Gender recognition at the crossroads: Four models and the compass of comparative law

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The article explores the different constitutional developments of the right to gender recognition and discusses their potential to protect trans and nonbinary people. Focusing on a few selected jurisdictions, each incarnating a specific kind of recognition system, it also proposes a conceptual map to understand and identify the different shapes of such a right. The article argues that four types of gender recognition can be identified, each with their own characteristics, advantages, peculiarities, and set of challenges for trans and nonbinary people and for the system of gender categorization itself. In clarifying this area of law, the article contends that the very process of creation and policing of gender identities and categories represents a critical aspect of contemporary gender constitutionalism.

1. Introduction

Over the last decades, courts, legislatures, and international organizations have increasingly discussed, and at times granted, the right to legal gender recognition, which has been advocated for by trans and nonbinary people.[1] This right ensures that every

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[1] Yogyakarta Principles Plus 10: Additional Principles and State Obligation 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, principle 31, Nov. 10, 2017, https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf [hereinafter Yogyakarta Principles Plus 10]; Third Int'l Intersex Forum, Malta Declaration, Dec. 1, 2013, https://oiieurope.org/malta-declaration/ [hereinafter Malta Declaration]; Statement of the First European Intersex Community Event, Mar. 31, 2017, https://oiieurope.org/statement-1st-european-intersex-community-event-vienna-30st-31st-march-2017/ [hereinafter Vienna Statement]. *See also* Marie-Xavière Catto and Stefano Osella, *The Sexed Subject*, *in* The Cambridge Companion to Gender and the Law 25

person is legally classified according to their (binary or, more rarely, nonbinary) gender identity in the different forms of civil status registration and identity documents.[2] Legal recognition is a crucial demand of trans and nonbinary people. Arguably, it is key to creating just and equitable societies.[3] Gender recognition is known to have a psychological value, improving one's sense of inclusion and belonging, and can also be a determining factor in the development of one's personality.[4] Not least, everyday interactions presuppose gender recognition, the lack of which may be the source of legal and administrative hurdles. In brief, recognition favors integration into what are often transphobic societies, helping trans and nonbinary people[5] overcome discrimination and socioeconomic marginalization.[6]

While of paramount importance for trans and nonbinary people, gender recognition is hardly welcomed without controversy. It often triggers heated debates and is fiercely opposed by several social actors, some of whom might perceive this to be a threat to other rights. The arguably minoritarian[7] gender-critical women's and LGB rights advocates are a prime example: their vocal resistance to gender self-determination—that is, the right to change one's legal identity based on the simple declaration of the person—has made news in several countries around the world.[8] Opposition has

(Stéphanie Hennette Vauchez and Ruth Rubio-Marín eds., 2023); Ruth Rubio-Marín and Stefano Osella, *El nuevo derecho constitucional a la identidad de género: Entre la libertdad de elección, el incremento de categorías, y la subjetividad y fluidez de sus contenidos. Un análisis desde el derecho comparado* [*The New Constitutional Right to Gender Identity: Between the Liberty of Choice, the Increasing of Categories, and the Subjectivity and Fluidity of Its Contents. A Comparative Law Analysis*], 118 Revista Española de Derecho Constitucional 45 (2020) (on which this paper partially draws). For an international law discussion, see Pieter Cannoot & Ariël Decoster, *The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis*, 21 Int'l. J. Gender, Sexuality & L. 26 (2020).

2 According to the Yogyakarta Principles, gender identity refers "to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth." Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Mar. 2007, at 6 n.2, http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf [hereinafter Yogyakarta Principles].

3 For a discussion of different theorical approaches to recognition and why it matters for trans people, see Sally Hines, Gender Diversity, Recognition and Citizenship: Towards a Politics of Difference 9–20 (2013).

4 *Id.* At 7.

5 "Trans people" is a blanket term that, broadly speaking, refers to all individuals whose gender identity is not consistent with the normative expectations associated with the gender they have been legally assigned at birth. *See* Stephen Whittle, Respect and Equality: Transsexual and Transgender Rights at xiii (2002).

6 Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law (2015). The case law of the Court of Justice of the European Union links gender recognition to socioeconomic equality concerns, including equal pay and access to welfare benefits. *See* Stefano Osella, *The Court of Justice and Gender Recognition: A Possibility for an Expansive Interpretation?*, 87 Women's Stud. Int'l. F. 102493 (2021). On the benefits of nonbinary recognition by the Federal Constitutional Court of Germany and the Indian Supreme Court, see Section 4 below.

7 Alona Ferber, *Judith Butler on the Culture Wars, JK Rowling and Living in "Anti-intellectual Times,"* New Statesman (2020), www.newstatesman.com/long-reads/2020/09/judith-butler-culture-wars-jk-rowling-and-living-anti-intellectual-times.

8 Aleardo Zanghellini, *Philosophical Problems With the Gender-Critical Feminist Argument Against Trans Inclusion*, 10 SAGE Open (2020), https://doi.org/10.1177/2158244020927029; Roger Brubaker, Trans: Gender and Race in an Age of Unsettled Identities (2016); Ruth Rubio-Marín & Stefano Osella, *La autodeterminación de género: Gender Critical Radfems a la Prueba de la Proporcionalidad* [*Gender Self-Determination: Gender Critical Radfems vis-à-vis Proportionality*], IberICONnect Blog (Feb. 1, 2021), www.ibericonnect.blog/2021/02/la-autodeterminacion-de-genero-gender-critical-radfems-a-la-prueba-de-la-proporcionalidad/.

also been mustered by actors who see in trans rights an attack on traditional moral and religious values.[9] In strictly legal terms, the right to change legal gender[10] has also been perceived as a challenge in contemporary legal systems, which are still largely based on binary gender categories as well as on a binary and stable gender assignment for each individual.[11] In an effort to balance these social and legal tensions, limitations and preconditions have often been attached to this right.[12] More rarely, the demands of trans and nonbinary people have been granted in full, and gender recognition has been defined as self-determination; namely, without requirements by external authorities. In sum, the right to gender recognition has now taken a plurality of different shapes and shades. Human and constitutional rights norms have come to play an increasingly relevant role in ways that, to date, remain largely unsystematized.

But which are those shapes and shades? And how do the different forms of the right to gender recognition relate to the demands of gender diverse individuals?[13] By setting out to answer such questions, this article examines a rapidly evolving field and explores the development of the right to gender recognition at the comparative level. By looking at the "laboratory of the world,"[14] we generate a framework to think critically about this right and its several manifestations. Our primary aim is to offer a taxonomy: an analytical tool to understand and assess the various models of the right to gender recognition, as well as their main characteristics and shortcomings. We highlight some of the limits of contemporary forms of such a right, which—perhaps paradoxically—not only safeguard but also regiment gender diversity. Yet, and this should be clarified here at the outset, our aim is to generate knowledge, not to advocate for reforms or, least of all, "legal transplants."[15] This does not mean that our analysis might not have an additional normative *potential*: that of underscoring, among the mushrooming forms of this right, those that might come closest to granting the

[9] For an analysis of a religiously grounded resistance against trans rights, see Mary Anne Case, *Trans Formations in the Vatican's War on "Gender Ideology,"* 44 Signs 639 (2019).

[10] We use "sex" and "gender" interchangeably throughout the article. As we clarify in Section 2, the distinction between these terms has lost much of its significance thanks to the contribution of queer theory.

[11] *See infra* Section 2. *See also* Paisley Currah, Sex Is as Sex Does: Governing Gender Identity 76–118 (2022).

[12] For an overview of the preconditions on gender recognition, see The Legal Status of Transsexual and Transgender Persons (Jens Scherpe ed., 2017).

[13] We refer to gender diverse people as those who do not "conform to their society's norms or values when it comes to their gendered physicality, gender identity, gender expression, or a combination of these factors." *See* Sally Hines, Is Gender Fluid?: A Primer for the 21st Century 16 (2018). *See also* Sandra Duffy, *Contested Subjects of Human Rights: Trans- and Gender-Variant Subjects of International Human Rights Law*, 84 Mod. L. Rev. 1041, 1042 (2021). This approach, which attempts to foreground the lived experience of those who interact with constitutional and human rights, is present both in sociolegal studies and constitutional law. For an example of the former, see Ellen Desmet, *Analysing Users' Trajectories in Human Rights: A Conceptual Exploration and Research Agenda*, 8 Hum. Rights Int'l Leg. Discourse 121 (2014). For a discussion from a constitutional standpoint, see Paolo Veronesi, Il Corpo e la Costituzione [The Body and the Constitution] 7 (2007).

[14] We borrow the expression from Jeremy Waldron, Partly Laws Common to All Mankind: Foreign Law in American Courts 61 (2012).

[15] About this comparative method, see Giuseppe de Vergottini, Diritto Costituzionale Comparato [Comparative Constitutional Law] 51–67 (11th ed. 2022); Ran Hirschl, Comparative Matters. The Renaissance of Comparative Constitutional Law 238–42 (2014). On the importance of providing taxonomies in comparative law, see Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 Am. J. Comp. L. 5 (1997).

demands of trans and nonbinary people. Nevertheless, we would like to stress, our goal is *not* to provide a fully justified normative and universally applicable position on these matters. This would require both the assessment of the potential and limitations of a rights-based approach, and the ponderation of competing rights and interests in context-specific ways. As it is all too evident, we cannot provide this analysis in this article. As a result, our more contained hope is that this article will contribute to a better understanding of this burgeoning field in the academic and public debate. Rather than providing "easy solutions," we strive to stimulate a process of constant thinking and rethinking of gender recognition in its various forms.

Our argument departs from two basic premises. First, legal systems normally provide two legal genders or more. Gender recognition, therefore, may take a binary or a nonbinary form, depending on the number of gender options given in a specific jurisdiction. Second, legal identity can either be determined by the concerned person or by a third party. Recognition may thus be granted on the basis of self-determination (elective form), without any requirements, or on the basis of the fulfillment of certain preconditions (ascriptive form), such as conforming to medical or behavioral standards that a third party must certify.[16]

We contend that, at the intersection of these two axes, four main models of gender recognition can be identified: ascriptive binary, ascriptive nonbinary, elective binary, and elective nonbinary.[17] These axes of classification rely on two central demands of trans and nonbinary advocacy—namely, the nonbinary option and gender self-determination. At a deeper level, these axes also relate to central issues discussed in queer theory, including the gender binary, and the understanding of gender as a system of norm production (see Table 1).

Having identified these forms of recognition, their main characteristics, and—at least in succinct terms—how they have developed, we rely on queer and post-structural theories to assess the ways in which each of them may fail or succeed in protecting trans and nonbinary identities. We demonstrate how specific gender norms are laid out as preconditions on gender recognition in the first three models (binary ascriptive, nonbinary ascriptive, and binary elective). In all three cases, the law sets gender standards that individuals must meet to achieve recognition. The effect of such definition, we argue, might be the imposition of standards of recognition that, in one way or another, end up limiting the identity recognition demands of gender

Table 1. The four models of gender recognition

	Binary	**Nonbinary**
Ascriptive	Binary ascriptive (e.g., France, Italy)	Nonbinary ascriptive (e.g., India, Germany)
Elective	Binary elective (e.g., Colombia 2015–2022)	Nonbinary elective (e.g., Belgium)

[16] Here, we partially rely on the persuasive taxonomy and terminology to classify "legal identity" provided by Clarke. *See* Jessica A. Clarke, *Identity and Form*, 103 Cal. L. Rev. 747 (2015).

[17] *See infra* Section 2.

diverse people. Conversely, the "fourth" (nonbinary elective) model—at least in principle—does not contain gender definitions or standards that applicants must conform to. It therefore creates the best conditions for gender diversity to be welcomed in the legal system. As this protection—or indeed regulation—of gender identity operates through rights, we further argue that the right to gender recognition, when associated with a definition of the beneficiary of those rights, may have an "ambivalent" dimension.[18] On the one hand, it can and has empowered trans and nonbinary persons. On the other, it remains a tool for the definition of gender identities and for the preservation of the legal categories that rest on such identities.

