

# Gender identity and registration of sex by public authorities

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## Introduction

Gender identity and trans<sup>1</sup> rights are high on many agendas these days, including political and legal agendas. New reports are published, resolutions adopted, judgments published and national laws introduced in quick succession.<sup>2</sup> Many of the initiatives are aimed at combating discrimination and marginalisation of gender-nonconform people.<sup>3</sup> Health issues also increasingly receive attention, one example being the genital surgeries performed on intersex children to adapt them physically to the prevailing gender standards.<sup>4</sup> Similarly, the so-called sterilisation requirement as a condition to change one's legal sex is increasingly being questioned, and has found its way to the European Court of Human

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- 1 The University of California (UCLA) glossary of LGBTQI terminology explains the term 'trans' as 'an abbreviation that is sometimes used to refer to a gender variant person. This use allows a person to state a gender variant identity without having to disclose hormonal or surgical status/intentions. According to the same glossary a gender variant person is someone who 'by nature or by choice does not conform to gender-based expectations of society (e.g. transgender, transsexual, intersex, genderqueer, cross-dresser, etc.)'. The term trans sometimes refers to the gender variant community as a whole. It is in the third, broad sense that 'trans' is used here. See: <http://www.lgbt.ucla.edu/documents/LGBTTerminology.pdf>. All websites mentioned in this article were accessed 27 October 2015.
- 2 Some examples: Castagnoli, C. (2010), *Transgender persons' rights in the EU member states*, Directorate General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs, Note, available at: <http://www.lgbt-ep.eu/wp-content/uploads/2010/07/NOTE-20100601-PE425.621-Transgender-Persons-Rights-in-the-EU-Member-States.pdf>; Human Rights Watch (2011), *Controlling bodies, denying identities; Human rights violations against trans people in the Netherlands*, New York: Human Rights Watch, available at: <https://www.hrw.org/report/2011/09/13/controlling-bodies-denying-identities/human-rights-violations-against-trans-people>; Hammarberg, T. (2011), *Discrimination on grounds of sexual orientation and gender identity in Europe*, Brussel: Council of Europe Publishing Editions, available at: [http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011\\_en.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf); International Commission of Jurists (ICJ) (2013), *Sexual orientation and gender identity in international human rights law: The ICJ UN compilation*, 5<sup>th</sup> updated edition, Geneva, available at: [http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/06/SOGI-UN-Compil\\_electronic-version.pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/06/SOGI-UN-Compil_electronic-version.pdf); UN OHCHR (2012), *Born Free and Equal. Sexual Orientation and Gender Identity in International Human Rights Law*, New York / Geneva, available at: <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>; Commissioner for Human Rights, Council of Europe (2015), *Human rights and intersex people* [issue paper], available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2768767&SecMode=1&DocId=2282716&Usage=2>; EU Agency for Fundamental Rights (FRA) (2015), *The fundamental rights situation of intersex people*, FRA Focus 04/2015, available at: <http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>; for a list of UN Human Rights Council and General Assembly resolutions on LGBT rights see: <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx>.
- 3 Recently the European Commission explicitly stated in a report to the European Parliament, the Council and the European Economic and Social Committee, that EU sex discrimination law is relevant not only to gender reassignment discrimination but also to other forms of gender identity discrimination: 'There is no case law concerning gender identity more generally speaking as covered by the protection against sex discrimination but the Commission considers that the approach should be materially similar.' European Commission (2015), *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, Brussels, 5.5.2015 COM(2015) 190 final, paragraph 3.3, p. 4.
- 4 For example: Ghorayshi, A. (2015), *Should doctors operate on intersex babies?*, posted on 6 August 2015, at: <http://www.buzzfeed.com/azeenghorayshi/born-in-between>.

Rights (ECtHR).<sup>5</sup> A third area is sex registration, meaning the practice of attribution and record keeping of legal sex by public authorities. In 2014 two cases, one from the Australian High Court and one from the Indian Supreme Court, drew worldwide media attention. The Australian High Court concluded that it should be possible to register applicant *Norrie's* sex as 'non-specific'.<sup>6</sup> The Indian Supreme Court ordered both the national and regional state authorities to recognise a 'third gender' and develop policies to improve the lives of the people concerned.<sup>7</sup>

There are many developments concerning sex registration in Europe. In 2014, following the example set in 2012 by Argentina, Denmark introduced the possibility to change one's legal sex without submitting a declaration of a medical professional.<sup>8</sup> In Sweden the Administrative Court of Stockholm concluded that the mere fact that no (medical) examination has taken place, is not sufficient to deny a request for a legal change of gender.<sup>9</sup> Germany introduced the possibility to leave the legal sex of a child undetermined until it can be established.<sup>10</sup> In the Netherlands, sterilisation as a condition for a legal change of sex was dropped on 1 July 2014.<sup>11</sup> In April 2015 Malta adopted the 'Gender Identity, Gender Expression and Sex Characteristics Act', which has been hailed as 'a historic break-through for the rights of trans and intersex persons in Malta and Europe'.<sup>12</sup> Also in spring 2015 an advisory committee established by the Norwegian Ministry of Health published its recommendations, advising among other things to raise the age of intersex children for the purposes of the attribution of legal gender. Most recently, on 7 August 2015, the Polish Senate adopted the first gender-recognition legislation in the country.<sup>13</sup>

This article focuses on the widespread practice of States – taking the Netherlands as a starting point and briefly describing some other countries – to register the sex of their population, and, moreover, to register it in a binary way: the gender options to choose from are limited to M(ale) and F(emale).<sup>14</sup> The few recent exceptions to this rule will be discussed below. The possibilities and impossibilities to change the way in which sex is registered in national population registers will be explored, including the consequences of putting an end to the practice of sex registration as such. What would, for example, be the consequences – if any – of deleting a gender entry in a birth certificate without replacing it by 'the other sex', i.e. replace M(ale) by F(emale) or vice versa, as is currently prescribed by most legal systems? The primary concern is with transgenders whose appearance, expression or self-identified gender does not correspond with the legal gender options M or F. However, there is a wider relevance. Raising questions about the engrained habit of attributing a legal sex to every individual might also be welcomed by transitioning

5 ECtHR, *Y.Y. v. Turkey* (Application No. 14793/08), 10 March 2015. Three cases against France are pending (Applications Nos 79885/12, 52471/13 and 52596/13).

