# BODIES AND IDENTITIES BEYOND THE BINARY SEX AND GENDER SYSTEM

## From Question of Order to Question of Rights

Ino Kehrer*



ABSTRACT

There is a 'common sense' understanding of sex and gender as binary. This is reflected in most European countries' civil status dispositions, which are based on the assumption that everyone is born either female or male and will later identify as a woman or a man. People who fall outside of this binary sex and gender system are rendered invisible and suffer from the medicalisation and pathologisation of their bodies and identities. This contribution examines rulings, passed by the German and Austrian Constitutional Courts, that have recognised the right to

* The author wishes to thank Eleonora Capaccioni (friend and proofreader), Leslie Jaye (intersex advocate) and Michela Balocchi (researcher, ally and advocate for intersex rights) for discussing and reading earlier drafts of this contribution, and the reviewers for their crucial insights and helpful comments.

personal identity and respect of private life for people who do not fit within the female and male categories. In said rulings, the public interest in maintaining a binary sex and gender classification system, grounded on the long-standing argument that the 'Western' legal and public orders are rooted in it, has not been considered sufficient, proportionate and adequate to justify the lacking compliance of the civil status law with fundamental and human rights standards. Nonetheless, the legislative implementation of the rulings, consisting of the introduction of a third option besides 'male' and 'female', did not bring about the replacement of a legal status model based on a 'sex as gender' approach with one based on self-defined gender identity. Further actions will thus be needed to ensure full protection of the individuals' right to self-determination regardless of their sex characteristics, in line with the emerging international trend.

## 1. INTRODUCTION

There is a widespread assumption that every child, at birth, can be unambiguously assigned to the female or male sex, as shown by the fact that soon after birth, usually after a week,[1] almost all European civil status dispositions stipulate that the sex of the child is to be registered on a birth certificate, which usually provides only two options: female or male. This registration and assignment to a particular sex is generally made by a member of the medical profession, mostly on the basis of an examination of the sex characteristics of the child, in particular the size and other aspects of the genitalia.[2] This sex assignment is also referred to as 'gender assignment', the assumption being that the latter will automatically follow the former; this is echoed by the fact that – especially in law – sex and gender are often understood to be interchangeable, not only because the distinction between them is relatively recent,[3] but also because there is a widespread assumption that it is a natural matter of fact[4] that everyone

1 D. C. Ghattas, 'Human Rights between the Sexes, A Preliminary Study on the Life Situations of Inter* Individuals', (2013) 34, *Heinrich Böll Foundation Publication Series on Democracy*; European Union Agency for Fundamental Rights (FRA), 'The Fundamental Rights Situation of Intersex People', (2015), *Focus,* pp. 7–59.

2 G. Viggiani, 'Appunti per un'Epistemologia del Sesso Anagrafico', (2018) 5(1), *Genius*, pp. 30–39; S. L. Gössl, 'From Question of Fact to Question of Law to Question of Private International Law: the Question whether a Person is Male, Female, or …?', (2016) 12(2), *Journal of Private International Law*, pp. 261–280.

3 The first to assert the distinction between sex and gender was Money (1955), who affirmed that a gender role is 'used to signify all those things that a person says or does to disclose himself or herself as having the status of boy or man, girl or woman, respectively'. This distinction was subsequently elaborated upon by Stoller (1984), who differentiated among gender roles, gender identity, sex and sexual behaviour. J. Money, 'Hermaphroditism, Gender and Precocity in Hyperadrenocorticism: Psychologic Findings', (1955) 96(6), *Bulletin of the Johns Hopkins Hospital*, pp. 253–264; R. Stoller, *Sex and Gender: The Development of Masculinity and Femininity*, Carnac Books, London 1984.

4 W. C. Harrison and J. H. Williams, *Beyond Sex and Gender*, SAGE Publications, London 2002.

is born either female or male and will later identify as a woman or a man. This understanding of the relation between sex and gender has led to consider as exceptional and often as pathological the cases where the child could not be easily assigned to the female or male sex due to a variation of sex characteristics,[5] or where there is no alignment between sex and gender identity.[6] By registering the sex/gender of a person on birth certificates, this *datum* becomes part of the person's civil status, positioning the individual within the legal order.

Most Western societies indeed use the sex/gender of individuals as a criterion to categorise and organise them[7] by division into females and males, a practice probably rooted in the widespread perception that this distinction is grounded in biology and is therefore an apolitical and ahistorical basic truth[8] that could be used 'as a matter of motivated compliance with (…) a legitimate order'.[9]

This dichotomous sex and gender order based on presumed biological roots has established a double hierarchy: one internal hierarchy between female and male, where – as described since the first wave of feminism – the man is in charge of the public sphere and the woman is relegated to the private sphere due to her reproductive function;[10] and one external hierarchy toward anyone who does not fit within this framework, such as intersex and non-binary people, who are rendered invisible by a legal order that does not recognise their existence and redirects them on a legal and often even medical level to the female or male category.[11] This contribution will focus on the latter form of hierarchy and on the breach of rights it brings about.

---

5 The latest reform of the International Classification of Diseases (ICD 11), carried out in 2018 and approved by the World Health Assembly on May 2019, codes variations of sex characteristics by describing them as 'disorders of sex development': a highly contested terminology, as it is perceived by the intersex social movement to contribute to the pathologisation and medicalisation of intersex variations. M. Carpenter, 'Intersex Variations, Human Rights, and the International Classification of Diseases', (2018) 20(2), *Health and Human Rights Journal*, pp. 205–214.

6 Until the latest reform of the ICD, trans persons, whose gender identities do not correspond to their sex assigned at birth, were classified under the chapter on Mental and Behavioral Disorders. The new ICD 11, which will come into effect on 1 January 2022, will for the first time depathologise the trans-related categories by including them under Chapter 17 on Conditions Related to Sexual Health.

7 L. Renre, 'Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law', (1997) 5, *American University Journal Of Gender & the Law*, pp. 343–351.

8 D. Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*, South End Press, New York 2011.

9 H. Garfinkel, *Studies in Ethnomethodology*, Prentice Hall, New Jersey 1967, p. 122.

10 U. Lembke,'Sexualität in der Öffentlichkeit. Zwischen Konfrontationsschutz und Teilhabe am öffentlichen Raum', in U. Lembke (ed.), *Regulierungen des Intimen. Sexualität und Recht im modernen Staat*, Springer Fachmedien, Wiesbaden 2017, pp. 271–294.

11 In the case of children with VSC, the 'invisibilisation' on the legal level is often accompanied by the medical erasure of intersex traits through early masculinising or feminising surgeries. M. Balocchi, 'The Medicalization of Intersexuality and the Sex/Gender Binary System: A Look on the Italian Case', (2014) 6(1), *LES Online*; D. Crocetti, *L'invisibile intersex. Storie di corpi medicalizzati*, Edizioni Ets, Pisa 2013.

Starting by looking at some Member States' court rulings to provide an overview of how the binary sex and gender system has been framed as pertaining to the Western legal and public order, the aim of this contribution will be to analyse and discuss how, recently, German and Austrian judges and lawmakers have assessed the requests for recognition of people who felt permanently and unambiguously not to belong either to the female or the male gender, and were born with a variation of sex characteristic (VSC).

## 2. PREVIOUS RELEVANT COURT RULINGS

Notwithstanding the existence of a consistent number of people who could not be unambiguously assigned to the female and male categories (due to a missing alignment of the different sex characteristics that compose the biological sex of a person) and the existence of people who do not self-identify as female or male, a 'common sense' dichotomy in our Western society has been established, as stated by Kessler and McKenna.[12] This is based on the assumption that there are only two sexes, which are biologically/naturally given, and that all people, without exception, belong to one or the other and identify with it. Apart from the nominal number of cases in which a request to obtain the recognition of one's sex and gender beyond that of female or male has been brought in front of the courts of the European States, this deeply rooted 'common sense' is found in some court rulings that have stressed the existing strong connection between a binary sex and gender system and the national public and legal order.

### 2.1. THE PUBLIC ORDER ARGUMENT

Although the concept of public order is complex and has many different meanings, it is, however, possible to distinguish two main interpretations. The first sees public order as a product of an ideal and regulative conception. It represents the unitary and coherent system of political and ethical values and principles, the compliance with and implementation of which are essential for the existence of a certain legal order and for the achievements of its essential aims.[13] These basic legal values that characterise a country's legal order are used, at the international level, to decide whether judicial decisions or even legal principles and rights of such a country should be recognised in another.

