

**Abolishing gender registration: A feminist defence** <sup>iii</sup>*Lila Braunschweig*<sup>1</sup>**Abstract**

This article argues in favour of the abolition of gender markers on identity documents. Its main goal is to assess the emancipatory dimension of such a proposition not only for gender minorities but also for individuals who recognise themselves within traditional gender identities. I first discuss the discriminations resulting from the practices of binary gender registration for intersex children, trans persons, and non-conforming individuals. Then, I look at the different deadlocks ensuing from the most popular remedy to those discriminations that loosen gender binary by adding one or more registration options. I go on to argue that those should lead us to advocate for the abolition of gender registration as a “transformative remedy” (Fraser, 1995) for the harmful consequences of normative gender regulations and as a way to integrate the queer conception of identity within a debate about institutional change and public policy. Such a proposition however raises question for feminist politics, since identity categories are also tools to achieve rights, equality and reparation on the basis of group oppression and specific shared situations. Yet, degendering civil registration could be part of a broader claim to a renewed conception of neutrality, not the liberal gender blindness, famously criticised by feminists but a neutrality critically reconstructed as non-assignment. This alternative neutrality would ask the collective not to assign its members to predetermined identities, to try and suspend the will to institutionally identify individuals according to collective categories and to construct distinctive groups.

**Keywords**

gender registration; gender justice; neutrality; non-assignment

**Biography**

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## Introduction

In late 2018, Germany became the fifteenth country in the world to undermine the binarity of gender registration in civil status and administrative documents by enabling individuals who do not recognise themselves in binary identification to check the box "diverse." This change comes after a case was brought to the German Federal Constitutional Court, highlighting the discrimination faced by intersex citizens. Across the globe, the growing number of newly adopted laws and pending court cases that demand such legal reforms has added to the growing visibility of intersex and gender non-conforming activism that questions the long-held rigidity of binary identity categories. It seems that the traditional norms of gender identity are becoming more and more inadequate to represent and recognise the flourishing scope of gender expressions and identifications. Most interestingly, adding one option of gender registration ("diverse", "other", "x", etc.) has been the most common legal remedy for this problem. The third box is, for instance, currently available not only in Germany but also in Australia, Austria, Uruguay, India, some states of Canada and the United States of America. In fact, beyond the legal realm and sometimes before it, the tendency to add categories has also pertained to other areas of society such as social and dating apps sometimes offering more than 50 boxes of gender identity from which to choose. These issues generally divide public opinion into two camps: those favoring the introduction of one or several new categories and those resisting it.<sup>2</sup> Another perspective, however, has remained widely overlooked.<sup>3</sup> When the German Federal Constitutional Court recognized the discriminatory character of binary registration for the intersex plaintiff, it ordered the German parliament to either offer a third option of identification on legal documents or suppress the mention of sex on those documents altogether. Interestingly, but not so surprisingly considering the general trend on this issue, the Bundestag chose the first proposition.

Yet, adding one or several categories of identification does not go without difficulties. These challenges lie in the "paradox of rights" (Brown 2000), "dilemma of

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<sup>2</sup> The constitutional court of France has for instance ruled against the introduction of a third gender option in 2017 arguing that gender binary in identity documents "has a legitimate goal and is necessary to the juridical and social organisation of which it is a founding element". My translation. « *La dualité des énonciations relatives au sexe dans les actes de l'état civil poursuit un but légitime en ce qu'elle est nécessaire à l'organisation sociale et juridique, dont elle constitue un élément fondateur* ». (Arrêt n°531, Cour de Cassation France, May 4<sup>th</sup>, 2017).

<sup>3</sup> Some activists have advocated for the suppression of gender markers altogether, as well as some academic pieces (Davis, 2014; Shrage, 2012), but those arguments have not reached the public sphere so far.

difference" (Minow 1990, 20) or "conundrum of equality" (Scott, 1988, 202). That is, marginalised social groups claim equality based on the identity category that is the source of their exclusion. In doing so, they give new meanings to this category but also reconduct the social differences they are trying to abolish. The claim to add one or more boxes for gender registration in identity documents and administrative forms does not escape this emancipation paradox. Such legal change provides gender non-conforming individuals with more basic human rights while leaving almost untouched the widespread gender binary and its discriminatory effects for non-conforming individuals, intersex children and women. It also perpetrates the naturalisation of gender frontiers.

Instead of granting the privilege to have one's gender identity recognised by the state and inscribed in civil status, why not rather attenuate the administrative, social, and legal needs to know and display gender identities? The main argument of this article is that, confronted with the limits of a third gender option, the only remaining solution to discriminatory binary registration is to abolish gender markers on identity documents and other kinds of administrative forms. The objective is to assess the emancipatory dimension of such a proposition not only for gender minorities but also for individuals who recognise themselves within traditional gender identities. This article takes the proposition of Patchen Markell seriously when he wrote, that "faced with a relation of privilege or subordination, look for the way to dismantle or attenuate the privilege itself before (or while also) working to include a determinate group of previously excluded people under its protection" (Markell, 2003, p. 181).

