

Non-binary identities and the Elan-Cane case

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Many people in our societies identify as male or female, a man or a woman, but there have been people around the globe in different eras that have claimed other identities regarding their gender identity and have put this binary under challenge. Alternative genders across the globe demonstrate examples of cross-cultural gender diversity. In a number of Native American societies for example, different gender systems have been documented, which include more than two options for gender identification. In India, ‘hijras’ are accepted as a third gender. In the First Nations ‘two-spirit’ is non-binary gender category, and in Hawaii ‘mahuwahine’ is a culturally accepted gender form.¹ Gender variance has also been documented in other regions such as Brazil, the Philippines, Polynesia, and Thailand.² Perceiving gender as a binary category system is a just a feature of some cultures and not a universal classification; it is culturally established within communities by socializing interactions in each one.³

According to Corwin, in the U.S. there is a growing number of persons that identify outside the male-female binary. Corwin deals with the term ‘genderqueer’, which refers to people that either position themselves in a continuum between femininity and masculinity or simply see themselves falling outside of the male/female dichotomy.⁴ Since most legal cultures and many languages include only two options for gender identification, that is male (he) and female (she), genderqueer and non-binary individuals are faced with the challenge of explaining and claiming space for their gender identity in a social arena where other options for gender are not recognized. Indeed, it is challenging to speak about gender as including more than two options since additional options are not widely recognized, but this thesis holds the view that

¹Jessica Clarke, ‘They, Them, and Theirs’ (2019) 132 Harvard Law Review 894, 907, 932.

²Serena Nanda, *Gender diversity: Crosscultural variations* (Waveland Press 2000).

³Penelope Eckert and Sally McConnell-Ginet, *Language and gender* (Cambridge University Press 2003).

⁴Anna I. Corwin, ‘Language and gender variance: Constructing gender beyond the male/female binary’ (2009) 12 Electronic Journal of Human Sexuality <<http://www.ejhs.org/Volume12/Gender.htm>> accessed 28 April 2019.

the gender binary cannot be assumed as necessary when examining gender identity and holds space for non-binary genders, such as genderqueer, bigender, agender among others. These will be examined under the umbrella of non-binary identities, which is a catch-all term for people who identify between the categories of ‘man’ and ‘woman’ or beyond these categories, either permanently or some of the time.⁵ Non-binary identities fall under the wider definition of transgender phenomena, that refer to people who do not identify with the sex assigned at birth.⁶ The non-binary community is incredibly diverse with its members occupying different gender positions across and outside the binary. Some of them may undergo a number of surgeries and interventions in order to affirm their gender identity, while others do not.⁷ What is common is the rejection of the notion that there are only two genders with which one can identify and the transgression of the binary by appearance, social behaviour or by a mere sense of deep self-identification.

Non-binary people challenge ontological assumptions about gender, and in particular the assumption that the sex/gender configuration falls into binary categories. Non-binarism refers to gender and not sexual orientation, as heterosexual, lesbian, gay and bisexual, but it disrupts sexual orientation categories too. People identifying as beyond the gender binary destabilize the gender system and transgress gender stereotypes.⁸ Trans, hijra, non-binary and intersex people pose a fundamental challenge to the ontology of the sex/gender system, since the latter is based on bigenderism, namely the assumption that there are only two gender categories, man and woman, that are mutually exclusive. Bigenderism is the ‘systematic division of the population not only by sex, but also by an extraordinarily complex, subtle, and refined system of behavior, manner, communication, presentation, and interaction’, which causes great distress to gender variant people, since it holds no space for self-identification and classification.⁹

Bigenderism is also challenged at a legal level in various jurisdictions. There are developments in several countries that point to a recognition of non-binary identities. For example, in 2011, the Australian Passport office published updated guidelines regarding the issuing of

⁵Vic Valentine ‘Including Non-binary People: Guidance for Service Providers and Employers’ (*Scottish Trans Alliance*, 2015) <<https://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-guidance.pdf>> accessed 28 April 2019.

⁶LGBT Foundation, ‘Non-binary inclusion’ <<https://lgbt.foundation/who-we-help/trans-people/non-binary>> accessed 28 April 2019.

⁷Riki Wilchins, ‘Changing the subject’, in Joan Nestle, Clare Howell and Riki Wilchins (eds.), *GenderQueer: Voices from beyond the sexual binary* (Alyson Books 2002).

⁸Surya Monro, ‘Transmuting Gender Binaries: the Theoretical Challenge’ (2007) 12(1) *Sociological Research Online* <<http://www.socresonline.org.uk/12/1/monro.html>> accessed 28 April 2019.

