

## Smashing the Binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10

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### *Abstract*

This article analyses the potential of Principle 31 of the Yogyakarta Principles plus 10 to smash the gender binary. Principle 31 proposes several innovations with regards to the registration of people's gender on official documents and/or in state registries. In order to understand the practical meanings of these innovations, the article inspects exemplary jurisdictions that have realised some of the Principle's suggestions. Queer and feminist theories serve as the normative framework to understand how Principle 31 smashes the static binary gender registration in the form of F and M. Moreover, relying on developments in international law helps to comprehend the context in which Principle 31 was created and its innovative nature. The four central reforms proposed by Principle 31 are discussed in independent sections in the article. They include the elimination of gender markers, unconditional gender recognition laws, the introduction of non-binary legal gender categories and the elimination of the public gender registration. The article concludes that all of these four measures face specific limitations in how they smash the gender binary, but, as a whole, they trouble the naturalised understanding of dichotomous (legal) gender relations. Finally, Principle 31 alerts to the necessity of reducing the naturalised state control over people's gender assignment, while making sure that where the state (still) has control, it valorises gender diversity outside of a binary frame.

### *Keywords*

Yogyakarta Principles; gender binary; queer theory; gender registration; trans persons; intersex persons

### *Biography*

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Centre of her university and her research is focused on the rights of LGBTIQ persons and the gender binary in international law. In addition to her current work as a Teaching Assistant at her university, she has teaching experience at the Danube University Krems and Utrecht University, and has worked for international human rights organisations, including ILGA-Europe.

## Introduction<sup>2</sup>

The gender binary, which assumes that women and men are naturally complementary, opposite and mutually exclusive categories, has long existed as a principle structuring social and legal relations around the world.<sup>3</sup> The answer to the famous question “*Is it a boy or a girl?*” not only affects the social role assigned to a newborn but also continues to influence its legal rights and duties. While the assignment of a gender<sup>4</sup> at birth restricts *everybody’s* choices and personal development, the assumption that gender identity/expression and sexual orientation are conditioned upon the appearance of sex characteristics has in particular detrimental effects for the social and legal acceptance of LGBTIQ<sup>5</sup> persons. ‘Smashing the Binary’ has thus become a prominent slogan among queer and feminist activists in order to demand the dismantling of heteronormative, cisnormative and endosexnormative legal and social structures.

In the following article, I will analyse the potential of Principle 31 of the Yogyakarta Principles Plus 10 (YP+10),<sup>6</sup> an international document on the rights of LGBTIQ persons released in 2017, to smash the gender binary. Principle 31 of the YP+10 concerns the right to legal recognition and proposes several reforms for the public registration of people’s gender.<sup>7</sup> In order to understand the practical meanings of the innovations put forward by Principle 31, I am examining exemplary jurisdictions that have implemented some of the Principle’s suggestions concerning the public registration of gender through the perspective of queer and feminist

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<sup>2</sup> Some information presented in this article was collected during my work as consultant for ILGA-Europe. See also: Holzer, 2018.

<sup>3</sup> Not all societies have a rigid binary understanding of gender (e.g. Hollimon 2015; Hossain 2017; Wieringa 2010).

<sup>4</sup> The meanings and differences of the terms *sex* and *gender* have been debated extensively in feminist research. While the possibility to clearly separate the two concepts is contested, *sex* is commonly used to refer to physical sex characteristics and *gender* to a social role and/or identity. As my conviction is that until states register one of the two as part of personal status procedures, they should record a person’s social role or identity, instead of physical characteristics, I am using mainly the term *gender* instead of *sex* in this article.

<sup>5</sup> LGBTIQ stands in this article for Lesbian, Gay, Bisexual, Trans, Intersex and Queer.

<sup>6</sup> The Yogyakarta Principles plus 10. Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 2017.

<sup>7</sup> Next to gender registration procedures, Principle 31 also addresses mechanisms to change names, which are often intertwined with those for changing the legal gender. However, in this article, I will focus only on the latter ones, while an analysis of regulations concerning the official registration of names is left to another occasion.

theories. In addition, I will reference relevant developments in international law in order to understand the context in which the proposals of Principle 31 were made and their innovative nature. The article thus aims to introduce the reader to the legal and societal effects of current changes in the field of legal gender registration, but due to space constraints, it cannot provide the level of critical analysis that each of the addressed reform projects would deserve. Moreover, the examples discussed are not exhaustive of current developments in the field of gender registration but have been selected because they constitute exceptional alternatives to the otherwise static binary gender registration.

My theoretical framework for an analysis of the potential of Principle 31 to smash the gender binary is informed by queer feminist theories, in particular Judith Butler's and Judith Lorber's work. Butler understands gender as *performance* that comes into existence only through the enactment of naturalised scripts, instead of describing it as an innate stable essence (2007, pp. xv-xvi, 34, 192). She further sees the compulsory integration into the gender binary as a source of continuously re-enacted violence and oppression (2007, pp. xi, 155; 2004, p. 35), while Lorber (2006) is calling for a "feminist degendering movement", which shall aim to subvert binaries, such as women vs. men and homosexuals vs. heterosexuals. Lorber identifies the binary legal gender registration as one of several structures that uphold gender binaries, which always contain assumptions of "one dominant and one subordinate group, one normal and one deviant identity, one hegemonic status and one 'other'" (1996, p. 145). This binary structure has legitimised many gender inequalities, such as the exploitation of women but also the discrimination of LGBTIQ persons (Lorber 2000, pp. 79–83). In addition to queer feminist theories as put forward by Butler and Lorber, I will also mobilise other feminist concepts, for instance "strategic essentialism" by Gayatri Chakravorty Spivak, to understand the role that the official registration of gender plays in gender politics.

As there is no specific international treaty on the rights of LGBTIQ persons, the Yogyakarta Principles (YP),<sup>8</sup> which were created by a group of human rights experts in 2007, have been the most influential international document in this field. The Principles have been described as "modest" demands based on "stable foundations", because they apply concepts deeply enshrined in international law, such as the principle of non-discrimination, to the issues of sexual orientation and gender identity

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<sup>8</sup> The Yogyakarta Principles, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2007.

(Thoreson 2009). The updated YP+10 issued in 2017 are more forward-looking and reflect novelties in international law rather than the accepted *status quo*. One novelty is Principle 31, which challenges the idea that gender is a static and binary legal category that states must record as part of personal status registrations, a view that was still taken for granted in the original Principles.

Principle 31 of the YP+10 addresses the problem that currently many trans and some intersex persons are officially registered with a gender that does not coincide with their gender identity, gender expression or physical appearance in a binary logic. Having a legal gender recorded in state registries and on identification documents that does not “match” one’s identity can result in persons being outed and scrutinised in everyday situations, such as when applying for jobs or being checked for identity papers. Indeed, studies have shown that as a reaction to “mismatching” IDs, trans and intersex persons often experience harassment, physical violence and exclusion from housing or employment (James et al. 2016, pp. 89–90, 150, 179). In addition, they are frequently denied access to rights that are dependent upon a person’s legal gender (e.g. marriage, retirement age). International human rights bodies therefore increasingly consider the right to change the legal gender, also often called the right to gender recognition, a human right (Madrigal-Borloz 2018, paras. 19–24). Indeed, since 1972, when Sweden became reportedly the first country that allowed a change of legal gender (Garland 2015, p. 282), about half of all countries worldwide – clear numbers are difficult to obtain – have introduced gender recognition procedures (Chiam, Duffy and González Gil 2017; Transrespect, n.d.). However, almost all of these countries allow a change of legal gender only upon satisfaction of restrictive preconditions and limit the options to the gender categories F and M. Organisations representing trans and intersex persons have therefore called for a revisitation of the permanent registration of F or M on official documents and public registries, a call also reflected in Principle 31 of the YP+10 (TGEU 2018; Third International Intersex Forum 2013).