6 High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v. Norrie*, [2014] HCA 11, 2 April 2014, S273/2013.

7 Supreme Court of India, *National Legal Services Authority v. Union of India and others*, writ petition (civil) No. 400 of 2012 with writ petition (civil) No. 604 of 2013, New Delhi, 15 April 2014.

8 A motion to amend the Act on the [Danish] Civil Registration System was adopted by the Danish Parliament on 11 June 2014. The law entered into force on 1 September 2014. See <http://tgeu.org/tgeu-statement-historic-danish-gender-recognition-law-comes-into-force/>.

9 Administrative Court in Stockholm, *N.N. v National Board of Health and Welfare*, Case No. 24931-13, 16 May 2014. Both the official Swedish text and an unofficial English translation are available at: <http://tgeu.org/administrative-court-in-stockholm-striking-out-diagnosis-in-gender-recognition-16-05-2014/>.

10 This change was introduced on 1 November 2013, No. 21.4.3 *Allgemeine Verwaltungsvorschrift zum Personenstandsgesetz* (General Administrative Regulation on the Personal Status Law).

11 Netherlands, Act of 18 December 2013 on changing Book 1 of the Civil Code and the Municipal Database (Personal Records) Act in connection with changes in the conditions and the competences related to legal change of sex in the birth certificate (*Wet van 18 december 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek en de Wet gemeentelijke basisadministratie persoonsgegevens in verband met het wijzigen van de voorwaarden voor en de bevoegdheid ter zake van wijziging van de vermelding van het geslacht in de akte van geboorte*), Stb. 2014, 1.

12 Transgender Europe (TGEU) press release 1 April 2015, <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/>.

13 TGEU, 'Transgender Europe acknowledges first Polish gender recognition law, posted 7 August 2015, <http://tgeu.org/transgender-europe-acknowledges-first-polish-gender-recognition-law>.

14 This article draws on the results of a study commissioned by the Dutch Deputy Minister of Security and Justice: Brink, M. van den, Tigchelaar, J. (2014), *M/V en verder; Seksregistratie door de overheid en de juridische positie van transgenders* (M/F and beyond; Sex registration and the legal position of transgenders), Den Haag: BJu, 2014. The report is also available at: <https://www.wodc.nl/onderzoeksdatabase/2393-de-mogelijkheid-en-consequenties-van-het-onbepaald-laten-van-het-geslacht.aspx?cp=44&cs=6796>. The report is in Dutch, with a summary in English. The six reports on other countries have been included as appendices and are in English.

transsexuals – people who as such do not, at least not per se, suffer from the binary perception of gender, but self-identify with the ‘other’ gender and wish to be recognised as such. The issue may also be of relevance to people with an intersex condition, since a more flexible way of registering sex at birth – or not registering sex at all – may take some of the pressure away that is caused by the necessity to decide on a child’s gender for the purpose of registering its birth, in case of doubts regarding the child’s sex.<sup>15</sup> Last but not least, the issue also has relevance from a feminist perspective. Several (Dutch) feminists have argued in favour of abolition of the practice of gender registration as such because of its implicit message that gender does matter, that there is some kind of core difference between men and women.<sup>16</sup> Such a message goes directly against the basic tenet of legal sex equality, which presumes that sex/gender is *not* relevant.

It is important to note that in this article no distinction is made between the concepts of sex and gender, since the two are very much intertwined, overlapping and contested. For the purposes of this article, the distinction is not particularly relevant.

First, the legal history of sex registration in the Netherlands and the current Dutch legal framework will be described. Then the different types of legal provisions that are prevalent at the national level and that refer to gender in one way or another will be discussed, including whether distinctive results according to sex are intended by those provisions. The article then turns to the international level and explores whether international agreements and obligations may be expected to restrict national possibilities to change sex registration systems. After this, relevant developments in five countries are analysed, to see whether any lessons can be learned. The article will conclude with an indication of the expected legal and practical consequences of changing gender registration, by widening the options or abolishing it altogether, and with some short-term possibilities to reduce the burden of the binary gender registration system for trans persons.

## Rationale and current legal framework of sex registration in the Netherlands

Population registration was introduced in the Netherlands in 1811 by Napoleon.<sup>17</sup> From the start, information about people’s sex was one of the identity characteristics to be registered. Although