⁹Miqqi Alicia Gilbert, ‘Defeating Bigenderism: Changing Gender Assumptions in the Twenty-first Century’ (2009) 24(3) *Hypatia* 93, 97.

passports with an X gender, which was up to then a possibility only for individuals with atypical sex characteristics. The X descriptor was extended to encompass binary trans people, but also people transcending binary genders, whether they had proceeded to gender affirmation surgery or not.¹⁰ In addition, in 2013, the Sex Discrimination Act 1984 was amended to provide new protections to individuals with diverse sexual orientation, gender identity and sex characteristics in the public life. According to the Australian Government Guidelines on the Recognition of Sex and Gender, individuals may identify as a gender other than the one that they were assigned at birth or beyond the gender binary and that should be reflected in the public government records. According to the same guidelines, '[t]he X category refers to any person who does not exclusively identify as either male or female, i.e. a person of a non-binary gender'.¹¹ In New Zealand as well, as from 2012, there is an option for an X descriptor in passport, which is reserved for people who are trans or intersex.¹² In the U.S., a number of jurisdictions, including Oregon, Washington, California and New York allow for a non-binary gender option on the documents they issue.¹³

In Malta, reforms in gender recognition laws have introduced the X category as an option for passports and public documents.¹⁴ In Denmark, where medical prerequisites have been removed for binary legal gender recognition, there is also a provision according to which individuals can change their passport gender marker to X upon application, without approval from the Gender Clinic.¹⁵ In Germany on the other hand, in 2018, the government adopted an act providing the possibility for intersex individuals to choose between binary gender markers, 'diverse' or the removal of gender marker.¹⁶ This act has been criticized, since it does not allow for non-binary individuals to choose this option if they do not have atypical sex characteristics and for that reason repathologizes intersex conditions.¹⁷

¹⁰Department of Foreign Affairs and Trade, Australian Government, 'Sex and Gender Diverse Passport Applicants' (*Australian Passport Office*) <<https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>> accessed 28 April 2019.

¹¹Australian Government, *Guidelines on the Recognition of Sex and Gender* (July 2013)<<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>> accessed 28 April 2019.

¹²Simon Collins, 'X marks the spot on passport for transgender travellers' *NZ Herald* (New Zealand, 5 December 2012)

¹³Jessica Clarke, 'They, Them, and Theirs' (2019) 132 *Harvard Law Review* 894, 896-897.

¹⁴Transgender Europe 'Third gender marker options in Europe and beyond' (9 November 2017) <<https://tgeu.org/third-gender-marker-options-in-europe-and-beyond/>> accessed 28 April 2019.

¹⁵Transgender Europe, 'Denmark: X in Passports and New Trans Law Works' (12 September 2014) <<https://tgeu.org/denmark-x-in-passports-and-new-trans-law-work/>> accessed 28 April 2019.

¹⁶Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben 2018 (Act modifying the information to be entered into the birth register 2018)

¹⁷Grietje Baars, 'New German Intersex Law: Third Gender but not as we want it' (*Critical Legal Thinking*,

Other countries that have introduced non-binary options in their government records are India, Nepal and Bangladesh. On April 15, 2014, a third gender was recognized by the Supreme Court of India. According to the Supreme Court, the third gender refers to transgender people that are neither male nor female and the recognition and acceptance of which does not constitute a social or medical issue, but a human rights' one.¹⁸ In Nepal, the Supreme Court established a third gender category as well in a landmark decision on December 27, 2007, according to which citizens can choose among three gender options, male, female and 'others'. The 'others' option refers to people identifying as a gender different than the one they were assigned at birth, a fact that will be solely defined by their self-identification.¹⁹ In November 2013, the Bangladeshi government announced the recognition of 'hijras', a community of feminine individuals with male sex characteristics counting over 10.000 people in Bangladesh, as a third gender category in public documents in order for their rights to be better protected.²⁰ On the other hand, according to Human Rights Watch, several abuses and discrepancies have been reported in the process of acquiring the third gender marker.²¹ Pakistan has also issued in 2017 its first passports with an X gender marker, years after its Supreme Court has declared that 'hijra' could be recognized as a third gender in national identity cards.²²

On 22 June, 2018 the English and Welsh High Court of Justice delivered a landmark judgment on an application relating to the issue of non-gender-specific passport filed by a non-gendered individual.²³ The judgment reflects the changing attitudes towards non binary genders and their recognition by public bodies. The application was refused, but the rationale of the decision highlights the dynamic development of gender systems that is taking place in the current social configuration.

24 August 2018) <<http://criticallegalthinking.com/2018/08/24/new-german-intersex-law-third-gender-but-not-as-we-want-it/>> accessed 28 April 2019.

¹⁸Deepshikha Ghosh, 'Transgenders are the 'third gender', rules Supreme Court' *NDTV* (New Delhi, 15 April 2014) <<https://www.ndtv.com/india-news/transgenders-are-the-third-gender-rules-supreme-court-557439>> accessed 28 April 2019.

¹⁹Michael Bochenek and Kyle Knight, 'Nepal's Third Gender and the Recognition of Gender Identity' (*Jurist*, 23 April 2012) <<http://jurist.org/hotline/2012/04/bochenek-knight-gender.php>> accessed 28 April 2019.

²⁰Farzana Hussain, 'Ensure rights of the third gender' *Dhaka Tribune* (7 January 2015) <<https://www.dhakatribune.com/uncategorized/2015/01/07/ensure-rights-of-the-third-gender>> accessed 28 April 2019.