As Principle 31 proposes four major innovations concerning the public gender registration, the article is structured along these four reform proposals. These include: the elimination of gender markers from identification documents (*section I*); the adoption of unconditional gender recognition laws (*section II*), the introduction of non-binary legal gender categories (*section III*) and the abolition of the gender registration for personal status purposes (*section IV*). Each section starts off with explaining the practical meanings of the innovation and concludes with an analysis on the impacts for the gender binary.

**Principle 31:****THE RIGHT TO LEGAL RECOGNITION**

*Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.*

**STATES SHALL:**

- A.** 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;
- B.** Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;
- C.** While sex or gender continues to be registered:
  - i.** Ensure a quick, transparent, and accessible mechanism that legally recognizes and affirms each person's self-defined gender identity;
  - ii.** Make available a multiplicity of gender marker options;
  - iii.** Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;
  - iv.** Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

***I. Elimination of gender markers on identification documents***

While Principle 3 of the original YP focused on ensuring that identity documents “reflect the person's profound self-defined gender identity”, Principle 31 rejects the use of gender markers for identification purposes. It says that states shall register personal information on identity documents only if it is “relevant, reasonable and necessary” for a legitimate purpose and thereby, end the registration of gender or sex on identification documents altogether. The use of gender markers for identification purposes entails relying on cisnormative, endosexnormative<sup>9</sup> and gender stereotypical assumptions about how persons with an F, M or X on their identity cards look like. It thus exposes persons with a gender marker that does not match these assumptions, including some trans and intersex persons as well as certain endosex cis persons transgressing gender norms (e.g. “masculine” cis women), to societal scrutiny. For these reasons, gender markers are not always reasonable or reliable identification criteria. Indeed, using biometric data, such as fingerprints and iris

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<sup>9</sup> The term *endosex* is a rather new word and used in this article to refer to persons with sex characteristics that fit medical norms for female and male bodies. Endosexnormative means therefore that endosex persons are considered as the norm.

recognition, for identification purposes is a desirable alternative to gender markers, which are increasingly considered as “archaic means of verification” (TGEU 2018, p. 4).

Interestingly, even though some scholars and civil society organisations have started to approach gender markers from the angle of the right to privacy, the YP and its updated version from 2017 do not directly relate the discussion on gender markers to the protection of privacy.<sup>10</sup> However, the positive effects on the right to privacy of eliminating gender markers from identity cards were stressed by the NGO Transgender Europe, stating clearly that “the recording and display of a visible gender marker in an individual’s identity documents infringe upon the right to privacy” (TGEU 2018, p. 4). Marjolein van den Brink and Jet Tigchelaar have equally called out for classifying gender as sensitive personal identity marker (2015, p. 40). Indeed, so far, data protection laws, such as the *EU General Data Protection Regulation*, implemented in 2018, do not restrict the disclosure of gender or sex as they do for other personal characteristics, including racial or ethnic origin, religious beliefs and sexual orientation (Preamble 75, Art. 9(1)).

### *Current developments*

While indeed innovative, the call for eliminating gender markers reflects current discussions in several states and international bodies. Several jurisdictions, for instance some US cities (Neuman Wipfler 2016, pp. 525–526), Ontario (Ministry of Government and Consumer Services, 2016) and the Netherlands (Ministerie van Veiligheid en Justitie, 2016), recently eliminated gender markers from certain official documents or encouraged their elimination from cards of private entities (e.g. Dutch transport cards). Tasmania made headlines in 2019 when it removed a reference to gender or sex from birth certificates through the adoption of the *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019*. According to Section 22 of the Act, a newborn’s sex or gender continues to be recorded as F or M in the birth registry, but will no longer be shown on the birth certificate, unless parents or the person concerned, who has attained the age of 16, explicitly request this. Moreover, Section 14 introduced the possibility to change the legal gender not only among F and M but

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<sup>10</sup> The YP do address the right to privacy in Principle 6(F), in particular the right to “choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity”, but fail to question whether the use of gender markers itself breaches the right to privacy.

also to the categories “indeterminate gender”, “non-binary” or “a word, or a phrase, that is used to indicate a person’s perception of the person’s self”.

At the international level, the discussion on the usefulness of gender markers started when intersex persons gained more visibility in the human rights discourse. In 2015, following reports of the German and Swiss Ethic Commissions (German Ethics Council 2013, pp. 166–167; Swiss National Advisory Commission on Biomedical Ethics 2012, pp. 14–15), the Commissioner for Human Rights of the Council of Europe urged all member states to “consider the proportionality of requiring gender markers in official documents” in a report on the human rights of intersex persons (2015, p. 9). A Dutch study had concluded shortly before that there are basically no constraints under international law of leaving the legal gender indeterminate in certain cases (Van den Brink and Tigchelaar 2014, p. 6). Yet, one limitation concerns passports, since guidelines from 2015 by the International Civil Aviation Organisation (ICAO) prescribe that gender shall be noted in form of F, M or X on international travel documents (p. 14). These guidelines were transposed into EU law, through Council Regulation 2252/2004 on biometric passports, which obliges all EU member states to issue passports in line with ICAO guidelines (Preamble para 3, Annex para 2).<sup>11</sup> This means that at least EU member states are legally obliged to keep gender markers on passports, even though they could substitute an F or M with an X.

### *Are gender markers a necessity in a gender-divided world?*

The rationale of registering gender publicly seems to be the facilitation of binary gender divisions in society and law. In 2014, the British Passport Office held in a review on the usefulness of gender markers that gender markers can serve as “proof of identity to access gender-specific services” (HM Passport Office 2014, p. 2).<sup>12</sup> Indeed, as long as certain laws establish different rights and duties for women and men, such as those concerning inheritance, the conscription to the military and employment benefits, it remains necessary to “prove” one’s legal gender at times. Yet, in the rare case that a person must legally prove their gender, countries could also rely on the

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<sup>11</sup> In 2012, the ICAO guidelines on gender markers were subject to a review, which concluded that the negative impacts of abolishing gender markers from passports, such as the unrecognisability of documents by electronic border systems, outweigh the advantages of avoiding problems for trans travellers. However, it held that the necessity of gender markers can be reconsidered once electronic border control systems do not rely on gender markers anymore (ICAO 2012).

<sup>12</sup> See also: Van den Brink and Tigchelaar 2014, p. 3.



civil registry instead of using gender markers. However, not all countries have central registries that collect all personal status information. For example, many countries in the Global South (partly) lack such registries, due to weak bureaucracies, and common-law countries tend to have separate records for different public institutions, instead of one central information source (Van den Brink, Reuß and Tigchelaar 2015, p. 284; Gössl 2013, p. 302). Another strategy for getting rid of the need to include gender markers on identification documents is to ensure complete formal gender equality by eliminating all differences for women and men in laws. This would resolve most situations in which one must prove the (legal) gender for determining their rights and duties.