12 J. S. Kessler and W. Mckenna, *Gender: An Ethnomethodological Approach*, University of Chicago Press, Chicago 1978.

13 G. Paoli and G. Zanobini, *Ordine Pubblico*, Enciclopedia Italiana, 1935.

This evaluation will include the consideration of the extent to which they are compatible with the other country's fundamental principles and values. This concept was first established in the Napoleonic Code and has been subsequently adopted by several other national codes[14] and considered by international conventions as a legitimate justification for the limitation of the individual's rights.[15] The second meaning of public order is used especially in criminal law, and it represents the totality of conditions that assure the security and safety of all citizens.

The first meaning of public order has often been used in relation to issues concerning family law, such as the legitimacy of marriages in cases of legal change of sex, same-sex marriages celebrated abroad and adoptions made by same-sex couples abroad.[16] In all three scenarios, the courts' reasoning has been based on the *imitation naturae* criterion. The argument has consistently been that the spouses need to be of the opposite sex (i.e. one male and one female), as this is, so to say, a key naturalistic pre-condition of the very existence of marriages and of the adoptive framework.[17]

However, reference to the concept of public order can even be found in a case, brought before a French court, that is very similar to those assessed by the German and Austrian Constitutional Courts under review in this contribution. The French case[18] involved a person born with an '*ambiguïté sexuelle*', who was registered as male on the birth certificate but did not feel to belong either to the female or male gender. The applicant therefore requested the change of the entry on the birth certificate from 'male' to '*neutre*' or '*intersexe*'. In 2015, the Court of Tours affirmed that with regard to the requested change:

> … there are no legal obstacles relating to the public order in that the demonstrated rarity of the situation of the claimant does not call into question the ancestral notion of the dichotomy of sex, nor is there any intention, as perceived on the part of the judge, to create a 'third sex', which would go beyond the judges' mandate, but it would just be an acknowledgement of the impossibility, in this case, to redirect the

---

14 W. A. Bewes, 'Public Order (Ordre Public)', (1921) 37, *Law Quarterly Review*, p. 315.

15 Such as Art. 29 of the Universal Declaration of Human Rights; Art. 12, 19, 21, 22 of the International Covenant on Civil and Political Rights; Art. 8 of the Covenant on Economic, Social and Cultural Rights.

16 B. Nascimbene, *Divorzio, Diritto Internazionale Privato e dell'Unione Europea*, Giuffrè, Milano 2011; M. Dogliotti, 'I due padri tra ordinanza di rimessione e sezioni unite della Cassazione', (2019) 2, *Genius*, pp. 38–48; E. C. Raffiotta, '*Matrimonio, famiglia e unioni tra persone dello stesso sesso: quali confini nelle decisioni della Corte di Strasburgo*?', in L. Mezzetti and A. Morrone (eds.), *Lo strumento costituzionale dell'ordine pubblico europeo*, Giappichelli, Torino, 2011, pp. 323–338.

17 Tribunale per i Minori di Bologna, Ordinanza di remissione, 10.11.2014. F. Bilotta, 'How Far is Europe', (2015) 15, *Diritto & Questioni Pubbliche*, pp. 105–121. Italian Constitutional Court, 15.04.2010, n. 138.

18 Tribunal de Grand Instance de Tour, 20.08.2015, JurisData 2015-022399.

> claimant to one or the other sex and that the entry on the birth certificate is simply erroneous.[19]

The existence of people who do not fit within the female or male categories was considered an exception which not only does not endanger the public order, but which in some way confirms the binary rule. Nonetheless, the opening toward a non-binary sex classification system was considered problematic, and two years later, in 2016, the ruling was overturned by the Court of Appeal of Orléans.[20] The statement of the Advocate General of the Court asserted that:

> … in this State, although the fact of not recognising an intermediate sex is an interference of the public authority, as stipulated in Article 8 para.2 of the European Convention on Human Rights (ECHR), it seems to be a legitimate interference in that it:
>
> - is a product of law (in this case through "negative incompetence" to use a term of the constitutional jurisprudence),
> - pursues legitimate aims: a precise identification through criteria that reduce, as far as possible, uncertainty and interpretation; considers the male or female sex as factors to assign certain rights, in particular within the framework of public order such as filiation;
> - is proportional for the more important aims of the public order such as the coherence and the security of the citizens, by guaranteeing the identification of people.[21]

In the above case, it is possible to see both meanings of public order in action: ensuring the fundamental principle of distinction between female and male on which the entire set of legal rules is based, and ensuring security of the citizens by guaranteeing a reliable identification for all individuals.

## 2.2. THE LEGAL ORDER ARGUMENT

As seen in the previous section, the legal order – meaning the totality of norms of a certain democratic state – is rooted on the political and ethical values and

---

19 'Il a enfin estimé que la demande ne se heurtait 'à aucun obstacle juridique afférent à l'ordre public, dans la mesure où la rareté avérée de la situation dans laquelle il se trouve ne remet pas en cause la notion ancestrale de binarité des sexes, ne s'agissant aucunement dans l'esprit du juge de voir reconnaître l'existence d'un quelconque 'troisième sexe', ce qui dépasserait sa compétence, mais de prendre simplement acte de l'impossibilité de rattacher en l'espèce l'intéressé à tel ou tel sexe ed te constater que la mention qui figure sur son acte de naissance est simplement erronee'. Tribunal de Grand Instance de Tour, 20.08.2015, JurisData 2015-022399.

20 Cour d'appel d'Orléans, 22.03.2016, no 15/03281.

21 'En cet état, le fait de ne pas reconnaitre un sexe intermédiaire, constitutif d'une ingérence de l'autorité publique prévue à l'article 8-2 de la CESDHL apparaît légitime en ce que une telle

principles of a certain state. In this case, the underlying principle is the belief that both sex and gender are dichotomous, an assumption on which most legal orders of European Member States have been built, thereby differentiating rights and duties according to the assignment of the individuals to the female or male category. The legal order argument has been used by Austrian and German courts in cases concerning the legal gender recognition of transgender persons.

In 2008, the Austrian Constitutional Court stated that the: 'Austrian legal order and social life assumes that every human being is either female or male'.[22]

In the same way, and in a similar case, the German Supreme Court stated that:

> … in relation to the assignment of human beings to a sex/gender[23] category some basic experiences have been assumed to be obvious realities, these include: the fact that every human being has a sex/gender and that this could be and should be assessed within the category of female or male on the base of the physical sex characteristics of the person as these are immutable and innate. The fact that there are exceptions, such as in the case of intersex people, where the sex and gender categorisation could not be done so easily, should not be understood as a breach of these fundamental principles. They have not led to the adoption of any specific treatment into the general social life of these individuals, nor to the adoption of specific legal dispositions. The principle of the unambiguous and immutable assignment into the alternative category of female or male, is a self-evident prerequisite, not only for the whole social life but also for the whole legal order.[24]

---

ingérence: – résulte de la loi (ici par 'incompétence négative', pour employer une terminologie de la jurisprudence constitutionnelle); -poursuit des objectifs légitimes : précision dans l'identification des personnes au regard de critères prêtant le moins possible à interprétation ou incertitude ; prise en compte du sexe masculin ou féminin comme déterminant un certain nombre de situations de droit, notamment dans des domaines d'ordre public tels la filiation'. – est proportionnée au regard de la finalité majeure d'ordre public de cohérence et sécurité de l'état-civil garantissant une identification fiable des personnes', AVIS DE L'AVOCAT GÉNÉRAL, M D … C/PG près la cour d'appel d'Orléans, no. Q1617189.

AQ: Fixed "spaced endash". Please confirm.

22 *'Die österreichische Rechtsordnung und auch das soziale Leben gehen davon aus, dass jeder Mensch entweder weiblich oder männlich ist'*. Austrian Constitutional Court, B 1973/08, 03.12.2009, VfSlg 18.929/2009.