- 15 Greenberg, J.A. (2012), *Intersexuality and the law: why sex matters*, NYU Press; Lisdonk, J. van (2014), *Living with intersex/DSD. An exploratory study of the social situation of persons with intersex/DSD*, SCP, 18 June 2014 (publication date English translation 25 August 2014). Available at: [http://www.scp.nl/english/Publications/Publications\\_by\\_year/Publications\\_2014/Living\\_with\\_intersex\\_DSD](http://www.scp.nl/english/Publications/Publications_by_year/Publications_2014/Living_with_intersex_DSD). For an extensive exploration of the issue see also the E.MA doctorate thesis of Lena Holzer, *Making Room for the Rights of Intersex Children Legal perspectives on intersex genital surgeries*, Utrecht, 14 July 2015. On file with the authors.
- 16 Brink, M. van den (2000), ‘*De inbedding van sekse(on)gelijkheid in het recht. Als je geen Barbie wilt zijn, hoe weet je dan dat je een vrouw bent?*’ (The embedding of sex (in)equality in the law. If you don’t want to look like Barbie, how do you know you’re a woman?), in: Holtmaat, R. (ed.), *De toekomst van gelijkheid. De juridische en maatschappelijke inbedding van de gelijkebehandelingsnorm* (The future of equality. The legal and social embeddedness of principle of legal equality), Deventer: Kluwer, pp. 29-44; Hondt, I. de (2002), ‘*Abolitionisme ten aanzien van sekseaanduidingen in het familierecht*’ (Abolitionism with regard to references to sex in family law), *Tijdschrift voor Familie- en Jeugdrecht*, 2002, pp. 219-224. Graven, M., Brink, M. van den (2008), ‘*Trans m/v. Genderdiversiteit, seksegelijkheid en het recht*’ (Trans M/F, Gender diversity, sex equality and the law), *Tijdschrift voor Genderstudies*, pp. 52-66. See also: Felten, H. (2013), *Wat heeft de overheid te zoeken in onze onderbroek?* (What business is our underwear to the authorities?) [opinion], *De Volkskrant*, 5 April 2013. Also see: Spade, D. (2007-2008), ‘*Documenting gender*’, *Hastings Law Journal*, vol. 59, pp. 731-842. Note however, that other feminists are vehemently opposed to dropping the gender distinction or equating sex and gender. See for example the open letter of Cathy Brennan and Elizabeth Hungerford to the UN Commission on the Status of Women, of 1 August 2011, at: <http://sexnotgender.com/gender-identity-legislation-and-the-erosion-of-sex-based-legal-protections-for-females/>. See also Hungerford’s follow-up letter to the CSW of 26 July 2012 at: [https://gendertrender.files.wordpress.com/2012/08/hungerford\\_csw\\_communication\\_2012\\_8-28-2012.pdf](https://gendertrender.files.wordpress.com/2012/08/hungerford_csw_communication_2012_8-28-2012.pdf).
- 17 For more background information on the civil registry see e.g. Elenbaas, J.N. (1952), *Handboek voor de burgerlijke stand, deel 1* (Handbook for the civil registry, part 1), revised by Septer, A.J.G.P., Schouten, J.C., Alphen aan de Rijn: N. Samsom N.V.; Plasschaert, J.N.E. (2002), *Burgerlijke stand; Serie Burgerzaken* (Civil registry; Series Civil Affairs Department), Amsterdam: Stadsdrukkerij Amsterdam N.V.; Kampers, J. (2010), *Inleiding tot de burgerlijke stand* (Introduction to the civil registry), revised by Evers, L.J.V., Vat, H., Alphen aan de Rijn: Kluwer.

information on the rationale behind this practice is scant, it probably has to do with gender-specific rights (or lack thereof) and duties, such as military conscription for men. For a short time, it was even mandatory to bring a baby along when registering its birth, to prove the baby's gender to the registration officer. This requirement was probably introduced because too many people registered their male child as female, to avoid their sons being conscripted into Napoleon's army later in life. In the 200 years that have passed since the introduction of personal record keeping by the State, many legal provisions that directly distinguished on the basis of sex, have been repealed, but not all, as is also illustrated by the size of the inventory of legal provisions mentioning sex, discussed further below. Some gender-specific rules remain. One example is the different ways to establish legal fatherhood or motherhood, another is the (currently suspended) military draft that exclusively focuses on men. Sex equality legislation paradoxically depends on gender categorisation as well.

Sex registration has always been binary: people were identified either as male or as female, without any exceptions. The first dent in this binary structure was introduced in 1970, when Article 1:17(2) of the new Civil Code (*Burgerlijk Wetboek*) provided for the situation that a new-born baby's features raised doubts as to its sex. A possibility was created to indicate on the birth certificate that the child's sex 'cannot be determined'. After the child's sex had become clear, the entry on the certificate could be changed. That change, however, remained visible. Because this was regarded as undesirable by those involved (including the parents and public prosecutor) the option was mostly rejected. The registration of the child would just be postponed until its sex could be determined. This practice, which strictly speaking was illegal, came to an end when the revised Civil Code entered into force in 1995. The new Article 1:19d, that presents the law as it currently stands, stipulates that if a child's sex is unclear, a provisional certificate may be drawn up indicating that the child's sex could not be established. Within three months after birth, and as soon as the sex has been determined, a definite certificate must be issued. If the child's sex cannot be determined within three months, the definite certificate will indicate that sex determination was not possible. Changes in the certificate will only be visible if the attribution of sex occurs after the end of the three-month period. If nobody turns up to change the original entry, the provisional certificate will be made final. If, in later years, the attributed sex turns out to have been a mistake, the legal sex can be changed by 'correcting' it. At the time, the association of civil registrars suggested to delete the three-month period so as to avoid any undue pressure on parents. This proposal, however, was rejected because legal certainty was considered to be more important.<sup>18</sup>

The procedure regarding the 'correction of mistakes' in case of intersex conditions, differs from the procedure prescribed for transsexual people who wish to change their legal sex from male to female or vice versa (Articles 1:24, 24a and 24b of the Civil Code).<sup>19</sup> The possibility to change one's legal sex (Articles 1:28 – 28c of the Civil Code) was introduced in 1985. The most important requirements for such a change were a medical declaration, not being married, the *permanent* conviction of belonging to the 'other' sex, and the impossibility to procreate (commonly referred to as the 'sterilisation requirement'). The requirement regarding marriage became meaningless after classic marriage was opened up to same-sex couples in 2001.<sup>20</sup> In July 2014 the sterilisation requirement was dropped, as was already mentioned above.