However, even if all laws were gender neutral, gender would continue to matter for the organisation of society, such as for gender-divided spaces (e.g. changing rooms, prisons), services (e.g. counselling for women) and sports. Most trans rights organisations advocate for *self-identification* as means to determine a person's gender with regards to gender-segregated institutions, but many gender non-conforming persons continue to face exclusions from gender-segregated places. Indeed, a look into different domestic jurisdictions reveals that having a legal gender that fits a gender-segregated institution does not necessarily guarantee the access to the institution. For example, Alex Sharpe, Peter Dunne and Tara Hewitt explain that in the UK, trans women whose legal gender is male, but who have undergone, are undergoing, or plan to undergo some process of transition, must generally have access to women-only spaces (Dunne and Hewitt 2018; Sharpe 2018).<sup>13</sup> At the same time, any person, including trans women recognized as female, can be excluded from gender-segregated spaces if this serves "a proportionate means of achieving a legitimate aim" (Sharpe 2018).<sup>14</sup> Moreover, the Canadian Supreme Court held in *Vancouver Rape Relief Society v. Nixon et al.* (2007) that a trans woman, who was legally recognised as female, could be lawfully excluded from volunteering in a women-only rape counselling centre. Thus, legally speaking, gender markers do not necessarily ensure access to gender-divided institutions. Nevertheless, socially speaking, they can transfer legitimacy upon a person's gender identity by serving as a kind of state-certification, which could open doors to gender-segregated institutions (Cooper and Renz 2016, p. 496; Neuman Wipfler 2016, p. 541). Therefore, as long as they correspond to the

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<sup>13</sup> As Dunne and Hewitt explain, the Equality Act 2010 provides two exceptions that allow the exclusion of trans women if this serves a "proportionate means of achieving a legitimate aim". As the explanatory note to the Act holds, the prime example to this exception is when clients of group counselling sessions for female victims of sexual assault do not attend the sessions due to the presences of trans women. However, this exception is rarely applied (Dunne and Hewitt 2018).

<sup>14</sup> See also: Cooper and Renz 2016, pp. 496–497.

cardholder's gender identity, gender markers can assist gender non-conforming persons in being accepted in gender-segregated institutions. In addition, they can help in avoiding the "misgendering", the wrong use of pronouns and titles, of gender non-conforming persons.

Finally, the ICAO stressed that gender markers are a necessary tool to collect gender-disaggregated data, such as about travellers (2012, p. 5). This assumes that a person's gender is discernible from their identity card, which is not always the case for trans and intersex persons. Gender markers can indeed be a practical and relatively cheap instrument for collecting gender disaggregated data, since in the majority of cases, the legal gender indicates a person's gender role and identity. However, surveys could replace the use of gender markers for the collection of data, which have the advantage of capturing a person's gender identity and/or gender expression, instead of the legal gender, but are generally a more expensive instrument for data collection.

*Does the elimination of gender markers smash the binary?*

Removing a reference to gender on official documents reduces the relevance of gender for identification purposes and can positively impact the right to privacy. This can contribute to Lorber's "feminist degendering movement", since using gender markers to identify people assumes that a person's gender expression "matches" the person's gender marker in a binary logic, which mostly entails the reliance and reproduction of cisnormative, endosexnormative and stereotypical assumptions on gender expression. Eliminating gender markers from identification documents can thus reduce the policing of gender expression by disconnecting it from the legal gender.

Nevertheless, eliminating gender markers does not necessarily resolve the gender binary in law, because states can continue to record individuals' gender in registries and to make a legal difference between people based on their gender. In the logic of Butler, this would mean that humans are still subjected to "disciplinary violence" when being assigned to a gender at birth, even if the gender is no longer mentioned on official documents. Moreover, not having any gender markers on identification documents would not necessarily render the documents gender neutral. For example, first and last names often imply a person's (legal) gender (e.g. many Slavic last names contain gendered endings), which is why Principle 31 also demands in Section B that names can be easily changed, including to gender-neutral names.

This means that as long as names continue to be gendered, gender can be used as tool of identification, even if gender markers were no longer included on identity cards. Besides, eliminating gender markers could take away “an authoritative resource in situations of perceived gender misrecognition” (Cooper and Renz 2016, p. 496), including situations in which gender non-conforming persons want to access gender-segregated institutions. It would further make the collection of gender-disaggregated data more costly, since relying on gender markers would need to be substituted with surveys.

## II. Unconditional gender recognition laws

Next to the elimination of gender markers on official documents, Principle 31 of the YP+10 also advocates for the introduction of unconditional gender recognition procedures based on the principle of self-determination. It holds in Section C that gender recognition procedures shall be “quick, transparent and accessible” and without subject to any barriers, such as eligibility criteria, a person’s status or any other third party opinion. This means that states should no longer be able to ask preconditions that are currently common for gender recognition, including the requirement of having undergone sterilisation or gender affirmation treatment, having obtained a psychological diagnosis of “gender dysphoria” and being unmarried. Hence, by explicitly condemning psychological “treatment” as precondition for changing the legal gender, Principle 31 differs from the original YP, which only mentioned medical treatment and personal statuses (e.g. marital and parental status) as unlawful barriers to gender recognition in Principle 3.

The demand to allow people to change their legal gender unconditionally and without satisfying specific requirements reflects an international trend. More and more countries follow the example of Argentina, which through the passing of the *Ley Identidad de Genero* in 2012 became the first country worldwide that introduced a simple administrative gender recognition procedure that allows applicants to change from F to M or *vice versa* without fulfilling any conditions.<sup>15</sup> The exact procedures for changing the legal gender in countries such as Argentina differ in details, but they have in common that the change of legal gender is based on the principle of self-

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<sup>15</sup> For more information on gender recognition laws worldwide, see: Chiam et al. 2017.

determination and no longer depends on the consent of third parties, such as judges, doctors, psychologists and spouses.<sup>16</sup>

Among the major international human rights bodies, the Inter-American Court of Human Rights (IACtHR) has endorsed unconditional gender recognition procedures the most unequivocally. In its Advisory Opinion on *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (2017), the Court held that:

*“States should respect the physical and mental integrity of individuals by providing legal recognition of their self-perceived gender identity without obstacles or abusive requirements that may constitute human rights violations”*(para. 129).

Unconditional gender recognition laws have equally been supported by the majority of the Parliamentary Assembly of the Council of Europe (PACE), which in 2015 in a resolution called on member states to abolish the requirement of being diagnosed with gender dysphoria, next to those of divorce, sterilisation, surgical interventions and other medical treatments (paras. 6.2.2, 6.2.3). The European Court of Human Rights (ECtHR) has acted only partly in accordance with the views of the Assembly in *A.P., Garçon and Nicot v. France* (2017). It held in paragraph 135 that requiring body alterations which can result in the person’s sterilisation for the purpose of gender recognition violate the right to private and family life (Article 8) of the European Convention on Human Rights.<sup>17</sup> Nevertheless, the Court confirmed in this case that states can continue to ask applicants to be diagnosed with *gender dysphoria* and to undergo body alterations not resulting in sterilisation, such as mastectomy and hormone treatment, before they can change the legal gender (paras. 143, 144).

