German Law Journal (2022), **23**, pp. 920–942
doi:10.1017/glj.2022.65

ARTICLE

Special Issue: Breaching the Boundaries of Law and Anthropology: New Pathways for Legal Research

When Comparative Law Walks the Path of Anthropology: The Third Gender in Europe

Stefano Osella[1]

[1]Law & Anthropology Department, Max Planck Institute for Social Anthropology, Halle/Saale, Germany
Corresponding author: osella@eth.mpg.de

(Received 29 August 2022; accepted 29 August 2022)

Abstract

Gender recognition is a crucial achievement for non-binary people. To better understand this right, this article combines comparative law with theoretical insights from anthropology to offer a discussion of non-binary recognition in European fundamental rights law. It identifies three approaches to such a right and critically assesses each of them. The first approach is denial, with the non-binary option being explicitly or implicitly rejected, as has occurred in French and Italian courts. The next approach is limited recognition, whereby a non-binary option is granted under specific limitations, such as when certain physical characteristics are present or when a claimant permanently identifies with the non-binary gender. This is the course of action that has been taken in German law. The third approach is gender self-determination, whereby individuals can obtain recognition on the basis of their declaration alone. This solution has been offered by the Belgian Constitutional Court. On the strength of findings from anthropology, the article argues that the first two models are incapable of genuinely engaging with gender diversity, while the third one offers more robust legal protection. The analysis presented here serves as an example of how anthropological insights can be effectively used to advance comparative law research.

Keywords: Non-binary identity; gender binary; gender recognition; comparative public law; law and anthropology

The traditional path of anthropology . . . , beginning with the examination of the "other," leads us back to an examination of ourselves.[1]
All thirdness is not alike.[2]

Stefano Osella is the postdoctoral Research Fellow, Department of Law and Anthropology, Max Planck Institute for Social Anthropology. I wholeheartedly thank Alison Dundes Renteln, Marie-Claire Foblets, Jean-François Gaudreault-DesBiens, and Michele Graziadei for their insightful comments and encouragement to combine legal comparison with anthropology. I also thank Jens Theilen for our useful discussion. All errors are my own.

[1]Serena Nanda, Neither Man nor Woman: The Hijras of India xi (II ed., 1999).

[2]Lawrence Cohen, *The Pleasures of Castration: The Postoperative Status of Hijras, Jankhas, and Academics*, *in* Sexual Nature, Sexual Culture 278 (Paul R. Abramson & Steven D. Pinkerton eds., 1995).

A. Introduction

On March 17, 2020, Anne Caron-Déglise, Advocate General to the French Court of Cassation, delivered an opinion on a tricky case concerning gender identity.[3] A trans woman[4] had lodged a claim to be registered as the "mother" on the birth certificate of the child whom she had begotten. Being recorded as the "father"—which would have traditionally been the case, given her role in the specific act of procreation—indeed clashed with the plaintiff's female gender identity.[5] The Advocate General's carefully articulated reasoning supported the plaintiff. One passage is of particular interest for the purposes of my argument: Madame Caron-Déglise cited at length two prominent French anthropologists, Claude Lévi-Strauss[6] and Françoise Heritier.[7] She argued that the rules on the establishment of filiation vary from context to context, and that a plurality of social and cultural factors, and not biology alone, determines family ties.[8] She relativized the rules on parenthood present in French law, showing different models from the one legally protected in the jurisdiction. In effect, the Advocate General arguably implied that there is no rulebook for the characteristics of a "mother:" Definitions shift across societies and cultures, and one can hardly affirm that the traditional way established by French law—or, for that matter, *any* way—is, so to speak, the correct one. Nothing is natural in one's identity, she seemed to suggest. With her opinion, Madame Caron-Déglise hinted at the potential of anthropological theory—and, in general, of socio-legal enquiry—to advance legal arguments concerning personhood. By understanding how identities are defined and evolve across contexts, we can better comprehend, and possibly transform, the legal rules that govern them.

This article aims to expand on this use of anthropology to develop a comparative and critical analysis in the field of gender identity recognition, that is, the right to change one's legal classification according to one's inner-felt sense of gendered self. Although gender recognition, as a term, applies to both binary and non-binary changes, I concentrate on non-binary—also sometimes referred to as "third gender"—identities,[9] and on the ever more frequently debated jurisprudence regarding their recognition.[10] Combining the tasks of the comparative lawyer with those of the socio-legal scholar, I will thus first identify, and then discuss through an anthropological and legal lens, the different approaches to recognition of non-binary identities in Europe. In doing so, I intend to offer one example of how a public lawyer can engage in legal comparison in a multidisciplinary way. In essence, this article answers three questions: What are the different approaches to the addition of a third-gender legal status in European fundamental rights law?

[3]Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sep. 16 2020, Bull. civ. I. No. 18-50.080 (Fr.) (opinion of Advocate General Déglise, C., Mar. 17, 2020).

[4]"'Trans" can be understood as a political umbrella term that refers to all those people whose gender identity is different from the gender assigned to them at birth on the basis of the cultural interpretation of their anatomy. Stephen Whittle, Respect and Equality: Transsexual and Transgender Rights xxii (2002).

[5]The Preamble of the Yogyakarta Principles, the widely recognized and effective advocacy statement on LGBTI+ rights, defines gender identity as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms." International Commission of Jurists Yogyakarta Principles, pmbl., Nov. 10, 2017. On the importance of the Yogyakarta Principles, see Michael O' Flaherty, *The Yogyakarta Principles at Ten*, 33 Nordic J. Hum. Rts. 280 (2015).

[6]Claude Lévi-Strauss, Les Structures Élémentaires de la Parenté [The Elementary Structures of Kinship] (1949).

[7]Françoise Héritier, Masculin/Feminin I. La Pensée de la Difference [Masculin/Feminin. The Thought of Difference] (1996).

[8]Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sep. 16, 2020, Bull. civ. I. No. 18-50.080, (Fr.) (opinion of Advocate General Déglise, C., 14-15, Mar. 17, 2020).

[9]Rob Clucas & Stephen Whittle, *Law, in* Genderqueer and Non-Binary Genders 74 (Christina Richards, Walter Pierre Bouman & Meg-John Barker eds., 2017) (explaining non-binary is "an all-encompassing name for those people whose gender identities fall outside the dominant societal gender binary.").

[10]*See* Marie-Xavière Catto & Stefano Osella, *The Sexed Subject, in* The Cambridge Companion to Law and Gender (Stéphanie Hennette-Vauchez & Ruth Rubio-Marín eds., 2022 forthcoming).

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

Are some forms of recognition more likely than others to protect non-binary people—who often face severe forms of discrimination? How can we use anthropology to develop a critique of the different solutions to this legal problem?

On the whole, three approaches can be detected in Europe. First, we encounter *denial*. This can be explicit, as is the case in France.[11] It can also be implicit, as happens in Italy,[12] where the right to gender recognition *within the binary* is subject to a set of preconditions aimed at preventing the recognition of "third" legal genders.[13] Denial, I contend, has exclusionary effects. It frames diversity in the context of a supposed normality. These effects, as well as the rationales behind the rejection of non-binary identities, can be better understood when the law is read through an anthropological lens.

Second, demands for a third-gender legal category may encounter *limited recognition*. This was the approach followed, for instance, by the German Federal Constitutional Court (FCC) in 2017 and Parliament in 2018. They granted non-binary recognition to people with *variations of sex characteristics*[14]—that is, arguably, intersex persons[15]—who *permanently identify* as non-binary.[16] This approach is also not exempt from criticisms. It insists on associating non-binary identity with a certain physical embodiment. As I will show, this correlation has been convincingly falsified by anthropological enquiry.[17] For this reason, I argue that, in reality, the fundamental right to non-binary recognition as designed by the FCC and Parliament is underinclusive. All non-binary people who do *not* have variations of sex characteristics are excluded from it. At the same time, a right structured in this way could also be overinclusive. Indeed, thanks to what can be defined as a "radiating effect,"[18] this approach to non-binary recognition could, perhaps unwittingly, encourage the view that non-binary recognition is a political objective of the intersex community at large. However, as the ethnographic literature reveals,[19] a segment of the intersex community has no interest in non-binary recognition, which they see as a distraction from their primary political

[11]Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 4, 2017, 16 2020, Bull. civ. I. No. 16-17.189 (Fr.).

[12]Corte Cost., 13 luglio 2017, n.185 (It.); Corte Cost., 13 luglio 2017, n.180 (It).; Corte Cost., 5 novembre 2015, n.221 (It.); Corte Cost., 11 novembre 2015, n.45 (It.); Cass., sez. un., 20 luglio 2015, n.15138 (It.).

[13]Stefano Osella, *Disciplining the Subject and Reinforcing the Binary: The Constitutional Right to Gender Recognition in the Italian Case Law,* 20(1) Int'l J. Const. L. 454 (2022); Laurence Brunet & Marie-Xavière Catto, *«Homme et Femme, la Cour Créa». Note Sous Cass. 1re Civ., 4 Mai 2017, n. 16-17.189* [Man and Woman, the Court Created Them. Comment on Cass., 1st Civ., 4 May 2017, n. 16-17189], *in* La Bicatégorisation de Sexe Entre Droit, Normes Sociales, et Sciences Biomédicales (Marie-Xavière Catto & Julie Mazaleigue-Labaste eds., 2021).

[14]BVerfG, 1 BvR 2019/16, Oct. 10, 2017, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html;jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329 (stating Civil status law must allow further positive gender entry); Peter Dunne & Jule Mulder, *Beyond the Binary: Towards a Third Sex Category in Germany?*, 19 German L. J. 627 (2018). In similar terms, see Verfassungsgerichtshof [VfGH] (Constitutional Court), Jun. 19, 2018, Erkenntnisse Und Beschlusse des Verfassungsgerichtshofes, G-77/2018 VfSlg (Austria).

[15]*See* United Nations, Office of the High Commissioner for Human Rights. *Free & Equal Campaign Fact Sheet: Intersex*, United Nations https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf (2017) (explaining 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.").

[16]However, non-binary gender can also be subjected to socio-behavioral preconditions, as is, for example, the case in India. *See* Stefano Osella & Ruth Rubio-Marín, Conference Presention at ICON-S Mundo 2021 Conference: The New Constitutional Right to Gender Recognition: A Conceptual Map (2021) (on file with author); *see also* Ruth Rubio-Marín & Stefano Osella, *El Nuevo Derecho Constitucional a la Identidad de Género: Entre la Libertad de Elección, El Incremento de Categorias, Y la Subjectividad y Fluidez de Sus Contenidos: Un Analisis desde El Derecho Comparado* [The New Constitutional Right to Gender Identity: Adding Choice, Categories or Turning Contents Subjective and Fluid. A Constitutional and Comparative Enquiry], 118 Revista Espanola de Derecho Constitucional 45 (2020).

[17]*See infra* Section B.

[18]Mark Galanter, *The Radiating Effect of Courts, in* Empirical Theories about Courts (Keith Boyum & Lynn Mather eds., 1983); Leila Kawar, Contesting Immigration Policy in Court: Legal Activism and Its Radiating Effects in the United States and France (2015).

[19]Katrina Karkazis, Fixing Sex: Intersex, Medical Authority, and Lived Experience (2008).

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

objective, which is to stop involuntary genital surgeries on intersex infants, also called "intersex genital mutilations."[20] This critique hints at one more advantage of the combination of law and anthropology, namely, the possibility of examining legal developments from the perspective of the user.[21] This strand of socio-legal research not only highlights what is doctrinally problematic, but also what individuals perceive as a challenge.

