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**Citation:** Baars, G. (2019). Queer Cases Unmake Gendered Law, or, Fucking Law's Gendering Function. *The Australian Feminist Law Journal*, 45(1), pp. 15-62. doi: 10.1080/13200968.2019.1667777

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# QUEER CASES UNMAKE GENDERED LAW, OR, FUCKING LAW'S GENDERING FUNCTION

Grietje Baars\*

**Abstract.** *Law's role in upholding and continually reproducing the cisheteropatriarchy is increasingly being challenged in Western courts. This is happening directly, by 'non-gendered' claimants wishing to undo law's compulsory gender performance, and by 'birthing men' seeking to queer law's gender binary. Indirectly 'fucking' law's gendering function are the defendants in the so-called 'gender deception' prosecutions. Here we see the judicial system reasserting its hegemony as heteronorm-maker and enforcer. A different face of state pushback against queer anti-normativity shows in accommodation: several European courts have recently ordered the creation of a third gender option. This paper evaluates these 'queer cases', and asks what the queer struggle with the heteronormative can tell us about law's social function, its relationship to the body, its material effects and emancipatory potential more broadly. Can we queer the legal structures that seek to know, categorise, assign, police and contain our genders and sexualities or is now the time to say 'fuck law'?*

## 1.0 Introduction

In 2013, a young Berliner, let's call him Lukas, walked into his local registry office with his newborn baby on his arm. Beaming with pride and smiling from ear to ear, he told the registry official, "I'm a new father, and I'd like to register my child." "Congratulations," the registrar responded, "mother's name?" "No mother", Lukas responded, "just me, I'm the father." "Mother's name??" the registrar repeated, this time a bit louder, and with a bureaucrat's mix of ennui and disinterest. "No really, no mother, just me, the father, I had the baby, alone." "I need a mother's name. The computer needs a mother's name." After a few more increasingly frustrated, and annoyed exchanges, Lukas very reluctantly agreed to have his deadname<sup>1</sup> to be registered in the database as the child's mother, and heaved a deep sigh. "Next question", the official proceeded, "Your baby: boy or girl?" Lukas responded, "Human! Human baby child!" "Boy or girl?" the official bounced back, with a grunt. Another ten

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<sup>1</sup> His old 'female' name from before his legal transition.

minutes of exchange went by, with no concession in sight: “The computer needs to know: boy or girl.” “Well, in that case,” Lukas said, exasperatedly defiant, “I’ll say it’s a boy.”

This exchange is an entirely fictionalised account of real events, my fantasy of what may have happened when the young man, in the anonymised media reports (which followed a leak by the registry official and contained no comment from the father in question) entered the ‘regulating space’ of the Berlin registry office. Amplifying the discomfort ostensibly felt by the ‘leaking’ official – who describes Lukas as ‘birthing father’ and ‘male mother’, German weekly *Der Spiegel* concluded its news report with the speculation, “Perhaps, the child, is in truth a girl. A girl, who in law counts as a boy, and officially has no mother.”<sup>2</sup>

Of course the child officially *has* a mother, which is precisely the problem: a mother on paper and a father in life. Today, ‘Lukas’ – having lost in the lower courts<sup>3</sup> - is processing the German Constitutional Court’s decision to decline to consider his case (no reasons were given),<sup>4</sup> and petitioning the European Court of Human Rights for his right to be registered as his child’s father.<sup>5</sup> He had been opposed in the lower courts by his own infant child, represented by a state appointed attorney, who on the child’s behalf claimed the German constitutional right ‘to know one’s mother’.<sup>6</sup>

‘Lukas’ story strikingly illustrates the key themes of this essay. These are, on the one hand: law’s role in the state’s sexing/gendering function (what I will call *sexage*), the vehemence with which the state’s bureaucracy (registry offices, courts hospitals, prisons,) polices and enforces this function, and the ideological commitment, felt by the official (and many in our society) to a strict gender binary and heteronormative family structure and, relatedly, the seeming legitimacy of the state’s right to know our bodies. On the other, the disruptive, potentially *queering* effect on the legal order of things, of the Berlin transfather’s ‘genderfuckery’.<sup>7</sup> His case is one of a series of ‘queer cases’, a small ‘archive’ of queer

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<sup>2</sup> Der Spiegel, ‘Der Gebärwater’ *Spiegel Online* (online) 9 September 2013 <

<http://www.spiegel.de/spiegel/print/d-111320061.html>> (last accessed 4 July 2019).

<sup>3</sup> AG Berlin-Schöneberg, 13.12.2013 - 71 III 254/13; KG, 30.10.2014 - 1 W 48/14; BGH, 06.09.2017 - XII ZB 660/14; BGH, 08.11.2017 - XII ZB 660/14.

<sup>4</sup> Nichtannahmebeschluss ohne Begründung, BVerfG v. 15.05.2018 - 1 BvR 2831/17 .

<sup>5</sup> Queer.de, ‘Nicht als Vater anerkannt: Transmann zieht vors Bundesverfassungsgericht’ 18 October 2017 <[http://www.queer.de/detail.php?article\\_id=29915](http://www.queer.de/detail.php?article_id=29915)> (last accessed 4 July 2019).

<sup>6</sup> Interestingly, and somehow comfortingly, no one has yet argued for the child’s, or indeed the State’s right to know the child’s ‘true sex’.

<sup>7</sup> The anonymous claimant became known in the media as the ‘Berliner Trans-Vater’. Although his case seems unique, he is by no means alone, see, for example Meka Beresford, ‘54 Transgender Men in Australia have given Birth to Children over the Past Year’ *PinkNews* (online) 12 July 2017 <<http://www.pinknews.co.uk/2017/07/12/54-transgender-men-have-given-birth-in-australia-this-year/>> (last accessed 4 July 2019). Most recently, an almost identical case has been brought in the UK, see Danielle Sheridan, ‘Baby Born to a Transgender Man Could Become First Person Without a Legal Mother’ *The Telegraph* (online) 7 June 2018 <<https://www.telegraph.co.uk/news/2018/06/07/baby-born-transgender-man-could-become-first-person-without/>> (last accessed 4 July 2019).

cases and events I have collected over the past few years, that challenge the form, function and even the existence of gender and the gender binary in law, and that have come to the courts in a variety of countries. Here I assess the effects of these cases and their potential to queer the cisheteronormative order.

The ‘queer cases’, and ‘Lukas’ case’ in particular, appealed to me, as someone who has grown up with a profound discomfort with the ubiquitous and compulsory gendering in society. I have never felt any particular identification with ‘male’ or ‘female’, or understood what these labels mean or why we use them, while also knowing they hold immense power and have significant material consequences individually and socially. I always feel intense reluctance when asked to ‘declare’ a sex/gender as a precondition to carrying out even the most basic everyday transactions such as booking a train ticket, and cringe at *being* ‘gendered’ constantly in everyday human interaction (‘Sir, sir, that is the LADIES’ toilet!!!’). Most of all I wonder what business it is of anyone’s (least of all the state’s) what my genitalia look like, or what chromosomes I might have, or what my ‘authentic gender identity’ is, and why any of these, or the sum total of these, *should* result in my placement somewhere in the hierarchy of society’s pecking order— while obviously being aware that clearly it *does*. Still, I am placed near the top due to my white privilege<sup>8</sup> Race and class are of course no less powerful as tools of categorisation deployed by today’s increasingly violent system of racial capitalism. However gender<sup>9</sup> is one of the last remaining state-assigned, and supposedly stable and permanent ‘characteristics’ of a person that remains explicitly registered as a key element of one’s *legal* ‘identity’ in most countries around the world. My discomfort drives my commitment to understanding the state’s practice of sexage, and what work the *legal* category of gender does in (re)producing the cisheteropatriarchy.<sup>10</sup>

Although in this article I focus on gender (and to some extent sexuality), of course citizenship and immigration status are legal categories entailing potentially far more extensive violence than the category of gender. Combined with other non- (no longer) registered categories, especially race, as they often are, they can be deadly. Borders kill: one need only look at the list of names of the 34,361 migrants who have died attempting to reach and find safety in Europe since 1993, and realise the actual death toll far larger.<sup>11</sup> I hope, however, that understanding more about how legal gender, and gendering works

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<sup>8</sup> On the notion of white privilege, see, for example, Robin DiAngelo, *What Does it Mean to be White?: Developing White Racial Literacy* (Peter Lang 2012).

<sup>9</sup> I use gender to include both sex and gender as state practices often do not distinguish the two, and some languages have one word for both, e.g. ‘geslacht’ in Dutch. I find Wittig’s analysis which holds that the mark of sex exists to justify the mark of gender, persuasive. Monique Wittig, ‘The Mark of Gender’ (1985) 5(3) *Feminist Issues* 5.

<sup>10</sup> As opposed to ‘women’s rights’ etc. On the limits of ‘women’s rights’ see Wendy Brown, ‘Suffering Rights as Paradoxes’ (2000) 7(1) *Constellations* 208.

<sup>11</sup> Alex Needham, ‘The List: The 34,361 Men, Women and Children Who Perished Trying To Reach Europe’ *The Guardian* (online) 20 June 2018 < <https://www.theguardian.com/world/2018/jun/20/the-list-34361-men-women-and-children-who-perished-trying-to-reach-europe-world-refugee-day>> (last accessed 4 July 2019). For

may help understand the larger and more complex map of power co-constituted by and mediated through law.

Foucault in *The History of Sexuality* famously traced the genealogy of sexuality and to some extent gender and explained the practice of assigning fixed categories of identity (something you are) to what was previously seen as practices (something you might do) as tools of biopolitics, governance of our bodies' (re)productivity in capitalism.<sup>12</sup> Before he did so French Marxist feminists Guillaumin and Wittig had already theorised gender/sex as technologies existing to subject 'the category of women' to those marked as 'men' for the purpose of maintaining the capitalist economic order (Guillaumin called this process 'sexage' and I use this term here).<sup>13</sup> Moreover, Wittig added, the 'Straight Mind' – a 'conglomerate of sciences and disciplines' – 'discourses which take for granted that what founds society, any society, is heterosexuality'<sup>14</sup> - or what Foucault would later call the knowledge-power nexus which creates coherent, readably gendered bodies and exists so as to obscure precisely these purposes. Originating in the writings of Gayle Rubin and Adrienne Rich, and popularised by Michael Warner, a more recent term for the general assumption of the gender binary of two stable and fixed sexes who are attracted to each other to form monogamous pair bonds aimed at procreation is the 'heteronormative'.<sup>15</sup> Its gender-specific companion term is 'cisgenderism': the assumption everyone is M or F, permanently, from birth till death and the characterisation of gender diversity beyond M/F as exceptional, inferior and undesirable.<sup>16</sup> As key elements of Western imperialism, cisgenderism and the heteronormative have attempted to suppress gender practices beyond the binary that existed previously

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a book of poetry and essays detailing the workings and effects of various intersecting legal and social borders, see, Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza* (Aunt Lute Books 2012, 4<sup>th</sup> edn).

<sup>12</sup> Michel Foucault, *The History of Sexuality Volume 1: Introduction* (Vintage 1987) 141.

<sup>13</sup> As an ideology that 'serves to conceal the fact that social differences always belong to an economic, political, ideological order' (Monique Wittig, 'The Category of Sex' (1982) 2(1) *Feminist Issues* 2; Colette Guillaumin, 'Pratique du pouvoir et idée de nature (1) L'appropriation des femmes' *Questions Féministes* No. 2, les corps appropriés (février 1978), 5. Although 'sexage' is used to resemble 'esclavage' (slavery), "the comparison is to the struggle to withdraw one's labor from a system that creates sexual and racial differences to justify exploitation; it does not mean, as many seem to think, that race is collapsed into sex per se", Diane Griffin Crowder, 'From the Straight Mind to Queer Theory: Implications for Political Movement' (2007) 13(4) *GLQ: A Journal of Lesbian and Gay Studies* 489.

<sup>14</sup> Monique Wittig, 'The Straight Mind' in Monique Wittig *The Straight Mind and Other Essays* (Beacon Press 1980, 1992). According to Wittig, Heterosexuality is a cultural construct designed to justify the whole system of social domination based on the obligatory reproductive function of women.' Monique Wittig, 'Paradigm' in George Stambolian and Elaine Marks (eds) *Homosexualities and French Literature* (Cornell University Press 1979) 115.

<sup>15</sup> The term 'heteronormative' emerged out of Adrienne Rich's 1980 article on compulsory heterosexuality, and Gayle Rubin's description of the sex/gender system. Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence' (1980) 5(1) *Signs: Journal of Women in Culture and Society* 631; Michael Warner, 'Introduction: Fear of a Queer Planet' (1991) 29(1) *Social Text* 3.

<sup>16</sup> Y Gavriel Ansara, 'Cisgenderism in Medical Settings: Challenging Structural Violence through Collaborative Partnerships' in Ian Rivers and Richard Ward (eds) *Out of the Ordinary: Representations of LGBT Lives* (Cambridge Scholars Publishing 2012) 102, 93.

and elsewhere, if not as social, at least as legal categories.<sup>17</sup> Here, I am interested specifically in the role of law in (creating, upholding, etc.) the heteronormative (including cisgenderism), where the ‘normative’ could be said to include social, moral, and legal norms (categories that are not necessarily distinct/distinguishable and that co-constitute each other: viz, Lloyd’s use of the term ‘regulation’<sup>18</sup>). ‘Law’ here includes legal rules (e.g. those found in statutes) their interpretation (e.g. in the judge’s ‘Straight Mind’ or the ‘Straight Court’), implementation and administration by the wider legal/state ‘bureaucracy’ or apparatuses, operating within regulatory spaces, such as courthouses, hospitals and registry offices forming part of a ‘normalising society’.<sup>19</sup> Most powerful of all are the norms we internalise and self-police.

Heteronormative law enforces the legal gender binary most basically, through requiring subjection to ‘sexing’ at birth (inspection of the genitalia) and subsequent assignment and registration of gender. The heteronormative, heteropatriarchal legal system apportioned material-legal resources according to an intricate structure of heteronormative regulation. For most of us these norms have become so ‘normal’ that we don’t even notice them (while we daily perform a binary gender ‘automatically’ and ‘voluntarily’). Gender has become ‘one of the naturalised givens of social relationships.’<sup>20</sup> The *fetishisation* of gender and its attached role expectation, policing (of the self and others), subjection to ‘sexage’, forms part of the technology of power (which also includes race, class, ‘ability’, etc.) that creates our broader consent to being governed and exploited by the current mode of production (financialised late capitalism).<sup>21</sup> Importantly, this ideological aspect of the heteronormative also effects

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<sup>17</sup> Western imperialism suppressed the multiple genders commonly found in non-western cultures and imposed a legal gender binary. See, for example, Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books 1987); Oyèrónkẹ Oyěwùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997) (I thank Tshepo Madlingozy for these references); J Kēhaulani Kauanui, *Paradoxes of Hawaiian Sovereignty: Land, Sex, and the Colonial Politics of State Nationalism* (Duke University Press 2018); Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar 2019); Vanja Hamzić, *Sexual and Gender Diversity in the Muslim World: History, Law and Vernacular Knowledge* (I.B.Tauris 2016). For legal challenges and critiques in legal institutions see also, *National Legal Services Authority v Union of India*, Writ Petition (Civil) No. 400 of 2012, India: Supreme Court, 15 April 2014 where the Indian Supreme Court recognised the Hijra identity, and *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples* (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017); Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OEA/Ser.L/V/II. Doc.36/15 Rev.2; Fundación Diversencia, *The State of Human Rights of LGBTI Persons of Diverse Ancestry in the context of Indigenous Peoples in Abya Yala*, presented at a public hearing during the 147th Period of Sessions of the IACHR, March 16, 2013.

<sup>18</sup> Kevin Floyd, *The Reification of Desire: Toward a Queer Marxism* (Minnesota University Press 2009) 33-6.

<sup>19</sup> I am using here the concept of bio-power as set out by Michel Foucault, *History of Sexuality, Volume 1, Introduction* (Vintage 1990) 144.

<sup>20</sup> Colette Guillaumin, ‘Race and Nature: the System of Marks’ in Colette Guillaumin *Racism, Sexism, Power and Ideology* (Routledge 1995) 150.

<sup>21</sup> Gundula Ludwig, ‘Queering Capitalism’ (2018) 2 (1) *Krisis: Journal for Contemporary Philosophy* 1.

the ‘phobia of, and indeed violence towards, those whom the norm cannot see, recognise, protect or contain. That is, when talking about gender, the queer and/o, intersex or otherwise ‘gender non-normals’.<sup>22</sup> When encountering heteronormative law, queers become deviants, outlaws, transgressors, ‘gender rule breakers’ through our very existence and relating. Because to queers the heteronormative is not ‘normal’, natural or a given, because it in fact grazes, pinches and cuts at every turn, we are less likely to ‘accept’ the (broader) system and more likely to be involved in anti-systemic and indeed reformist work.<sup>23</sup> Partly for that reason, in recent years there has been some measure of accommodation of gender non-normals (normalisation) in heteronormative law, through ‘gay marriage’ and legal gender change laws in some jurisdictions – creating a new ‘homonormative’ and a nascent ‘transnormative’, while also giving rise to right wing conservative pushback. There is an increasing level of resistance to (binary) gendering expressed in North American and European media in the past five years or so.<sup>24</sup> Nevertheless, anno 2019, there is still a strong attachment to ‘gender M/F’ (and to law, law’s ordering function, and the ‘correctness of the register’ as we shall see later, in this, as in other, respects), which is simply not questioned or even seen as a contentious issue by the vast majority of people, not *even* by women, as Monique Wittig also noted thirty years ago.<sup>25</sup>

The archive of Queer Cases collected in this article illustrates some of the processes of ‘regulation’ – sexing and gendering through law – a process which becomes starkly visible when queers are caught in the accommodation-pushback dialectic, disrupting, subverting or fucking with, legal gender and sexual binaries.

The types of cases I discuss in the following sections are: the ‘post-gender’ cases (section 2), the ‘criminalised trans’ (section 3), the ‘birthing fathers’ (section 4), and in section 5 I discuss how the ‘post-gender’ legal struggle morphed into the fight for a ‘third gender option’. The questions I focus on in the analysis of the cases include, what is the (dialectical?) relationship between legal rule and social norm? What is the relationship between the physical bodies and the social imaginary of the courts’

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<sup>22</sup> *Nanette* (Hannah Gadsby, 2018).

<sup>23</sup> In a sense, then, Judith Butler’s recent *New Statesman*’s article is misleading. Judith Butler, ‘Judith Butler: the backlash against “gender ideology” must stop’ *New Statesman America* (online) 21 January 2019 <<https://www.newstatesman.com/2019/01/judith-butler-backlash-against-gender-ideology-must-stop>> (last accessed 11 July 2019).

<sup>24</sup> I’m focusing on the hegemonic cultural context of western late capitalism here.

<sup>25</sup> Purely anecdotally this is reflected in what happened when I organised a conference in 2016 for critical lawyers and others working on the political economy from leftist perspectives. I battled for some weeks with the conservative hosts to come to a compromise of a ‘gender: n/a’ box on the conference registration form (my initial request had been to leave gender off the form altogether). Out of 150 who registered, only two chose that option.

functionaries, bureaucrats or ‘straight minds’? What ‘administrative violence’<sup>26</sup> is meted out by the courts? What possibilities exist for queer emancipation through law, at what cost?

The currently acutely pertinent question of queer cases’ radical potential is raised in the final section of this article when I examine the recent ‘gender x’ or ‘third option’ cases. The cases discussed in Section 5 have seen constitutional courts in Germany, Austria and The Netherlands follow India, Pakistan, and Nepal and Argentina’s course by accepting there is gender beyond the binary, and opening up the way to ‘third gender’ legal registration.<sup>27</sup> Does a ‘third gender’ category,<sup>28</sup> a third box to tick, liberate us from the binary, or does it incorporate our difference in a reconstituted, fine-tuned ‘ternary’ compulsory gendering system, and box us in? This article identifies at its core the dilemma between the need to claim our identities and be recognised,<sup>29</sup> and the desire and struggle for a world where identity is no longer a factor in role hierarchies and expectations and the distribution of resources, and administration of violence, for instance where intersex children’s bodies are no longer surgically ‘normalised’ to fit a binary model.