### *Resistance against unconditional gender recognition laws*

As the hotly debated reform of the Gender Recognition Act in the United Kingdom shows (e.g. Editorial 2018), unconditional gender recognition laws challenge societal preconceptions on the gender binary and who is considered as a woman or a man. The use of self-identification as a means to determine a person’s gender has been at

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<sup>16</sup> Other examples for countries with unconditional gender recognition laws include Chile (2018), Ireland (2015) and Pakistan (2018).

<sup>17</sup> In *Y.Y. v. Turkey* (2015), the Court ruled that Turkey violated the same article when denying the applicant to undergo gender re-assignment surgery without prior sterilisation, but it did not clarify whether mandatory sterilisation as requirement for legal gender recognition is *per se* unlawful. Similarly, the Court avoided to address the legality of requiring gender affirmation procedures for the purpose of gender recognition in *X v. the former Yugoslav Republic of Macedonia* (2019).

the core of not only this debate but also in the so-called “transgender bathroom battle” in the United States (Thoreson 2016). For example, conservatives and religious voices have expressed the fear that allowing trans persons to use the bathrooms that correspond to their gender identity would make the family unit and “society’s definition of humanity” crumble and destroy the “once-obvious definition of male and female”(Chumley 2016). States have used similar arguments for defending restrictive gender recognition laws or the complete lack thereof. For example, in 2019, the Japanese Supreme Court argued that sterilisation and gender affirmative treatment are legitimate requirements for accessing gender recognitions procedures, since they “prevent “problems” in parent-child relations that could lead to societal “confusion” and “abrupt changes” in society”(Faget, 2019).

Another argument used for justifying requirements for gender recognition is that these are needed to ensure certainty in historical records of civil status (Van den Brink and Snaathorst 2017, p. 5). For example, the UK government argued in *Rees v. The United Kingdom* (1986) at the ECtHR that changing the gender marker on birth certificates would falsify historical facts (paras. 21, 42(b)). The ECtHR rejected this argument in the landmark case *Christine Goodwin v. The United Kingdom* (2003), which established the right of a post-operative “transsexual” person to change the legal gender. It held that the British civil registry already changes records of the civil status concerning legitimisation and adoption, and that making another exception for trans persons would not pose a significant burden to the bureaucratic system (paras. 86, 87). Similarly to the UK, Dutch politicians have argued that the requirement of providing an expert declaration to access gender recognition procedures in the Netherlands helps to ensure that the conviction to change a legal gender is *permanent*, since repeated changes would create a *mess* in the civil registry and are undesirable as the birth certificate is a legal document (Van den Brink and Snaathorst 2017, p. 5).

Apart from bureaucratic hurdles and legal certainty, identity fraud is often invoked as argument against self-identification in gender recognition issues. For example, Dutch registrars have argued that unconditional gender recognition procedures could facilitate fraud by making persons changing their legal gender untraceable in the civil registry, which could enable them to get rid of civil penalties, such as parking fines (Van den Brink and Snaathorst 2017, p. 6). However, a Dutch study held that changing the legal gender, or name, is much less likely to create untraceability in the civil registry than errors in other elements recorded, such as the address (Van den Brink and Snaathorst 2017, p. 6). The possibility of deceit is also invoked in the current discussion on the reform of the Gender Recognition Act in the

UK, since some people have expressed fear that unconditional procedures would enable men to fraudulently enter women-only-spaces or benefit from affirmative action for women.<sup>18</sup> However, gender recognition requirements cannot stop people who “disguise” themselves as women for the purpose of harming them, because, as discussed previously, according to current UK Equality Law, one’s *legal* gender assignment does not determine whether a person has the right to access women-only spaces (Dunne and Hewitt, 2018; Sharpe 2018). Susanne Lilian Gössl and Berit Völzmann further reported that legal genders are rarely used to determine a person’s eligibility to benefit from affirmative action for women; instead, self-identification or external perception of the person’s gender is determinative (Gössl and Völzmann 2019, p. 420). Thus, basing gender recognition laws on the principle of self-determination would not change much as regards the eligibility to benefit from women-only institutions and affirmative action, at least not for countries like the UK. In addition, there is no indication that fraud has been a problem in countries that already provide unconditional gender recognition laws, such as in Argentina (Gössl and Völzmann 2019, p. 421).<sup>19</sup> Gössl and Völzmann further argue that gender fraud is unlikely, because it can cause ostracism and even result in legal punishment (Gössl and Völzmann 2019, p. 421). One should also not forget that trans persons are fighting hard to gain the right to change their legal gender, precisely because misrecognition can lead to a range of negative repercussions. Changing legal gender for fraudulent purposes would expose the persons concerned to negative repercussions that are similar to those experienced by trans persons who have not altered their legal gender.

Lastly, restrictive requirements for gender recognition have been justified by arguing that these protect people from committing an error in a moment of “confusion” or as a consequence of a psychosis. This claim loses its validity if the decision to change the legal gender can be easily reversed and if irreversible preconditions, such as body alterations, are not required for gender recognition in the first place. In addition, there is little indication that unconditional gender recognition laws result in more “erroneous” decisions than those procedures that require preconditions for changing the legal gender (Van den Brink and Snaathorst 2017, pp. 6–7).

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<sup>18</sup> Interestingly, due to the beliefs that “women are inherently vulnerable and men are dangerous”, the discussions on fraud mostly centre on men disguising as women and not *vice versa* (Westbrook and Schilt 2014, p. 32).

<sup>19</sup> I have only come across one case of gender fraud in Argentina, where a cis man working as a civil servant changed his legal gender in order to benefit from earlier retirement reserved for women (Daily Nation 2018).

*Do unconditional gender recognition laws smash the binary?*

As research on Argentina shows, the introduction of unconditional gender recognition laws creates a range of positive changes for the rights of trans persons, such as in the field of education, health care, work, security, and civil rights (Aristegui et al. 2017). However, Argentina and most other countries that allow the change of legal gender without fulfilling any conditions recognise only two gender categories: F and M. Exceptions are California and Tasmania, which provide unconditional gender recognition procedures next to non-binary legal gender categories, and Malta, which allows an X marker on passports, residence permit and identity cards (*Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 (TAS)*; Legislative Council California 2017; Pace 2017). In addition, most of the countries that have introduced unconditional gender recognition laws – Norway is an exception – demand that people fulfil certain conditions if they want to change the legal gender for a second time (Van den Brink and Snaathorst 2017, p. 7).<sup>20</sup> This mirrors the assumption that every person has one “true” gender identity and that gender is a stable and permanent identity characteristic, which is contrary to Butler’s view of gender being performative without following a natural inner sense (2015, pp. xv-xvi, 34, 192).

Despite the discussed limitations, unconditional gender recognition laws stop reproducing the assumption that the body, including its appearance, determines a person’s legal gender and that there is a “test” to determine somebody’s “true” gender identity. This not only makes life easier for any person wishing to change their legal gender from M to F or *vice versa*, but also challenges the boundaries between the socially accepted notions of men and women. For example, abolishing the sterilisation requirement for the purpose of gender recognition troubles binary parenting roles, such as by creating the possibility that legal men give birth. This can lead to a “degendering movement”, in which the social roles of women and men no longer differ, which would also undermine the view that women and men are dichotomous and complementary identities.