Before proceeding, a few words are due on the choice of jurisdictions. For each model, we have chosen representative examples by relying on a plurality of criteria. First, we have selected cases where the public law discussion has been focused on the constitutional or human rights level. Second, the availability and abundance of scholarly, legislative, and judiciary material has also been considered. Third, we have attempted to ensure a wide geographical distribution, including cases from the Global South. Last, practical considerations—such as the accessibility of sources or the absence of language barriers—have also played a role in the selection of cases. To show the many different nuances that characterize the "ascriptive models," more entrenched and established than the "elective" ones, we offer two examples of the binary ascriptive and nonbinary ascriptive models. As to the elective models, a single jurisdiction for each model has been delved into more deeply.

This article is structured as follows. In Section 2, we clarify the premises of the debate and describe the challenges of trans and nonbinary people seeking gender recognition, the notion of gender as a meaning-making mechanism, and the ambivalent dimension of rights. In Section 3, we illustrate the "binary ascriptive" model, focusing on France and Italy. In Section 4, we explore the "nonbinary ascriptive" model and show how gender norms can also be reestablished beyond the binary. The relevant case law is from Germany and India. In Section 5, attention is turned to the experience of Colombia between 2015 and 2022 in order to explore a "binary elective model."[19] We move on to the "nonbinary elective" model in Section 6, exemplified in the case law of the Belgian Constitutional Court. Finally, in Section 7, we summarize our arguments and press for further research.

2. The premises of the debate

2.1. Gender identities versus legal categories

Gender categories are deeply entrenched in legal systems. Several areas of the law rely on the stable binary assignment of each person. Such is the case of family law,[20]

[18] Ben Golder, Foucault and the Politics of Rights 89 (2015).

[19] In the last stages of writing this article, Colombia "shifted" from the binary elective model to the nonbinary elective model. The Colombian case, however, still offers food for thought on how to conceptualize the binary elective model, hence our decision to still rely on it for this article.

[20] Stefano Osella, *Reinforcing the Binary and Disciplining the Subject: The Constitutional Right to Gender Recognition in the Italian Case Law*, 20 Int'l J. Const. L. 454 (2022).

the administration of gender segregated facilities[21] and activities,[22] individual identification,[23] and equality and equity policies, just to name a few.[24] When faced with demands for recognition, courts and parliaments have striven to keep control over gender categories. They have tried to balance the interests of trans and nonbinary people with the various public interests that rely on such categories. Gender recognition, if allowed at all, has therefore been typically subjected to a variety of requirements.[25] Medical treatments—be they surgical, hormonal, or psychiatric—or behavioral standards have usually been imposed on applicants.[26] In addition, gender recognition has nearly always been limited to the male–female binary.[27]

Such limitations and preconditions have attracted widespread criticism, especially those of a medical nature. They have been contested for being intrusive and coercive,[28] but also for being incapable of reflecting the great diversity that characterizes trans and nonbinary identities, lifestyles, and preferred bodily expression. As queer and gender anthropology have long demonstrated, gender and gender identity are socially situated. Gender expectations and understandings of the self may vary according to multiple concrete circumstances, including nationality, race, class, and citizenship status, which mutate across time and places.[29] As Osella has argued, legal definitions of gender—such as those contained in or entailed by preconditions on gender recognition—tend, therefore, to be underinclusive. Fixed in the law, they are incapable of keeping up with the great diversity of gender manifestations, which develop through multiple intersecting and changing concrete circumstances.[30]

[21] Dean Spade, *Documenting Gender*, 59 Hastings L.J. 731 (2008).

[22] For a recent overview of the topic, see Matteo Winkler & Giovanna Gilleri, *Of Athletes, Bodies, and Rules: Making Sense of* Caster Semenya, 49 J. L. Med. & Ethics 644 (2021).

[23] Paisely Currah & Lisa J. Moore, *"We Won't Know Who You Are": Contesting Sex Designations in New York City Birth Certificates*, 24 Hypatia 113 (2009).

[24] Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law (2015); Heath Fogg Davis, Beyond Trans: Does Gender Matter? (2017).

[25] *See* Scherpe, *supra* note 12.

[26] Osella, *supra* note 20; Jemima Repo, *Governing Juridical Sex: Gender Recognition and the Biopolitics of Trans Sterilization in Finland*, 15 Pol. & Gender 83 (2019).

[27] This is the case with a limited number of national jurisdictions: *see, e.g.*, Decree 476/2021, July 20, 2021, B.O. 34.706 (Arg.); *NSW Registrar of Births, Deaths, and Marriages v. Norrie* [2013] NSWCA 145 (Austl.); Verfassungsgerichtshof [VfGH] [Constitutional Court], June 19, 2018, G-77/2018 (Austria); C.C. [Constitutional Court], June 19, 2019, n°99/2019, M.B., Jan. 1, 2020, p. 2338, www.const-court.be/public/f/2019/2019-099f.pdf (Belgium); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 10, 2017, 1 BvR 2019/16, ECLI:DE:BVerfG:2017:rs20171010.1bvr201916 (Ger.); Law of June 19, 2019 (Ice.); Nat'l Legal Service Authority (NALSA) v. Union of India & Ors., AIR 2014 SC 1863, https://indiankanoon.org/doc/193543132/ (India); Sunil Babu Pant & Ors. v. Gov't Nepal & Ors., Writ No. 917 of the year 2064 BS [2007] (Nepal); Muhammad Aslam Khaki v. S.S.P. [Operations] Rawalpindi, Constitutional Petition No. 43 of 2009 (Pak.); Law no. 19,684, Apr. 29, 2019 (Uru.).

[28] *See* Peter Dunne, *Transgender Sterilisation Requirements in Europe*, 25(4) Med. L. Rev. 554 (2017); Anne Silver, *An Offer You Can't Refuse: Coercing Consent to Surgery through the Medicalization of Gender Identity*, 26 Colum. J. Gender & L. 488 (2013). On the pathologization of trans identity, see Jens T. Theilen, *Depathologisation of Transgenderism and International Human Rights Law*, 14 Hum. Rts. L. Rev. 327 (2014).

[29] For an exploration on the use of anthropology in third gender recognition, see David Valentine, Transgender: Ethnography of a Category (2007); Martin Manalansan IV, Global Divas: Filipino Gay Men in the Diaspora (2003).

[30] Stefano Osella, *When Comparative Law Walks the Path of Anthropology: The Third Gender in Europe*, 23 Ger. L.J. 920 (2022)

Trans and nonbinary people have unsurprisingly mobilized to abolish the various requirements to gender recognition. More and more, they have come to claim the right to gender self-determination, inclusive of nonbinary options.[31] The fortunes of this fight ebb and flow. Overall, among significant setbacks, a few victories can be counted. Gender self-determination and nonbinary recognition, however, remain quite exceptional.[32]

2.2. Gender as a norm-production apparatus

The critical angle of this article touches on theoretical notions that we should introduce before focusing on the legal analysis. We first need to clarify our use of gender, by which we mean an apparatus that produces norms. As is only too evident, we draw on the thought of Judith Butler.

In *Gender Trouble*, Butler famously challenged the traditional understanding of gender as a cultural inscription on a precultural bodily reality (sex) and contested the traditional separation between sex and gender—that is, the idea that we can identify two biological sexes (male and female) and then attach cultural norms to each of them (gender). The very fact that we delineate two biological sexes is in itself a "construction," Butler argued. Sexual anatomy may take a multiplicity of different forms—just think of intersex people and their important struggles for the protection of bodily integrity.[33] Biologist Anne Fausto-Sterling argued that the male and female sexes are not enough, that we need five sexes, and that even these five sexes might be somewhat reductive.[34] In this light, the "standard" male and female anatomies seem to be two among many. Yet they are often problematically presented as the correct ones. Using Butler's words, we subsume a "myriad of bodies" under the male–female binary, and we interpret bodies through a binary lens, grouping them under the male or female labels, while reducing those that cannot fit to the condition of exceptions. From this theoretical standpoint, sex cannot be understood as culturally existing before gender. Rather, it manifests as a naturalized category rooted in gender itself.[35]

Gender comes to "designate the very apparatus of production whereby the sexes themselves are established. As a result, gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which 'sexed nature' or 'a natural sex' is produced and established as 'prediscursive,' prior to culture, a political neutral surface on which culture acts."[36] Gender, in other words, is an apparatus that produces

[31] Yogyakarta Principles Plus 10, *supra* note 1.
[32] Rubio-Marín & Osella, *supra* note 1.
[33] "Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies." *See* Office of the High Comm'r for Hum. Rts., *Fact Sheet: Intersex*, U.N. Free & Equal, www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf (last visited Apr. 11, 2023).
[34] Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, 33 The Sciences 20 (1993); Anne Fausto-Sterling, *The Five Sexes Revisited*, 40 The Sciences 18 (2000).
[35] Judith Butler, Gender Trouble 9–12 (1990).
[36] *Id.* at 10.

not only maleness and femaleness but also gender norms at large. Gender is the "mechanism by which notions of masculine and feminine are produced and naturalized, but [it] might very well be the apparatus by which such terms are deconstructed and denaturalized."[37]

One corollary to this understanding of gender is that the apparatus that produces gender standards may extend and replicate *beyond* the binary. This mechanism may lay down "norms" for how to be—so to speak—not only proper males or females but also nonbinary. The addition of a third legal category, especially when it is defined in the legal narratives or when preconditions are attached to it, may still produce norms that have the capacity to misrecognize individuals.[38] Clearly, the production machinery of gender norms spans a plurality of social and cultural discourses.[39] It is obviously not limited to law. Yet law represents an important site for the production of normative worlds.[40] The legal systems that we examine are good examples thereof. Specific requirements mark the boundaries of legal categories, and procedures are established to verify whether individuals satisfy them. Such boundaries and constraining factors are not limited to binary genders. Nevertheless, this is not to say that adding nonbinary options has no disruptive potential at all. It invites public authorities and the legal community at large to reflect on the permanence and justification of the gender binary in law, thus problematizing binarism and the very political "nature" of gender classification.[41]

2.3. The ambivalent dimension of rights

Gender norms are—perhaps counterintuitively—also generated through rights recognition. Although normally presented and justified (also) as autonomy-enhancing, rights often have a regulatory side attached to the definition of who may benefit from them. The resulting dynamic can be exclusionary, as individuals who do not fit the description of the rights holder are left out of the scope of protection. Furthermore, rights may also trigger normalizing mechanisms, which contain rather than protect diversity. This happens when individuals have to present or acquire certain characteristics to qualify.[42] In other words, rights "produce subjects; they position, constrain, and conduct those who deploy them and subtly contour the subjectivity or the self-understanding of the rights holder."[43]

The emancipatory limits of the rights vocabulary have long been discussed in the literature, all the more so in gender studies. As Wendy Brown has argued, "having a right *as* a woman is not to be free of being designated and subordinated by gender. Rather, while it may entail some protection from the most immobilizing features of

[37] Judith Butler, Undoing Gender 42 (2004).
[38] This notion is in fact obvious among trans and nonbinary activists, who indeed demand a third option in the civil status based on self-determination, free from requirements or preconditions.
[39] *See* Marco Wan, *Law, Film, and Trans Identity in Hong Kong*, 21 Int'l J. Const. L. 673 (2023).
[40] Robert Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983).
[41] Grietje Baars, *Queer Cases Unmake Gendered Law, Or, Fucking Law's Gendering Function*, 45 Austl. Feminist L.J. 1 (2019).
[42] On the ambivalent dimension of rights, see Golder, *supra* note 18, at 89.
[43] *Id.* at 97.

that designation, it reinscribes the designation as it protects us, and thus enables our further regulation through that designation."[44] Rights are indeed "never deployed 'freely,' but always within a discursive, hence normative, context, precisely the context in which 'woman' is iterated and reiterated."[45] Similar considerations have been made in relation to trans and, more generally, LGBT+ identities.[46]

In the following sections, we will see how this regulatory and, at the same time, emancipatory dynamic is at work in the mechanisms of gender recognition, since every time such a right—be it binary or nonbinary—is based on specific characteristics of the right holder, a certain conception of trans and nonbinary identity is upheld. A "hierarchy of legitimacy" of identities is thus inevitably generated.[47] Some subjectivities find full recognition. Others do not. The "insiders" are those who fit the characteristics, fulfill the requirements listed in the country-specific law on gender recognition, and can live their diverse gender identity in a way that is deemed acceptable. Those who do not are left outside the scope of recognition. They become "illegible" to the system[48] or are coerced into it, presented with "an offer you cannot refuse."[49] As we will show, this happens with greatest clarity in two of the models of gender recognition that we have identified (binary ascriptive; nonbinary ascriptive) and, to a minor extent, in the binary elective model. The nonbinary elective model is the one with the greatest transformative potential.[50]

3. Binary ascriptive gender recognition

The "binary ascriptive" is the first form of gender recognition that we encounter. With this model, specific requirements (e.g., medical or sociobehavioral, or both) are attached to recognition. The ideal right holder is defined by such norms, and applicants must conform to them to change their legal gender. The fulfillment of such preconditions usually requires assessment by a third party, be it a judge[51] or a civil servant.[52] By definition, no third gender category is envisioned.