One aspect of the Queer Cases archive worth noting is that it is a very specific set of individuals who have ‘access to law’. Whereas I cannot know for sure as some claimants (including Lukas) are anonymous, I am fairly certain that all protagonists in this article (apart from – significantly - Tara Hudson in s. 3) are white, and probably at least lower middle class. When assessing law’s emancipatory potential we must consider the vast majority of people who do not have access to the western courts and legislatures which hegemonically set the parameters of the white supremacist cisheteropatriarchy. Elsewhere I have analysed in detail the relationship between law and (imperialist) capitalism and argued for resistance beyond, and indeed against the state and law.<sup>30</sup>

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<sup>26</sup> Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (South End Press 2011) 28-33.

<sup>27</sup> Although the German case is usually referred to as a ‘third gender’ case, the court also gave the German Parliament the option to legislate an end to gender registration. See further section 5.3 below.

<sup>28</sup> A distinction can be drawn between ‘third gender’ and ‘third gender option’ – the former may imagine the existence of a third gender beside M or F, for example ‘non-binary’ or ‘intersex’. A third option, on the other hand, may offer bureaucratic space to a range of different genders that are not (or not exclusively) M or F, and may be labeled as ‘other’, diverse, not specified. Whether intersex is or can be a gender identity is an ongoing discussion, see, for example, Hida Vilorio and Dana Zzyym, ‘How Intersex People Identify’ *Intersex Campaign for Equality* (online) 10 July 2015 <<https://www.intersexequality.com/how-intersex-people-identify/>> (last accessed 11 July 2019); Morgan Carpenter, ‘The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia’ (2018) 15(4) *Journal of Bioethical Inquiry* 1.

<sup>29</sup> Nancy Fraser, ‘Rethinking Recognition’ (2000) 3(3) *New Left Review* 107.

<sup>30</sup> Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective of the Role of Law in the Political Economy* (Brill 2019).

Ultimately, here, I argue for gender strike,<sup>31</sup> and the abolition of gender registration (which by no means means the abolition of gender which we must celebrate in all its myriad manifestations) as a first step towards refusing the state's governance of our bodies and families as sites of capitalist production. Queers throughout history and today excel in surviving in the shadows of law, relating, fucking, building community and family, leading social movements, on our own terms. Rather than seeking assimilation to a system that is built to destroy (exploit) us (Audre Lorde: "Remember, we were never meant to survive"<sup>32</sup>) we must struggle to overcome it and build a world where all of us can flourish.<sup>33</sup> In the words of Morgan Bassichis, Alex Lee, and Dean Spade, we must "Build[...] an Abolitionist Trans & Queer Movement with Everything We've Got".<sup>34</sup>

## 1.0 Sexage, Gender(Ing) and the Post-Gender Legal Subject

Although domestic laws worldwide overwhelmingly adhere to a strict and largely inflexible gender binary to which citizens must submit and show allegiance through regular declaration and performance (actualising the process Guillaumin called 'sexage'<sup>35</sup>), those resisting or not fitting neatly (or permanently) into their assigned place on the gender binary are in some measure legally accommodated through the (increasingly 'liberal') laws regulating the change of legal sex/gender status. The legal gender binary, in other words, is already unstable.<sup>36</sup> For example, on 1 July 2014, an amendment came into effect in The Netherlands removing surgery (which until then included mandatory procedures to render the individual incapable of reproduction) as a prerequisite for changing one's legal gender.<sup>37</sup>

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<sup>31</sup> For an early explanation see 'Gender Strike' *Seven by Nine Squares* (online) <[https://www.thing.de/projekte/7:9%23/y\\_Gender\\_Strike.html](https://www.thing.de/projekte/7:9%23/y_Gender_Strike.html)> (last accessed 5 August 2019); and for an argument for its use, see, Sam Bourcier, *Homo Incorporated: Le Triangle et La Licorne Qui Pete* (Cambourakis 2017) especially 173ff.

<sup>32</sup> Audre Lorde, 'Litany for Survival' *The Collected Poems of Audre Lorde* (WW Norton and Co 1997).

<sup>33</sup> Elsewhere I have analysed in detail the relationship between law and capitalism, and argued that the struggle against capitalism must include a struggle against law: Grietje Baars *The Corporation, Law and Capitalism: A Radical Critique of the Role of Law in the Global Political Economy* (Brill 2019).

<sup>34</sup> Morgan Bassichis, Alex Lee and Dean Spade, 'Building an Abolitionist Trans & Queer Movement with Everything We've Got' in Eric Stanley and Nat Smith (eds) *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (AK Press 2011).

<sup>35</sup> As above. Interestingly in this regard, in France In France, change of gender marker is based on gender expression and proof must be provided of others' perception of one's gender, see *Code Civil* art 61-5. I thank Benjamin Moron-Puech for this insight.

<sup>36</sup> Spade above note 26 at 37.

<sup>37</sup> Amended article 1:28 Civil Code. Also, see the report produced by Marjolein van den Brink and Jet Tigchelaar, Ministry of Safety and Justice, 'M/V en Verder: Seksregistratie door de overheid en de juridische positieve van transgenders' (online) < [https://www.wodc.nl/binaries/2393-volledige-tekst\\_tcm28-73312.pdf](https://www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf) > (last accessed 6 August 2019). Includes English summary, 'M/F and beyond: Gender registration by the state and the legal position of transgender persons'.

New York City also recently removed the surgery requirement for some applicants.<sup>38</sup> In Argentina (2012),<sup>39</sup> Denmark (2014),<sup>40</sup> Malta (2015),<sup>41</sup> Ireland (2015),<sup>42</sup> Belgium (2018),<sup>43</sup> Portugal (2018),<sup>44</sup> Tasmania (2019)<sup>45</sup> and Luxembourg (2019)<sup>46</sup> no surgery, hormones, medical or psychological diagnosis or statement at all is required for a legal change in status – which is now simply based on a person’s self-determination.<sup>47</sup> England & Wales and also Scotland are considering moving in this direction.<sup>48</sup>

The liberalisation of requirements for legal gender marker change does not however take away from the fact that, in most places, the state still requires us to submit to sexing and legal gender assignment and registration.<sup>49</sup> Stories of the legal treatment of persons who do not identify, who cannot or refuse to *be identified* through law, as either male or female have increasingly made the news in the last few years. In the mainstream medical and legal literature, intersex bodies, and non-binary subjectivity are

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<sup>38</sup> Sylvia Rivera, ‘BREAKING: New York State Updates Birth Certificate Policy, Removing Surgical Requirement’ *Law Project News Release* (online) 5 June 2014 <<http://srlp.org/breaking-new-york-state-updates-birth-certificate-policy-removing-surgical-requirement/>> (last accessed 11 July).

<sup>39</sup> Emily Schmall, ‘Transgender Advocates Hail Law Easing Rules in Argentina’ *The New York Times* (online) 24 May 2012 <<http://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html>> (last accessed 7 August 2019).

<sup>40</sup> A motion to amend the Act on the Civil Registration System was adopted by the Danish Parliament on 11 June 2014 and entered into force on 1 September 2014, see TGEU PR: Denmark goes Argentina! *Transgender Europe* (online), 11 June 2014, <<https://tgeu.org/denmark-goes-argentina/>> (last accessed 28 August 2019).

<sup>41</sup> *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta). See ‘TGEU Transgender Europe, Malta Adopts Ground-breaking Trans and Intersex Law’ *Transgender Europe* (online) 1 April 2015 <<http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/>> (last accessed 7 August 2019).

<sup>42</sup> Lynsey Black and Peter Dunne (eds) *Gender in Ireland: Critique and Reform* (Hart Publishing 2018).

<sup>43</sup> ‘Belgium: Legal Gender Recognition Law (2017)’ *Transgender Europe* (online) 21 August 2018 <<https://tgeu.org/belgium-legal-gender-recognition-law-2017/>> (last accessed 7 August 2019). See also Pieter Cannoot, ‘New Belgian Gender Recognition Act: Shouldn’t Self-determination Also Include Non-Binary People?’ *UGent* (online) 30 March 2018 <<http://hdl.handle.net/1854/LU-8557959>> (last accessed 7 August 2019).

<sup>44</sup> ‘Portugal Votes for Self-determination, Keeps Medicalization for Minors’ *Transgender Europe* (online) 13 July 2018 <<https://tgeu.org/portugal-votes-for-self-determination-keeps-medicalization-for-minors/>> (last accessed 7 August 2019).

<sup>45</sup> Justice And Related Legislation (Marriage Amendments) Bill 2018 (Tas) (passed 10 April 2019).

<sup>46</sup> ‘Luxembourg Adopts Self-determination Law’ *Transgender Europe* (online) 7 March 2019 <<https://tgeu.org/luxembourg-adopts-self-determination-law/>> (last accessed 7 August 2019).

<sup>47</sup> For a transnational statement expressing this idea, see ‘Principle 3’ *Yogyakarta Principles* (online) 2016 <<http://yogyakartaprinciples.org/principle-3/>> (last accessed 7 August 2019).

<sup>48</sup> This is discussed in the Consultation Document stating the rationale behind the 2018 public consultation on reform of the Gender Recognition Act 2004, see ‘Reform of the Gender Recognition Act’ *Department of Education* (UK) 3 July 2018 <<https://consult.education.gov.uk/government-equalities-office/reform-of-the-gender-recognition-act/>> (last accessed 7 August 2019). See also ‘Variations in Sex Characteristics Call For Evidence’ *Government Equalities Office* (UK) 17 January 2019 <<https://www.gov.uk/government/consultations/variations-in-sex-characteristics-call-for-evidence>> (last accessed 7 August 2019).

<sup>49</sup> See the work of Gender Free ID to end state-assigned gender: <http://gender-freeidcoalition.ca>.

generally seen as a ‘problem’ which is to be ‘rectified’ or, exceptionally, to be ‘accommodated’ in or with the help of law. In 2013, for example, Germany passed a law allowing for the registration of newborns with ‘ambiguous genitalia’ as “x” (undefined) rather than female or male, with the expectation that this would be changed to a defined category within around six months, after surgery.<sup>50</sup> I will come back to the recent Dutch, French, German and Austrian intersex cases in Section 5. The Indian Supreme Court in April 2014 recognised a ‘third gender’ category for hijre<sup>51</sup> In Australia,<sup>52</sup> New Zealand,<sup>53</sup> Bangladesh,<sup>54</sup> Nepal,<sup>55</sup> Argentina,<sup>56</sup> California and four other states in the US,<sup>57</sup> Canada (amongst others), it is possible for *some* individuals to have a passport with an ‘x’ or another ‘third gender’ category. In April 2019, Tasmania made gender optional on birth certificates.<sup>58</sup> Yet, outside of Tasmania, not only is our assigned gender *legally* assigned (and socially performed), but the concept of gender *in itself*, the idea that we necessarily *have* a gender and that it is either M or F (or in some cases X), and that this is an essential marker – or, as more recently asserted, a *builder*<sup>59</sup> - of our identity, our citizenship, our personhood, is almost unequivocally accepted. Gender is *so* important that the first question we ask when a baby is born, is, “is it a boy or a girl?” - unless of course we have already been told about the embryo’s genitalia in a ‘gender reveal party’.<sup>60</sup>

The two cases discussed here, of K and Norrie, show attempts by two individuals to reject gender altogether. While both live as agender persons in The Netherlands and Australia, they were (and indeed are) still registered with a gender/sex label. Both applied to have their birth registration cleared of any gender marker.

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<sup>50</sup> Gesetz zur Änderung personenstandsrechtlicher Vorschriften (Personenstandsrechtsänderungsgesetz – PStRÄndG) (online) 15 August 2012 <<http://dipbt.bundestag.de/dip21/btd/17/104/1710489.pdf>> (last accessed 9 August 2019).

<sup>51</sup> *National Legal Services Authority v. Union of India and others*, Writ Petition (Civil) No. 400 of 2012, Supreme Court of India, 15 April 2014 <<http://www.refworld.org/docid/5356279d4.html>> (last accessed 9 August 2019).

<sup>52</sup> See below, section 2.2.

<sup>53</sup> As above.

<sup>54</sup> As above.

<sup>55</sup> As above.

<sup>56</sup> Valentina Cullman, ‘Male, Female, X: First Argentinian Allowed ‘Blank’ Gender on ID’ *Argentina Reports* (online) 5 November 2018 <<https://argentinareports.com/first-argentinian-blank-gender-id/2006/>> (last accessed 9 August 2019).

<sup>57</sup> Daniel Trotter, ‘New York City the Fifth Place to do so after California, Oregon, Washington State and New Jersey’ *Reuters* (online) 10 October 2018 <<https://uk.reuters.com/article/uk-usa-lgbt-new-york/new-york-city-creates-gender-neutral-x-option-for-birth-certificates-idUKKCN1MJ2PL>> (last accessed 9 August 2019).

<sup>58</sup> Justice And Related Legislation (Marriage Amendments) Bill 2018 (passed 10 April 2019) <[http://www.parliament.tas.gov.au/bills/pdf/47\\_of\\_2018.pdf](http://www.parliament.tas.gov.au/bills/pdf/47_of_2018.pdf)>.

<sup>59</sup> Verfassungsgerichtshof, 15 June 2018, G 77/2018.

<sup>60</sup> See, for example, this video that went viral in 2016, Couple Shocked When Balloon Store Mixes up Order for Gender Reveal *Inside Edition*, published 8 November 2016, <https://www.youtube.com/watch?v=YIpVbBHFr1g> (last accessed 28 August 2019).

## 1.1 K (The Netherlands)

What we know about the case of K is what the court documents tell us. K has not given media interviews and has not appeared in court. In the second stage appeal decision<sup>61</sup>, the ‘facts’ of K are reported by the court as follows (I summarise the facts in the court’s – translated - words). K was born as a ‘male child’, and at a later age “formed the conviction” not to belong to the male gender, underwent sex reassignment surgery, after which they<sup>62</sup> formed the conviction that they did not belong to the female gender either. They once again underwent gender reassignment surgery and have now, after a long-term self-understanding of being ‘non-sexed’, requested, in 2001, that the gender designation ‘male’ be removed from their record in the birth register, without being replaced with another designation. K had not changed their legal gender status, but had changed first names through court procedure from “boys’ names” to “girls’ names” and back over the years. The first instance court dismissed K’s request, and the appeal court also dismissed K’s appeal. The ground for K’s request was Art. 1:24 of the Dutch Civil Code (correction of the register), and secondarily, Article 8 (Right to Privacy) of the European Convention of Human Rights (ECHR) – on the basis of which, according to the Appellant, there is a positive obligation to recognise the identity of a person belonging neither to the male nor to the female sex. The Appeal Court considered that K’s ‘process of many years of experience and consciousness-forming’ did not mean that the entry in the birth register must be seen as a ‘mistake’ which by law can be rectified in the register. The court acknowledged that there exists a legal possibility for ‘transsexuals’ wishing to change their legal gender registration (Arts 1:28-28c), but “no such procedure exists for ‘intersex’ identity in the sense of belonging to neither the male nor the female gender”.<sup>63</sup> (The court throughout conflates or confuses intersex and K’s *agender* experience.) Simply crossing out the gender designation would, according to the court, result in a situation ‘not foreseen’ by the Civil Code, which would moreover conflict with the ‘systematic’ (order) that lies at the base of this regulation. The court mentions the possibility in Dutch law of registering a child where it has not been possible to determine the sex of a child but this is “intended to be temporary”.<sup>64</sup> With regard to K’s ECHR argument,<sup>65</sup> which was based on the case of *Goodwin v UK* (European Court of Human Rights 2002),<sup>66</sup> the court stated that K’s case did not, like Goodwin’s “transsexualism” case, have the benefit of the same context, namely “that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief” (para 81) and the visibility of “a continuing international trend towards legal recognition.”<sup>67</sup> The appeal court (again confusing *agender* and intersex) concluded that despite K’s case and two reports on intersexuality produced by the San Francisco Human Rights

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<sup>61</sup> K, Gerechtshof Arnhem, 15 November 2005 (629/2005).

<sup>62</sup> The court uses male pronouns. I use male pronouns when quoting the court, and neutral pronouns otherwise.

<sup>63</sup> K, Gerechtshof Arnhem, 15 November 2005 (629/2005) [4.3].

<sup>64</sup> As above [4.4].

<sup>65</sup> In the monist Dutch system international law can be relied on directly in the national court.

<sup>66</sup> *Goodwin v United Kingdom* 2002 Eur Court H R, 11 July 2002 (appeal no 28957/95).

<sup>67</sup> K, Gerechtshof Arnhem, 15 November 2005 (629/2005) [4.8].

Commission and the Constitutional Court of Colombia referred to by K's counsel, there is no broad international medical recognition of 'intersexuality in the sense as experienced by K', there was no violation of Art. 8.

Notably, the advice of the 'Parket bij de Hoge Raad', the Solicitor and Advocate General to the Supreme Court of The Netherlands ("AG") whose advice to the Supreme Court is normally adopted) adds to the detail given by the appeal court. It mentions that the 'Openbaar Ministerie' ("OM", prosecutorial authority of the state) had written to the lower court (as a third, interested, party in the case) to emphasise that the current legal registration system is based, by force of law, on two genders, and that extension of this categorisation to include a 'third gender' could lead to 'socially unacceptable consequences'<sup>68</sup> – which are not explained. In the view of the OM the general interest of the continued existence of the current binary gender registration system outweighs the interest of K.<sup>69</sup> The Supreme Court then proceeded to examine various medical and other definitions of 'intersex' to conclude that 'intersex' is a condition of the physical characteristics and not, as in the case of K, a condition consisting of 'deep-rooted psychological conviction'.<sup>70</sup>

According to the AG, "society benefits from a well-ordered registration of births, adoption, marriage, divorce and death, through which insight and certainty can be derived in relation to the status of persons."<sup>71</sup> Moreover because of the evidentiary nature of the register, "the register serves the public interest."<sup>72</sup> The AG narrates in some detail the history of civil registration in The Netherlands, from the *Code Napoleon* in 1811 to the present. 'Gender/sex' (Dutch language does not distinguish between the two) is stated to be an essential element of the registry, though it is not explained why. Without gender/sex a registration is not valid. For 'true, physical' cases of intersex births there is the possibility of a 'gender unknown' designation which is intended to be temporary – and the registration is based on the assessment of external characteristics at birth by a doctor.<sup>73</sup> The AG then details at length the careful considerations that underpinned the adoption of 'transsexual recognition' legislation – and emphasises the need for precise criteria, 'considering the important social and legal consequences attached to the change of gender' – which are, however, again not spelt out.<sup>74</sup>

Finally, the AG noted that the main argument for the court's granting of K's claim would be an international trend of social acceptance and legal recognition of a 'non-sexed' position – as there is for

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<sup>68</sup> Parket, 30 March 2007 ECLI:NL:PHR:2007:AZ5686 (*'Parket'*) [1.14] .

<sup>69</sup> As above.

<sup>70</sup> Parket [2.6]. Although the appellant also sought to rely on arts. 3 and 14 (torture, non-discrimination) these were not discussed by the Parket or Supreme Court.

<sup>71</sup> Parket [2.8].

<sup>72</sup> As above.

<sup>73</sup> Parket [2.14-17].