²¹Kyle Knight, "I Want to Live With My Head Held High' Abuses in Bangladesh's Legal Recognition of Hijras' (*Human Rights Watch*, 23 December 2016) <<https://www.hrw.org/report/2016/12/23/i-want-live-my-head-held-high/abuses-bangladeshs-legal-recognition-hijras>> accessed 28 April 2019.

²²Zeesan Haider, 'Pakistan issues landmark transgender passport; fight for rights goes on' *Reuters* (Islamabad, 28 June 2017) <<https://www.reuters.com/article/us-pakistan-lgbt-passport/pakistan-issues-landmark-transgender-passport-fight-for-rights-goes-on-idUSKBN19J237>> accessed 28 April 2019.

²³*R Christie Elan-Cane v Secretary of State for the Home Department*, [2018] EWHC 1530 (Admin).

In the above case, Christie Elan-Cane asked for the issuance of an ‘X’ passport, that would correspond to their non-gendered identification. The claimant, a 60-year-old person assigned female at birth, who grew detached from their gender and performed a series of medical interventions to fit their emotional and psychological development, adopted a non-gendered identity, which they perceive to be a fundamental part of their personality, after having rejected several other terms for their non-binary gender identity.²⁴ After the applicant asked for a passport without a declaration of being male or female, they were informed that the International Civil Aviation Organisation (ICAO), permitted countries to issue passports with either ‘M’, ‘F’ or ‘X’ in the sex section where X indicated ‘unspecified’ sex. Although the applicant underlined the latter fact, the response remained the same in refusing to issue them a passport with an X gender marker.²⁵ The applicant claimed that a declaration of being either male or female in order to acquire a passport, against the international standards, constituted a degrading and humiliating process that forces individuals to deny their identity.²⁶

The Identity and Passport Service (IPS) acknowledged the feelings of the claimant in not identifying as either male or female, but raised technical issues, such as the current computer system, as well as security issues for passports without a gender marker and lack of recognition of non-traditional gender markers at an international level. It also underlined the possibility of acquiring a passport with a binary marker that better corresponds to the individual’s gender, upon submission of medical evidence of transition. {Ibid [8]. This statement highlights the additional discrimination that non-binary transgender people face in the public realm. In addition, although the IPS acknowledged the need to work with the transgender community in order to move forward on this important issue, it stressed that UK law recognizes only two genders, male and female, and that in order for the applicant’s claim to be accepted, a fundamental change in UK recognition law would be required.²⁷ It becomes evident that matters challenging social bigenderism cannot be addressed in isolation from legal frameworks regulating sex/gender in an interrelated and fundamental manner. The judgment makes that clear in dismissing the claim that the Government has a positive obligation under Article 8 ECHR to provide the option of an X marker in passports, based on the fact that ‘[i]t will be necessary for the Government to consider to what extent if any, in an age of increasing social and legal awareness and acceptance of the importance of issues relating to diversity and equality, the recording of an individual’s sex and/or gender in official and other documentation is justified’ and that ‘[i]t will also be necessary to consider the extent to which other identities both within

²⁴Ibid, [2]-[3].

²⁵Ibid [5].

²⁶Ibid [6].

²⁷Ibid [11].

and beyond the binary concept of gender are to be recognised, and if so, whether they are to be self-determined or are to be objectively evidenced'.²⁸

Although the claim was refused, the UK courts have recognised for the first time in the body of the judgment that the right to respect for an individual's private life guaranteed by Article 8 ECHR entails gender identification that could include non-binary individuals and that gender identification as elaborated by the ECtHR in *Van Kück* does not necessarily refer to 'transsexuals'.²⁹ In concluding the UK Court noted that:

rights afforded to individuals under the ECHR are ones which have to be interpreted in the light of changing conditions and in a dynamic and evolutionary manner. Therefore, not only may the situation amongst the Member and other States alter, but in particular in the present case the claimant will be entitled to scrutinise with care the results of the Government's current review.³⁰

In view of the above, one must acknowledge the shifting attitudes that are taking place regarding identities that challenge bigenderism. In a social arena that is regulated according to binary sex/gender categories, non-binary individuals face many challenges and limited protection while challenging deeply rooted socio-cultural significations. On the other hand, there is a growing number of people identifying as non-binary, whose identity is not reflected in man/woman categories as various studies show³¹ and it is essential that non-binary people be included in the public discourse on gender identity and transgender phenomena. It is crucial to address the concerns that have arisen on how the sense of self of non-binary persons, as well as their rights, can be accommodated in an environment that is increasingly accepting of gender-identity as a fundamental part of one's personality and one that does not necessarily develop in congruence with the classification of sex characteristics.

²⁸Ibid [151].

²⁹Ibid [104]-[106].

³⁰Ibid [149].

³¹See Jack Harrison, Jaime Grant and Jody L. Herman, 'A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey' (2012) 2(1) LGBTQ Public Policy Journal at the Harvard Kennedy School13; Christina Richards, Walter Pierre Bouman, Leighton Seal, Meg John Barker, Timo O. Nieder and Guy T'Sjoen 'Non-binary or genderqueer genders' (2016) 28(1)International Review of Psychiatry 95.