The current preconditions for a legal change of sex for a person aged sixteen or older are: the sense of belonging to the sex 'other' than the one registered and the declaration of an expert in gender dysphoria that the person concerned shows a well-considered sense of belonging to the 'other' sex and understands what the implications of a legal sex change entails. The Government has repeatedly stressed that the declaration requirement is not meant to question trans people's experiences or self-identification.

18 See *Kamerstukken II*, 1990-1991, 21847, No. 3. See also Plasschaert, J.N.E. (2002), pp. 12-13.

19 The UCLA glossary of LGBTQI Terminology defines 'transsexual' as 'a person who identifies psychologically as a gender/sex other than the one to which they were assigned at birth. Transsexuals often wish to transform their bodies hormonally and surgically to match their inner sense of gender/sex.' See: <http://www.lgbt.ucla.edu/documents/LGBTTerminology.pdf>.

20 Netherlands, *Wet Openstelling van het huwelijk voor personen van hetzelfde geslacht*, *Stb.* 2001, 9. This Act allows couples of the same sex to marry.

Rather, it is to ensure that people with a mental disorder do not mistakenly ask for gender reassignment treatment.<sup>21</sup> The trans people concerned, however, experience it differently.

The requirement of a well-considered conviction is closely linked to the foundations of the Dutch registration system, which is strongly centralised. The Netherlands has two major record-keeping systems that include information on legal gender: the civil registry (*Burgerlijke stand*) and the population registration (*Basisregistratie personen*). The certificates contained in the civil registry, such as birth certificates, are static in character and may be used as legal proof (Article 1:22 Civil Code). The registry primarily serves as a formal source of information for the population registration. The static character of the documents contained in the civil registry explains the caution with which the Dutch authorities approach changes in people's legal sex: it is possible, but only once.

The population registration, which is administered by the municipal authorities, contains most (not all) information from the civil registry records plus additional information such as citizen service numbers and place of residence. It also contains information on people residing temporarily in the Netherlands, e.g. exchange students. The two systems are organised in such a way that a change in one of the systems will automatically be reflected in the other. That is, if people change the sex as indicated on their birth certificate from M to F or vice versa, that change will be copied into the population registration, which in turn will inform other records, like those regarding drivers licences and travel documents.

This kind of highly centralised registration is typical of civil-law countries, such as the Netherlands and Germany.<sup>22</sup> Common-law systems tend to keep their records separate, meaning that a change of the gender entry in a birth certificate will not automatically be reflected in another document.<sup>23</sup> Thus, the people concerned will need to change the gender entry separately for different records. However, this does not necessarily entail an advantage for trans persons in the Netherlands, as sometimes seems to be suggested,<sup>24</sup> since they would be saved the administrative hassle: changing the legal sex in a birth certificate will be reflected in the registry on driver's licenses. This in turn implies that the licence (or other identity document) will lose its validity immediately after the change. Continued use of the old document might even give rise to criminal prosecution.<sup>25</sup>

This difference in record-keeping seems to explain at least to some extent the apparent ease with which countries like Australia and New Zealand (both common-law countries) introduced the third option of an X on passports and other travelling documents. Since the different records are not linked, the change will not impact on marriage law for example. This issue will be discussed further below in the section on experiences in other countries.

Except for the first entry on the birth certificate for intersex babies as described above, it is not possible to have an entry other than M or F. In 2007 an individual, 'K.', asked the Dutch Supreme Court (*Hoge Raad*) to order the registrar to delete the gender entry on K's birth certificate (M) without replacing it by

21 *Kamerstukken II*, 2011-2012, 33351, No. 3, pp. 3-4. See also Brink, M. van den (2015), '*De X-factor: genderidentiteit en geslachtsregistratie*' (The X-factor: gender identity and registration of sex), in: Boele-Woelki, K., Jonker, M. (eds), *Actuele ontwikkelingen in het familierecht* (Recent developments in family law), Nijmegen: Ars Aequi Libri, pp. 11-22, on p. 14.

22 On the comparative aspects see e.g. Brink, M. van den, Reuß, P., Tigchelaar, J. (2015), 'Out of the box? Domestic and private international law aspects of gender registration. A comparative analysis of Germany and the Netherlands', *European Journal of Law Reform*, Vol. 17, No. 2, pp. 282-293.

23 See Gössl, S.L., (2013), '*Intersexuelle Menschen im Internationale Privatrecht*' (Intersex persons in international private law), *Das Standesamt (StAZ)*, pp. 301-305.

24 *Kamerstukken I*, 2012-2013, 33219 C, pp. 2-3. In answer to questions about purpose and necessity of sex registration, the Minister states that diverging information in multiple records 'would not be efficient and would not positively affect the protection of the private sphere'.

25 See the information on: <http://www.transvisie.nl/transvisie.nl/index.php/transgenders-juridisch>.

F. K described their<sup>26</sup> gender as ‘desexualised’.<sup>27</sup> The Supreme Court turned K’s request down, since at that time there was no clear trend towards legal recognition of a neutral gender identity and granting the request would imply a fundamental change of the legal system, which could only be brought about after careful considerations of the legal consequences by the legislator.