23 It ought to be noted that the German word '*Geschlecht*' means both sex and gender.

24 Bundesgerichtshof, IV ZB 61/70, 21.09.1971: 'Bei der Einordnung der Menschen in die Kategorien der Geschlechtlichkeit sind bislang gewisse Grunderfahrungen als selbstverständliche Gegebenheiten angenommen worden: Außer der Erkenntnis, daß es keine Geschlechtslosigkeit gibt, sondern daß jeder Mensch als geschlechtliches Wesen in die alternative Kategorie "männlich" – "weiblich" einzuordnen ist, ist dies die Erfahrung, daß das Geschlecht eines Menschen auf Grund körperlicher Geschlechtsmerkmale bestimmbar und auch zu bestimmen und ihm angeboren, unwandelbar ist. Gelegentlich auftretende Schwierigkeiten bei der Geschlechtseinordnung von Zwittern können nicht als Durchbrechung dieser Grundsätze verstanden werden. Sie haben weder zu einer besonderen Behandlung dieser Menschen im allgemeinen Lebensbereich noch zu einer speziellen rechtlichen Regelung ihrer Belange geführt (vgl. Motive I, 26). Vielmehr durchzieht das

This was reaffirmed a few years later in another comparable case by the German Constitutional Court, which stated that the German 'legal order and social life are based on the principle that every person is either female or male, regardless of whether there are anomalies in the genital area'.[25]

## 3. CASES BEFORE THE GERMAN AND AUSTRIAN CONSTITUTIONAL COURTS

The German and Austrian judges assessed people's requests to obtain a positive entry on birth certificates that differs from that of female and male. Both the German and Austrian Constitutional Courts analysed whether the respect of the individual's fundamental rights implies the recognition of sex/gender differing from female and male – an analysis they carried out by considering the legal and public order arguments, such as the coherence and certainty of law and security purposes, used to justify the need to have only two sex and gender categories.

### 3.1. FACTS BROUGHT BEFORE THE COURTS

In the German case,[26] the applicant, assigned as a newborn to the female sex and registered on the birth certificate as such, had an atypical number of chromosomes (Turner syndrome)[27] and felt 'permanently and unambiguously' (*eindeutig und dauerhaft*) not to belong either to the female or the male gender. The claimant therefore asked the registration office to modify the birth certificate by replacing the entry 'female' with that of 'inter/diverse' or, alternatively, only with 'diverse'. The request was denied on the grounds that in line with Article 21 *Personenstandsgesetz* (*PStG*), it is only possible to be registered as female or male.

---

Prinzip der eindeutigen und unwandelbaren Einordnung des Menschen in die alternative Kategorie 'männlich' – 'weiblich' als selbstverständliche Voraussetzung nicht nur das gesamte soziale Leben, sondern auch die gesamte Rechtsordnung'.

25 'Dabei geht unsere Rechtsordnung und unser soziales Leben von dem Prinzip aus, daß jeder Mensch entweder "männlichen" oder "weiblichen" Geschlechts ist, und zwar unabhängig von möglichen Anomalien im Genitalbereich', Bundesverfassungsgericht, 1 BvR 16/72, 11.10.1978.

26 Bundesverfassungsgericht, 1 BvR 2019/16, 10.10.2017.

27 This is one of the at least 40 variations of sex characteristics included in the umbrella term 'intersex'; O. Hiort, 'I-03 DSDnet: Formation of an Open World-Wide Network on DSD', (2013), *Proceedings of the 4th International Symposium on Disorders of Sex Development*, p. 13. Besides the term 'intersex', there are also other terms that refer to the same phenomenon. For further information about the ongoing debate concerning the terminology, see M. Balocchi, 'Intersex. Dall'ermafroditismo ai 'Disturbi dello Sviluppo Sessuale", (2012) 29, *Zapruder. Il Nome della Cosa. Classificare, Schedare, Discriminare*, pp. 76–84.

The German civil status office put forward as one of the reasons for the refusal that the: ' lawmaker has opted for a binary sex and gender order'.[28]

The only existing alternative to the female and male positive entries, as suggested by the registration office to the claimant, would be to leave the entry blank on the birth certificate, according to Article 22, paragraph 3 of the above law, as modified in 2013.[29]

The same position was expressed in all the following levels of judicial control,[30] which dismissed the claimant's actions against the registration office's rejection. The claimant appealed to the German Constitutional Court through a procedure called *Verfassungsbeschwerde*, by alleging that the civil status law, in particular, the existence of just two positive entries on birth certificates, was incompatible with Articles 2 and 3 of the German Constitution, which protect the right to personal identity and the right to be free from discrimination.[31]

The Austrian case concerned similar facts to the German one: a person born with a VSC was registered in the birth certificate as male, but since

---

28 ‚*Der Gesetzgeber habe sich für eine binäre Geschlechterordnung entschieden*'. The fact that the civil status office affirmed that the German ' lawmaker has opted for' is interesting with a view to the history of German civil status law. The Allgemeine Landrecht für die preußischen Staaten (ALR) of 1794 in Art. 19 provided that: 'at the birth of a *zwitter* (a child that could not be assigned unambiguously to the male or female sex) parents decide which gender to attribute to them'. Art. 20 ALR stated further that: 'after the age of 18 such people have the right to decide freely to which gender they belong'. However, in 1875, with the introduction of the law about the civil status and marriage certification (Gesetz über die Beurkundung des Personenstandes und die Eheschließung), the ALR disappeared. The German lawmaker affirmed in the draft law of the Gesetz über die Beurkundung des Personenstandes und die Eheschließung that the existence of *zwitter*s was contrary to the contemporary scientific knowledge, for which there is no such thing as a sexless person, or one with a combination of sexes: there are only females and males. In this sense, it is possible to say that the German legislator opted for a binary sex and gender system. U. Klöppel, *XXOXY ungelöst. Hermaphroditismus, Sex und Gender in der deutschen Medizin. Eine historische Studie zur Intersexualität*, Transcript Verlag, Bielefeld 2010, p. 274.

29 Art. 22, para. 3 of the Civil Status Act was introduced in Germany after the concluding observation of 2009 of the Committee on the Elimination of Discrimination against Women (CEDAW/C/DEU/CO/6, 2009) and the statement of the German ethical committee that expressed the necessity to amend the German civil status law in order to protect the rights of intersex people, including the right to have a fair treatment by law (Deutscher Ethikrat, *Intersexualität, Stellungnahme*, Deutscher Ethikrat, Berlin 2012). The solution adopted by the German lawmakers has been interpreted in two ways – a 'soft' way and a 'hard' way – namely, as merely option or as a specific duty to leave the sex entry blank where a newborn could not be unambiguously assigned to the male or female sex. S. L. Gössl, 'Eintragung im Geburtenregister als "Inter" oder "Divers"', (2015) 6 *Das Standesamt*, pp. 171–174; T. Helms, 'Personenstandsrechtliche und Familienrechtliche Aspekte der Intersexualität vor dem Hintergrund des neuen §22 Abs. 3 PStG', in I. Götz, I. K. Schwenzer, K. E. Seelmann and J. Taupitz (eds.), *Familie – Recht – Ethik, Festschrift für Gerd Brudermüller zum 65. Geburtstag*, Beck, Munich 2014, pp. 301–309.

30 Amtsgericht, 85 III 105/14, 13.10.2014; Oberlandesgericht, 17 W 28/14, 21.01.2015; Bundesgerichtshof, XII ZB 52/15, 22.06.2016.

31 Bundesverfassungsgericht, 1 BvR 2019/16, 10.10.2017.

infancy, the person felt that they did not belong to the female or male gender. The claimant thus asked the registration office to replace the entry 'male' with that of 'inter', '*anders*' ('different'), 'X' or 'indeterminate'. When the registration office gave no answer, the person presented a formal complaint to the Administrative Court of Upper Austria. This court rejected the complaint in 2016, asserting that the claimant had no right to obtain a positive entry on the birth certificate giving expression to the fact that the person is not to be assigned to the female or to the male sex/gender, and adding that 'the entire Austrian legal system proceeds on the principle that every human being is either female or male'.[32]

Against the alleged violation of their constitutional rights by the Administrative Court's decision, the claimant presented the case in front of the Austrian Constitutional Court, which, on 14 March 2018, decided to examine of its own motion the constitutionality of the civil status disposition. This procedure is foreseen by Article 140 of the Austrian Constitution, which provides that the Constitutional Court may assess on its own motion the constitutional legitimacy of a national legal disposition that is the object of a pending case before itself. In this case, the Austrian Court was concerned that the current civil status law was not compatible with Article 8 of the European Convention on Human Rights (ECHR).[33]

### 3.2. THE COURTS' JUDGEMENTS: A BALANCE BETWEEN PRIVATE AND PUBLIC INTERESTS

In its 2017 ruling, the German Constitutional Court underlined that the sex and gender of a person, in line with well-established jurisprudence, are fundamental and very intimate elements of personal identity.[34] Article 2 of the German Basic Law protects the free development of the personal identity of every individual, irrespective of their sex and gender, with the purpose – if read in conjunction with Article 1, paragraph 1 of the German Basic Law, which concerns the duty to respect and protect human dignity – to 'ensure to everyone an autonomous sphere of private life for the development and maintenance of their individuality'.[35]

---

32 Landesverwaltungsgericht Oberösterreich, LVwG-750369/5/MZ/MR, 05.10.2016.

33 The European Convention of Human Rights (ECHR) has constitutional status, and the rights enshrined in it are constitutionally guaranteed rights within the meaning of Art. 144 and Art. 144a *Bundes-Verfassungsgesetz* (B-VG). Their protection is of responsibility of the Constitutional Court. Verfassungsgerichtshof, U 466/11, 14.03.2012.