<sup>74</sup> As above.

transsexuality. Such a trend, the AG states, it has not been able to find after an internet search, which did turn up the Indian ‘hijra’ phenomenon. (Of course had the search been for ‘intersex’, rather more would have turned up!) Nor could the AG find any medical or medical-psychological criteria or discussion of such, on which basis someone could be classified as ‘non-sexed’. It concluded that until medical science had understood the phenomenon, as well as the ‘medical-therapeutic consequences of changing the birth register’, we could not possibly start to consider a law to set out the appropriate legal criteria for such changes.<sup>75</sup> The Supreme Court accepted the AG’s advice, concluding, that one *has to have* a gender, and that gender has to be either male or female. The legal provisions available to persons with the ‘medical condition of transsexualism’ are described as the ‘finishing touch’ to their medical ‘correction’, allowing transsexuals “to develop themselves in the best possible manner, according to the gender identity in which they present themselves. ... Always there is the proviso, however, that the person in question wants to, as is usual in social intercourse, present themselves as either man or woman.”<sup>76</sup> The court concluded that there simply was no reason to decide otherwise.<sup>77</sup>

One commentator has noted, that the decision and AG’s advice (both unusually long) look very similar to the 1973 and 1975 decisions on trans recognition which were issued before change of legal gender was regulated by law. Moreover, in *K*, the Supreme Court twice uses the phrase ‘in the current state of the law...’ – giving the impression that resolution must come from the legislature. This is unlikely to be forthcoming, ‘so long as there is no broad international recognition’ of the concept of agender or non-binariness.<sup>78</sup> With the current and rapid popularisation of the non-binary label and the German and Austrian intersex cases discussed below, this may be about to change. The question then becomes, will being gendered through a ‘third gender’ category be a satisfactory solution to a claimant like *K*? I will return to this question below in Section 5.

## 1.2 Norrie (New South Wales)

In 2010, Norrie May-Welby, who on her<sup>79</sup> website describes herself as ‘androgynous’,<sup>80</sup> and who is a Scottish-born Australian citizen, applied to the New South Wales Government Registrar of Births,

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<sup>75</sup> Parket [2.52-4].

<sup>76</sup> “Steeds is daarbij evenwel het uitgangspunt dat de betrokkene zich, zoals in het maatschappelijk verkeer gebruikelijk is, hetzij als man hetzij als vrouw wil presenteren” Hoge Raad [3.4.3].

<sup>77</sup> Hoge Raad, 30 March 2007, ECLI:NL:HR:2007:AZ5686.

<sup>78</sup> AJM Nuytinck, *De Geboorteakte van een interseksuele of niet-geseksueerde persoon*, *Ars Aequi* 56 (2007) 9 685.

<sup>79</sup> Norrie uses the pronouns she and her. See *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 [2].

<sup>80</sup> Norrie May Welby, ‘I who may well be...’ (blog) <<http://may-welby.blogspot.com>> (last accessed 9 August 2019).

Deaths and Marriages (the “Registrar”) to record in the Register that her sex was “non-specific”.<sup>81</sup> The Registrar initially approved this application, but then rescinded it by letter of cancellation on 17 March 2010. The Administrative Decisions Tribunal of New South Wales confirmed this decision, as did the Administrative Decisions Tribunal Appeal Panel.<sup>82</sup> Norrie applied for her change of sex to be registered through the provisions available in the *Births Deaths and Marriages Registration Act* (“BDMR Act”) 1995, s 32DC(1) as a result of the *Transgender (Anti-Discrimination and Other Acts Amendment) Act* 1996. Norrie’s application was accompanied by the required medical declarations which supported her statement that her gender was “non-specific”, and that the required “sex affirmation procedure” had taken place.<sup>83</sup> The Tribunal employed the ‘common law meaning’ of sex, which is limited by three factors:

(c) there is no "third sex" recognised at common law... (d) it is "impractical" and would cause "insuperable difficulties" to abandon the two sex assumption at law...; (e) the task of the law is to assign people to one sex or the other for legal purposes rather than seeking to discover some entity that is the person's "true sex" ...<sup>84</sup>

The Tribunal held that the Registrar was not entitled to register a person’s gender as anything other than “male” or “female”. This was because “. . . the [BDMR] Act is predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female. It does not allow a person to choose to have an unspecified sex recorded”. That conclusion was said to be consistent with both the ordinary meaning of the word "sex" and with the fact that courts when interpreting various statutory provisions have regarded the sex of an individual to be a choice between two categories - male or female.”<sup>85</sup>

The Appeal Panel considered the appellant’s ‘subjective intention in undergoing gender affirmation surgery’, which was to eliminate an ambiguity as to her bi-gender or non-specific sex - through removal of male reproductive organs. However, the Appeal Panel confirmed that s. 32A of the BDMR Act only allows change “to the opposite gender” which must be either male or female, and that the “elimination of ambiguity” referred to in the BDMR Act is limited to “surgery [which] is carried out to alter the person's reproductive organs so that the person can more definitively be regarded as either male or

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<sup>81</sup> Because Norrie’s birth was not registered in Australia, she applied for her change of sex to be registered, rather than an alteration of the register. See *Norrie v Registrar of Births, Deaths and Marriages* (GD) [2011] NSWADTAP 53 (29 November 2011) (*NSWADTAP Decision*).

<sup>82</sup> NSWADTAP Decision.

<sup>83</sup> Section 32A of the BDMR Act defines "sex affirmation procedure" as follows: "sex affirmation procedure means a surgical procedure involving the alteration of a person's reproductive organs carried out: (a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or (b) to correct or eliminate ambiguities relating to the sex of the person."

<sup>84</sup> *Re Secretary, Department of Social Security and "HH"* [1991] AATA 94 (other references omitted).

<sup>85</sup> NSWADTAP Decision [13].

female.”<sup>86</sup> Norrie contended to the Appeal Panel that although she had undergone surgery for the purpose specified in para (b), the surgery had not been successful in the sense that it had not resolved her ambiguity in relation to her sex. However, since the Tribunal had not erred in law when finding that its power under Pt 5A, s 32DC of the BDMR Act was confined to a registration of a person's sex as either "male" or "female", by refusing Norrie's application they had taken 'the only available decision'.<sup>87</sup>

In response to this, Norrie filed complaints with the Australian Commission for Human Rights and the Court of Appeal of the Supreme Court of New South Wales.<sup>88</sup>

The Court of Appeal (AC) considered the definition of "sex" and whether, where the word was not defined in the statute, it was a question of fact or law. It found it was a question of law, and considered whether interpreting it within a statute certain extrinsic sources could be used, including parliamentary debates, dictionaries, and academic texts on gender.<sup>89</sup> The court accepted Julie Greenberg's "*Intersexuality and the Law, Why Sex Matters*"<sup>90</sup> as authoritative.

The AC moreover found that "the recognition of gender identity extending beyond the binary form of "male" and "female" is relatively recent and legislative recognition of that has occurred in the context of increasing medical, scientific and social awareness ... To date, the legislative changes in this State have been confined to anti-discrimination laws and statutory registration requirements, such as the provisions of the *Births, Deaths and Marriages Registration Act* presently under consideration. The *Gender Reassignment Act* of Western Australia also deals with the recognition, for registration purposes, of a change of sex."<sup>91</sup>

The AC concluded that "sex" should be interpreted as allowing for more possibilities than "male" and "female" and that therefore the Registrar *did* have the power to register Norrie as something other than that. What precise term the Registrar could employ for Norrie the AC referred back to the Tribunal to decide.<sup>92</sup>

The Registrar appealed this decision in the High Court of Australia (HCA). The underlying contention to the Registrar's argument was that there would be "significant ramifications" if a person were to be

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<sup>86</sup> NSWADTAP Decision [19-23].

<sup>87</sup> NSWADTAP Decision [43].

<sup>88</sup> 'Norrie Backflip a Breach of Rights' *Star Observer* (online) 18 March 2010

<<http://www.starobserver.com.au/news/national-news/victoria-news/norrie-backflip-a-breach-of-rights-2/35268>> (last accessed 9 August 2019).

<sup>89</sup> *Norrie v NSW Registrar of Births, Deaths and Marriages* (NSWCA) [2013] 145 [76-114].

<sup>90</sup> Julie Greenberg, *Intersexuality and the Law, Why Sex Matters* (NYU Press 2012).

<sup>91</sup> NSWCA [2013] [190]; *Births, Deaths and Marriages Registration Act 1995* (NSW); *Gender Reassignment Act 2000* (WA).

<sup>92</sup> NSWCA [2013] [306].

registered with a sex other than "male" or "female".<sup>93</sup> Again these were not spelt out. However, the HCA held that the Act requires the Registrar to honour the request of a person who has undergone gender affirmation surgery (whether successful or not) and whose application is accompanied by two doctors' declarations to that effect. The registrar's function is merely to record information provided by members of the community, not to make "any moral or social judgments [and his function] certainly does not extend to the resolution of any medical questions or the formation of a view about the outcome of a sex affirmation procedure."<sup>94</sup> According to the HCA, since the Act acknowledges 'ambiguities' it is not for the Registrar to seek to resolve such ambiguities. Rather, registering 'non-specific' is entirely appropriate in such cases.<sup>95</sup> The HCA went on to dispel the Registrar's prediction that 'unacceptable confusion' would result from recognising more than two genders, stating that, "For the most part, the sex of individuals concerned is irrelevant to legal relations."<sup>96</sup> The HCA set aside the Court of Appeal's order remitting the case to the Tribunal, and ordered the Registrar to determine Norrie's 2009 application in line with the HCA's reasons.<sup>97</sup>

Following the decision, the Australian government introduced (in 2013) guidelines specifying that, where information on gender is collected or recorded on official records, an 'x' option (where x is understood to mean 'unspecified' or 'indeterminate') must be available.<sup>98</sup>

In the Norrie case it was clear that the main concern of the Appeal Court was not Norrie's experience or identity, but the 'correctness of the register'. More value was attached to upholding the bureaucratic system of registration, and by extension gender regulation and reproduction, even if that necessitated creating a third gender category. Where Norrie had asked not to be 'sexed' by the state at all, the courts insisted on doing so extensively and highly intrusively – seeking to establish a (the) 'truth' based on a detailed examination of the human/legal subject's genitalia, exemplified in the lengthy discussion in court of Norrie's physical body, her various surgeries and her 'semi-functional vagina'.<sup>99</sup>

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<sup>93</sup> *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA [189].

<sup>94</sup> HCA [2014] [16].

<sup>95</sup> HCA [2014] [39-40].

<sup>96</sup> HCA [2014] [41-42].

<sup>97</sup> HCA [2014] [47].

<sup>98</sup> Indeterminate is defined in the same document as "including non-binary, gender diverse, gender queer, pan-gendered, androgynous and inter-gender. Some cultures may have their own terms for gender identities outside male and female, for example, 'sistergirl' and 'brotherboy' are used by some Aboriginal and Torres Strait Islander people." 'Australian Government Guidelines on the Recognition of Sex and Gender' *Australian Government* July 2013

<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF> (last accessed 9 August 2019) 9.

<sup>99</sup> HCA [2014] [6].

By asking *how* Norrie should be gendered, the ‘Straight Court’ (the court functioning as part of Wittig’s ‘Straight Mind’) focused on matching the ‘taxonomy’ of Norrie’s body<sup>100</sup> with the existing bureaucratic structures and processes. In doing so it avoided the underlying question of *whether* we should gender people at all or why we do so. Here, like in K’s case, a person *has to have* a gender. Perhaps surprisingly, almost nothing has been written on this case in the law journals.<sup>101</sup> The effect of these Queer Cases is thus on the one hand, positive recognition of gender beyond the binary, but on the other, to strengthen, expand, make more effective and accurate, law’s gendering function.

## 2 Criminalising Trans/‘Gender Deviants’/The Heteropatriarchy Fights Back

While the civil justice system created additional boxes for Norrie and others, the criminal justice system ‘boxes’ queers particularly violently. According to Bent Bars, “queer, trans and gender non-conforming people, particularly those from poor backgrounds and communities of colour, are disproportionately funnelled into the prison system as a result of systemic discrimination, inequality and social exclusion.”<sup>102</sup> While black trans women are disproportionately subjected to police and other state violence and murder in particular in the US,<sup>103</sup> in England and Wales (which imprisons more black people relative to the total population than the US<sup>104</sup>) the treatment of LGBTQ and especially trans prisoners of colour must be highlighted. Organisations such as the Bent Bars Project<sup>105</sup> and Empty Cages Collective<sup>106</sup> advocate on behalf of trans prisoners and for prison abolition. In England and Wales most trans women are detained in men’s prisons, leaving them at risk of violence by other inmates (or, subject to lengthy solitary confinement) and by staff, and also often deprived of life-saving medical assistance. Tara Hudson’s case is emblematic of this situation in England, and as a prominent activist she managed to gather 150,000 signatures on a petition to get her moved to a womens’ prison. She has

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<sup>100</sup> The court uses the word ‘taxonomy’ in para. 210 (10) of NSWCA [2013].

<sup>101</sup> But see, for example, Mary Keyes, ‘The Formal Recognition of Sex Identity’ (2014) 28 *Australian Journal of Family Law* 266; Benjamin Moron-Puech, who criticizes the fact that sex markers were kept, Benjamin Moron-Puech, «Création d’un sexe « non spécifique » par la Haute Cour d’Australie», *La Revue des droits de l’homme*, Actualités Droits-Libertés, 10 April 2014. Available at, <http://journals.openedition.org/revdh/641>.

<sup>102</sup> Bent Bars Project, ‘About’ 2011 <<https://www.bentbarsproject.org/about>> (last accessed 9 August 2019).

<sup>103</sup> LaLa B Holston-Zannell, ‘Black Trans Women Are Being Murdered in the Streets. Now the Trump Administration Wants to Turn Us Away From Shelters and Health Care’ *AGLU* (online) 24 May 2019 <<https://www.aclu.org/blog/lgbt-rights/transgender-rights/black-trans-women-are-being-murdered-streets-now-trump>> (last accessed 9 August 2019).

<sup>104</sup> Randeep Ramesh, ‘More Black People Jailed in England and Wales Proportionally than in US’ *The Guardian* (online) 11 October 2010 <<https://www.theguardian.com/society/2010/oct/11/black-prison-population-increase-england>> (last accessed 9 August 2019).

<sup>105</sup> Above note 102.

<sup>106</sup> Empty Cages Collective <<http://www.prisonabolition.org/>> (last accessed 9 August 2019).

sued the Ministry of Justice over her treatment.<sup>107</sup> Rather than recognising trans prisoners' gender, the MoJ is now proposing to detain (some) trans people in a specific trans prison.<sup>108</sup> The Scottish government, as well as non-binary legal recognition, is considering building new non-binary prisons.<sup>109</sup>

In the second part of the story I again focus on the UK, although similar cases have come to courts in other countries.<sup>110</sup> In the UK, even though binary trans identity and experience is in principle legally recognised alongside LGB rights, primarily through the Gender Recognition Act 2004, trans acceptance has its limits. For example, getting a Gender Recognition Certificate (GRC - the prerequisite for changing one's legal gender status), is a long, expensive, and intrusive process. The fact that trans people are able to change their name and gender marker in their passports and other documents (but not their birth certificate) *without* a GRC has led to the situation where most trans people in the UK do not change their legal gender.<sup>111</sup> Currently therefore many people live and embody a certain gender, who in law may be treated as another. This means that despite the Gender Recognition Act, 'fucking while trans/queer' remains a highly risky activity, which becomes clear upon reading the so-called 'gender deception' cases, where the 'Straight Court' shows its trans and lesbophobic side.<sup>112</sup>

## 2.1 McNally: Gender/Sex As A Crucial Element Of Our Identity

In the UK in 2012, Justine McNally<sup>113</sup> pleaded guilty to six counts of 'assault by penetration' contrary to section 2 of the Sexual Offences Act 2003 ("SOA"). McNally, aged 13 and living in Scotland, had struck up an online friendship with M, one year younger, and living in London. The relationship developed into a romantic one over the following 3-4 years, and just after McNally's 16<sup>th</sup> birthday, McNally visited M at her parental home. According to the Court, McNally, who had used the name Scott throughout the relationship, 'presented as a boy'. During this and the following four visits, McNally and M had consensual sex regularly, involving oral and digital penetration of M. On the fourth

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<sup>107</sup> Mark Townsend, 'Transgender Woman Sues Over Ordeal in Male Prison' *The Guardian* (online) 20 January 2018, <<https://www.theguardian.com/society/2018/jan/20/tara-hudson-transgender-prisoner-sues-government>> (last accessed 9 August 2019).

<sup>108</sup> 'First UK transgender prison unit to open' *BBC News* (online) 3 March 2019 <<https://www.bbc.co.uk/news/uk-47434730>> (last accessed 9 August 2019).

<sup>109</sup> 'New Non-Binary Prison in Scotland?' *Corporate Watch* (online) 17 January 2018 <<https://corporatewatch.org/new-non-binary-prison-in-scotland/>> (last accessed 9 August 2019).

<sup>110</sup> See especially, Aeyal Gross, 'Gender Outlaws Before the Law: The Courts of the Borderlands' (2009) 32 *Harvard Journal of Law & Gender* 165.

<sup>111</sup> This situation was one of the stated motivations behind the recent England & Wales Gender Recognition Act consultation, see the Consultation Document, published July 2018, stating the rationale behind the 2018 public consultation on reform of the Gender Recognition Act 2004. Government Equalities Office, 'Reform of the Gender Recognition Act' 3 July 2018 <<https://consult.education.gov.uk/government-equalities-office/reform-of-the-gender-recognition-act/>> (last accessed 9 August 2019).

<sup>112</sup> On this topic, see Alex Sharpe, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal and Ethical Debate* (Routledge 2018).

<sup>113</sup> McNally had indicated that she identified as female during this period, which is why I use she/her (as did the court), *R v McNally (Justine)* [2013] EWCA Crim 1051.

visit, M's mother confronted McNally about 'really being a girl'. The police became involved and McNally was arrested and charged with multiple counts of assault by penetration (S. 2 Sexual Offences Act 2003).

The defendant had made some conflicting statements as to whether or not she believed that M knew her gender assigned at birth - and the court chose to adopt the view that she did not. McNally had seen a counsellor about gender dysphoria. Following McNally's guilty plea, neither McNally nor M gave evidence in court. Counsel in the appeal case argued that McNally had been wrongly advised by her solicitors to plead guilty. If McNally is in fact trans, there was no deception. If McNally had believed that M knew her assigned gender the mental element of the offence – one element of which is 'absence of reasonable belief in [the complainant's] consent' - may not have been established. Equivocal statements were apparently made by M herself as to whether or not she knew McNally's 'true gender' and also, vitally as to whether she would still have chosen to have a sexual relationship with 'a girl'.<sup>114</sup> When McNally was 'outed' by M's mother McNally apparently repeatedly asserted that they 'wanted a sex change'.<sup>115</sup> Pre-sentencing reports also noted McNally's 'confusion' as to their gender and sexuality,<sup>116</sup> though they did not explicitly testify as being trans.

Since the examples of deceit which vitiate consent to sexual acts in s. 76 of the SOA (deception as to the nature or purpose of the act<sup>117</sup> and impersonation of a person personally known to the complainant) do not cover the current scenario, the court focused its analysis on s. 74 of the SOA 2003. This section explains consent thus: "a person consents if he agrees by choice and has the freedom and capacity to make that choice." Judge Leveson stated,

"25. In reality, some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent. In our judgment, Lord Judge's observation that "the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad commonsense way" identifies the route through the dilemma.

26. Thus while, in a physical sense, the acts of assault by [digital and oral] penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male. Assuming the facts to be proved as alleged, M chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception.

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<sup>114</sup> *R v McNally (Justine)* [2013] EWCA Crim 1051 [46].

<sup>115</sup> As above [10].

<sup>116</sup> As above [47].

<sup>117</sup> Which could apply to, for example, the case of a medical professional carrying out a physical exam not for medical purposes but in fact for their sexual gratification.