[44] Wendy Brown, *Suffering Rights as Paradoxes*, 7 Constellations 230, 232 (2000).
[45] *Id.*
[46] For a discussion of how some gender identities are defined in international human rights law, while others are made invisible, see Sandra Duffy, *Contested Subjects of Human Rights: Trans- and Gender-Variant Subjects of International Human Rights Law*, 84 Mod. L. Rev. 1041 (2021); Damian A. Gonzalez-Salzberg, *The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights*, 29 Am. U. Int'l L. Rev. 797 (2014); Tom Dreyfus, *The "Half-Invention" of Gender Identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles*, 37 Austl. Feminist L.J. 33 (2012).
[47] Sofia Aboim, *Fragmented Recognition: Gender Identity between Moral and Legal Spheres*, 29 Soc. Pol.: Int'l Stud. in Gender, State & Soc'y 71, 79 (2022).
[48] Valentine, *supra* note 29, at 228.
[49] Silver, *supra* note 28.
[50] To be clear, practice is always more complex and contradictory than theory. At times, it might be difficult to assess whether one specific jurisdiction entirely fits a certain model.
[51] Such is the case in Italy and France, *see infra* Sections 3.1 and 3.2.
[52] Such is the case in, for example, Spain, according to Ley orgánica 3/2007 (B.O.E. no. 71, Mar. 23). It is important to mention that, at the time of writing, a new bill has been presented before the Spanish Parliament—the so-called Ley Trans, or Trans Law—which, if passed, would introduce gender self-determination in Spanish law.

3.1. Ascribing a binary gender relying on medico-behavioral definitions

Preconditions may be medical and behavioral. Italian Law no. 164 of 1982 provides a telling example. It grants individuals the right to obtain a reclassification following the "modification of sex characteristics."[53] Ordinary courts oversee the applications for gender recognition. They must check whether such transformations have actually occurred. The "modification of sex characteristics" is obviously a rather opaque precondition, as it does not specify what treatments are required by law. Unsurprisingly, this unclarity has led to litigation.[54]

The beneficiary of gender recognition in Italian law seems clear since the first decision that grounded such a right at the constitutional level. In 1985, the Constitutional Court ruled that the right to health,[55] the general protection of one's personality, as well as the duty of solidarity, enshrined in the Italian Constitution,[56] formed the basis for a right to "sexual identity."[57] Yet, at the same time, the Court defined the "beneficiary of the right" by referring to the postoperative transsexual person. For the Court, this right to "sexual identity" was meant to relieve the distress of "transsexual" people, defined as individuals eager to reshape a loathed corporeality and acquire the physical characteristics of the "other sex."[58] There was no doubt—as there was also no doubt for legislators who, a few years earlier, had presented and debated the bill[59]—that a medicalized bodily transformation would occur. In the judicial application following this ruling, courts routinely required behavioral, psychological, and physical modifications to grant recognition. Physical transformations also included the surgical transformation of primary sex characteristics; that is, the removal of gonads and (for trans men) of the uterus.[60]

This invasive precondition has understandably encountered abundant opposition and was eventually ruled out by the Court of Cassation.[61] In July 2015, under pressure from activists and reflective of the evolutions unfolding at the European

[53] Legge 14 aprile 1982, n. 164, art. 1, G.U. Apr. 19, 1982, n. 106 (It.).

[54] For insightful overviews, see Chiara Angiolini, *Transessualismo e identità di genere: La rettificazione del sesso tra diritti della persona e interesse pubblico* [*Transsexualism and Gender Identity: Change of Legal Gender between Individual Rights and Public Interest*], Europa e Diritto Privato, no. 1, at 263 (2017); Anna Lorenzetti, Diritti in transito: la condizione giuridica delle persone transessuali [*Rights in Transition: The Legal Positions of Transsexual People*] 59 (2013); Francesco Bilotta, *Identità di genere e diritti fondamentali della persona* [*Gender Identity and Fundamental Rights of the Person*], 29 Nuova Giurisprudenza Civile Commentata 1116 (2013).

[55] Art. 32 Costituzione (It.).

[56] *Id.* art. 2.

[57] Corte Cost., 6 maggio 1985, n. 161, G.U. June 5, 1985, n. 131 bis (It.).

[58] *Id.* ¶ 3.

[59] Stefania Voli, *(Trans)gender Citizenship in Italy: A Contradiction in Terms? From the Parliamentary Debate about Law 164/1982 to the Present*, 23 Mod. Italy 201 (2018).

[60] *See* Ruth Rubio-Marín & Stefano Osella, *Le precondizioni per il riconoscimento dell'identità sessuale*, Quaderni Costituzionali 61 (2015).

[61] Bilotta, *supra* note 54.

Court of Human Rights (ECtHR),[62] the Court of Cassation ruled that the required "modification of sex characteristics" must be interpreted as respectful of the rights to physical integrity, self-determination, sexual identity,[63] and health.[64] Accordingly, surgery on primary sex characteristics could no longer be a requirement for recognition.[65] In the same decision, however, the Court stressed that "serious" applicants must rely on a medically supervised and irreversible bodily transformation. This "seriousness," the Court held, avoids gender self-determination, ensures the "certainty of social relations," and prevents legal "relationships not recognized by Italian family law, especially in the area of marriage and parental rights."[66] This doctrine has since been explicitly confirmed by further case law of the Constitutional Court insisting on the need for medically supervised alterations of the applicant's "behavioral, psychological, and physical characteristics"[67] for the sake of preserving the "certainty of legal relations," arguably a reference to the heterosexuality of family law in the Italian context.[68]

[62] *See* Y. Y. v. Turkey, App. No. 14793/08 (Mar. 10, 2015), https://hudoc.echr.coe.int/eng?i=001-153134. The case was brought forward by Rete Lenford–Avvocatura per i Diritti LGBTI, a central cause lawyering association for LGBTQI+ rights in Italy. More generally, the ECtHR, despite having banned sterilization, does not require gender self-determination. To date, medical expertise—for example, psychiatric assessments or medical examinations—remains compatible with the convention. It is safe to argue that, at the time of writing, the "binary ascriptive" model is compatible with current European human rights law standards. *See also* A. P., Garçon & Nicot v. France, App. Nos. 79885/12, 52471/13, 52596/13 (Apr. 6, 2017), https://hudoc.echr.coe.int/eng?i=001-172913. For a thorough discussion of gender recognition in European human rights law, see Damian A. Gonzalez Salzberg, Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law (2019). While a case on nonbinary recognition is currently pending, the ECtHR has still not ruled on the matter. *See* Y. v. France, App. No. 76888/17 (introduced Oct. 31, 2017), https://hudoc.echr.coe.int/eng?i=001-204284.

[63] European Convention on Human Rights, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Art. 2 Costituzione (It.).

[64] Art. 32 Costituzione (It.).

[65] Cass. civ., sez. I, 20 luglio 2015, n. 15138, Foro It. 2015, I, c. 3137, www.articolo29.it/wp-content/uploads/2015/08/Cass-civ-15-n.-15138-Rettifica-del-sesso-senza-intervento-chirurgico.pdf (It.). These requirements have attracted criticism in the Italian literature. *See, e.g.*, Salvatore Patti, *Trattamenti medico-chirurgici e autodeterminazione della persona transessuale: A proposito di Cass., 20.7.2015, n. 15138* [*Medical and Surgical Treatments, and Self-Determination of the Transsexual Person: Considerations about the Judgement of the Court of Cassation of 20.7.2015, n. 15138*], Nuova Giurisprudenza Civile Commentata 643 (2015).

[66] Cass. civ., n. 15138, at 29–30.

[67] Corte Cost., 21 ottobre 2015, n. 221, G.U. Nov. 11, 2015, n. 15 (It.); Corte Cost., 21 giugno 2017, n. 185, G.U. July 19, 2017, no. 29 (It.); Corte Cost., 20 giugno 2017, n. 180, G.U. July 19, 2017, n. 29 (It.). For a mostly positive commentary on the 2015 decision, see Ilaria Rivera, *Le suggestioni del diritto all'autodeterminazione personale tra identità e diversità di genere: Note a margine di Corte cost. n. 221 del 2015* [*The Suggestions of the Right to Personal Self-Determination between Identity and Gender Diversity: A Note on Corte Cost., no. 221 of 2015*], Consulta Online 175 (2016); Luigi Ferraro, *La Corte costituzionale e la primazia del diritto alla salute e della sfera di autodeterminazione* [*The Constitutiona Court and the Primacy of the Right to Health and of the Sphere of Self-Determination*], Giurisprudenza Costituzionale 2059 (2015). For a critical approach, especially of the 2017 decisions, see Anna Lorenzetti, *Il cambiamento di sesso secondo la Corte costituzionale: Due nuove pronunce (nn. 180 e 185 del 2017)* [*Gender Recognition According to the Constitutional Court: Two New Decisions (nos. 180 and 185 of 2017)*], 4 Studium Iuris 446 (2018).

[68] *See* Osella, *supra* note 20.

These decisions effectively banned surgical sterilization, thus opening the right to gender recognition to those trans persons who do not desire to undergo physical transformation. Yet this case law further entrenched the contours of a right holder with specific (physical, behavioral, and psychological) features. By defining the beneficiary of the right, they normatively defined the legal male and female gender as well as the trans person worthy of recognition—the transsexual, medicalized, born-in-the-wrong-body person—to the exclusion of everyone who does not fit into these characteristics. Therefore, the constitutional right to gender identity expands available options but arguably becomes a disciplinary normalizing mechanism, managing and suppressing diversity.[69]

3.2. Ascribing a binary gender by relying on sociobehavioral definitions

As mentioned above, the rejection of all medical preconditions on gender recognition has become a central claim of trans activism. Yet *de-medicalization* does not entail gender self-determination. Other requirements—e.g., sociobehavioral—may be preserved, and identities may still be externally examined. Gender standards may still define the normatively accepted right holder, albeit with an obvious normalizing potential. This is arguably the case in French law.