In the following sections, I first discuss the discriminations resulting from the practices of gender registration for intersex gender non-conforming individuals. I understand gender non-conforming as a social situation relative to the current norms of gender. This situation concerns people whose gender expressions do not fit the normative conception of gender identities, who identify in as gender diverse or non-binary, or whose ambiguous body disrupt the daily assignation of gender. Then, I look at the drawbacks of the solution to those discriminations that consists in adding a third option of gender identification. I go on to argue that these drawbacks should lead us to advocate for the abolition of gender registration as a "transformative remedy" (Fraser, 1995) for the harmful consequences of normative gender regulations.

I then explore how the abolition of gender registration sheds new lights on two existing debates in queer and feminist scholarship. The first one relates to the discussions on the compatibility between queer politics and social transformation through legal and institutional ways. I suggest that abolishing gender registration is one of the ways to integrate a queer conception of identity within a debate about the law and public policy. The second debate concerns the role of identity categories in feminist emancipatory politics. Following the feminist arguments on the “paradox of rights” (Brown, 2000) and the “dilemma of difference” (Minow, 1990, 20), the main risk of abolishing gender registration would be to reenact a norm of institutional gender-blindness, akin to “colorblindness” on issue of race. This norm of gender-blindness conceals rather than reduces gender inequalities. I argue, instead, that abolishing gender registration should be part of a broader claim for a renewed and feminist conception of neutrality, critically reconstructed as non-assignment. This renewed neutrality asks the collective not to assign predetermined identities to its members, to suspend the institutional and administrative will to identify individuals according to collective categories, and not to construct distinctive groups. The main objective is to de-gender the institutions and laws that organise our collective life.

### *Gender binary registration is discriminatory*

Gender registration is part of the broader system of identity assignment and norm enforcement that reproduces the gender division of the social world in most Western countries.<sup>4</sup> Gender identities are constructed through different social institutions that require individuals to situate themselves on one side of the gender frontier. Since the 18th century, especially, the development of science has expanded the possibilities to verify, classify, and identify individuals' gender identity (Foucault, 1980). It has reinforced the naturalised and biological approach to gender and rendered it difficult to escape or fool its regulation. The progress of science, with the expansion of the modern administrative state and its specific type of governability, displaced the conception of gender identity and provided doctors and administrators with authority to verify and decide the gender of an individual, leaving less – if any – room for gender self-determination (Foucault, 1980). Those modern practices of medical and institutional gender identification enforce the gender binary.

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<sup>4</sup> I focus here in on the issue of third gender as it has emerged in western countries' public sphere destabilising the long lasting western hegemonic conception of gender binary. Non-binary individuals and identities are part of traditional cultures in other part of the world. In most countries, however, non-binary individuals and communities still face some kind of social stigma, marginalisation or violence (Diehl et al., 2017).

Gender in fact, is not only the social aspect of sex. The biologist Anne Fausto Sterling has showed that “labelling someone a man or a woman is a social decision” (Fausto-Serling, 2000, p.3). This social decision is always informed and oriented by contingent and cultural beliefs on gender. Those beliefs, according to Sterling, “define our sex” and “affect what kind of knowledge scientists produce about sex in the first place.” (Fausto Sterling, 2000, p. 3). The sex binary is, in this sense, a social and political construction based on the multiple biological, physiological, gonadal, chromosomal, hormonal variations of human sexuality (Fausto-Serling, 2000). If sex itself is a social and medical construction, then the divide between, on the one hand, a natural, biological sex and, on the other, a social and cultural gender becomes irrelevant<sup>5</sup>. In this perspective, gender is a norm that divides our sense of the world into two different categories. It is an epistemological lens, a “grid of legibility” through which we see and understand the social world, recognise certain phenomena, practices, and bodies while rejecting others in the domain of the unrecognisable, and unreal (Butler, 2004, 42). As human beings, we are always gendered in some way, situated and understood by others in relation to the gender frontier. The social regulation of the gender norm consists of a series of repeated acts of intersubjective and institutional assignation that take place through administrative procedures and public spaces. Gender registration is, indeed, one, if not the first, of those institutional regulations. These regulations, however, are not costless.

Reassignment surgeries performed on newborns presenting a variation of the sexual development exemplify the constructed character of the binary conception of sex and gender. But they also highlight the role of gender registration in the painful enforcement of this conception. Indeed, those medical interventions happen partly because declaring a baby’s gender is needed to let them enter the world as a human being. When the established phrase “it is a boy/it is a girl” stumbles over a seemingly ambiguous body, it calls into question the binarity of gender. To fix the ambiguity and make them fit the dualism, doctors still correct the deviant bodies with surgical re-assignation and hormonal therapy.<sup>6</sup> As Judith Butler puts it, their scalpel becomes the “knife of the norm” (Butler, 2004). These surgeries are profoundly costly for those who endure them. They leave painful traces and scars on the body but also on individuals’

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<sup>5</sup> This is why, throughout this paper, I use the terms “gender” and “sex” interchangeably.