27. It follows from the foregoing analysis that we conclude that, depending on the circumstances, deception as to gender can vitiate consent...<sup>118</sup>

Whether or not McNally's behaviour should be thought of as morally or legally reprehensible, there is – outside of the 'Straight Mind' - nothing 'obvious' about why deception as to wealth is not, and gender is, sufficient to vitiate consent. The straight court chose not to explain this 'obvious' difference. When does non-disclosure amount to 'deception', and what information should be explicitly exchanged before engaging in sexual encounters? The default, heterosexuality, is assumed, the opposite needs to be explicitly, deliberately 'chosen'. Noone would expect a straight cisperson to have to explain their sexuality, gender, or genitalia to a potential lover (or indeed ever<sup>119</sup>). Additionally, it is interesting to see how ingrained the semiotics of gender are, when use of a "boy's name" and wearing "boy's clothes" amount to "deception as to gender". Moreover, where does this leave trans people who have legally transitioned?<sup>120</sup> The court conflates sex and gender, and moreover assumes we can read the 'truth' of off someone's body, based on the assumption of their genitalia – which, in McNally's case, remained well hidden - as McNally kept her clothes on at all times. Moreover this 'truth' carries with it enormous significance, here landing a young person in jail for several years.

The Appeal Court's decision is based on the *idea* (equivocal statements were made by M on the issue) that M would not have engaged in intercourse with McNally "had she known the *devastating 'truth'*" of McNally's sex. Neither McNally nor M were heard in court and their words appear only in written statements. It was M's mother who challenged McNally on their gender status, and (reportedly) insisted on her daughter's heterosexuality. The police became involved after M's mother complained to McNally's school and McNally admitted to the headmaster that she and M had had sex. It is possible that McNally pled guilty to protect 'the love of her life' from having to take the stand. Why the complaint was made in the first place may have more to do with societal/parental/school attitudes than the 'reality' of the relationship between M and McNally – as popular magazine *Vice* puts it, "[i]f you enjoyed having sex with a girl, but then became revolted when someone revealed you had sex with a

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<sup>118</sup> *R v McNally* [25-27].

<sup>119</sup> Except perhaps in the case of a cisman without a penis: Georgia Sheales, 'Man with No Penis Fools over 100 Women into Bed' *Acclaim* (online) <<https://acclaiammag.com/culture/man-penis-fools-100-women-bed/>> (last accessed 9 August 2019).

<sup>120</sup> McNally had seen a counselor about gender dysphoria as a young teenager, but after the court and prison experience has chosen to live as a woman [latest report on Justine McNally's release in 2013 – tabloid press]. See also, Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) *The Journal of Criminal Law* 417.

girl, in the 21st century, isn't that a kind of reverse-induction homophobia?"<sup>121</sup> Likewise, if you enjoyed having sex with a boy, why did you freak out when your mother discovered he is trans?

While some factors 'obviously' vitiate consent in law, others do not. In August 2014 the UK Crown Prosecution Service (CPS) decided not to charge a number of police officers who had posed as activists and engaged in long term sexual relationships (some including marriage and even children<sup>122</sup>) with members of activist groups in order to elicit information for law enforcement purposes.<sup>123</sup> The issue became known as the 'Spycops' scandal and the subject of a public inquiry.<sup>124</sup> Some of the victims complained to the police that the spycops effectively raped them since they never would have consented to sex had they known the men were undercover police sent to undermine their political work. The CPS however decided that the officers' deception did not constitute a deception vitiating consent to intercourse. The CPS cited s. 74 of the SOA 2003, which it considered provided 'helpful guidance as to the ordinary meaning of "consent"'. It moreover cited, as setting out the law on consent, the cases of *Assange v Swedish Prosecution Authority*<sup>125</sup> (where it was held that if consent to intercourse was conditional upon the use of a condom, and this condition was deliberately ignored, the ensuing intercourse was capable of amounting to rape), *R(F) v the DPP*<sup>126</sup> (a similar 'conditional consent' case where the claimant had been deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based, in this case, pre-ejaculation withdrawal), and *R v McNally*.

Significantly, the CPS does not explain its finding that 'any deceptions in the circumstances of this case were not such as to vitiate consent'. Thus we are left with the notion that the protection of the mark of gender (the existence of which was why McNally may have felt compelled to take on a 'boy's name', wear 'boy's clothes' etc. in the first place) is more obviously necessary and incontrovertible than the protection of a person, and their child, from a deception that was in fact *specifically intended to do harm to them*. Moreover, the spycops scenario is one *where the perpetrator would have been certain that the victim would not have consented had she known the truth*. This goes against the notion that in law, so as not to commit a sexual offence, a person must have a 'reasonable belief' in the other party's consent. Indeed, Harriet Wistrich (the lawyer representing the women in this case) made this very argument: "[The law] leaves it open to the state to continue to utilise sex as a weapon in their undercover arsenal

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<sup>121</sup> Gavin Haynes, 'The Morality of Pretending to Be a Man in Order to Sleep with Women' *Vice* (online) 25 March 2013 <[https://www.vice.com/en\\_uk/article/ex7y5a/justine-mcnally-scott-gemma-barker-strap-on-dildo-morality](https://www.vice.com/en_uk/article/ex7y5a/justine-mcnally-scott-gemma-barker-strap-on-dildo-morality)> (last accessed 9 August 2019).

<sup>122</sup> For more information, see 'The Eight Womens Case – Overview' *Police Spies Out of Lives* <<http://policespiesoutoflives.org.uk/the-case-overview/>> (last accessed 9 August 2019).

<sup>123</sup> CPS Blog Charging decision concerning MPS Special Demonstration Squad, 21 August 2014, <https://www.webarchive.org.uk/wayback/en/archive/20141129080657/http://blog.cps.gov.uk/2014/08/charging-decision-concerning-mps-special-demonstration-squad.html> (last accessed 28 August 2019).

<sup>124</sup> Undercover Police Inquiry <<https://www.ucpi.org.uk>>.

<sup>125</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

<sup>126</sup> *R(F) v DPP* [2013] EWHC 945 (Admin)

with impunity and leaves women open to very frightening abuses of power for the foreseeable future." She argues the CPS should consider whether Mr Boyling [one of the spycops] should be prosecuted on the same legal terms as two women who were convicted of sexual assault by deception."<sup>127</sup> This was rejected.<sup>128</sup>

While deep structural misogyny (treatment of women and their bodies instrumentally to gain information for the benefit of the state) defines the SpyCops cases, the limits of trans and also LGB acceptance come into clear view in the 'gender deception cases'. These cases are a reminder that 'trans panic' as a partial defence to murder is still available in the USA today.<sup>129</sup> This defence allows the argument that if a trans person fails to disclose their trans status before the sexual encounter, they are liable for whatever happens next. Murder, this suggests, is the logical response to an unexpected trans status revelation. A clear line under trans and LGBTIQ acceptance has been drawn when it comes to 'fucking while trans/queer', allowing the heteropatriarchy to resume its regulatory enforcement capacity in this area, using trans- and homophobia as its truncheon.

What we can see in both these cases, is law used to uphold the violent, exploitative cisheteropatriarchal order. Rather than a sexual offence as such, the courts viewed McNally's crime much more seriously, as an attack aimed directly against the cisheteropatriarchy itself: McNally was convicted for having taken away M's freedom to be the default – hetero. This reinforces the old trope that LGBTQ people *choose* to be different, as an act of deliberate deviance or delinquency, which deserves to be punished, and from which the innocent, normal, ought to be protected.

## 2.2 Gayle Newland: Too Queer For Our Binary

Several cases similar to McNally's have come up since, all relating to young 'assigned female at birth' individuals, some identifying as trans (e.g. Kyran Lee, who was male in law) and others not (Newland).<sup>130</sup> Newland's case stands out for the bizarre facts and long sentence passed. It also provides

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<sup>127</sup> *R (on the application of Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin). See also, Carole McCartney and Natalie Wortley, 'Under the Covers: Covert Policing and Intimate Relationships' (2018) 2 *Criminal Law Review* 137; Dominic Casciani, 'Undercover Officer Won't Face Prosecution Over Relationship' *BBC News* (online) 14 December 2018 <<https://www.bbc.co.uk/news/uk-46570224>> (last accessed 9 August 2019).

<sup>128</sup> The question whether forming sexual relationships was part of the 'job description' of Spy Cops is still under investigation by the Undercover Policing Inquiry. 'List of Issues' *Undercover Police Inquiry* 4 March 2019 <<https://www.ucpi.org.uk/about-the-inquiry/lists-of-issues/>> (last accessed 9 August 2019). See also Undercover Research Group <<http://undercoverresearch.net>> (last accessed 9 August 2019).

<sup>129</sup> 'Gay and Trans "Panic" Defense' *The LGBT Bar* <<https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/>> (last accessed 9 August 2019).

<sup>130</sup> See, for example, Laura-Anne Douglas, 'The Criminalisation of Transgender-Cisgender Sexual Relations: "Gender Fraud" or Compulsory Cisnormativity? Assessing the Meaning of Consent in Sexual Offences for Transgender Defendants' (2017) 3 *Juridical Review* 139; Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (2014) 3(3) *Criminal Law Review* 207.

the dilemma familiar from other contexts: the feminist obligation to believe a victim of sexual violence versus the reality of lesbophobia (homophobia with a misogynist twist) or more specifically the fear that ‘gender-normals’ have of those who ‘do female incorrectly’ – in the words of comedian Hannah Gadsby.<sup>131</sup>

Gail Newland (in the courts and media records she is often referred to as Gayle) is said to have struck up an online friendship with the complainant, using a ‘male persona’ Kye, while at the same time becoming the complainant’s (‘female’) best friend at university. The complainant and Gail (as Kye) are said to have spent over 100 hours in each other’s company over the space of a year, chatting, watching movies, going for drives, and having sex at least fifteen times. During all of this time the complainant claimed to have worn a blindfold. The pair testified to having been deeply in love and happy together, until the moment the complainant said she took off her blindfold during sex and discovered ‘Kye’ was in fact her best friend Gail, wearing a pink dildo. Newland claimed that she had met the complainant at a student LGBT party called ‘Gender Blender’, had been open about her sexuality, but had agreed to participate in gender role play because the complainant had difficulty accepting her own sexuality and wasn’t ‘out’ to anyone else. Newland claimed in other words that the complainant was fully aware of Gail and ‘Kye’ being the same person, and also that the complainant had not worn a blindfold all of the time. Newland was convicted of three counts of sexual assault and sentenced to 8 years imprisonment.<sup>132</sup>

A partly new legal team, more experienced in such cases as some of its members had represented McNally in her appeal, appealed based on bias in the Crown Court judge’s summing up of the case to the jury,<sup>133</sup> as well as the excessive length of the sentence. The Court of Appeal quashed the Crown

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<sup>131</sup> Above note 22.

<sup>132</sup> Since the initial trial and the retrial occurred in the Crown Court we do not have official published accounts of the process, apart from Judge Dutton’s sentencing remarks. ‘Sentencing Remarks of HHJ Dutton: R v Gayle Newland’, Courts and Tribunals Judiciary (UK) 12 November 2015

<<https://www.judiciary.uk/judgments/sentencing-remarks-of-hhj-dutton-r-v-gayle-newland/>> (last accessed 9 August 2019). In my discussion I rely therefore on reports from the Guardian, the Liverpool Echo as well as Nigel Power QC’s summary of the facts and the transcript of Judge Dutton’s Summing up to the Jury (documents on file with the author). See, for example, Simon Hattenstone and Helen Pidd, ‘Gayle Newland Found Guilty at Retrial of Tricking Female Friend into Sex’, *The Guardian* (online) 30 June 2017 <<https://www.theguardian.com/uk-news/2017/jun/29/gayle-newland-found-guilty-at-retrial-of-tricking-female-friend-into-sex>> (last accessed 9 August 2019); Simon Hattenstone, “‘I was pretending to be a boy for a variety of reasons’”: The Strange Case of Gayle Newland’ *The Guardian* (online) 15 July 2017 <<https://www.theguardian.com/uk-news/2017/jul/15/gayle-newland-retrial>> (last accessed 9 August 2019); Jonathan Humphries, ‘Vital evidence in fake penis sex assault trial that helped jail Gayle Newland’ *The Liverpool Echo* (online) 1 July 2017 <<https://www.liverpoolecho.co.uk/news/liverpool-news/vital-evidence-gayle-newland-trial-13268526>> (last accessed 9 August 2019).

<sup>133</sup> Meaning that the judge’s bias against Newland had skewed his summing up and thus influenced the jury.

Court judgment agreeing with the appeal team on the first point: according to Lady Justice Hallet, the summing up had been one ‘the prosecution would have been proud of’.

The summing up is not a public document,<sup>134</sup> but Crown Court Judge Dutton’s sympathies are evident in his sentencing remarks, which open with “Gayle Newland – at 25 years of age you are an intelligent, obsessional, highly manipulative, deceitful, scheming and thoroughly determined young woman.”<sup>135</sup> Dutton states the victim “was successfully deceived into believing this was full sex with a man and nothing less.”<sup>136</sup> Sex with a woman wearing a pink dildo is here considered “less” than “full” sex, which is of course, heterosexual ‘penis in vagina’ (PIV) sex. Yet if one compares the sentences handed out by Judge Dutton to sex offenders, lesbian sex appears somehow more harmful than child sex offences. Judge Dutton gave a four year and 8 month sentence to a man for raping four 13-year-olds, while another – a former teacher who had abused 24 boys in the 1970s – received a sentence of just six years and nine months.<sup>137</sup>

As the retrial occurred again in a Crown Court by jury trial, no written decision or proceedings are published. Instead we must rely on the reports of journalists, who, according to one, did not believe Newland to be guilty.<sup>138</sup> However the jury, split 11-1, again found Newland guilty of three counts of assault by penetration and the judge sentenced her to 6 years.<sup>139</sup> Lawyers deem this ‘not a good case’ for progression to the ECtHR, partly because Newland has not publicly identified as trans - which would have made the case ‘easier’ to argue in that there would have been no ‘deception as to gender’. The better questions would be whether ‘deception as to gender’ should *ever* be considered in law to vitiate consent - or whether the notion of ‘gender deception’ is intrinsically trans/homophobic. Waiting for a trans case appears as a necessary concession to a still-Straight Court. A pragmatic consideration is, whether an ‘assigned female at birth’ defendant in a case such as this *would* come out as trans at this point, if that could get them sent to a ‘male’ prison?

Also the notion that only as trans the scenario could be ‘innocent’ denies the complexity that an individual’s sense and performance of gender carries. In a world where we have Facebook recognise 52 genders, effectively 50 of these could land you in jail. According to Gail’s statement, Newland and her girlfriend enjoyed gender role play, because in fact neither were comfortable with their sexuality.

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<sup>134</sup> Summing up transcript on file with the author. The CA decision was not published.

<sup>135</sup> *R v Gayle Newland*, Chester Crown Court, 12 November 2015 (Dutton J) 1.

<sup>136</sup> As above at 2.

<sup>137</sup> Sophie Wilkinson, ‘The Troubling Case of a UK Woman Convicted of “Gender Fraud”’ *VICE* (online) 23 December 2017 <[https://www.vice.com/en\\_ca/article/43qvz9/the-troubling-case-of-a-uk-woman-convicted-of-gender-fraud](https://www.vice.com/en_ca/article/43qvz9/the-troubling-case-of-a-uk-woman-convicted-of-gender-fraud)> (last accessed 9 August 2019).

<sup>138</sup> Hattenstone above note 132.

<sup>139</sup> With an additional six months for defrauding her employer. Helen Pidd, ‘Woman who posed as man to dupe friend into sex is jailed after retrial’ *The Guardian* (online) 20 July 2017 <<https://www.theguardian.com/uk-news/2017/jul/20/gayle-newland-jailed-for-tricking-female-friend-into-sex>> (last accessed 9 August 2019).

Perhaps then, their internalised homophobia, might have led them to perform a heteronormative ‘PIV’ role play, and to a homophobic court’s punishment. Perhaps Gail’s crime was what Halberstam has described as ‘female masculinity’<sup>140</sup> - how dare a woman wield a dildo (far larger than ‘natural’) and apparently successfully (at least for 100 hours spent together, and 15 times while fucking) ‘pretend to be a man’? It is interesting to see that all UK ‘gender deception’ cases concerned the prosecution of defendants ‘assigned female at birth’ because – like in the Israeli ‘nationality deception’ case where a Palestinian was convicted of ‘sex by deception’ having pretended to be a Jewish Israeli,<sup>141</sup> it is hard to imagine that one would ever be tried for ‘pretending’ to be the less valued thing.

The fact that the dildo appeared in court as ‘evidence’ (of what exactly other than to ‘humiliate’ both the accused and the complainant?<sup>142</sup>), and is regularly described as a ‘fake penis’, or in the court’s language, a ‘prosthetic’, shows the centrality to the institutions of heteronormalisation of the materiality of the ‘sex organ’. In sexage, ‘man’ is reduced to ‘penis’ and the deception is distilled into the question, silicone or meat penis?

McNally was decided on consent having been vitiated according to the court because M ‘lacked the freedom to consent’ (an interpretation of Art. 74 SOA – the freedom to be the straight default or *choose* to be gay - as discussed above) while in Newland’s case the case seems to have turned on s. 76(2)(b) ‘deception as to the nature or purpose of the act’ (which gives rise to a conclusive presumption of non-consent). This makes this a case that turns on the material the object of penetration was made of. On the one hand, it could be argued that ‘we have the right to know what we are being penetrated with’, but, on the other, since many transmen (and lesbians, and others) regard their dildo as their ‘dick’, can we really say that the material fundamentally changes things such as to amount to ‘intentional deception as to the nature of the act’? The purpose of the act is sexual pleasure, the nature of the act is penetration, exactly the same but for the material of the thing penetrating. Making this argument posits that there is a fundamental/essential difference in the nature of lesbian/queer sex versus hetero sex.

In UK caselaw on this point ‘deception as to the nature or purpose of the act’ has been far more *obvious* – e.g. a fake ‘medical exam’ of the breasts, or a situation where a girl was told she needed to have her singing tutor insert his penis into her mouth so as to improve her voice.<sup>143</sup> It would seem that the statutory provision of s. 76(2)(a) SOA exists in order to protect those persons in situations where it may

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<sup>140</sup> Jack Halberstam, *Female Masculinity* (Duke University Press 1998).

<sup>141</sup> Gross above note 110 ; Aeyal Gross, ‘Rape by Deception and the Policing of Gender and Nationality Borders’ (2015) 24 *Tulane Journal of Law & Sexuality* 1.

<sup>142</sup> Transcript records the complainant’s embarrassed reaction to the dildo being brought out.

<sup>143</sup> *R v Tabassum* [2000] 2 Cr App R 328 Court of Appeal; *R v Williams* [1923] 1 KB 340.

not be clear that the purpose of a certain conduct can in fact be sexual, when it could indeed be otherwise.<sup>144</sup>

Moreover, a woman using a ‘fake penis’ is regarded as clearly deceptive, while one using a ‘prosthetic’ is at best a ‘defective’ man (castrated male). The lesbian using a common sex toy remains invisible, erased. Viz. Judge Dutton’s sympathy with the complainant’s dissatisfaction, since she had been expecting “full sexual intercourse with a man and nothing less”!<sup>145</sup> McNally strenuously denied having used her dildo ‘on M’, and was acquitted of the count of assault by penetration that related to the use of the dildo, while being convicted of the counts that related to penetration of the vulva/vagina by tongue and fingers (‘oral and digital’). Somehow, oral and digital penetration are less serious, regarded as less ‘real sex’<sup>146</sup> (even than ‘dildo in vagina’ sex). This is reminiscent of the time when sodomy was a crime, but sex between women wasn’t – because what women do isn’t ‘really sex’ – perhaps because it does not affect women’s reproductive capacity.<sup>147</sup>

This case shows the crackdown on the gender non-normal, who are ‘served up’ as a sort of live lesbian porn – coming to the courtroom to be forced to submit and be punished, by the ‘Straight Court’, forcibly protecting victims’ heterosexuality.