Third, demands for non-binary recognition may be addressed in the form of *gender self-determination*. This was exemplified by the Belgian Constitutional Court in 2019.[22] In this model, there are—at least in principle—no preconditions on non-binary recognition; it depends exclusively on the declaration of the applicant.[23] Again, anthropological literature sheds light on the potential of this right. Notes from the field show us that there is not a single non-binary identity, but many, and that they vary according to the concrete circumstances.[24] A right without preconditions can, therefore, be more accepting of the different forms of non-binary identity.

In short, I will explore a "strategic" employment of anthropology. I will use this discipline as a tool to better understand socially complex issues that need legal regulation.[25] This is not unprecedented in the law and anthropology literature. For example, Marie-Claire Foblets has drawn on kinship studies to argue in favor of the protection of family diversity.[26] She argues that we can look to anthropology to understand that family arrangements are a matter of social convention, that "diversity is nothing new,"[27] and that all families can provide a healthy environment for the development of the individual.[28] Likewise, Foblets deploys anthropology to complexify our understanding of the bodily modification of children, such as male circumcision and genital cutting. These insights have proved fundamental to a more informed understanding of this thorny and socially divisive problem.[29]

For pragmatic reasons, in this article I concentrate on Europe, where challenging developments in legal approaches to gender diversity are taking place. To date, only three jurisdictions in Europe have granted a *constitutional* right to non-binary recognition: Austria, Germany, and Belgium.[30]

[20]Intersex children are often subjected to culturally motivated medical operations intended to equip them with standard genitalia. These treatments have devastating effects on their psychological health. For example, see Markus Bauer, Daniela Truffer, & Daniela Crocetti, *Intersex Human Rights,* 24 Int'l J. Hum. Rts. 724, 741 (2020); Morgan Carpenter, *The Human Rights of Intersex People: Addressing Harmful Practices and Rhetoric of Change,* 24 Reprod. Health Matters 74, 79 (2016). In general, from a legal point of view, see The Legal Status of Intersex Persons (Jens Scherpe, Anatol Dutta & Tobias Helm eds., 2018).

[21]Ellen Desmet, *Analysing Users' Trajectories in Human Rights: A Conceptual Exploration and a Research Agenda,* 8 Hum. Rts. Int'l Legal Discourse 121 (2014).

[22]CC [Constitutional Court] [CC], 99/2019 of June 19, 2019, n° 99/2019, 2019-099 https://www.const-court.be/public/f/2019/2019-099f.pdf.

[23]For a criticism of Belgian law, see Pieter Cannoot, *The Limits to Gender Self-Determination in a Stereotyped Legal system. Lesson from the Belgian Gender Recognition Act, in* Protecting Trans Rights in the Age of Gender Self-Determination (Eva Brems, Pieter Cannoot & Toon Moonen eds., 2020).

[24]Situatedness/situational is defined as "the dependence of meaning (and/or identity) on the specifics of particular socio-historical, geographical, and cultural contexts, social and power relations, and philosophical and ideological frameworks, within which the multiple perspectives of social actors are dynamically constructed, negotiated, and contested. *Situatedness/situational*, Oxford References Online Dictionary, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100509181 (last visited July 19, 2022).

[25]On the important role of anthropological inquiry to the research on LGBTQI+ rights, see Mark Goodale, Anthropology and Law. A Critical Introduction 175 (2017).

[26]Marie-Claire Foblets, *Kinship Through the Two-Fold Prism of Law and Anthropology, in* The Oxford Handbook of Law and Anthropology (Marie-Claire Foblets, Mark Goodale, Maria Sapignoli & Olaf Zenker eds., 2021).

[27]*Id.* at 7.

[28]*Id.* at 11.

[29]Marie-Claire Foblets, *The Body as Identity Marker: Circumcision of Boys Caught between Contrasting Views on the Best Interest of the Child, in* The Child's Interest in Conflict. The Intersections between Society, Family, Faith, and Culture (Maarit Jänterä-Jareborg ed., 2016).

[30]*See* the June 2022 Thematic Report on Legal Gender Recognition in Europe. First Thematic Implementation Review Report on Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

Despite some doctrinal differences, Austria and Germany are relatively similar. They have both granted a right to non-binary recognition to intersex people *only*.[31] Germany, however, has received more international attention. It is therefore a strategic choice on my part to engage with the literature on non-binary recognition in Germany. As for Belgium, it is currently the only country in Europe where non-binary recognition is granted on the basis of a simple declaration. As for "non recognition," the French Court of Cassation has radically denied the possibility of any additions to the binary, making it a good case study. Italian courts also aimed at restricting gender to the binary. Thus, it is illustrative of the same trend, although in a different, and less apparent, form.

"Third gender" identities have fascinated lawyers for centuries.[32] Yet it is only in the past few years that the debate on a human or fundamental right to non-binary recognition has taken off, thanks to the demands of intersex, trans, and non-binary advocates.[33] The number of jurisdictions worldwide that recognize "third" genders has increased, reaching at least fifteen as of this writing.[34] Since the Nepali Supreme Court broke new ground in 2007,[35] the right to a third gender category has now reached the status of constitutional right in no less than seven jurisdictions.[36] Europe is part of this global trend, where non-binary recognition has been discussed—although not always granted—at the legislative,[37] constitutional,[38] and supranational levels.[39] Currently, the question of the existence of a human right to non-binary recognition is pending before the

Discrimination on Grounds of Sexual orientation or Gender Identity, Prepared by the CDADI (Steering Committee on Anti-Discrimination, Diversity, and Inclusion), Working Group on sexual orientation and gender identity (GT-ADI-SOGI) and the European Governmental LGBTI Focal Points Network (EFPN), https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3. *See* also Lena Holzer, *Non-Binary Gender Registration Models in Europe. Report on Third Gender or No Gender Marker Options*, ILGA Europe (September 2018).

[31]The fundamental difference between the two constitutional decisions lies in the fact that the German FCC ruled that civil status law could not accommodate non-binary recognition, while the Austrian Constitutional Court ruled that the law could be interpreted in light of the fundamental right, hence it was not in violation of the ECHR. Verfassungsgerichtshof [VfGH] (Constitutional Court), Jun. 19, 2018, Erkenntnisse Und Beschlusse des Verfassungsgerichtshofes, G-77/2018 VfSlg (Austria).

[32]Catto & Osella, *supra* note 10; Anne E. Linton, *Hermaphrodite Outlaws: Ambiguous Sex and the Civil Code in Nineteenth-Century France,* 138 Representations 87 (2017); Gabrielle Houbre, *Un «sexe indéterminé»? L'Identité Civile des Hermaphrodites entre Droit et Médicine au XIX siècle* [An "Undetermined Sex"? The Civil Identity of Hermaphrodites in the Law and Medicine During the XIX Century], 48 Revue d'Histoire du XIXe Siècle 63 (2014).

[33]*See* Grietje Baars, *Queer Cases Unmake Gendered Law, or, Fucking Law's Gendering Function,* 45 Australian Feminist L. J. 1, 15 (2019); Dunne & Mulder, *supra* note 14; Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 896 (2018).

[34]Zhan Chiam, Sandra Duffy, Matilda González Gil, Lara Goodwin, & Nigel Timothy Mpemba Patel, *Trans Legal Mapping Report 2019: Recognition before the law*, ILGA World (2020); *see generally* Baars, *supra* note 33.

[35]*Sunil Babu Pant and Others v. Government of Nepal and Others*, Supreme Court, 2064 BS (2007 AD) 2NJALJ (2008) 261 Writ no. 917 (Nepal).

[36]These are: Austria (Verfassungsgerichtshof [VfGH] (Constitutional Court), Jun. 19, 2018, Erkenntnisse Und Beschlusse des Verfassungsgerichtshofes, G-77/2018 VfSlg (Austria)) Belgium, (C [Constitutional Court] [CC], 99/2019 of June 19, 2019, n° 99/2019, 2019-099 https://www.const-court.be/public/f/2019/2019-099f.pdf); Colombia, (Corte Constitucional [CC] [Constitutional Court], febrero 4, 2022, Sentencia T-033/22, https://www.corteconstitucional.gov.co/Relatoria/2022/T-033-22.htm); Germany (BVerfG, 1 BvR 2019/16, Oct. 10, 2017, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html;
jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329); India (National Legal Service Authority vs. Union of India, AIR 2014 SC 1863 (India)); Nepal (*Sunil Babu Pant and Others v. Government of Nepal and Others*, Supreme Court, 2064 BS (2007 AD) 2NJALJ (2008) 261 Writ no. 917 (Nepal)); and Pakistan, (Khaki v. Rawalpindi, (2009) PLD 2013 (SC) 188 (Pak)).

[37]*See* Holzer, *supra* note 30.

[38]*See* CC [Constitutional Court] [CC], 99/2019 of June 19, 2019, n° 99/2019, 2019-099 https://www.const-court.be/public/f/2019/2019-099f.pdf; Verfassungsgerichtshof [VfGH] (Constitutional Court), Jun. 19, 2018, Erkenntnisse Und Beschlusse des Verfassungsgerichtshofes, G-77/2018 VfSlg (Austria); BVerfG, 1 BvR 2019/16, Oct. 10, 2017, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html;
jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329; Cour de cassation [supreme court for judicial matters], 1e civ., May 4, 2017, n. 16-17.189 (Fr.); Corte Cost., 13 luglio 2017, n.185 (It.).

[39]European Parliament Resolution on the Rights of Intersex People (RSP) 2018/2878 of 14 Feb. 2019.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

European Court of Human Rights. The judges in Strasbourg will have to decide whether denial of a non-binary legal identity represents a disproportionate violation of Article 8 of the European Convention on Human Rights.[40] My investigation is, therefore, not only topical, but also innovative. Despite the growing interest in and increasing attention to the topic in recent years,[41] the combination of anthropology and comparative law to understand the different approaches to non-binary recognition is new in the literature.

The remainder of the article is divided into five sections. After a brief overview of the right to gender recognition, I will highlight the main contributions of anthropology to the study of gender diversity in the law, Section B. I will then move to the discussion of the different approaches to non-binary recognition, starting with denial in France and Italy, Section C. The analysis of the limited non-binary recognition, as prominently developed in Germany, comes next, Section D. At this point, I will examine non-binary recognition based on self-determination, focusing on Belgium, Section E. In conclusion, after briefly summarizing the argument, I press for further research, Section F.

B. Simplistic Legal Categories Vis-à-vis a Complex Reality: The Contribution of Anthropology

I. The Importance of Gender Recognition and the Limits Imposed on It

Gender recognition—either within or beyond the male-female dyad—is a crucial achievement for trans and non-binary people. It is arguably a key to an inclusive society that accepts individuals as who they are.[42] Despite the many different theoretical approaches, it is generally agreed that "recognition [including gender recognition] lies at the heart of social justice."[43] As stated by the German FCC, gender recognition is essential to the development of one's personality.[44] The Yogyakarta Principles, the authoritative and highly effective advocacy statement on LGBTQI+ rights, clearly state that "each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."[45] Lack of recognition—whether binary or non-binary—can cause frustration and unhappiness,[46] leading to increased discrimination, exclusion, and poverty.[47] It can be associated with considerable administrative and legal hurdles. Individuals who already experience particularly intense forms of vulnerability, such as racialized and poor people, may pay a particularly heavy toll.