<sup>6</sup> For now, and to the best of my knowledge, there exists no precise national data on the number of those medically unnecessary surgeries performed each year. Yet, several reports agree that despite being increasingly denounced by international organisations and NGOs, those surgeries still happen in, for instance, France (Blondin, Bouchoux, 2017), the US (Human Rights Watch, 2017), Germany and Denmark (Amnesty International, 2017).

sense of self and potentialities for bearable life, reproduction and sexual pleasure (Amato, 2016; Chase, 1998; Jones, 2017). The reflections and claims of intersex and queer activists and theorists show us not only the normative power exercised on those bodies that cannot conform to the norm but also the regulatory productions of gender performed on any new-born. Babies are recognised as boys and girls as much as they are called upon this gender.

Yet, the medical violence imposed on intersex babies is not the sole cost of those institutional regulations of gender. For gender non-conforming individuals, the gender binary also renders life among others and within institutions extremely challenging. Retaining identity documents that do not reflect your lived identity and gender expression complicate administrative acts such as registering for school or getting social welfare. It exposes non-conforming individuals to the discretion of administrative agents responsible for verifying people's identities in a variety of contexts. Heath Fogg Davis tells the enlightening story of a trans woman of colour who was denied access to a public bus in the city of Philadelphia (USA) because of her gender expression. Her public transit pass indicated "F," and the driver judged that she did not present in a womanly enough way and refused her boarding. But the same problem also arose when she presented a transit pass indicating "M" to another driver who decided that she could not be a man and denied her again the right to use public transportation (Davis, 2014).

Beyond the administrative turmoil hampering access to public services and social insertion, the lack of official recognition of one's identity can also cause significant psychological and emotional damages. Axel Honneth has underlined the social harms resulting from suffering a lack of collective positive understanding of one's form of life. For him, "the result of the evaluative degradation of certain patterns of self-realization is that they cannot relate to their mode of life as something of positive significance within their community." This leads to a "loss of personal self-esteem, of the opportunity to regard themselves as beings whose traits and abilities are esteemed" (Honneth, 1995, 134). These types of degradation apply, for instance, to ways of experiencing identity, love, sex and kinship that are depreciated and marginalised by mainstream gender norms. But in the cases of intersex and non-binary individuals, there might be an even more pressing claim than to have one's ways of life – here gender identity - *positively* recognised. To be depreciated, marginalised or oppressed "means that you already exist as a subject of some kind" (Butler, 2004, 218). In the current legal and institutional organisation of gender, intersex and non-binary individuals are, in fact, unreal. Their existence is

unintelligible. And the consequence of finding “that one is fundamentally unintelligible (indeed, that the laws of culture and of language find one to be an impossibility)” is “to find that one has not yet achieved access to the human [...]It is to find that one’s language is hollow, and that no recognition is forthcoming because the norms by which recognition takes place are not in one’s favor” (Butler, 2004, 218). The stake here is to not only to be positively – or equally – recognised but to be recognised at all.

The binary character of gender registration, I have argued, enforces the gender norm on new-borns presenting some variations of sexual development. However, it is also discriminatory for individuals – intersex or not - who do not recognise themselves or are not recognised by others in one of the two socially accepted genders and who therefore have difficulty being recognised by public agents and institutions and access fundamental civic and social rights.

### *The pitfalls of the “other” box*

In order to remedy this lack of recognition, certain countries have introduced the option to check “other”, “diverse” or “third gender” on identity documents and administrative forms. Yet, shortcomings emerge when the law sets particular criteria to access this new category. In Germany for instance, the agreement of a physician is needed to check the box “diverse,” meaning that only people who are medically recognised as presenting variations of the sexual development can claim this new administrative identity. As the state indeed offers an alternative option to gender binary, those types of conditions re-naturalise gender identities. The reform in fact consisted in adding one gender to the two already scientifically and biologically recognised genders. The conditions set up by the German law naturalise and pathologize gender non-conforming identities. It does this by negating the lived identity of persons who—not intersex—identify nor as either male or female. The proliferation of biological sexes will not be of much help for those suffering discriminations due to the incongruency between their assigned and lived gender identity. It just creates another medical box to assign new-borns presenting ambivalent genitalia, displacing instead of subverting the naturalized norms of gender identity. Under this criterion, adding a box just reinforces the common belief that one’s gender is reducible to a doctor’s assessment of one’s sexual organs and bodies.

Even in the cases of more liberal practices where no previous conditions are required to be recognised as a member of the “third”, “other” or “diverse” gender some problems remain. In Argentina, for instance, individuals can choose to be registered according to the gender of their choices (female, male, or any other appellations) without having to prove any specific medical certification. Letting people decide for themselves seems at least a more rightful option in terms of autonomy and self-determination. Nevertheless, it does not alleviate the burden of marginality to gender non-conforming individuals. Adding an exception to the binary gender system will solely confirm the rules that the dual dimension of sexual identity is and should remain the norm. It would undoubtedly help non-conforming individuals to navigate administrative life more smoothly while reducing the numbers of reassignment surgeries on intersex babies, but it is not likely to enhance the general cultural evaluation of their forms of life.