The ‘gender deception’ cases have had a deeply felt impact in the trans community. Considering the fact that most trans people in the UK do not change their legal gender because the process is so cumbersome, many trans people live in genders that do not match their legal gender status. Since the widely reported case of McNally, many trans people fear that if they do not disclose their trans status they potentially expose themselves to criminal charges.<sup>148</sup> ‘Sexual assault’ could be implied from a momentary touch or kiss, since the rules on consent apply across the sexual offences.<sup>149</sup> The situation potentially criminalises people living their lives, criminalises them for being trans. By way of contrast,

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<sup>144</sup> On the flipside, where a john refused to pay a sex worker after her services, as he had in fact never intended to do, this was not treated as deception of the nature nor purpose of the act, the purpose was resolutely seen from the john’s perspective (sexual gratification) rather than that of the sex worker (earning a living).

*R v Linekar* [1995] 2 Cr App R 49.

<sup>145</sup> ‘Sentencing Remarks of HHJ Dutton: *R v Gayle Newland*’, Courts and Tribunals Judiciary (UK) 12 November 2015 <<https://www.judiciary.uk/judgments/sentencing-remarks-of-hhj-dutton-r-v-gayle-newland/>> (last accessed 9 August 2019), p. 2.

<sup>146</sup> See also Sheales above note 119.

<sup>147</sup> See Sophie Lewis, *Full Surrogacy Now: Feminism Against Family* (Verso 2019).

<sup>148</sup> Conversations with friends and see also Jane Fae, ‘Trans People Face Jail for rape if they have sex without sharing their gender history’ *Gay Star News* (online) 1 June 2016 <<https://www.gaystarnews.com/article/trans-people-face-jail-rape-sex-without-sharing-gender-history/>> (last accessed 9 August 2019). For a critical discussion of the ethics of disclosure requirements, see Alex Sharpe, ‘The Ethicality of the Demand for (Trans)parency in Sexual Relations’ (2017) 43(2) *Australian Feminist Law Journal* 161.

<sup>149</sup> Except in the case of offences against children where consent is generally irrelevant (see for instance Sexual Offences Act 2003 ss. 5-12).

a white cis het male who ‘pretended to be a lesbian’ for a night in order to ‘make out with’ ‘gorgeous young lesbians’ - Toby Young - deliberately going out to harm people, gets not 7 years in jail but at most a ‘twitter backlash’.<sup>150</sup> What these cases show is a contradiction between the purported acceptance of trans status in law and what is still a deeply cisgenderist system.

### 3 The Heteronormative Family Structure Vs ‘Birthing Fathers’

Same sex parents and their families however are being brought into the normative fold in an increasing number of countries where ‘same sex marriage’ is available, evidencing the success of the assimilationist LGBT rights movement’s strategies.<sup>151</sup> Yet, through queer cases, families with non-normative bodies continue to grind up against the ‘normalising’ role of law, escaping the effects of homo and transliberal law reform. The cases in this section concern ‘assigned female at birth’ trans men whose legal masculinity is undermined by the straight court’s refusal to accept a scenario where cismasculinity is threatened. I have found only one case (in the UK) of a trans woman being refused registration as mother – in this case of a child born during her transition (which in the UK takes at least two years) and thus before she acquired a GRC.<sup>152</sup>

The case of *X, Y and Z v The United Kingdom*, a 1997 ECtHR case,<sup>153</sup> concerned a trans man (X) whose partner had given birth following donor insemination. X was still legally female as this was pre-Gender Recognition Act 2004, but, “it was important to note that X had irrevocably changed many of his physical characteristics and provided financial and emotional support to Y and Z. To all appearances, the applicants lived as a traditional family.”<sup>154</sup> However, although generally cis men whose partners bear children with the help of sperm donors are recognised as fathers in law, the European Court of Human Rights in 1997 decided that a trans man need not be accorded the same right - i.e. the UK was

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<sup>150</sup> Danielle Mustarde, ‘Twitter backlash as Toby Young “I was a Lesbian” article resurfaces’ *Diva Magazine* (online) 2 January 2018 <<http://www.divamag.co.uk/Diva-Magazine/News/Twitter-backlash-as-Toby-Young-I-was-a-Lesbian-article-resurfaces/>> (last accessed 9 August 2019). See also Sophie Wilkinson, ‘I – a Lesbian – Dressed Up as Toby Young to Get Into Gentlemen's Clubs’ *Vice* (online) 8 January 2018 <[https://www.vice.com/en\\_uk/article/9kndv7/i-a-lesbian-dressed-up-as-toby-young-to-get-into-gentlemans-clubs](https://www.vice.com/en_uk/article/9kndv7/i-a-lesbian-dressed-up-as-toby-young-to-get-into-gentlemans-clubs)> (last accessed 9 August 2019).

<sup>151</sup> In fact, the legal recognition of same-sex parenting pre-dated same sex marriage in many jurisdictions.

<sup>152</sup> *R (on the application of JK) v Registrar General for England and Wales* [2015] EWHC 990 (Admin). In this case, JK, who conceived a child naturally with her wife, asked to be described as parent or parent/father on the child’s birth certificate. The court denied JK’s request on the basis that the Gender Recognition Act 2004 only recognises change of legal status with a Gender Recognition Certificate, and does not work retrospectively. JK had been transitioning at the time of the birth, and had not yet (been entitled to, under the Act) obtain a GRC, despite having changed her name by deed poll before the birth and despite ‘living as a woman’.

<sup>153</sup> *X, Y and Z v The United Kingdom* ECtHR [21830/93](#) (1997).

<sup>154</sup> As above at [33].

permitted to use its margin of appreciation to exclude trans people from recognition based on the notion that “only biological men can be considered fathers.”<sup>155</sup>

The next series of cases concerns legal men giving birth, and also not being considered fathers. Eight years after Patrick Califia and his boyfriend Matt, “who is the mother of [their] child”<sup>156</sup> started their family in San Francisco, Thomas Beatie, was reported as the first ‘pregnant man’ in the US in 2008.<sup>157</sup> Beatie was described as the father of his children on their birth certificates, in this otherwise ‘normal’ heterosexual marriage. Three children and several years of marriage later, the courts however needed four years to grant Beatie a divorce from his wife as the court challenged the marriage and Beatie’s legal gender *because* the husband had borne the children.<sup>158</sup> What we can see here is a deep reluctance on the part of the system to allow trans men to ‘ascend’ to key male roles like ‘father’ (possibly making cis men feel redundant except as sperm donors) as well as a reluctance to accept trans men as ‘real men’ if they perform functions traditionally labelled as “woman’s”.<sup>159</sup> In other words, the legal system mirrors and co-constitutes a trans male acceptance which is only superficial, limited by transphobia and misogyny which are both ‘enforcement’ functions of the heteropatriarchal system, as they were in McNally and Newland.<sup>160</sup>

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<sup>155</sup> As above at [52].

<sup>156</sup> Patrick Califia-Rice, ‘Family Values’ *The Village Voice* (online) 20 June 2000 <<http://www.villagevoice.com/2000-06-20/news/family-values/2/>> (last accessed 9 August 2019).

<sup>157</sup> Thomas Beatie, ‘Labor of Love: Is society ready for this pregnant husband?’ *The Advocate* (online) 14 March 2008 <<http://www.advocate.com/news/2008/03/14/labor-love>> (last accessed 9 August 2019); see also Mitch Kellaway, ‘Kentucky Husband and Wife, Both Trans, Discuss His Pregnancies’ *The Advocate* (online) 8 August 2008 <<http://www.advocate.com/parenting/2014/08/08/watch-kentucky-husband-and-wife-both-trans-discuss-his-pregnancies>> (last accessed 9 August 2019).

<sup>158</sup> See the Amicus Brief filed by the Transgender Law Centre. ‘Amicus Brief’ 5 September 2013 <<http://transgenderlawcenter.org/wp-content/uploads/2013/09/Beatie-Amicus-Brief-Final.pdf>> (last accessed 9 August 2019).

<sup>159</sup> Transman pregnancy has become a regular media story and the subject of a number of documentaries. See, for example, Paula Coccozza, ‘The story of one man’s pregnancy: “It felt joyous, amazing and brilliant”’ *The Guardian* (online) 22 March 2018 <<https://www.theguardian.com/lifeandstyle/2018/mar/22/story-one-mans-pregnancy-trans-jason-barker>> (last accessed 9 August 2019); Andrea Cornwell and Jeanie Finlay, ‘Seahorse: exclusive trailer for documentary about the dad who gave birth – video’ *The Guardian* (online video) <<https://www.theguardian.com/film/video/2019/apr/02/seahorse-exclusive-trailer-for-new-documentary-about-the-dad-who-gave-birth-video>> (last accessed 9 August 2019).

<sup>160</sup> Likewise, the legal system co-constitutes and reinforces the limited acceptance of trans women, which is borne out for example in the treatment of trans female prisoners such as Tara Hudson. See, for example, [above note 107](#); [Above note 108](#).

### 3.1 The ‘Berlin Transfather’

In March 2013 the person I named ‘Lukas’ above gave birth to his child. In October 2014, the Berlin Court of Appeal, heard his appeal against the registrar’s refusal, and the Schöneberg court’s December 2013 affirmation of this refusal,<sup>161</sup> to name him as the father of his child.<sup>162</sup>

His child was represented by a state-appointed lawyer, who argued in its name for the child’s constitutional right to know its mother. ‘Lukas’ was registered on his child’s record in his deadname (former ‘female’ name<sup>163</sup>) because the registrar considered (and the court agreed) that he was related to the child ‘as a woman’ because he gave birth to him. According to the court, German trans law foresees reverting back to previous genders when there is biological parenthood. Secondly, the constitutional right of the child to have a mother and a father, despite the transition of (in this case) one of the parents is thus upheld.<sup>164</sup>

German law defines as mother of a child the woman who gave birth to it,<sup>165</sup> and the court took this to mean that the person who gave birth to the child, must *therefore* be its mother. This, regardless of the person’s legal gender. The German Constitutional Court in 2011 held that to require trans people to be sterilised before allowing a legal gender change was unconstitutional, which gave rise to the possibility of exactly this type of case.<sup>166</sup> No legislative provisions to accommodate a putative ‘Lukas’ were made following the 2011 decision, but rather, the ordering function of the register and the constitutional rights of the child were invoked to partially cancel the decision’s effect. In Lukas’ case the ‘Straight Court’ acts seeking to prevent that male persons bear children ‘because this contradicts gender relations and can have far-reaching effects on the legal ordering’.<sup>167</sup> What those far-reaching consequences would be was not explained, the court appeared to consider these obvious, and obviously dangerous. The Berlin transfather’s request posed a threat to the legal order, no less.

The court reasoned that if Lukas were not registered as the mother, it would not be possible to ascertain that the child was Lukas’ offspring. Lukas argues there can in fact be no doubt that he is the child’s parent, but the court stated that in law this can only be when he gave birth ‘as a woman’. For legal motherhood in German law it is irrelevant whether the person who births the child is genetically related,

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<sup>161</sup> AG Schöneberg – Beschluss vom 13. Dezember 2013 – 71 III 254/13.

<sup>162</sup> Kammergericht Berlin, Entscheidung vom 30.10.2014 - 1 W 48/14.

<sup>163</sup> Germany has a strict system of binary gendered naming, where newborns cannot be given a name, nor can adults change their name to one ‘incongruent with their birth sex/legal gender’. See, for example, OLG Hamm, Beschluss vom 18. Januar 2005 – 15 W 343/04 –, juris (deciding “Luka” is only acceptable as a boy’s name) and for a commentary on the practice: Martin Weber, ‘Namenserwerb und Namensänderung bei Kindern’ (NZFam 2015) 4.

<sup>164</sup> Kammergericht Berlin, Entscheidung vom 30.10.2014 - 1 W 48/14 [8].

<sup>165</sup> § 1591 Bürgerliches Gesetzbuch (BGB) “Mutter eines Kindes ist die Frau, die es geboren hat”.

<sup>166</sup> BVerfG, Beschluss des Ersten Senats vom 11.01.2011 - 1 BvR 3295/07 - Rn. (1-82)

[http://www.bverfg.de/e/rs20110111\\_1bvr329507.html](http://www.bverfg.de/e/rs20110111_1bvr329507.html).

<sup>167</sup> As above at [9].

as also ‘surrogates’ who carry a pregnancy through egg transplant are seen as legal mothers. ‘Lukas’, the court held, can only bear parental responsibility for the child (which manifests itself in the mother’s right to name the child) as its mother. The court continued by noting – although this is not relevant here - that in German law a child cannot have two legal (biological) fathers. If Lukas’ marriage had not been dissolved before the birth of his child the now ex-husband (who is not related to the child – the court specifies that the child was conceived using the ‘Bechermethode’ and donor sperm<sup>168</sup>) would automatically have been the legal father. Moreover, there is ‘naturally’ a ‘biological father’ in play here, and – the court held - his identity is not dependent on the method of conception used (mixed donation impregnation) but established on the basis of the genetic ties. Lukas’ sperm donors had agreed not to claim any rights over any child that might be conceived, however the court decided that the agreement made between Lukas and the donors had no validity vis-à-vis the child. Although the discussion was mostly about why Lukas could not *not* be his child’s mother, he could also not be a father. ‘There is no legal possibility to simply attribute the legal provisions around motherhood to the father’ was the biologist view of the court.<sup>169</sup> Also, the court held that Lukas was under an obligation to reveal to the registrar that his current gender status is not his ‘biological’ gender status.<sup>170</sup>

The court concluded that the appellant is to be distinguished from other persons who are legally male, in that he has the ability to conceive and bear a child. This circumstance – the court found- permits in law the distinction in attribution of parenthood between mother/father.<sup>171</sup> With emphasis, the court stated, “[‘Lukas’] desire not to disclose his birth sex, is subordinate to the interests of his child and society in general.”<sup>172</sup>

It is clear that the three Straight Courts that considered the case (although admittedly constrained by the statutory rule that a child’s mother is the *woman* who give birth to it) held an essentialist/biologist view of gender which does not fully accept trans existence and demands to know a person’s genitalia so as to assign legal status. ‘Lukas’ was painted as “not a proper man” on the one hand, not a man capable of being a father, and “still a woman really”.<sup>173</sup> Moreover he was painted as a fraud, when he had simply stated the legal truth of his male gender. His inability to be a father to his child is evidenced, in the eyes of the court, by the fact that he placed his own desire to keep his ‘biological sex’ (read: his genitals) a secret from the registrar, above the assumed interest of the child. He is seen as violating his child’s right to a mother, necessitating the performance of a lawyer arguing against him on his child’s behalf in court.

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<sup>168</sup> Kammergericht Berlin, Entscheidung vom 30.10.2014 - 1 W 48/14 [2].

<sup>169</sup> As above at [10].

<sup>170</sup> As above at [11].

<sup>171</sup> As above at [12].

<sup>172</sup> As above at [14].

<sup>173</sup> As above at [6] – “Der Beteiligte zu 1) ist im Verhältnis zu seinen Kindern weiterhin als Frau anzusehen - da er den Beteiligten zu 2) geboren hat, als dessen Mutter, § 1591 BGB”.

The child's right to a mother, and the public right to know the mother of the child, is primary. Lukas' 'fraud' alone, depriving his child of a mother, is painted as a heinous act.

In 2014 Lukas took his case to the German Federal Supreme Court. On 10 December 2014 this court decided that a different child, born in California to a surrogate mother, could be registered as the child of the father, without a mother, where a foreign court had assigned parenthood to the father and his (male) partner on the basis of the surrogacy agreement.<sup>174</sup> Moreover, the 'genetic' father and his partner are both to be registered in the German population register as the child's parents. This, despite the fact that surrogacy is prohibited in Germany, despite the rights of the birthmother (who, though not genetically related to the child, is the mother in German law), despite there being no genetic relationship here between the genetic father's partner and the child, and despite the fact that same-sex couples are normally only ever recognised as parents in Germany in rare trans cases<sup>175</sup> (same sex marriage only became legal in 2017). The right of the child to parents (understood to exist under ECHR Art. 8.1) was held to be preeminent here. The child's right to know its parentage in German law, which one might expect to give rise to a duty to register the surrogate as mother, was considered subordinate to the interest of recognizing the factual family situation, and, it was added, such a right would sooner be directed at knowing the identity of the egg-donor rather than the surrogate.<sup>176</sup>

This decision caused some to be hopeful that 'Lukas'' case would be decided in his favour at the German Federal Court.<sup>177</sup> However, in September 2017 the German Federal Court rejected his claim, holding that the lower court had been correct to find that the legal effects of a trans person's legal gender change were limited by (effectively, subordinate to) "the 'ordering function' of the law of persons and the rights of the child of any transsexual" (the child's right to know its mother).<sup>178</sup> According to Anna Katharina Mangold, "there is no such thing. The BVerfG only stated that the State is obliged to not withhold access to data if a child wants to find out who its birth parents were."<sup>179</sup> The cases so far only concern fathers as the Latin proverb still is considered sound: mater semper certa, pater semper incertus

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<sup>174</sup> Bundesgerichtshof (BGH) Decision of 10 December 2014 – XII ZB 463/13.

<sup>175</sup> As above at [44]. For example, where one of the biological parents transitions. In German law surrogacy is prohibited and the law on parenthood which recognises only the birth mother – even if she is not genetically related to the child – and any father recognised by the birth mother or the court, or married to the birthmother, as legal parents is designed to deter surrogacy and 'reproductive tourism' – para. 35. In US law a surrogate mother can relinquish her rights over her child through a court declaration, which is what happened here.

<sup>176</sup> As above at [63].

<sup>177</sup> Correspondence with Dr Anna Katharina Mangold, Faculty of Law, University of Frankfurt, 21 January 2015. Note that since this scenario has not yet been examined by the Constitutional Court, it is not yet settled law (Comment by Anna Katharina Mangold, 13 August 2018).

<sup>178</sup> "Die allgemeinen Folgen einer Geschlechtsänderung seien im Hinblick auf die Ordnungsfunktion des Personenstandsrechts und der Grundrechte der Kinder eines Transsexuellen eingeschränkt," p. 9, Beschluss des XII. Zivilsenats vom 6.9.2017 - XII ZB 660/14.

<sup>179</sup> "Recht auf Kenntnis der eigenen Abstammung", BVerfGE 79, 256, 1989  
<<http://www.servat.unibe.ch/dfr/bv079256.html>> (last accessed 9 August 2019).

es. Thus, a right to know one's parents exists in the jurisprudence of the BVerfG [Constitutional Court], but explicitly not a distinct right to know one's mother which the courts made up ad hoc in the transfather cases as motherhood had never been a legal question before that. Hence, the argument of the registrar and the civil courts is not at all legally sound."<sup>180</sup>

In November the same court also rejected Lukas' petition claiming his right to access to justice.<sup>181</sup> Lukas then petitioned the German Constitutional Court.<sup>182</sup>

In May 2018 the Constitutional Court, without giving reasons, declined to consider the case.<sup>183</sup> The spokesperson of Germany's main trans advocacy organisation Bundesvereinigung Trans\*, Sasha Rewald, said the decision is evidence of the 'structural transphobia' in today's society.<sup>184</sup> The practical impact of a child's birth certificate bearing a parent's dead name and former legal gender status, is that it becomes very difficult for the parent to prove his relationship to the child, for example at school, at the doctor's, when travelling together, etc. It requires the parent regularly to 'prove' his relationship to the child through disclosing his trans status. The effect of Lukas' five year long court struggle and the final negative decision has been that trans men in Germany now doubt whether having children/giving birth is in fact a viable option for them.<sup>185</sup> The sterilisation requirement that used to accompany legal gender change thus continues to exist de facto even after its official abolition by the German Constitutional Court in 2011. While the 'system' of law has adapted to the necessity to incorporate trans persons, it has not incorporated trans lives fully, and 'structural transphobia' as the ideological enforcement mechanism of the cisheteropatriarchy, ensures the viability of the system and the subordination and bracketing of trans lives.<sup>186</sup> It is the 'Queer cases' like Lukas' that shed a light on the administrative violence of law's gendering practices.<sup>187</sup>

Lukas, who has financed his legal fees through 'soliparties' (fundraising parties) thrown by his friends and trans advocacy groups, is now joined by some of Germany's several trans rights organisations and,

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<sup>180</sup> Correspondence with Professor Anna Katharina Mangold, Europa-Universität Flensburg, 17 June 2019.