Despite its importance for trans and non-binary people, the right to gender recognition has nearly always been restricted. Epochal changes are taking place at the national and international human rights levels,[48] but significant limitations remain. To begin with, gender recognition usually remains binary, excluding the possibility of any additions to the male–female dyad. Further preconditions have typically been imposed on applicants, including requirements to undergo

[40]Y. v. France, App No. 76888/17, (introduced on Oct. 31, 2017), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-204284%22]}.

[41]*See* Baars, *supra* note 33; Clarke, *supra* note 33.

[42]Sally Hines, Gender Diversity, Recognition, and Citizenship. Towards a Politics of Difference 9-20 (2013).

[43]*Id.* at 10.

[44]BVerfG, 1 BvR 2019/16, Oct. 10, 2017, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html; =jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329.

[45]*See* Yogyakarta Principles, Principle 3, Nov. 10, 2017.

[46]To grasp the extent of the troubles of non-binary people *without* gender recognition, refer to: Clucas & Whittle, *supra* note 9.

[47]Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law (2015); Dean Spade, *Documenting Gender,* 59 Hastings L. J. 731, 759 (2008).

[48]Rubio-Marín & Osella, *supra* note 16; Baars, *supra* note 33; Pieter Cannoot & Mattias 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).

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

psychological and medical supervision and treatments such as surgeries, sterilization, and hormonal therapy. For example, of the forty-one states in Europe and Central Asia where gender recognition is legally possible, only ten grant it without medical requirements.[49] Thirteen others require the sterilization of the applicant.[50] These limitations are usually justified on the grounds of the different public interests, which presumably rely on stable and binary gender categories in the law. In this view, the public interest includes the preservation of family law structures, the administration of public facilities, and gender equality, among others.[51]

Such limits have been criticized by human rights advocates. This is especially the case when they entail unwanted medical treatments, which have been described as cruel and even akin to torture.[52] Given how important legal recognition is for trans and non-binary people, imposing such requirements has been contested as coercive, a Godfather-like "offer you can't refuse."[53] Such requirements and limitations clearly identify an ideal beneficiary of the right:[54] A type, or a subject, to which applicants must conform if they want their application to be successful. The exclusionary effects of such policies are evident. People who are unwilling or unable to fit this binary type are barred from recognition and its benefits. What is more, these requirements arguably have effects that suppress or contain diversity on the very body of trans and non-binary people.[55]

In response, LGBTQI+ activists have argued that "[e]veryone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents" when they state the gender of the bearer.[56] Activists have, moreover, advocated for gender self-determination—binary as well as non-binary.[57]

II. The Contribution of Anthropology to Understanding (Non-Binary) Gender Recognition

Anthropology, I contend, can be particularly helpful to understanding such demands—especially that of a self-determined, non-binary option. To begin with, echoing Foblets, we must have clear that "[gender] diversity is nothing new."[58] In fact, the study of the varying manifestations of gender across societies and geographical contexts features centrally in ethnographic accounts.[59]

[49]Belgium, Denmark, France, Greece, Ireland, Luxembourg, Malta, Norway, Portugal, Sweden. *See Trans Rights Europe and Central Asia Map and Index 2019*, Transgender Europe TGEU (2020), https://tgeu.org/trans-rights-europe-central-asia-map-index-2019/.

[50]*Id.*

[51]Osella, *supra* note 13; Heath Fogg Davis, Beyond Trans: Does Gender Matter? (2017); 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); *see* Spade, *supra* note 47 (explaining the connections between the administrative states and normative gender identities).

[52]Micah Grzywnowicz, *Consent Signed with Invisible Ink: Sterilization of Trans* People and Legal Gender Recognition, in* Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report 73–81 (2014) https://www.wcl.american.edu/index.cfm?LinkServID=B1E62031-B166-2D46-90503AB9D07B6ADA.

[53]Anne Silver, *An Offer You Can't Refuse: Coercing Consent to Surgery through the Medicalization of Gender Identity,* 26(2) Colum. J. Gender & L. 488 (2013).

[54]Osella, *supra* note 13; Catto & Osella, *supra* note 10; Jemima Repo, *Governing Juridical Sex: Gender Recognition and the Biopolitics of Trans Sterilization in Finland,* 15 Pol. & Gender 83 (2019).

[55]Osella, *supra* note 13; Repo, *supra* note 54.

[56]International Commission of Jurists, *The Yogyakarta Principles Plus 10: Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, Principle 31* (November 2017), http://yogyakartaprinciples.org/principles-en/yp10/.

[57]*Id.*

[58]I have taken the liberty of adding "gender" to this expression: see Foblets, *supra* note 29, at 8.

[59]Among the earliest works, see, for example: Bronislaw Malinowski, Sex and Repression in Savage Society (1927); Margaret Mead, Coming of Age in Samoa (1928); Margaret Mead, Sex and Temperament in Three Primitive Societies (1935). For an overview, see: William Schlesinger, *Sex, Gender, and Sexual Subjectivity: Feminist and Queer*

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

Lesbian and gay studies have been important in anthropology for decades,[60] at times anticipating some of the most central findings of queer theory.[61] More recently, interest in identities that challenge the—predominantly, Western male–female binary has surged.[62] This has happened most notably in the field of queer anthropology, which studies variations in the expression of sexuality and gender.[63] As anthropologist Serena Nanda has argued, "cross-cultural studies demonstrated such a wide variety of attributes of masculine and feminine roles and characteristics in different societies that the view of gender as a cultural construction, the content of which varies from society to society, is now widely accepted in the social sciences."[64]

In particular, ethnographic accounts have long contested the exclusive and universal existence of a male–female binary, whereby all other gender manifestations are reduced to—usually pathologized—deviations. Such a reduction ignores the great spectrum of identities which, across time and space, have been amply documented. "Third-gender" people—to use an all-encompassing expression incapable of conveying the differences among these identities—are present the world over, notably in Asia,[65] Europe,[66] and the Americas.[67] Despite the high level of discrimination that trans and non-binary people often experience, they have also been found to have important and even cherished roles within a given society.[68] Echoing Serena Nanda and her groundbreaking work on non-binary identities in India, if we look at how gender manifests itself in different societies, we are provoked "to reexamine the nature and assumptions of our own gender system"[69] and to conclude that "the Western views of sex and gender are culturally constructed and are not universal."[70]

Anthropology, in THE SAGE HANDBOOK OF CULTURAL ANTHROPOLOGY (Lene Pedersen & Lisa Cligget eds., 2021). I acknowledge that some of these approaches are criticized today and may be based on outdated approaches that are at odds with more contemporary notions of equality and respect.

[60]Kath Weston, *Lesbian and Gay Studies in the House of Anthropology,* 22 ANN. REV. ANTHROPOLOGY 339 (1993); Tom Boellstorff, *Queer Studies in the House of Anthropology,* 36 ANN. REV. ANTHROPOLOGY 17, 21 (2007).

[61]Of crucial importance is Esther Newton's research on "female impersonators" and role models, which anticipated Judith Butler's research on drag: *See* ESTHER NEWTON, MARGARET MEAD MADE ME GAY: PERSONAL ESSAYS, PUBLIC IDEAS 14 (2000); JUDITH BUTLER, GENDER TROUBLE. FEMINISM AND THE SUBVERSION OF IDENTITY 175 (2d ed., 1999).

[62]As mentioned, debates on the recognition of non-binary identities are not new in the European legal debate: see Houbre, *supra* note 32. Similary, the binary has not always been the standard in the West, either. See THOMAS LAQUEUR, MAKING SEX. BODY AND GENDER FROM THE GREEKS TO FREUD (1992); ALICE DOMURAT-DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX (1998); VALERIO MARCHETTI, L'INVENZIONE DELLA BISESSUALITÀ. DISCUSSIONI TRA TEOLOGI, MEDICI E GIURISTI DEL XVII SECOLO SULL'AMBIGUITÀ DEI CORPI E DELLE ANIME [The invention of the sexual binary: Discussions among theologists, medical doctors and lawyers of the XVII century on the ambiguity of bodies and souls] (2008).

[63]Ara Wilson, *Queer Anthropology, in* THE CAMBRIDGE ENCYCLOPEDIA OF ANTHROPOLOGY (Jul. 31, 2019).

[64]NANDA, *supra* note 1, at 128.

[65]VANJA HAMZIC, SEXUAL AND GENDER DIVERSITY IN THE MUSLIM WORLD: HISTORY, LAW AND VERNACULAR KNOWLEDGE (II ed., 2019); GAYATRI REDDY, WITH RESPECT TO SEX. NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA (2005); *see* NANDA, *supra* note 1.

[66]MARZIA MAURIELLO, AN ANTHROPOLOGY OF GENDER VARIANCE AND TRANS EXPERIENCE IN NAPLES: BEAUTY IN TRANSIT (2021); Maria CAROLINA VESCE, ALTRI TRANSITI.CORPI, PRATICHE, E RAPPRESENTAZIONI DI FEMMINIELLI E TRANSESSUALI [Other Transitions. Bodies, Practices, and Representations of *Femminielli* and Transsexual People] (2017).

[67]BERNARD SALADING D'ANGLURE, ETRE ET RENAITRE INUIT: HOMME, FEMME OU CHAMANE [Inuit Stories of Being and Rebirth: Gender, Shamanism, and the Third Sex] (2006); DON KULICK, TRAVESTÍ : SEX. GENDER AND CULTURE AMONG BRAZILIAN TRANSGENDERED PROSTITUTES (1998).

[68]See, for example, the literature on the Navajo "Nádleehí" persons: Brian Schnarch, *Neither Man nor Woman: Berdache—A Case for Non-Dichotomous Gender Construction,* 34 ANTHROPOLOGICA 105 (1992). Another seminal source is the classic: Willard W. Hill, *The Status of the Hermaphrodite and Transvestite in Navaho Culture,* 37 AM. ANTHROPOLOGIST 273–79 (1935). For a critique of the imposition of Eurocentric categories on these identities, see: Carolyn Epple, *Coming to Terms with Navajo "Nádleehí": A Critique of "Berdache," "Gay," "Alternate Gender," and "Two-Spirit,"* 25 AM. ETHNOLOGIST 267-90 (1998). On India, see REDDY, *supra* note 65.

[69]NANDA, *supra* note 1, at 129.

[70]NANDA, *supra* note 1, at 149.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

Ara Wilson has argued, however, that anthropological research, and queer and feminist anthropology in particular, cannot be reduced to a chronicle of the various forms through which gender manifests itself.[71] Its main contribution is not a cabinet of curiosities, but rather a set of sophisticated theoretical tools to understand the culturally dependent nature of identity.[72] It points out the degree to which the assumption about the existence of universal identity norms are facile, contestable, and unrepresentative.[73]

First, anthropologists have shown that identity is indeed interconnected with the body, yet in a way that is far from standardized. In other words, there is no established, one-to-one correspondence between bodily form and identity. As Rebecca Gowland and Tim Thompson have contended:

> The construction of identity is complex, multidimensional, sometimes passive, sometimes active, relational and above all body-mediated, whether through individual agency or through the body's capacity to respond dynamically and absorb the by-products of the social fabric. Identity as a concept is difficult to pin down, and teasing out the individual facets of a person's identity (e.g. gender, ethnicity) is harder still, because in essence they are interwoven both biologically *and socially*.[74]

Second, anthropology shows the dynamic and processual nature of how people navigate their lives and thus define and redefine themselves.[75] As Gayle Rubin famously put it, "sexual systems cannot be understood in isolation … but must take *everything* into account: the evolution of commodity forms in women, systems of land tenure, political arrangements, subsistence technology and so on."[76] Incidentally, this insight has been very influential on subsequent queer theorizations.[77] In other words, gender identities—conventional or not—are lived differently in different "historical and cultural contexts."[78] They are negotiated amid concrete circumstances such as sexuality, class, nationality, race, and immigrant status.[79] Narratives about the features that constitute proper trans or non-binary characteristics are therefore questioned.[80]

For example, David Valentine, in his ethnography on the "transgender" category in New York City, demonstrated how identities develop at the interstices of institutional discourses—for example, of academics or NGOs—and individual demands.[81] Gayatri Reddy, writing about the *hijras* of India, pointed out that third genders should be understood against the background of a wide range of differences, including "sexuality, religion, gender, kinship, and class." In other words, she

[71]Wilson, *supra* note 63.