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<sup>20</sup> For example, in Argentina, a judicial authorisation is required if a person wants to switch back to the previous legal gender assignment (Aristegui et al. 2017, p. 447).

### III. Introduction of non-binary legal gender categories

The original YP neither explicitly mention non-binary gender identities nor use binary language – they are silent on the existence of gender identities other than F or M.<sup>21</sup> This changed in Principle 31 of the updated version, which recognises in Section C(ii) explicitly that not all people identify with the categories F or M by calling on states to “[m]ake available a multiplicity of gender marker options”. The creators of the 2017 version likely intended with this phrase to demand the introduction of non-binary legal gender categories for all legal purposes. However, the literal focus on *gender marker options* leaves room for interpreting the phrase differently, since some states provide the option to register a non-binary gender marker on IDs, without having created an entire new legal gender category that is also registered in the civil registry and/or noted on the birth certificate. For example, in Malta, a person can register an X on the passport, identity card and residence permit, but keeps an F or M in the civil registry, which becomes relevant when the person encounters gender-specific laws (Calleja 2018). In the following section, I will mainly analyse the effects of introducing non-binary legal gender markers and non-binary legal gender categories for all legal purposes.

The reference to non-binary legal gender categories in Principle 31 reflects an increasing awareness that F and M are not enough to describe all existing gender identities. In addition to countries introducing “third” legal categories, also international human rights bodies increasingly recognise the existence of non-binary gender identities. Shortly after the publication of the YP+10, the IACtHR in its 2017 Advisory Opinion on *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* was the first international court to recognise that some people identify with a gender other than female or male, or as both (para. 32(f)). By holding that persons identifying “with diverse gender identities must be recognized as such” (para. 15), it indirectly called out for the introduction of non-binary gender categories. This follows the approach taken by PACE in two resolutions prior to the publication of the YP+10: in 2015, a resolution called on member states to “consider including a third gender option in identity documents” (para. 6.2.4) and in 2017, another resolution demanded

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<sup>21</sup> Dianne Otto criticised the original Principles for trying to fit diverse gender identities in the existing binary division of gender, such as through their definition of gender identity that partly serves “to reinstate (bio)logic which, in turn, re-naturalises the gender binary” (Otto 2015, pp. 313–314). The YP+10 reaffirm YP’s definition on gender identity but recognise non-binary gender in Principle 31.



that “a range of options are available for all people, including those intersex people who do not identify as either male or female” (para. 7.3.3).<sup>22</sup>

#### *Losses of and requirements for non-binary gender registration*

Even though an increasing number of jurisdictions recognise non-binary legal gender categories, many barriers continue to exist for non-binary persons to access these new categories. The exact procedures to change the legal gender to a non-binary category often remain unclear and/or bureaucratic hurdles make it difficult to make these changes. For example, Bangladesh’s decision to recognise a “third” legal gender in 2013 still lacks proper implementation. Reports show that the local *hijra* communities, persons not identifying with F or M, continue to experience difficulties in receiving identity cards with a non-binary gender marker and voter registration forms continue to mention only F and M (Aziz and Azhar 2019). Obtaining identification documents with a third gender marker could have material benefits for Bangladeshi *hijra*, as this would allow them to apply for particular entitlements reserved for scheduled classes, such as seats in decision-making organs and access to ration cards (Aziz and Azhar 2019, p. 9). The situation differs in Pakistan, where the change to a third legal gender, which was introduced for the *khawaja sira* community in 2009, can result in socio-economic losses for the persons concerned. Since Pakistani law is based on patriarchal legal traditions, *khawaja sira* who are legally registered with an M are often reluctant to change their legal gender to the new non-binary category as this would result in losing male legal privileges, such as receiving higher shares of inheritance (Nisar 2018).<sup>23</sup> Thus, local circumstances and the political and legal system influence the material advantages – or disadvantages – non-binary persons derive from being recognised with a “third” legal gender.

In addition to losing male privileges, Muhammad Azfar Nisar reported in 2018 that the *khawaja sira* community in Pakistan must also provide a medical declaration showing that they are “biologically” a third gender before the change to the non-binary category is possible (p. 73). Even though this seems to have changed through

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<sup>22</sup> The latter resolution adopted in 2017 follows two reports on the rights of intersex persons by the Commissioner for Human Rights of the Council of Europe and the EU Fundamental Rights Agency in 2015, both recommending the consideration of alternatives to the current binary gender registration of intersex persons, including the introduction of gender-neutral markers (Council of Europe Commissioner for Human Rights 2015, p. 9; FRA 2015, p. 8).

<sup>23</sup> Pakistan has insufficiently addressed the issue of inheritance for trans persons in para. 7(3)(iii) of the Transgender Persons (Protection of Rights) Act, 2018.

the adoption of the Transgender Persons (Protection of Rights) Act (2018),<sup>24</sup> many other jurisdictions with “third” legal gender categories continue to demand the applicants to fulfil certain conditions, such as providing medical and/or psychological attestations, before they can adopt these categories. For example, in 2018, Austria introduced the legal gender category “divers” as a result of decisions by its Constitutional Courts (Bundesministerium Inneres 2018). However, it restricted the access to the new categories to intersex persons who can certify that they are intersex.<sup>25</sup> This means that persons identifying with a gender different from M and F can only change their legal gender to “divers” if they have intersex variations.<sup>26</sup> Intersex and trans rights organisations criticised this narrow scope of the new categories for reflecting the biological determinist idea that the body determines (legal) gender, and called for the establishment of unconditional procedures that ensure the change to “divers” based on a self-determined decision. This would mirror the situation in California and Tasmania, which, as already mentioned, have introduced non-binary categories while simultaneously abolishing all requirements for gender recognition (*Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 (TAS)*, Part 4; Legislative Council California 2017).

#### *Legal gaps and cross-border issues created through non-binary gender categories*

As Jessica A. Clarke explains, the reluctance to introduce non-binary legal genders is often justified by arguing that creating new legal gender categories troubles the whole legal system and demands significant legal follow-up changes (Clarke 2019, p. 945). Undeniably, new gender categories do come with legal and bureaucratic hurdles. In its judgment on non-binary genders, the German Constitutional Court rightly held that introducing a new legal gender categories may create legal gaps with regards to gender-specific laws (*1 BvR 2019/16* 2017, paras. 53, 54). This means that in order to

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<sup>24</sup> The Act has been celebrated as securing the right to self-identify as male, female or a blend of both genders without demanding any requirement for a change of legal gender (Hashim 2018).

<sup>25</sup> In 2018, Germany also introduced the gender category “divers” for intersex persons. However, in late 2019, the Münster Local Court (Amtsgericht) determined that it would be unconstitutional to deny the applicant, an endosex person with a non-binary gender identity, to change their legal gender to divers, given the fact that the person could provide a medical attestation certifying their non-binary gender identity (AG Münster, 16.12.2019 - 22 III 36/19). Thus, in Germany, the access to the category “divers” is thus no longer limited to intersex persons.

<sup>26</sup> In a decision in February 2020, the Upper Austrian Regional Administrative Court held that the applicant could demand the change of their gender marker on the birth certificate also to “inter” and not only to “divers” (LVwG OÖ 18.02.2020, LVwG-750727/5/MZ).

avoid leaving persons with non-binary legal genders in a legal “no man’s land”<sup>27</sup>, it is necessary to render all laws distinguishing between women and men gender-neutral or specify their effects for non-binary persons. Relevant laws include, for instance, those concerning family relations (marriage, parenthood), the age of retirement and the conscription to the military. In addition, all government forms or online systems asking for gender information need to be changed.