34 Bundesverfassungsgericht, 1 BvL 3/03, 06.12.2005; 1 BvL 1, 12/04, 18.07.2006; 1 BvL 10/05, 27.05.2008; 1 BvR 3295/07, 11.01.2011.

35 *'Sichern jedem Einzelnen einen autonomen Bereich privater Lebensgestaltung, in dem er seine Individualität entwickeln und wahren kann'.* ' U. Di Fabio, *Grundgesetz*, in T. Maunz and G. Dürig (eds.), Art. 2 Rn. 1-247, Beck, Munich 2019.

For the court, the right to freely develop and maintain one's self-determined gender identity, which is a core element of a person's individuality, protected under Article 2, has to be enjoyed by everyone, whether they identify in a permanent and unambiguous way as woman, man, as neither or as both.

The Austrian Constitutional Court applied the right to respect for private life[36] protected under Article 8 ECHR. For this purpose, the Austrian Court affirmed that the concept of gender identity, which, according to a long-standing jurisprudence of the European Court of Human Rights (ECtHR), was included in the notion of 'private life' as a very intimate aspect of a person's identity,[37] is not limited to persons who identify as woman or man.

Therefore, as we see, the gender identity of people who do not identify as women or men is protected both under Article 2 of the German Basic Law and Article 8 of the ECHR.

The lack of a further positive entry on birth certificates that differs from the gender binary, which forces people to be categorised as female or male even if this does not correspond to either objective data (the claimants have a VSC) or subjective data (their gender identity), constitutes an interference with their right to freely express and develop their personal identity. Such interference has several consequences, because, with the act of registering and displaying on official documents an individual's sex/gender, this *datum* becomes a constitutive element of someone's personal identity, and even a foundational aspect of the 'position of a person within the legal system'. In this way, this personal element pertaining to the self-perception of an individual assumes an important effect on the person's legal position, including therefore the rights and duties that the person will hold. Furthermore, this aspect notably affects how the person will be perceived by others. The inconsistency, incongruence and confusion that may derive from the use of documents that do not correctly reflect the person's identity could have many severe effects on the concerned individual's social, personal and legal life, as such individuals may be exposed to several forms of discrimination and ill treatment.[38] Therefore, people have a

---

36 The concept of private life has been described by the European Court of Human Rights (ECtHR) as a 'broad term', a 'living concept', part of the living instrument nature of the ECHR that has to be 'interpreted in the light of present-day conditions'. ECtHR, *Knecht v Romania*, no 10048/10, 02.10.2012; A. Mowbray, 'The Creativity of the European Court of Human Rights', (2005) 5(1), *Human Rights Law Review*, p. 60.

37 ECtHR, *Van Kück v Germany*, no 35968/97, 12.06.2003; ECtHR, *Schlumpf v Switzerland*, no 29002/06, 09.01.2009; ECtHR, *Y.Y. v Turkey*, no 14793/08, 24.08.2016; ECtHR, *A.P., Garçon and Nicot v France*, nos 79885/12, 52471/13 and 52596/13, 06.04.2017.

38 This has been well described in a recent ruling of the ECtHR which – for the first time – condemned Italy on the basis of Art. 8 ECHR due to the fact that the applicant was obliged to live with a discrepancy between the applicant's physical appearance and their personal, social and legal identity for an unreasonably long time, a situation that had exposed the claimant to severe forms of humiliation, vulnerability and anxiety; ECtHR, *S. V. v Italy*, no 55216/08, 11.10.2018.

legitimate interest in having their individual right to personal identity respected by giving expression to the fact that they do not fit within the binary sex and gender system. The courts thus considered whether the interference with this fundamental right to personal identity is outweighed by public interests on the basis of the proportionality principle. As seen previously in both the German and Austrian cases, among the main arguments to refuse the amendments of the birth certificates were that the civil status law provides only two positive entries, the Austrian and German legal orders are in fact binary and that public order rests on the idea that all human beings are either female or male.

First, both courts assessed whether there is any obligation to provide only two sex/gender entries. The German Constitutional Court recognised that there is no prescription that the sex/gender of a person has to be dichotomous and that this *datum* has to be registered for civil status purposes. The court further stressed that the fact that anti-discrimination law only mentions 'woman' and 'man' and the fact that previous rulings of the German courts affirmed that the German 'legal system and (…) social life were based on the principle that every person is either "male" or "female" sex' must be seen in light of the prevailing scientific knowledge and social and cultural understanding of the concepts of sex and gender in place at the time in which those rulings and laws were released.[39] Similarly, the Austrian Constitutional Court affirmed that art. 2 para. 2 *PStG* 2013, in its mention of '*Geschlecht*' (a very broad term as it means both sex and gender), not only does not prescribe that the sex/gender markers for the registration of this personal *datum* should be limited to the terms 'female' or 'male', but is also easily interpretable as inclusive of gender identities different from 'female' and 'male'. Both the German and Austrian courts recognised therefore that the reference to 'woman' and 'man', as well as the existence of just two positive entries, are not imposed by the respective legal orders, because neither the countries' constitutions nor any other legal provision including those on the civil status:

- prescribe the existence of just two sex/gender categories
- provide any definition of what should be understood as sex or gender of a person
- establish the criteria for the registration of the sex/gender of a child
- explicitly prohibit the introduction of further sex/gender entries.[40]

[39] This interpretation is sustained by the aforementioned comment to the German law reform of the civil status in 1875, where it was affirmed that – in line with the current medical science, there are no people without or with both sexes (in that period, sex and gender were not differentiated). As for as people with VSC (*zwitters*), they are seen as deformed females or deformed males.

[40] Bundesverfassungsgericht, 1 BvR 2019/16, 10.10.2017, para. 50.

Secondly, the courts assessed the issues concerning the fact that both legal orders provide gender-specific rights and that in both countries, the sex/gender *datum* is used for public order purposes, namely, to assure security by permitting the identification of all individuals.

The German Constitutional Court acknowledged that the registration of an individual's sex and gender is aimed at contributing to the public interest, so as to render the identification and assignment of duties and rights to that individual certain and unambiguous. However, the court noted that this does not exclude that other sex/gender options besides the 'traditional' ones could be introduced into the civil status registers. The German court further stressed that the introduction of an additional sex/gender entry would not create greater hardships or complications than already done by the introduction of Article 22 *PStG* in 2013. The introduction of this article, which allows individuals to leave the sex/gender entry blank, has so far not resulted in the adoption of any provision that clarifies which rights and duties are held by a person without any sex/gender entry. This should be considered, while bearing in mind that the formal and technical efforts that the introduction of a further option would require should nonetheless be expended, since they are aimed at halting the interference with a fundamental right that results from the lacking legal recognition of one's own gender identity.