[72]*Id.*

[73]Margot Weiss, *Always After: Desiring Queerness, Desiring Anthropology,* 31 Cultural Anthropology 627, 634 (2016).

[74]Marie-Claire Foblets, *The Body as Identity Marker: Circumcision of Boys Caught between Contrasting Views on the Best Interest of the Child, in* The Child's Interest in Conflict: The Intersections between Society, Family, Faith, and Culture 148 (Maarit Jänterä-Jareborg ed., 2016) (quoting Rebecca Gowland & Tim Thompson, Human Identity and Identification 175 (2013)) (Emphasis added).

[75]William Schlesinger, *Sex, Gender, and Sexual Subjectivity: Feminist and Queer Anthropology, in* The Sage Handbook of Cultural Anthropology 66 (Lene Pedersen & Lisa Cliggett eds., 2021).

[76]Gayle Rubin, *The Traffic in Women. Notes on the "Political Economy" of Sex, in* Deviations: A Gayle Rubin Reader 65 (2011).

[77]As Judith Butler put it in an interview with Gayle Rubin: "I think that what you produced [in *The Traffic in Women*] was an amalgamation of positions which I very much appreciated, and it became one of the reasons I went with gender myself in *Gender Trouble*." *Id.* at 281.

[78]Boellstorff, *supra* note 60, at 19.

[79]David Valentine, Imagining Transgender: An Ethnography of a Category (2007).

[80]*Id.*; Kulick, *supra* note 67, at 191. With reference to "gay" men—I am using this term fully conscious of the cultural clash that it may entail—see Martin F. Manalansan IV, Global Divas: Filipino Gay Men in the Diaspora (2003).

[81]Valentine, *supra* note 79.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

challenged an "essentialized vision of the third sex."[82] She demonstrated, as Lawrence Cohen put it, that "all thirdness is not alike." Non-binary—as well as binary—gender manifestations are many and different.

Anthropological enquiry has not only contested generalized narratives of personhood, but also demonstrated their detrimental effects. Valentine underlined how these definitions may disadvantage "those people who do not understand themselves through these interpretive and institutionalized practices. [They] come to be unrepresentable in these politics in the terms in which they understand themselves." Because of this, they may come to be subjected to violence and discrimination.[83] Aniruddha Dutta, focusing on the work of NGOs advocating for the rights of sexual minorities in India, has persuasively argued how globalized identity definitions may impact, transform, and discriminate against the vernacular diversity of gender by limiting access to resources and support.[84] The result is that some identities are rendered unintelligible, which further marginalizes them.[85] These findings are additional confirmation of the adverse effects that denial of recognition may have. They suggest that the criteria for eligibility to change legal gender may ultimately discriminate against those who do not or cannot conform to them.

Anthropological research also highlights how misrecognition may operate intersectionally.[86] If the standards of gender recognition are established on the basis of definitions that ignore the plurality of factors that actually determine individual identity, then it is likely that intersectional forms of discrimination might develop. Drawing from a related field of asylum and migration law, people who are motivated to seek asylum because of hostility against their sexual orientation and gender identity have often encountered significant difficulties in obtaining international protection because the lived experience of their diversity is unintelligible in contexts such as Europe, the United States, or Canada. Cases of asylum seekers deemed "not credible" because their sexuality or gender expression do not fit the image of the LGBTQI+ person in the Global North are far too common.[87] Communities of queer people who are descendants of migrants or who belong to minority religions also struggle to navigate the norms of recognition in the Global North.[88] This topic remains rather underinvestigated in the field of gender recognition, especially non-binary recognition. Although a thorough treatment of the intersectional effects of gender norms falls beyond the scope of this article, we must bear in mind how the establishment of general norms around specific forms of gender diversity can, at least in principle, operate against people who might already experience discrimination on other grounds.

C. Denial: Rejecting Non-Binary Recognition

How can anthropological insights help understand the different approaches to non-binary recognition? We begin with "denial." It can be explicit, for example when a court turns down an application for recognition, as happened in France when the Court of Cassation ruled that no third-gender category could be judicially established. Alternatively, denial can be implicit, as happens

[82]Reddy, *supra* note 65.

[83]Valentine, *supra* note 79, at 228.

[84]Aniruddha Dutta, *Legible Identities and Legitimate Citizens,* 15 Int'l Feminist J. Pol. 494 (2013).

[85]*Id.* at 508.

[86]The literature on intersectionality has now become enormous. Foundational texts include: Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* U. Chi. Legal F. 139 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against People of Color,* 43 Stan. L. Rev. 1241 (1991).

[87]For an exhaustive investigation in this field, see Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on grounds of Sexual Orientation and Gender Identity (Carmelo Danisi, Moira Dustin, Nuno Ferreira, & Nina Held eds., 2021); David A.B. Murray, Real Queer? Sexual Orientation and Gender Identity Refugees in the Canadian Refugee Apparatus (2016).

[88]Wim Peumans, Queer Muslims in Europe. Sexuality, Religion, and Migration in Belgium (2018).

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

when requirements for gender recognition *within the binary* have the purpose, or the effect, of preventing the creation of a third-gender category. This characterizes the evolution of Italian law. Anthropological studies can help us not only understand the effects of the law's restricted inclusion, but also provide an analytical explanation of the rationales underlying the denial of non-binary recognition. Ultimately, this helps us contest the assumptions that undergird the conclusions of the courts in these jurisdictions.

I. An Explicit Denial: Preserving the Societal and Legal Binary in France

In 2016, the law on gender recognition was reformed in France. With Law 2016-1547 ("J21")[89] the French Parliament de-medicalized the right to gender recognition. Every person can now change their legal "sex," on the condition that they prove, with multiple forms of supporting evidence, that they live in the gender that they claim.[90] They must, in other words, "possess the status" for which they are applying.[91] In practice, they must demonstrate that they behave and are socially recognized in the gender that they demand. The law is silent on non-binary recognition, which was neither granted nor denied.

Despite passage of the new law, on May 4, 2017, the French Court of Cassation rejected an application to change the gender entry in the civil status from "male" to "neuter" or "intersex."[92] This was the last word from a domestic court[93] on a case lodged by an intersex person who had been registered as male at birth. The applicant had a masculine appearance due to health-related testosterone treatment but identified as non-binary. After having been granted by the Court of First Instance and rejected by the Court of Appeal, the claim reached the Court of Cassation.[94] The Court, on the one hand, acknowledged that Article 8 ECHR protects the right to gender identity. Yet, on the other hand, it also considered that preserving the gender binary is a legitimate public interest. The Court ruled that the binary is indeed a "necessary element in the social and legal organization."[95] The introduction of a third gender would have, the Court continued, far-reaching consequences for the system, and the applicant was socially acknowledged to

[89]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 21st Century] Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], Nov. 18, 2016 (hereinafter also J21).

[90]Code Civil [C. civ.] [Civil Code], Arts. 61-5–61-8.

[91]See, for example, Sophie Paricard, *Du Sexe par Possession d'État à la Consécration de l'Identité du Genre?* [From sex based on the possession of status to the consecration of gender identity], *in* Personnes et familles du XXIe siècle. Actes du colloque de Pau du 30 juin 2017 (Jean-Jacques Lemouland & Daniel Vigneau, 2018); Philippe Reigné, *Changement d'État Civil et Possession d'État du Sexe dans la Loi de Modernisation de la Justice du XXI Siècle. À Propos de la Loi n. 2016-1547 du 18 Novembre 2016* [Changes of civil status and possession of sex status in the law on the modernization of justice in the 21st century : On law 18 November 2016], 51 La Semaine Juridique 2365.

[92]Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 4, 2017, 16 2020, Bull. civ. I. No. 16-17.189 (Fr.).

[93]The case is now pending before the European Court of Human Rights, see Y. v. France, App No. 76888/17, (introduced on Oct. 31, 2017), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-204284%22]}.

[94]The claim was initially welcomed by the *Tribunal de Grande Instance* (TGI) [the ordinary court of original jurisdiction] of Tours. The TGI considered that no express prohibition of a "third gender" is present in French law, while Article 8 ECHR guarantees the right to gender recognition. Furthermore, the TGI determined that the applicant was indeed physically intersex, and that intersex people are a small minority in the population and therefore pose no threat to the overall binary organization of the legal system (TGI Tours, Aug. 20, 2015 (unreported)). This decision was reversed by the Court of Appeals of Orleans, which considered that the applicant had a masculine appearance, was married to a woman, and had adopted a child. He was therefore not living as an "intersex" or "neuter" person. Moreover, the Court of Appeals considered that recognizing a non-binary legal status was a matter of great moral and legal complexity. It thus deferred to the legislator. Cour d'appel [CA] [regional court of appeal] Orleans, ch. réuns., Mar. 22, 2016, 15/03281.

[95]Y. v. France, App No. 76888/17, (introduced on Oct. 31, 2017) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-204284%22]}.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

be a male. The mismatch between identity and legal gender was not deemed to violate the core of the right to recognition. This led to the rejection of the claim, *de facto* deferring to the legislature.

As for which specific aspects of "social and legal organization" could be affected, the French Supreme Court remained vague. The Advocate General Philippe Ingall-Montagnier held that the binary represents an existing reality in law and society. It is central, he contended, to the establishment of parent–child relations and to the achievement of equality between men and women.[96] The Advocate General echoed the Court of Appeal of Orléans, which had decided on the previous stage of the case. In rejecting the claim, the court had stated that "sexual identity is a necessary element in our legal and social organization, primarily in light of its effects on the law regulating family, filiation, and procreation."[97]

The reasoning of the Court of Cassation has been criticized by legal scholars, who have questioned its doctrinal rigor.[98] Leaving these contestations to the side, when the Court of Cassation underscored the importance of the binary as a social element, it ignored the existing diversity of gender manifestations. It erased them from the legal narrative, despite the great array of identities beyond the binary—so wide that, as Arnaud Alessandrin argued, even reducing them to a triptych could be considered an excess of systematization.[99] This judgment also demonstrates how legal identities are defined—in this case, by a Court—according to concrete circumstances and legal needs, very much confirming, from a legal standpoint, a central tenet of queer anthropology. In this specific context, the Court of Cassation rejected the third gender because only binary identities fit social and legal arrangements. Corinne Fortier saw in the denial of a third gender a demonstration of the difficulty of recognizing a new category that questions the established sexual order of society,[100] which, especially when it comes to the law, is linked to the heterosexuality of the family, as Daniel Borrillo has argued.[101] This order, Fortier seems to suggest, is challenged by developments that are taking place in French families, for example, with trans parenthood.[102] This leaves us with doubts as to whether the need to preserve the binary is actually reflective of societal needs. Granted, more research is needed in this field. At the same time, however, it is worth emphasizing that the protection of women's equality has also been linked to the preservation of the legal binary. This underscores the plurality of factors and sensitivities that determine the definition of identities.