In addition to legal uncertainties created by non-binary legal gender categories *within* a country, persons concerned could experience problems in *cross-border movements*. For example, the United Arab Emirates reportedly deny entry to persons with an X marker on their passport (SafeTravelsMagazine 2018). Even though there is little information on the experiences of people travelling over national borders with an X or another non-binary gender marker on their passports,<sup>28</sup> some countries anticipate problems. This is why Malta provides their citizens the option to get two passports, one with an M or F and another one with an X marker (Calleja 2018). Another issue is whether and how non-binary legal genders are recognised in other countries that recognise only F and M, such as with regards to marriage. These questions are determined through the private international law rules of the relevant countries. Maltese legislation explicitly states that it recognises a “gender marker other than male or female, or the absence thereof, recognized by a competent foreign court or responsible authority” (*GIGESC Act 2015*, para. 9(2)), but the law of other countries is rarely as straight-forward. Thus, to determine whether a country recognises “third” legal genders from other jurisdictions, a case-by-case analysis is needed, in a similar way to questions concerning same-sex marriage.

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<sup>27</sup> The creation of a so-called “no man’s land” was also a concern for the Registrar in the Australian *Norrie* case (2015), the landmark case introducing the legal gender category “non-specific” in New South Wales (*Appellant’s Submissions. NSW Registrar of Births, Deaths and Marriages v. Norrie* (S273 of 2013) 2013, paras. 38–41; Bennett 2014).

<sup>28</sup> For example, in 2015, Human Rights Watch reported that a Nepali citizen with an O on their passport travelled to Taiwan without problems. In the same year, an Indian person’s visa application to the United States could not be processed, since the electronic system did not recognise gender markers other than **F** or **M** (Feder 2015; Knight 2015). The United States has been named as one jurisdiction that does not recognize gender markers other than **F** or **M** (Peter Dunne cited in Women and Equalities Committee, House of Commons 2015, pp. 12, 13).

*Does the introduction of non-binary legal gender categories smash the binary?*

Introducing legal gender categories different from F and M seems to challenge the gender binary, since it makes genders outside of the dichotomy women/men institutionally visible. However, as it multiplies the boxes of genders, instead of getting rid of them, it does not necessarily lead to a “degendering movement”, as advocated for by Lorber. Registering gender, albeit through non-binary terms, still assumes that everybody can be boxed into a more or less stable category, an assumption that is also visible in the definition of gender identity in the YP, as recalled by the updated version of 2017. By describing gender identity as referring “to *each* person’s deeply felt internal and individual experience of gender [emphasize added]” (p. 8), the YP presume that gender identity is an essential experience for all humans.<sup>29</sup> This fails not only to consider people who do not identify with any gender, often referred to as *agender*, but also suggests that gender identity is innate and natural, which denies the shifting nature of some people’s gender identity and social influences on feelings of identity. Moreover, no country has so far introduced the possibility to be recognised with several genders, which the reference to the “multiplicity of gender marker options” by Principle 31 likely intends. Introducing third, fourth or even more legal gender categories further does not resolve the problem that with each category, new notions of normality for each category are created and with them also exclusions. As Butler says, “[i]dentity categories are never merely descriptive, but always normative, and as such, exclusionary” (1994, pp. 15–16). The process of normalisation through the recognition of non-binary gender identities thus reflects power relations that render certain identities “legitimate” and others “illegitimate”. In addition, the static and normative categories of women and men are not necessarily challenged by creating a new category that classifies everybody who does not perfectly fit the binary gender. This could even reinforce stereotypical notions of female and male, since all exceptions are singled out from F and M.

On the other hand, according to Butler, the feeling of legitimate personhood is connected to a desire of recognition (2004, p. 33). Being officially recognised with one’s gender identity cannot only increase social legitimacy and visibility, but also influence one’s self-respect. Indeed, a survey of 985 non-binary persons conducted in the United Kingdom in 2015 revealed that most of the survey participants felt that the lack of their

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<sup>29</sup> Principle 3 of the Yogyakarta Principles similarly states that “each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom”.

legal recognition negatively affected their social visibility, mental health and self-esteem (Valentine 2015). Therefore, state recognition can not only positively impact the rights of gender non-conforming persons by providing them with material benefits, such as the access to particular entitlements in the case of Bangladeshi *hijra*,<sup>30</sup> but also act as normalisation resulting in the de-medicalisation and de-pathologisation of intersex and trans persons. However, what if the state never had the power to legitimise the gender of individuals through official recognition, would people still long for the official validation of their gender as part of legitimate personhood, as suggested by Butler?

#### *IV. Elimination of the public gender registration*

The most innovative aspect of the Principle 31 is the call in Section A to end the registration of sex and gender as part of one's legal personality altogether. As mentioned above, the original YP approached the public gender registration in this regard quite differently, since they assume not only that everybody has a deeply felt internal gender identity that is integral to their personality, but also that it is important that this gender identity is recorded by the state. Principled 31 thus breaks with the naturalised idea that states register the gender of individuals, as also reflected in the original YP. Nonetheless, the drafters of the YP+10 acknowledged that gender registration is unlikely to be abolished overnight, as they provide suggestions on how sex or gender should be registered, as discussed above, so long as these continue to be part of the personal status registration.

Albeit forward-looking, the call for ending the registration of gender for personal status purposes is not entirely new. For example, the outcome document of the Third International Intersex Forum in 2013, the *Malta Declaration*, demanded that “[i]n the future, as with race or religion, sex or gender should not be a category on birth certificates or identification documents for anybody” (Third International Intersex Forum 2013). This relates to Lorber's call for a “feminist degendering movement”, whereby she draws the analogy of gender to other socially constructed categories, such as race, ethnicity and class, and argues that “the belief that gender

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<sup>30</sup> Reducing the marginalisation and ensuring the constitutional rights of communities concerned was also an objective of the Indian Supreme Court when recognising “third” legal genders in 2014 (*National Legal Services Authority v. Union of India and others*, 2014, paras. 126, 129(1)). Moreover, the Uruguayan Trans Bill, adopted in October 2018, foresees that 1% of government jobs are reserved for trans persons (*Ley Integral Para Personas Trans* 2018).

divisions are normal and natural is still an underlying frame for modern social life” (2000, p. 80). Thus, despite the fact that activists and scholars have considered the elimination of the public gender registration for some time now, international legal institutions have not addressed this possibility of law reform yet.