However, there are exceptions to the rule that only M or F is possible, apart from the provision for intersex babies discussed above. The most common situation (even if rare) is that foreign people are unable to ‘prove’ their legal sex when registering with the local Dutch authorities. Their sex must be noted as ‘unknown’, although in practice sometimes registrars seem to take people’s statements on their sex (only M or F of course) at face value. A second exception is the recording of a foreign birth certificate, which indicates a gender different from M or F (unknown, non-specific etc.) in the Dutch civil registry: the gender as noted in the original certificate will be copied in the Dutch records (Article 1:25 Civil Code). Research of the population registration showed that in December 2013, 67 individuals were registered with ‘unknown gender’ (December 2013). Of these, 24 had been born in the Federal Republic of Germany and 20 in Italy. This relatively high number of Germans and Italians can probably be explained by the fact that German and Italian identity cards do not have a gender entry. Thus, an Italian who uses an identity card to prove personal data when registering with the local authorities, will not be able to prove legal gender identity.<sup>28</sup> Only one of the 67 people that turned up in the query had been born in the Netherlands. Due to considerations of privacy, it was not possible to further explore the reasons for the gender entries as ‘unknown’. It is likely, however, that most if not all entries were motivated by lack of sufficiently authoritative evidence of legal sex.

## Dutch gender-related legal provisions and current use of gender information

The Dutch national laws and regulations that either mention the neutral concept of gender (*geslacht*) or refer to sex-specific terms (husband/wife) can be classified under a number of themes.

Most provisions mentioning gender in a neutral way (*geslacht*), serve either identification or policy purposes, an exception being sex-equality law which is discussed below. Information on gender is required, for example, to obtain a driver’s licence, a passport, or a registration at the Chamber of Commerce. The information thus collected seems primarily aimed at the identification of individuals. Data on gender is also collected for practical and policy purposes, in areas such as education, health and youth care. There is a relatively high incidence of this kind of provisions in lower regulations. This arguably shows the relevance of gender-specific data for implementation purposes.

Most provisions containing sex-specific terms appear in social security legislation, for example regarding retirement pensions and other social benefits, in regulations regarding civil servants and on compensation for wartime damages. Some of these provisions focus on one specific sex, such as male prisoners of war. This makes sense if such provisions regard a period in which prisoners of war were male by definition. In other instances, such gender-specific provisions have been ‘equalised’ by adding the ‘second’ gender. An example is the provision for widows’ pensions, which after the well-known *Barber* judgment by the European Court of Justice,<sup>29</sup> was extended to widowers: instead of drafting a new provision, providing for a benefit for the surviving partner, equality was achieved by adding a reference to widowers.

26 Trans people who do not identify as male or female are increasingly frequently referred to in the plural, at least in English. See for example Petrow, S. (2014), ‘Gender-neutral pronouns: When ‘they’ doesn’t identify as either male or female’, *The Washington Post*, 27 October 2014, [https://www.washingtonpost.com/lifestyle/style/gender-neutral-pronouns-when-they-doesnt-identify-as-either-male-or-female/2014/10/27/41965f5e-5ac0-11e4-b812-38518ae74c67\\_story.html](https://www.washingtonpost.com/lifestyle/style/gender-neutral-pronouns-when-they-doesnt-identify-as-either-male-or-female/2014/10/27/41965f5e-5ac0-11e4-b812-38518ae74c67_story.html).

27 Hoge Raad 30 March 2007, ECLI:NL:HR:2007:AZ5686, Paragraph 3.5.3.

28 This of course may be the perfect solution for genderqueer individuals who move to the Netherlands and would prefer not to be registered as M or F.

29 ECJ, *Barber v. Guardian Royal Exchange Assurance Group* (1990), C-262/88.

Another category consists of provisions referring to fathers or fatherhood and mothers or motherhood, for example in the context of legal affiliation and obtaining the Dutch nationality. A specific group of provisions relates to the legal accommodation of pregnancy, such as pregnancy and maternity leave, as well as specific benefits and protections, for example against work which involves health risks. Abortion laws and laws prohibiting infanticide are another example. The law on infanticide prescribes lower sentences for the *mother* who kills her newly born child for fear of discovery of her pregnancy, but not for the *father* of that child or that mother's partner.

In addition, a considerable number of provisions with references to gender can be found in equality legislation. These provisions are mostly intended to protect everyone regardless of gender, and are thus comprehensive in the sense that different treatment based on sex is prohibited, irrespective of whether women or men would be disadvantaged by such distinct treatment. However, this body of law also contains a number of sex-specific provisions, for example regarding preferential treatment,<sup>30</sup> genuine occupational requirements and sports. Finally there are miscellaneous provisions regarding the royal family, regarding sex-segregated facilities such as prisons and on other very specific issues, such as military service (only for men), and health-related issues, for example regarding preventive checks on cervical cancer.<sup>31</sup>

A notable feature of this collection of gender-related provisions is that references to gender are far more frequent in lower regulations, such as regulations issued by Ministers, than in national statute.<sup>32</sup> This seems to indicate that information on gender is most frequently used for implementation purposes. Quite often this seems to be a matter of convenience and common practice, rather than anything else.

The inventory shows that there is a wide range of provisions that make reference to gender. Sometimes, the provisions aim to achieve sex-specific effects such as the military draft, and the prohibition of pregnancy discrimination because of its disproportionate effects on women. Affiliation law, distinguishing between fatherhood and motherhood is another example. This is reminiscent of the days of Napoleon. Of a more 'modern' character are the provisions aimed at identification and for policy and research purposes. Also noteworthy is that a large number of provisions that use gender-related terms does not seem intent on different treatment at all. This is true for example for all provisions that mention the male and female terms (widow/widower) in one breath. Obviously, the very purpose of equal treatment legislation is the elimination of sex-based discrimination, and thus no difference in treatment on the basis of sex is intended by this body of law either.