The role of filiation law in justifying the preservation of binary identities is also apparent in the jurisprudence on trans parenthood.[103] In 2020, the Court of Cassation ruled that a trans mother

[96]Avis de l'Avocat General [Opinion of the Advocate General] n. Q1617189, Mar. 21, 2017, For a discussion of gender categories and gender equality, see Stefano Osella, *De-Gender the civil Status: A Public Law Problem?*, 18 Int'l J. Const. L. 471 (2020).

[97]Cour d'appel [CA] [regional court of appeal] Orleans, ch. réuns., Mar. 22, 2016, 15/03281.

[98]Brunet & Catto, *supra* note 13; Michelle Gobert, *Le Sexe Neutre ou la Difficulté d'Exister* [The neuter sex or the difficulty of existing], 25 La Semaine Juridique—Edition Generale, Doctr 716 (2017); Benjamin Moron-Puech, *Rejet du Sexe Neutre: Une "Mutilation Juridique"* [Rejection of the neuter sex : A legal mulation], 24 Recueil Dalloz 1404 (2017); Jean-Philippe Vauthier & François Vialla, *Hermès ou Aphrodite: Puisq'Il Faut Choisir* [Hermes or Aphrodite : Since we have to choose], 24 Recueil Dalloz 1400 (2017).

[99]Arnaud Alessandrin, *Au-delà de Troisième Sexe: Experiences de Genre, Classifications, et Debordements* [Beyond the Third Sex: Gender Experiences, Classifications, and Overflows], 9 Socio ¶¶ 9–11 (2017), https://journals.openedition.org/socio/3049.

[100]Corinne Fortier, *Intersexués: Le Troisième Genre en Question en France at Au Dela* [Intersex people. Questioning the Third Gender in France and Beyond], 9 Socio ¶ 26 (2017). Fortier referred to the decision of the Court of Appeal of Orléans, which also denied non-binary recognition and which the Court of Cassation essentially confirmed.

[101]Daniel Borrillo, *Le Sexe et le Droit: De la Logique Binaire des Genres et la Matrice Hétérosexuelle de la Loi* [Sex and the law: On the binary logic of gender and on the heterosexual matrix of the law], *Jurisprudence,* Revue Critique. Université de Savoie 263 (2011).

[102]Fortier, *supra* note 100, at ¶ 26. Same-sex marriage was introduced in France by: Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013, Opening Marriage to Same-Sex Couples] Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], May 17, 2013, p. 3873.

[103]Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sep. 16 2020, Bull. civ. I. No. 18-50.080 (Fr.).

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

could not be officially registered as "biological parent" of the child whom she had begotten. Instead, the Court ruled that parents must always be registered as either "fathers" or "mothers" according to their role in the procreation process. As noted above, the controversy originated when the plaintiff, a trans woman, asked to be registered as the "mother" of her offspring. She complained that being registered as the "father" infringed on her right to gender recognition. The claim had been turned down by the Court of First Instance. The Court of Appeal rejected the claim too, but it ordered that the applicant should be designated as "biological parent." This solution—which the applicant also opposed because she wanted to be recorded as "the mother"—would have opened family law to a neutral, or, in effect, a non-binary designation.

The French Supreme Court concluded that no such third category exists in the law. The applicant had to be registered as the father of the child. The Court, with this decision, clearly constructed parenthood in biologistic, binary terms. As mentioned above, the Court also ruled against the opinion of the Advocate General. Underlining the complexity of the relations of filiation, and the role of culture in their determination, she had suggested accepting the claim of the plaintiff, arguing that registration as the "mother" would provide the best protection for both the applicant and her child.[104]

II. Implicitly Reinforcing the Binary and Erasing the "Third Gender": The Normalizing Mechanism of Italian Law

A closely related, yet better disguised, denial of the third gender is represented by the case law of the Italian Court of Cassation and Italian Constitutional Court. These courts have erased non-binary identities despite *never* having rejected an application for non-binary recognition. To do so, they have established medical and social requirements to change legal gender *within* the binary. These preconditions have the stated purpose of avoiding any deviations from the male–female dyad. Paradoxically, these limitations have been imposed by rulings that were, ostensibly, legal victories for trans advocates. Critical socio-legal analysis, however, unmasks the contradictions within these decisions, as well as the erroneous assumptions underlying them.

Law 164 of 1982 grants to every individual the possibility of amending their legal gender "after the modification of sex characteristics."[105] As the parliamentary debates and the early constitutional jurisprudence make clear,[106] the beneficiary of this right is the "transsexual person": An individual who invariably longs to transform his or her—binary pronouns intended—body through medical and surgical interventions.[107] For more than three decades, the courts applied the law consistently.[108] They would grant recognition to applicants who had undergone surgical sterilization and transformed their secondary sex characteristics—breasts, body hair, voice, etc.

[104]Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sep. 16 2020, Bull. civ. I. No. 18-50.080 (Fr.) (opinion of Advocate General Déglise, C., Mar. 17, 2020). We must notice that this "saga" ended positively for the applicant. The Court of Cassation had partially annulled the decision of the Court of Appeal of Montpellier and yet sent the case back to the Court of Appeal of Toulouse. Considering the legal developments taking place in France, this Court ultimately acquiesced to the demand of the plaintiff to be registered as the mother of the child, technically *via* judicial recognition of parenthood (instead of the original demand of voluntary recognition). This changes nothing, however, with regard to the addition of a neutral or non-binary designation. *See* Cour d'appel [CA] [regional court of appeal] Orleans, ch. réuns., Mar. 22, 2016, 15/03281.

[105]Legge 14 aprile 1982, n. 164 G.U. Apr. 14, 1982 n.106 (It.).

[106]Corte Cost., 6 maggio 1985, n. 161, G.U. 5 giugno 1985, n. 131bis.

[107]*See* Stefania Voli, *"Il parlamento può fare tutto, tranne che trasformare una donna in un uomo e un uomo in una donna". (Trans)sessualità, genere, e politica nel dibattito parlamentare della legge 164/1982* ["Parliament can do Everything but Make a Woman a Man and a Man a Woman". (Trans)sexuality, Gender and Politics in the Parliamentary Debate on law 164/1982], 287 Italia Contemporanea 75, 94 (2018).

[108]*See* Osella, *supra* note 13.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

Understandably, the surgical sterilization requirement attracted a barrage of criticisms, and numerous actions were taken to try to ban it.[109]

In July 2015, driven by activists' demands,[110] the Court of Cassation ruled that surgical sterilization could not be a precondition for gender recognition. Under the pressure of European developments,[111] the Court determined that the sterilization requirement disproportionately affected the right to "sexual identity." The Court nevertheless continues to insist on requiring the "serious" and "irreversible" medical transformation of the applicant—which, while no longer involving surgical sterilization, must still include secondary sex characteristics.[112] The Court stressed that these requirements are essential to preserve *two* clear "sexes," and to avoid a "third gender" composed of the characteristics of both.[113] This "third gender" would, in the Court's opinion, introduce family forms that are not recognized in Italian law. Just a few months later, the Constitutional Court explicitly approved the doctrine of the Court of Cassation. It insisted that, while sterilization surgery cannot be a requirement for recognition, trans applicants must still irreversibly transform their "physical, behavioral, and psychological characteristics."[114]

In 2017, the Constitutional Court reaffirmed this doctrine twice, demonstrating the hostility of Italian constitutional law to any deviations from the binary.[115] In one such case in particular, the Constitutional Court rejected a preliminary reference filed by a Court of First Instance (*Tribunale*).[116] The *Tribunale* had problematized the ban on the sterilization requirement.[117] It feared that allowing recognition without surgery might open the door to gender self-determination. In turn, this would have allegedly endangered the "right of society" to maintain a clear gender binary. The referring *Tribunale* had argued that the muddling of the binary would clash with a "centuries-old tradition" of Italian society. Awkward consequences of this liberalization were envisioned. Embarrassment would accompany interactions in gender-segregated facilities such as schools and prisons, police searches, and life "at the beach," where people wear – so to speak – revealing swimsuits.[118]

The Constitutional Court rejected this preliminary reference. It thus undeniably protected an achievement for trans people. Of particular interest, however, is the reasoning. The Constitutional Court confirmed the 2015 doctrine on gender recognition, which, despite banning surgical sterilization, still required irreversible transformations. This was seen, I repeat, as a necessary

[109]Ruth Rubio-Marín & Stefano Osella, *Le Precondizioni per il Riconoscimento dell'Identità Sessuale* [Preconditions on gender recognition], QUADERNI COSTITUZIONALI 61 (2015).

[110]The case was litigated by lawyers from Rete Lenford—Avvocatura per i Diritti LGBTI, a prominent cause-lawyering NGO in Italy.

[111]Cass., sez. un., 20 luglio 2015, n.15138 29-30 (It) (citing Verwaltungsgerichtshof [VwGH] [Administrative Court of Justice] January 27, 2009 2008/17/0054 (Austria); The Administrative Court of Appeals [Kammarrätten] in Stockholm, no. 1968- 12 (2012) (Swed.) http://du2.pentagonvillan.se/images/stories/Kammarrttens_dom_-_121219.pdf; YY v Turkey, App. No. 14793/08 (March 10, 2015), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-153134%22]}.

[112]Cass., sez. un., 20 luglio 2015, n.15138 29-30 (It).

[113]*Id.*

[114]Technically, the Constitutional Court rejected the preliminary reference filed by the Court of First Instance, which was trying to posit a contrast between Article 1, L. n. 164/1982, and Articles 2 and 32 of the Constitution and Article 8 ECHR, where the former was interpreted as requiring sterilization surgery. The Constitutional Court ruled that L. n. 164/1982 could be interpreted in conformity with the Constitution, as not requiring such a surgery, as the Court of Cassation had previously demonstrated. Corte Cost., 5 novembre 2015, n.221 (It.)

[115]Corte Cost., Jul. 13, 2017, n. 180; Corte Cost., 13 luglio 2017, n.185 (It.). For a critical commentary, refer to: Anna Lorenzetti, *Il Cambiamento di Sesso Secondo la Corte Costituzionale: Due Nuove Pronunce (180 e 185 del 2017)* [Changing Sex According to the Constitutional Court: Two New Decisions (180 and 185 of 2017)], STUDIUM IURIS 446 (2018).

[116]Corte Cost., 13 luglio 2017, n.185 (It.).

[117]The Court considered that interpreting L. n. 164/1982 *without* the surgery requirement violated the general protection of the fundamental rights clause (Art. 2 Constitution) and the right to equality (Art. 3 Constitution). *See* Trib. Avezzano, 12 gennaio 2017, ord. 58, G.U. 17 gennaio 2017 (It.).

[118]*Id.*

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

precaution to maintain two distinguishable genders.[119] The Constitutional Court also ruled that the right to gender recognition, in its 2015 form, has precisely the purpose of balancing individual identity claims with the many legal relations that—allegedly—depend on the clear distinction between the two "sexes." This Court also stated that the law does *not* protect—and, in fact, is intended to avoid—gender self-determination, which the referring judge saw as a threat to the binary. In simple terms, the preliminary reference was not rejected because the Constitutional Court disagreed in principle with the concerns of the *Tribunale*. Rather, the constitutional justices held that these worries were already taken good care of in the current state of the law.