What would be the reaction of an employer or a school headmaster or teacher in front of the application of a candidate presenting a "third gender" civil status? Those stigmas weighting on bodies and subjectivities that do not recognise themselves within traditional dual identities would most likely be left untouched, even if they are legally recognised. The third gender option is not likely to generate the types of intersubjective relationships that “inspire not just passive tolerance but felt concern for what is individual and particular about the other person” (Honneth, 1995, 129). Gender non-conforming individuals might become legally legible, but they will still be oppressed. In Bangladesh for instance, and despite the differences in the cultural conceptions of gender, Adnan Hossain has identified the paradox entailed in the state recognition of hijras. He argues that the introduction of a third legal gender has not done much to the social stigma weighting on those traditionally non-binary individuals and has increased their regulation and disciplinarisation by administrative and medical institutions. (Hossain, 2017).

In fact, the issue raised by the introduction of third options of identification echoes the paradox of identity specific rights theorised by Wendy Brown (Brown, 2000). Discussing the necessity and limitations of legal battles for feminist politics, Brown argues that when they are targeting specific social groups, rights may be as hindering as they are protective. She writes that “to have a right as a woman is not to be free of being designated and subordinated by gender. Rather it may entail some protection from the most immobilizing features of that designation, it re-inscribes the



designation as it protects us, and thus enables our further regulation through that designation" (Brown, 2000, 232). Here, the problem applies to gender non-conforming individuals. The introduction of a third gender might well grant them access to basic rights, but it will also re-inscribe them in an assigned identity and provide the legal grounds for further regulations based on this identity. Those regulations could be social and take the form of moral and physical harassment, sexual violence, and discrimination. They could also be legally organised and deny access to marriages and parenthood, especially in those countries where family law is still strongly structured around normative heterosexuality. In 2019, the French parliament has adopted a Bill extending the right to medically assisted procreation to all women (including single mothers and lesbian couples) but did not extend the right to individuals who can be pregnant but are not legally "women" according to their identity documents, like trans men or non-binary persons with a functioning uterus<sup>7</sup>. It remains very much uncertain whether such a right would be accessible to persons who check the "third gender" option if this were to ever become available in France.

As Brown remarks, the risk with specific rights is that they "are never deployed 'freely' but always within a discursive, hence normative context, precisely the context in which "woman" (and any other identity category) is iterated and reiterated" (Brown, 2000, 232). The context here is one where gender is naturalised, biologically determined and conceived as a crucial aspect of one's subjectivity and physical embodiment, capable of providing necessary information on who one is and what should be one's place in the world. The norms regulating gender identity are not only naturalised and rigidly conceived, but they also operate in a very hierarchical understanding. Gender categorisation and assignation rely on cultural norms that sort individuals into two groups and allocate them different values and social worth. In Western languages and discursive practices, the binary opposition male/female refers not only to a strictly physiological difference but always entails a broader set of oppositions (i.e., active/passive, universal/particular). As Joan Scott argues "oppositions rest on metaphors and cross-references, and often in patriarchal discourse, sexual difference (the contrast masculine/feminine) serves to encode or establish meanings that are literally unrelated to gender or the body. In that way, the meanings of gender become tied to many kinds of cultural representations, and these, in turn, establish terms by which relations between women and men are organized and understood" (Scott, 1988, 37). Not only are those oppositions constructed as mutually exclusive, but they give primacy to the values affiliated with the masculine.

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<sup>7</sup> Projet de loi relatif à la bioéthique, n°2658, *Assemblée Nationale*, France, 2020.

Moreover, the gender norms establishing a clear separation between male and female identities also involves a heteronormative dimension. In other words, being a real man or a real woman not only means performing the expression and embodiment associated with masculinity or femininity, but it also implies engaging in sexual and emotional relationships with partners of the opposite sex (Butler 1999). Consequently, the comprehension and recognition of a “third” or “other” option will necessarily be affected by this hierarchical and heteronormative context where men and masculine values as well as heterosexual forms of life occupy a dominating position. The right to a third option on identity documents cannot escape this discursive, and as put by Brown, *normative* context. Even though this right was framed as to make the access to the third option as opened as possible, such context would inform the social, legal, and administrative ways in which this category would be processed and regulated.

Beyond the number of gender boxes available on administrative documents, the problem might lie in the administrative regulation of gender itself. For instance, the possibility already introduced by many Western countries to switch one’s administrative identity to the opposite gender surely fixes some discriminations faced by trans persons who pass well and who have no difficulty in being recognised in their lived identities. It can also give them the emotional relief of official collective recognition. However, this opportunity can still cause administrative deadlocks and recognition inadequacy for trans people in transitions with non-conforming gender expressions. The identification of gender on identity documents and administrative forms often “out” transgender people “which renders them vulnerable to public harassment, humiliation and physical violence” ((Davis, 2014, 51). For Davis, “the political harm of sex classification policies is that they transfer the crucial and deeply personal matter of sexual identity to administrative agents who then have the power to use their normative ideas about gender to deprive people of their civil right to use the public accommodations under their watch.” (Davis, 2014, 48).