<sup>181</sup> Zurückweisung der Anhöhrungsrüge, BGH, 08.11.2017 - XII ZB 660/14.

<sup>182</sup> BVerfG, 15.05.2018 - 1 BvR 2831/17; Interview with Leo Yannick Wild, Schwulenberatung and TriQ, Berlin, 25 July 2018.

<sup>183</sup> The court is not obliged to give reasons for such a decision.

<sup>184</sup> 'Press release: Bundesverfassungsgericht nimmt Beschwerde von trans\* Vater nicht an – „Strukturelle Transfeindlichkeit schadet dem Kindeswohl“ *Bundesvereinigung Trans* 25 June 2018 <<https://www.bv-trans.de/wp-content/uploads/2018/06/250618-PE-BVT-BVerfG-nimmt-Beschwerde-von-trans-Vater-nicht-an.pdf>> (last accessed 9 August 2019).

<sup>185</sup> Interview with Leo Yannick Wild, Schwulenberatung and TriQ, Berlin, 25 July 2018. For further examples of the impact of the current law on trans families see also Caroline Ausserer, *Transfamilien: „Das perfekte Glück“* *Presspectives* (online) 26 May 2014 <<http://www.presspectives.net/das-perfekte-glueck/>> (last accessed 9 August 2019).

<sup>186</sup> Juana Remus, *Rechte von trans- und intergeschlechtlichen Eltern*, *NJW-aktuell* 3/2014, 14.

<sup>187</sup> On administrative violence and trans lives, see above note 26.

together with his child, has applied to the ECtHR on the basis of violation of Art. 8 Right to Private and Family Life, and Art. 14 Discrimination in regard to such enjoyment.<sup>188</sup>

### 3.2 Israel and England: Yuval Topper-Erez

In 2011, Yuval Topper-Erez gained a lot of media attention as the first transman (known) to give birth in Israel.<sup>189</sup> However despite trying to register his child at the hospital's Ministry of Interior stand, the registration failed to include Yuval's partner Matan as the father and the couple were asked to attend a hearing. Here, according to the couple, 'Yuval's sex change was undermined'. Finally after going to the Interior Minister himself, and with the help of a Knesset member of the 'Pride' faction, the couple were both registered as biological fathers. Not, however without an awkward solution: Yuval had to change his own registration back to female for a day, register as his son's mother, and change back to male the next day and become a father. Two years later, on the birth of their second child, this entire procedure had to be repeated.<sup>190</sup>

One of the reasons Lukas above had had his child at home may have been that in a hospital the staff would have inspected the genitalia of his newborn and assigned a gender.<sup>191</sup> Extensions of the state, like public hospitals, registry offices and other 'public service providers' form part of the regulating bureaucracy administering sexage and gendering.<sup>192</sup>

In 2018 a UK transman filed a claim similar to Lukas' in the UK court. No further detail is known as the case was heard in camera and the decision is pending [as at 28 August 2019].<sup>193</sup> Yuval, now based in the UK, gave birth in May to his third child. After spending some time awaiting the court's decision

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<sup>188</sup> 'Press release: Bundesverfassungsgericht nimmt Beschwerde von trans\* Vater nicht an – „Strukturelle Transfeindlichkeit schadet dem Kindeswohl“ *Bundesvereinigung Trans\** (online) 25 June 2018 <<https://www.bv-trans.de/wp-content/uploads/2018/06/250618-PE-BVT-BVerfG-nimmt-Beschwerde-von-trans-Vater-nicht-an.pdf>> (last accessed 9 August 2019); See the application, citing Art. 8 and Art. 14 in conjunction with Art. 8, *O.H. and G.H. v. Germany (communicated case)* - [53568/18](#) and [54941/18](#).

<sup>189</sup> Omri Efraim, 'State recognizes 2 biological fathers for first time' *YNet News* (online) 15 September 2013 <<http://www.ynetnews.com/articles/0,7340,L-4430009,00.html>> (last accessed 9 August 2019).

<sup>190</sup> Correspondence with Yuval Topper-Erez, November 2014.

<sup>191</sup> Der Spiegel above note 2 at 61.

<sup>192</sup> As well as, of course, racialising and othering through (in the UK currently) the administration of the border in the hospital. Amelia Gentleman, 'Crackdown on migrants forces NHS doctors to "act as border guards"' *The Guardian* (online) 20 April 2017 <<https://www.theguardian.com/uk-news/2017/apr/20/crackdown-migrants-nhs-doctors-border-guards-immigration-undocumented-migrants>> (last accessed 9 August 2019); See the work of organisations such as Doctors of the World <<https://www.doctorsoftheworld.org.uk>> and UK universities: see the work of groups such as Unis Resist Border Controls (Facebook) <<https://www.facebook.com/UnisResist.BorderControls/>>.

<sup>193</sup> But see *In the Matter of TT and YY* [2019] EWHC 1823 (Fam), the decision of 11 July 2019 granting the request by a number of British newspaper editors to have the father's anonymity order lifted. The court noted that the father had not sought to protect his own anonymity since he was the willing subject of a documentary film about his quest for fatherhood, entitled 'Seahorse'.

(which has been much delayed), he had to register his new child also as its mother – although this time, a mother with the profession: ‘full time father’.<sup>194</sup>

### 3.3 Sweden: Warren Kunce

In April 2015 the Stockholm Administrative Court decided, in a case brought by the Swedish American Warren Kunce, that a transman who had given birth can be registered as ‘father’ rather than ‘mother’ and not doing so would violate his privacy under Art. 8 ECHR.<sup>195</sup> It was held that Kunce’s right to privacy outweighed the need for the registration of a biological mother for every child. Kunce was represented by Kerstin Burman of RFSL, Sweden’s main LGBT rights organisation.<sup>196</sup> While in K’s case the court found that European society was not ready for a genderless person, Kunce aided his own acceptance (avoided his own erasure) by being a regular public speaker on trans issues – appearing at film festivals, with his own YouTube channel.<sup>197</sup> While Sweden is reputed to be a welcoming environment for the gendervariant – viz the gender neutral pronouns, and kindergarten,<sup>198</sup> in Denmark in 2017 a trans man who sought to be recognised as his son’s father (where the child had been borne by his partner), managed to change the previously genitalia-bound law of parenthood into a fully gender-neutral law.<sup>199</sup> Similarly now in Canberra, Australia parents can list themselves as parent 1, parent 2, mother or father – regardless of gender.<sup>200</sup> A de-gendered parenting law may be easier for the straight legal system to digest than a birthing father.

### 3.4 Straights Queering The Family: Other Non-Normative Families And The Law

Law’s gendering function also affect those whose gender and/or sexuality is not seen as part of the problem, with obvious distributive effects. As an example of law’s treatment of those choosing to live outside of the cisheteronormative family model, two Scottish sisters were denied the inheritance tax

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<sup>194</sup> Correspondence with Yuval and Hannah Markham QC, representing the UK claimant during May-August 2019.

<sup>195</sup> *Warren Kunce v Skatteverket*, Förvaltningsrättens i Stockholm, 24685, 14 April 2015. This case was preceded by a case where a trans man was recognised as the father of the child he gave birth to before his legal status change: *A and B v Skatteverket*, Förvaltningsrättens i Göteborg 11453-13, 10 October 2014.

<sup>196</sup> ‘Rätt att bli registrerad som sitt barns far’ *RFSL* (online) 7 November 2015 <<https://www.rfsl.se/aktuellt/raett-att-bli-registrerad-som-sitt-barns-far/>> (last accessed 9 August 2019).

<sup>197</sup> Warren Kunce (YouTube Channel) <<https://www.youtube.com/user/sillyyetsuccinct>>.

<sup>198</sup> Anna Leach, “‘It’s all about democracy’: inside gender neutral schools in Sweden” *The Guardian* (online) 2 February 2016 <<https://www.theguardian.com/teacher-network/2016/feb/02/swedish-schools-gender-alien-concept>> (last accessed 9 August 2019).

<sup>199</sup> Anna von Sperling, ‘Juridisk er Jon en mand. Men for staten må han ikke være far til sin søn’ *Information* (online) 23 March 2013 <<https://www.information.dk/indland/2017/03/juridisk-jon-mand-staten-maa-vaere-far-soen>> (last accessed 9 August 2019); Anna von Sperling, ‘Ministeren vil ikke give transkønnede mulighed for forældreskab’ *Information* (online) 23 March 2013 <<https://www.information.dk/indland/2017/03/ministeren-give-transkoennede-mulighed-foraeldreskab>> (last accessed 9 August 2019).

<sup>200</sup> Kirsten Lawson, ‘New gender non-specific birth certificates for the ACT’ *Canberra Times* (online) 16 February 2016 <<https://www.canberratimes.com.au/national/act/new-gender-nonspecific-birth-certificates-for-the-act-20160216-gmv41w.html>> (last accessed 9 August 2019).

benefit available to cohabiting couples – such that when one died, the other was forced to sell the home they had shared during their entire lives.<sup>201</sup> Similarly, others with non-normative bodies (queer or straight) do not fit in law’s scheme. According to the British ‘bedroom tax’ (a tax on ‘spare rooms’ for social housing tenants), ‘couples’ must share bedrooms – so that when partners sleep separately because one of them requires a specially adapted bed and other equipment a tax becomes payable.<sup>202</sup> The legal reforms developed for LGBT people have created opportunities for straight people to queer this area of law even further. In Canada two friends became legal mothers to the son of one of them, and in Ireland two best friends made use of ‘equal marriage’ to safeguard their shared property.<sup>203</sup> In the UK, after a long court battle, a couple opened up civil partnerships for different-sex couples. The High Court and the Court of Appeal rejected the claim, but on 27 June 2018 the UK Supreme Court held that that sections 1 and 3 of the Civil Partnership Act 2004 insofar as they preclude different sex couples from entering into civil partnerships is incompatible with Article 14 read in conjunction with Article 8 of the ECHR.<sup>204</sup> The claimants had been ideologically opposed to the institution of marriage - which they recognised as ‘patriarchal and sexist’<sup>205</sup> but desired the legal protection a civil partnership would offer, also in relation to their children.<sup>206</sup> Ontario also allows up to 4 parents to be registered on a birth certificate.<sup>207</sup> Further afield, partnership law is queered by the polyamorous, when three men create a

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<sup>201</sup> *Burden v the United Kingdom* ECtHR 13378/05, Grand Chamber, judgment 29.04.08; See Aeyal Gross, ‘The Burden of Conjuality’ in Eva Brems (ed) *Diversity and European Human Rights* (Cambridge University Press 2013) 265. Ironically, ‘after losing the first case in 2006, Joyce Burden commented: “If we were lesbians we would have all the rights in the world. But we are sisters, and it seems we have no rights at all.”’ Richard Savill, ‘Sisters cannot inherit house they have lived in since birth, European Court rules’ *The Telegraph* (online) 29 April 2008 <<https://www.telegraph.co.uk/news/1906767/Sisters-cannot-inherit-house-they-have-lived-in-since-birth-European-Court-rules.html>> (last accessed 9 August 2019); but see also John Bingham, ‘Spinster sisters could win legal right to be treated as married couples, Peers told’ *The Telegraph* (online) 24 June 2013 <<https://www.telegraph.co.uk/news/politics/10139936/Spinster-sisters-could-win-legal-right-to-be-treated-as-married-couples-Peers-told.html>> (last accessed 9 August 2019).

<sup>202</sup> Sue Bott, ‘Bedroom tax: success and failure for disabled people at the Supreme Court’ *Equality and Human Rights Commission* (online blog) 30 November 2016 <<https://www.equalityhumanrights.com/en/our-work/blogs/bedroom-tax-success-and-failure-disabled-people-supreme-court>> (last accessed 9 August 2019).

<sup>203</sup> ‘How two friends fought to be legal ‘co-mommas’ to a 7-year-old boy — and won’ *CBC Radio* (online) 7 July 2017 <<http://www.cbc.ca/radio/thecurrent/the-current-for-february-21-2017-1.3991287/how-two-friends-fought-to-be-legal-co-mommas-to-a-7-year-old-boy-and-won-1.3991307>> (last accessed 9 August 2019); Natasha Bakht and Lynda Collins, ‘Are you my Mother? Parentage in a Non-Conjugal Family’ (2018) 31(1) *Canadian Journal of Family Law* 105.

<sup>204</sup> *Steinfeld and Keidan v Secretary of State for Education* [2017] EWCA Civ 81; R (on the application of Steinfeld and Keidan) (*Appellants*) v *Secretary of State for the International Development* (in substitution for the Home Secretary and the Education Secretary) (Respondent) [2018] UKSC 32.

<sup>205</sup> Owen Bowcott, ‘Ban on heterosexual civil partnerships in UK ruled discriminatory’ *The Guardian* (online) 27 June 2018 <<https://www.theguardian.com/lifeandstyle/2018/jun/27/uk-ban-on-heterosexual-civil-partnerships-ruled-discriminatory>> (last accessed 9 August 2019).

<sup>206</sup> Owen Bowcott, ‘Plan to extend civil partnerships revealed in government report’ *The Guardian* (online) 13 May 2018 <<https://www.theguardian.com/lifeandstyle/2018/may/13/uk-plan-extend-civil-partnerships-revealed-government-report-heterosexual-couple-legal-fight>> (last accessed 9 August 2019).

<sup>207</sup> Part I of the Children’s Law Reform Act, R.S.O. 1990, c. C.12.

legal partnership in Colombia in 2017 and there may well be more such examples of legal accommodation.<sup>208</sup>

What we can see here is that there is a tension between ‘regulating’ or normalising of non-normative relationships and bodies, and a desire to uphold the supposed ‘natural order’ of the cisheteropatriarchy. It is to be expected that decisions such as Lukas’ – where the ‘Straight Court’ simply cannot get over the most quintessentially ‘female’ function of birthing being ascribed to a man (almost as upsetting as a woman with a dildo fucking ‘like a man’), will continue to clash with the more pragmatic incorporation of the ‘modern family’ into a hetero/homonormative<sup>209</sup> order. One wonders whether it is relevant that both Kunce and Topper-Erez are in stable marriages with men, while Lukas is a deliberate single parent, always the less socially acceptable option.<sup>210</sup>

#### **4 Third Gender 2.0**

The past two years have seen several so-called ‘third gender’ (or, more accurately: ‘third option’) cases come to European courts. What connects all of the cases I discuss in this section apart from the English case, is that they are brought by intersex claimants, often in conjunction with major campaigning organisations and/or as part of broader campaigns. It is important to note that contrary to K and Norrie, none of these claimants wanted there to be no gender on their registration (the option now available in Tasmania), these claimants wanted a specific third option. What looked like an attempt to move away from gender registration in the noughties, has become a move for more/better registration in the 2010s.

##### **4.1 Gaëtan (France)**

On 4 May 2017 the French Cour de Cassation, the highest court, denied the petition by an intersex individual – born, ‘sans penis ni vagin’ (without penis nor vagina) - to have ‘neutral’ entered as a gender registration.<sup>211</sup> According to intersex scholar Benjamin Moron-Puech, the civil status case was brought to highlight the intersex genital mutilation issue, with the word mutilation used in the attorney’s

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<sup>208</sup> Sibylla Brodzinsky, ‘Colombia legally recognises union between three men’ *The Guardian* (online) 3 July 2017 <<https://www.theguardian.com/world/2017/jul/03/colombia-three-men-union-alejandro-rodriguez-manuel-bermudez-victor-hugo-prada>>.

<sup>209</sup> Depending on whether the ‘Straight court’ ‘internally’ sees the birthing parent as ‘really a woman’ in a relationship with a man (while ignoring the legal sex change), or as two gay men in a stable marriage/family unit.

<sup>210</sup> In The Netherlands in the 70s the BOM-vrouw (where the acronym spells bomb but stands for ‘consciously unmarried mother’) was an archetypal radical feminist, it is interesting to see that there is no such concept in English.

<sup>211</sup> ‘La justice refuse l’inscription « sexe neutre » sur un état civil’ *Le Monde* (online) 4 May 2017 <[https://www.lemonde.fr/societe/article/2017/05/04/la-justice-refuse-l-inscription-sexe-neutre-sur-un-etat-civil\\_5122329\\_3224.html](https://www.lemonde.fr/societe/article/2017/05/04/la-justice-refuse-l-inscription-sexe-neutre-sur-un-etat-civil_5122329_3224.html)> (last accessed 9 August 2019).

pleadings before the Cour de Cassation, in order to trace a link between the lack of legal status and the prevalence of mutilation.<sup>212</sup>

However, the court explained, “the gender binary in civil status registration serves a legitimate goal and is necessary for the organisation of the social and legal spaces, of which it constitutes a foundational element; that the recognition by the judge of a “neutral sex” would have profound repercussions on the rules of French law constructed on the basis of the gender binary and would necessitate numerous legislative modifications.”<sup>213</sup> This ‘necessity’, and the potential ‘profound repercussions’, were not explained. Moreover, the court found, the infringement of the Appellant’s rights were proportionate since in fact he “looks and acts male,” in accordance with the original entry on his birth certificate,<sup>214</sup> despite the fact that Gaëtan, the claimant, had stated, ‘when I look at myself in the mirror, in the morning or in the evening, I see plainly that I don’t belong in the world of men nor in that of women’. His lawyer had added, ‘Gaëtan is neither man nor woman. He doesn’t identify as male or female, He can’t become man nor woman. He does not want to become man nor woman.’<sup>215</sup> The French court, ignoring Gaëtan’s body and certainly ignoring his gender experience, seemed to prefer not to upset the binary for one person it might have viewed (denying intersex identity) as having a rare medical condition. The court also chose to ignore the mutilation point, to which intersex lawyers responded by seeking the prosecution of surgeons performing what the UN Committee Against Torture has denounced as torture.<sup>216</sup> The Dutch, German and Austrian courts take a very different approach to the French, more akin to Norrie’s case.

#### **4.2 Leonne Zeegers (The Netherlands)**

In The Netherlands in 2017, Leonne Zeegers, who experiences her<sup>217</sup> gender as neutral, started an explicitly political case in a quest to change the law for others like her. She asked for her birth registration to be corrected, and ‘female’ to be replaced with either a third sex designation or, if the

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<sup>212</sup> Correspondence with Benjamin Moron-Puech, 10 June 2019.

<sup>213</sup> «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» Arrêt n° 531 du 4 mai 2017 (16-17.189) - Cour de cassation - Première chambre civile - ECLI:FR:CCASS:2017:C100531.

<sup>214</sup> As above.

<sup>215</sup> As above.

<sup>216</sup> Benjamin Moron-Puech, ‘Rejet historique de la première plainte pénale d’une personne intersexuée (commentaire de la décision de rejet)’ *Open Edition* (online) 22 June 2018 <<https://sexandlaw.hypotheses.org/412>> (last accessed 9 August 2019); See also the regularly updated website tracking UN reprimands for intersex genital mutilation. StopIGM <<http://stop.genitalmutilation.org/post/IAD-2016-Soon-20-UN-Reprimands-for-Intersex-Genital-Mutilations>>.

<sup>217</sup> Although it is not clear from the court decision, this interview explains Zeegers is comfortable with she/her pronouns: Nosheen Iqbal, ‘Meet Leonne Zeegers, the first gender-neutral Dutch citizen’ *The Guardian* (online) 3 June 2018 <<https://www.theguardian.com/world/2018/jun/03/leonne-zeegers-dutch-court-victory-hermaphrodites-third-gender>> (last accessed 9 August 2019).

court would not allow this, ‘sex could not be determined’ – an option that already exists in Dutch law though only for newborns with ambiguous genitalia.<sup>218</sup>

The court took the dual approach of examining Zeeger’s genitalia and societal attitudes. Zeegers was born ‘with two sexes’ in her words, but her parents, for religious reasons, refused the regularly applied ‘normalising surgery’ or mutilation. In preliminary hearings it had become evident however that it was no longer possible to tell from Zeegers’ genitalia (explicit photographs were required to be submitted) that she had been born with ‘differences of sexual development’<sup>219</sup> since she had undergone surgery so as to be able to change her original male registration to female before 2014, when surgery was still a requirement for a legal sex change. No medical records were available in relation to those surgeries, nor were her parents able to testify. However since Zeegers stated she had two X and one Y chromosomes (Kleinfeldt Mosaic Syndrome), the District Court at Roermond decided to appoint a medical expert from the DSD Centre at Nijmegen University Hospital to determine whether Zeegers was intersex or not.