In 2016, Law 2016-1547 (hereinafter "Law J21") on the modernization of justice in the twenty-first century reformed the Civil Code.[70] Gender recognition is now granted to all people who prove, with a "sufficient gathering of facts," that the "sex" registered in the civil status no longer corresponds to the gender under which they identify themselves and for which they are known.[71] The law clarifies such a "gathering of facts" with a few nonexhaustive examples, including public appearance, being known as a person of the claimed "sex," and a previous change of name.[72] The absence of medical treatments cannot be a cause of rejection of the application.[73] In this way, the French Parliament chose to give legal effect to the "sociological truth" and protect the "possession of status"; that is, the recognizable performance of gender.[74] The law does not explicitly limit recognition to the binary. However, in 2017, the Court of Cassation denied the possibility of nonbinary recognition.[75] The Court

[69] *Id.*

[70] Loi 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle [Law 2016-1547 of Nov. 18, 2016 on the modernization of justice in the twenty-first century], www.legifrance.gouv.fr/loda/id/JORFTEXT000033418805 (last visited Apr. 11, 2023) [hereinafter Law J21] (encompassing a plurality of aspects and not limited to gender recognition).

[71] Code civil [C. civ.] [Civil Code] arts. 61–65 (Fr.).

[72] *Id.*

[73] *Id.* arts. 61–68.

[74] Sophie Paricard, *Du sexe par possession d'état à la consécration de l'identité du genre?* [*From Sex Based on Possession of Status to the Sacralization of Gender Identity*], *in* Personnes et Familles du XXIe Siècle: Actes du Colloque de Pau du 30 Juin 2017 at 31 (Jean-Jacques Lemouland & Daniel Vigneau eds., 2018).

[75] Cour de cassation [Cass.] [Cassation Court] [supreme court for judicial matters] 1e civ., May 4, 2017, Bull civ. I, No. 531. The court also considered that, in this specific case, the interference with the right to privacy of the person (ECHR, *supra* note 63, art. 8) was not disproportionate. The applicant was indeed classified as a male and looked masculine. What the court missed, however, was that the applicant was not interested in "passing" or in not being "outed" as trans, but in having his nonbinary identity acknowledged.

ruled that, given the crucial importance of the binary in legal and social organization, the addition of a third category would have far-reaching consequences for the system and substantively deferred the matter to the legislature.[76] The binary structure of the legal system was arguably confirmed in a 2020 case on trans parenthood that, among other aspects, also excluded the possibility of registering a parent under a gender neutral definition on a child's birth certificate.[77]

Law J21 filled a legislative vacuum that had perdured at least since 1992.[78] That was the year that the ECtHR condemned France in *B.*[79] The ECtHR ruled that France had violated the right to privacy (article 8 ECHR) of "transsexual" people for failing to provide them with any form of recognition of their gender identity in official documents. That same year, following the European ruling, the Court of Cassation established that recognition was to be granted to those individuals who underwent an irreversible and medically supervised transition.[80] Medical requirements—and the irreversibility they ensured—were deemed justified by the need to preserve the inalienability of the civil status and as a way of protecting the public order (*ordre public*).[81] Despite a rich evolution at the highest judicial level,[82] the French doctrine on gender recognition remained, until the 2016 reform, based on a medicalized transition that essentially involved the sterilization of the applicant.[83]

Law J21 follows a protracted period of contestation of such preconditions. Multiple national and supranational institutions demanded de-medicalization and, to a lesser extent, gender self-determination.[84] Medical requirements were labelled as violations

[76] For a thorough critique, see Laurence Brunet & Marie-Xavière Catto, *"Homme et femme, la Cour créa": note sous Cass. 1er Civ., 4 Mai 2017, n. 16–17.189* [*"Man and Woman, the Court Created Them": Note to the Decision of the Court of Cassation, I Civil Section, May 4, 2017, no. 16–17.189*], *in* La bicatégorisation de sexe entre droit, normes sociales et sciences biomédicales [The Binary Categorization of Sex in Law, Social Norms, and Biomedical Sciences] 75 (Marie-Xavière Catto & Julie Mazaleigue-Labaste eds., 2021).

[77] Cour de cassation [Cass.] [Cassation Court] [supreme court for judicial matters] 1e civ., Sept. 16, 2020, Bull. civ. I. No. 519. *See also* Osella, *supra* note 30, at 930.

[78] Prior to that date, an abundant case law had consistently denied the right to gender recognition to trans people. *See* Jean-Paul Branlanrd, Le sexe et l'état des personnes: Aspects historique, sociologique, et juridique [Sex and Status of People: Historical, Sociological, and Legal Aspects] (1993).

[79] B. v. France, App. No. 13343/87 (Mar. 25, 1992), https://hudoc.echr.coe.int/eng?i=001-57770.

[80] Cour de cassation [Cass.] [Cassation Court] [supreme court for judicial matters] 1e civ., Dec. 11, 1992, No. 117.

[81] Arguably, inalienability is strictly related to heteronormative values. *See* Daniel Borrillo, *Le sexe et le droit: De la logique binaire des genres et la matrice hétérosexuelle de la loi* [Sex and Law: About the Binary Logic of Genders and the Heterosexual Matrix of the Law], 2 Jurisprudence: Revue Critique (Special Issue) 1 (2011), https://hal.science/hal-01236493.

[82] Cour de cassation [Cass.] [Cassation Court] [supreme court for judicial matters] 1e civ., Jun. 7, 2012, No. 123; Feb. 13, 2013, No. 124; and Feb. 13, 2013, No. 14.

[83] See the analysis offered by the ECtHR in AP, Garçon & Nicot v. France, App. Nos. 79885/12, 52471/13, 52596/13 (Apr. 6, 2017), https://hudoc.echr.coe.int/eng?i=001-172913.

[84] Commission Nationale Consultative des Droits de l'Homme [Nat'l Consultative Comm'n Hum. Rts.], Assemblée plénière du 27 juin 2013, Avis sur l'identité de genre et changement de la mention de sexe à l'état civil, Journal Officiel de la Republique Française [J.O.] Official Gazette of France, July 31, 2013, www.legifrance.gouv.fr/jorf/id/JORFTEXT000027778791 [hereinafter Avis sur l'identité de genre]; Défenseur des Droits [French Ombudsman], Décision MLD-MSP-2016-164 relative à la mise en œuvre d'une procédure déclarative de changement de la mention du sexe à l'état civil [Decision MLD-MSP-2016-164 on the Implementation of a Declaratory Procedure for Change of Sex in Civil Status], June 24, 2016, at 11–13, https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=14833.

of physical integrity and privacy.[85] These national and supranational evolutions, in conjunction with the fear of a foreseeable condemnation by the ECtHR—which eventually came in *A. P., Garçon & Nicot v. France*[86] after the law was passed—prompted a group of MPs to propose a de-medicalized and de-judicialized procedure for gender recognition during the debate around Law J21.[87] This radical proposal was outspokenly rejected by the French legislature and government, perceived as infringing on the principle of inalienability of the civil status.[88] In other words, behavioral standards seemed to become a point of compromise.

Law J21 represents an obvious progress for trans people, even though it was not spared constitutional contestation.[89] The behavioral model grants gender recognition to individuals whose bodies challenge the conventional understanding of gendered corporeality. Yet behavioral standards still reiterate an objectified understanding of trans identity and its appearance. Immediately, scholars and the French ombudsperson criticized the law, highlighting the risk of a stereotyped application.[90] Aware of the possibility, the Ministry of Justice enacted an interpretative guideline (*circulaire)* to define its implementation just a few months after the law had been passed,

[85] Benjamin Moron-Puech, *Conditions du changement de sexe à l'état civil: Le droit français à l'épreuve de l'arrêt* Y. Y. c/ Turquie *du 10 mars 2015: Droit au respect de la vie privée (Art. 8 CEDH)* [*Conditions to Change Sex in the Civil Status: French Law vis-à-vis Decision* Y. Y. v. Turkey *of 10 March 2015: The Right to Respect of Private Life (Article 8 ECHR)*], Revue des Droits de l'Homme: Actualités Droits-Libertés, ¶¶ 100–3 (Mar. 2015), https://doi.org/10.4000/revdh.1076; Philippe Reigné, *Appartenance sexuelle et droit au respect de la vie privée* [*Sexual Belonging and the Right to Respect of Private Life*], 32 Recueil Dalloz 1875 (2015); Sophie Paricard, *Transsexualisme: Maintenir ou assouplire les conditions de chagement de sexe?* [*Transsexualism: Preserving or Softening the Conditions of Sex Change?*], 8 Revue des Droits de l'Homme (2015), https://doi.org/10.4000/revdh.1640.

[86] Article 8 ECHR. *See* A. P., Garçon & Nicot v. France, Apps. No. 79885/12, 52471/13 and 52596/13 (April 6, 2017), https://hudoc.echr.coe.int/eng?i=001-172913.

[87] *See* Assemblée Nationale, N. 282 (Rect), amending Code Civil [C.C.] art. 18 quarter, May 12, 2016, www.assemblee-nationale.fr/14/amendements/3726/AN/282.pdf. *See also* Erwann Binet, Assemblée Nationale, XIV National Assembly, Constitution of 4 October 1958, XIV Legislature, Ordinary Session 2015–2016, Compte Rendu Integral, Second Session of Thursday 19 May 2016, available at https://www.assemblee-nationale.fr/dyn/14/dossiers/justice_21e_siecle?etape=14-AN1.

[88] Marie-Xaviere Catto, *Changer de sexe à l'état civil depuis la loi du 18 novembre 2016 de modernisation de la justice du XXIe siècle: Un bilan d'application* [*Changing Sex in the Civil Registries after the Law of 18 November 2016 on the Modernization of Justice in the Twenty-First Century: An Assessment of the Application*], 9 Cahiers Droit, Sciences & Technologies 107, ¶ 39 (2019), https://journals.openedition.org/cdst/1087.

[89] The constitutionality of this solution has been availed by the Constitutional Council. A group of MPs had argued that the new right to gender recognition threatened the principle of the inalienability of the civil status, shaking the social order and the position of the person in the family and the public sphere. Another argument made was that the clear identification of the individual was central to the preservation of individual dignity. The Constitutional Council ruled that the de-medicalization of the procedure does not infringe the principle of human dignity, thereby vouching for the constitutionality of the new right and, arguably, the balancing act behind it. In addition, there were procedural grounds of contestation. Conseil constitutionnel [CC] [Constitutional Court], No. 2016-739DC, Nov. 17, 2016, J.O. 0269 ¶ 63. The MPs complained that de-judicializing the procedure violated Article 66 of the Constitution. This provision confirms the role of the judicial authority as guardian of individual liberty, protecting such a principle. The Constitutional Council underscored that the right to gender recognition falls outside the scope of Article 66. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2016-739DC, Nov. 17, 2016, J.O. 0269 ¶ 65.

[90] *See* Défenseur des Droits [French Ombudsman], Décision MLD-MSP-2016-164 relative à la mise en œuvre d'une procédure déclarative de changement de la mention du sexe à l'état civil, June 24, 2016.

suggesting—in obvious contrast to the letter of the provisions—that the new law was open to gender self-determination.[91]

However, the concrete application of the law shows a rather intense "gender scrutiny" by the courts when deciding on individual applications. Admittedly, some courts have avoided stereotyped evaluations.[92] Still, there is no denying that commonsensical applications of gender standards are present as well.[93] Moreover, no matter the degree of stereotyping, the ultimate authority on gender reclassification remains in the hands of a judge, called on to make the decision on the basis of externally assessable criteria, such as clothing,[94] mannerisms,[95] general physical appearance,[96] or the acquisition of secondary sexual characteristics.[97]

In the end, under the 2016 law, individuals must still persuade the judge that they perform gender in a—so to speak—correct way. Therefore, while there is no denying that this law has made the boundaries between genders less rigid,[98] the letter of the law and its implementation to date have come to define a subject of recognition based on a plurality of elements of "proper belonging" within a scheme that remains explicitly binary. Some applicants are singled out as worthy of recognition, while some others, who do not live their gender as courts see fit, may be excluded from it. Furthermore, the application of the law shows the normalizing potential of such a right, which has become a site where norms of gender are routinely restated.