### *Exceptions to the universal registration of gender*

Even though international bodies have not yet considered the possibility of abolishing the mandatory recording of legal genders, some states already provide exceptions to the universal registration of gender. For example, in 2018, an adult received the first Argentinian birth certificate stating no gender, an option guaranteed by the Argentinian Gender Identity Law (Simpson 2018). Similarly, the 2018 amendment of the German personal status law clarifies that according to paragraph 22(3) intersex persons, who provide a medical attestation or an affidavit confirming their intersex variation, can ask for the deletion of their gender from the civil registry, in addition to requesting of being registered with the gender category “divers” (*PStG 2007*, paras. 22(3), 45b). Previous decisions by German courts held that paragraph 22(3) can also be applied to endosex trans persons, which means that they can equally delete their gender registration (*BVerfG, 10.10.2017 - 1 BvR 2019/16*, paras. 13, 43; *OLG Celle, 12.05.2017 - 17 W 5/17*; *AG Stade, 21.11.2016 - 51 III 13/16*). The legal position of persons without any legal gender with regards to gender-specific laws, such as concerning marriage or parental status, in Germany and Argentina is yet to be specified.<sup>31</sup>

Other exceptions to the universal registration of gender concern children, in particular intersex new-borns. A report published by the EU Fundamental Rights Agency in 2015 shows that a few EU member states provide the possibility to delay the gender registration of new-borns with intersex variations (FRA 2015, pp. 4–5). In most of these countries, the postponement of a child’s gender registration is only temporary and gender must be recorded on the birth certificate and/or the civil registry within a certain period, such as within three years after birth in France (FRA 2015, p. 5; Ghattas 2013, p. 32). However, in a few countries, such as Austria, Germany and the Netherlands, there is no final deadline when the gender of an intersex child has to be registered in the civil registry, which creates the possibility that children

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<sup>31</sup> For example, it is unclear whether persons registered without a legal gender in the Netherlands and Germany could marry, since marriage in these two countries is possible for “two persons of different or the same sex” (*Dutch Civil Code*, Art. 1:30(1); *Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*, 2017; Van den Brink, Reuß and Tigchelaar 2015, p. 287).

concerned become adults without any legal gender.<sup>32</sup> One major issue here is that as the exception in these three countries concerns only intersex persons, the gender binary is not necessarily challenged, but rather reinforced, because intersex persons are “othered” and framed as “exception to the rule” (Holzer 2019, pp. 99–101). This “othering” of intersex children was avoided in Malta, which, in 2015, created the precedent of granting *all* parents or legal guardians the possibility to postpone a newborn’s gender registration until the child’s 18<sup>th</sup> birthday (*GIGESC Act 2015*, para 7(4)).<sup>33</sup> However, children must eventually register a gender at the age of 18 and the number of parents opting for this possibility seems low.<sup>34</sup>

### *The effects of eliminating the legal gender registration on gender politics*

At the heart of much controversy in debates on reforming gender registration procedures is the role that legal gender categories play in gender politics. Indeed, one side effect of eliminating legal gender categories would be the establishment of complete formal gender equality, since laws could no longer differentiate between people based on their gender. Thus, gender-specific laws, for instance with regards to the military, retirement age, family law and inheritance rights, would need to be rendered gender-neutral. Nonetheless, even if laws were generally gender-neutral, the gender of individuals could continue to play a role for determining the eligibility to gender affirmative action. However, according to Gössl and Völzmann, eliminating legal genders would be unlikely to pose a problem to the undertaking of gender affirmative action, since the access to gender affirmative action is already nowadays rarely dependent upon a person’s legal gender. Instead, it mostly relies on self-

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<sup>32</sup> Paragraph 22(3) of the German Personal Status Law creates the possibility to leave the gender registration of an intersex new-born blank (*PSStG 2007*, p. 22(3)). Similarly, Article 1:19d(1) of the *Dutch Civil Code* holds that “[i]f the child’s gender cannot be established”, the child receives an interim birth certificate for three months indicating that the sex could not be “established”. If after three months the child’s gender has still not been “established” by a medical certificate, the final birth certificate is issued, stating once more that the child’s sex has not been determined (Van den Brink, Reuß and Tigchelaar 2015, p. 286). In Austria, the gender marker on birth certificates of intersex children can equally be left “open”, until information on the “medical development” of the child is provided (Bundesministerium Inneres 2018, p. 3).

<sup>33</sup> The German Institute for Human Rights recommends the same measure for Germany, but without imposing a time limit on having a blank gender registration, such as the 18<sup>th</sup> birthday in Malta (Althoff et al. 2017, p. 69).

<sup>34</sup> A policy maker in Malta confirmed in an interview in Spring 2018 that no parents had postponed the gender registration of their new-born within the first three years of the law (Calleja 2018).

identification or the perception by others (Gössl and Völzmann 2019, pp. 420–421).<sup>35</sup> Yet, determining the eligibility for gender affirmative action by relying on the perception of a person's gender by others raises similar problems as when gender markers are used for identification purposes. Establishing a person's gender solely through external perception of a person's bodily appearance and gender expression means that the person making the judgment relies on their own understandings of how women, men or any other gender look like or are named. These are likely influenced by stereotypical and cis- and endosexnormative gender norms. Using self-identification as eligibility criteria for gender affirmative action instead has also raised some controversy, similar to the discussions on basing gender recognition procedures on self-identification, for example with regards to fraud. For instance, the clarification of the UK labour party to use self-identification as method to determine access to the party's all-women shortlist resulted in 300 cis women leaving the party and claiming that self-identification means that "any man can simply claim to be a woman" (Mayday4Women 2018).<sup>36</sup> Thus, even though legal genders are no precondition for undertaking gender affirmative action, using self-identification or the perception by others as eligibility tests for gender affirmative action do not remain without controversies.

In addition to the (ir)relevance of legal gender categories for gender affirmative action, one should not forget the symbolic value of state recognition when discussing the elimination of legal genders. Some states have introduced non-binary legal gender categories explicitly in order to advance the social acceptance of non-binary persons. For example, by officially recognising a "third gender" in 2012, the Indian Supreme Court intended to reduce the socio-economic marginalisation and ensure the constitutional rights of *hijra* (*NALSA v. Union of India and others* 2014, paras. 126, 129(1)). Indeed, some trans persons see value in the legal recognition of their gender as this can transfer social legitimacy upon them and provide them a tool to publicly manifest their identity (Clarke 2019, p. 951; Cooper and Renz 2016, pp. 495–496; James Morton cited in Women and Equalities Committee, House of Commons 2015, p. 13). As discussed above, having legal proof of one's gender can at times assist gender non-conforming persons to be protected from societal mistreatment, for instance when being denied access to gender-segregated resources, such as homeless shelters, prisons, bathrooms and sport teams (Neuman Wipfler 2016, p. 541). The value of being recognised with one's legal gender is reflected in the abovementioned survey on non-

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<sup>35</sup> The preferential treatment scheme for Bangladeshi *hijra* provides a contrary example, since the legal registration as a third gender is determinative for accessing the reserved entitlements for *hijra* in Bangladesh (Aziz and Azhar 2019, p. 9).

<sup>36</sup> See also: Zeffman 2018.



binary persons in the UK conducted in 2015. 73% of the survey participants wished for the introduction of third gender category, whereas only 41% of the participants thought that eliminating gender markers on identification documents was the best option for reforming the public gender registration (Valentine 2015, pp. 22, 73). Thus, the public recognition of one's gender identity, whether binary or not, can contain a significant positive symbolic value and increases a person's social acceptance (Bennett 2014, p. 866).

Apart from the symbolic value, legally registered genders can also help to make gender disparities visible in data collection, since a lot of gender-disaggregated data is currently derived from state registries. Having access to gender-disaggregated data is crucial for rendering social inequalities between different genders in a population visible, which also helps to make political claims on behalf of marginalised gendered groups.<sup>37</sup> However, as briefly discussed above, states can replace the use of state registries with other data collection methods that they use for collecting data on other social categories (e.g. race or ethnicity), such as surveys.