The effects of this transfer of power fall even more harshly on gender non-conforming persons from social marginalised economic or racialised groups who often lack the various resources to access physical and legal official transitions. Those groups are in most Western countries also more likely to be subjected to administrative and police identity and physical checks and to face sex-segregated institutions like prisons or shelters. Dean Spade has shown how the constant exposure of trans individuals (especially trans persons of colour and trans migrants) to various

forms of gender classification, regulation and segregations through administrations and state institutions increases their vulnerability to violence, marginalisation and criminalisation (Spade, 2015, xiii). Introducing another category to existing binary gender classifications, just like loosening the conditions to change one's gender, will not reduce the power given to those different administrative agents and institutions to regulate vulnerable populations based, among other features, on gender expectations and norms. It will make administratively legible a certain population but will not reduce their exposition to administrative control and regulations.

Adopting additional identification categories, therefore, involves serious potential problems. Those problems have to do with overly specific rights for members of marginalised groups in a context of normative gender regulations and to the extensive power given to administrative agents and institutions in those regulations. In this case, the addition of a third gender option runs the risks of reinforcing the barriers between identities, re-naturalising gender and doing little to prevent the marginalisation of individuals who check this third gender option. Moreover, it does not disturb the rigidity of sexual division and its discriminatory consequences for all genders.

### *Queering institutions by abolishing gender registration*

Confronted with these limits, why not instead advocate for the abolishment of gender registration on identity documents and administrative forms altogether and go with Markell's advice that, in situations of privileges and inequalities, "sometimes less may be more"? (Markell, 2003, 181) In fact, this proposition resembles the kind of strategies deployed by queer theorists and activists who aim at destabilising the traditional categories of gender and sexuality in opposition to gay identity politics and the types of feminism that claims social recognition for female identity and values (Fraser, 1995) This solution would fall into the category of what Nancy Fraser has called "transformative remedies" to injustice (Fraser, 1995). Distinct from affirmative remedies that "aimed at correcting inequitable outcomes of social arrangements without disturbing the underlying framework that generates them", the goal of transformative remedies is to fight inequalities by "restructuring the underlying generative framework" (Fraser, 1995, 82). The remedies described by Fraser in a discussion about different types of injustice also differ in the effects they produce. While the affirmative ones will value the specificities of different social groups and the frontiers between them, the transformative remedies would "change everyone's

sense of belonging, affiliation, and self" by "destabilizing existing group identities and differentiations" (Fraser, 1995, 83). There is a similar contrast between the two alternatives to binary gender registration. While the addition of a third option would balance inequalities without disturbing group frontiers and classifications, the suppression of gender boxes registration aims, on the contrary, at blurring the processes of categorisation and hence the hierarchical organisation of gender identities.

Abolishing gender registration would also be a way to bridge the gap between the contribution of feminist and queer theories to the conceptions of gender identity and normative political theory. In contrast to gay identity politics that aim at legal equality and social recognition for sexual minorities, queer politics focus on individual bodies and marginal communities that destabilise traditional women/men, hetero/homo distinctions. In this sense, they often go beyond the quest for equality for gays and lesbians and seek to deconstruct the hegemonic norms of gender and sexuality that produce the oppression and marginalisation of people who cannot conform to those norms (Kosofsky Sedgwick, 1993, Butler, 1999). However, queer theorists rarely provide practical insight as how to transform the institutions that produce those distinctions and norms - except by critiquing them, certainly, a crucial step to achieve any kind of change. They are in fact often reluctant to formulate normative claims and specific political projects that can take form in public policies.

One of the reasons for this reluctance, argues Lisa Duggan, is the gap between the language of queer studies and politics and the language of liberal politics. Queer politics' rhetoric of socially constructed, fluid and moving sexual practices and gender embodiments leave the "politics of the state" to "lesbian and gay civil rights strategies" that focus on the affirmation of specific groups and identities (Duggan, 1994, 6). Duggan has argued that queer intellectuals should, however, concentrate on the "creative production of strategies at the boundary of queer and nation-strategies specifically for queering the state" (Duggan, 1994, 3). She claims that queer rhetoric and language are too remote from the polished and liberal language of politics. I would add that part of this mutual disinterest is also due to the queer conception of gender and sexual identities – socially constructed and potentially fluid – in a context where the language of institutions and politics is in many ways determined by appeal to relations of recognition and rigid identity categories (Markell, 2003). Because the state is shaped by relations of recognition with several communities to which it allows rights and privileges, dominated groups are bound to voice their political claims for equality through the prism of identity and recognition (Markell, 2003, 184).

Accordingly, the more intelligible political strategy for gender non-conforming individuals seeking social and political equality is to ask for the addition of the third option in civil registration, unless we subvert – or queer – the broader institutional understanding of gender identity.

Giving up in front of those discursive incompatibilities between queer feminist politics and institutional change would indeed have significant unwanted consequences. Being intelligible within institutions does allow one to exist politically and socially. How could one resist legal and institutional translation for one's form of life when the numerous conditions of a livable life depend on it? Yet, how to translate the queer language that shapes and celebrates indeterminate, fluid and changing identities and experiences of gender and sexual politics into the fixed and determining language of mainstream politics and social transformations?