## International legal impediments to changing binary sex-registration systems

States are increasingly bound by international legal obligations. It is therefore useful to explore the legal impediments to changes in national practices of record keeping, before modifying such systems.

An interesting example of an international agreement regarding gender registration that has been the focus of some gender-specific research is Document 9303 of the International Civil Aviation Organisation (ICAO).<sup>33</sup> The ICAO is a specialised agency of the United Nations. Document 9303 lists non-binding

30 The Netherlands has not broadened the scope of the national legal provision for preferential treatment, which in the past was restricted by EU law to women, after EU law introduced the possibility for national authorities to allow for preferential treatment for underrepresented *men* (Article 157(4) Treaty on the Functioning of Europe).

31 On the basis of the *Wet van 29 oktober 1992, houdende regels betreffende bevolkingsonderzoek* (Act of 29 October 1992 containing rules concerning population screening), licensed health organisations may receive gender-specific information to distribute invitations for breast cancer screening or cervical cancer screening to women only.

32 The full inventory of provisions referring to 'gender' or using sex-specific references (father/mother) in national statutes and regulations is available at: [https://www.wodc.nl/images/2393-bijlage\\_tcm44-573684.pdf](https://www.wodc.nl/images/2393-bijlage_tcm44-573684.pdf).

33 ICAO Document 9303 on Machine Readable Travel Documents (7th edition), is available at: <http://www.icao.int/publications/pages/publication.aspx?docnum=9303>. The EU has also adopted the approach as outlined in ICAO

standards for travel documents. The document was adopted in 1980, around the time the first machine-readable travel documents were introduced. It was important to decide on standard documents, to prevent the necessity to design machines that would be able to read a myriad of differently designed documents. The ICAO guidelines mention gender as one of the mandatory personal data and provide for three options: M, F or X. The 2008 version of the guidelines states: 'Where a person does not wish his/her [sic] sex to be identified or where a State does not want to show this data, the filler character (<) shall be used in this field in the MRZ and an x in this field in the VIZ.'<sup>34</sup>

In 2012 New Zealand presented a report on the question whether the mention of gender on travel documents was still acceptable, particularly in light of the human dignity of trans people, and given technological developments that might make the use of gender data superfluous, such as biometric data.<sup>35</sup> However, after balancing the pros and cons of eliminating the gender box on travel documents, New Zealand concluded that the benefits, especially in terms of improvements of the position of trans people, are outweighed by the disadvantages. The loss of the availability of information on gender will lead to a significant decrease in the possibilities to assess risks, there will be more 'errors' when identifying individuals, and the queues, for instance at airports, will get longer. Moreover, replacing the current technical equipment to read travel documents will involve considerable costs, even if all member states of the ICAO would agree to skip the gender entry.

There are many other international agreements, including EU regulations relating to transnational movement (like border controls) and exchange of information regarding foreign individuals.<sup>36</sup> Most of these documents do not seem to present insurmountable obstacles to changing the current practice of binary sex registration. Generally, such documents do demand information on the individual's biographical data, sometimes on a person's sex, but they hardly ever specify the form that information should take. That is to say, States are mostly not requested to state whether an individual is male or female, but to provide information on that individual's sex/gender.<sup>37</sup> Even though this lack of precision may very well be the result of the self-evident understanding of sex as binary, that does not imply per se that the interpretation of acceptable information on gender identity cannot be expanded to include an X for example. This is also apparent from (still rare) current practices in a number of countries, such as Australia, which allow people to choose an X on their travel documents. So far, this practice has not disrupted the international system. Although people with an X in their passports certainly should expect difficulties crossing borders, this is not so much different from the current situation confronted by people whose legal gender does not match their gender appearance or expression.

Arguably, if the provisions are taken literally, a State could even identify all individuals as X, while still complying with its international obligations. However, it must be noted that underlying documents and regulations are often more specific, using for example M and F boxes that must be ticked. Then again, this kind of document is easier to change than an international treaty.

A problem of a different nature is the legal framework regarding pregnancy and maternity, especially within the context of EU law. On the one hand, it is probably not hard to read legal provisions protecting

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document 9303: Council Regulation (EC No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, *OJ L* 385, 29 December 2004; and Regulation (EC) No. 444/2009 of the European Parliament and of the Council of 28 May 2009, amending Council Regulation (EC) No. 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

34 See Part 3, Volume 1, p. V-4 and footnote f on p. V-9. Part 2 of the document on machine-readable visa (2005) has the same text in footnote f, on p. V-12.

35 Technical Advisory Group on Machine Readable Travel Documents, *Information paper*, ICAO, TAG/MRTD/21-IP/4, 10-12 December 2012. Appendix A contains the executive summary of the research of New Zealand 'Displaying the holder's gender on travel documents: Is it still appropriate in the age of e-travel documents?'

36 For example: Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between member states, article 11 paragraph 1 (a) (i).