This case law has been positively received in legal[120] and non-legal scholarship.[121] Undoubtedly, by banning sterilization, it granted a very important demand to trans people. Yet a socio-legal, and in particular, an anthropological, reading immediately spots the inaccuracies and inconsistencies in these decisions. In the first place, the referring judge mentioned an alleged "centuries-old tradition" as a valid principle and a good reason to uphold the binary. The Constitutional Court did not disagree. In fact, it implicitly confirmed that such values could be a valid reason to deny gender self-determination. Leaving aside the argument over whether such a tradition could actually justify denying a third gender, the statement is, at best, inaccurate. Abundant anthropological research has documented the existence of non-binary identities in Italy possibly going back centuries. One prominent example are the *femminielli* of the city of Naples, individuals assigned to the male gender at birth but whose gender identity and expression transcended the boundaries of maleness and femaleness.[122] In other words, if courts are limiting gender self-determination—and with it, reinforcing the binary—to preserve this "centuries-old tradition," their reasoning is factually inexact. Of course, non-binary people have always represented a minority, most likely a small one, yet they have existed all along.

Furthermore, the ambivalent dimension of these rulings—on paper granting a right while in practice reinforcing the gender binary—comes to the fore if we look beyond doctrinal law. For example, Laurence Herault has argued that medical—and especially psychiatric—requirements may in fact rely on and reinforce binary conceptions of gender.[123] Furthermore, Simona Grilli and Maria Carolina Vesce, while acknowledging the empowering potential of the sterilization ban, also show how courts still require individuals to narrate themselves according to established—and, I add, obviously binary—patterns.[124] As I have argued elsewhere,[125] the requirements established by the Court of Cassation and the constitutional law favor the creation of a disciplinary apparatus, the ultimate effect of which is the definition of a binary subject of gender recognition.

[119]Technically, the Constitutional Court, with *ordinanza* (Corte Cost., 13 luglio 2017, n.185 (It.)), explicitly confirmed its own decision 221/2015. Corte Cost., 13 luglio 2017, n.185 (It). This decision, in turn, endorsed in no uncertain terms decision 15138/2015 by the Court of Cassation, which had insisted on the preservation of the binary. Cass., sez. un., 20 luglio 2015, n.15138 (It).

[120]*See* Chiara Angiolini, *Transessualismo e Identità di Genere. La Rettificazione del Sesso tra Diritti della Persona e Interesse Pubblico* [Gender recognition between fundamental rights and public interests], 1 Europa e Diritto Privato 263 (2017); 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 transsexual people. On Cass., 20.7.2015, n. 15138], 11 Nuova Giurisprudenza Civile Commentata 643, 648–650 (2015).

[121]Lorenzo Bernini, Le Teorie Queer. Un'Introduzione [Queer Theories: An Introduction] 101 (2017).

[122]Vesce, *supra* note 66.

[123]*See* Simonetta Grilli & Maria Carolina Vesce, *Introduzione: Spunti per una Riflessione sui Modelli Normativi di Genere e Sessualità* [Introduction: Initial reflections on the normative models of gender and sexuality], 55 Illuminazioni 59, 69 (2021); With reference to the medicalization of trans identity in France, see Laurence Herault, *Constituer des Hommes et des Femmes: La Procedure de Transsexualisation* [Making men and women: The procedure of sex change], 42 Terrain 95 (2004).

[124]Simonetta Grilli & Maria Carolina Vesce, *Genitalia Out of Scope. Riflessioni Intorno a Pratiche di Cura e Cittadinanza Trans nelle Sentenze di Rettifica e di Attribuzione di Sesso* [Genitalia out of scope. Reflections on care and citizenship in the decisions on gender recognition], (2) Dada—Rivista di Antropologia Post-Globale 91 (2020).

[125]Osella, *supra* note 13.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

D. Limited Recognition: Third Gender Identity and Intersex Embodiment

In 2017, the German Federal Constitutional Court (FCC) granted non-binary recognition to intersex people[126] who permanently identify as non-binary.[127] This was confirmed in 2018 by the German Parliament,[128] and – arguably – in 2020 by the Federal Court of Justice (FCJ).[129] Ostensibly, this seems to be a remarkable achievement for non-binary people; however, an anthropologically informed eye can see through the veneer to the underlying complexities. What the FCC and the legislature have done is establish a connection between a certain embodiment—intersexuality—and a specific—permanent—non-binary identity, thereby excluding from the scope of this right those non-binary people who are not intersex. Furthermore, in doing so they have become complicit, whether intentionally or not, in attributing a political objective to the entire population of intersex people—something that, we will see, some of them resist.

German law has consented to changes in legal gender since the 1980 *Transsexuellengesetz* (Transsexual People Act).[130] Gender recognition is granted to "transsexual" people who do not identify according to their birth gender and have lived as another gender for at least three years. Gender recognition is granted by courts, which rely on expert opinions, including medical expertise,[131] even though mandatory medical transformations and sterilization have been ruled unconstitutional by the FCC.[132] Until 2017–2018, gender recognition for trans people was limited to the binary. Since 2013, however, German law had permitted leaving the gender marker blank in cases of newborns whose sexual anatomy did not allow for a clear gender assignment[133]—not a "third gender" as such, but rather an acknowledgement of missing information in special cases.[134]

The 2017 decision followed the application of a non-binary-identifying intersex person who wanted to be reclassified as "inter/divers" or "divers."[135] They[136] complained that being legally required to have gender registered meant that they had to tolerate an entry that did not correspond to their true self. This affected their personal development and self-image. It made it very

[126]In the words of the FCC, people who have "variations/disorders of sex development" (Varianten/Störungen der Geschlechtsentwicklung). BVerfG, 1 BvR 2019/16, Oct. 10, 2017, ¶ 9 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html;jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329.

[127]*Id.*

[128]Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben [Act amending the Information to be Entered in the Birth Registry], Dec. 22, 2018, which added, among other things, §45b Personnenstandgesetz [hereinafter PstG] [Personal Status Law].

[129]Bundesgerichtshof [herein after BGH], Apr. 22, 2020, XII 383/19 (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=106062&pos=0&anz=1. This decision stated that the fundamental right designed by the FCC in 2017 and implemented by – among other provisions – §45b of the PStG applies exclusively to people who are *physically* intersex. On the other hand, this decision granted *another* form of recognition to non-binary people who are *not* intersex, relying on the general law on gender recognition (Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen (Transsexuellengesetz - TSG) [hereinafter TSG] [Law on the change of first names and the determination of gender affiliation in special cases]). Despite the practical progress, this ruling has entrenched a restrictive reading of the fundamental rights esblished in the 2017 decision of the FCC and reaffirmed a narrative that reinforces the association between embodiment and legal identity: *see infra* in the text.

[130]TSG at § 8, In June 2022, a bill intended to replace the TSG with a procedure based on self-determination has been put before German legislature and is now pending (Selbsbestimmungsgesetz) [Self-determination Act], see Eckpunkte für das Selbstbestimmungsgesetz vorgestellt [Key points oft he presented self-determintion act], https://www.bmj.de/SharedDocs/Artikel/DE/2022/0630_SelbstbestimmungsG.html.

[131]TSG at §9(3), §4(3).

[132]BVerfG, 1 BvR 3295/07, Jan. 11, 2011, (Ger.) http://www.bverfg.de/e/rs20110111_1bvr329507.html.

[133]Personnenstandgesetz [PstG] [Personal Status Law], Feb. 19, 2007, §22(3) (Ger.).

[134]Tobias Helms, *Germany (The 2013 German Law), in* THE LEGAL STATUS OF INTERSEX PERSONS 369 (Jens Scherpe, Anatol Dutta, & Tobias Helms eds., 2018).

[135]They were asking to be reclassified as "inter/diverse" (in German, *inter/divers*) or, alternatively, simply "diverse" (*divers*). BVerfG, 1 BvR 2019/16, Oct. 10, 2017, ¶ 1 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html; jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329.

[136]The applicant, in English, uses "they/them" as their preferred pronouns.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

difficult for them to "move about in public and to be seen by others as a non-binary person."[137] The possibility to be legally genderless, which the 2013 law protected, did not fit the plaintiff. They indeed were not genderless, but rather had a positive, non-binary, gender identity. After rejection by the administrative authorities and by lower courts,[138] the FCC eventually heard the case. First, the Court ruled that the law interfered with the right to identity, which is part of the more general right to free development of personality.[139] In light of the fact that the law required registration, the Court argued that it precluded from a positive registration those people with a "variation of gender/sexual development" and who "permanently" identified as non-binary. The option offered by the 2013 law could not amount to a positive recognition of the applicant's identity.[140] The lack of a third gender entry was also deemed a violation of gender equality. Following the doctrine of the Court of Justice of the European Union, the principle of gender equality also covers discrimination based on gender identity.[141] These limitations, the Court found, were not justified by the interests at stake, including equality of men and women and the containment of bureaucratic and administrative costs associated with the addition of a third gender category.[142]

This ruling granted a "limited" non-binary category. The FCC's decision was, admittedly, based on the specific facts of the case, but at no point did it explicitly exclude from recognition people who are *not* intersex or who do *not* permanently identify as non-binary.[143] Some parts of the decision are, moreover, phrased in broader terms, and seem to speak of a more general right to non-binary recognition. This holds especially true if the ruling is interpreted in light of the case law that the FCC has developed over the years.[144] Yet a narrow reading of this decision limits non-binary recognition to *physically intersex* people permanently identifying as non-binary.[145]

This was certainly the understanding upheld by the legislature.[146] Under the 2018 law,[147] applicants must provide medical certification of their intersex condition. If the medical certificate is not

[137]BVerfG, 1 BvR 2019/16, Oct. 10, 2017, ¶ 48 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html; jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329.

[138]The application had been previously rejected by the Federal Court of Justice (BGH, Jun. 22, 2016, XII ZB 52/15, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=75539&pos=0&anz=1; by the Higher Regional Court in Celle (Oberlandesgericht [Higher Regional Court] [Olg] 17 W 28/14, January 21, 2015) and by the District Court in Hannover (Amtsgericht [AG] [District Court] 85 III 105/14, October 13, 2014).

[139]Grundgesetz [GG] [Basic Law], art. 2(1), art. 1(1) translation at http://www.gesetze-im-internet.de/.

[140]BVerfG, 1 BvR 2019/16, Oct. 10, 2017, ¶¶ 43–44 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html; jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329.

[141]Case C-13/94, P. v. S. and Cornwall Cnty. Counc., 1995 E.C.R. I-2143; *See* Stefano Osella, *The Court of Justice and Gender Recognition: A Possibility for an Expansive Interpretation?,* 87 Women's Stud. Int'l F. 1 (2021).

[142]BVerfG, 1 BvR 2019/16, Oct. 10, 2017, ¶¶ 49–55 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html; jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329.

[143]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 102 (Eva Brems, Pieter Cannott & Toon Moonen eds., 2020).

[144]Dunne & Mulder, *supra* note 14, at 641–43.

[145]*See* Theilen, *supra* note 143. For a more open interpretation of the 2017 decision, see Anna Katharina Mangold, Maya Markwald & Cara Röhner, Rechtsgutachten zum Verständnis von, Varianten der Geschlechtsentwicklung" at § 45b Personenstandsgesetz [Legal Opinion on the Understanding of "Variants of Sex Development" in Section 45b of the Personal Status Act], 2 Dec. 2019, https://eufbox.uni-flensburg.de/index.php/s/WwkHJkHaEaHpkQk#pdfviewer.