In her response, the medical expert stated, that she could not confirm whether petitioner was intersex, “as that is a gender identity which only the individual concerned can determine”.<sup>220</sup> The expert witness thus gave voice to the emerging right to gender self-determination, as well as the de-pathologisation of gender identity.

The court also noted evidence of ‘gender neutral’ gradually becoming a socially accepted phenomenon, observing that since 2017 the Dutch Railways no longer greet passengers with ‘ladies and gentlemen’, but with ‘dear travellers’, that gender-neutral toilets are increasingly common and that the main Dutch department store now sells only gender neutral children’s clothing. Moreover the court cites Article 2 of the Universal Declaration on Human Rights, before citing “Article 3 UDHR” which is not in fact part of the UDHR but the third of the Yogyakarta principles:

“Everyone has the right to recognition [including] Persons of diverse ... gender identities [who] shall enjoy legal capacity in all aspects of life. Each person’s self-defined ... gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender

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<sup>218</sup> Rechtbank Limburg, 07-11-2017, C/03/232248 / FA RK 17-687, ECLI:NL:RBLIM:2017:10713. See also above note 216.

<sup>219</sup> I’m using ‘Differences in Sex Development’ here rather than the increasingly seen as outdated/inappropriate ‘Disorders in Sex Development’. See, for example, the UCL Hospitals website which adds that most intersex people do not accept the DSD designation: University College London Hospitals <<https://www.uclh.nhs.uk/OurServices/ServiceA-Z/WH/GYNAE/DSD/Pages/Home.aspx>>.

<sup>220</sup> Rechtbank Limburg, 28-05-2018 / C/03/232248 / FA RK 17-687, ECLI:NL:RBLIM:2018:4931 [1.6].

identity. No one shall be subjected to pressure to conceal, suppress or deny their ... gender identity. ... States shall: ...b) Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity.”<sup>221</sup>

The court further cites the Nepali and Indian third gender judgments<sup>222</sup> and the Council of Europe's Resolution 2048 of 2015, which urges member states to adopt a third gender option,<sup>223</sup> as well as a number of ECtHR cases upholding gender identity as covered by Art. 8 ECHR.<sup>224</sup> Interestingly, however, the court does not mention the German and French decisions on this topic.

In its dictum, the court foregoes genetic evidence of Zeegers' physical make-up, holding that gender status can only be determined on the basis of how a person experiences their gender. It concludes that it is convinced Zeegers is neither male nor female and that “in the current social, legal and political climate the individual's right to recognition outweighs the interest of maintaining the existing legal order.”<sup>225</sup> Therefore, the petitioner's birth municipality should allow ‘gender could not be determined’ to be entered in their registration – the option previously only available for newborns with ‘ambiguous genitalia’. The tone of the decision changes from sceptical/prurient to embarrassed/righteous. Eventually, the court agrees a third option such as X should be available also to others in Zeegers' position,<sup>226</sup> however for this legislative change will be needed. In a media comment on the case, Transgender Netwerk Nederland (TNN) chair Brand Berghouwer calls for ‘gender freedom’ and the abolition of gender registration, “your gender is yours, not the state's.”<sup>227</sup> What this case does, however, is drown out precisely this movement, that had emerged after K, that sought the abolition of gender registration altogether. Once a third gender is legislated for (currently it still requires individual court orders), the state can point to this as a sufficient solution for those uncomfortable with the gender binary.

On 24 July 2019 Nanoah Struik, a non-binary individual, was granted the right to an ‘X Passport’ by the Noord Nederland court at Assen.<sup>228</sup> Remarkable is that the court ordered the registrar to delete the gender marker on Struik's birth registration and replace it with ‘could not be determined’, *despite* noting

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<sup>221</sup> As above at [2.5.2].

<sup>222</sup> As above at [2.5.2] citing *Sunil Babu Panta v the Government of Nepal*, Supreme Court of Nepal, Writ. No. 9172007(2064) 2007); *National Legal Services Authority v Union of India*, Supreme Court of India, Writ. petition (civil) No. 400 of 2012 with Writ. petition (civil) No. 604 of 2013, New Delhi, 15 April 2014.

<sup>223</sup> As above citing “...the Assembly calls on member states to: ...6.2.4. consider including a third gender option in identity documents for those who seek it”. ‘Discrimination against transgender people in Europe’ *Council of Europe*, Resolution 2048 of 2015 (adopted 22 April 2015) [6].

<sup>224</sup> As above at [2.5.3].

<sup>225</sup> As above at [2.6].

<sup>226</sup> Currently a court order is needed based on ‘proof of DSD status’ according to the author's birth municipality's registry office (correspondence dated 20 August 2018).

<sup>227</sup> ‘Rechtbank zet druk op erkenning non-binaire trans en intersekse personen’ *Transgender Netwerk Nederland* (online) 28 May 2018 <<https://www.transgendernetwerk.nl/rechtbank-zet-druk-op-erkenning-non-binaire-trans-en-intersekse-personen/>>.

<sup>228</sup> Rechtbank Noord Nederland, 24-07-2019 C/19/126841 / FA RK 19/966, ECLI:NL:RBNNE:2019:3437.

there is no legislative basis for this decision, and instead basing itself on the Zeegers decision. The court notes Struik has demonstrated their gender dysphoria diagnosis and their sense of being neither man nor woman.<sup>229</sup> According to the TNN press release, Struik’s birth city’s municipality (which administers the register) has already announced itself willing to carry out the changes and that it will not appeal the decision, thus signalling growing support for a third gender designation in The Netherlands. In the same press release, TNN (together with prominent LGBT organisation COC and intersex organisation NNID) reiterate the demand for the abolition of gender registration, “for those who don’t feel comfortable in the categories ‘male’ or ‘female’ and for everybody who thinks it’s none of the state’s business what’s in your pants.”<sup>230</sup>

### 4.3 Vanja (Germany)

Two days after the interim decision in Zeegers’ case, on Intersex day of Solidarity (8 November) 2017, the German Constitutional Court (BVerfG) published its 10 October 2017 decision, in which it also found in favour of an intersex claimant. This case was initiated by a claimant known by the alias Vanja, and was supported in their<sup>231</sup> claim by *Dritte Option* (Third Option Initiative).<sup>232</sup> Ten years after “K” (above) was denied it, Vanja went to court precisely because what *K* had wanted - the so-called ‘Nulloption’ (the gender box left unticked) – was not satisfactory to them. The ‘Nulloption’ has been available in Germany through the widely reported 2013 amendment of the *Personenstandsgesetz*<sup>233</sup> and allows parents to leave the gender status of their newborn blank in case of ‘ambiguous genitalia’. The BVerfG held that Vanja’s constitutional right to affirmative gender recognition was violated by the sole availability of the ‘negative’ blank box, alongside the two ‘positive’ options M and F, in combination with an obligation to have one’s gender registered. The BVerfG held that the German Parliament, by end 2018, must remedy the unconstitutional status quo by either adding a third, ‘inter/divers’ option, or, by abolishing gender registration altogether. The Constitutional Court emphasised the importance of gender/sex (in German there is only the word *Geschlecht*), calling it “a constituting factor of one’s personality”.<sup>234</sup> The real problem, according to the court, is that there is not yet a specific gender identity

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<sup>229</sup> As above.

<sup>230</sup> Tweede Volwassene Krijgt X in Paspoort *Transgender Netwerk Nederland* (online) at <https://www.transgendernetwerk.nl/tweede-volwassene-krijgt-x-in-paspoort/> (last accessed at 28 August 2019).

<sup>231</sup> In German there is no commonly used gender neutral pronoun as yet, but I use ‘they’ here as I *imagine* Vanja would use this pronoun in English.

<sup>232</sup> BVerfG, Beschluss des Ersten Senats vom 10. Oktober 2017 - 1 BvR 2019/16 - Rn. (1-69). For a more extensive discussion of this case, see my blog post as well as the others in the special online symposium: Verfassungsblog on Matters Constitutional (blog) <<https://verfassungsblog.de/category/debates/nicht-mann-nicht-frau-nicht-nichts/>>.

<sup>233</sup> Art. 22(3) Kann das Kind weder dem weiblichen noch dem männlichen Geschlecht zugeordnet werden, so ist der Personenstandsfall ohne eine solche Angabe in das Geburtenregister einzutragen. Personenstandsgesetz in the version of 07.05.2013 (BGBl. I S. 1122).

<sup>234</sup> BVerfG, Beschluss des Ersten Senats vom 10. Oktober 2017 - 1 BvR 2019/16 - Rn. (1-69) [39].

and social role for intersex people to fit into (conform to).<sup>235</sup> The creation of a specific box intersex people can tick could play the identity-building role of law, according to the court. The court sounded almost romantic about gender and one's gender journey, "[f]inding and accepting one's own gendered identity is a fundamental human value".<sup>236</sup> We hear here the neoliberal language of 'self-responsibilisation' and the realisation of the 'authentic self'. Even though neoliberalism sees life as process and a journey towards fulfilment, neoliberal law knows only static states of being. There is moreover a clear contradiction between the romantic narrative of self- and gender-discovery and what happened, across the English Channel, to McNally and Newland on those journeys.

The decision in Vanja's case was widely reported, and celebrated as a "high point of enlightened liberalism in increasingly illiberal times" and a "lighthouse in stormy political weather".<sup>237</sup> With the publication two days later of the Yogyakarta Principles +10 (YP+10),<sup>238</sup> which emphasises the right to legal recognition, self-determination, and states' obligations in this regard, the direction of development seemed clear, a narrative of hope was created, though as I describe below, the Bundestag did not deliver on this promise.

#### 4.4 Alex Jürgen (Austria)

Seven months after Vanja's win, on 15 June 2018 the Austrian Constitutional Court upheld 'the right to gender identity' which it considers part of Art. 8(1) ECHR, in an opinion almost identical to its German counterpart's.<sup>239</sup> Well-known intersex activist Alex Jürgen, who wanted to be recognised as gender: inter (or alternatively, other, X, or undetermined) petitioned the Constitutional Court, having lost in the lower courts. Noting that gender is a particularly sensitive and central area of one's private life,<sup>240</sup> the Austrian court echoed the German court in describing how gender works to *build* identity.<sup>241</sup>

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<sup>235</sup> "Das eigentliche Problem intergeschlechtlicher Personen sei, dass es allgemein akzeptierte Geschlechtsidentitäten und soziale Rollen in der gesellschaftlichen Wirklichkeit für Intergeschlechtliche noch nicht gebe." As above at 23.

<sup>236</sup> As above at 26.

<sup>237</sup> Anna Katharina Mangold, 'Nicht Mann. Nicht Frau. Nicht Nichts' *Ein Verfassungsblog Symposium* (blog) 12 November 2017 <<https://verfassungsblog.de/nicht-mann-nicht-frau-nicht-nichts-ein-verfassungsblog-symposium/>> (last accessed 9 August 2019). (Mangold cites various news sources celebrating the BVerfG's decision).

<sup>238</sup> 'Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (adopted on 10 November 2017), Geneva ("Yp+10"). See, especially, Principle 31 'The Right to Legal Recognition' *Yogyakarta Principles* (online) 2016 <<http://yogyakartaprinciples.org/principle-31-yp10/>> (last accessed 9 August 2019).

<sup>239</sup> Verfassungsgerichtshof G 77/2018-9, 15 June 2018.

<sup>240</sup> As above at [17; 30]. See also Greif, Elisabeth, 'Tertium datur – causa finita? Zum Dritten Geschlecht in Österreich' *VerfBlog* (blog) 6 July 2018 <<https://verfassungsblog.de/tertium-datur-causa-finita-zum-dritten-geschlecht-in-oesterreich/>> (last accessed 9 August 2019).

<sup>241</sup> As above 'Identitätsstiftend' at [31].

The Austrian constitution does not oblige the state to register gender,<sup>242</sup> but neither does it prohibit it, so if it chooses to make this particularly sensitive aspect visible and needs to be accurate. Thus, the court concluded, the restriction to m/f cannot be justified by 8(2) ECHR (which has constitutional status in Austria). The court found a way around this by holding that the word “Geschlecht” in the law that regulates registration could be interpreted as including, besides male and female, also diverse, inter or open.<sup>243</sup> People, especially children, the court held, should be able to decide their gender designation autonomously when they are ready and also leave the entry blank until such time.<sup>244</sup> Intersex persons, the court held, are a group in special need of protection due to their small numbers and due to their – from the perspective of the majority – “otherness”.<sup>245</sup> The court ordered Alex Jürgen’s birthplace’s registry office, within 6 months from July 2018, to hand him a copy of his birth certificate with ‘inter’ on it. On the day of the decision, Alex commented, ‘Today is the first day that I am recognised as me, as I was born.’<sup>246</sup> Jürgen was one of the founders of the Austrian intersex organisation VIMÖ (OII Austria), which has as its primary demand the cessation of intersex genital mutilation.<sup>247</sup> Unlike the other courts in this section, the Austrian court did acknowledge intersex people’s principal demand to end ‘normalising’ surgeries, and also noted that surgeries on intersex children are to be avoided, and that parents’ fear of stigmatisation cannot be a justification for surgery.<sup>248</sup>

It is not clear from the decision itself whether the new third option applies only to intersex people or for, e.g., non-binary people also. This will need to be decided by the legislature – or a future constitutional court. A commentator has said, “it’s always the Constitutional Court (or some other Supreme Court) that defends the rights of LGBTIs (after an individual fought years and years and their claim got refused and refused and refused ... it’s never politicians who fight for LGBTIs, and currently the right wing party (which is part of our government) is - of course - making fun of the decision regarding intersex people).”<sup>249</sup> As we shall see below, in Austria the judicial promise of gender self-determination was also not matched by the legislature.

#### **4.5 Elan-Cane (England & Wales)**

In the UK, the initial decision in the first ‘third option’ case came on 22 June 2018.<sup>250</sup> Christie Elan-Cane launched a judicial review case to test whether the Passport Office’s policy of only issuing

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<sup>242</sup> As above at [30].

<sup>243</sup> As above at [37].

<sup>244</sup> As above at [43].

<sup>245</sup> As above “Anderssein” at [20].

<sup>246</sup> ‘Actuelles’ *vimo* (online) <<https://vimoe.at/aktuelles/>>.

<sup>247</sup> ‘Position paper’ *vimo* (online) <<https://vimoe.proserver1.at/index.php/s/nP2GXkf8ZDCB4MC#pdfviewer>> (last accessed 9 August 2019).

<sup>248</sup> Verfassungsgerichtshof G 77/2018-9, 15 June 2018, at [16].

<sup>249</sup> Correspondence with a member of Platform Intersex Österreich, 7 July 2018.

<sup>250</sup> *Elan-Cane, R (on the application of) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin).

passports with the designations M and F rather than and X, indicating an unspecified sex, is discriminatory. Unlike the other recent European claimants, Elan-Cane is not intersex but uses the term non-gendered.<sup>251</sup> Elan-Cane was not accompanied in their claim by a campaigning organisation – they were (like Norrie) represented *pro bono* by one of the big international corporate law firms - but Human Rights Watch, ILGA and TGEU filed applications to intervene in support of the claimant’s challenge.<sup>252</sup>

Again, a detailed description of the claimant’s body, and various surgeries (double mastectomy and hysterectomy), was included in the court’s decision.<sup>253</sup>

Elan-Cane is cited, “My non-gendered body is innate and is a fundamental component of who I am.”<sup>254</sup> An X passport would enable Elan-Cane (in their own words) to “gain the social legitimacy, affirmed through the correct documentation, that most people take for granted.”<sup>255</sup> The claimant emphasised the centrality of their gender in their self-understanding and the importance attached to the state’s validation of the unique way they conceptualise their gender. The court decision (in fact, it reads like the personal opinion of Mr Justice Jeremy Baker who wrote the decision in the first person), provides an overview of ‘progressive’ statements on gender politics attached to a conservative decision.<sup>256</sup>

First Baker J cites the 2016 House of Commons Women and Equalities Committee’s report on Transgender Equality, where it concluded that legal gender is often asked of people where this is neither required nor appropriate, a clear policy should be instituted, and the requirement to produce a doctor’s letter as a prerequisite to legal status change should be dropped. Moreover, he notes that this committee recommended that the UK, like Australia, should introduce gender X passports, while in the long term, consideration should be given to the removal of gender from passports, and official records should be non-gendered.<sup>257</sup>

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<sup>251</sup> “NON-GENDERED. Fighting for legal recognition” is their self-description on Twitter. ChristieElanCan (Twitter) <<https://twitter.com/ChristieElanCan>>.

<sup>252</sup> *Elan-Cane, R (on the application of) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin) [63, 83].

<sup>253</sup> “The claimant, who is 60 years of age, was born with female physical sexual characteristics and was therefore registered as female at birth. However, throughout childhood, the claimant grew increasingly detached from the gender which had been assigned at birth. This had a profound effect upon the claimant’s emotional and psychological development, to the extent that the claimant decided to undergo 2 surgical procedures: the first in 1989, a bi-lateral mastectomy at the age of 31; the second in 1991, a total hysterectomy at the age of 33. The first of these procedures was paid for privately, whilst the second was undertaken by the National Health Service.” As above at [2].

<sup>254</sup> Above note 248 at [3].

<sup>255</sup> Above note 248 at [19].

<sup>256</sup> A quirk of the English legal system is that for the Passport Office to decide to issue X-passports would not need legislation as passports are issued by the Passport Office under Royal Prerogative. Above note 248 at [34].

<sup>257</sup> Above note 248 at [31]. Women and Equalities Commission, ‘Transgender Equality Inquiry’ 14 January 2016 <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/transgender-equality/>> (last accessed 9 August 2019).

Secondly Baker J noted the results of the UK government's national survey of LGBT+ people, which counted 7,411 'non-binary' respondents out of a total of 108,098<sup>258</sup> (making it a figure that put non-binary on the map in the UK, and on the government's agenda).<sup>259</sup>

Baker J discusses the 'legal and social difficulties faced by ... "bi-gendered" and "non-gendered"' people, who in the face of 'well-resourced transsexual interest groups' have been 'somewhat marginalised'. The court considers that the 'non-gendered identity is likely to be as important and integral a component of their personal and social identity, as being either male or female is to the vast majority of society.'<sup>260</sup> What is interesting though, is that after quoting the claimant as stating "The idea of rejecting gender is hugely controversial in our society", the court twists this back, "my understanding of what is intended to be conveyed by the use of this phrase is that the claimant is seeking to identify outside the binary concept of gender, rather than entirely rejecting the concept of gender altogether."<sup>261</sup> This reasoning directly reflects the court's effort to connect the claim with the ECtHR's bracketing of the sphere to which the Art. 8 Right to Privacy is applicable - since *Van Kück* this includes gender identification (which is why the German and Austrian courts cited Art. 8 ECHR).<sup>262</sup> Justice Baker in the current decision recognises - a first in a UK court - that Art. 8 ECHR guarantees a right for respect for non-gendered identity.<sup>263</sup> In doing so the Baker J (like the court in *Norrie*) both circumvents the argument (which may not have been made by the claimant but was by *Norrie*) that gender registration is itself a violation of a person's privacy not necessary in a democratic society (as powerfully made by *Berit Vözlmann*<sup>264</sup>) AND the more radical claim (which is not made by *Elan-Cane*) that the complaint is not *individual* but in fact against the violent structural practice of gendering/sexage that occurs in society in the furtherance of the current racialised cisheteropatriarchal capitalism.