37 However, sometimes a form specifies the gender with the boxes F and M. This is the case with the form referred to in Articles 6, 7, 8, 9 and 10 of the above-mentioned Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between member states.

pregnant women workers in such a way as to encompass *all* pregnant workers, and it is unlikely that there will be major difficulties in dealing with pregnant persons who have no *legal* gender, since it is unlikely that such a change in the legal system will affect the number of pregnancies in any way.<sup>38</sup> It is also clear that the protection is focusing on the pregnancy, rather than on the gender of the person concerned. On the other hand, the EU prohibition of pregnancy discrimination is currently based on the premise that pregnancy affects women only, resulting in pregnancy discrimination being equated with women's discrimination. If pregnant persons were no longer identified as women, pregnancy discrimination could be rephrased as a separate non-discrimination ground, but it would need a different justification, since that justification is currently based on the equation of pregnancy discrimination with women's discrimination.<sup>39</sup>

Other international agreements that mention gender include the Geneva Conventions,<sup>40</sup> the Rome Statute on the International Criminal Court<sup>41</sup> and many of the conventions of the International Labour Organisation. These documents can mostly not be regarded as limiting national possibilities to change national sex registration systems, since States are generally free to offer more protection than the minimum prescribed by those international instruments. Therefore, it may be argued that extending the gender-specific protection offered by those treaties to gender-nonconform people, must be considered as being in line with the purpose of those instruments

In human rights law the categories of men and women seem to be taken for granted, as is evident just from the title of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Even though trans rights currently enjoy increased attention, so far there is no legally binding document of international human rights law that includes gender identity as a 'suspect' ground for discrimination, although this is different in case law.<sup>42</sup> As yet there is no positive obligation to recognise other genders than male and female, nor is there any explicit indication that gender should be regarded as a sensitive identity characteristic or that gender can no longer be registered. However, the so-called Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007)<sup>43</sup> are increasingly invoked and endorsed by state representatives, including those from the Netherlands.<sup>44</sup> This, arguably, paves the way for moral (albeit not yet legal) obligations vis-à-vis trans rights, including of those of gender-nonconform individuals.

Treaty bodies, including the Committee that monitors implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), regularly demand that States Parties provide information that is segregated by sex. Just as discussed above, this kind of requirement does not stand in the way of national changes in the registration system. Data collection can take place in other ways. However, without further consultation with experts it is difficult to predict the consequences for statistical and other sex-specific research.

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- 38 Note that this is already necessary to some extent in EU countries that have dropped the sterilisation requirement for transsexuals: this change implies that now persons who are legally male may become pregnant. See Brink, M. van den, Tigchelaar, J., 'The equality of the (non) trans-parent: women who father children'. In: Brink, M. van den, Burri, S., Goldschmidt, J. (eds), *Equality and human rights: nothing but trouble?*, Utrecht: SIM Special No. 38, 2015, pp. 247-260. The article can be found at: <http://sim.rebo.uu.nl/wp-content/uploads/2015/04/van-den-Brink-and-Tigchelaar-Equality-of-the-non-trans-parent.pdf>.
- 39 Court of Justice EU, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88, 8 November 1990, ECLI:EU:C:1990:383.
- 40 1949 Geneva Conventions I, II, III and IV and Additional Protocols, available at: <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.
- 41 Rome Statute of the International Criminal Court, A/CONF.183/9, adopted 17 July 1988, into force 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depository: Secretary-General of the United Nations, <http://treaties.un.org>.
- 42 The European Court of Human Rights has an impressive list of judgments. For an overview see the Court's Factsheet on Gender Identity Issues, the latest version currently dating from May 2015, at: [http://www.echr.coe.int/Documents/FS\\_Gender\\_identity\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf).
- 43 The Yogyakarta Principles can be found at: [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf).
- 44 An overview of the Principles' impact between 2007 and 2010 can be found at: [http://ypinaction.org/files/02/57/Yogyakarta\\_Principles\\_Impact\\_Tracking\\_Report.pdf](http://ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf).

## Experiences in Australia, Germany, India, Nepal, and New Zealand

Developments in Australia, Germany, India, Nepal, and New Zealand clearly show the increased attention for the restrictions and disadvantages of the common binary conception of sex. This interest in the gender dichotomy has led to a variety of measures and approaches. The highest courts in both India and Nepal have ordered their respective governments to recognise a third gender.<sup>45</sup> In both countries ‘third genders’ have throughout the centuries formed a separate and highly visible group that especially in the last decades has become increasingly marginalised. Because of their perceived nonconform gender identity, individuals often do not receive identity documents, thus being deprived of access to education, healthcare and many other facilities. It is this situation that the highest courts of these countries wished to address. Although there is a big gap between the aspirations of the judgments on the one hand and the harsh reality of the ‘hijra’s’ daily life on the other, there are indications that even the mere legal interpretation has already had some positive effects on members of the group(s) concerned in terms of awareness and empowerment.<sup>46</sup>

However, there is a clear difference between the situation in these two countries and the position of trans people in Western Europe, where trans people (or third genders) have never been very visible, nor been regarded as a more or less clearly defined group. Therefore, chances are that now identifying gender-nonconform people in Western Europe as ‘third gender’ might increase stigmatisation and exclusion, rather than improve their status, as is expected to happen in India and Nepal.

Australia and New Zealand have introduced the possibility to obtain a passport with an X, merely based on a statutory declaration. As mentioned above, this is possible, since the different records (on travel documents, on marriage etc.) are not linked, and thus people obtaining this X on their passports will retain their designated sex (F or M) for all other purposes. Also, different options have been introduced to register babies with unclear gender characteristics. In Australia these options differ from state to state, with the Australian Capital Territory heading the list with five different possibilities: m, f, unspecified, indeterminate or intersex.<sup>47</sup>

The event that drew most international attention in Australia was the judgment of the Australian High Court in the case of *Norrie* (April 2014), already mentioned above. Norrie, more or less like ‘K.’ in the Dutch Supreme Court case of 2007, asked the registrar to change Norrie’s sex into something that the law did not provide for, i.e. non-specific. After having undergone a sex affirmation procedure, Norrie decided that they was not male, but also not female. This self-identification was backed up by medical declarations, as required for a ‘regular’ change of legal sex (i.e. from M to F or vice versa). The High Court ruled that the law applicable to the civil registry could not possibly demand that clearly incorrect facts – such as Norrie being male or female – would be registered. Therefore, because Norrie fulfilled all requirements for a legal change of sex, Norrie’s sex should be registered as nonspecific. The objections of the registrar that this might result in unforeseen problems were brushed aside, since such problems could be dealt with once they occurred. Again, this is different in a civil-law registration system such as that of the Netherlands, where all records are linked, and where it is impossible to have different genders for different purposes.