[146]The faithfulness of the law to the ruling has been contested. See, for example, Helen Lindenberg, *Das Dritte Geschlecht. Eine Bewertung des Gesetzesentwurfs zur Einführung des Geschlechtseintrages ‚divers' sowie möglicher Folgeregelungen,* [The Third Gender: An Assessment of the Bill on the Introduction of the Gender Entry "Diverse" as well as Potential Implementing Regulations], NZFam, 1062, 1063 (2018).

[147]Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben [Act amending the Information to be Entered in the Birth Registry], Dec. 22, 2018.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

available, or if the intersex condition can no longer be proved or can only be proved with an invasive evaluation, applicants can give a sworn oath about their original intersex condition.[148] The parliamentary debates related the necessity to define a non-binary identity according to such criteria to the role of gender in the legal system. The need for certainty of the civil status, the advancement of the rights of women, and an underspecified "regulation of family law" were mentioned as objectives, the effective pursuit of which required that any third gender be medically certified and supervised.[149]

In April 2020, the Federal Court of Justice (FCJ) entrenched the restrictive reading of the fundamental right established with the 2017 decision and subsequently enacted by the legislature. The FCJ ruled that such form of non-binary recognition is exclusively "connected to the impossibility to assign a female or male gender considering physical characteristics."[150] The FCJ moreover stated that the civil status is in its "entirety tied to biological sex,"[151] thus making even more explicit the connection between legal identity and embodiment. The FCJ, I must mention, offered a *different* form of recognition to the applicant, a non-binary person who was *not* intersex – or, in the wording of the FCJ, with a merely perceived intersexuality. They could have their gender erased from the civil status or be recorded as "divers," yet only relying on a different legal framework, namely the Transsexual People Act.[152] Yet, this can hardly be reduced to a harmless technical difference. Despite undeniably representing a progress for non-binary people, this form of recognition has several shortcomings. At a more conceptual level, as Jens Theilen underlined, the 2020 judgement of the FCJ is imbued with "distrust" of trans and non-binary people. The FCJ essentially described the third option for *non-intersex* people as a (dangerous) exception to the system of gender classification, to be contained by the judicial procedures of the Transsexual People Act. This law, the FCJ made clear, is not only intended to protect trans people. It also has the purpose to safeguard the competing "rights, duties, and family positions", to ensure permanence and certainty to the civil status. Hence, it allows recognition only under strict reasons.[153] This understanding – this creation of a different form of recognition for non-binary people who are *not* intersex – is far from being only conceptual. The procedures established by the Transsexual People Act may be longer, more expensive, and intrusive.[154] Unsurprisingly, the FCJ's decision has been appealed before the FCC and the case is currently pending.[155] Be that as it may, at least for the time being, the fundamental right established by the 2017 decision of the FCC and regulated by the 2018 law has been narrowly constructed and tied to physical intersexuality.

This form of limited recognition is worth investigating. On the one hand, it opened a door to a long-marginalized minority.[156] In a way, it can be seen as positive result of decades-long intersex

[148]Personnenstandgesetz [PstG] [Personal Status Law], Feb. 19, 2007, §45(b) (Ger.).

[149]Deutscher Bundestag [Federal Parliament], Dec. 13, 2018, 8330 C, ähttps://dip.bundestag.de/vorgang/gesetz-zur-änderung-der-in-das-geburtenregister-einzutragenden-angaben/239069.

[150]BGH, Apr. 22, 2020, XII 383/19 (Ger.), at ¶¶ 14, 18, 22, and 32, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=106062&pos=0&anz=1.

[151]*Id.* ¶ 25.

[152]*Id.; see* Jens Theilen, Der biologische Essentialismus hinter, lediglich empfundener Intersexualität" [The biological essentialism behind "merely perceived intersexuality,"], VerfBlog, 2020/5/24, https://verfassungsblog.de/der-biologische-essentialismus-hinter-lediglich-empfundener-intersexualitaet/.

[153]Theilen, *supra* note 152, ¶ 43.

[154]S*ee* Anna Katharina Mangold, Friedrike Boll Katrin Niedenthal, Verfassungsbeschwerde [Constitutional Appeal] 15 June 2020, at ¶ B.I.4.cc, https://legacy.freiheitsrechte.org/home/wp-content/uploads/2020/06/2020-06-16-Verfassungsbeschwerde-Personenstandsgesetz-anonymisiert.pdf.

[155]*Id.* The applicant complained that the FCJ's decision restricted their right to personality and equality (Art. 2(1), with Art. 1(1) and Art. 3(3) GG).

[156]Anna Katharina Mangold, *Symposium on the "Third Option": "Not Man, Not Woman, Not Nothing"*, IACL-AIDC Blog (Jan. 16, 2018), https://blog-iacl-aidc.org/the-third-gender/2018/5/28/i2tnkkxpwywkbpinwn5wva1fmlb449; Berit Völtzmann, *The Same Freedom for Everyone*, IACL-AIDC 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.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

activism in Germany, which had several successes along the way.[157] However, some aspects of such a right are concerning. The FCC and the legislature protected *one* form of non-binary identity, based on a specific embodiment. Non-binary people who are *not* intersex are excluded from the scope of this right. Yet, as observations from fieldwork – and, in fact, the very application that led to the 2020 decision by the FCJ – indicate, "not all thirdness is alike": Not every non-binary person has intersex characteristics, and not all intersex people are non-binary. Identity, as we have seen, is body-mediated but also "interwoven both biologically and socially." Certainly, it cannot be reduced to the sole physical component.[158] Interestingly, this was also in apparent contrast to the demands of intersex activists. In large part they did indeed demand non-binary recognition, but *not* for the benefit of intersex people only.[159] Similar concerns were voiced among scholars, especially about the 2018 law and 2020 decision of the FCJ.[160]

The decision of the FCC is, moreover, silent on the issue of involuntary medical interventions on intersex infants, which is what remains *the* central demand of intersex advocacy.[161] Admittedly, the FCC had *not* been called on to decide on involuntary medical treatments, which were anyways arguably limited with a 2021 law.[162] Nevertheless, an *obiter dictum* could have been issued and perhaps would have been symbolically significant —as the Constitutional Court of Austria did in a similar case in 2018.[163] This is not to say that the ruling, being more accepting of intersex identities, might not have strategic value in changing the social perception of intersex medical treatments in the longer run. Socio-legal scholars have underlined that case law can have a political impact that goes well beyond the doctrinal dimension.[164] As Mark Galanter put it, rulings may have "radiating effects," conveying a "whole set of messages that can be used as resources in making (or contesting) claims, bargaining (or refusing to bargain), and regulating (or resisting regulation)."[165] Indeed, NGOs saw this judgment as an opportunity to gain visibility, increase acceptance, and diminish violence—including involuntary medical treatments—against intersex people.[166] Yet a more explicit pronouncement might have been positive.

Another, and possibly less welcome, "radiating effect" of these legal developments might be the implicit—and most likely inadvertent—yoking together of intersex demands and non-binary recognition. The combination of the decision and of the 2018 law might, perhaps unwittingly, turn non-binary recognition into an intersex issue. This is *not* a doctrinally necessitated consequence. In the end, the FCC only granted an option to those intersex people who wish for it. However, as intersex people are the only beneficiaries of the right—no matter that this can be explained by the circumstances of the case—it is not too far-fetched to foresee that a correlation between identity

[157]Angelika Von Wahl, *From Object to Subject: Intersex Activism and the Rise and Fall of the Gender Binary in Germany,* 28(3) Soc. Pol.: Int'l Stud. Gender, State & Soc. 755 (2021).

[158]*See* Gowland & Thompson, *supra* note 74; Foblets, *supra* note 29.

[159]*Malta Declaration*, Organisation Intersex International (Dec. 1, 2013), https://oiieurope.org/malta-declaration/.

[160]Dunne & Mulder, *supra* note 14, at 636-43; Grietje Baars, *New German Intersex Law: Third Gender but not as We Want It,* VerfBlog, (Aug. 24, 2018), https://verfassungsblog.de/new-german-intersex-law-third-gender-but-not-as-we-want-it/.

[161]Dunne & Mulder, *supra* note 14, at 640; Grietje Baars, *The Politics of Recognition and Emancipation Through Law*, VerfBlog, (Nov. 29, 2017), https://verfassungsblog.de/the-politics-of-recognition-and-the-limits-of-emancipation-through-law/.

[162]Gesetz zum Schutz von Kindern mit Varianten der Geschlechtsentwicklung [Law for the protection of children with variations of sex development], May 12, 2021.

[163]BVerfG, 1 BvR 2019/16, Oct. 10, 2017, ¶ 3 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html; jsessionid=4E195B8067172CE8EE1FB5FF419E8E7B.2_cid329.

[164]Kawar, *supra* note 18, at 8.

[165]Galanter, *supra* note 18, at 136.

[166]See, for example, the Statement of the Board of the Activist NGO "Intersexuelle Menschen" on the decision. *Stellungnahme des Vorstandes Intersexuelle Menschen e.V. zum Beschluss des Ersten Senats des Bundesverfassungsgerichtes vom 10.10.2017 (1 BvR 2019/16)*, Intersexuelle Menschen (Oct. 10, 2017), https://www.im-ev.de/pdf/2018_05_29_Stellungnahme_IMeV_BV_zum_BVerfG.pdf; *see also*, *Joint Statement: Civil Society Welcomes German Constitutional Court Demand for a New Regulation of Sex Registration as Ground-Breaking*, Organisation Intersex International (2017), https://oiigermany.org/wp-content/uploads/2017/11/press_release_OIITGEUBVT2017.pdf.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

and physical non-binariness may well be drawn. In fact, the correlation between identity and embodiment, if anything, has been further strengthened by the 2020 decision of the FCJ.

However, it should be pointed out here that non-binary recognition is *not* a unanimous demand among intersex advocates.[167] As the anthropologist Katrina Karkazis argued, some intersex people reject the idea of *being* intersex. They may regard their diversity as a matter of a "condition," something that they "have," rather than who they are. Furthermore, "the goal of many people with an intersex condition is not to deconstruct or eliminate gender, or to advocate for a third sex or no sex, but rather to change treatment practices and improve the well-being of others with these conditions."[168] Relatedly, some intersex activists distance themselves from LGBTQ+ movements.[169] Morgan Carpenter contended that the inclusion of intersex people in queer movements presents the risk of misunderstanding intersex needs, potentially reducing them to more sensitive use of honorifics, pronouns, and toilets. Not only does this approach obscure issues of medicalization and bodily autonomy, but it also presumes intersexuality to be a gender identity issue, which it may not be.[170] Making intersex demands a part of "LGBTIQ activism" might thus be a "misrepresentation." Advocates subscribing to this view argue that, even though medical activity and social values often overlap, violence against intersex people happens in medical settings, where identity recognition may not come into play.[171] The reception of this decision by intersex organizations deserves more empirical research and anthropological analysis, but it is interesting to note that some intersex activists hurried to qualify the FCC's decision as addressing what they describe as a "non-existent" or "marginal" issue for most intersex people.[172] As such, it contributes to a debate that could in fact divert attention away from what they see as the more important issue—that of intersex surgeries—and might, therefore, do "more harm than good."[173]

In short, if read within an anthropological framework, non-binary recognition "German-style" might be at best a bittersweet victory for all stakeholders. The right that the FCC laid the ground for, and which the legislature designed, rests on gender standards that clash with the variability and situatedness of gender diversity. Such a right established a questionable connection between body and identity that ultimately, in the words of Valentine, makes "those people who do not understand themselves through these interpretive and institutionalized practices ... unrepresentable."[174] Non-binary people who are *not* intersex might be – and, as the case currently pending before the FCC demonstrates, are – dissatisfied. They are indeed excluded from the scope of the 2017 fundamental right, not only with symbolical, but very practical, disadvantages. The correlation between identity and embodiment, moreover, is obviously at odds with all anthropological findings. Likewise, intersex persons advocating non-binary recognition were left wanting, as they do so for the benefit of everyone regardless of their sex characteristics. Finally, intersex people who want to distance themselves from identity demands might fear political appropriation; they might feel dragged into a battle they do not care for and which ultimately diverts attention away from their primary political goals.