The Austrian Constitutional Court, similarly, recognised that the registration of an individual's sex/ gender serves the principles of stability, consistency and reliability of the civil status registers, with an eye to first guaranteeing the public interest to legal certainty, and second, but just as importantly, to ensuring correctness of the means of identification and of the assignment of duties and rights. However, the court affirmed that the repercussion that the recognition of a gender identity different from 'female'/'male' would have on the legal order, and the eventual adjustments that such a reform would require, would not be serious enough to justify such a grievous interference with the individual's rights. Indeed, the court further stressed that the presence of legal dispositions that 'rely only on the traditional female and male gender, do not affect from the outset the right of persons to maintain their individual gender identity if this is different from the female and male one'.[41]

Therefore, both the courts interpreted public interests linked to the public and legal order – namely, the identification and allocation of rights and duties – as not proportionate to the justification of an interference with the individual's fundamental right to personal identity. The required adjustments of legal provisions that rely on the sex/gender of persons and the financial and bureaucratic efforts that would be necessary if further entries are to be introduced have not been considered as sufficient to outweigh the fundamental

41 Verfassungsgerichtshof, G 77/2018-9, 15.06.2018, para. 35.

right to obtain legal recognition of one's own gender identity. Yet, as already noted by the ECtHR in the case of *Goodwin v United Kingdom*, when striving to protect the individual's right to recognition of their self-determined gender identity, 'society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in the sexual identity chosen by them at great personal cost'.[42]

To conclude, the Austrian and German Constitutional Courts have overturned the previous legal approach, affirming that the limitation of part of the individual's rights to autonomy and self-determination, protected on a national and international level, within such intimate aspects of their personal identity, is not outweighed by any public interest that could be pursued in a proportionate, adequate and necessary manner through dispositions of civil status.

## 4. IMPLEMENTATION OF THE COURTS' RULINGS: THE INTRODUCTION OF A (CONTROVERSIAL) THIRD OPTION

The German and Austrian Constitutional Courts established the right of individuals to have their sex and gender recognised even if it goes beyond the female/male dichotomy. The German Constitutional Court ruled that the German lawmaker must amend the existing civil status law by the end of 2018, while the Austrian Constitutional Court stated that – since there are no legal provisions that establish the existence of just two entries – it will not be necessary to amend the civil status law, as it is sufficient to make a constitutional interpretation of the civil law provisions.

In compliance with the Constitutional Courts' rulings, there were at least two possible alternatives: abolishing all the civil status law requirements to register the sex/gender of a child at birth,[43] or introducing further entry options. In both the German and Austrian cases, the chosen solution was the latter. A brief mention of the option of abolishing the sex/gender registration altogether was made in the German draft law, but that was met with the counterargument

42 ECtHR, *Goodwin v United Kingdom*, no 28957/95, 11.07.2002, para. 91.

43 The German Constitutional Court proposed, for example, the carrying out of research to evaluate if there is still an overall need to register the sex/gender of individuals, given that the legal provisions that assign rights and duties on the basis of the sex or gender of a person are increasingly diminishing and there are other security devices for identification purposes, such as fingerprints or retinal and facial scans. For an examination of this option, see L. Holzer, 'Non-Binary Gender Registration Models in Europe', *Report on third gender marker or no gender marker options*, ILGA-Europe, 2018; N. Althoff, G. Schabram and P. Follmar-Otto, *Gutachten: Geschlechtervielfalt im Recht, supra* note 40.

that many legal provisions rely directly or indirectly on an individual's legal sex/gender.[44] Such provisions, as shown by the report of the German Institute for Human Rights,[45] abound in several legal areas, such as civil status law, family law, law of descent and labour law. Surely, the abolishment of the sex/gender registration would therefore require meaningful reforms in all these legal areas in order to render these regulations more gender neutral. Furthermore, this solution is seen with a critical eye both from feminist and transgender scholars and activists. From a feminist perspective, in a society which is still markedly patriarchal, sex and gender categories are important tools to counter sex- and gender-based discrimination and inequality,[46] while, from the transgender viewpoint, official documents attesting the gender identity of a transgender person have an important role in the affirmation of identity. They are the product of long-lasting advocacy work that aimed to render transgender persons visible in the eyes of the law and are thus a crucial tool to substantiate their identity and rights by contributing to protecting them against transphobic violence.[47] In this context, it is thus likely that Germany and Austria, besides exhibiting a general unwillingness to completely dismiss their gendered legal system, would not want to incur the issues and consequences related to abolishing the sex/gender registration altogether, especially since they would be the first countries worldwide to take such a step.

The law enacted by Germany in December 2018, with which Article 22 *PStG* was modified, provided a further option on birth certificates (aside from the female, male, and the blank entry, for cases in which a child cannot be assigned unambiguously to the female or male sex): the option 'other' *('divers')*.[48] Furthermore, it was provided under Article 45b *PStG* that the request to change the sex/gender entry to that of '*divers*' may be filed either in person by the individual in a later stage of life or by the legal representative (if the

---

44 Referentenentwurf des Bundesministeriums für Inneres, für Bau und Heimat Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben, p. 7, available at https://www.bmi.bund.de/SharedDocs/downloads/DE/gesetztestexte/gesetztesentwuerfe/entwurf-aenderung-personenstandsgesetz.pdf?__blob=publicationFile&v=1, last accessed 08.06.2020.

45 Deutsches Institut für Menschenrechte (DIMR), *Gutachten: Geschlechtervielfalt im Recht. Status quo und Entwicklung von Regelungsmodellen zur Anerkennung und zum Schutz von Geschlechtervielfalt. Begleitmaterial zur Interministeriellen Arbeitsgruppe Inter- & Transsexualität* – Band 8. Berlin, January 2017.

46 J. Lorber, 'Using Gender to Undo Gender: A Feminist Degendering Movement', (2000) 1(1), *Feminist Theory* p. 90; D. Vade, 'Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People', (2005) 11(2), *Michigan Journal of Gender and Law*, pp. 277–278.

47 C. Hutton, 'Legal Sex, Self-Classification and Gender Self-determination', (2017) 11(1), *Law and Humanities*, pp. 64–81. A. J. N. Wipfler, 'Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents', (2016) 39, *Harvard Journal of Law and Gender*, pp. 540–542.

48 Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben, 18.12.2018.

person is under the age of 14), by simply presenting a medical certificate that attests the presence of a VSC. Similarly, in Austria, a statement of the Ministry of the Interior has introduced that when the medical professional is not able to make a medical sex assignment at birth, the entry on the birth certificate has to state 'open' (*offen*).[49] The grounds of this decision can be found in the reasoning of the Austrian Constitutional Court, which affirmed that it has to be possible for children to suspend their gender assignment until they are able to autonomously determine their belonging to a certain gender identity. In the statement of the Austrian Ministry of the Interior, it was stressed that perhaps the entry 'open' ought to be replaced as soon as possible with that of 'female', 'male' or '*divers*'. This latter option is available even for people who want to change their birth certificate in a later stage of life, as long as they provide a medical certificate attesting the presence of a VSC that 'from a medical point of view does not allow an unambiguous assignment to the female or male sex due to an atypical development of the biological sex',[50] which has to be approved by a multi-professional and interdisciplinary group of experts called 'VdG group'.

The introduction of a third option available only for people with a certified VSC raises concerns in relation to two main aspects: the developments that are occurring on international and European levels concerning non-binary legal gender categories and recognition procedures; and the rationale on which it is rooted.

## 4.1. DEVELOPMENTS AT INTERNATIONAL AND EUROPEAN LEVELS

It is interesting to note that by affirming the necessity of introducing further positive entries, the Constitutional Courts referred to the right of obtaining the recognition and respect of the person's gender identity. The Austrian and German legislators, however, failed to take this opportunity to implement a legal gender identity model based on the self-determination principle, in line with the emerging international consensus that 'a person's legal status

---

49 Verwaltungsangelegenheiten – Sonstige; Personenstandswesen Erkenntnis des VfGH vom 15. Juni 2018, G 77/2017-9, zu §2 Abs. 2 Z 3 PStG 2013 – Umsetzung zu Varianten der Geschlechtsentwicklung ('3. Geschlecht'), 20.12.2018, available at https://www.kommunalnet.at/fileadmin/media/Downloads/PDF/2019/Briefe/Drittes_Geschlecht_Empfehlungsschreiben_BMI.pdf (last accessed 21.04.2020).

50 'Unter dem hier zu Grunde gelegten Begriff der "VdG" ist die medizinisch nicht eindeutige Zuordnung einer Person zum männlichen oder weiblichen Geschlecht aufgrund einer atypischen Entwicklung des biologischen (chromosomalen, anatomischen und/oder hormonellen) Geschlechts zu verstehen', *supra*, note 49.

should not be based upon their sexed body'.[51] The new positive entry '*divers*' is indeed available only for people with a medically certified VSC. This has been confirmed by a recent decision of the German Federal Court of Justice that has clarified that Article 45b *PStG* is not available for those that have a 'only perceived intersexuality', meaning that the requirement to have access to this article is that a 'clear physical assignment to the female or male sex' must not be possible.[52] This not only erroneously suggests that only people with VSC may identify as 'woman', 'man', neither or both, but it also creates an unjustified difference in treatment on the ground of sex (characteristics) between people with VSC who do not identify as 'women' or 'men' and people without a VSC who do not identify as 'women' or 'men'. This creates a further discrimination on the grounds of sex (characteristics), and that is precisely what this civil status law reform was supposed to remedy. In its ruling, the German Constitutional Court indeed affirmed that the fact that women and men are able to register their self-identified gender, while people that fall outside the binary rule are prevented from doing so, creates an unequal legal treatment.