4. Nonbinary ascriptive gender recognition

The introduction of a "third option" is a central demand of trans and nonbinary people. As discussed above, in addition to its positive effects, it may have a significant destabilizing potential for the legal system based on gender categories. Nevertheless, the addition of a "third gender," per se, does not seem capable of disestablishing mechanisms of identity assessment and enforcement of gender standards in the law. It may still result in the replication of the structure of norm production when preconditions are imposed on recognition or when the beneficiary of the right is defined. Nonbinary genders, detached from self-determination, may simply multiply the structures that define gender and regulate individual identities. This seems particularly evident from (a restrictive

[91] Circulaire du 10 mai 2017 de présentation des dispositions de l'article 56 de la loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle concernant les procédures judiciaires de changement de prénom et de modification de la mention du sexe à l'état civil, Bulletin Officiel du Ministère de la Justice [B.O.M.J.] [Official Bulletin of the Ministry of Justice] n° 2017-05 (May 31, 2017), www.legifrance.gouv.fr/download/pdf/circ?id=42281.

[92] Catto, *supra* note 88, at 45.

[93] *Id.* at 107–29; *see also* Laurence Herault et al., État civil de demain et transidentité (2018).

[94] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 14, 2017, No. 17/05786 (unreported).

[95] TGI Paris, May 23, 2018 (unreported).

[96] TGI Bobigny, Nov. 21, 2017 (unreported).

[97] TGI Evry, I-A Chamber, Oct. 9, 2017, No. 17/04792 (unreported).

[98] Clara Bernard Xemard, *La loi du 18 novembre 2016: Un grand pas pour les personnes transgenres?* [*Law of November 17, 2016: A Great Step for Transgender People?*], Droit de Famille, no. 1, at 1, 29–32 (2017); Paricard, *supra* note 74.

reading of) Indian constitutional jurisprudence,[99] where a third gender, narrated as a right, has been arguably ascribed to an entire group of individuals, regardless of their identification. A similar dynamic can be traced in Germany, where nonbinary gender recognition is predicated on physical and identity characteristics.

4.1. Ascribing a nonbinary gender by relying on medical or sociohistorical definitions

The 2014 Supreme Court of India's ruling in *National Legal Service Authority (NALSA) v. Union of India*[100] offers one example where gender recognition is arguably established according to ascriptive standards, especially in its nonbinary dimension. With this case, the Supreme Court enunciated a right to gender recognition grounded in autonomy and dignity,[101] equality,[102] and freedom of expression.[103] It also put forth a long list of directives aimed at ensuring conditions of substantive equality for gender minorities. With specific reference to nonbinary recognition, however, the Supreme Court seemed to have modeled a right to a "third gender" on the rather contested experience and history of the *hijra* people. This is an identity from the subcontinent with specific historical and social traits.[104] Yet, the panorama of gender diversity in India is clearly not limited to such an identity.[105]

The *NALSA* decision is particularly complex. It dealt with a claim lodged by the National Legal Service Authority,[106] which sought gender recognition to secure full social participation, access to education, and healthcare for "transgender" persons;[107] in short, to remedy the rampant discrimination from which they suffer, a legacy of British colonial rule.[108] The decision is couched in postcolonial terms and contrasts

[99] There is disagreement on the exact potential of the Indian Supreme Court decision in Nat'l Legal Service Authority (NALSA) v. Union of India & Ors., AIR 2014 SC 1863, https://indiankanoon.org/doc/193543132/ (India).

[100] *Id.*

[101] India Const. art. 21.

[102] *Id.* arts. 14, 15, 16.

[103] *Id.* art. 19(1)(a).

[104] Hijras are a social group of birth-assigned males or intersex people who acquire a female or nonbinary identity, forming a separate community based on shared symbolic, ritual, and religious practices, sharing ways of life and professional activities, including dancing in ceremonies and sex work. *See* Serena Nanda, Neither Man nor Woman: The Hijras of India (2d ed. 1999); Gayatri Reddy, With Respect to Sex: Negotiating Hijra Identity in South India (2005).

[105] *NALSA*, AIR 2014 SC ¶ 129(1). *See also* Tarunabh Khaitan, *NALSA v Union of India: What Courts Say, What Courts Do*, U.K. Const. L. Ass'n Blog (Apr. 24, 2014), https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/.

[106] The National Legal Services Authority, constituted under the Legal Service Authority Act 1997, is in charge of providing free legal services to the weaker and other marginalized sections of society. *See NALSA*, AIR 2014 SC ¶ 3.

[107] *Id.* ¶¶ 3, 4, 5, 45.

[108] Adopted during colonial times, the Criminal Tribes Act 1871 mandated their registration and control and imposed severe limitations on their legal capacity. *See* Bret Boyce, *Sexuality and Gender Identity under the Constitution of India*, 18 J. Gender, Race & Justice 1, 20 (2015). Even after the repealing of the act, persecution did not entirely subside, with the criminalization of oral-genital and anal sexual intercourse under section 377 of the Indian Penal Code, which was often used by the police to harass nonheterosexual or trans people. *See* Siddhart Narrain, *Crystallising Queer Politics: The Naz Foundation Case and Its Implication for India's Transgender Communities*, 2 Nat'l U. Juridical Sci. L. Rev. 455, 466 (2009).

a traditional and allegedly more tolerant Indian attitude toward gender diversity with the British Victorian prudishness.[109] Part of the complexity of the case is due to the many identities contemplated by the Supreme Court. The decision considers "transgender" an umbrella term that includes all those people whose identity does not match the birth-assigned gender. It also refers more specifically to multiple Indian subjectivities, with a specific emphasis on hijras.[110]

Despite the arguably successful outcome, the judgment is riddled with contradictions.[111] On the one hand, the narrative emphasizes gender self-determination in certain passages. Individuals are recognized a right to a binary and nonbinary gender identity,[112] defined as "one of the most basic aspects of self-determination, dignity, and freedom."[113] Throughout the reasoning, the justices enunciated that no medical treatments—including gender confirmation surgery, sterilization, or hormonal treatment—shall be required for gender recognition and that self-identification should be the compass for gender recognition.[114] This was partially confirmed in the final directives of the judgment, where the Supreme Court ruled that "transgender" people have the right to decide their male, female, or third-gender identity[115] and that requiring "sexual reassignment surgery" for gender recognition was "immoral and illegal."[116] This has led some scholars to conclude that *NALSA* protects a pure right to gender self-determination.[117] In this sense, an expansive reading of the decision seems possible.

However, some other passages might suggest a more restrictive reading of the *NALSA* decision, representing an example of an ascriptive right to nonbinary recognition. One justice stated that gender recognition should follow sex reassignment surgery.[118]

[109] Nat'l Legal Service Authority (NALSA) v. Union of India & Ors., AIR 2014 SC 1863, ¶ 110, https://indiankanoon.org/doc/193543132/.

[110] The Supreme Court refers to hijras, eunuchs, aravanis, thurinangi, khoti, jogtas/jogappas, and shivshaktis as "historical. . . transgender related identities" in India. *NALSA*, AIR 2014 SC ¶¶ 12–19. Although the Court acknowledges the differences between such identities, they are lumped together in the decision. A detailed discussion of the similarities or differences of such identities falls outside the scope of this article. However, it is important to underline that these identities are not synonymous and that there are social and cultural differences between them. *See* Reddy, *supra* note 104, at 54.

[111] Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's* NALSA *Judgement on Transgender Recognition and Rights*, 5 J. Indian L. & Soc'y 225 (2014). The decision was provided by a "Division Bench," with two judges filing separate opinions and concluding their judgments with a list of final directives. In this specific case, the two judges agreed on the outcome of the application, but their reasoning differed slightly, especially along the lines explained in the text.

[112] *NALSA*, AIR 2014 SC ¶ 62.

[113] *Id.* ¶ 99.

[114] *Id.* ¶ 20.

[115] *Id.* ¶ 129(2).

[116] *Id.* ¶ 129(5).

[117] Jayna Kothari, *Trans Equality in India: Affirmation of the Right to Self-Determination of Gender*, 13 Nat'l U. Juridical Sci. L. Rev. 1 (2020); Holning Lau, *Courts, the Law, and LGBT Rights in Asia*, *in* Oxford Encyclopedia of LGBT Politics and Policy 349, 352 (Donald P. Haider-Markel ed., 2021). Also, the Indian Supreme Court has interpreted *NALSA* as endorsing pure self-determination in its subsequent case law decriminalizing oral-genital and anal sex for men who have sex with men. *See* Navtej Singh Johar & Ors. v. Union of India, (2018) 10 SCC 1, ¶ 9, as underlined by Kothari above.

[118] *NALSA*, AIR 2014 SC ¶ 106.

Furthermore, the status of hormonal treatments as a precondition for gender recognition remains vague in the final directives (even if one opinion categorically rejects them),[119] and the first opinion called for the introduction of an underspecified "psychological test" (which might perhaps also be read as a psychiatric assessment) that would substitute physical evaluations as a means of identifying tangible indicia of the trans condition.[120] The decision seems to echo a "trapped-in-the-wrong-body" narrative. Overall, as queer legal theorist Rahul Rao has argued, the court relies on and restates gender notions, defined as "different kinds of queer embodiment and desire [to be] intelligible in a juridical context."[121]

Regardless of these contradictions, the tendency of the Supreme Court to define and objectify is clearly perceivable, especially where the Court refers to nonbinary people. Despite granting "transgender" people in general a binary and nonbinary recognition, the narrative arguably constructs a nonbinary gender shaped after the experience of the hijra people. As said, hijras—almost used as representatives of the whole group of Indian vernacular gender and sexual identities—are "compressed" into a nonbinary dimension, regardless of their personal identification. This ascription to the nonbinary category is particularly evident in the final statement of the directives whereby hijras are "to be treated as 'third gender' for the purpose of safeguarding their rights."[122] Yet, as activists and scholars have highlighted, hijras may identify as women instead of as "third gender."[123] Hijras are also defined as incapable of procreating with a sexual anatomy that is different from either male or female standards.[124] Again, this may however not be the case, as some hijras may be intersex or may have undergone surgeries on their genitalia.[125]

Additionally, in the words of Gee Imaan Semmalar, hijra identity has been subjected to a process of "saffronisation." To show hijras are local and not Western imports, the decision insists on them being historically and traditionally Hindu, giving only little weight to the contributions of Indian Muslims to gender diversity.[126] Finally, hijras have been defined not only in terms of identification but also with regard to their social role as performing specific activities, such as dancing at ceremonies, conferring blessings to newborns, sex work, and collecting alms.[127] The beneficiaries of the third gender label have therefore been defined according to assessable—albeit contestable—elements.

[119] *Id.* ¶¶ 20, 129.
[120] *Id.* ¶ 34. *See also* Dutta, *supra* note 111, at 232 (suggesting that such a test might be linked to the finding of gender dysphoria in the trans applicant).
[121] Rahul Rao, Out of Time: The Queer Politics of Postcoloniality 189 (2020); *see also* Vaibhav Saria, *Begging for Change: Hijras, Law and Nationalism*, 53 Contributions to Indian Socio. 133, 136 (2019).
[122] *NALSA*, AIR 2014 SC ¶ 129(2).
[123] Dutta, *supra* note 111, at 230; *see also* Gee Imaan Semmalar, *Gender Outlawed: The Supreme Court Judgment on Third Gender and Its Implications*, Round Table India (Apr. 18, 2014), www.roundtableindia.co.in/because-we-have-a-voice-too-the-supreme-court-judgment-on-third-gender-and-its-implications/.
[124] *NALSA*, AIR 2014 SC ¶ 11.
[125] Dutta, *supra* note 111, at 230.
[126] Semmalar, *supra* note 123.
[127] *NALSA*, AIR 2014 SC ¶ 44.

Unsurprisingly, the decision was welcomed with a degree of skepticism among some activists, who argued that "it is clear that the court wants to make us into a manageable category, reveal the 'truth' of our sex."[128] Equally unsurprisingly, they have pointed out that "tendencies of gatekeeping transgender identity seemed to have intensified after the Supreme Court's *NALSA* judgment."[129] In the end, despite reasonable disagreement, it seems that the ascriptive dimension of the classification system preeminently features in the *NALSA* decision, however much it might have been celebrated by many trans and nonbinary people.