The abolition of gender registration could, in this sense, be a way to start inscribing within collective practices the denaturalisation of gender and questioning the need for fixed and determined gender boxes. It would do so without using the peculiar language of identity fluidity and multiplicity but also without introducing new forms of gender regulation as does the addition of a third option. In other words, degendering civil registration will make more audible the queer critique of identity and participate in the "disestablishment" of gender classification and segregation. Discussing the debate on sexual diversity in the USA, Duggan suggested translating queer language into an audible argument for mainstream politics. She offers to "borrow and transform" the liberal discourse of religion disestablishment, for the exception that the religion in question would be "the religion of heteronormativity" (Duggan, 1994, 9). In this way, the non-neutrality of policies, law, and institutions would appear more partial and unfair. I argue that we can go even further and ask than the state not only avoid establishing any "state sexuality" but also have no legitimacy in establishing and enforcing the gender frontier (Duggan, 1994, 9).

### ***Blindness vs. non-assignation: Rethinking state neutrality***

Yet, doesn't this proposition look like the neutral gesture of liberalism, its historical advocacy for state blindness to identities and differences disguised into a *queer* proposition? Aren't identity categories also tools to achieve rights, equality, and reparation based on group oppression and specific shared situations? How can

abolishing gender registration be part of an emancipatory project for intersex, trans and non-conforming individuals, but also for women?

In the following section, I argue that the abolition of gender registration does not imply the end of conflictual politics based on experiences of domination. Instead, it can be part of a broader feminist project to degender institutions and alleviate the individual and collective needs to comply with norms that are hindering for all genders. After discussing the limits of granting rights based on specific categories, we face, in fact, the other side of the problem. Brown reminds us that if category-oriented rights re-inscribe individuals in assigned identities, too general ones can conceal and reconduct social relations of subordination. The “paradox of rights” (Brown, 2000), also called “conundrum of equality” (Scott, 1988, 202) or “dilemma of difference” (Minow, 1990, 20) has been the center of an extensive feminist scholarship spotting the limits of both gender neutrality and specific protective rights for women. Minow summarises the dilemma in the following way:

The stigma of difference may be recreated both by ignoring and by focusing on it. Decisions about education, employment, benefits, and other opportunities in society should not turn on an individual's ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet, refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind. The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently. (Minow, 1990, 20)

When, in order to preserve individual liberties, the state claims to be neutral, its institutions protect and even reinforce a series of power relations organised around socially significant group categories. The argument is twofold.

On the one hand, inaction – not to act on those categories – equates participating to the perpetuation of discrimination since the law, even when it is silent, authorise certain kind of practices and participates in the fabrication and maintenance of social order. In other words, state blindness problematically implies that “the status-quo general social and economic arrangements are natural and desirable.” (Minow, 1990, 70) Hence, the distribution of places, roles, and privileges are seen as neutral, as the result of intrinsic features of differences (gender and race, for instance)

or mere consequences of individual free choices. As rightly noted by Minow, many commentators have considered “affirmative action as nonneutral, compared with the status quo treatments of race and gender in employment and other distributions of societal resources” (Minow, 1990, 71).

Yet, those social differences are anything but natural and neutral. They are the social and material products of old – and less old – statutory differences and economic relations of subordination previously entrenched in law. These limits of general liberal rights have been often discussed by Marxist commentators of liberalism, “rights differentially empower different social groups, depending upon their ability to enact the power that a right potentially entails [...] the more social resources and the less social vulnerability one brings to the exercise of a right, the more power that exercise will reap, whether the right at issue is sexual freedom, private property, speech, or abortion” (Brown, 2000, 232).

On the other hand, the discourse of the law itself is rarely neutral. How can it be neutral “in a world that is not itself neutral?” (Minow, 1990, 44). Legal norms, public policies, and social institutions are colored by the interests and practices of those who shaped them – usually white, wealthy, heterosexual men. As Spade argues, “even though explicit racial and gender exclusions are less frequently written into law today, ideas about race and gender are commonly mobilized to support a general policy or program that may not explicitly target a group on its face, but that still accomplishes its racist/sexist purpose.” (Spade, 2015, 59) Spade gives here the example of the suppression and budget-cut of certain welfare programs in the USA based on the mobilisation of the negative image of “‘welfare queen’ – portrayed as Black single mothers ‘cheating’ the welfare system” (Spade, 2015, 59).

Another famous example of this type of colouration is the differential social and economic worth often inscribed in law and public policy attributed to certain types of occupations and jobs. Because they have been historically performed by women – and still are, often by women of marginalised groups - and associated with femininity, some occupations are indeed still not recognised as worthy of decent salaries and respect. Those occupations generally revolve around practices of care for other more dependent human beings – children, people with disabilities, the elderly, etc. Yet, should the social worth of those occupations be reassessed because they are performed by women or associated with feminine values and take the risk of reconducting this association while we celebrate it? Or because they are, as care

theorists have shown, intrinsically valuable for our societies, necessary for the wellbeing of our communities and way more vital than most of the profit-generating and generously paid activities and jobs (Tronto, 2013)? Gender norms produce a value system that favours social goods, activities and values associated with the category of man and the masculine while devaluating those associated with femininity or with the subversion of gender binaries. This value system organises our institutions and economy and imposes expectations and norms on individuals. Yet, should we try to neutralise the effects of this value system by revaluing the feminine part of it, or, by destabilising its binary? We start to see here a third way between the obliviousness of gender blindness and the pitfalls of group-specific rights for women and non-conforming individuals.