Furthermore, the solution is also in contrast with the emerging trend at both the international judicial[53] and legislative levels[54] toward the recognition of the right of all people who do not identify or fit within the binary sex/gender categories to obtain the registration of their gender identity.

Aside the *quid*, namely a third option available only for people with a certified VSC, even the *quomodo*, namely, the procedure to gain access to this third option, raises many concerns. The German and Austrian procedures seem indeed to be in contrast with the most recent reforms of the legal gender recognition procedures. Even if it is true that there is still no uniform legal gender recognition procedure at the European level, it is nonetheless possible to note a trend toward a de-medicalised and de-pathologised approach considering gender identity 'as one of the most basic essentials of self-determination', in line with the jurisprudence of the ECHR.[55]

Despite the fact that the majority of the European Member States still provide judicial legal gender recognition procedures that include medical

---

51 J. M. Scherpe, 'Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons', in J. M. Scherpe, A. Dutta and T. Helms (eds.), *The Legal Status of Intersex Persons*, Intersentia, Cambridge 2019, p. 212.

52 Bundesgerichtshof, XII ZB 383/19, 22 April 2020.

53 High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v Norrie*, Case No. S273/2013. Supreme Court of India, *National Legal Services Authority v Union of India and others*, writ petition (civil) No. 400 of 2012, with writ petition (civil) No. 604 of 2013, 15.4.2014.

54 Some countries, which include Canada, India, Nepal, Australia, Malta and some states within the US, such as Oregon, California and New Jersey, have already introduced a third option – 'X' – available for all people who do not identify as female or male.

55 ECtHR, *Van Kück v Germany*, no. 35968/97, 12.06.2003, para. 73.

requirements, such as surgical interventions, sterilising procedures, hormonal treatments and psychological diagnosis, the most recent reforms of these procedures show a trend toward the elimination of these requirements and the implementation of the self-determination principle in relation to the recognition of one's own preferred gender.[56] Denmark,[57] Ireland,[58] Malta,[59] Norway,[60] Belgium,[61] Luxembourg[62] and Portugal[63] all introduced straightforward administrative procedures that only require a self-declaration of the person at the registry office to obtain the legal recognition of their preferred gender. These procedures represent an implementation of the Resolutions n. 2048 of 2015[64] and n. 2191 of 2017[65] of the European Parliament Assembly and of Principle 31 of the Yogyakarta Principles *+10*,[66] that recommend the introduction of simple, quick and transparent administrative procedures for the legal recognition of an individual's preferred gender. The German and Austrian solutions seem to be in contrast with this trend and related recommendations: by requiring a medical certification, they not only reproduce the idea of intersex conditions as medical conditions, but they also exclude an application of the self-determination principle. Furthermore, by not abandoning the connection between the gender identity and the sex characteristics of an individual, they take no steps toward the disentanglement from a legal 'sex as gender' approach, which is among the main reasons why people have been pathologised, medicalised and allowed to obtain the recognition of their preferred gender only insofar as they had to adapt as much as possible their body to the 'opposite sex'.[67] This approach not only reflects the assumption that only two sex/genders exist, but even that there is a strong connection between the biological sex characteristics and the gender identity of a person. Both assumptions have been demonstrated to be erroneous by scientific developments and social reality that show the existence of a great sex and gender diversity, and that the gender identity of a person could not be predicted or deduced from the sex characteristics of

56 M. van den Brink and P. Dunne, *Trans and intersex equality rights in Europe – a comparative analysis*, European Union, Luxembourg 2018.

57 Amendment Act L182, 2014.

58 Gender Recogntion Act 2015.

59 Gender Identity, Gender Expression and Sex Characteristics Act 2015.

60 Legal Gender Amendment 2016.

61 Gender Recognition Act 2017.

62 Decree (XIII 3 105), 2018.

63 Decree (XIII 3 105), 2018.

64 Parliamentary Assembly, Discrimination against transgender people in Europe, Resolution 2048(2015).

65 Parliamentary Assembly, Promoting the human rights of and eliminating discrimination against intersex people, Resolution 2191(2017).

66 Yogyakarta Principles Plus 10; available at http://yogyakartaprinciples.org/principles-en/yp10/, last accessed 25.6.2020.

67 P. Dunne, 'Towards Trans and Intersex Equality', in J. M. Scherpe, A. Dutta and T. Helms (eds.), *The Legal Status of Intersex Persons*, Intersentia, Cambridge 2019, p. 237.

that person, as the gender identity solely belongs to the concerned individual's personal experience.[68]

The under-inclusiveness, re-pathologisation and maintenance of a conflation between sex and gender identity of both the German and Austrian solutions have been criticised and denounced by both scholars and activists.[69] On 2 June 2020, activists in Austria sent an open letter to the government signed by 64 organisations, demanding the implementation of a third option available to all, regardless of their sex characteristics, which should be obtained via a self-declaration submitted before the registry office.[70] The German Parliament was presented with two notable draft laws on the topic: one by the party *Fraktion Bündnis 90/Die Grünen*, which sought to 'repeal the transsexual law and introduce a self-determination law' (19/19755);[71] and one by the *Freie Demokratische Partei* (FDP), aiming to 'strengthen the sex/gender self-determination' (19/20048).[72] The two draft laws propose to review the third option and make it available to all individuals, to introduce a gender identity self-determination model for the legal gender recognition procedure and to prohibit surgical genital-modifying interventions on intersex children.

## 4.2. A (CONTROVERSIAL) RATIONALE

The answer to the question of why the German and Austrian lawmakers did not open up the third option to all people, regardless of whether they have a VSC, could potentially lie in the fact that the aim of this solution was not to reform

---

68 This was affirmed by the medical expert involved by the Court of Limburg in a case concerning a person with an intersex condition who asked to replace the entry 'female' on their official documents with that of 'gender can not be determined'. Court of Limburg, C/03/232248/FA RK 17-687, 28.05.2018.

69 See, for instance, G. Baars, 'New German Intersex Law: Third Gender but not as we want it', available at https://verfassungsblog.de/new-german-intersex-law-third-gender-but-not-as-we-want-it/, last accessed 8.6.2020; N. Althoff, 'Gender Diversity in Law: the German Pespective', in J. M. Scherpe, A. Dutta and T. Helms (eds.), *The Legal Status of Intersex Persons*, Intersentia, Cambridge 2018, p. 411. Die deutsche Vertretung der Internationalen Vereinigung Intergeschlechtlicher Menschen (IVIM) | Organisation Intersex International (OII Germany), *Stellungnahme zum Gesetzentwurf des des Bundesministeriums der Justiz und für Verbraucherschutz und des Bundesministeriums des Innern, für Bau und Heimat zur Neuregelung der Änderung des Geschlechtseintrags*, available at https://oiigermany.org/wp-content/uploads/2019/05/Stellungnahme_OII_Germany_Gesetzentwurf_5-2019.pdf, last accessed 9.6.2020.

70 Offener Brief zum 3. Geschlechtseintrag Salzburg, 2. June 2020, available at http://www.hosi.or.at/wp-content/uploads/2020/06/Offener-Brief-zum-dritten-Geschlechtseintrag_2020-06-02-1.pdf, last accessed 9.6.2020.

71 Selbstbestimmungsgesetz, Inneres und Heimat/Gesetzentwurf, 11.6.2020, available at https://www.bundestag.de/presse/hib/700376-700376, last accessed 26.6.2020.

72 Geschlechtliche Selbstbestimmung, Inneres und Heimat/Gesetzentwurf, 17.6.2020, available at https://www.bundestag.de/presse/hib/701358-701358, last accessed 26.6.2020.

the entire legal gender recognition procedures by replacing the legal sex-based approach with that of legal gender. It seems indeed that the intent was rather to acknowledge the existence of people who, due to their sex characteristics, could not be assigned to the female or male sex, and to contribute to putting a halt to not only their legal but even their medical heteronomous assignment to the female or male sex and gender.