45 Supreme Court of India, *National Legal Services Authority v. Union of India and others*, writ petition (civil) No. 400 of 2012 with writ petition (civil) No. 604 of 2013, New Delhi, 15 April 2014; and Supreme Court of Nepal, *Sunil Babu Pant v. the Government of Nepal*, Writ No. 9172007 (2064) 2007.

46 For example, in India’s federal elections after the judgment, hijras and other transgender people were permitted to publicly declare their gender identities when voting. See: Seervai, S. (2015), ‘India’s Third Gender. Shanoor Seervai interviews Laxmi Narayan Tripathi’, *Guernica, a magazine of art and politics*, 16 March 2015, available at: <https://www.guernicamag.com/interviews/indias-third-gender/>.

47 This change was made possible on 26 April 2014. See Keyes, M. (2014), ‘Country Report for Australia’, in: *M/F and beyond* (2014), pp. 157-170, on p. 167. (The link provided on p. 167 in footnote 56 no longer seems to work.)

As for Germany, research carried out by German legal experts within the context of the Dutch research into sex registration M/F, mentioned above, showed that the German provision on intersex babies was probably not intended to pave the way for a general introduction of a 'third gender'.<sup>48</sup> Different from the Dutch provision on the attribution of sex to intersex babies as discussed above, the German provision has received quite a bit of criticism. Organisations of intersex people are afraid that the provision will lead to more, instead of fewer, surgical interventions.<sup>49</sup> This difference in reception is arguably caused by the fact that in Germany a medical declaration is demanded for birth registration. It is feared that medical staff will feel obliged to fill out the declaration truthfully, stating an unspecified sex, whereas parents may prefer clarity about their child's sex. In the Netherlands, a medical declaration is not required.

Overall, it has become clear that in the countries where changes to the binary registration system have been made, no prior assessment was carried out of international legal impediments, or other problems to be expected.

## Conclusions

Breaking the gender dichotomy in population registrations would certainly coincide with an international trend of increased recognition of the human dignity of trans people and the importance of gender identity. International law seems to pose relatively few limitations, although, as with travel documents, it might not always be possible to ignore gender altogether. Often it seems possible to provide for more options than just M and F, and even – depending on how far one is willing to stretch it – to just attribute an X to all citizens.

However, because references to gender permeate the legal landscape – as the Dutch example has shown – an infinite number of smaller and larger changes must be reckoned with. The exact extent of such changes depends on the scope of the changes in the registration system. If the possibility to register differently, for example as X or as 'third gender' is introduced but limited to a clearly defined group of people, the effects will probably be 'manageable'. Dropping the practice of registration of gender altogether, on the other hand, will have quite far-reaching consequences if nothing is done in advance to remove expected difficulties. Difficulties may occur for example as regards sex-segregated facilities (like prisons or psychiatric institutions) and legal provisions of motherhood and fatherhood.

The use of information on gender in travel and other identity documents is widespread and any changes in the system will be noticed here. Again, much depends on the scale of the changes. Relatively minor changes, such as the Australian possibility to have an X on one's passport instead of an M or an F, will primarily affect the individual holder of that passport, who will frequently if not always be asked to step out of the line at the airport or elsewhere, because the system or the officers in charge (or both) are unable to digest such information.

A step forward, however, that can and quite likely will be made in the near future,<sup>50</sup> with only few adverse consequences, is to introduce much more restraint in the dissemination of information on individuals' gender. The authorisation in the Netherlands for both governmental and non-governmental agencies, to receive information on gender drawn from the population registration, is also provided when it does not seem strictly necessary. A major reason for the more or less automatic inclusion of information on

48 See Dethloff, N., Gössl, S. (2014), *Country report for Germany*, in: Brink, M. van den, Tigchelaar, J. (2014), *M/V en verder; Seksregistratie door de overheid en de juridische positie van transgenders (M/F and beyond; Sex registration and the legal position of transgenders)*, Den Haag: Bju, 2014, pp. 171-183.

49 See for example: NNID (2013), *Geen derde geslacht in Duitsland (No third gender in Germany)*, 20 August 2013, <http://nnid.nl/2013/08/20/geen-derde-geslacht-in-duitsland/>.

50 Especially since the ruling party (VVD) supported such a stance. See for example: *COC 'bijzonder gelukkig' met VVD-steun voor afschaffing geslachtsregistratie (COC very happy with VVD support for abolishing gender registration)*. The COC is the Dutch national LGBT rights NGO; the VVD is the liberal party. See: <http://www.coc.nl/politiek-2/coc-bijzonder-gelukkig-met-vvd-steun-voor-afschaffing-geslachtsregistratie>.

gender, is that it is considered to be indispensable to properly address individuals, i.e. to enable a letter to address the recipient with 'Dear Sir' or 'Dear Madam'. This cannot be regarded as a major interest when weighed against the position of trans people and their wish to not be identified or spoken to as different from their self-identified gender. Therefore, a first step that can and should be taken immediately is to restrict the dissemination of information on gender – not just trans people's gender, but everyone's gender. Secondly, gender should be identified, also within the EU, as a sensitive personal identity marker. Even if for the time being it might be impossible to protect gender information as protectively as other sensitive information, the effort should at least be made.