This third way would consist, in a more ambitious and emancipatory conception of neutrality as a practice of non-assignment. In the mainstream understanding of neutrality as blindness, equality takes the form of "deliberate indifference to specified differences", a commitment to the idea that certain differences exist (gender, race, religion, class, etc.) but should not determine access to equal rights (Scott, 2002, 44). Those differences are considered apolitical, the consequences, we have seen, of either embedded qualities or individual choices. As long as access to rights and social goods are not explicitly determined along gender rules, the legal system and institutions are considered to be neutral. On the contrary, neutrality as non-assignment would recognise the role of institutions and legal arrangements in the harmful production of social identities, in the regulation and normalisation of our conception and experiences of femininity, masculinity and the rigid frontier between the two. It would acknowledge that the gender registration of individuals at birth, the segregation of public bathrooms or the widespread habits to divide a group of pupils based on gender are not mere assessments of physical differences or benign and convenient teaching practices. . These practices, in fact, are all part of the performative social reconstruction of the gender frontier. They repeatedly divide the world according to two sexes. Neutrality as non-assignment recognises the role of those various types of social regulations in the institution of gender as a structuring social norm and the production of gender identities and hierarchies

This neutrality as non-assignment consists of actively degendering social institutions. It requires interrupting the repeated presence of gender institutional regulations which are most of the time unnecessary, and it can start with the abolishment of gender registration on civil identification documents and other kinds of administrative forms. In fact, degendering civil documents will undoubtedly help



to make obsolete any family law organised alongside the gender lines. How can we forbid marriages, adoption, and medically assisted reproduction to same-sex couples, if identity documents do not indicate individuals' gender?<sup>8</sup> It could also delegitimise those everyday segregations that organise social spaces and experiences, from public bathrooms to school life.<sup>9</sup> It would contribute to the denaturalisation of gender divisions and classifications that remind us all the time that we are gendered human beings and that gender is and should be a crucial aspect of our social and political life. As Spade argues, following James C. Scott arguments, “the terms and categories used in the classification of data gathered by the state do not merely collect information about pre-existing types of things, but rather shape the world into those categories that, ultimately, are taken for granted by most” (Spade, 2015, 76).

Of course, abolishing gender registration in administration forms and identity documents will not solve once and for all gender discriminations targeting women, trans, intersex and gender non-conforming individuals. It will not magically stop physical and verbal violence based on gender norms, nor will it resolve the economic, social, and political marginalisation faced by women and non-conforming individuals of economically and racially dominated groups. Gender functions as a regulatory norm in most social interactions and spaces and its impacts exceeds the realm of legal and administrative rules. Gender regulations often have no administrative or institutional purpose and take the form of gendered education in primary and secondary spaces of socialisation, discriminations in school, family and the workplace, or verbal and physical harassment of women, transgender, and non-conforming individuals in all kinds of social situations.

Yet the social norms that trigger those intersubjective forms of gender regulations are shaped by institutional arrangements. In other words, institutions like gender registration organise collective reality and determine which embodiments and experiences of gender are socially recognisable and acceptable. In fact, institutions constitute “the essential mediation between individuals and historical collectives: it's them that determine the formation of subjectivity, the mode of “their interpellations as subjects”, as Althusser used to say, and that determine therefore the behaviors of

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<sup>8</sup> Another critical way to dismantle the heteronormativity of kinship regulations would be to dissociate parental rights from biological ties and allow partners to adopt each other's children.

<sup>9</sup> For an expanded argument for the desegregation of public bathrooms and other similar types of facilities and especially against the safety argument for segregation, see *Beyond trans: does gender matter?*, chapter 2 (Davis, 2017).

exclusion and inclusion, recognition and discrimination” (Balibar, 2016, 23).<sup>10</sup> Gender markers on birth certificates and administrative documents give legitimacy and validity to other types of gender segregation and regulation, to the “constant work of differentiation to which men and women have never ceased to be subject and which leads them to distinguish themselves by masculinizing or feminizing themselves”, “the endlessly renewed social (re)construction of the principles of vision and division that generate genders” (Bourdieu, 2001, 84). Social norms, just as assumptions about the different categories that constructs a particular society shapes the legal rules and institutions of that particular society just as legal rules and institutions participate to the reproduction, legitimisation and naturalisation of those norms and categories.

