wordt gemaakt tussen personen die de overtuiging hebben tot *het* andere geslacht te behoren en personen die de overtuiging hebben buiten de exclusief mannelijk of vrouwelijke geslachtsaanduiding te vallen (non-binair).

- GERMANY Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], Oct. 10, 2017, 1 BvR 2019/16, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/10/rs20171010_1bvr201916.html (Ger.).

> 36. § 21 Abs. 1 Nr. 3 in Verbindung mit § 22 Abs. 3 PStG verstößt gegen das allgemeine Persönlichkeitsrecht (Art. 2 Abs. 1 i.V.m. Art. 1 Abs. 1 GG) in seiner Ausprägung als Schutz der geschlechtlichen Identität. Das allgemeine Persönlichkeitsrecht schützt die geschlechtliche Identität auch jener Personen, die weder dem männlichen noch dem weiblichen Geschlecht zuzuordnen sind (1). In deren Grundrecht wird eingegriffen, weil das geltende Personenstandsrecht dazu zwingt, das Geschlecht zu registrieren, aber keinen anderen Geschlechtseintrag als weiblich oder männlich zulässt (2). Der Grundrechtseingriff ist nicht gerechtfertigt (3).
>
> [§ 21(1) no. 3 in conjunction with § 22(3) PStG violates the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) in its manifestation as the protection of one's gender identity. The general right of personality also protects the gender identity of persons who can be assigned neither the male nor the female sex (see 1 below).

> There is an interference with their fundamental right because current civil status law requires that sex be registered, but does not allow a gender entry other than female or male (see 2 below). This interference with fundamental rights is not justified (see 3 below).]

- ICELAND Government of Iceland. Act on Gender Autonomy No. 80/2019 as amended by Act No. 159/2019, No. 152/2020 and No. 154/2020. (2020, May 8). Retrieved May 26, 2022, from https://www.government.is/publications/legislation/lex/2020/05/08/Act-on-Gender-Autonomy/ (Iceland).

> Article 6 - Neutral Gender Registration.
>
> Neutral gender registration is permitted. Public and private bodies that register gender shall provide for the possibility of registering gender as neutral, inter alia in identity documents, forms and databases, and provide for a clear denotation of such registration. In passports, neutral gender registration shall always be denoted with the letter X.

- BELGIUM Cour Constitutionnelle [CC] [Constitutional Court], decision no. 99/2019, June 19, 2019. https://www.const-court.be/fr/ (Belg.).

> B.6.1. Le moyen unique, en sa seconde branche, est pris de la violation des articles 10, 11 et 22 de la Constitution, lus en combinaison avec l'article 8 de la Convention européenne des droits de l'homme, par les dispositions attaquées, en ce que celles-ci prévoient un système 31 binaire qui contraint les personnes dont l'identité de genre est non binaire à accepter, dans leur acte de naissance, un enregistrement du sexe qui ne correspond pas à leur identité de genre, alors que les personnes dont l'identité de genre est binaire mais ne correspond pas au sexe enregistré dans leur acte de naissance peuvent faire modifier cet enregistrement.