*Does the elimination of the public gender registrations smash the binary?*

Abolishing the public gender registration would end the practice of using gender – a socially constructed category – for creating dichotomous legal classifications of humans and could thus create more room for diverse gender identities and expressions. As succinctly put by Andrea Büchler and Michelle Cottier, “the elimination of the legal category gender would have a liberating effect, since the biologisation, ontologization and essentialization of the differences between genders would have no legal basis anymore” (Büchler and Cottier 2005, p. 131 [transl. from German into English by author]). This “degendering movement”, as demanded by Lorber, could “liberate human personality from the straightjacket of gender” (Lorber cited by Clarke 2019, p. 915), which would have an emancipatory effect on society in general, since it could help dismantling gender norms that construct women and men as naturally different, opposite and complementary identities. In addition to reducing

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<sup>37</sup> The discussion on questions asked in censuses illustrate how important data on social disparities are for making political claims on behalf of marginalised groups. For example, in the United States, various ethnic groups, such as Arab Americans, have demanded the inclusion of an ethnic category that fits their identity on the census, since this could result in the group's consideration in the struggle for receiving public resources. Similarly, LGB persons have demanded (in vain) that the census in 2020 asks a question about the respondent's sexual orientation, as this is hoped to result in government action for queer persons (Browne 2016; Omi and Winant 2014, p. 122; Schilt and Bratter 2015, p. 78).

law's discursive and normative effects to (re)produce the gender binary in society, it could resolve many human rights challenges for LGBTIQ persons. This includes the alleviation of stress from gender non-conforming persons, who would no longer need to worry whether their legal gender fits their gender expression and/or identity in a cisnormative and endosexnormative way. Moreover, legal genders could no longer be used for restricting people's right to marry the person of choice or to adopt a child. As doctors and parents would not need to assign an F and M to a newborn on the birth certificate, they could be less pressured to conduct genital mutilations on intersex children, even though the practice would still need to be prohibited in order to effectively protect intersex children's bodily integrity (Carpenter 2018; Lembke 2011, p. 6).

However, the de-institutionalisation of the gender binary by eliminating the gender registration for personal status purposes would not necessarily resolve hierarchical relationships in society that are based on the gender binary, such as the systematic oppression of women and LGBTIQ persons. Instead, abolishing the public gender registration could even take away a tool of *strategic essentialism*, a term coined by Spivak to describe the idea that group ascriptions are sometimes necessary in order to represent marginalised people, enhance their institutional visibility and make political claims on their behalf (Bennett 2014, pp. 866–867; Butler 2004, pp. 32–33; Spivak 1990, p. 109). Indeed, Lorber notices the risk that gender-neutral policies in certain contexts, such as development programmes in countries with low levels of gender equality, could make laws and policies “gender blind”. This could have counterproductive effects for marginalised gendered groups, for instance women and girls, since their needs could likely be overlooked (Lorber 2000, p. 89). Thus, the public registration of gender can also create visibility of gender non-conforming individuals and, as discussed above, provide social legitimacy to them.

This last issue points to a larger question on the possibility of smashing the binary through legal means. Similar to Butler, who argues that “[i]nternational human rights is always in the process of subjecting the human to redefinition and renegotiation” (2004, p. 33), Ratna Kapur stipulates that human rights are inherently normative and prescribe value to certain ways of being (2018, p. 17). Smashing the binary, on the other hand, describes the attempt to resolve normative hierarchies based on the idea that women and men are stable, complementary and opposite entities. It aims to dismantle regulatory schemes that prescribe how people have to conduct themselves with regards to gender and sexuality. Eliminating legal gender categories thus seems promising for the purpose of breaking with normative

ascriptions about legitimate genders and sexualities, but is the *absence* of law entirely norm-free? Does the absence of legal gender categories halt the ascription of normative value to genders and sexualities? Or could it reinforce the dominant *status quo* by giving away the possibility of making certain groups institutionally visible?

***Conclusions: Challenging state control over gender while using the normative power of states for fostering gender diversity***

While the original YP (2007) have been called “modest”, the updated version of 2017 is expressively visionary as reflected in the four main innovations concerning gender registration proposed by Principle 31. All of the four measures analysed face specific limitations in how they *smash* the gender binary, but all of them *trouble* the naturalised understanding of dichotomous (legal) gender relations. Indeed, eliminating gender markers from identification documents, as envisioned by Principle 31, would reduce the state’s influence of “policing” gender expressions by ending the practice of using gender markers for identification purpose. However, in a gender-divided world, gender markers can also serve as legitimisation of one’s identity and be useful for gender non-conforming persons to fight their way into gender-divided spaces and services.

Unconditional gender recognition laws, on the other hand, not only ensure the right to self-determination for trans and intersex persons, but can also contest the boundaries between socially accepted notions of men and women, since a person’s body, including its appearance and reproductive functions, does not determine the person’s legal gender anymore. Nevertheless, these unconditional gender recognition laws often allow a change of legal gender only from F to M or *vice versa*, except for California and Tasmania, and mostly continue to assume that everybody has one “true” and stable gender that is recorded by the state. This means that they mostly make travelling between the gender binary easier, but rarely smash it.

The proposal by Principle 31 to ensure a *multiplicity of gender marker options* challenges the gender binary by acknowledging that gender identities other than F and M exist. However, non-binary legal gender categories still expect that gender can be “boxed” into square categories, even if it is an X, without recognising that with each box, some exclusions are created. In addition, the new gender categories in Austria and Germany are examples for legal developments that could even reinforce the

gender binary, since intersex persons are singled out and “othered”, as they are the only ones who can access the new categories. Thus, it depends on the exact legal construction of non-binary legal gender categories in their specific context and whether other measures are complementarily taken to weaken the relevance of legal genders in order to understand whether new legal gender categories help smashing the binary.

Lastly, eliminating the public gender registration, as envisioned for the future by the creators of the YP+10, would undermine an important pillar of the institutionalisation of the gender binary and resolve many formal human rights challenges for LGBTIQ persons. It would stop seeing gender as fixed, stable and legally relevant personal characteristics. Yet, the downside of this measure would be that gender categories can serve in some instances as tools of “strategic essentialism” for making marginalised groups, including non-binary persons and women, institutionally visible, including in data collection, and transferring social legitimacy upon them. Thus, the absence of legal regulations about gender assignment seems promising for smashing the binary and creating more acceptance of gender non-conforming persons. Yet, this could also take away a mechanism for enhancing their public visibility.

Principle 31 is dealing with the paradox of trying to decrease the influence of the state in the assignment of gender, such as through the elimination of gender registrations, while at the same time using state recognition in order to create more acceptance of gender diversity and ensure the rights of gender non-conforming persons. The dual role of legal categorisation, on the one hand, to act as political tool of strategic essentialism and, on the other hand, to forcefully draw division between people needs to be considered when undertaking reform projects in a specific context. Thus, the combination of the four measures proposed by Principle 31 makes the YP+10 innovative, but also realistic, by taking into account the current role and use of legal gender categories. Principle 31 thus demands for a simultaneous process of reducing the naturalised state control over people’s gender assignment while making sure that where it (still) has control, it valorises gender diversity outside of a binary frame. In any case, Principle 31 reflects a new era in which states lose their authority to act as (sole) arbiters of people’s official gender assignment.

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