[167]In general, on the intersex movement, see Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement's Path to De-Medicalization,* 41 HARV. J. L. & GENDER 1 (2018); GEORGIANN DAVIS, CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS (2015).

[168]KATRINA KARKAZIS, FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE 247 (2008).

[169]Elisa A.G. Arfini & Daniela Crocetti, *I movimenti Intersex/DSD in Italia: Stili di Militanza e Biomedicalizzazione del Binarismo di Genere* [Intersex/DSD social movements in Italy: Different approaches to activism and bio-medicalization of the gender binary], *in* POLITICHE DELL'ORGOGLIO. SESSUALITÀ, SOGGETTIVITÀ E MOVIMENTI SOCIALI 155 (Massimo Prearo ed., 2015).

[170]Carpenter, *supra* note 20.

[171]Bauer, Truffer, & Crocetti, *supra* note 20.

[172]Stellungnahme zum BVG-Urteil für einen "3. Geschlechtseintrag" [Statement on the decision of the Federal Constitutional Court on the Third Gender Entry], http://blog.zwischengeschlecht.info/post/2017/11/10/Stellungnahme-zum-BVG-Urteil-3-Geschlechtseintrag.

[173]*Id.*

[174]VALENTINE, *supra* note 79.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

E. Recognition as Self-Determination

The last approach to non-binary recognition in Europe can be identified as the self-determination model. In 2019, the Belgian Constitutional Court granted non-binary recognition solely on the basis of the declaration of the person. Neither physical requirements—such as intersex physical characteristics—nor a stable identification were demanded.[175] The decision profoundly changed the 2017 Gender Recognition Act—also called the "trans* act" (*loi trans**)—which had indeed introduced self-determination in Belgium.[176] The 2017 act was the result of the mobilization of several associations for LGBTQI+ rights, in cooperation with the government. It was mostly intended to overcome the sterilization and psychiatric diagnosis requirements contained in the previous 2007 law.[177]

The 2017 act does not impose medical or behavioral preconditions. At the core of the law is the self-declaration of the applicant. They must state to the registrar their "mature conviction" to identify according to the gender in which they claim recognition. This statement must be repeated after a three-to-six-month interval. Meanwhile, the Public Attorney is informed and can raise objections if they envision a threat to public order. Before the judgment of the Constitutional Court, recognition was limited to the binary. Furthermore, it was in principle irreversible. In practice, applications following the first one were subjected to a judicial process and not to the quicker and less burdensome administrative procedure. These limitations were seen as a compromise. Legislators were indeed afraid of going too far and passing a law for which the country was not ready.[178]

LGBTQI+ NGOs experienced this undeniable advancement as a "half-victory."[179]

Hence, they soon mobilized and started constitutional litigation.[180] On one hand, the Constitutional Court found that precluding non-binary recognition violated the Belgian constitution; on the other hand, it conceded that the gender binary is central to the legal system. Yet this in and of itself did not constitute a valid reason to deny recognition to non-binary people. Despite references to the binary in the constitutional equality clause,[181] the Constitutional Court rejected the argument that protection of the principle of equality between men and women should prevent a third legal category. In fact, the Court clarified that non-binary people are discriminated against on gender grounds when they are not granted self-determination. A different matter, however, was *how* such a right should be granted. The Court envisioned two options: First, by adding a third gender category; second, by erasing gender from the civil status altogether. The decision regarding how best to implement the right, however, is a matter that should be left to the

[175]CC [Constitutional Court] [CC], 99/2019 of June 19, 2019, n° 99/2019, 2019-099f (const-court.be).

[176]On the process that led to the new law, see 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 (Eva Brems ed., 2018).

[177]Loi 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 reforming the regulation applicable to transgender people concerning the modification of the registration of sex in the civil registries and its effects], July 10, 2017, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2017062503&table_name=loi; on the law before 2017, see Caroline Simon, *Au-delà du Binaire: Penser le Genre, la Loi, et le Droit des Personnes Transgenre en Belgique,* 28 Can. J. Women & L. 521 (2016); Joz Motmans, *Being Transgender in Belgium. Mapping the Social and Legal Situation of Transgender People,* Institute for Equality of Women and Men (2010).

[178]Dimitri Tomsei & David Paternotte, *L'Adoption de la "Loi Trans*" du 25 Juin 2017. De la Stérilisation et la Psychiatrisation à la Autodetermination* [The Trans Law of 25 June 2017. From sterilization and psychiatrization to self-determination], 2505 Le Courrier Hebdomadaire 31 (2021).

[179]*Id.*

[180]These were: Çavaria, Genres Pluriels, and Maison Arc-en-Ciel Brussels. *See* CC [Constitutional Court] [CC], 99/2019 of June 19, 2019, n°; 99/2019, 2019-099f (const-court.be).

[181]1994 Const. (Belg.) art. 11bis.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

discretion of the legislature.[182] In the same decision, the Constitutional Court also recognized a right to change one's gender multiple times without restrictions imposed by the law. It reasoned that gender-fluid people—needing to change their legal status more than once—cannot be discriminated against vis-à-vis individuals with a more "fixed" gender identity.[183] The Belgian government has announced the intention to enact the ruling of the Court with *ad hoc* legislation, yet, at the time of writing, such law has not been approved yet.[184]

Theoretical contributions coming out of anthropology help to highlight the innovativeness of the "Belgian way." First, non-binary identities may be many and different, and can vary across contexts and historical circumstances. By forgoing criteria for non-binary recognition, the Belgian Constitutional Court created space for the different forms through which non-binary identity may develop. At a more abstract level, the Belgian model defines an identity without a pre-existing beneficiary—an empty and formless container, so to speak. It offers a flexible mode of inclusion for whomever desires recognition. Its positive consequences are only too obvious, especially if we take to heart an insight from queer anthropology, namely, that any attempt to establish gender norms is bound to be exclusionary and is doomed to failure. The risks of unintelligibility and exclusion that Valentine emphasized are therefore prevented when gender identities are not defined—and therefore not restricted—in the law. Admittedly, more empirical research is needed on the practical operations of this right. As highlighted by Pieter Cannoot, the Public Attorney might use their power to oversee applications in a biased way and, ultimately, limit gender self-determination beyond—as well as within—the binary.[185] This is indeed a real risk, and more anthropological research could go a long way toward assessing it and suggesting workable solutions.

F. Conclusions

This article has drawn on socio-legal literature, and especially on queer anthropology, to develop a deeper understanding of non-binary gender recognition in Europe. As such, it makes two principal contributions, the first substantive and the second methodological. As for the substantive one, I have identified the different approaches to this issue, and criticized them in light of their capacity to effectively ensure protection to identity. I have argued that asserting the impossibility of granting non-binary gender recognition, as French and Italian courts have done, amounts to the explicit or implicit rejection of third genders. This approach ignores what social sciences—and especially anthropology—have been preaching all along: That non-binary identities are common across cultures, that non-binary people have important and respected social roles in some societies, and that this can and should be true in European societies as well. In a way, the first lesson anthropology offers is one in "modesty": Amid the richness and diversity of human experiences regarding gender, amid its complexity and variability, assuming that the binary is the one true and correct expression of gender seems questionable and, in fact, presumptuous. Denial of non-binary identities dismisses, and therefore belittles, this complexity. It imposes and enforces *one* model, arguing that the binary reflects entrenched social norms, even though these norms are far more complex than most courts have been willing to concede. The multidisciplinarity underpinning this article is also useful to understand why the law continues to insist on and preserve the presumption of binary identities: It is responding to concrete needs, primarily the maintenance of kinship as it has been historically constructed through the law.

[182]CC [Constitutional Court] [CC], 99/2019 of June 19, 2019, n° 99/2019, 2019-099 https://www.const-court.be/public/f/2019/2019-099f.pdf.

[183]*Id.* at ¶¶ B.8.4-B.8.8.

[184]*See* the Government Policy Notes n. 15, 16, and 18 of Oct. 29, 2021, https://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?legislat=55&dossierID=2294

[185]*See* Cannoot, *supra* note 23.

https://doi.org/10.1017/glj.2022.65 Published online by Cambridge University Press

This critique does suggest that *some* form of recognition is fundamental. The examination of the German developments provided more detail as to the difficulties that a specific connection between identity and corporeality may present. Anthropology again offers a lesson regarding the substance: There is no specific or definitive correlation between physical diversity and non-binary identity. Ignoring this fact, non-binary individuals who are not intersex are excluded from the recognition based on the 2017 decision of the FCC. Second, German law runs the risk of attributing, if not an identity, at least a political objective to intersex people, despite the clear divisions within intersex movements on that matter. All these shortcomings, it must be emphasized, are found in relation to a decision that is nonetheless a legal victory for non-binary people. Socio-legal investigations allow us to understand not only what is doctrinally problematic, but also what might be perceived as a challenge by the persons concerned. Finally, the Belgian decision offers a solution to the problems presented by the other approaches to non-binary identity. Drafting a right without a specific right-holder, the Belgian Court succeeded in opening up the possibility of recognition, at least in principle, to all variations of gender identity, to all embodiments and cultural manifestations.

The second contribution of this article is more methodological. It exemplifies how a comparative public law scholar can engage in socio-legal research and draft legal arguments based on it. To do so, I have applied to the field of non-binary recognition anthropological theory that has important precedents in the literature and in legal practice, as the opinion of the Advocate General to the French Court of Cassation shows. Anthropology, and social sciences in general, offer valuable insights when diversity and identity are at stake. Methodologically, public lawyers, despite not being required to undertake empirical research, can draw on the abundant literature in this field to advance their arguments. Admittedly, this methodology is not without its difficulties. It requires a degree of multidisciplinary literacy, which is generally not provided in law school curricula. This, however, is an issue that is beyond the scope of this article.

Finally, as a coda, I believe that I must push for further research, and specifically for more empirical research. This would be extremely helpful for understanding how non-binary recognition operates on the ground. First, it would be important to learn how the right designed by the German FCC has been navigated in practice by non-binary people. Data are also needed to understand how non-binary recognition relates to intersex demands, and its effects on intersex individuals. More empirical research might also be of great use to better understand the operations of the right to non-binary recognition in Belgium. Even though the "law in the books" seems to be empowering, knowing more about its application would help to better understand its practical dimensions. What is certain is that anthropological enquiry, with its methodological toolbox and theoretical potential, can certainly be a fruitful complement to doctrinal investigations.

Conflicts of interest. I have no conflicts of interest or special funding to disclose.

Cite this article: Osella S (2022). When Comparative Law Walks the Path of Anthropology: The Third Gender in Europe. *German Law Journal* **23**, 920–942. https://doi.org/10.1017/glj.2022.65