I still have to answer two worries that my claim for neutrality as non-assignment is likely to engender among readers who are both diversity-friendly and concerned with social justice. The first relates to the potentiality of grounding legal and social struggles against gender discrimination without any kind of possible data on the existing social dynamics of gender. How could we know if desegregating institutions and suspending assignment work if we have no way to assess the state of gender relations and the position of women and non-conforming individuals, in, say, the labor market or the education system? Gender discriminations in the professional world, sexual violence, gender-based harassment will not end with state registration. However, anti-discriminations provisions generally do not need identity documents to be legally enforced. Similarly, abolishing gender registration does not necessarily mean refusing to produce surveys assessing the current state of gender equality – or lack thereof – in one field or another. What neutrality as non-assignment asks instead is to limit as much as possible the regular and unnecessary social enforcement of gender categories, to negotiate social spaces where gender is not a salient aspect of one’s identity and life around others. Why not, for instance, imagine that surveys and forms would ask people to disclose their gender only when their goal is specifically to find out about inequalities? They could also ask open questions instead of offering boxes to choose from.

But do we really want gender not to be a salient aspect of our identity? And this relates directly to the second concern and the widely shared fear that degendering (in the sense of abolishing some of the institutional, spatial, and legal enforcement of

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<sup>10</sup> My translation: « L’institution constitue ainsi « la médiation essentielle entre les individus et les collectivités historiques : c’est elle qui détermine la formation de leur subjectivité, le mode de leur « interpellation en sujets » comme disait Althusser, et qui détermine par contrecoup leurs comportements d’inclusion et d’exclusion réciproque, de reconnaissance et de discrimination ».

gender) will likely produce androgynous sameness. I believe that this fear, well entrenched in the conservative criticism of feminist and queer politics is no more than a reverse idle fantasy. The goal of this renewed neutrality is indeed to transform the well-polished – and hierarchically organised - social *diversity* of state-blindness into a more joyful and less confining *multiplicity*. One of the reasons is that gender as an understanding of someone's embodiment, and experiences of masculinity and femininity are not likely to disappear altogether, nor is the traditional types of gender expressions and identities. What a commitment to a principle of neutrality as non-assignment wishes instead is a world that leaves more leeway for flexible combinations, variations, and juxtapositions in gender experiences, practices, and embodiments.

What degendering institutions and law finally implies is to question our own relation to identity and its role in our everyday interactions with others. It suggests that we try and get rid of what Foucault in a different context has called "the morality" of "bureaucrats" and "police" (*morale d'état-civil*), the desire to know and classify ourselves and others according to fixed and intelligible social identities (Foucault, 1972). Of course, as we have seen, in a world where identity matters so much, it seems inevitable that gender diverse individuals will formulate their claim for equality as claims for recognition of their particular gender identities. In debates about equal recognition, however, "identity is understood specifically as an antecedently given set of facts about who we are and as a set of facts which both precedes and governs our action, telling us what acting "authentically" means for us" (Markell, 2003, 12). For Markell this conception of identity and the claim for recognition lies in a will for sovereignty, a desire to secure our interactions with others based on what we know, or think to know, about their identities and ours. In fact, the appeal to identity categories can be seen as a means to ensure power and agency in a social world where our encounter with others can hurt, impede us or alter our very sense of who we are. The proposition to degender identity documents and the broader call for a renewed conception of neutrality as non-assignment entail to recognise this unpredictable, and even vulnerable, dimension of social life. It forces us to ask ourselves, what do we risk – and what do we lose – if we suspend the need to know and recognise our identities and the one of others in a stable and irrevocable way? Which trouble, which awkwardness in our sense-of-self can produce the encounter with alterity, with a disturbing body whose gender is for us unintelligible? How can we accept the fragility of our own gender that this troubling body reveals?

## Conclusion

This article sought to demonstrate that, in many ways, the suppression of gender registration represents a better alternative to the problematic current binary classification than an addition of one - or more - gender categories. The dual dimension of gender registration is indeed discriminatory. First, it gives legitimacy to violent and painful re-assignment mutilations on new-borns diagnosed with an intersex condition. Second, it makes life within institutions, administrations and many social spaces very difficult for individuals who do not recognised themselves or are not recognized by others within the traditional gender categories. This includes individuals who identify as non-binary, but also trans people in transition and more largely people who may identify as men or women but whose gender expressions do not fit hegemonic gender norms.

Yet adding one or more options of identifications on identity documents will not resolve the problems. Confronted with the paradox of specific rights, such an addition would probably create another biological gender without attending to the stigmas and discriminations affecting non-conforming gender identities and expressions. Butler asks, "what departures from the norm constitute something other than an excuse or rationale for the continuing authority of the norm," "what departures from the norm disrupt the regulatory process itself" (Butler, 2004). Suspending the practices of sorting citizens and users of public services by gender looks, it seems, a better departure from the norm than the more official inclusion of non-binary and intersex persons into the gender regulatory process. De-gendering civil registration and identity documents would also complicate other types of legally organised gender regulation in, for instance, family law or sex-segregated social places. Those gender regulations are not only discriminatory for gender non-conforming individuals, they also reconstitute constantly the division between the two traditional genders and remind us all the time that gender is a structuring dimension of the social world. In that sense, they give legitimacy to gender classifications and norms that are hindering for all genders.

Thus, I finally argue that, abolishing gender registration could be part of a broader queer and feminist project to rethink state neutrality, a project that would consist in neutralising legal, administrative and institutional forms of gender assignments. Instead of being obviously blind to identities and inequalities, this feminist neutrality would work to degender the law and institutions that structure our collective realities.

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## Notes

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