A rather tormented legislative development followed *NALSA*, confirming the risks associated with the decision's lack of clarity.[130] The Transgender Persons (Protection of Rights) Act 2019 entrusts a district magistrate with the decision of gender recognition on the basis of the documents that should be supplied. Among such documents are included medical certificates of "sexual reassignment surgery," thus apparently making gender recognition subject to a rather ascriptive procedure for all "transgender" people (binary and nonbinary alike).[131] A decision on the constitutionality of the 2019 Act—and specifically on its failure to protect self-determination—is currently pending before the Supreme Court, which might possibly build on the expansive reading of the *NALSA* decision to grant the demands of trans and nonbinary people.[132]

4.2. Ascribing a nonbinary gender by relying on physical definitions

Germany represents a rather different approach to the ascriptive nonbinary model.[133] Nonbinary identity, despite being an "option" not imposed on anyone, is defined in medical and identitarian terms and excludes those who do not fit the mold. The German approach follows a 2017 decision[134] in which the Federal Constitutional Court (FCC) welcomed the claim of an intersex, nonbinary identifying plaintiff who argued a violation of their right to personality[135] and gender equality.[136] Since 2013, German law had allowed a blank space to be left in the civil status registration, but solely as an option reserved for intersex children if they could not be assigned a male or female gender at birth.[137] Yet a third, positive option was not allowed in the Personal Status Law. The plaintiff claimed that this lack of recognition caused them administrative

[128] Dutta, *supra* note 111.
[129] Ani Dutta, *Gatekeeping Transgender*, Raiot (Oct. 4, 2016), https://raiot.in/gatekeeping-transgender/.
[130] Transgender Persons (Protection of Rights) Act 2019 (India). *See* Aastha Khanna & Divesh Sawhney, *Legislative Review of the Transgender Persons (Protection of Rights) Act, 2019*, 24 Hum. Rts. Brief 155, 160 (2021).
[131] Transgender Persons (Protection of Rights) Act 2019, sec. 7.
[132] Almas Shaikh, Grace Banu Ganeshan & Ors. v. Union of India & Anr.*: A Constitutional Challenge to the Transgender Persons (Protection of Rights) Act 2019*, Ctr. for L. & Pol'y Res. (June 18, 2020), https://clpr.org.in/litigation/grace-banu-ganesan-ors-v-union-of-india-anr/.
[133] For a deeper analysis, see Osella, *supra* note 30.
[134] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 10, 2017, 1 BvR 2019/16, ECLI:DE:BVerfG:2017:rs20171010.1bvr201916 (Ger.).
[135] Grundgesetz [GG] [Basic Law], art. 2(1) in conjunction with art. 1(1), translation at www.gesetze-im-internet.de/englisch_gg/index.html.
[136] *Id.* arts. 3(1), 3(3).
[137] Personnenstandsgesetz [PStG] [Law on the Status of Persons], § 22(3).

problems and made it difficult for them to be recognized as nonbinary in society, which was vital to the free development of their personality.[138]

Although the Personal Status Law required gender registration, the FCC found, it excluded people with a variation of sexual development,[139] who permanently identify with the nonbinary gender, from having a positive gender entry. As such, it forced these individuals to either accept a binary designation that failed to reflect their identity or remain in a limbo.[140] While acknowledging the presence of the binary in the wording of the Basic Law, the FCC held that the mention of "men" and "women" in the equality clause could not be intended to deny nonbinary identities.[141] More concretely, the FCC insisted that the Basic Law "neither requires that sex be governed by civil status law, nor is it opposed to the civil status recognition of a third option identity beyond male and female."[142] Even though the FCC acknowledged that the introduction of a third gender could cause bureaucratic or organizational costs, it did not consider that this justified the denial of one's right to legal personality and equality.[143]

In many ways, this decision is the result of a decade-long period of activism for intersex rights in Germany.[144] It can undeniably be hailed as a victory for the rights of gender minorities, creating the possibility of a very important option for many individuals.[145] Nevertheless, the decision can also be subject to criticism.[146] The lack of inclusion of those people who do *not* have "a variation of sex development" in the "third option" may be problematic. Furthermore, people with a more fluid identity—i.e., one that changes over time—are arguably excluded from the possibility of nonbinary recognition. Admittedly, expansive nonbinary interpretations of the decision are possible and could mitigate these shortcomings.[147] To begin with, the decision reflects the facts of the case and has not addressed nonbinary people who are *not* intersex and neither

[138] BVerfG, 1 BvR 2019/16, ¶ 48.
[139] In the original German, "Varianten der Geschlechtsentwicklung."
[140] BverfG, 1 BvR 2019/16, ¶¶ 43–4.
[141] GG, *supra* note 135, art. 3.
[142] BVerfG, 1 BvR 2019/16, ¶ 50.
[143] *Id.* ¶ 52.
[144] Angelika Von Wahl, *From Object to Subject: Intersex Activism and the Rise and Fall of the Gender Binary in Germany*, 28 Soc. Pol.: Int'l Stud. in Gender, State & Soc'y 755 (2021).
[145] For a debate on the decision, see the symposium on the matter on the IACL-AIDC blog, and specifically, Anna Katharina Mangold, *Symposium on the "Third Option": "Not Man, Not Woman, Not Nothing,"* Int'l Ass'n Const. L. Blog (Jan. 16, 2018), https://blog-iacl-aidc.org/the-third-gender/2018/5/28/i2tnkkxpwywkbpinwn5wva1fmlb449; Berit Völtzmann, *The Same Freedom for Everyone!*, Int'l Ass'n Const. L. Blog (Jan. 23, 2018), https://blog-iacl-aidc.org/the-third-gender/2018/5/28/symposium-on-the-third-option-not-man-not-woman-not-nothing-the-same-freedom-for-everyone; Nora Markard, *Structure and Participation: On the Significance of the "Third Option" for the Equality Guarantee*, Int'l Ass'n Const. L. Blog (Feb. 3, 2018), https://blog-iacl-aidc.org/the-third-gender/2018/5/28/symposium-on-the-third-option-not-man-not-woman-not-nothing-structure-and-participation-on-the-significance-of-the-third-option-for-the-equality-guarantee; Gritje Baars, *The Politics of Recognition and Emancipation Through Law*, Int'l Ass'n Const. L. Blog (Feb. 13, 2018), https://blog-iacl-aidc.org/the-third-gender/2018/5/28/symposium-on-the-third-option-not-man-not-woman-not-nothing-the-politics-of-recognition-and-emancipation-through-law.
[146] In particular, see the analysis of Osella, *supra* note 30.
[147] *See, e.g.*, Anna Katharina Mangold, Maya Markwald, & Cara Röhner, Rechtsgutachten zum Verständnis von "Varianten der Geschlechtsentwicklung" in § 45b Personenstandsgesetz [Legal Opinion on the Understanding of "Variants of Sex Development" in Section 45b of the Personal Status Act], EUFBox (Dec. 2, 2019), https://eufbox.uni-flensburg.de/index.php/s/WwkHJkHaEaHpkQk.

those who have a fluid identity.[148] Additionally, some passages of the judgment are framed in broad terms, indeed seeming to speak of a right to nonbinary recognition in general, one that is not limited to intersex people.[149] Reading such passages in light of the case law that the FCC has developed over time on the right to gender identity might serve to increase the protected scope of this right.[150]

However, strictly interpreted, this decision can hardly be said to open the third option to everyone.[151] In fact, the FCC laid down precise "nonbinary" gender norms by defining a beneficiary of the right to gender identity as someone who, in addition to a permanent nonbinary identity, must be *physically intersex*. This is how the German Federal Parliament has received the case, for the law enacting the decision certainly limits gender recognition to intersex people. Applicants, through an administrative procedure, must provide a medical certificate for this purpose to the registrar or swear an oath if the medical certificate is not available.[152]

In June 2020, the Federal Court of Justice (FCJ)—Germany's highest court of criminal and civil jurisdiction—explicitly confirmed the connection between nonbinary recognition and physical intersexuality.[153] The FCJ stated that the constitutional right crafted by the FCC—and implemented by the legislature—is limited to intersex people who identify beyond the binary.[154] For the partial benefit of the applicant (a nonbinary person who was *not* intersex), the FCJ ruled that nonbinary recognition would be possible on the basis of the law on gender recognition, the 1980 Transsexuellengesetz (Transsexual People Act), which consents to gender recognition after a judicial procedure involving experts, including medical ones.[155] This is no mere technicality. Symbolic effects follow, as the right to nonbinary recognition is constructed as an exception to the system to be contained through the judicial procedures of the Transsexual People Act.[156] At a practical level, it imposes on the applicant a longer and more costly path to nonbinary recognition.[157] This decision

[148] Jens Theilen, *Developments in German Civil Status Law on the Recognition of Intersex and Non-Binary Persons: Subversion Subverted*, *in* Protecting Trans Rights in the Age of Gender Self-Determination 95, at 112 (Eva Brems, Pieter Cannoot, & Toon Moonen eds., 2020).

[149] Peter Dunne & Julie Mulder, *Beyond the Binary: Towards a Third Sex Category in Germany?*, 19 German L.J. 628 (2018).

[150] *Id.*

[151] Theilen, *supra* note 149.

[152] PsTG, *supra* note 137, § 45b.

[153] Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 22, 2020, XII 383/19, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=106062&pos=0&anz=1.

[154] *Id.* ¶ 21.

[155] Transsexuellengesetz [TSG] [Transsexuals Act].

[156] *See* Jens Theilen, *Der biologische Essentialismus hinter "lediglich empfundener Intersexualität"* [*The Biological Essentialism behind "Merely Perceived Intersexuality"*], Verfassungsblog (May 24, 2020), https://verfassungsblog.de/der-biologische-essentialismus-hinter-lediglich-empfundener-intersexualitaet/.

[157] This is clarified in the appealed filed against this decision before the FCC. *See* Anna Katharina Mangold, Friedrike Boll, & Katrin Niedenthal, Verfassungsbeschwerde [Constitutional Complaint], June 15, 2020, sec. B.I.4.cc, https://legacy.freiheitsrechte.org/home/wp-content/uploads/2020/06/2020-06-16-Verfassungsbeschwerde-Personenstandsgesetz-anonymisiert.pdf.

has now been appealed before the FCC.[158] At the same time, a bill on gender self-determination has been presented in Parliament.[159]

Whatever the evolution of German law may be, it seems clear that the restrictive reading of the 2017 doctrine has evident exclusionary effects, as many nonbinary people who are *not* intersex are left unrecognized. In conclusion, we note that a clear definition of the beneficiary of the right to gender identity exists in France, Italy, India, and Germany, as does a related apparatus aimed at verifying whether applicants comply with the set norm. Nonbinary recognition—to the extent granted by the FCC—continues to rely on defining mechanisms that construct, limit, and establish norms of gender identities in law.

5. Binary elective model

A "binary elective" right to gender recognition was protected in Colombia from 2015 to 2022.[160] The foundation of this model was Decision T-063/15, in which the Colombian Constitutional Court granted gender self-determination and established that recognition should follow a notarial—and not a judicial—process.[161] Even though more expansive interpretations were possible, Presidential Decree 1227 of 2015 implemented the constitutional doctrine in a restrictive fashion.[162] It established a notarial procedure based on the sworn oath of the applicant.[163] Despite barring any other requirements,[164] the decree limited recognition to the binary[165] and to two transitions in total; that is, one transition and another one "back" only after a ten-year period had elapsed.[166] In 2022, the Constitutional Court ruled that such limitations are unconstitutional.[167] It granted the right to nonbinary recognition. Furthermore, it ruled that applicants can also obtain recognition *before* the ten-year interval has passed. Colombia has *now* a nonbinary elective model (very similar to Belgium's).[168] Yet the binary elective form that was in force until recently exemplifies both the shortcomings and the instability of the binary system once self-determination has been affirmed.