Since the 1950s, after the adoption of the so-called Money Protocol,[73] intersex children started to be submitted early after birth, mostly within the first two years of life, to what has been called a 'corrective surgical operation', with the aim of 'fixing their sex' in order to ensure a gender-normative behaviour and appearance and restore a 'natural order of things'.[74] Infants with VSC, in particular those who presented an atypical appearance of their genitalia at birth, underwent and still undergo early surgeries that aim to 'normalise' the external aspect of their genitalia. The interventions are characterised by the creation of new sexual organs and the removal of those that are not in line with the sex/gender chosen by third parties (i.e. physicians and parents) for the child. They include, *inter alia*, gonadectomies, hysterectomies, hypospadias repairs, genitoplasties, clitoral reductions/recessions and vaginoplasties.[75] These interventions have long- and short-term consequences that have started to be documented and denounced by the intersex community in the 1990s.

Since the majority of these surgeries is not medically necessary, as they are not indicated to heal any urgent health issue and could be therefore often safely postponed to a later stage of life so that the children could be involved in the decision-making procedure and give their personal informed consent, these interventions have been declared by many international and European institutions as infringements of a child's right to bodily integrity and autonomy.[76] Yet so far, in Europe, only Malta[77] and Portugal[78] have introduced specific

---

73 J. Money and A. A. Ehrhardt, *Man & Women, Boy & Girl: The Differentiation and Dimorphism of Gender Identity from Conception to Maturity*, John Hopkins University Press, Baltimore 1972.

74 S. Kessler, *Lessons from the Intersexed*, Rutgers University Press, New Jersey 2008, p. 37.

75 I. Ismail and S. Creighton, 'Surgery on Intersex', (2005) 5(1), *Reviews in Gynaecological Practice,* pp. 57–64.

76 UN Special Rapporteurs on Torture Juan Mendez 2013 A/HRC/22/53 (2013); Council of Europe, *Children's right to physical integrity*, Resolution 1952, 2013; UN High Commissioner for Human Rights, *Human rights of intersex people*, Issue Paper, 2015; European Agency for fundamental rights, *The fundamental rights situation of intersex people*, 2015; Parliamentary Assembly of the Council of Europe, *Promoting the human rights of and eliminating discrimination against intersex people*, Resolution 2191, 2017.

77 'Gender Identity, Gender Expression and Sex Characteristics', Act no. XI of 2015, as amended by Acts XX of 2015 and LVI of 2016 and XIII of 2018.

78 Law No. 38/2018. This law has been criticised by some intersex associations, as the Portuguese parliament has missed the opportunity to ban such surgeries (https://www.stopigm.org/portugal-new-law-fails-to-protect-intersex-children/, last accessed 08.05.2020.

provisions concerning surgeries on intersex children. In 2019, the European Parliament thus asked the Member States to adopt measures to:

> … prohibit medically unnecessary sex 'normalising' surgery, sterilisation and other treatments practised on intersex children without their informed consent' and to ensure that 'except in cases where the life of the child is at immediate risk, any treatment that seeks to alter the sex characteristics of the child, including their gonads, genitals or internal sex organs, is deferred until such time as the child is able to participate in the decision, based on the right to self-determination and on the principle of free and informed consent.[79]

As there is a prevailing notion that the introduction of a further option on birth certificates may concur to lower the pressure experienced by care-givers to both legally and medically assign their children with intersex traits to the female or male sex/gender soon after birth,[80] it seems reasonable to conjecture that with the introduction of such an third option, lawmakers aimed to contribute to the reduction of the unnecessary and non-consensual interventions on intersex minors, which were explicitly addressed by the Austrian Constitutional Court. It is noteworthy that there is no evidence that amendments to civil status provisions have an impact on the performance of such cosmetic surgeries. In particular, there is no proof that a reform of civil status provisions concerning the registration of the sex/gender of children at birth would produce a decrease in sex-assigning interventions on intersex children. A study carried out in Germany after the introduction of the option to leave the sex entry blank in 2013 shows that between 2005 and 2016, there was no significant decrease in the number of surgical interventions on children with VSC under the age of 10.[81] A civil status reform that eases the burden of the binary sex and gender norm is nonetheless unlikely to contribute to the priority of the intersex human rights movement, namely, the eradication of non-therapeutic and non-consensual interventions, unless it is accompanied by a ban of such harmful practices.[82]

---

79 European Parliament, Resolution on the rights of intersex people (2018/2878(RSP)), 14 February 2019, available at http://www.europarl.europa.eu/doceo/document/TA-8-2019-0128_EN.pdf, last accessed 08.05.2020.

80 N. Dethloff, S. L. Goessl and S. Sucker, 'Registration of Intersex Persons, Medically Assisted Reproduction and Other Matters under Consideration', in M. F. Brining (ed.), *The International Survey of Family Law*, LexisNexis, Bristol 2017, p. 119; M. Van Den Brink, P. Reu and J. Tigchelaar, 'Out of the Box? Domestic and Private International Law Aspects of Gender Registration A Comparative Analysis of Germany and the Netherlands', 2015 17(2), *European Journal of Law Reform*, pp. 286–287.

81 J. Hoenes, E., Januschke, U. Klöppel et al., *Häufigkeit normangleichender Operationen 'uneindeutiger' Genitalien im Kindesalter, Follow Up-Studie*, Ruhr-Universität Bochum, Bochum 2019.

82 P. Dunne and J. Mulder, 'Beyond the Binary: Towards a Third Sex Category in Germany?', (2018) 19(3), *German Law Journal*, p. 641.

Some scholars and intersex activists argue that the introduction of a third option – called 'diverse' or 'X' – reserved for intersex people only could eventually even increase the likelihood of parents giving their consent to such medical interventions, so as to avoid the 'othering' of their children caused by their assignment to a less well defined third option,[83] which is intended to ease rather than counter the stigmatisation and discrimination toward children with VSC. This problem could be solved, as already proposed, by adopting a legal status model that postpones the registration of this *datum* to a later stage of life for everybody, allowing all individuals to self-determine their legal gender.[84]

## 5. THIRD OPTIONS BEYOND NATIONAL BORDERS

In addition to the specific issues raised by the solution chosen by the German and Austrian governments, the introduction of a third option, even if accessible for all, may create certain problems. Even if the national legal orders would be changed to be inclusive toward people that belong to the third category, by defining which duties and rights this further category would have in gendered legal areas such as marriage and parenthood, in order to avoid the extra risk of creating a right-less third category, a third option for all legal purposes could raise issues under the international public order.[85] For example, would an Austrian citizen registered as '*divers*' be able to marry in a country that does not recognise a third option, such as Italy?

Such a case would be regulated under international private law, and probably an Italian court, before assessing whether a person registered as '*divers*' would be able to marry, would examine whether the status '*divers*' is compatible with the Italian public order, in line with the international public order principles as described in section 2.2.[86] The scope of the international public order principle in the evaluation of whether foreign decisions or even legal principles and rights could obtain legal recognition in a country has been recently clarified on

---

83 M. Carpenter, 'The "Normalization" of Intersex Bodies and "Othering" of Intersex Identities in Australia', (2018) 15(7), *Journal of Bioethical Inquiry*, pp. 487–495; F. Garland and M. Travis, 'Legislating intersex equality: building the resilience of intersex people through law', (2018) 38, *Legal Studies*, pp. 587–606.

84 N. Althoff, 'Germany (Gender diversity in Law)', in J. M. Scherpe, A. Dutta and T. Helms (eds.), *The Legal Status of Intersex Persons*, Intersentia, Cambridge 2019, pp. 393–413.

85 An in-depth discussion can be found in T. Van Den Brink, P. Reuss and J. Tigchelaar, 'Out of the Box? Domestic and Private International Law Aspects of Gender Registration: A Comparative Analysis of Germany and the Netherlands', (2015) 17(2), *European Journal of Law Reform*, pp. 283–293.