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<sup>258</sup> Id. para. 76. The survey results are published here: Government Equalities Office and Penny Mordaunt (MP), 'National LGBT Survey: Research Report' 3 July 2018 <<https://www.gov.uk/government/publications/national-lgbt-survey-summary-report>> (last accessed 9 August 2019).

<sup>259</sup> Considering this figure is a portion of survey respondents only, and non-binary people are not necessarily LGBT+, one might expect the number of non-binary people in the UK to be much higher. See the UK Government's 'LGBT Action Plan 2018: Improving the lives of Lesbian, Gay, Bisexual and Transgender people' published with the survey results. Government Equalities Office and Penny Mordaunt (MP), 'LGBT Action Plan 2018: Improving the lives of Lesbian, Gay, Bisexual and Transgender people' 3 July 2018 <<https://www.gov.uk/government/publications/lgbt-action-plan-2018-improving-the-lives-of-lesbian-gay-bisexual-and-transgender-people>> (last accessed 9 August 2019).

<sup>260</sup> *Elan-Cane, R (on the application of) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin) [100-102].

<sup>261</sup> As above at [107].

<sup>262</sup> As above at [107]. Also see *Van Kück v Germany*, no. 35968/97, ECtHR 2003-VII.

<sup>263</sup> As above at [108].

<sup>264</sup> *Berit Vözlmann Postgender im Recht? Zur Kategorie „Geschlecht“ im Personenstandsrecht*, *Juristenzeitung* 8, 2019, 381-389.

Despite his understanding of the issues and apparent empathy with Elan-Cane, a review of international legal development, including Zeegers' case, Justice Baker considered that there is *not* a body of evidence which can be as yet properly described as a trend on the issue<sup>265</sup> and therefore the balance between Elan-Cane's interest and maintaining the current policy favours the Passport Office. Baker cites the importance of sex as a marker of identification, and security. "Security" appears here as a word which can be cited without explanation and to close down a conversation. If the conversation remained open one might ask if forcing someone to carry a passport with a marker that doesn't match their body or experience would help with either. In particular, because it is not only the courts that seek to read gender off of a detailed scrutiny of one's genitalia, but also airport security staff – leading to alarm if one's body is seen as an 'anomaly'.<sup>266</sup>

Justice Baker concluded with reference to the changing legal and social landscape in this area, noting "the claimant will be entitled to scrutinise with care the results of the Government's current [GRA] review".<sup>267</sup> The UK government consultation on reform of the GRA 2004 following the publication of the LGBT survey results, has raised trans people's hopes of self-determination.<sup>268</sup> Baker notes the Government must gain a full understanding as to the distinction between the concepts of sex and gender." And, again, "in an age of increasing social and legal awareness and acceptance of ... diversity and equality, the recording of an individual's sex and/or gender in official and other documentation is justified. [...] It will also be necessary to consider the extent to which other identities both within and beyond the binary concept of gender are to be recognised, and if so, whether they are to be self-determined or are to be objectively evidenced."<sup>269</sup> Elan-Cane was granted permission to appeal, and the hearing is scheduled for December 2019.<sup>270</sup>

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<sup>265</sup> *Elan-Cane, R (on the application of) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin) at [128].

<sup>266</sup> See, for example, Katelyn Burns, 'Traveling While Trans: Airport Security Sees Your Genitals as Cause for Alarm' *Rewire* (online) 5 May 2017

<<https://rewire.news/article/2017/05/05/traveling-trans-airport-security-sees-genitals-cause-alarm/>> (last accessed 9 August 2019); Dawn Ennis, 'Goodbye, "Anomaly" — TSA's New Word for Trans Bodies Is "Alarm"' *The Advocate* (online) 23 December 2015 <<https://www.advocate.com/transgender/2015/12/23/goodbye-anomaly-tsas-new-word-trans-bodies-alarm>> (last accessed 9 August 2019).

<sup>267</sup> *Elan-Cane, R (on the application of) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin) at [150].

<sup>268</sup> Many guides to how to complete the consultation were produced with those by trans organisations all recommending support for self-determination. See, for example, the guide by Gendered Intelligence. 'Fill in the Consultation!' *gendered intelligence* (online) <<http://genderedintelligence.co.uk/gra/whatyoucando>> (last accessed 9 August 2019).

<sup>269</sup> *Elan-Cane, R (on the application of) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin) at [151].

<sup>270</sup> Christie Elan-Cane, 'Status: 'X' Passports' (Twitter) 2 July 2019 <<https://twitter.com/ChristieElanCan/status/1103369039315914752>> (last accessed 9 August 2019).

#### 4.6 Third Gender Redux

In response to the BVerfG's order in Vanja's case the German cabinet adopted, in August 2018 (during the summer holidays and well before the end 2018 deadline) a draft amendment to the personal status law, creating a third gender category: 'divers' which means 'various'.<sup>271</sup> The draft did not deliver what the intersex and trans communities had hoped for, and has been called a missed historical opportunity, a massive disappointment, counterproductive and damaging to intersex people.<sup>272</sup>

The main criticisms are that the third option, which was adopted into law in 2018, does not fully recognize gender diversity as it will only be available to those with a medical diagnosis of an intersex condition, and also that the government failed to genuinely consider the alternative option presented by the Constitutional Court - that of scrapping sex/gender registration altogether.<sup>273</sup> The latter is the option preferred by most intersex and trans organisations in Germany and indeed elsewhere. In Austria likewise Alex Jürgen's court win led to a third option conditional upon compulsory subsection to genital examination rather than gender freedom and self-determination.<sup>274</sup> In a comment on Gaëtan's case mentioned above, Vincent Guillot, one of the founders of *Organisation Internationale des Intersexes France* (OII-France) commented that the organisation's principal demand is the cessation of mutilating surgeries on intersex infants, and that it would prefer the cessation of gender registration altogether.<sup>275</sup> Similar statements were made in response to Zeegers' case in the Netherlands,<sup>276</sup> and Norrie's in Australia. In Australia, X is only issued subject to "confirmation from a registered medical practitioner or psychologist that you are of indeterminate sex or are intersex".<sup>277</sup> Compare this with New Zealand, however, which requires only a Statutory Declaration indicating the sex/gender identity you wish to be

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<sup>271</sup> 'Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben' Gesetzentwurf der Bundesregierung (online)

<[https://www.bmi.bund.de/SharedDocs/downloads/DE/gesetztestexte/gesetztesentwuerfe/entwurf-aenderung-personenstandsgesetz.pdf;jsessionid=F9EEB759977FE3C6CC079F06D4FDA306.1\\_cid364?\\_blob=publicationFile&v=1](https://www.bmi.bund.de/SharedDocs/downloads/DE/gesetztestexte/gesetztesentwuerfe/entwurf-aenderung-personenstandsgesetz.pdf;jsessionid=F9EEB759977FE3C6CC079F06D4FDA306.1_cid364?_blob=publicationFile&v=1)> (last accessed 9 August 2019).

<sup>272</sup> See, for example, Grietje Baars, 'New German Intersex Law: Third Gender but not as we want it' *Verfassungsblog* (blog)

24 August 2018 <<https://verfassungsblog.de/new-german-intersex-law-third-gender-but-not-as-we-want-it/>> (last accessed 9 August 2019).

<sup>273</sup> See also Berit Völmann, 'Postgender im Recht? Zur Kategorie „Geschlecht“' *Personenstandsrecht, Juristenzeitung* (2019) 8 381.

<sup>274</sup> 'Dritter Geschlechtseintrag in Dokumenten: Gutachtenzwang statt Selbstbestimmung' VIMÖ (press release) 27 December 2018 <[https://www.ots.at/presseaussendung/OTS\\_20181227\\_OT0029/dritter-geschlechtseintrag-in-dokumenten-gutachtenzwang-statt-selbstbestimmung](https://www.ots.at/presseaussendung/OTS_20181227_OT0029/dritter-geschlechtseintrag-in-dokumenten-gutachtenzwang-statt-selbstbestimmung)> (last accessed 9 August 2019).

<sup>275</sup> Jeanne Cavalier, 'Vincent Guillot: « Il faut cesser les mutilations des enfants intersexes en France »' *Le Monde* (online) 21 March 2017 <[https://www.lemonde.fr/societe/article/2017/03/21/vincent-guillot-il-faut-cesser-les-mutilations-des-enfants-intersexes-en-france\\_5098554\\_3224.html](https://www.lemonde.fr/societe/article/2017/03/21/vincent-guillot-il-faut-cesser-les-mutilations-des-enfants-intersexes-en-france_5098554_3224.html)> (last accessed 9 August 2019).

<sup>276</sup> As above.

<sup>277</sup> Australian Passport Office, 'Sex and gender diverse passport applicants' Australian Government Department of International Affairs and Trade <<https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpop.aspx>> (last accessed 9 August 2019).

displayed in your passport (M, F or X) and how long you have maintained your current sex/gender identity.<sup>278</sup> Since, as I noted above, many countries have moved to gender self-determination for binary trans people, at first glance it seems odd not to go this way for intersex and (other) non-binary people. That is, until one remembers the mysterious ‘serious ramifications’ that would follow destabilizing the binary ‘too much’. With self-determination opened to intersex and non-binary people, one would have people in society with ambiguous gender presentation and who knows what kind of genitalia. This would mean the end of the straight state’s capacity to control and police people’s bodies, (and if there was significant take-up of this possibility by people detached from binary identification) almost as if gender registration was abolished altogether.

An oddly ‘progressive’ decision with a fraction of this destabilising effect is that of The European Court of Justice in *MB v UK*. The ECJ held that (in the specific, narrow circumstances of the case) a trans person’s gender must be recognised *regardless* of their legal gender, meaning that their ‘lived gender’ should trump their legal gender. *In casu* a trans woman wished to retire at the legal retirement age for women, but had been held by the UK Supreme Court to be legally male.<sup>279</sup> She had not obtained a Gender Recognition Certificate when she transitioned in 1991, as at that time this would have required her to divorce her wife, and the couple wished to remain married.<sup>280</sup> The ECJ considered the UK Supreme Court’s view directly discriminatory in violation of Directive 79/7/EEC,<sup>281</sup> when it compared the requirement of being unmarried placed on a trans person, versus no such requirement placed upon a cisgendered person.<sup>282</sup> The ECJ ordered the UK Supreme Court to recognise MB as a woman, at least for the purpose of the specific social security question raised. The difference in retirement ages between men and women is gradually being phased out in the UK, along with many other previously gendered provisions in various European countries. Does this mean that the law is starting to take direction from queer life and relinquishing some of its regulatory function?

## 5 Conclusion

In this final section I ask what the queer struggle with the heteronormative can tell us about law’s social function, material effects and emancipatory potential more broadly. What we have seen in this article

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<sup>278</sup> New Zealand Te Mata Uruwhenua/Identity and Passports, ‘Information about Changing Sex / Gender Identity’ Te Tari Taiwhenua/Internal Affairs <<https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>> (last accessed 9 August 2019).

<sup>279</sup> *MB v Secretary of State for Work and Pensions* [2016] UKSC 53 on appeal from [2014] EWCA Civ 1112.

<sup>280</sup> *The Marriage (Same Sex Couples) Act 2013* (UK) which led to the amendment of the *Gender Recognition Act 2004* (UK) permitting a married applicant to receive a full gender recognition certificate, with spousal agreement, does not have retrospective effect.

<sup>281</sup> Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

<sup>282</sup> *MB v Secretary of State for Work and Pensions*, Case C-451/16 (Opinion of Advocate General Bobek delivered on 5 December 2017).

is queer engagement with (or indeed by) the law, with varying degrees of ‘success’. Apart from our ‘gender deception’ defendants the people discussed here all had at least some element of choice in engaging the legal system, and must have had some hope of a successful outcome.

By now it should be clear that those with ‘access to the law’ - people with the resources to afford legal representation, or the social capital to get pro bono advice from corporate law firms or the support of a rights organisation, are only a very small proportion of people (potentially) affected by the violence of legal sexage described in this article. It is clear that the Straight Court’s main concern is upholding the cisheteronormative order – even if that means applying a homo- or transnormative patch. The cases that are successful are those that the heteronormative market of capitalist (re)production can bear (viz. also the ECJ Case in MB and the legal questions we ask in court are those we imagine the ‘Straight Court’<sup>283</sup> may understand and respond to, and are spoken in the language of the law. The heteronorm thus shapes what we can ask for and what we get, but does it shape what we can imagine? McNally and Newland show us the dark side of a much messier reality of gender and sexuality. Having reviewed the decisions, can we say that it is possible to queer the legal structures that seek to contain our genders and sexualities or is now the time to say ‘fuck law’?

When we read the ‘gender deception’, third gender and transfather cases together, it seems that rather than a time for radical queering of the cisheteronorm it appears we may have arrived at time where there is limited accommodation of certain types of ‘harmless’ homonormative and transnormative families, and a limited acceptance of life beyond the binary. Any such genders, bodies and lives as the heteronorm can bear must be examined, declared, displayed, repeated, performed, in fixed and legible ways, in a stable ternary. While living, while fucking, while reproducing, while travelling. The limited degree of willingness to accept a third gender category exists for those whose bodies that, either by birth or surgery or both, clearly do not fit M or F. One may read these third option cases also as in fact ‘saving’ or purifying the binary (or the system, now ternary) by removing ‘deviating’ elements.<sup>284</sup> Perhaps ‘X’ or ‘divers’ allow a clearer labeling of those ‘misfits’ who don’t belong in the categories M and F, thus strengthening and legitimizing those very categories. Order then seems to be best served, ‘the ordering function of the law’, by the creation of a narrowly bracketed third category available only on the basis of scientific evidence describing the ‘neuter’/‘neutered’ body. A narrow, exceptional category is permitted to be created to uphold the integrity of the heteronormative order. A non-neutered body that plays with gender, uses dress and toys, hands and tongue instead of PIV, ‘artifice’ and ‘deception’ is

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<sup>283</sup> Or indeed the not-quite postcolonial court. One of the most blatant cases of racist (white privileging) judgement is recognising gay marriage even where there is no gay marriage Hong Kong, see Kai Yeung Wong, ‘An Incomplete Victory: The Implications of QT v Director of Immigration for the Protection of Gay Rights in Hong Kong’ (2018) 81(1) *The Modern Law Review* 874.

<sup>284</sup> DA Davis also makes this argument, in, Dylan Amy Davis, ‘The Normativity of Recognition: Non-Binary Gender Markers in Australian Law and Policy’ in Vasilikie Demos and Marcia Texler Segal (eds) *Gender Panic, Gender Policy: Advances in Gender Research* (Emerald Publishing Limited 2017) 227.

considered a grave threat to this order. Real gender self-determination would lead only to more ‘legal men with wombs’ and ‘legal women with meat penises’ – and, persons of uncertain gender and unreadable bodies, leaving cisgenderists without a ‘panic’ defence.

Nevertheless, it is imaginable and expected, that in due course there will be legal recognition also of other non-binary categories. The Straight Courts, with their exhortations of the fundamental importance and preciousness of authentic gender identity seem to be steering us in this direction. There are popular campaigns for non-binary legal recognition that are not challenged, not even by queers. It is hard not to want what we have been ‘denied for so long’ and clearly ‘deserve’.<sup>285</sup> Iceland and Belgium both stand to adopt non-binary legal recognition, though it is unclear in what form.<sup>286</sup> Non-binary is ‘on trend’ in ‘cool’ and ‘edgy’ subcultures (the translation of a general sense of discomfort with the state’s need to know, classify and register our bodies into an aspect of the ‘true self’) and it is only a matter of time before we see capitalism seeking to cash in. What Raha calls the neoliberal incorporation of difference,<sup>287</sup> Ludwig termed the process of heteronormalising.<sup>288</sup> Capitalism’s ability to continuously reproduce and repair itself through ever-further encroaching appropriation and production of new ideological codes and ‘coherent identities’,<sup>289</sup> has captured (parts of) feminism and created ‘governance feminism’,<sup>290</sup> parts of ‘gay liberation’ and created homonationalism,<sup>291</sup> and indeed captured a part of trans to create trans liberalism.<sup>292</sup> It has also all but silenced the campaign to scrap gender registration that emerged with K and Norrie among more radical trans and intersex activists in the noughties.

Through living queer lives we wrench the frames of law, yet law adapts to us - or we to it - and seduces us (the more privileged among us) into accepting our legal framing, our box – where, we if we sit still

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<sup>285</sup> Jamie Windust, ‘Non-binary People Deserve to Have Their Identities Legally Recognised – but the Government is Standing in the Way’ *The Independent* (online) 25 January 2019, <<https://www.independent.co.uk/voices/non-binary-gender-lgbt-male-female-passports-home-office-petition-gina-martin-a8795736.html>> (last accessed 4 July 2019).

<sup>286</sup> See Cavaria, ‘Grondwettelijk Hof geeft çavaria gelijk en bevestigt recht op zelfbeschikking’ <https://www.cavaria.be/transgenderwet>; Full Constitutional Court decision of 19 June 2019, Arrest 99/2019 at <https://www.const-court.be/public/n/2019/2019-099n.pdf>; Andie Fontaine, ‘Iceland Passes Major Gender Identity Law: “The Fight Is Far From Over”’ *The Reykjavík Grapevine* (online) 19 June 2019 <<https://grapevine.is/news/2019/06/19/iceland-passes-major-gender-identity-law-the-fight-is-far-from-over/>> (last accessed 4 July 2019).

<sup>287</sup> Nat Raha, ‘Queer Marxism and the Task of Contemporary Queer Social Critique’, draft on file with the author.

<sup>288</sup> Gundula Ludwig, ‘Desiring Neoliberalism’ (2016)13(4) *Sex Research and Social Policy* 417; see also Kevin Floyd, *The Reification of Desire: Toward a Queer Marxism* (Duke University Press 2017) 36.

<sup>289</sup> Gundula Ludwig, *Queering Capitalism* (Krisis 2018).

<sup>290</sup> Janet Halley, Prabha Kotiswaran, Rachel Rebouché and Hila Shamir, *Governance Feminism: An Introduction* (University of Minnesota Press 2018).

<sup>291</sup> Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007).

<sup>292</sup> Nat Raha, *The Limits of Transliberalism* (online) 21 September 2015 <<https://www.versobooks.com/blogs/2245-the-limits-of-trans-liberalism-by-nat-raha>> (last accessed 9 August 2019).

inside of it, we don't feel our chains. Yet there are millions out there who do not have this luxury. If we sit still we remain complicit in the gendering violence committed against them. Better to imagine, with Gloria Anzaldúa, 'Identity is not a bunch of little cubbyholes stuffed respectively with intellect, race, sex, class, vocation, gender. Identity flows between, over, aspects of a person. Identity is a river – a process.'<sup>293</sup> A river, that over time, wears away any structure that tries to contain it. If law's gendering function is about upholding the current cisheteronormative order, let's ramp up those ramifications and revolt, strike against the reading of bodies, ask those of us with access to resources orient them to supporting, uplifting those experiencing the sharp end of the straight state, as a prelude to real structural change. Let us be inspired by, join, and center, radical transfeminists, in particular those of colour.<sup>294</sup> Let's Build an Abolitionist Trans & Queer Movement with Everything We've Got.<sup>295</sup> Queer is about wrenching frames, but it is also about queer kinship, queer family, full surrogacy,<sup>296</sup> about imagining, trusting, building our own futures, a queer utopia well beyond the current normative horizon.

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<sup>293</sup> Gloria Anzaldúa, *The Gloria Anzaldúa Reader* (Duke University Press 2009) 166.

<sup>294</sup> Nat Raha, *Radical Transfeminism Zine* (Autumn 2017)

<<https://radicaltransfeminismzine.tumblr.com/post/165475105432/radical-transfeminism-zine>> (last accessed 4 July 2019).

<sup>295</sup> Above note 34.

<sup>296</sup> Above note 147.