[158] *Id.*

[159] Selbstbestimmungsgesetz [Self-Determination Act] (not yet in force); *see also Eckpunkte für das Selbstbestimmungsgesetz vorgestellt* [Key Points of the Presented Self-Determintion Act], Bundesministerium der Justiz (June 30, 2022), www.bmj.de/SharedDocs/Artikel/DE/2022/0630_SelbstbestimmungsG.html.

[160] This section draws on Stefano Osella & Ruth Rubio-Marín, *The Right to Gender Recognition before the Colombian Constitutional Court: A Queer and Travesti Theory Analysis*, 40 Bull. Latin Am. Res. 650 (2021).

[161] Corte Constitucional [CC] [Constitutional Court], febrero 13, 2015, Sentencia T-063/15, www.corteconstitucional.gov.co/RELATORIA/2015/T-063-15.htm.

[162] Julia Sandra Bernal Crespo, *Los derechos fundamentales de las personas transgénero* [*The Fundamental Rights of Transgender People*], 38 Cuestiones Constitucionales 229 (2018); Jorge Ricardo Palomares Garcia & Camila Aleandra Rozo Ladino, *El registro civil de las personas y el modelo no binario* [*The Civil Registry and the Nonbinary Model*], 25 Revista Ius et Praxis 113, 123–43 (2019); Diana Carolina Moreno Pabón, *Derecho, persona e identidad sexual: El debate jurídico de la documentación de las personas trans* [*Law, Person, and Sexual Identity: The Legal Debate on the IDs of Trans People*], 11 Universitas Estudiantes de Bogotá 123 (2014).

[163] Presidential Decree 1227 of 2015, art. 2.2.6.12.4.5.

[164] *Id.* art. 2.2.6.12.4.4.

[165] *Id.*, art. 2.2.6.12.4.3.

[166] *Id.*, art. 2.2.6.12.4.6.

[167] Corte Constitucional [CC] [Constitutional Court], febrero 4, 2022, Sentencia T-033/22, www.corteconstitucional.gov.co/Relatoria/2022/T-033-22.htm.

[168] *See infra* Section 6.

Decision T-063/15 established the "binary elective" model in Colombia and clarified the procedure to obtain gender recognition. The question at the time was whether legal sex reflected an objective fact that external authorities should certify—thereby falling within the jurisdiction of courts—or an aspect of individual identity that was ultimately for the individual to determine and could therefore simply be declared before a notary. The law was unclear. The constitutional doctrine up to that point seemed to perpetuate the idea that "sex" was an objective fact to be discovered. Decision T-063/15 reversed this doctrine.[169]

The Constitutional Court established that gender identity can be recognized through the quicker, cheaper, and less intrusive notarial procedure.[170] Consistently, the Court clarified that "sex" is an "identitarian construction," in harmony with an individual's gender identity.[171] Moreover, the Court also stated that, for the purposes of legal classification, no objective, "true" sex exists in reality and that, as such, it cannot be recorded in the civil registry.[172] It also defined gender as a political-cultural category and, endorsing a *depathologizing* discourse, ruled that gender is an aspect of individual identity that only the person concerned is best suited to assess, leaving the notary with the mere role of recording it.[173]

As a result, the judicial avenue was deemed a disproportionate interference with the rights to dignity,[174] free development of one's personality,[175] and legal personality.[176] Admittedly, the Court acknowledged that judicial supervision of the civil status could serve constitutionally legitimate purposes.[177] Nevertheless, the Court found that this went beyond necessity. The underlying public interests could just as well be achieved through different and less intrusive instruments, such as a declaration before a notary.[178] Moreover, the Court noted that, in its own case law, cis people[179] were not required to appeal to a Court to correct their gender classification when wrongly registered. Because the Court excluded the existence of a "true sex,"[180] the correction of gender registration of trans and cis people had to be considered qualitatively identical. Any external—especially judicial—assessment would require

[169] *See* Osella & Rubio-Marín, *supra* note 160; Corte Constitucional [CC] [Constitutional Court], noviembre 8, 1994, Sentencia T-504/94, www.corteconstitucional.gov.co/relatoria/1994/T-504-94.htm.

[170] Corte Constitucional [CC] [Constitutional Court], febrero 13, 2015, Sentencia T-063/15, ¶ II.7.2.7, www.corteconstitucional.gov.co/RELATORIA/2015/T-063-15.htm.

[171] *Id.* ¶ II.5.2

[172] *Id.* ¶ II.7.2.4.

[173] Corte Constitucional [CC] [Constitutional Court], noviembre 8, 2012, Sentencia T-918/12, ¶ II.7.2.2, www.corteconstitucional.gov.co/relatoria/2012/T-918-12.htm.

[174] Constitución Política de Colombia [C.P.], art. 1.

[175] *Id.* art. 16.

[176] *Id.* art. 14; *see also* Corte Constitucional [CC] [Constitutional Court], febrero 13, 2015, Sentencia T-063/15, ¶ II.2, www.corteconstitucional.gov.co/RELATORIA/2015/T-063-15.htm.

[177] The Court refers to ensuring that the civil status of the person is protected from arbitrary changes and to granting certainty to the information required to assign public offices, rights, and duties based on the civil status of persons.

[178] CC, febrero 13, 2015, Sentencia T-063/15, ¶ II.7.2.6.

[179] Cis people are individuals whose gender identity corresponds to that assigned to them at birth on the basis of anatomical considerations.

[180] Corte Constitucional [CC] [Constitutional Court], abril 18, 2012, Sentencia T-231/13, www.corteconstitucional.gov.co/relatoria/2013/T-231-13.htm.

a degree of physical or psychological intrusion and would necessarily rely on stereotyped evaluations.[181]

Interestingly, the Court did not specify the characteristics of the beneficiary of this right. This, at least, partially curbed the establishment of gender norms. Gender identity was defined along the lines of the Yogyakarta Principles instead, following arguments put forward by the associations intervening in the case.[182] It was thus detached from any physical dimension. Genitocentrism and a normative understanding of gender categories and expressions were arguably equally repudiated. This invited a *de-essentialized* and *de-essentializing* understanding of legal gender capable of subversive applications. The production of gender norms (how law defines men or women) was challenged, as the constitutional right was designed to avoid gender definitions.

The change in tune vis-à-vis the binary ascriptive model in France and Italy seems undisputable. The entire structure producing norms that restrict recognition and impose standardized versions of maleness and femaleness is questioned. More complex is the comparison with the nonbinary ascriptive model that we have encountered in India and Germany. Despite the possibility of expansive readings, no third option was granted in Colombian Decision T-063/15, thus not including an explicit recognition of nonbinary or fluid identities.[183] Yet the disestablishment of the gender meaning-making apparatus can indeed be seen as a challenge to binary structures of gender, especially since this right opens itself to the reimagination of conventional identities in law. To be sure, gray areas—which the Court failed to address—were noticeable in the decision, leaving much to the regulatory domain.

In 2022, the Constitutional Court ruled that requiring a ten-year interval between the first and the second recognitions was disproportionate, since this would disregard the social and psychological consequences of a lack of recognition.[184] Similarly, the absence of a third option misrecognized nonbinary people's experience of gender and interfered with the rights to legal personality,[185] free development of one's personality,[186] and the principle of human dignity.[187] The lack of a nonbinary gender, the Court continued, leads to social exclusion[188] and represents a type of legal discrimination of nonbinary people vis-à-vis cis and trans people who identify as a binary gender.[189] Thanks to this decision, the Court shifted the Colombian system to the nonbinary elective model, to which we will now turn.

[181] CC, febrero 13, 2015, Sentencia T-063/15, ¶ II.7.2.3.
[182] *Id.* ¶ I.4.1.8.
[183] In case of genital ambiguity, making gender assignment at birth virtually impossible, the Constitutional Court ensured the right to be registered nonetheless, leaving the gender category unmarked. *See* Corte Constitucional [CC] [Constitutional Court], julio 16, 2013, Sentencia T-450A/13, www.corteconstitucional.gov.co/relatoria/2013/t-450a-13.htm. *See also* Registraduria Nacional del Estado Civil, Circular No. 33, febrero 24, 2015.
[184] Corte Constitucional [CC] [Constitutional Court], febrero 4, 2022, Sentencia T-033/22, ¶ 61, www.corteconstitucional.gov.co/Relatoria/2022/T-033-22.htm.
[185] C.P. art. 14.
[186] *Id.* art. 16.
[187] *Id.* art. 1.
[188] CC, febrero 4, 2022, Sentencia T-033/22, ¶ 61.
[189] *Id.* ¶ 64.

6. Nonbinary elective model

In 2019, a fundamental change took place in Belgium.[190] Breaking new ground at the global level, the Constitutional Court offered the final piece of this taxonomy and arguably changed the paradigm of gender recognition in a fundamental way.[191] The case involved the legitimacy of the 2017 Gender Recognition Act, which modified the 2007 Transsexual Act.[192] Following an intense engagement with LGBTQI+ associations,[193] the 2017 act established a model of gender self-determination. All medical and behavioral preconditions were removed. The declaration of the person, to be repeated twice over a three-to-six-month timeframe, became the focus of the procedure. During this time, the Public Prosecutor's Office is informed and can object to the process should they suspect a threat to the *ordre public*. In the law's original formulation, the applicant's choice was limited to the binary. Transition was, in principle, permanent. A change "back"—from the gender obtained through recognition to the birth assigned gender—was only possible in exceptional circumstances. It was, at any rate, subtracted to a self-declaratory procedure and fell within the jurisdiction of family courts. Self-determination was obviously impaired by these requirements. Furthermore, the possibility that a stereotyped understanding of gender might orient the evaluations of the public prosecutor has been argued not to be too far-fetched. From this perspective, it is feared that the public prosecutor might envision a threat to the public order or the risk of fraud when the applicant does not conform to the stereotypical understanding of gender or trans identity.[194] Therefore, although hailed as progress vis-à-vis the previous 2007 law, the 2017 Gender Recognition Act left stakeholders not fully satisfied.[195]

These shortcomings led LGBTQI+ associations to—successfully—challenge the constitutionality of the 2017 act.[196] The Constitutional Court ruled that the absence of a third option and the irreversibility principle, which translated into an aggrieved

[190] This section partly draws on Osella, *supra* note 30.

[191] Cour constitutionale [CC] [Constitutional Court], decision n° 99/2019 du 19 juin 2019, Moniteur Belge [M.B.], Jan. 21, 2020, p. 2338.

[192] Loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets [Law of June 25, 2017 reforming the rules concerning transgender people about the modification of sex registration in the civil registries and its effects], Moniteur Belge [M.B.], July 10, 2017, p. 71465, www.ejustice.just.fgov.be/img_l/pdf/2017/06/25/2017012964_F.pdf. *See also* Emmanuelle Bribosia & Isabelle Rorive, *Human Rights Integration in Action: Making Equality Law for Trans People Work in Belgium*, *in* Fragmentation and Integration in Human Rights Law: Users' Perspective 111 (Eva Brems ed., 2018). The 2007 act required the permanent identification with the "other" gender, the completion of a medically supervised transition, and the loss of the ability to procreate. *See* Pieter Cannoot, *The Limits to Gender Self-Determination in a Stereotyped Legal System: Lessons from the Belgian Gender Recognition Act*, *in* Protecting Trans Rights in the Age of Gender Self-Determination 11, 15–17 (Eva Brems, Pieter Cannoot, & Toon Moonen eds., 2020).

[193] Bribosia & Rorive, *supra* note 192.

[194] *See* Cannoot, *supra* note 192.

[195] Dimitri Tomsei & David Paternotte, *L'adoption de la "Loi Trans*" du 25 juin 2017: De la stérilisation et la psychiatrisation à la autodetermination* [*The Adoption of the "Trans Law" of June 25, 2017: From Sterilization and Psychiatrization to Self-Determination*], 2505 Le Courrier Hebdomadaire 31 (2021).