86 S. L. Goessl, 'Intersexuelle Menschen im Internationalen Privatrecht', (2013) 10, *Das Standesamt*, pp. 301–305.

several occasions by Italian courts on issues concerning the transcriptions of birth certificates of children born abroad through medically assisted procreation, where same-sex couples are registered as parents. These transcriptions have been refused both by Italian civil status offices and lower courts, by affirming that such documents are contrary to the public order, 'which protects the sets of principles and values considered as fundamental by the legislators, such as the fundamental requirement of the difference of sex of the parents for the recognition of a parent-child relationship towards a third person'.[87]

The judges of the Italian Court of Cassation stressed on several occasions that the meaning of public order has changed. Originally, it was conceived as 'the expression of a limit concerning the national public order, for the protection of certain conception of moral and political order, that stood out particularly in the state framework and used by the ordinary legislator as directive criteria'.[88] Perhaps, with the growing openness toward the international community and external legal systems, the judges began to assess the conformity of a foreign act or judicial decision with the local public order not by considering whether it conforms to one or more internal laws, but by evaluating whether it is in contrast with the 'need to protect the fundamental human rights, drawn from the Constitution, the founding treaties and fundamental charter of the European Union, as well as of the European Convention of Human Rights'.[89] The united section of the Court of Cassation indeed remarked that the 'public order is no longer to be understood as the set of fundamental principles of the national community in a certain historical moment',[90] but the 'distillate of the system of supranational protections retrievable from the Community legislation and the ECHR'.[91]

Considering the issues analysed above in this context, and given that in Italy, civil status law also does not prescribe the existences of only two positive sex markers and does not provide a description of the criteria to follow for the registration of the sex/gender, the acceptance of the status '*divers*' could be resolved in a similar way as in the cases brought before the German and Austrian Constitutional Courts, namely, by affirming that it would not be in contrast with the internal laws. Furthermore, the fact that the Austrian and German Constitutional Courts have considered the lack of a positive entry

87 Italian Court of Cassation, sez. I, n.19599, 30.09.2016.

88 Italian Court of Cassation, sez. I, n.19599, 30.09.2016.

89 Italian Court of Cassation, sez. I, n.19599, 30.09.2016; n. 1302, 21.01.2013; n. 27592, 28.12.2006; n. 22332, 26.11.2004; n. 17349, 06.12.2002.

90 G. Vettori, 'L'evoluzione dei rimedi nel dialogo fra legge e giudice', in G. Conte and S. Landini (eds.), *Principi, regole, interpretazione. Contratti e obbligazioni, famiglie e successioni. Scritti in onore di Giovanni Furgiuele*, Universitas Studiorum, Mantova, 2017, p. 597.

91 Italian Court of Cassation, n. 1302, 21.01.2013: 'il distillato del sistema di tutele sovranazionali ricavabili dall'ordinamento comunitario e dalla Cedu'.

of a sex/gender different from the female and male one as an infringement of fundamental rights protected even under international law, in particular Article 8 EHCR, could be used to affirm that the recognition of the status '*divers*' is in compliance with the need to protect fundamental human rights. However, even if the status '*divers*' were to be declared not to be in contrast with the Italian public order, this would not mean that the person would be able to marry in Italy. In Italian law, marriage is conceived as a traditional institution rooted in the idea of only two sexes/genders. The individual will, therefore, probably have to be assigned to the female or male sex/gender by means of transposition in order to enjoy the right to marry.[92]

## 6. CONCLUSION

Sex and gender identities are two different and autonomous aspects of a person's identity. Every person, irrespective of their sex characteristics, may self-identify as woman, man, both or neither. The fact that most Western legal orders rest on the principle that every person is either female or male has to be understood as a product of a certain historical, social and scientific knowledge, which has been overturned by recent scientific evidences showing that both sex and gender identity can be situated in a continuum and not in discrete categories and that they do not necessarily correspond to each other. It seems necessary, therefore, that the legal approach align with these scientific facts, in order to avoid the risk described already in 1996 by the Advocate General Tesauro, that law 'imposes an overturned point of view and assumes a static rule'.[93]

The dynamic nature of law, through the activity of lawmakers and judges, gives law the opportunity to be adapted to the evolving conceptions of two fundamental elements of a person's identity, namely, their sex and gender, which are protected, as recognised by the German and Austrian Constitutional Courts, under national and international law.

Indeed, the existence of a diversity between sex and gender is not a scientific problem that should be cured through medical intervention, but rather, a scientific fact that should be assessed by law. Nature does not determine who is a woman and who a man, nor does it provide categories. Human beings create categories, and laws are often based on a binary logic that simplifies the

---

92 For a deeper discussion concerning the recognition of a civil status that differs from that of female and male obtained abroad in a country that does not provide such an entry, see S. L. Goessl (2016), 'From Question of Fact to Question of Law to Question of Private International Law', *supra* note 2, pp. 261–280.

93 *P v S and Cornwall County Council*, Case C-13/94, Opinion of the Advocat General Giuseppe Tesauro, 1995.

complexity of reality.[94] However, as seen through the Constitutional Courts' rulings examined above, there is no sufficient, proportionate and adequate public interest to justify the lacking recognition of the legal status of people who do not fit within the binary sex/gender classification system. It is important to begin rethinking public and legal orders to make them fair and inclusive: not based on stereotypes, but aligned with scientific developments, within a human rights perspective that recognises the same rights to all human beings with the aim of moving toward a universality that functions with pluralism and diversity.[95] A significant step in this direction may be achieved by leaving behind any form of biological determinism between sex and gender identity and avoiding the creation of a further hierarchy among people who request the recognition of their legal status on the grounds of whether this request is supported by specific biological reasons – in other words, by implementing a legal status model based on the individual's self-determined gender identity.

The introduction of further positive entries available for all regardless of their sex characteristics would not only comply with the international trend to recognise the individual's rights to freely develop their personal identity and obtain legal recognition of their self-defined gender identity, but even with public interest, as it would contribute to the truthfulness and authenticity of the civil status information. This solution is, however, to be understood as solely an interim one, as the endgame, as argued by Currah, is to:

> … dis-establish gender from the State by ending the State's authority to police the relation between one's legal sex assigned at birth, one's gender (identity), and one's gender expression; by attempting to stop the State's use of 'sex' as a marker of identity on identification documents; and by ending the State's reliance on sex/gender as a legal category.[96]

The overall goal is that of abolishing sex and gender registration altogether and thus treating sex and gender not as legal categories, but as sensitive personal identity markers which are safeguarded under data protection laws, as affirmed by van den Brink and Tigchelaar.[97] This is, however, 'a gradual process rather than something that you leap straight to',[98] as it requires time to render

---

94 J. McGrath, 'Are You a Boy or a Girl – Show Me Your REAL ID', (2009) 9, *Nevada Law Journal*, p. 368.

95 M. C. Nussbaum, *Diventare Persone. Donne e Universalità dei Diritti* (translated by W. Mafezzoni), Il Mulino, Bologna 2001.

96 P. Currah, 'Gender Pluralisms under the Transgender Umbrella', in P. Currah, R. M. Juang and S. Price Minter (eds.), *Transgender Rights*, University of Minnesota Press, Minneapolis 2006, pp. 3–31, p. 24.

97 M. van den Brink and J. Tigchelaar, 'Gender Identity and Registration of Sex by Public Authorities', (2015) 2(29), *European Equality Law Review*, pp. 29–40, p. 40.

98 A. J. N. Wipfler (2016), 'Identity Crisis', *supra* note 47, p. 491.

gender-specific rights and services neutral or, where this is not possible, to develop them based on a self-identification model.

The introduction of further entries should be therefore accompanied by the progressive de-gendering of law and by a decline in the dissemination of gender information, in line with Principle 31 of the Yogyakarta Principles *+10*.

In the meanwhile, it is important to overcome what has been described by Balocchi as a paradox, namely, that 'the more is known about human biological complexity and diversity, the more is done from a medical standpoint to eliminate such diversity and to redirect it to social gender/sex binary'[99] and to prohibit the medicalisation and pathologisation of bodies and identities that do not fit within the binary sex/gender system, in line with the Yogyakarta Principles *+10*, by acknowledging that differences are not disorders.[100] In this framework, through specific dispositions and not civil status law reforms, intersex children should be protected primarily against the heteronomous assignment on the medical level to the female or male sex and gender – which violates their right to bodily integrity and to an open future – by being prevented from making autonomous decisions, once they are mature enough, about their bodies and identities.

99 M. Balocchi (2014), 'The Medicalization of Intersexuality', *supra* note 10.

100 M. Carpenter, 'Intersex Variations, Human Rights, and the International Classification of Diseases', (2018) 20(2), *Health and Human Rights Journal*, p. 212; J. M. Scherpe (2019), 'Lessons from legal developments', *supra* note 51, p. 213.