[196] Such nonprofit organizations were Çavaria, Maison Arc-en-Ciel, and Genres Pluriels.

process in practice, violated the right to privacy and family life.[197] Moreover, it was found to infringe the gender equality of nonbinary people.[198] The Court acknowledged that the legal system largely relies on the binary, yet it deemed this an insufficient reason to deny a self-determined third option. Just as in the German case, the Court excluded the fact that the constitutional reference to gender equality expressed in binary terms could prevent a nonbinary recognition, clarifying that gender equality actually protects nonbinary people. Unlike trans persons who identify with a binary gender (to whom the 2017 act ensured self-determination), people who rejected the male/female categories were denied any recognition. This, the Court held, amounts to gender discrimination. The Court, however, did not specify *how* to address this discrimination, whether a third category should be added, or whether gender should be erased from the civil status altogether. On this point, the Court deferred to the legislative power.[199] A constitutional right to a self-determined third option seemed to be nothing short of revolutionary at the global level. The seldom-granted nonbinary recognition had arguably always been limited by preconditions (be they medical or cultural) and, therefore, to the "ascriptive nonbinary" model—with clear consequences in terms of inclusivity.[200]

The Court stated that gender equality also protects gender-fluid people—who may feel the need to change their legal identity more than once over their lifetimes. Individuals with a permanent identification were fully protected under the 2017 law. Gender-fluid people, though, were limited by the requirement of irreversibility of recognition in principle and by the judiciary procedure for multiple gender changes to the legal status in practice.[201] The Court also recognized that preventing frauds—being the alleged rationale underlying the limitation of multiple changes to the legal status—was a legitimate objective. Nevertheless, it considered that the control power the public prosecutor was entrusted with, along with the mandatory interval between the first application for recognition and the confirmation from three up to six months later, was enough of a guarantee to achieve this purpose.[202]

The explicit protection of gender-fluid people was likely a very significant aspect. It safeguarded gender diversity in a rather innovative way. Prior to the date of the ruling, no constitutional court had granted protection to gender-fluid people. And to date, an

[197] 1994 Const. art. 22 (Belg.).
[198] *Id.* arts. 10.3, 11*bis*.
[199] Cour constitutionale [CC] [Constitutional Court], decision n° 99/2019 du 19 juin 2019, Moniteur Belge [M.B.], Jan. 21, 2020, p. 2338, ¶ B.7.3.
[200] More doubts could be raised about Nepal, with its groundbreaking decision in Sunil Babu Pant and Others v. Government of Nepal and Others, Writ No. 917 of the year 2064 BS [2007]. Although the "third sex" was possibly granted on the basis of gender self-determination, gender-diverse people—including those identifying within the binary—were apparently "limited" to the third gender. As Sofia Aboim demonstrates, this had consequences in terms of inclusivity, preventing trans people who identify as binary from seeking recognition. *See* Sofia Aboim, *Gender in a Box? The Paradoxes of Recognition beyond the Gender Binary*, 8 Pol. & Governance 231 (2020).
[201] CC [Constitutional Court], July 19, 2019, n° 99/2019, ¶ B.8.1, www.stradalex.com/fr/sl_src_publ_jur_be/document/cconst_2019-99 (Belg.).
[202] *Id.* ¶¶ B.8.4–5.

explicit protection of fluidity, especially at the constitutional level, represents an absolute exception. Multiple changes have nearly always been restricted, even—and perhaps surprisingly—when gender self-determination is otherwise granted.[203] This has often left gender-fluid people at a disadvantage, one that the Belgian Constitutional Court remedied. In a more profound way, however, this ruling challenged the rather central notion of permanence. Gender fixity, as Paisley Currah and Lisa Jean Moore have argued, has often been assumed to be a central, and even natural, aspect of legal gender categorization. It has also been deemed essential to ensure the identifiability of the individual, to "prevent frauds," and, therefore, to stabilize the entire system of gender categories.[204] Repeatedly, as we have seen, for example in relation to France, the irreversibility of gender transition has been considered a guarantee of the certainty of legal relations and has been the main ground for the imposition of external (and medical) requirements.[205] Hence, by challenging this central assumption, the Belgian ruling profoundly impacted the standard paradigm of gender recognition. It has set new ways to understand this (constitutional) right but also, at a more general level, gender categorization.[206]

In sum, the Belgian Constitutional Court established a fundamental right to gender recognition, ensuring that the person has, at least in principle, the final say on who they are. Individuals are allowed a binary or nonbinary, permanent or fluid, recognition without having to satisfy any explicit identity requirements that can be monitored, such as medical conditions or behavioral signs. Although the risk of practical restrictions of such a right are present, no gender norms are expressly identified to be externally controlled, nor is a limitation set to the male/female dichotomy. This seems to mark a significant difference from the (binary and nonbinary) ascriptive and the (binary) elective models. The Court left the contours of the beneficiary of the right to gender identity undefined, enabling them to encompass any form of "gendered" manifestations. Following the judgment, the Belgian government announced the intention to pass a law to enact it. Legislative works are currently ongoing.[207]

[203] Catto & Osella, *supra* note 1, at 50.

[204] On the importance of "permanence" in gender recognition, see Paisley Currah & Lisa Jean Moore, *"We Won't Know Who You Are": Contesting Sex Designations in New York City Birth Certificates*, 24 Hypatia 113 (2009). For an analysis of temporality in relation to gender recognition, see Emily Grabham, *Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act*, 19 Soc. & Legal Stud. 107 (2010).

[205] Catto & Osella, *supra* note 1, at 50.

[206] As said, to date, only the Colombian Constitutional Court seems to have followed the lead of the Belgian Constitutional Court. Corte Constitucional [CC] [Constitutional Court], febrero 4, 2022, Sentencia T-033/22, www.corteconstitucional.gov.co/Relatoria/2022/T-033-22.htm (Colom.). This might suggest that future analyses and taxonomizations should include gender fluidity—which, for simplification purposes, we decided to leave out in the present article.

[207] *See* Chambre de Représentants, Note Politique Générale: Égalité des genres, Égalité des chances et Diversité, Doc. no. 2294/015 (Oct. 29, 2021), www.lachambre.be/FLWB/PDF/55/2294/55K2294015.pdf (Belg.); Chambre de Représentants, Note Politique Générale: Justice et Mer du Nord, Doc. no. 2294/016(Oct. 29, 2021), www.lachambre.be/FLWB/PDF/55/2294/55K2294016.pdf (Belg.); Chambre de Représentants, Note Politique Générale: Intérieur, Doc. no. 2294/018 (Oct. 29, 2021), www.lachambre.be/FLWB/PDF/55/2294/55K2294018.pdf (Belg.).

7. Conclusions

Although practice is always more nuanced, confusing, and contradictory than theory, in this article we were able to delineate the basic features of four different models of gender recognition along the lines of two criteria: "ascriptive" versus "elective" and binary versus nonbinary.

The ascriptive models, binary as well as nonbinary, establish norms for recognition to which applicants must conform if they want their application to be successful and, in so doing, clearly distinguish between "acceptable" and "unacceptable" gender identities. In such models, we observe the legal mechanism of gender construction at play, given the existence of an entire apparatus set to determine gender standards for legal transition and to verify whether such standards are met in practice. This is not the case for the elective models, where individuals are allowed to reinterpret their gender more freely and nonetheless obtain recognition. In other words, gender election allows for the redefinition and reappropriation of notions of legal maleness and femaleness. Yet a grain of gender definition persists as long as recognition remains confined to the binary and fluidity is not protected.[208] Therefore, the nonbinary and fluid gender understandings endorsed by the Belgian Constitutional Court seem to allow, at least in principle, for the highest degree of diversity recognition.[209]

At the same time, we have highlighted the inherent transformative limitations of some of the results thus far achieved through the vehicle of rights. When the right holder is defined, rights are arguably incapable of fundamentally altering the paradigm of gender norm production, let alone its potentially exclusionary effects. In fact, they provide an opportunity for the mechanism of norm production to take hold and develop, also beyond the binary. Central to this transformative incapacity seems to be the reliance on a definition of the beneficiary of the right, or subject of recognition. This allows for a dynamic that is both exclusionary—as any act of identity definition is—and normalizing, as it creates the conditions for gender norms to be established and confirmed.

De-medicalization without self-determination is a perfect example. Despite ensuring a better inclusion of trans people, it does not necessarily alter the fundamental mechanism that regulates identities. Similarly, the addition of a nonbinary gender may enlarge the pool of people who receive recognition while multiplying gender categories and replicating the mechanisms that produce gender norms. The potential of gender self-determination—demanded by many activists—comes closest to calling into question the structures that control legal gender. Yet such a right does not necessarily offer an option to those who do not feel represented by a binary category, no matter how subversively they may live it, or to those who have a more fluid identity. A nonbinary elective model, which we think the Belgian system best exemplifies, seems to address

[208] The fluid/fixed dichotomy might in fact offer yet another axis of classification, which, for simplification purposes, we did not introduce. We plan to continue this investigation in future research.

[209] Cristopher Hutton, *Legal Sex, Self-Classification and Gender Self-Determination*, 11 Law & Humanities 64 (2017).

most of these concerns, opening up to those individuals who do not permanently fit within the binary.

One could, of course, raise the question as to whether a purely self-determined gender identity may perhaps represent the "end of legal sex."[210] Self-determination, with the inclusion of nonbinary and gender-fluid people, might disestablish the structure of definition that gender relies on. It may destabilize the traditional understanding of gender by recognizing creativity and different gender manifestations.[211] On the other hand, self-determination, when it comes to defining the legal gender, may not be sufficient to de-entrench gender norms from the legal system and, more importantly, from society altogether. As Davina Cooper and Flora Renz argue, we inhabit a plurality of normative systems, each capable of determining gender norms with which to comply. Private organizations, schools, etcetera, may still define standards when deciding who qualifies as a man, woman, or nonbinary.[212] The civil status is, in this sense, just *one* of the sites where gender is recorded—even if it is perhaps one of the most significant.

Still, a fundamental question remains: what would be the point of preserving a system of gender registration when the fundamental pillars on which it was built—binariness, stability, intelligibility, etcetera—are shattered? This question opens a Pandora's box of issues that we cannot properly discuss here. Nevertheless, this question needs asking. "No gender" has indeed been argued to offer a true liberating path, not only for trans and nonbinary people but also, eventually, for everyone.[213] A gender-blind civil status was deemed constitutionally legitimate by both the German and Belgian constitutional courts. At the same time, a gender-blind civil status might raise serious issues as to how to protect the equality of women and gender minorities in societies that largely remain sexist as well as hetero- and cisnormative.[214] As the Supreme Court of India seems to suggest in its *NALSA* decision, some form of recognition might additionally be essential to implement measures aimed at the inclusion of trans and nonbinary people.

In the end, exploring the potential and limits of the various definitions of a right in the making, such as gender recognition, is an exercise that cannot avoid either the balancing of that right with competing ones or the possibility to limit it for other legitimate and compelling public interests. But having clarity about the scope of that right might be a necessary first step toward insights that could help us move forward in various and sometimes competing directions.

[210] *Id.* at 78. *See also* Ruth Rubio-Marín, Global Gender Constitutionalism and Women's Citizenship: A Struggle for Transformative Inclusion 295 (2022).
[211] Janet Halley, Split Decisions: How and Why to Take a Break from Feminism 138 (2006).
[212] Davina Cooper and Flora Renz, *If the State Decertified Gender, What Might Happen to Its Meaning and Value?*, 43 J. L. & Soc'y 483 (2016).
[213] Heath Fogg Davis, Beyond Trans. Does Gender Matter? (2017).
[214] Stefano Osella, *"De-Gendering" the Civil Status? A Public Law Problem*, 18 Int'l J. Const. L. 471 (2020).